

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Community Affairs Committee

BILL: SB 88

INTRODUCER: Senator Gaetz

SUBJECT: Public Officers

DATE: February 18, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	Pre-meeting
2.	_____	_____	JU	_____
3.	_____	_____	GO	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

SB 88 places limitations on severance pay for nonelected public officers. The bill defines severance pay. The bill prohibits any public officer serving in a nonelected position from receiving severance pay after July 1, 2011, but creates exceptions for when severance pay is (1) paid wholly from private funds and is not a violation of the employee code of ethics; (2) the severance pay is part of an interstate interchange of employees; or (3) the severance pay is given as part of a settlement agreement.

This bill creates an undesignated section of law.

II. Present Situation:

Section 215.425, F.S., provides:

No extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made, with the following exceptions:

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

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

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

The following were not deemed to violate s. 215.425, F.S.:

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

The key issue in these attorney general opinions seemed to be whether the benefits were benefits that were anticipated as part of the initial contract or hiring policy or whether they were additional payment for services over and above that fixed by contract or law when the services were rendered.⁵ Benefits that were anticipated as part of the hiring process were deemed to be included in the salary/payment for services. Whereas, additional benefits, not anticipated at the hiring date or available to all employees as part of a retirement plan, were deemed to be extra compensation prohibited by the statute.

Sections 125.01(1)(bb) and 166.021(7), F.S., allow cities and counties to “provide for an extra compensation program, including a lump-sum bonus payment program, to reward outstanding employees whose performance exceeds standards, if the program provides that a bonus payment may not be included in an employee’s regular base rate of pay and may not be carried forward in subsequent years,” notwithstanding the prohibition against extra compensation set forth in s. 215.425, F.S.

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

- The employee must have been employed prior to July 1 of that fiscal year and have been continuously employed through the date of distribution.
- The employee must not have been on leave without pay consecutively for more than 6 months during the fiscal year.
- The employee must have had no sustained disciplinary action during the period beginning July 1 through the date the bonus checks are distributed. Disciplinary actions include written

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

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

³ Op. Att’y Gen. Fla. 91-51 (1991).

⁴ Op. Att’y Gen. Fla. 2009-03 (2009).

⁵ Op. Att’y Gen. Fla. 2007-26 (2007).

reprimands, suspensions, dismissals, and involuntary or voluntary demotions that were associated with a disciplinary action.

- The employee must have demonstrated a commitment to the agency mission by reducing the burden on those served, continually improving the way business is conducted, producing results in the form of increased outputs, and working to improve processes.
- The employee must have demonstrated initiative in work and have exceeded normal job expectations.
- The employee must have modeled the way for others by displaying agency values of fairness, cooperation, respect, commitment, honesty, excellence, and teamwork.

DMS also has rules for:

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

Section 110.191, F.S., authorizes bonuses in specified circumstances to leased employees authorized by the Legislature, an agency, or the judicial branch.

Section 373.0795, F.S., prohibits severance pay for water management district employees. That section defines “severance pay” to mean the actual or constructive compensation, in salary, benefits, or perquisites, of an officer or employee of a water management district, or any subdivision or agency thereof, for employment services yet to be rendered for a term greater than 4 weeks before or immediately following termination of employment (excluding leave time and retirement).

III. Effect of Proposed Changes:

Section 1 of the bill defines severance pay as actual or constructive compensation, including salary, benefits, or perquisites, for employment services yet to be rendered for a term greater than 4 weeks before or immediately following termination of employment. The term does not include compensation for:

- Earned and accrued annual, sick, compensatory, and administrative leave.
- Early retirement under provisions established in actuarially funded pension plans.⁶

On or after July 1, 2011, a public officer serving in a nonelected position may not receive severance pay unless the severance pay is:

- paid wholly from private funds and is not a violation of the employee code of ethics;⁷
- the severance pay is part of an interstate interchange of employees;⁸ or
- the severance pay is given as part of a settlement agreement if there is no prohibition against publicly discussing the settlement.

⁶ Subject to part VII of chapter 112, F.S. (relating to actuarial soundness of retirement systems).

⁷ Under part III of chapter 112, F.S.

⁸ Under part II of chapter 112, F.S.

The bill specifies that this section does not create an entitlement to severance pay in the absence of its authorization.

Section 2 of the bill provides an effective date of July 1, 2011.

Other Potential Implications:

Restrictions on severance pay will limit the ability of public employers to recruit employees by including severance pay clauses in their contract. Alternatively, it will eliminate abuses associated with severance pay that may be occurring now.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill prohibits all severance pay, even severance pay included in contracts entered into prior to the effective date of the bill. As a result, impairment of contract claims may arise. The United States Constitution and the Florida Constitution prohibit the state from passing any law impairing the obligation of contracts.⁹ “[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear.”¹⁰ If a law does impair contracts, the courts will assess whether the law is deemed reasonable and necessary to serve an important public purpose.¹¹ The factors that a court will consider when balancing the impairment of contracts with the public purpose include:

- whether the law was enacted to deal with a broad, generalized economic or social problem;

⁹ U.S. Const. art. I, § 10; art. I, s. 10, Fla. Const.

¹⁰ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979). See also *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

¹¹ *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681 (Fla. 1980); *Yellow Cab C. v. Dade County*, 412 So. 2d 395 (Fla. 3rd DCA 1982). See also *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) (construing the federal constitutional provision). An important public purpose would be a purpose protecting the public’s health, safety, or welfare. See *Khoury v. Carvel Homes South, Inc.*, 403 So. 2d 1043 (Fla. 1st DCA 1981).

- whether the law operates in an area that was already subject to state regulation at the time the parties undertook their contractual obligations, or whether it invades an area never before subject to regulation; and
- whether the law effects a temporary alteration of the contractual relationships of those within its scope, or whether it works a severe, permanent, and immediate change in those relationships, irrevocably and retroactively.¹²

A law that is deemed to be an impairment of contract will be deemed to be invalid as it applies to any contracts entered into prior to the effective date of the act.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Cost savings may arise from the prohibition against severance pay. However, because severance pay is already prohibited under s. 215.425, F.S., it is more likely to prohibit government employers from using severance pay as a recruitment tool.

VI. Technical Deficiencies:

The term public officer is vague and defined differently in different sections of law. If the intent is to capture public officers/employees as defined in s. 112.3173, F.S., it may be best to place this section of law in chapter 112 for clarity.

The definition of severance pay includes payments made “for a term greater than 4 weeks before or immediately following termination of employment.” Although this is the same definition already used in statute,¹³ it seems to explicitly exclude the time period 4 weeks prior to termination and immediately after termination: the period in which payments would traditionally be considered severance pay. It may be best to fix this definition and the definition in existing law if the purpose is to include the period immediately before and after termination.

VII. Related Issues:

None.

¹² *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979).

¹³ Section 373.0795, F.S.

VIII. Additional Information:

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

None.

- B. **Amendments:**

None.

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