

FINAL BILL ANALYSIS

BILL #: CS/CS/CS/SB 88

FINAL HOUSE FLOOR ACTION:

115 Y's 2 N's

SPONSOR: Sen. Gaetz (Rep. Smith)

GOVERNOR'S ACTION: Approved

COMPANION BILLS: CS/CS/HB 43

SUMMARY ANALYSIS

CS/CS/CS/SB 88 passed the House on May 4, 2011. The bill was amended by the Senate, and again by the House, on May 5, 2011, and subsequently passed the House on May 5, 2011. The bill was approved by the Governor on June 17, 2011, chapter 2011-143, Laws of Florida, and takes effect July 1, 2011.

The bill makes several changes with respect to public employee compensation.

On or after July 1, 2011, a unit of government that enters into a contract or employment agreement, or renews or renegotiates an existing contract or agreement that contains a provision for severance pay, must include in the contract or agreement a limitation on severance pay of not greater than 20 weeks of compensation. In addition, it must include a provision prohibiting severance pay when the officer, agent, employee, or contractor has been fired for misconduct by the unit of government. An employment agreement or contract may not include confidentiality provisions involving extra compensation.

On or after July 1, 2011, an officer, agent, employee, or contractor may receive severance pay not provided for in a contract or employment agreement if such pay represents the settlement of an employment dispute. The severance pay may not exceed an amount greater than six weeks of compensation.

Finally, the bill provides criteria for a unit of government to follow when implementing a bonus scheme, and deletes provisions of law inconsistent with these restrictions.

The bill has an indeterminate fiscal impact on state and local governments.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Extra compensation claims are prohibited under s. 215.425, F.S., with some exceptions. No extra compensation may be made to any officer, agent, employee, or contractor after service has been rendered or the contract made, with the following exceptions:

- Extra compensation given to state employees who are included within the senior management group pursuant to rules adopted by the Department of Management Services;
- Extra compensation given to county, municipal, or special district employees pursuant to policies adopted by county or municipal ordinances or resolutions of governing boards of special districts, or to employees of the clerk of the circuit court pursuant to written policy of the clerk; or
- A clothing and maintenance allowance given to plainclothes deputies pursuant to s. 30.49, F.S.

Attorney General opinions have been issued interpreting this section of law.¹ According to the Attorney General opinions, the following forms of remuneration violate s. 215.425, F.S.:

- Severance pay or wages in lieu of notice of termination;²
- Bonuses to existing employees for services for which they have already performed and have been compensated, in the absence of a preexisting employment contract making such bonuses a part of their salary;³ and
- Lump-sum payments made as an incentive for an employee to end his or her employment.

The following do not violate s. 215.425, F.S.:

- Certain settlements;
- Lump-sum supplemental payments as an increased benefit to qualified current employees who elect early retirement; and
- Accrued annual or sick leave.⁴

The key issue in the Attorney General opinions seems to be whether the benefits are benefits that were anticipated as part of the initial contract or hiring policy, or whether they are additional payments for services over and above that fixed by contract or law when the services were rendered.⁵ Benefits that were anticipated as part of the hiring process are deemed to be included in the salary or payment for services, whereas, additional benefits not anticipated at the hiring date or available to all employees as part of a retirement plan are deemed to be extra compensation prohibited by current law.

Notwithstanding the prohibition against extra compensation set forth in s. 215.425, F.S., counties and municipalities may, under their respective governing statutes, "provide for an extra

¹ See Op. Att'y Gen. Fla. 2009-03 (2009); Op. Att'y Gen. Fla. 2007-26 (2007); Op. Att'y Gen. Fla. 97-21 (1997); and Op. Att'y Gen. Fla. 91-51 (1991).

² Op. Att'y Gen. Fla. 2007-26 (2007); Op. Att'y Gen. Fla. 91-51 (1991).

³ Op. Att'y Gen. Fla. 91-51 (1991).

⁴ Op. Att'y Gen. Fla. 2009-03 (2009).

⁵ Op. Att'y Gen. Fla. 2007-26 (2007).

compensation program, including a lump-sum bonus payment program, to reward outstanding employees whose performance exceeds standards, if the program provides that a bonus payment may not be included in an employee's regular base rate of pay and may not be carried forward in subsequent years."⁶

Section 110.1245, F.S., tasks the Department of Management Services (DMS) with paying bonuses when funds are specifically appropriated by the Legislature for bonuses. Statutory eligibility criteria include the following:

- The employee must be employed prior to July 1 of that fiscal year and be continuously employed through the date of distribution.
- The employee may not be on leave without pay for more than six consecutive months during the fiscal year.
- The employee may not have sustained disciplinary action⁷ during the period beginning July 1 through the date the bonus checks are distributed.
- The employee must demonstrate a commitment to the agency mission by reducing the burden on those served, continually improving the way business is conducted, producing results in the form of increased outputs, and working to improve processes.
- The employee must demonstrate initiative in work and exceed normal job expectations.
- The employee must display agency values of fairness, cooperation, respect, commitment, honesty, excellence, and teamwork.

DMS also has rules providing:

- A process for peer input that is fair, respectful of employees, and affects the outcome of the bonus distribution.
- A division of the agency by work unit for purposes of peer input and bonus distribution.
- A limitation on bonus distributions equal to 35 percent of the agency's total authorized positions. This requirement may be waived by the Office of Policy and Budget in the Executive Office of the Governor upon a showing of exceptional circumstances.

Current law also authorizes bonuses to lease employees of the executive and judicial branch.⁸

Section 373.0795, F.S., specifically prohibits severance pay for water management district employees. Severance pay is defined as the actual or constructive compensation, in salary, benefits or perquisites, of an officer or employee of a water management district, or any subdivision or agency thereof, for employment services yet to be rendered for a term greater than four weeks before or immediately following termination of employment (excluding leave time and retirement).

Effect of Proposed Changes

The bill creates requirements for any policy, ordinance, rule, or resolution designed to implement a bonus scheme. The scheme must:

- Base the award of a bonus on work performance;
- Describe the performance standards and evaluation process by which a bonus will be awarded;

⁶ See ss. 166.021(7) and 125.01(1)(bb), F.S.

⁷ Disciplinary actions include written reprimands, suspensions, dismissals, and involuntary or voluntary demotions that were associated with a disciplinary action.

⁸ See s. 110.191, F.S.

- Notify all employees of the policy, ordinance, rule, or resolution before the beginning of the evaluation period on which a bonus will be based; and
- Consider all employees for the bonus.

The bill requires a unit of government that enters into a contract or employment agreement with an officer, agent, employee, or contractor, or that renews or renegotiates an existing contract or agreement, to include in the contract:

- A limitation on severance pay compensation of not greater than 20 weeks.
- A prohibition of severance pay when the officer, agent, employee, or contractor has been fired for misconduct⁹ by the unit of government.

Notwithstanding the requirements for contract provisions, the bill provides that on or after July 1, 2011, severance pay may be received by an officer, agent, employee, or contractor if the severance pay represents the settlement of an employment dispute. The severance pay, however, may not exceed an amount greater than six weeks of compensation.

The bill clarifies that it does not create an entitlement to severance pay in the absence of its authorization. Additionally, the term "severance pay" is defined as the actual or constructive compensation, including salary, benefits, or perquisites, for employment services yet to be rendered which is provided to an employee who has recently been or is about to be terminated.

The term does not include:

- Compensation for earned and accrued annual, sick, compensatory, or administrative leave;
- Early retirement under provisions established in an actuarially funded pension plan subject to part VII of chapter 112, F.S.; or
- Any subsidy for the cost of a group insurance plan available to an employee upon normal or disability retirement that is, by policy, available to all employees of the unit of government pursuant to the unit of government's health insurance plan.

The provision relating to any subsidy for the cost of a group insurance plan may not be construed to limit the ability of a unit of government to reduce or eliminate the subsidy.

On or after July 1, 2011, any agreement or contract entered into, or any renewal or renegotiation of an existing contract, involving extra compensation between a unit of government and an officer, agent, employee, or contractor may not include any provision that limits the ability of a party to the agreement or contract to discuss such agreement or contract. Additionally, any settlement of an employment dispute involving severance pay may not include provisions that limit the ability of any party to the settlement to discuss the dispute or settlement.

The bill provides an exemption to the requirements for bonuses and severance pay for an officer, agent, employee, or contractor of a public hospital operated by a county or a special district. Such bonus or severance pay must be paid wholly from nontax revenues and nonstate-appropriated funds, and the payment and receipt of such funds may not violate part III of

⁹ Section 443.036(29), F.S., provides that "misconduct" includes, but is not limited to, the following, which may not be construed in pari materia with each other:

- (a) Conduct demonstrating willful, or wanton disregard of an employer's interests and found to be a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his or her employee; or
- (b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

chapter 112, F.S. In addition, the bill retains the existing exemption for a clothing and maintenance allowance given to plainclothes deputies pursuant to s. 30.49, F.S.

Finally, the bill deletes provisions in law allowing counties, municipalities, special districts, and clerks of the circuit court to give bonuses as long as they had policies in place. It deletes provisions allowing state employees included within the senior management group from receiving bonuses pursuant to rules adopted by the Department of Management Services. It also repeals a section of law governing severance pay for water management districts due to inconsistencies in definitions.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate. See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Indeterminate. See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Cost savings may arise from the requirement that any new, renewed, or renegotiated contract or employment agreement that contains a provision on severance pay must limit the compensation to no greater than 20 weeks. Cost savings also may arise from the limitation on severance pay which is not provided for in a contract or employment agreement if it represents the settlement of an employment dispute. The severance pay in that instance is limited to no more than six weeks of compensation.