

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 Judiciary Committee

BILL: CS/SB 88

INTRODUCER: Community Affairs Committee and Senators Gaetz and Storms

SUBJECT: Public Employee Compensation

DATE: April 1, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	Fav/CS
2.	Munroe	Maclure	JU	Pre-meeting
3.			GO	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The committee substitute makes the following changes with respect to public employee compensation:

- prohibits the payment of severance pay with certain exceptions,
- restricts bonus schemes,
- deletes provisions of law inconsistent with these restrictions, and
- prohibits confidentiality agreements.

This bill amends the following sections of the Florida Statutes: 215.425, 166.021, and 112.061. This bill repeals ss. 125.01(1)(bb) and 373.0795, F.S.

II. Present Situation:

Section 215.425, F.S., provides that no extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made. The section specifies 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 s. 215.425, F.S.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 his or her 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;⁴ and
- Accrued annual or sick leave.⁵

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.⁶ 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.

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. 97-21 (1997).

⁵ Op. Att’y Gen. Fla. 2009-03 (2009).

⁶ Op. Att’y Gen. Fla. 2007-26 (2007).

Section 110.1245(2), F.S., tasks the Department of Management Services (DMS) and other state agencies with paying bonuses when funds are specifically appropriated by the Legislature for bonuses. Statutory eligibility criteria are outlined as follows:

- 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 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.
- A periodic evaluation process of the employee's performance.
- 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.⁷

Section 110.191(1)(c), 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. "Severance pay" is defined 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).⁸

III. Effect of Proposed Changes:

Section 1 amends s. 215.425, F. S., to revise existing law that prohibits extra compensation made to a public employee after the service has been rendered or the contract made. The bill deletes current provisions allowing counties, municipalities, or special districts to give bonuses as long as they have policies in place. The bill creates requirements for any policy, ordinance, rule, or resolution designed to implement a bonus scheme. The scheme must:

⁷ Section 110.1245(2), F.S.

⁸ Section 373.0795(1), F.S.

- Base the award of a bonus on work performance;
- Describe the performance standards and evaluation process by which a bonus will be awarded;
- Notify all employees of the policy, ordinance, rule, or resolution before the beginning of the evaluation period on which a bonus will be based; and
- Consider all employees for the bonus.

The bill prohibits units of government from contracting to give severance pay to an officer, agent, employee, or contractor.

An officer, agent, employee, or contractor may receive severance pay only if the severance pay is:

- Paid wholly from private funds and is not a violation of the employee code of ethics;⁹
- Part of an interstate interchange of employees;¹⁰
- Given as part of a settlement agreement if there is no prohibition against publicly discussing the settlement; or
- Expressly included in a contract for employment which was entered into before July 1, 2011.

The bill clarifies that it does not create an entitlement to severance pay in the absence of its authorization.

The bill defines “severance pay” as the actual or constructive compensation, including salary, benefits, or perquisites, for employment services yet to be rendered which is provided to an employee who has recently been or is about to be terminated. The term does not include compensation for:

- Earned and accrued annual, sick, compensatory, or administrative leave; or
- Early retirement under provisions established in an actuarially funded pension plan subject to part VII of chapter 112, F.S.

Any agreement or contract involving extra compensation between a unit of government and an officer, agent, employee, or contractor may not include provisions that limit the ability of any party to the agreement or contract to discuss the agreement or contract.

Section 2 deletes subsection (7) of 166.021, F.S., allowing municipalities to provide extra compensation programs, including a lump sum bonus payment program to reward outstanding employees whose performance exceeds standards, under specified conditions.

Section 3 conforms cross references.

⁹ Under part III of chapter 112, F.S.

¹⁰ Under part II of chapter 112, F.S.

Section 4 repeals paragraph (bb) of s. 125.01(1), F.S., allowing counties to provide extra compensation programs. It also repeals s. 373.0795, F.S., which prohibits severance pay (under an inconsistent definition) for water management districts.

Section 5 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 contracts. 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:

Article I, Section 10 of the State Constitution and the Contract Clause of the United States Constitution prohibit laws impairing contractual obligations. To the extent that the bill (lines 91-95) prohibits any agreement or contract involving extra compensation between a unit of government and an officer, agent, employee, or contractor from including provisions that limit the ability of any party to the agreement or contract to discuss the agreement or contract, the bill raises issues as to whether it impairs any existing contractual obligations. Retrospective operation is not favored by courts, and a law is not construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the Legislature intended a retroactive application.¹¹ Lines 91-95 of the bill do not appear to provide any legislative intent for a retroactive application of its prohibition on any affected contractual provisions.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

¹¹ See *Heberle v. P.R.O. Liquidating Co.*, 186 So. 2d 280, 282 (1st DCA 1966) (“A strict rule of statutory construction indulged in by the courts is the presumption that the legislature, in the absence of a positive expression, intended statutes or amendments enacted by it to operate prospectively only, not retroactively.”).

B. Private Sector Impact:

None.

C. Government Sector Impact:

Cost savings may arise from the prohibition against severance pay. Under current law, employees could likely receive severance pay as a part of their initial contract, but not in an ad hoc manner subsequent to negotiating their terms of employment. Therefore, since ad hoc severance pay is already prohibited under s. 215.425, F.S., the bill will prohibit government employers from using severance pay as a recruitment tool.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Community Affairs on March 7, 2011:**

Makes the following changes with respect to public employee compensation. It:

- prohibits the payment of severance pay with certain exceptions,
- restricts bonus schemes,
- deletes inconsistent provisions of law, and
- prohibits confidentiality agreements.

B. Amendments:

None.