The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of Banking and Insurance Committee

BILL:	CS/SB 454
INTRODUCER:	Regulated Industries Committee and Senator Atwater
SUBJECT:	Employee Leasing Companies
DATE:	April 12, 2008 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Fav/CS**
2.	Johnson	Deffenbaugh	BI	**Pre-meeting**
3.			GA	
4.				
5.				
6.				

Please see section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

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. The client company has a co-employment relationship with the leasing company and the employee will be leased to the client to perform the work they previously performed as the client's employees. Currently, an employee leasing company is responsible for providing compensation coverage for the leased employees.

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 an employee leasing company to give written notice to all leased employees whether the leasing company or the client company will cover them for workers' compensation.

Under current law, 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. The bill requires an employee leasing company to provide notice to each leased employee when a leasing

arrangement is terminated with a client company. The bill also specifies that an employee leasing company's workers' compensation coverage for the employees leased to a client company ends once the leasing arrangement between the employee leasing company and the client company is terminated. If an employee 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 that the leasing company no longer covers the leased employee for workers' compensation and specifies when the termination of coverage is effective.

Workers' compensation is an injured employee's exclusive remedy. When an employer properly secures workers' compensation coverage for its employees, the law grants the employer 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 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.

The bill requires an employee leasing company to submit a quarterly report to the Labor Market Statistics Center of the Agency for Workforce Innovation and specifies the information that must be contained in the report. The report must include every client establishment and each establishment of the employee leasing company. According to the Agency for Workforce Innovation, the current reporting practices for employee leasing companies may inaccurately report employment levels, and that requirements in the bill are similar to the information that is currently required of all other businesses operating in the state.

This bill substantially amends the following sections of the Florida Statutes: 443.036, 443.1216, 468.525, and 468.529. This bill reenacts section 626.112, Florida Statutes.

II. Present Situation:

Background on Employee Leasing Companies
Essentially, the employment staffing industry in Florida has three basic segments:

- *Day labor and labor pools*. These entities assign their employees on a day-to-day basis to client companies (employers). They are regulated under ch. 448, F.S.
- *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 assign and actively co-employ their employees with a client company.

Employee leasing companies or professional employer organizations are licensed and regulated by the Board of Employee Leasing Companies (board) within the Department of Business and Professional Regulation (department) under pt. XI, ch. 468, F.S. As of February 2008, the board reports that 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.

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 coverage to their employees.[1] This is consistent with s. 440.02(16)(a), F.S., which provides that the definition of an employer, for purposes of workers' compensation insurance, include an employee leasing company. 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 it paid for worker's compensation insurance.[2] However, rules of the board allow, as an option, the client company to provide and maintain workers' compensation coverage.[3]

A leasing company also retains a right of control over management of safety at the worksite of the leased employees, which includes management of workers' compensation claims, claims filing, and related procedures of leased employees.[4]

Workers' Compensation Coverage for Employee Leasing Companies

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.[5] For purposes of workers' compensation insurance coverage requirements under ch. 440, F.S., the term "employer," includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons.[6] If the leasing company fails to provide workers' compensation coverage, the client company must provide the coverage.[7]

Sections 468.529 (1) and (2), F.S., provide that a licensed employee leasing company is the employer of the leased employees and require an employee leasing company to provide workers' compensation coverage to their employees.

[1]Section 468.529 (1) and (2), F.S. (2007).
[2]Section 468.529(4), F.S. (2007).
[3] Rule 61G7-10.0014, F.A.C.
[4]Section 468.525(4), F.S. (2007).
[5]Sections 440.11(2) and 440.38(1), F.S.
[6]Section 440.02(16)(a), F.S. (2007).
[7] Hazealeferiou v. Labor Ready, 947 So.2d 599 (Fla. 1st DCA 2007).

Section 440.10(1)(b), F.S., provides that all of the employees of a contractor or a general contractor are deemed employed in one and the same business or establishment and the contractor is liable for, and must secure, workers' compensation coverage for all employees, except for employees of a subcontractor who has provided coverage. This provision ensures that a person performing work for a contractor, even an employee of the subcontractor, is entitled to workers' compensation protection with the primary employer if the subcontractor fails to provide coverage.[8]

If the contractor does not have adequate coverage, s. 440.11(1)(a), F.S., permits the injured employee to sue the employer either under the workers ' compensation law or in tort. In a tort action, the employer is barred from raising the defenses of negligence of a fellow servant, assumption of risk, or comparative negligence.

Workers' Compensation Immunity in Employee Leasing Scenarios

Workers' compensation is an injured employee's exclusive remedy.[9] When employers properly secure workers' compensation coverage for their employees, the employers have almost total immunity from suits brought by their employees. This immunity does not apply 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 client company's 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.[10]

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.

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."[11] 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.[12] Each employee leasing company is also required to notify the Division of

[8] *Gator Freightways, Inc. v. Roberts*, 550 So.2d 1117 (Fla. 1989).
[9] Section 440.11, F.S.
[10] 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).
[11] Section 627.192(6), F.S.
[12] *Id.*

Workers' Compensation, the Division of Unemployment Compensation, and the insurer within 30 days after the initiation or termination of a client company.[13] However, 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 a client within five days after the termination.

Section 468.529, F.S., requires employee leasing companies to maintain and make available to its workers' compensation insurer certain information concerning client companies and covered employees.[14] 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 factor[15] for each lessee or client company upon the termination of the employee leasing agreement.[16] The insurer is responsible for reporting to the National Council on Compensation Insurers, Inc., the data necessary to calculate the experience rating modifications for employers.

Unemployment Compensation

Chapter 443, F.S., provides for the administration of unemployment compensation by the Agency for Workforce Innovation (agency). Section 443.036(18), F.S., defines the term "employee leasing company," and requires these companies to maintain a listing of the clients of the employee leasing company and of the employees, including their social security numbers, who have been assigned to work at each client company job site. Section 443.1216, F.S., provides the types of employment that are subject to ch. 433, F.S. It includes services performed by the employees of an employee leasing company for a client company.

According to the agency, Florida's employment and employer counts are distorted by industry and geographic location due to the current Unemployment Compensation Law allowing Employee Leasing Companies to report all their clients (employers) under one Unemployment Compensation (the employee leasing company) account number. As a result, state and counties have inaccurate employer counts and employment by industry and geographic location, which skews all economic data to support the business community (workforce, economic development, and education).

According to the agency, it has been working over the last decade with employee leasing companies to pursue voluntary compliance of reporting their clients' information to alleviate the problem. However, the agency believes that this voluntary compliance has been inadequate, sporadic, and incomplete.

[13]Section 468.529(3), F.S.
[14] *See* s. 468.529, F.S.
[15] Pursuant to s. 627.192(2)(b), F.S., 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.
[16]Section 627.192(4), F.S.

III. Effect of Proposed Changes:

Unemployment Compensation
The bill provides that this act may be cited as the "Accurate Employment Statistics Enhancement Act."

Section 443.036(18), F.S., is amended to revise the definition of "employee leasing company" to specify and require that it means an employee leasing company which produces the quarterly report concerning the clients and internal staff of the leasing company, pursuant to s. 443.1216, F.S. This provision revises the current law by requiring the employee leasing companies to report each of their clients (employers) and internal staffs' information separately on a quarterly basis.

The bill amends s. 443.1216(1)(a)2., F.S., to require employee leasing companies to file quarterly reports with the Labor Market Statistics Center of the Agency for Workforce Innovation, or as otherwise directed by the agency, which include information relating to the client company's business, number of employees, wages paid, the business relationship between the employee leasing company and the client company, and the internal staff of the employee leasing company. The bill requires that the employment data and wage data on this report must match the employment and wages reported on the unemployment compensation quarterly tax and wage report. This is similar information currently required of all businesses operating in the State of Florida.

The bill prescribes a format for such reports and the time within which the reports must be filed, provides for rulemaking authority, and clarifies the agency's authority to administer, collect, enforce, and waive penalties for failure to file such reports.

The bill requires that the leasing company submit the report electronically or in a manner otherwise prescribed by the agency in the format specified by the United States Bureau of Labor Statistics for its Multiple Worksite Report for Professional Employer Organizations. The bill provides that the report must be filed by the last day of the month immediately following the end of the calendar quarter.

The bill also provides that, for the purposes of s. 443.1216(1)(a)2., F.S., the term "establishment" or "worksite" means any location where business is conducted or where services or industrial operations are performed.

Workers' Compensation Coverage for Employee Leasing Companies
Section 468.525, F.S., is amended to provide that each employee leasing company is required, regardless of the number of leased employees, to maintain a workers' compensation policy acceptable under the laws of this state at all times.

The section also requires a leasing company, if its contract with a client company provides for the client company to furnish workers' compensation coverage, to require the client company to provide evidence of valid workers' compensation coverage to the employee leasing company.

The bill also requires the leasing contract to specify that the employee leasing company will give written notice to all leased employees regarding whether the leasing company or the client company will provide workers' compensation coverage for the leased employees. This provision appears to conflict with s. 468.529(1), F.S., which provides that the leasing company is the employer of the leased employees and is responsible for providing workers' compensation coverage pursuant to ch. 440, F.S. However, this is consistent with the administrative rule of the Board of Employee Leasing Companies, which permits the client company to provide the workers' compensation coverage.[17]

The bill also requires that the leasing contract set forth whether the leased employees will be covered by a workers' compensation policy issued to the employee leasing company or to the client company.

Termination of Workers' Compensation Coverage In Employee Leasing Arrangements
The bill amends s. 468.529, F.S., to require a leasing company to provide notice by U.S. Postal Service first-class mail to each leased employee when a leasing arrangement is terminated with a client company. The notification must include the date for the termination of the leasing arrangement. Current law does not specify a notice period for termination; the notice of termination is provided in accordance with the contractual agreement.

The bill provides that a leased employee who continues in the employment of a terminated client company would not be covered by the leasing company's workers' compensation coverage once the leasing arrangement between the leasing company and the client company is terminated. It specifies that the termination of coverage is effective at the earliest of:

1. Five days after the employee leasing company mails a notice of termination by U.S. Postal Service first-class mail to the last known address of the terminated leased employee;
2. Upon the terminated leased employee receiving actual or constructive notice that he or she is no longer an employee of the client company or employee leasing company; or
3. Receipt, with proof of delivery, by the leased employee, or receipt, with proof of delivery, at the leased employee's last known address, of notice that the individual is no longer an employee of the employee 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, s. 468.529(4)(c), F.S., provides that the leasing company no longer covers the leased employee for workers' compensation and specifies when the termination of coverage is effective. The bill's provision for when the termination of coverage is effective is comparable to the termination provision in s. 468.529(4)(b), F.S., except that it does not include the receipt by the leased employee, or at the leased employee's last known address, of the notice that the individual is no longer an employee of the employee leasing company, as provided in s. 468.529(4)(b)3., F.S.

[17] *See* 61G7-10.0014(2)(c), F.A.C.

Section 468.529(4)(d), F.S., provides that, notwithstanding any actual or constructive notice, the leased employee is no longer covered under the workers' compensation policy of the leasing company if the leased employee:

- Negotiates a paycheck marked "final paycheck" that clearly states or provides written notice that the leased employee is no longer an employee of the employee leasing company and is not covered by its workers' compensation policy;
- Receives or accepts a direct deposit of a paycheck directly from a client company that has terminated its leasing arrangement with the leasing company; or
- Is provided written notice by the client company or the employee leasing company stating that the leased employee is no longer an employee of the employee leasing company and is not covered by the employee leasing company's workers' compensation policy.

Section 468.529(5), F.S., provides that an employee leasing agreement must state whether the responsibility to obtain workers' compensation insurance coverage for leased employees is allocated to the employee leasing company, the client company, or both. The responsibility for workers' compensation coverage must be through a master policy or multiple coordinated policies issued to the employee leasing company, a policy issued to the client company, or any other policy acceptable under Florida law.

Section 468.529(6), F.S., requires the leasing company, within 15 days of termination of the employee leasing agreement, to offer the client company an opportunity to receive 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

Section 468.529(7), F.S., provides that the client company and the leasing company must be considered the employer for purposes of coverage under ch. 440, F.S., regardless of whether the leasing company or the client company is supplying the workers' compensation coverage. The bill specifies the leasing company and the client company are employers under s. 440.11(2), F.S., for workers' compensation coverage and that workers' compensation immunity applies to both companies if workers' compensation coverage is provided to the leased employees by the leasing company or the client company.

This provision appears to conflict with s. 468.529(1), F.S., which provides that the leasing company is the employer of the leased employees and is responsible for providing workers' compensation coverage under ch. 440, F.S.

The bill reenacts s. 626.112, F.S., relating to the license and appointment requirements for insurance agents, customer representatives, adjusters, insurance agencies, service representatives, and managing general agents, in order to incorporate the amendment to s. 468.525, F.S.

Effective Date

The bill provides an effective date of October 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Some client companies may have to assume the cost of providing workers' compensation insurance for employees that are leased from an employee leasing company, and for which they are not currently providing the coverage.

The revised reporting requirements of unemployment compensation information by employee leasing companies, will assist private and public sector stakeholders in compiling more timely and accurate economic and workforce data. This information includes the total number of employers in Florida, including the number of large and small employers, and the growth or decline of industries by county. The validity of such information is critical. If this information is not accurate, it can negatively affect funding allocations, business recruitment, bond ratings, education and training curricula, business strategic planning, and legislative bill analysis. Under current reporting practices county employment levels can be reported as growing when in reality they could be declining or vice versa.

C. Government Sector Impact:

See Private Sector.

VI. Technical Deficiencies:

Section 468.529(7), F.S., of the bill provides that the client company and leasing company are employers for workers' compensation purposes. However, this provision in the bill appears to conflict with current statutory provisions not amended by the bill, s. 468.529(1), F.S., provides that the leasing company is the employer of the leased employee and is responsible for providing workers' compensation insurance and s. 440.02(16)(a), F.S., provides that an employee leasing company is an employer for purposes of workers' compensation coverage.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on April 8, 2008
The committee substitute (CS) provides that this act may be cited as the "Accurate Employment Statistics Enhancement Act."

The CS amends the definition of "employee leasing company" in s. 443.036(18), F.S.

The CS amends s. 443.1216(1)(a)2., F.S., to require a quarterly report by employee leasing companies to the Labor Market Statistics Center of the Agency for Workforce Innovation and to specify the information that must be contained in the report.

The CS creates s. 468.525(3)(h), F.S., to require each employee leasing company to maintain a workers' compensation policy acceptable under the laws of this state at all times.

The CS creates s. 468.525(3)(i), F.S., to require a leasing company, if its contract with a client company provides for the client company to furnish workers' compensation coverage, to require the client company to provide evidence of valid workers' compensation coverage to the employee leasing company.

The CS amends s. 468.529(3), F.S., to clarify that the referenced termination is of the employee leasing agreement.

The CS amends s. 468.529(4)(a), F.S., to clarify that the leasing company must send the required notice of the termination of the employee leasing agreement by United States Postal Service first-class mail.

The CS amends s. 468.529(4)(b), F.S., to provide that a leased employee who continues in the employment of a terminated client company is not covered by the leasing company's workers' compensation coverage after the termination of the employee leasing agreement.

The CS amends s. 468.529(4)(b)1., F.S., to increase from three days to five days the time within which the leasing company must give the leased employees a notice of the termination of the employee leasing agreement. It also requires that the notice be sent by United States Postal Service first-class mail.

The CS amends s. 468.529(4)(b)2., F.S., to provide that the termination of the leased employee's workers' compensation coverage may be effective upon the terminated leased

employee receiving actual or constructive notice that he or she is no longer an employee of the client company or employee leasing company.

The CS creates s. 468.529(4)(b)3., F.S., to provide that the termination of the leased employee's workers' compensation coverage may be effective upon receipt, with proof of delivery, by the leased employee or at his or her last known address of notice that the individual is no longer an employee of the employee leasing company.

The CS amends s. 468.529(4)(c), F.S., to increase from three days to five days the time within which the terminated employee's workers' compensation coverage is effective. It also requires that the notice be sent by United States Postal Service first-class mail.

The CS amends s. 468.529(4)(c)2., F.S., to provide that the termination of the leased employee's workers' compensation coverage, when the leasing company continues its relationship with the client company, may be effective upon the terminated leased employee receiving actual or constructive notice that he or she is no longer an employee of the client company or employee leasing company.

The CS amends s. 468.529(4)(d), F.S., to provides that, notwithstanding any actual or constructive notice, the leased employee is no longer covered under the workers' compensation policy of the leasing company if the leased employee negotiates a paycheck marked "final paycheck" that clearly states or provides written notice that the leased employee is no longer an employee of the employee leasing company and is not covered by its workers' compensation policy. It does not provide that it is conclusive proof that the leased employee is no longer covered by the leasing company's workers' compensation policy if he or she receives or accepts payment in cash or a paycheck which does not specify that the paycheck is issued by the leasing company. It also does not provide that any other benefit provided by the employee leasing company to its leased employees ceases upon termination of the leased employee's employment with the employee leasing company.

The CS amends s. 468.529(5), F.S., to provide that an employee leasing agreement must state whether the responsibility to obtain workers' compensation insurance coverage for leased employees is allocated to the employee leasing company, the client company, or both.

The CS amends s. 468.529(6), F.S., to provide that the offer to the client company for an opportunity to receive records relating to the loss experience of the workers' compensation insurance must be made within 15 days of termination of the employee leasing agreement.

The CS amends s. 468.529(7), F.S., to provide that the client company and the leasing company must be considered the employer for purposes of coverage under ch. 440, F.S., regardless of whether the leasing company or the client company is supplying the workers' compensation coverage.

The CS does not amend s. 440.02, F.S., to include employment performed by a leased employee under ch. 468, F.S., within the definition of "employment" in the workers' compensation law.

The CS does not amend s. 440.11(2), F.S., relating to immunity from liability for employee leasing companies, temporary help services companies, and their client companies.

The CS extends the effective date from July 1, 2008 to October 1, 2008.

B. Amendments:

None.