

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty: The bill allows either an employee leasing company or the client company to purchase workers' compensation for the leased employees.

B. EFFECT OF PROPOSED CHANGES:

Background on Employee Leasing Companies

Essentially, the employment staffing industry in Florida has three basic segments:

- *Day labor and labor pools.* These entities, regulated under ch. 448, F.S., assign their employees on a day-to-day basis to client companies (employers).
- *Temporary help firms.* These firms, which are not regulated by the state, assign their employees on a weekly, monthly, seasonal, or other basis to client companies for a period of less than one year.
- *Employee leasing companies or professional employer organizations.* These companies are licensed and regulated by the Department of Business and Professional Regulation (DBPR) under Ch. 468, F.S. These companies assign and actively co-employ their employees with a client company. As of February 2008, the Board of Employee Leasing Companies within DBPR reports 701 employee leasing companies hold an active license in Florida.

In a traditional employee leasing arrangement, an employee leasing company will enter into an arrangement with an employer ("client company") under which all or most of the client's workforce would be employed by the leasing company and leased to the client company. Generally, the client company will terminate all or most of its employees and these employees will be engaged by the leasing company and leased to the client to perform the same work they previously performed as the client's employees. Generally, the employee leasing company and the client establish a co-employer relationship by contract to the extent allowed by state law.

Section 468.525(4), F.S. requires the leasing company to maintain control over leased employees with limited exceptions; to pay wages to leased employees; to pay payroll taxes on leased employees; to retain authority to hire, terminate, discipline or reassign leased employees; to control safety at the worksite of leased employees which includes management of workers' compensation claims of leased employees.

Workers' Compensation Coverage for Employee Leasing Companies

For purposes of workers' compensation insurance coverage requirements under ch. 440, F.S., the law defines the term, "employer," to include employment agencies, employee leasing companies, and similar agents who provide employees to other persons.¹ Any person defined as an "employer" by ch. 440, F.S., is required to provide workers' compensation coverage to its employees by either securing coverage or meeting the requirements to self-insure.² Where, however, the leasing company fails to provide workers' compensation coverage, the client company must provide the coverage.³

The employee leasing laws specifically provide a licensed employee leasing company is the employer of the leased employees and require employee leasing companies to provide workers' compensation

¹ Section 440.02(16)(a), F.S. (2007).

² Sections 440.11(2) and 440.38(1), F.S. (2007).

³ *Hazealeferiou v. Labor Ready*, 947 So.2d 599 (Fla. 1st DCA 2007).

coverage to their employees.⁴ Additionally, a leasing company cannot be issued a license and a current license cannot be renewed unless the leasing company can provide evidence to the Board of Employee Leasing Companies it paid for worker's compensation insurance.⁵ However, rules of the Board of Employee Leasing Companies allow, as an option, the client company to provide and maintain workers' compensation coverage.⁶

The bill requires the leasing arrangement contract to specify whether the leasing company or the client company will provide workers' compensation coverage for the leased employees and requires employee leasing companies to give written notice to all leased employees whether the leasing company or the client company will cover them for workers' compensation. This is consistent with the administrative rule of the Board of Employee Leasing Companies.

Termination of Workers' Compensation Coverage In Employee Leasing Arrangements

If an employee leasing company wants to end a leasing arrangement with a client company, the leasing company must provide notice of the termination of the leasing arrangement to the client company in accordance with the contractual provisions in the leasing arrangement contract. Florida law does not specify a notice period required for termination of a leasing arrangement.

The bill requires a leasing company to provide notice to each leased employee when a leasing arrangement is terminated with a client company. The notification must include the date of termination of the leasing arrangement.

The bill also specifies a leasing company's workers' compensation coverage for employees leased to a client company ends once the leasing arrangement between the leasing company and the client company is terminated and specifies when the termination of coverage is effective.

The bill provides that if a leased employee receives a paycheck directly from a client company that has terminated its leasing arrangement with the leasing company or receives a paycheck which does not specify that the paycheck is issued by the leasing company, then the leased employee has conclusive proof that the employee is no longer covered under the workers' compensation policy of the leasing company.

If a leasing company and a client company do not terminate the leasing arrangement but the leasing company terminates, lays off, or puts a leased employee on a leave of absence, the bill specifies the leasing company no longer covers the leased employee for workers' compensation and specifies when the termination of coverage is effective.

If a leasing company and a client company agree to terminate the leasing arrangement, the leasing company must notify the workers' compensation insurance company providing workers' compensation coverage for the arrangement "prior to termination when feasible."⁷ If it is not feasible for the leasing company to notify the workers' compensation insurance company prior to the leasing arrangement termination, s. 627.192, F.S. requires the leasing company to notify the insurance company within five working days following actual termination of the leasing arrangement.⁸ Each employee leasing company is also required to notify the Division of Workers' Compensation, the Division of Unemployment Compensation, and the insurer within 30 days after the initiation or termination of a client company,⁹ although this provision appears to conflict with s. 627.192, F.S., which requires an employee leasing company to provide notice to the insurer of a termination of client within 5 days after the termination

⁴ Section 468.529 (1) and (2), F.S. (2007).

⁵ Section 468.529(4), F.S. (2007).

⁶ Rule 61G7-10.0014, F.A.C.

⁷ Section 627.192(6), F.S. (2007).

⁸ Id.

⁹ Section 468.529(3), F.S.

Under the provisions of the employee leasing law, an employee leasing company is required to maintain and make available to its workers' compensation insurer certain information concerning client companies and covered employees.¹⁰ Upon termination of an employee leasing arrangement, each employee leasing company is required to maintain and furnish to the insurer adequate information to permit the calculation of an experience rating modification factor¹¹ for each lessee or client company upon the termination of the employee leasing agreement.¹² The insurer is responsible for reporting to the National Council on Compensation Insurers, Inc., (NCCI) the data necessary to calculate the experience rating modifications for employers. The bill requires the leasing company to offer the client company an opportunity to obtain records relating to the loss experience of the workers' compensation insurance that was effective during the leasing agreement.

Workers' Compensation Immunity In Employee Leasing Scenarios

Workers' compensation is an injured employee's exclusive remedy.¹³ When employers properly secure workers' compensation coverage for their employees, the law grants them almost total immunity from suits brought by their employees. Immunity does not apply, however, if the employer has engaged in any intentional act that causes harm.

Statutory immunity extends to client companies who lease their workers from employee leasing companies. The fact that the employee leasing company provided workers' compensation coverage does not alter the actual employer's (i.e. client company) immunity status. This is because the employer in such cases will have paid a fee to the employee leasing company to provide workers' compensation coverage. If the employee is injured and receives workers' compensation benefits from the insurer for the employee leasing company, the worker cannot sue the client company in tort.¹⁴

The bill specifies the leasing company and the client company are employers for workers' compensation coverage and that workers' compensation immunity applies to both companies whether workers' compensation coverage is provided to the leased employees by the leasing company or the client company.

C. SECTION DIRECTORY:

Section 1: Amends s. 468.525 relating to license requirements.

Section 2: Amends s. 468.529 relating to licensee's insurance; employment tax; benefit plans.

Section 3: Amends s. 440.02 relating to definitions.

Section 4: Amends s. 440.11 relating to exclusiveness of liability.

Section 5: Reenacts provisions in s. 626.112 relating to license and appointment required; agents, customer representatives, adjusters, insurance agencies, service representatives, managing general agents in order to comply with the bill's other provisions.

Section 6: Provides an effective date of July 1, 2008.

¹⁰ Section 468.529, F.S. (2007).

¹¹ The term, "experience rating modification," means a factor applied to a premium to reflect a risk's variation from the average risk. It is determined by comparing actual losses to expected losses, using the risk's own experience. [s. 627.192(2)(b), F.S. (2007)].

¹² Section 627.192(4), F.S. (2007).

¹³ Section 440.11, F.S. (2007).

¹⁴ John J. Dubreuil, Florida Workers' Compensation Handbook, section 3.10[3][b] (2007 Edition, 2007) (citing Maxson Const. Co., Inc. v. Welch, 720 So.2d 588, 590 (Fla. 2d DCA 1998) and Caramico v. Artcraft Industries, Inc., 727 So.2d 348, 349 (Fla. 5th DCA 1999)).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision does not apply because this bill does not: require counties or municipalities to spend funds or to take an action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues:

Lines 154-156 provide the client company and leasing company are employers for workers' compensation purposes, but current law that is unchanged by the bill (Lines 50-51) provides the leasing company is the employer.

Lines 43-45 allow a workers' compensation policy in a leasing arrangement to be issued to the leasing company or the client company. However, current law that is unchanged by the bill specifies the leasing company is responsible for providing workers' compensation coverage. These provisions appear to conflict and current law should be amended to specify the leasing company **may** be responsible for providing workers' compensation coverage if it is the intent of the bill sponsor to allow client companies to obtain workers' compensation coverage directly rather than through the employee leasing company.

Line 105 provides a leased employee's workers' compensation coverage is terminated upon his or her learning that he or she is no longer an employee of the client or leasing company. Use of the word "learning" is vague and the bill provides no further guidance as to how the employee is to "learn" of his or her employment termination so as to make the coverage termination effective. Line 121 contains the same language when referring to when a leased employee's workers' compensation coverage is terminated when the employee learns he or she is no longer employed by either company, on a leave of absence from either company, or is laid off from either company. The amendment adopted by the Committee on Insurance on March 13, 2008 resolved this issue.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 13, 2008, the Committee on Insurance heard the bill, adopted a strike all amendment, and reported the bill favorably. The amendment:

- Removes statutory changes from chapter 440, the workers' compensation chapter and makes the changes in chapter 468, the employee leasing chapter.
- Requires all leasing companies to have a workers' compensation policy.
- Requires leasing companies that require the client company to cover the leased employees for workers' compensation purposes to obtain evidence of coverage from the client company.
- Requires all leasing agreements to state whether the leasing company or the client company is covering the leased employees for workers' compensation.
- Requires the leasing company to give written notice to all leased employees whether their workers' compensation is being provided by the leasing company or the client company.
- Requires the leasing company to notify each leased employee by mail when the leasing arrangement with the client company ends.
- Specifies when workers' compensation coverage ends when a leasing company and a client company end the leasing arrangement.
- Requires the leasing company to notify leased employees of the termination of their worker's compensation coverage if the leasing company terminates the leased employee or lays the employee off and specifies the notice procedure and when it is effective.
- Provides circumstances under which a leased employee is deemed to have notice that he/she is not a leased employee anymore and as such not covered by the employee leasing company's workers' compensation insurance.
- Extends workers' compensation employer immunity to the leasing company and the client company, regardless of which company provides workers' compensation to the leased employees.