



- Requiring claimants to make a systematic and sustained effort to find work, and to contact at least five prospective employers each week or report in person to a One-Stop Career Center to meet with a representative for reemployment services each week;
- Redefining “suitable work” to require claimants to seek a job after 19 weeks of benefits which pays the minimum wage and is at least 120 percent of their weekly benefit amount;
- Requiring claimants to file continuing claims by Internet, rather than by phone or mail.

The bill changes the criteria by which claimants are disqualified from receiving benefits by:

- Changing the standard to show misconduct from “willful” (a high standard) to “conscious” (a lower standard);
- Adding a disqualification for “gross misconduct,” which is defined by specific acts by an employee;
- Adding a disqualification for any weeks in which an individual receives severance pay from an employer;
- Expanding disqualification to include being fired for *all* crimes committed in connection with work (rather than only those punishable by imprisonment) and being fired for violating a criminal law which affects an employee’s ability to do his or her job; and
- Adding a specific disqualification for individuals who are incarcerated or imprisoned.

The bill codifies the executive order extending the temporary state extended benefits program and amends the program to conform to new federal law.

The bill eliminates the payment of benefits by mail.

Related to unemployment taxes, the bill:

- Allows employers to continue to have the option to pay their taxes in installments over 2012, 2013, and 2014;
- Allows employee leasing companies to make a one-time decision to change from reporting leased employees under their company account to reporting the employees under their respective clients’ accounts, an option that could result in lower taxes for those companies choosing to change; and
- Increases the number of employee leasing companies who may obtain tax information for their clients by filing a memorandum of understanding, instead of filing a power of attorney for each client, with the Department of Revenue.

The bill provides specific language to allow appeals of orders by the Unemployment Appeals Commission to be filed in district courts of appeal where the claimant resides or where the business was located. The bill also codifies certain agency rules related to the exclusion of evidence that is irrelevant or repetitious, and revises the admissibility of hearsay evidence to allow it to be used to establish a fact under certain circumstances. The bill limits the amount of overpayments that can be collected from a claimant when the Agency for Workforce Innovation does not issue a nonmonetary determination within 30 days of the filing of a new claim. The bill creates a rebuttable presumption that the date on a document mailed by AWI or DOR is the date that the document was mailed.

The bill revises the rule of construction and restores law as it existed in 2002, which provides that the chapter is to be liberally construed to accomplish its purpose to promote employment security.

The U.S. Department of Labor may find various provisions of this bill to be out of conformity with federal law. If the U.S. Department of Labor made such a finding, then it could result in a withholding of all administrative funding and a significant increase in employer's UC tax rates.

This bill amends the following sections of the Florida Statutes: 213.053, 443.031, 443.036, 443.091, 443.101, 443.111, 443.1115, 443.1216, 443.141, 443.151, and 443.171. This bill revives, readopts, and amends s. 443.1117, F.S.

## II. Present Situation:

### Unemployment Compensation Overview<sup>2</sup>

According to the U.S. Department of Labor (USDOL), the Federal-State Unemployment Insurance Program provides unemployment benefits to eligible workers who are unemployed through no fault of their own (as determined under state law) and who meet the requirements of state law.<sup>3</sup> The program is administered as a partnership of the federal government and the states.<sup>4</sup> The individual states collect unemployment compensation (UC) payroll taxes on a quarterly basis, which are used to pay benefits, while the Internal Revenue Service collects an annual federal payroll tax under the Federal Unemployment Tax Act (FUTA).<sup>5</sup> FUTA collections go to the states for costs of administering state UC and job service programs. In addition, FUTA pays one-half of the cost of extended unemployment benefits (during periods of high unemployment) and provides for a fund from which states may borrow, if necessary, to pay benefits.<sup>6</sup>

States are permitted to set benefit eligibility requirements, the amount and duration of benefits and the state tax structure, as long as state law does not conflict with FUTA or Social Security Act requirements. Florida's UC program was created by the Legislature in 1937.<sup>7</sup> The Agency for Workforce Innovation (AWI) is the current agency responsible for administering Florida's UC laws. AWI contracts with the Florida Department of Revenue (DOR) to provide unemployment tax collection services.<sup>8</sup>

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<sup>2</sup> For a comprehensive overview of Florida's unemployment compensation system, see Emerging Issues Related to Florida's Unemployment Compensation Program, The Florida Senate Committee on Commerce, Issue Brief 2010-306 (October 2009), at [http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim\\_reports/pdf/2010-306cm.pdf](http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-306cm.pdf) (last visited 1/31/2011).

<sup>3</sup> USDOL, Employment and Training Administration (ETA), State Unemployment Insurance Benefits, available at <http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp> (last visited 4/21/2011).

<sup>4</sup> There are 53 state programs, including the 50 states, Puerto Rico, the Virgin Islands, and the District of Columbia.

<sup>5</sup> FUTA is codified at 26 U.S.C. ss. 3301-3311.

<sup>6</sup> USDOL, ETA, Unemployment Insurance Tax Topic, available at <http://workforcesecurity.doleta.gov/unemploy/uitaxtopic.asp> (last visited 4/21/2011).

<sup>7</sup> Chapter 18402, L.O.F.

<sup>8</sup> Section 443.1316, F.S.

## Statutory Construction

Generally, states construe their unemployment statutes in favor of claimants. Courts have held that the unemployment laws are remedial in nature, and thus should be liberally and broadly construed.<sup>9</sup> Section 443.031, F.S., specifically states that ch. 443, F.S., “shall be liberally construed in favor of a claimant of unemployment benefits who is unemployed through no fault of his or her own.”<sup>10</sup>

For statutory construction purposes generally, remedial statutes are liberally construed. Remedial statutes are those that provide a remedy or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries. Florida courts have held that the unemployment statutes are “remedial, humanitarian legislation.”

“[A] statute enacted for the public benefit should be construed liberally in favor of the public even though it contains a penal provision. In this posture a reasonable construction should be applied giving full measure to every effort to effectuate the legislative intent.”<sup>11</sup>

Unemployment benefits are available as a matter of right to unemployed workers who have demonstrated their attachment to the labor force by a specified amount of recent work and/or earnings in covered employment. The purpose of the unemployment program is to benefit those unemployed through no fault of their own.<sup>12</sup>

## State Unemployment Compensation Benefits

A qualified claimant may receive UC benefits equal to 25 percent of wages, not to exceed \$7,150 in a benefit year.<sup>13</sup> Benefits range from a minimum of \$32 per week to a maximum weekly benefit amount of \$275 for up to 26 weeks, depending on the claimant’s length of prior employment and wages earned.<sup>14</sup>

To receive UC benefits, a claimant must meet certain monetary and non-monetary eligibility requirements. Key eligibility requirements involve a claimant’s earnings during a certain period of time, the manner in which the claimant became unemployed, and the claimant’s efforts to find new employment.

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<sup>9</sup> See J.W. Williams v. State of Florida, Department of Commerce, 260 So.2d 233 (1st DCA, 1972); and Williams v. Florida Industrial Commission, 135 So.2d 435 (3rd DCA, 1961). Other states do not specify how their statutes are to be construed; instead they rely upon the interpretation of their courts to make the determination.

<sup>10</sup> See Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 1448 (2003), for a discussion of this section. Other states’ laws contain a public purpose section, but this was removed from Florida Statutes in 2003, while preserving the standard for liberal construction.

<sup>11</sup> City of Miami Beach v. Berns, 245 So.2d 38, 40 (Fla. 1971).

<sup>12</sup> USDOL, ETA, State Unemployment Insurance Benefits.

<sup>13</sup> Section 443.111(5), F.S.

<sup>14</sup> Section 443.111(3), F.S. A benefit week begins on Sunday and ends on Saturday.

### ***Determinations and Redeterminations***

AWI issues determinations and redeterminations on the monetary and non-monetary eligibility requirements.<sup>15</sup> Determinations and redeterminations are statements by the agency regarding the application of law to an individual's eligibility for benefits or the effect of the benefits on an employer's tax account. A party who believes a determination is inaccurate may request reconsideration within 20 days from the mailing date of the determination. The agency must review the information on which the request is based and issue a redetermination.

If a party disagrees with either the determination or redetermination, the applicant or employer may request an administrative hearing before an appeals referee. Appeals referees in AWI's Office of Appeals hold hearings and issue decisions to resolve disputes related to eligibility for unemployment compensation and the payment and collection of unemployment compensation taxes.<sup>16</sup>

A decision by an appeals referee can be appealed to the Unemployment Appeals Commission. The Unemployment Appeals Commission is administratively housed in AWI, but is a quasi-judicial administrative appellate body independent of AWI.<sup>17</sup> The commission is 100 percent federally funded and consists of a three member panel that is appointed by the Governor. It is the highest level for administrative review of contested unemployment cases decided by the Office of Appeals referees. The Unemployment Appeals Commission can affirm, reverse, or remand the referee's decision for further proceedings. A party to the appeal who disagrees with the commission's order may seek review of the decision in the Florida district courts of appeal.<sup>18</sup>

### ***Able and Available for Work***

A claimant must meet certain requirements in order to be eligible for benefits for each week of unemployment. These include a finding by AWI that the individual:<sup>19</sup>

- Has filed a claim for benefits;
- Is registered to work and reports to the One-Stop Career Center;
- Is able to and available for work;
- Participates in reemployment services;
- Has been unemployed for a waiting period of 1 week;
- Has been paid total base period wages equal to the high quarter wages multiplied by 1.5, but at least \$3,400 in the base period; and
- Has submitted a valid social security number to AWI.

Section 443.036(1) and (6), F.S., provide the meaning of the phrases "able to work" and "available for work," respectively, as:

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<sup>15</sup> Section 443.151(3), F.S.

<sup>16</sup> Appeals are governed by s. 443.151(4), F.S., and the Administrative Procedures Act, ch. 120, F.S.

<sup>17</sup> Section 20.50(2)(d), F.S. "The Unemployment Appeals Commission, authorized by s. 443.012, F.S., is not subject to control, supervision, or direction by the Agency for Workforce Innovation in the performance of its powers and duties but shall receive any and all support and assistance from the agency that is required for the performance of its duties."

<sup>18</sup> Section 443.151(4)(c), (d), and (e), F.S.

<sup>19</sup> Section 443.091(1), F.S.

- “Able to work” means physically and mentally capable of performing the duties of the occupation in which work is being sought.
- “Available for work” means actively seeking and being ready and willing to accept suitable employment.

Additionally, AWI has adopted criteria, as directed in the statute, to determine an individual’s ability to work and availability for work.<sup>20</sup>

The law does not distinguish between part-time and full-time work with respect to benefits. With respect to the requirements of being able to work and available for work, Rule 60BB-3.021(2), F.A.C., provides that in order to be eligible for benefits an individual must be able to work and available for work during the major portion of the individual’s customary work week. Consequently, individuals whose benefits are not based on full-time work are not required to seek or be available to accept full-time work.

### ***Reemployment***

To maintain eligibility for benefits, an individual must be ready, willing, and able to work and must be actively seeking work. An individual must make a thorough and continued effort to obtain work and take positive actions to become reemployed. To aid unemployed individuals, free reemployment services and assistance are available. AWI defines reemployment services as: job search assistance, job and vocational training referrals, employment counseling and testing, labor market information, employability skills enhancement, needs assessment, orientation, and other related services provided by One-Stop Career Centers operated by local regional workforce boards.<sup>21</sup>

AWI’s website provides links to local, state, and national employment databases.<sup>22</sup> Claimants are automatically registered with their local One-Stop Career Center when their claims are filed and are required to report to the One-Stop Career Center as directed by the regional workforce board for reemployment services.<sup>23</sup> The One-Stops provide job search counseling and workshops, occupational and labor market information, referral to potential employers, and job training assistance. Claimants may also receive an e-mail from Employ Florida Marketplace with information about employment services or available jobs.<sup>24</sup> Additionally, a claimant may be selected to participate in reemployment assistance services, such as Reemployment and Eligibility Assessments (REAs).<sup>25</sup>

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<sup>20</sup> Rule 60BB-3.021, F.A.C.

<sup>21</sup> Rule 60BB-3.011(12), F.A.C.

<sup>22</sup> For example, on [www.fluidnow.com](http://www.fluidnow.com), where individuals can claim their weeks online.

<sup>23</sup> AWI’s Office of Workforce Services is responsible for providing One-Stop Program Support services to the Regional Workforce Boards. See s. 443.091(1)(b), F.S.

<sup>24</sup> Employ Florida Marketplace is a partnership of Workforce Florida, Inc., and AWI. It provides job-matching and workforce resources. <https://www.employflorida.com>.

<sup>25</sup> REAs are in-person interviews with selected UC claimants to review the claimants’ adherence to state UC eligibility criteria, determine if reemployment services are needed for the claimant to secure future employment, refer individuals to reemployment services, as appropriate, and provide labor market information which addresses the claimant’s specific needs. Research has shown that interviewing claimants for the above purposes reduces UC duration and saves UC trust fund resources by helping claimants find jobs faster and eliminating payments to ineligible individuals. Florida administers the

### *Disqualification for Unemployment Compensation*

Section 443.101, F.S., specifies the circumstances under which an individual would be disqualified from receiving unemployment compensation benefits, to include:

- Voluntarily leaving work without good cause, or being discharged by his or her employing unit for misconduct connected with the work;
- Failing to apply for available suitable work when directed by AWI or the One-Stop Career Center, to accept suitable work when offered, or to return to suitable self-employment when directed to do so;
- Receiving wages in lieu of notice or compensation for temporary total disability or permanent total disability under the workers' compensation law of any state with a limited exception;
- Involvement in an active labor dispute which is responsible for the individual's unemployment;
- Receiving unemployment compensation from another state;
- Making false or fraudulent representations in filing for benefits;
- Illegal immigration status;
- Receiving benefits from a retirement, pension, or annuity program with certain exceptions;
- Termination from employment for a crime punishable by imprisonment, or any dishonest act in connection with his or her work;
- Loss of employment as a leased employee for an employee leasing company or as a temporary employee for a temporary help firm if the individual fails to contact the temporary help or employee-leasing firm for reassignment; and
- Discharge from employment due to drug use or rejection from a job offer for failing a drug test.

The statute specifies the duration of the disqualification and the requirements for requalification for an individual's next benefit claim, depending on the reason for the disqualification.

As used in s. 443.101(1), F.S., the term "good cause" includes only that cause attributable to the employer or which consists of illness or disability of the individual requiring separation from work. An individual is not disqualified for voluntarily leaving temporary work to return immediately when called back to work by his or her former permanent employer that temporarily terminated his or her work within the previous 6-calendar months or for voluntarily leaving work to relocate as a result of his or her military-connected spouse's permanent change of station orders, activation orders, or unit deployment orders. An individual who voluntarily quits work for a good *personal* cause not related to any of the conditions specified in the statute will be disqualified from receiving benefits.

In determining "suitable work," the agency is directed by statute to consider several factors, including:

- Duration of an individual's unemployment;
- Proposed wages for available work, except in the 26<sup>th</sup> week of unemployment, when suitable work is a job that pays minimum wage and is 120 percent of the individual's weekly benefit amount;
- The degree of risk involved to the individual's health, safety, and morals;
- The individual's physical fitness and prior training;
- The individual's experience and prior earnings;
- The individual's length of unemployment and prospects for securing local work in his or her customary occupation; and
- The distance of the available work from the individual's residence.<sup>26</sup>

### **Financing Unemployment Compensation**

Unfortunately, due to the increasing unemployment rate in Florida, the Unemployment Compensation Trust Fund has been paying out more funds than it has been collecting. The trust fund fell into deficit in August 2009, and since that time the state has requested over \$2.3 billion in federal advances in order to continue to fund unemployment compensation claims.<sup>27</sup>

The decline in the balance of the trust fund, poor economic conditions, decrease in the number of employers and employees, and increasing unemployment rates have led to large increases in employer UC tax rates. Some employers face greater increases because their experience rates have increased due to laid-off employees making UC claims credited against the employers' accounts.

### ***State Unemployment Compensation Contributions***

Florida sets its own taxable wage base and rate. The funds collected are paid into the UC Trust Fund, which is maintained at the U.S. Treasury.<sup>28</sup> The trust fund is primarily financed through the contributory method—by employers who pay taxes on employee wages.<sup>29</sup> Employers' state UC taxes are used solely to pay UC benefits to unemployed Floridians.

Currently, an employer pays taxes on the first \$7,000 of an employee's wages.<sup>30</sup> An employer's initial state tax rate is 2.7 percent.<sup>31</sup> After an employer is subject to benefit charges for 8-calendar

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<sup>26</sup> Section 443.101(2), F.S.

<sup>27</sup> As of April 20, 2011. See U.S. Department of Treasury, Bureau of Public Debt, Treasury Direct's [Title XII Advance Activities Schedule](http://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiessched.htm) at [http://www.treasurydirect.gov/govt/reports/tfmp/tfmp\\_advactivitiessched.htm](http://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiessched.htm) (last visited 4/21/11).

<sup>28</sup> Section 443.191, F.S.

<sup>29</sup> Nonprofit employers may choose to finance compensation through either the contributory method or the reimbursement method. A reimbursing employer is one who must pay the Unemployment Compensation Trust Fund on a dollar-for-dollar basis for the benefits paid to its former employees. The employer is otherwise not required to make payments to the trust fund. See s. 443.1312, F.S. The state and local governments are reimbursing employers. Most employers are contributory employers; DOR advised that based on the most recent data available (from January 1, 2011) there were 453,800 contributing employers and 3,256 reimbursing employers in Florida.

<sup>30</sup> In 2012, the taxable wage base increases to \$8,500. See s. 3, ch. 2010-1, L.O.F.

<sup>31</sup> Section 443.131(2)(a), F.S.



quarters, the standard tax rate is 5.4 percent, but may be adjusted down to a low of 0.1 percent.<sup>32</sup> The adjustment in the tax rate is determined by calculating several factors.

Employer contributions are due in the month following the end of the quarter (April 30, July 31, October 31, and January 31). Most employers will have paid the \$7,000 wage base to their employees in the first or second quarter of the year, making their total UC payments due early in the year.

In 2010, legislation was enacted that permitted employers to spread the payment of their quarterly state UC taxes in installments over the year.<sup>33</sup>

	Due April 30	Due July 31	Due October 31	Due December 31	Due January 31
1 <sup>st</sup> Quarter Payment	¼	¼	¼	¼	-
2 <sup>nd</sup> Quarter Payment	-	⅓	⅓	⅓	-
3 <sup>rd</sup> Quarter Payment	-	-	½	½	-
4 <sup>th</sup> Quarter Payment	-	-	-	-	Full

For example, the quarterly payment due for the first quarter of 2010 may be spread into four equal installments, payable in each remaining quarter in 2010 (due by April 30, July 31, October 31, and December 31). However, UC taxes due for the fourth quarters of 2010 and 2011 are due as normally incurred in order for Florida employers to retain their eligibility for the FUTA tax credit for their federal UC taxes. An employer may participate in the payment plan if the employer pays an administrative fee of up to \$5 with the first installment payment. Interest and penalties do not accrue so long as the employer complies with the statutory provisions.

***State Unemployment Compensation Contributions – Benefit Charges***

In the unemployment tax calculation, the most significant factor in determining an employer’s tax rate is the “benefit ratio.”<sup>34</sup> This is the factor over which the employer has control. Often referred to as “experience rating,” this factor takes into account an employer’s experience with the UC Trust Fund by the impact of the employer’s laid off workers on the trust fund. Employers who lay off the most workers are charged the highest tax rates. The purpose of experience rating under Florida’s UC law is to ensure that employers with higher unemployment compensation costs pay a higher tax rate.

<sup>32</sup> Section 443.131(2)(b), F.S. Because of the definition of base period, at least 10 quarters must have elapsed before a new employer can be considered chargeable for 8 quarters of benefits. See also, s. 443.131(3)(d), F.S. An employer is only eligible for variation of the standard rate if its employment record was chargeable for benefits for 12 consecutive quarters ending on June 30 of the preceding calendar year. These employers are referred to as “rated employers.”

<sup>33</sup> Section 4, ch. 2010-1, L.O.F. Section 443.141(1)(e), F.S.

<sup>34</sup> Section 443.131(3)(b), F.S.

When an individual receives unemployment compensation based on the wages an employer paid the worker, benefit charges are assigned to that employer's account. The account of each employer who paid an individual \$100 or more during the period of a claim is subject to being charged a proportionate share of the compensation paid to the individual. However, an employer can obtain relief from benefit charges by responding to notification of a claim with information concerning the reason for the individual's separation from work or refusal to work.<sup>35</sup> An employer will not obtain relief from the benefit charges for failure to respond to the notice of claim within 20 days.<sup>36</sup>

### ***State Unemployment Compensation Contribution – Socialized Costs***

Compensation that cannot be charged against any employer's account is recovered through "variable adjustment factors" that socialize the cost of this compensation among all contributory employers who had benefit experience during the previous 3 years. An employer's variable adjustment factor includes a portion of the following socialized costs, based upon the employer's experience rate: the non-charge ratio (benefits not attributable to any employer over the last 3 years; also called "overpayments"),<sup>37</sup> the excess payments ratio (that portion of benefit charges which exceed the maximum rate of 5.4 percent),<sup>38</sup> and the fund size factor (requires the trust fund maintain a certain balance, discussed below as "triggers").<sup>39</sup>

The "final adjustment factor" is another factor in determining an employer's tax rate. It is a constant factor that applies to every employer regardless of experience rating.<sup>40</sup> The "final adjustment factor" takes into account-socialized costs, described above. This factor is also applied to employers who have no benefit charges in the preceding 3 years; as a result, this factor determines the minimum rate for the year.<sup>41</sup>

### ***State Unemployment Compensation Contribution – Trust Fund Triggers***

Florida's tax calculation method, especially due to the benefit ratio, is closer to a "pay as you go" approach, in which taxes increase rapidly after a surge in benefit costs. Economic conditions resulting in abnormally high unemployment accompanied by high benefit charges can cause a severe drain on the UC Trust Fund. The effect triggers the positive fund balance adjustment factor, which consequently increases tax rates for all employers. Conversely, when

<sup>35</sup> Section 443.131(3)(a), F.S.

<sup>36</sup> Section 443.151(3)(a), F.S. AWI is required to send notice to each employer who may be liable for benefits paid to an individual. Based upon information provided with filed claims for benefits and employer responses, if provided, AWI makes an initial determination on entitlement to benefits. An employer has an incentive to respond to AWI if the employer should not be liable for benefits; an employer can earn a lower tax rate by limiting the amount of benefit charges to the employer's account. A claimant is not required to repay any overpayments due to the employer's failure to respond, so long as there is no fraud involved.

<sup>37</sup> For example, these socialized costs include overpayments.

<sup>38</sup> Employers who have an experience rating that, if translated to a tax rate, would exceed the maximum rate get a break and any costs of unemployment benefits that exceed that 5.4 percent maximum tax rate are socialized to all other employers.

<sup>39</sup> Section 443.131(3)(e), F.S. See also DOR, What employers need to know about Florida Unemployment Compensation Law: How Rates are Calculated, at [http://dor.myflorida.com/dor/taxes/unemploy\\_comp\\_law.html#how](http://dor.myflorida.com/dor/taxes/unemploy_comp_law.html#how) (last visited 4/21/2011).

<sup>40</sup> If the combined factors exceed the maximum rate, the employer is assigned the maximum rate of 5.4 percent.

<sup>41</sup> DOR, What employers need to know about Florida Unemployment Compensation Law: How Rates are Calculated.

unemployment is low, the negative fund balance adjustment factor triggers, and tax rates for employers are reduced accordingly.<sup>42</sup>

The basis for the adjustment factors is the level of the trust fund on September 30 of each calendar year compared to the taxable payrolls for the previous year. Each adjustment factor remains in effect until the balance of the trust fund rises above or falls below the respective trigger percentage.

***State Unemployment Compensation Contribution – 2011 Rates and Forecasts***

In 2010, the Legislature turned the trust fund triggers “off” to avoid a significant rate increase for employers.<sup>43</sup> However, taxes still significantly increased from 2010 to 2011. This was due to a large increase in socialized costs, mostly attributable to costs associated with employers whose tax rate does not generate enough money to pay for all the benefits charged to their accounts due to the statutory maximum rate (or “maximum cap”).

The rates have been calculated for each Florida business that pays UC tax and approximately 25% of employers have begun paying based on these rates. The figures show that a business paying the minimum tax rate, which is the majority of Florida businesses (about 220,000), will see a tax rate increase from 0.36 percent to 1.03 percent. This means that a business that paid \$25.20 per employee under the previous rate will pay \$72.10 per employee in 2011. Those businesses at the maximum rate will still pay a per employee rate of \$378 due to the maximum cap.

	2010 Taxes		2011 Taxes	
Minimum Rate	0.36%	\$25.20	1.03%	\$72.10
Maximum Rate	5.4%	\$378	5.4%	\$378

Further, due in part to the short term relief provided to employers by legislation passed in the 2010 Regular Session, employers will be faced with a significant jump in tax rates beginning in 2012. Other facts affecting employer taxes in 2012 include the calculation of the trust fund factor and the scheduled increase in the wage base to \$8,500.<sup>44</sup>

<sup>42</sup> Emerging Issues Related to Florida’s Unemployment Compensation Program, The Florida Senate Committee on Commerce, Issue Brief 2010-306 (October 2009). Currently, the negative adjustment factor is not available until January 1, 2015, and then not in any calendar year in which a federal advance, or loan, from the federal government is still in repayment for the principal amount of the loan.

<sup>43</sup> Section 3, ch. 2010-1, L.O.F.

<sup>44</sup> Chapter 2009-99, L.O.F., increased the wage based to \$8,500 beginning in 2010; ch. 2010-1, L.O.F., delayed this increased until 2012.

	<b>2011 Taxes</b> ((\$7,000 wage base + tax trigger off)		<b>2012 Taxes<sup>45</sup></b> ((\$8,500 wage base + tax trigger on)		<b>2013 Taxes</b> ((\$8,500 wage base + tax trigger on)		<b>2014 Taxes</b> ((\$8,500 wage base + tax trigger on)	
Minimum Rate	1.03%	\$72.10	2.43%	\$206.55	2.07%	\$175.95	1.73%	\$147.05
Maximum Rate	5.4%	\$378	5.4%	\$459	5.4%	\$459	5.4%	\$459

In addition to the economic conditions which attributed to the increase in the contribution rate, the number of employers and employees has significantly decreased over the past year. Because there are fewer employers paying UC taxes on fewer employees to fund the UC Trust Fund, with the positive fund balance adjustment factor triggering “on” in 2012, existing employers will have to contribute more than they otherwise would have had to contribute in good economic times in order to reduce the current trust fund debt.

***Federal Unemployment Compensation Contributions***

The Internal Revenue Service charges each liable employer a federal unemployment tax of 6.2 percent on employees’ annual wages.<sup>46</sup> If, however, a state program meets the federal requirements and has no delinquent federal loans, employers are eligible for up to a 5.4 percent tax credit, making the net federal tax rate 0.8 percent. Employers file an annual return with the Internal Revenue Service each January for taxes on the first \$7,000 of each employee’s annual wages during the previous year.

The USDOL provides AWI with administrative resource grants from the taxes collected from employers pursuant to FUTA. These grants are used to fund the operations of the state’s UC program, including the processing of claims for benefits by AWI, state unemployment tax collections performed by DOR, appeals conducted by AWI and the Unemployment Appeals Commission, and related administrative functions.

***Federal Advances***

States may borrow money from the federal government through the USDOL to pay benefit claims whenever the state lacks funds to pay claims due in any month. Such loans are referred to as “advances.” The state’s trust fund balance must be zero in order to receive an advance.

Many states have experienced chronic problems with UC trust fund insolvency, causing them to borrow from the federal government to pay benefits and resulting in increased federal taxes to repay the loans (see below *Federal Advance – FUTA Credit Loss*). In response, these states have restricted eligibility to UC benefits to reduce benefit costs, thereby reducing the number of workers who are eligible to receive benefits and, consequently, jeopardizing the value of their

<sup>45</sup> Unemployment Compensation Trust Fund Forecast dated February 2011, by the Office of Economic and Demographic Research, on file with the Senate Commerce and Tourism Committee.

<sup>46</sup> The Federal Unemployment Tax Act (FUTA) is set to be reduced by 0.2 percent in June 2011 (considered a 0.2 percent surtax). 26 U.S.C. s. 3301 (2009). However, since the tax was increased to 6.2 percent in the mid-1980s, each year that the tax has been set to be reduced, Congress has enacted legislation that maintains the surtax.

UC programs as economic stabilizers.<sup>47</sup> In the current economic climate, states are increasingly requesting federal advances. Thirty-three states, including the Virgin Islands, currently have requested federal advances.<sup>48</sup> Six states have paid off their federal advances, including Texas, Tennessee, and Maryland.<sup>49</sup>

Prior to August 2009, Florida's UC Trust Fund had never become insolvent during the history of the tax trigger. In the aftermath of the 1973-1975 recession, the state anticipated the UC Trust Fund's reserves were insufficient to pay benefits. Consequently, the state twice borrowed funds from the federal government – \$10 million in 1976 and \$32 million in 1977. However, Florida's trust fund remained solvent and the loans were never drawn down. With the exceptions of 1976 and 1977, Florida had never sought a federal loan, making this state one of the few to avoid serious and chronic problems with trust fund insolvency.<sup>50</sup>

However, due to the current economic climate and increased demand on the UC Trust Fund, the trust fund fell into deficit in August 2009. AWI began the request process in July for an advance from the federal government in order to maintain the solvency of the trust fund. As of April 20, 2011, the state has requested over \$2.3 billion in federal advances in order to continue to fund unemployment compensation claims.<sup>51</sup>

Advances are requested for 3-month periods at a time, prior to the quarter in which they are needed. The USDOL evaluates the state's request and sends a confirmation letter that provides the authorized amount that the state may borrow and the authorization period. The state may not borrow more funds than the authorized amount. The state will only draw down, or borrow, funds as needed to pay UC benefits.

Advance monies may only be used to pay UC benefits. For example, if an employer is due a credit for overpayment of UC taxes, the employer cannot be repaid until the trust fund is replenished with funds other than advance monies.

The state may make repayments of the principal amount of the advance voluntarily by notifying USDOL by letter of the amount and effective repayment date. Repayments are made on a last made, first repaid basis.

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<sup>47</sup> Vroman, Wayne, The Role of Unemployment Insurance as an Automatic Stabilizer During a Recession, The Urban Institute, IMPAQ International, LLC, and USDOL, ETA, July 2010, available at [http://wdr.doleta.gov/research/FullText\\_Documents/ETAOP2010-10.pdf](http://wdr.doleta.gov/research/FullText_Documents/ETAOP2010-10.pdf) (last visited 2/1/2011).

<sup>48</sup> U.S. Department of Treasury, Bureau of Public Debt, Treasury Direct's Title XII Advance Activities Schedule at [http://www.treasurydirect.gov/govt/reports/tfmp/tfmp\\_advactivitiessched.htm](http://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiessched.htm) (last visited 4/21/2011).

<sup>49</sup> Some of these states only took out short term advances from USDOL. Other states took steps to increase their taxes to repay the federal advances. Texas issued bonds to repay their debt, and employers in that state will incur a new assessment in addition to state UC taxes to pay the debt service due on the bonds.

<sup>50</sup> Emerging Issues Related to Florida's Unemployment Compensation Program, The Florida Senate Committee on Commerce, Issue Brief 2010-306 (October 2009).

<sup>51</sup> See U.S. Department of Treasury, Bureau of Public Debt, Treasury Direct's Title XII Advance Activities Schedule at [http://www.treasurydirect.gov/govt/reports/tfmp/tfmp\\_advactivitiessched.htm](http://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiessched.htm) (last visited 4/21/2011).

### ***Federal Advance – FUTA Credit Loss***

After a state UC trust fund borrows from the USDOL, if the loan becomes delinquent, the federal tax credit for the state's employers is reduced until the loan is repaid (reduced by 0.3 percent for each year).<sup>52</sup> This serves as a sort of automatic loan repayment – the taxes collected due to the credit reduction go towards repayment of the principal amount of the state's advances. Thus, employers in states with insolvent trust funds are faced with multiple tax increases: increased state UC taxes to restore solvency of the state UC trust fund, and increased federal taxes to repay federal loans. In addition, any grants related to the costs of administration held in the UC trust fund do not earn interest.

It is anticipated that Florida employers will experience a partial loss of the federal UC tax credit for wages paid in 2011, due to the existence of an outstanding federal advance. The credit reduction continues and escalates until such time as the loan is fully repaid.<sup>53</sup> The Office of Economic and Demographic Research (EDR) estimated that the first repayment to the federal government through the loss of the federal credit will be \$139.8 million in January 2012, \$290.4 million in January 2013, and \$451.8 million in January 2014, for a total of \$882 million.<sup>54</sup> The forecast estimates that the federal advances will be completely repaid by April 2014.

States with outstanding loans may seek relief from the loss of the federal UC tax credit. If specific requirements are met, then a cap (or limit) on the credit reduction may be put in place. These requirements are:

- The state did not take any action in the prior year that would diminish the solvency of the state fund;
- The state did not take any action in the prior year that would decrease the state's unemployment tax effort;
- The average tax rate for the taxable year exceeds the 5-year average benefit cost rate; and
- The state's outstanding loan balance as of September 30 of the tax year is not greater than that for the third preceding September 30.<sup>55</sup>

### ***Federal Advance – Interest***

Federal advances accrue interest at an annual interest rate of up to 10 percent. Interest accrues on a federal fiscal year basis (October to September), and is due no later than September 30 each year. The interest rate charged is equal to the fourth calendar quarter yield on the Unemployment Trust Fund for the previous year, capped at 10 percent. The interest rate for 2011 is 4.0869 percent. Through December 2010, federal advances did not accrue interest due to a provision in the American Recovery and Reinvestment Act of 2009.

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<sup>52</sup> If a state has an outstanding loan balance on January 1 for 2 consecutive years, then the entire loan must be repaid before November 10 of the second year or the credit reduction will begin.

<sup>53</sup> USDOL Webinar on Title XII Advances, August 10, 2009 (slides on file with the Senate Commerce Committee).

<sup>54</sup> Unemployment Compensation Trust Fund Forecast dated February 2011, Office of Economic and Demographic Research, on file with the Senate Commerce and Tourism Committee.

<sup>55</sup> USDOL, [Unemployment Compensation: Federal-State Partnership](http://ows.doleta.gov/unemploy/pdf/partnership.pdf), page 7, available at <http://ows.doleta.gov/unemploy/pdf/partnership.pdf> (last visited 4/21/2011).

The interest due on advances cannot be paid from funds from the UC Trust Fund. In order to repay the interest, a state may make an appropriation from general revenue, issue bonds, or impose a surcharge on employers.<sup>56</sup> In 2010, the Legislature implemented legislation to pay interest on federal advances through an additional employer assessment.<sup>57</sup>

The Revenue Estimating Conference is charged with estimating the interest amount by December 1 of the year prior to the due date for the interest payment. DOR must make the assessment prior to February 1 of the year. The interest is due based upon a formula. To determine the additional rate for the assessment, the formula divides the estimated amount of interest owed by 95 percent of total wages paid by employers for the previous year ending June 30. To determine an employer's payment, the formula multiplies an employer's taxable wages by the additional rate. An employer has 5 months to pay the assessment, by June 30, and the assessment may not be paid by installment.

The first interest payment to the federal government will be due by September 30, 2011; the Governor or his designee directs DOR to make the interest payment. The Revenue Estimating Conference estimated a payment of \$61.4 million due in 2011; calculated as a per employee rate, the assessment is about \$9.51 per employee.<sup>58</sup>

The assessments are paid into the Audit and Warrant Clearing Trust Fund and may earn interest; any interest earned will be part of the balance available to pay the interest to the federal government. If the federal government postpones or forgives the interest due on the advances, the employer assessment is eliminated for that year. An assessment already paid will be credited to the employer's account in the UC Trust Fund.

States may apply to USDOL for deferrals of interest for loans in certain situations. These include:<sup>59</sup>

- Interest may be deferred, to December 31 of the following calendar year, for loans made in the last 5 months of the federal fiscal year (May-September). Interest accrues on the delayed interest payment.
- States with an average total unemployment rate (TUR) of 13.5 percent or greater for the most recent 12-month period for which data are available may delay payment of interest for a grace period not to exceed 9 months. Interest does not accrue on the delayed interest payment.
- States with an average insured unemployment rate (IUR) of 7.5 percent or greater during the first 6 months of the preceding calendar year may pay interest in four annual installments of 25 percent per year. Interest does not accrue on the deferred interest payments.

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<sup>56</sup> The option of issuing bonds to repay the interest may be unavailable to Florida. See Art. VII, s. 11, Fla. Const.

<sup>57</sup> Section 443.131(5), F.S. Section 4, ch. 2010-1, L.O.F.

<sup>58</sup> Revenue Estimating Conference forecast from November 30, 2010, available at <http://edr.state.fl.us/Content/revenues/reports/unemployment-compensation-trust-fund/index.cfm> (last visited 4/21/2011).

<sup>59</sup> USDOL, Unemployment Compensation: Federal-State Partnership, page 8. Currently, Florida does not qualify for a deferral.

If the interest is not paid when due, the federal government will not certify the state program and can withhold all administrative funding. Additionally, employer tax rates would increase to the total federal tax of 6.2 percent because Florida employers would lose the entire FUTA tax credit (5.4 percent).<sup>60</sup>

### **Temporary State Extended Benefits**

In 2009, the Legislature enacted a temporary state extended benefits program for unemployed individuals in order to qualify for federal funds.<sup>61</sup> Under this program, the federal government pays 100 percent of temporary state extended benefits to former private sector employees. The federal funds are paid from a separate federal general revenue account and did not affect the balance of Florida's UC Trust Fund.

Since the implementation of the temporary state extended benefits program in the American Recovery and Reinvestment Act of 2009, the existence of the program has been extended several times by the federal government. Most recently, in December 2010, Congress extended the eligibility window for Emergency Unemployment Compensation (EUC) and for state extended benefits through January 4, 2012.

Florida already had an extended benefits program in statute,<sup>62</sup> but in order to participate in the federal program, Florida had to enact a temporary state extended benefits program with an alternate trigger rate based upon the average total unemployment rate (TUR). Florida's regular state extended benefits program triggers "on" based upon a higher individual unemployment rate (IUR). In the past, the program has generally been set forth in state statute, adopted by the Legislature. However, when Congress extended this program in July 2010, because the Legislature was not in session, Governor Crist signed an executive order implementing the program.<sup>63</sup> On December 17, 2010, Governor Crist signed an additional executive order extending the program after the federal bill was signed into law.<sup>64</sup> However, the most recent extension put into law enacts a new "trigger" to keep the program "on" due to the continued high unemployment rates that many states are experiencing.

### **III. Effect of Proposed Changes:**

#### **Providers Representing Clients on Tax Matters**

Section 1 amends s. 213.053(4), F.S., to allow payroll service providers (like employee leasing companies) to file a memorandum of understanding if they provide services for 100 or more employers.

Under current law, providers that represent clients on UC tax matters before DOR must file a power of attorney for each of their clients. If the provider provides services for at least 500

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<sup>60</sup> Id. Because the state UC program would not be certified, there would be no state UC tax in this situation.

<sup>61</sup> Chapter 2009-99, L.O.F. Temporary extended benefits was originally created and funded by the American Recovery and Reinvestment Act of 2009 (Recovery Act). Section 2005, Public L. No. 111-5.

<sup>62</sup> Section 443.1115, F.S.

<sup>63</sup> Executive Order No. 10-170.

<sup>64</sup> Executive Order No. 10-276.



clients, the law permits the provider to file a single memorandum of understanding with DOR in lieu of the 500 individual powers of attorney. For providers that have fewer than 500 clients, completing individual powers of attorney is very burdensome. This change would reduce the burden on providers and reduce administrative burdens on DOR.

### **Statutory Construction**

Section 2 amends s. 443.031, F.S., by revising the rule of construction and restoring the statute as it existed in 2002, prior to a statutory re-write completed in 2003. The change eliminates the specific reference that provided that UC statutes were to be liberally construed in favor of a claimant and provides that the chapter is to be liberally construed to accomplish its purpose to promote employment security.

### **State Unemployment Compensation Benefit Eligibility**

The bill makes several changes to UC benefit eligibility, including changing the qualifying criteria and circumstances that automatically disqualify claimants from receiving benefits.

#### ***Qualifying Criteria***

##### Initial Skills Review

Section 4 amends s. 443.091(1), F.S., to amend the reporting requirement to require claimants to participate in an initial skills review. The administrator or operator of the online education or training program is required to report to AWI that the individual has taken the initial skills test for benefit eligibility purposes, and to the regional workforce board or One-Stop Career Center the results of the initial skills test for purposes of reemployment services. The regional workforce board is required to develop a plan to use the initial skills review to refer individuals training and employment opportunities.

Section 3 amends s. 443.036, F.S., to create a new definition for “initial skills review.” An initial skills review is an online education or training program, like Florida Ready to Work,<sup>65</sup> that is approved by AWI and designed to measure an individual’s mastery of workplace skills.

Florida Ready to Work is an employee credentialing program that is funded by the state.<sup>66</sup> To participate, individuals must first go to a local assessment center to sign up for the program. Once signed up, an individual may take the initial skills review at the assessment center or online at any location with Internet access. The assessment measures general skills necessary for 90 percent of all jobs in 3 areas: locating information, reading, and applied math. All the questions are based on workplace scenarios. After taking the initial skills review, an individual may take additional course material to try to improve his or her skills. An individual who completes the entire program may receive a Florida Ready to Work Credential to use as a tool when applying for jobs. This program is provided to Floridians at no cost.

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<sup>65</sup> Section 1004.99, F.S.

<sup>66</sup> Website available at <http://floridareadytowork.com/> (last visited 4/21/2011).

Section 12 amends s. 443.151(2)(a), F.S., to require claimants to file initial and continuing claims by the Internet. By requiring claimants to file UC claims by the Internet, the initial skills review could be incorporated into the benefit application process. This would allow claimants to participate in the initial skills review at the time they file for benefits and engage in reemployment services.

### Work Search Requirements

Section 4 of the bill also amends s. 443.091, F.S., to add specific work search requirements. Section 443.091(1)(d), F.S., is amended to specify that as part of being available for work, a claimant must be actively seeking work. A claimant is required to engage in a systematic and sustained effort to find work, including contacting at least five prospective employers each week. AWI may require a claimant to provide evidence of work search activities to the One-Stop Career Center as part of reemployment services. Additionally, the agency is directed to conduct random reviews of work search information provided by claimants.

For any week of benefits claimed, as an alternative to contacting five prospective employers, a claimant may report in person to a One-Stop Career Center to meet with a representative of the center to receive reemployment services. The One-Stop Career Center must keep a record of the services or information provided to the claimant and provide those records to AWI upon request.

The bill also amends the reporting requirements for claimants related to their activities in searching for work. Section 4 amends s. 443.091(1)(c), F.S., to specify that a claimant must report, at a minimum, the name, address, and telephone number of each prospective employer contacted as part of the claimant's search for work, or the date that the claimant reported to the One-Stop Career Center. Section 6 amends s. 443.111(1)(b), F.S., to require each claimant to attest that she or he has been seeking work and has contacted at least five prospective employers or reported in-person to a One-Stop Career Center for each week of unemployment claimed.

Section 12 amends s. 443.151(2)(a), F.S., to require claimants to file initial and continuing claims by the Internet. Claimants receiving temporary state extended benefits are required to meet heightened work search requirements, including the requirement to "furnish tangible evidence that she or he actively engaged in a systematic and sustained effort to find work."<sup>67</sup> These claimants are required to file their claims by mail or Internet. By imposing the same type of work search requirements on all claimants, restricting filing methods for continuing claims to the Internet will allow AWI to collect the work search evidence required by s. 443.091(1), F.S., as amended by the bill.

### Suitable Work

An individual is required to search for "suitable work" to be eligible for benefits under current law. Additionally, if an individual is found to not be searching for suitable work, she or he may be disqualified for benefits. As it relates to the wages paid by suitable work, under current law, specifically for the 26<sup>th</sup> week of benefits, "suitable work" is defined as "a job that pays the

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<sup>67</sup> Section 443.1115(3)(c)1.b., F.S.

minimum wage and is 120 percent or more of the weekly benefit amount the individual is drawing.”<sup>68</sup>

Section 5 of the bill amends s. 443.101(2), F.S., (renumbered in the bill as s. 443.101(3), F.S.) to require that the wage criteria for suitable work applies after 19 weeks of benefits.

Amendments made in Section 5 of the bill do not change the other current law criteria that AWI considers when determining if work is suitable or not. These include the degree of risk to the individual’s health, safety, and morals; the individual’s physical fitness, prior training, experience, prior earnings, length of unemployment, and prospects for securing local work in his or her customary occupation; and the distance of available work from the individual’s residence.

The bill also amends s. 443.036(6), F.S., in Section 3 to provide consistency throughout the chapter to use the term “suitable work.”

### Earned Income

Under s. 443.036, F.S., “earned income” means gross remuneration derived from work, professional service, or self-employment. It includes commissions, bonuses, back pay awards, and the cash value of all remuneration paid in a medium other than cash. Earned income does not include income derived from invested capital or ownership of property.

An individual who receives earned income in any week is considered to be partially unemployed and his or her weekly benefit amount is reduced by any earned income received that week if it is over a certain amount.<sup>69</sup>

Section 3 of the bill amends the definition of “earned income” to include back pay settlements, front pay, and front wages. This expands the types of income that would reduce the amount of benefits a claimant may receive.

In general, front pay, or front wages, is an equitable remedy applied in employment discrimination cases where a court determines that an individual cannot be placed back into the same employment.<sup>70</sup> “Back pay settlements are a common remedy for wage violations that consist of an order that the employer make up the difference between what the employee was paid and the amount he or she should have been paid.”<sup>71</sup>

### *Disqualifications*

#### Voluntarily Quitting

Under current law, an individual who voluntarily quits work without good cause attributable to his or her employer is disqualified from receiving UC benefits. Section 5 of the bill amends

<sup>68</sup> Section 443.101(2), F.S.

<sup>69</sup> Section 443.111(4)(b), F.S.

<sup>70</sup> Equal Opportunity Employment Commission, Front Pay, available at <http://www.eeoc.gov/federal/digest/xi-7-4.cfm> (last visited 4/21/2011).

<sup>71</sup> USDOL, ETA, Wages: Back Pay, available at <http://www.dol.gov/dol/topic/wages/backpay.htm> (last visited 4/21/2011).

s. 443.101(1)(a)1., F.S., to codify case law which states that “good cause” is that which would compel a reasonable individual to cease working.<sup>72</sup>

### Misconduct

Section 3 amends s. 443.036(29), F.S., to change the definition of “misconduct.”

Under current law, a claimant may be disqualified from receiving benefits for being fired for misconduct associated with work. The current law definition of “misconduct” requires showing:

- Willful or wanton disregard of an employer’s interests and is found to be deliberate, or
- Careless or negligent behavior that manifests culpability, wrongful intent, or evil design or was intentional or substantial disregard.

The bill reduces the standard to show misconduct to behavior that is a “conscious” disregard of an employer’s interests or that is careless or negligent behavior that manifests culpability, wrongful intent, or shows an intentional and substantial disregard of an employer’s interests.<sup>73</sup> Further, behavior that is a “conscious” disregard may be a violation of reasonable standards that an employer has a right to expect, including those lawfully set forth in an employer’s written rules of conduct.

USDOL may find this provision causes the state to be out of conformity with federal law.

### Gross Misconduct

Section 5 amends 443.101, F.S., to create a new disqualification for benefits for specific acts of “gross misconduct” by an employee that led to her or his termination from work. Some of the specific acts included are:

- Willful or reckless damage to an employer’s property that results in damage of more than \$50;
- Theft of employer, customer, or invitee property;
- Violation of drug and alcohol policies, testing, or use of such substances while on the job or on duty;
- Assault or battery of another employee, customer, or invitee;
- Abuse of a patient, resident, disabled person, elderly person, or child in the employee’s professional care;
- Insubordination (willful failure to comply with written employer rule or job description or reasonable order of a supervisor), provided that an employee receives at least one written warning before being terminated, unless the insubordination was severe;

<sup>72</sup> See e.g. Thomas v. Peoplease Corp., 877 So.2d 45(3rd DCA, 2004).

<sup>73</sup> The bill does not define “conscious disregard.” One court characterized the term “conscious disregard of consequences” in a negligence context as being a middle ground between careless disregard of consequences (as in simple negligence) and “the more extreme ‘willful or wanton’ disregard thereof (as in culpable or criminal negligence).” Courtney v. Fla. Transformer, Inc., 549 So. 2d 1061, 1064 (Fla. 1st DCA 1989).

- Willful neglect of duty as described in a written employer rule or job description, provided that an employee receives at least one written warning before being terminated, unless the willful neglect was severe; and
- Failure to maintain a license, registration, or certification required by law for the employee to perform her or his job.

The disqualification for gross misconduct continues until an individual becomes reemployed and earns income of at least 17 times his or her weekly benefit amount that would have otherwise been available.

### Severance Pay

Section 5 of the bill creates a disqualification in s. 443.101(3), F.S., (renumbered in the bill as s. 443.101(4), F.S.) for any week in which an individual receives severance pay. Severance pay is often granted to employees upon termination of employment, and is usually based on length of employment (matter of agreement between an employer and an employee). The bill provides for a calculation for the duration of disqualification, beginning from the date an individual separated from that employer.

### Criminal Acts and Incarceration or Imprisonment

Currently, under s. 443.101(9), F.S., an individual who is terminated from employment for violation of a criminal law punishable by imprisonment (either by conviction or entrance of a plea of guilty or nolo contendere) in connection with work is disqualified for benefits. This includes a violation of a criminal law under any jurisdiction.

The bill amends this disqualification in Section 5 of the bill by expanding the disqualification to a violation of any criminal law, not just those punishable by imprisonment, and includes being fired for violating a crime which affects an employee's ability to do his or her job.

USDOL may find this provision causes the state to be out of conformity with federal law.

Further, Section 5 creates a new disqualification for each week that an individual is unavailable for work due to incarceration or imprisonment in s. 443.101(12), F.S.

## **State Unemployment Compensation Contributions**

### ***Quarterly Contributions – Installment Payments***

As discussed in the Present Situation, employer contributions are due in the month following the end of the quarter (April 30, July 31, October 31, and January 31). Most employers will have paid the \$7,000 wage base to their employees in the first or second quarter of the year, making their annual UC payment due early in the year. Under current law, for 2011, employers may choose to participate in an alternative payment plan for an administrative fee of up to \$5 to participate.

Section 11 amends s. 443.141, F.S., to allow this option for UC taxes due in 2012, 2013, and 2014.

### **Temporary State Extended Benefits Program**

In December, Congress extended the time that the federal government would fund 100 percent of state extended benefits for former private sector employers through January 4, 2012.<sup>74</sup> There is no cost to private employers; however, “reimbursable” employers like state and local governments are not covered by the federal government and must pay for the benefits themselves. These benefits are not charged to employers and have no effect on an employer’s experience rating.

Section 8 revives, readopts, and amends s. 443.1117, F.S., to extend the duration of the temporary state extended benefits program. The section expired on April 5, 2010. When Congress extended the program in December 2010, Governor Crist signed Executive Order No. 10-276 extending the program. This bill codifies that executive order and revives the statute through January 4, 2012, in order for Floridians to be eligible for 100 percent federal funding for benefits for former private sector employees. Additionally, the bill conforms s. 443.1117, F.S., to federal law by putting into place the new “trigger” permitted.

This section is effective retroactive to December 17, 2010, and expires on January 4, 2012. The section contains an expiration date, because under the federal program, after January 4, 2012, any extended benefits paid will only be reimbursed by the federal government at a rate of 50 percent for former private sector employees making new claims. The bill sets a sunset date in enacting the program in order to take the best advantage of the program.

Section 9 clarifies that the temporary extended benefits will be available to unemployed Floridians who establish entitlement to extended benefits between December 17, 2010, and January 4, 2012.

### **Employee Leasing Companies**

An employee leasing company is “a form of business entity engaged in an arrangement whereby the entity assigns its employees to a client and allocates the direction of and control over the leased employees between the leasing company and the client.”<sup>75</sup> The leasing company provides services for the client companies, such as handling the filing of UC taxes and workers’ compensation.

Under current law, employee leasing companies are required to report leased employees under the leasing company’s UC tax account and contribution rate.

Section 10 amends s. 443.1216(1)(a), F.S., to allow the employee leasing company to report leased employees under the accounts of its clients for unemployment tax purposes only. The bill allows a one-time election to change an employee leasing company’s reporting and contribution

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<sup>74</sup> Pub. L. No. 111-312.

<sup>75</sup> Department of Business and Professional Regulation, definitions, available at <http://www.myfloridalicense.com/dbpr/pro/emplo/codes.html> (last visited 4/21/2011).

method. The leasing company is required to notify AWI or the tax collection service provider of such election and provide certain information. The election is binding on all clients of the leasing company, as well.

USDOL may find this provision causes the state to be out of conformity with federal law.

## **Appeals**

Section 12 amends s. 443.151(4)(e), F.S., relating to appeals of decisions by the Unemployment Appeals Commission.

Generally, if an appellant files a notice of appeal with the commission, the commission files the appeal with the appropriate district court of appeal. The decision of where to file is based upon where the appeals referee was located and the decision was mailed.<sup>76</sup> An appeal must be filed within 30 days of the issuance of the commission's order.

The bill provides that appeals should be filed in the district court where the appellant is located: if claimant is appellant, then where the claimant resides; if business is the appellant, then where the business is located. If the claimant does not reside in Florida or the business is not located in Florida, then the appeal is filed where the order of the commission was issued.

Section 12 also amends s. 443.151(4)(b), F.S., to create a new subparagraph which codifies certain rules of AWI related to the exclusion of evidence that is irrelevant or repetitious,<sup>77</sup> and revises the admissibility of hearsay evidence to allow it to be used to establish a fact under certain circumstances.

Hearsay is generally disfavored in civil and criminal proceedings because of concerns about its reliability as secondhand information and the potential unfairness in not affording the party against whom it is offered an opportunity to question the declarant of the statements.<sup>78</sup> Thus, it is not immediately clear the extent to which courts will accept findings of fact in the administrative process if they are based on hearsay. The bill does specify that, in order for hearsay evidence to be used to support a finding of fact, there must be a reasonable opportunity for review of the evidence before the hearing, and the appeals referee must determine that the evidence is trustworthy and probative and that its admission serves the interests of justice.

Section 13 amends s. 443.171, F.S., to create a new subsection to create a rebuttable presumption that the date on a document mailed by AWI or its tax collection service provider (DOR) is considered the date the document was mailed, absent any evidence provided to the contrary.

## **Overpayments**

Overpayments are UC benefits that cannot be charged against any employer's account. These costs are recovered through a non-charge factor that socializes the cost of the overpayments

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<sup>76</sup> See Unemployment Appeals Commission, *Appealing a UAC Order to a District Court of Appeal*, available at <http://www.uac.fl.gov/HowTo02.html> (last visited 4/21/2011).

<sup>77</sup> 60BB-5.024, F.A.C.

<sup>78</sup> *See, e.g., Doersam v. Brescher*, 468 So. 2d 427, 428 (Fla. 4th DCA 1985).

among all contributory employers who had benefit experience over the previous 3 years (discussed above in the Present Situation).

Section 12 amends s. 443.151(6), F.S., to create a provision which limits the amount of overpayments that AWI can attempt to collect from a claimant who receives benefits that she or he was not eligible to receive in a situation where notice of nonmonetary determination was not provided within 30 days of filing a new claim. The agency is limited to recollect of up to 5 weeks of benefits.

### **Payment of Benefits**

Section 6 amends s. 443.111(1)(a), F.S., to eliminate the payment of benefits by mail. The bill provides, however, that individuals being paid by paper warrant on July 1, 2011, may continue to be paid in that manner until the expiration of the claim. Thus, under the bill, benefits may only be paid electronically, for example by direct deposit or the debit card program.

### **Other**

Various sections of the bill also include changes correcting cross-references. Specifically, Section 7 amending s. 443.1115, F.S., is included for purposes of correcting a cross-reference.

Section 14 states that the Legislature finds that this act fulfills an important state interest.

Section 15 provides that this act shall take effect upon becoming law. Specifically, in the bill:

- Sections 3, 4, 5, 6, 7, 10, and 12 are effective July 1, 2011.
- Section 8 is effective upon becoming law and retroactive to December 17, 2010.

### **Other Potential Implications:**

USDOL has broad oversight for the UC program, including determining whether a state law conforms to federal UC law and whether a state's administration of the UC program substantially complies with processes and procedures approved by USDOL. States are permitted to set benefit eligibility requirements, the amount and duration of benefits, and the state tax structure, as long as state law does not conflict with FUTA or Social Security Act requirements. When a state's UC law conforms to the requirements of the Social Security Act, the state is eligible to receive federal administrative grants to operate the state's UC program. When a state's UC law conforms to the requirements of the FUTA, employers in the state may receive a credit of up to 5.4 percent against the federal unemployment tax rate of 6.2 percent.

The Secretary of USDOL is responsible for determining if a state's UC law meets the requirements of federal law. Under FUTA, the secretary annually certifies the state's compliance with federal requirements and this certification ensures that employers in the state are eligible for the full credit against the federal unemployment tax.

USDOL may find various provisions of this CS to be out of conformity with federal law. If USDOL made such a finding, then it would not certify the state's UC program and could



withhold all administrative funding or cause the employer federal tax rates to increase to the total 6.2 percent because of loss of the entire FUTA tax credit.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

Section 18, Article VII of the Florida Constitution, excuses counties and municipalities from complying with laws requiring them to spend funds or to take an action unless certain conditions are met.

To the extent, this bill requires cities and counties to expend funds to pay state extended benefits for eligible former employees through the end of 2011, the provisions of Section 18(a), Article VII of the State Constitution may apply. If those provisions do apply, in order for the law to be binding upon the cities and counties, the Legislature must find that the law fulfills an important state interest (see Section 14 of the bill) and one of the following relevant exceptions:

- a. Appropriate funds estimated at the time of enactment to be sufficient to fund such expenditures;
- b. Authorize a county or municipality to enact a funding source not available for such local government on February 1, 1989, that can be used to generate the amount of funds necessary to fund the expenditures;
- c. The expenditure is required to comply with a law that applies to all persons “similarly situated,” including state and local governments; or
- d. The law is either required to comply with a federal requirement or required for eligibility for a federal entitlement.

“Similarly situated” refers to those laws affecting other entities, either private or governmental, in addition to counties and municipalities. Because the bill would impact “all persons similarly situated,” this exception appears to apply.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

On March 4, the Revenue Estimating Conference adopted the following consensus estimate for the fiscal impact of the committee substitute:

	State Trust			
	FY 2011-12 Cash	FY 2012-13 Cash	FY 2013-14 Cash	FY 2014-15 Cash
UC Tax	(130.9)	(17.6)	(22.5)	32.9
Employer Interest Assessments	(1.7)	(7.4)	(7.2)	0
Installment Fees	.1	.1	.1	0

The conference estimated that, when analyzed together and compared to current law, the various changes to the unemployment compensation law made by the bill on balance will result in a reduction in unemployment tax revenues to the Unemployment Compensation Trust of approximately \$131 million in fiscal year 2011-12. However, the conference estimated that by fiscal year 2014-15 there would be a net UC tax gain to the trust fund of approximately \$33 million. The principal factor accounting for the reduction in the first fiscal year is the proposal to allow employers to continue to have the option to pay their taxes in installments over 2012, 2013, and 2014.

An employee leasing company is allowed, under the bill, to make a one-time election to change the way it reports for purposes of the UC tax, by reporting under the account of its clients. A company will likely decide to make this election only if it is financially advantageous to the company. However, while potentially lowering a leasing company’s UC taxes, such election is likely to have some negative effect on the balance of the UC Trust Fund. By changing its reporting method, the taxes due to the UC Trust Fund are anticipated to be less than when the leasing company was reporting under its own tax account. Additionally such a change may result in an increase in socialized costs.

Because it is anticipated that the bill will reduce the amount of borrowing by the state from the federal government, the amount of interest paid by the state to the federal government will be reduced. In turn the assessments by the state against employers to recoup the interest payments will be reduced, resulting in an estimated reduction in the amount of interest due from employers of \$1.7 million in fiscal year 2011-12 and more than \$7 million in each of the two subsequent fiscal years.

The \$5 administrative fee to participate in the installment payment program for UC taxes is a per-year fee. The amount of money generated from the fee depends on the number of businesses electing to participate. In 2010, out of 450,000 employers, about 10,342 elected to participate in this option (representing a total of \$127 million in UC taxes).<sup>79</sup> However, due to the expected significant increases in the UC tax in future years, more employers may elect to participate in the installment option. The Revenue Estimating Conference estimated that \$100,000 would be collected in administrative fees for each of the next three fiscal years, under the assumption that 10 percent of employers will participate in the installment payment program each year.

<sup>79</sup> Data from Department of Revenue, on file with the Senate Commerce and Tourism Committee.

**B. Private Sector Impact:**

Participation in the temporary state extended benefits program is expected to bring an estimated \$650 million in additional benefits to Florida.<sup>80</sup> Payment of these benefits comes 100 percent from federal funds. There will be no cost to private employers and there will be no effect on their contribution rates. Benefits paid by public employers, non-profits, and other reimbursable employers are not covered by federal funds (see explanation below related to Government Sector Impact for impact on public employers).

Individuals applying for benefits may have to visit their local One-Stop Career Centers or other facilities that offer Internet access in order to apply for benefits. This will expose individuals to additional reemployment services available if they visit their local One-Stop Career Center.

Changes to the qualification and disqualification criteria for UC benefits may reduce the amount of benefits paid from the UC Trust Fund to unemployed individuals, which may reduce the amount of federal advances drawn down. Additionally, these changes may reduce the amount of federal emergency and federally funded temporary state extended benefits to such individuals.

**C. Government Sector Impact:**

To the extent that provisions of the bill impact the conformity of Florida's UC law with federal requirements, the federal funding provided to administer the UC program could be jeopardized.

The costs to implement the requirement to review that a claimant is actively seeking work will be proportionate to the extent of the verification services, which could be extensive. AWI has preliminarily estimated that the cost to implement this provision could be as much as \$2.5 million, mostly due to the need to add additional positions to verify each claimant's information. Furthermore, because AWI has a limited amount of administrative resources from USDOL, allocation of funds to implement this requirement would reduce funds for other services. AWI indicated that computer programming that would be required as a result of changes made by the bill could be funded by currently available federal grants. However, the change made by the bill requiring that claims be filed over the Internet will result in reduced administrative costs to the agency of an amount undetermined at this time.

The Florida Ready to Work program was funded by \$5.3 million in nonrecurring general revenue in FY 2010-11.<sup>81</sup> Increasing the use of the program may result in additional costs to the state. Currently, the Department of Education contracts with a private company to use its skills assessment, training, and credentialing program. State funding allows for a certain number of assessments and credentials under the contract. To the extent that another online education or training program must be developed, reviewed, approved,

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<sup>80</sup> Estimate from the Agency for Workforce Innovation, on file with the Senate Commerce and Tourism Committee.

<sup>81</sup> See s. 2, ln. 111, ch. 2010-152, L.O.F.

and implemented to address non-English speaking claimants, there may be a fiscal impact to the state.

Additionally, currently to participate in the Florida Ready to Work program an individual must visit an assessment center in order to register with the program; not every county in Florida has an assessment center designated in it, and some assessment centers are not open to the public. Also, many regional workforce boards or One-Stop Career Centers are not Florida Ready to Work assessment centers. There may be additional costs incurred to create new assessment centers in counties or localities that do not currently have one, and to designate the regional workforce boards and One-Stop Centers as assessment centers in order to provide access to the program to UC claimants. The amount of such costs had not been determined at this time. To the extent that the initial skills review can be integrated into the process for applying for benefits, as the bill requires claims to be filed by the Internet, this may eliminate any potential costs of creating new assessment centers.

Related to the provisions of the bill that affect the tax, the Department of Revenue estimates the following costs to implement the employee leasing company reporting option: \$234,540 in FY 2010-2011; and a recurring impact of \$198,676.

The total cost in FY 2010-2011 includes:

- Related to the provisions which an employee leasing company to make a one-time election to change the way it reports:
  - \$280 in nonrecurring costs for tax information publication printing and mailing;
  - \$105,600 in nonrecurring costs to modify the SUNTAX system;
  - \$113,152 in recurring and \$15,508 in nonrecurring costs to hire 4 new revenue specialists III due to a predicted significant workload increase to process the reporting changes;
- DOR estimates that the necessary changes to modify the SUNTAX system to extend the installment payment program for UC taxes for 2012, 2013, and 2014 could be done in-house with existing resources.

The recurring cost of \$198,676 is for the 4 new positions to process the employee leasing company elections.

The Unemployment Appeals Commission has indicated that the commission may incur increased costs due to changes made in the bill related to where appeals may be filed. Courts have held that the Unemployment Appeals Commission is prohibited from charging claimants for provision of a transcript or a copy of the record of the agency hearing in their unemployment cases, under s. 443.041(2)(a), F.S.<sup>82</sup> Thus, to the extent that appeals are filed in district courts of appeal that require or request a transcript automatically when a case is filed, the Unemployment Appeals Commission may incur additional costs. In 2010, the commission spent more than \$51,000 to prepare transcripts for appeals filed in district courts of appeal. Also, to the extent that employees of the

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<sup>82</sup> Gretz v. Florida Unemployment Appeals Commission, 572 So.2d 1384 (Fla. 1991).

commission are required to make personal appearances in court, the commission may incur additional expenses related to travel.

The commission also noted that, in cases in which appeals are initially filed with the commission and need to be forwarded to the appropriate district court of appeal, the commission may expend time to identify where the job separation occurred or the claimant's current address in order to determine the appropriate district court. Additionally, as a general proposition the commission noted that some of the revisions to qualifying requirements and disqualifying criteria under the bill (e.g., changes relating to misconduct) may result in an increase in the number of appeals, generating additional staff costs.

Eliminating payment of benefits by mail will result in administrative savings for AWI, in an amount undermined at this time.

Extended benefits for former state and local employees do not qualify for federal funding due to the fact that these entities are self-insured and the federal law does not allow for their participation in federal sharing. The temporary extended benefits for these former employees must be paid by the governmental entity. The extension enacted on December 17, 2010, is estimated to cost a total of \$18.4 million, approximately \$5.4 million from state funds and \$13 million from local government funds.<sup>83</sup> In order to participate in federal sharing, the temporary state extended benefits program had to encompass unemployed individuals of both the private and public sectors.

## **VI. Technical Deficiencies:**

The specific acts set forth in the definition of "gross misconduct," in Section 5 of the bill, do not include violation of an employer's written policy disallowing any drug use whatsoever, including the use of drugs while off the job or off duty. Further, while a disqualification for simple misconduct carries a penalty measured in weeks as well as an earnings requirement, disqualifications for gross misconduct only impose an earnings requirement.

The new disqualification for being unavailable for work due to incarceration or imprisonment raises due process concerns related to individuals who are incarcerated or imprisoned due to mistaken identity, for example.

## **VII. Related Issues:**

Although this bill does not currently provide for a rate change, note that employers have already begun filing returns. On April 21, 2011, the Department of Revenue reported that 131,167 of 453,800 employer returns (29 percent) have already been filed using 2011 tax rates.<sup>84</sup> If rates are changed, the Department may be required to issue refunds.

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<sup>83</sup> Estimates from the Agency for Workforce Innovation, on file with the Senate Commerce and Tourism Committee.

<sup>84</sup> Email from DOR, dated April 21, 2011, on file with the Budget Subcommittee on Finance and Tax.

**VIII. Additional Information:**

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

**CS/CS by Judiciary on March 9, 2011:**

The CS makes the following changes:

- Revises the statutory rule of construction and restores law as it existed in 2002, which provides that the chapter is to be liberally construed to accomplish its purpose to promote employment security;
- Adds an alternative to the requirement that a claimant contact five prospective employers each week, such that, for any week claimed, a claimant may report in-person to a One-Stop Career Center and meet with a center representative;
- Requires a claimant to report the date she or he reported to the One-Stop Career Center when claiming benefits;
- Removes the requirement for gross misconduct that the assault or battery be “criminal;”
- Makes an exception to the requirement that an employee who has committed insubordination or willful neglect must have received at least one written notice before the person can be disqualified from benefits when the action by the employee was severe;
- Eliminates payment of benefits through mail, but preserves electronic payments such as direct deposit and debit card;
- Clarifies that the one-time election allowed to an employee leasing company to change how it reports its leased employees applies only to unemployment taxes, and does not apply for any other purposes; and
- Eliminates duplicate reporting by a leasing company that makes the election to AWI or DOR.

**CS by Commerce and Tourism on February 22, 2011:**

Specifically the strike-all is different from the bill as filed in the following ways:

- Maximum Rate: The increase to the maximum rate is removed from the bill;
- Construction: In response to preliminary comments from the U.S. Department of Labor, removes the portion changing the construction of the chapter to neutrally construed;
- Earned Income: Includes back pay settlements, front pay, and front wages in the definition of earned income, and receipt of this income would reduce an individual’s weekly benefit amount;
- Initial Skills Review: In response to preliminary comments from the U.S. Department of Labor, the CS:
  - Adds a definition of “initial skills review”;
  - Requires participation in the “initial skills review” as part of the reporting requirements for benefits;
  - Allows for exceptions for individuals who are illiterate or have language barriers;

- Requires the workforce boards to use the initial skills reviews to develop a plan for referring individuals to training and employment opportunities;
- Actively Seeking Work/Work Search Requirements: The CS changes the provisions for actively seeking work to:
  - Require each claimant to report the name, address, and telephone number of each prospective employer contacted for each week of benefits claimed;
  - Require each claimant to contact at least five prospective employers;
  - Direct AWI to conduct random audits, to keep the estimated costs to the system at a reasonable level (including administrative dollars and personnel time to verify the information);
- Gross Misconduct: Specifies that for insubordination and willful neglect, that the employee has received at least one written warning from the employer;
- Suitable Work: Instead of creating new criteria, the bill now simply amends current law such that after 19 weeks of benefits, “suitable work” is work that pays minimum wage + 120% of the claimant’s weekly benefit amount;
- Severance Pay: Specifies that the calculation is based upon the average wage that the individual received from the employer who paid the severance pay;
- Incarceration or Imprisonment: In response to preliminary comments from the U.S. Department of Labor, the bill is amended to disqualify an individual for any week in which the individual is unavailable for work due to incarceration or imprisonment;
- Employee Leasing Companies: In response to preliminary comments from the U.S. Department of Labor, and comments from DOR, the CS adds specificity:
  - Requires a reporting election be made by August 1, to allow DOR adequate time to process the election;
  - Requires specific information in the notification to DOR that the employee leasing company is going to change its reporting requirement, including:
    - A list of each client company and its unemployment account number;
    - A list of each client company’s current and previous employees, and their respective social security numbers, for the prior 3-state fiscal years;
    - All wage data and benefit charges for the prior 3-state fiscal years;
  - Specifies that the election applies to all the employee leasing company’s current and future clients;
  - Specifies that the employee leasing company has to remit the quarterly reports for each client and pay contributions by approved electronic means; and
  - Specifies that when a client leaves the employee leasing company, the client takes its wage and benefit history with it;
- Filing Claims: Requires claims to be filed by the Internet;
- Evidence: Codifies certain rules of AWI related to the exclusion of evidence that is irrelevant or repetitious, and revises the admissibility of hearsay evidence to allow it to be used to establish a fact under certain circumstances;
- Presumption of Mailing: Provides that the date on a document mailed by AWI or its tax collection service provider (DOR) is considered the date the document was mailed, absent any evidence provided to the contrary;
- Appeals: Simplifies the language related to appeals to specify that the appeal is filed in the district court where the appellant is located (if claimant is appellant, then where

the claimant resides; if business is the appellant, then where the business is located);  
and

- Effective Date: Changes the effective date of the bill to “upon becoming law,” and specifies certain provisions to become effective July 1, 2011, to allow the agencies to implement them.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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