

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 Commerce and Tourism Committee

BILL: SB 676

INTRODUCER: Senator Smith

SUBJECT: Workers' Compensation Certificate-of-Exemption Process

DATE: January 18, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rubio	Burgess	BI	Favorable
2.	Philo	Hrdlicka	CM	Favorable
3.			BC	
4.				
5.				
6.				

I. Summary:

SB 676 amends laws related to the workers' compensation certificate of exemption process. This bill addresses three issues:

First, a full-time member of a non-construction limited liability company (LLC) is currently not an "employee" as defined by workers' compensation law. The bill allows such a person to elect to be included in the definition of "employee" by mailing a notice to that effect to the Department of Financial Services (DFS).

Second, corporate officers (both generally and specifically as to the construction industry) are defined as "employees" under current workers' compensation law, but may elect to be exempt from the law by mailing written notice of the election to DFS. Construction industry corporate officers making such an election must currently submit certain additional information and documentation. The bill streamlines the process by providing for electronic submission (as opposed to paper mailing), and alters the required information and documentation to facilitate such submission.

Third, the resulting certificates of election issued by DFS are currently valid for 2 years from issuance in the construction industry. The bill applies this 2-year limit to all certificates (not just to those issued in the construction industry) issued on or after January 1, 2013.

This bill substantially amends sections 440.02 and 440.05, F.S.

II. Present Situation:

Non-Construction LLCs

Under ch. 440, F.S., Florida employers are required to maintain workers' compensation coverage for "employees." Full-time sole proprietors or partners not engaged in the construction industry may include themselves in the definition of "employee" by mailing a notice of election (opt-in) as provided in section 440.05(2), F.S. If no notice is made, the sole proprietor or partner shall not be considered an employee and not eligible for workers' compensation benefits. Full-time members of a non-construction LLC are not currently afforded such an opt-in provision. The Florida Limited Liability Companies Act defines an LLC member as "any person who has been admitted to a limited liability company as a member in accordance with this chapter and has an economic interest in a limited liability company which may, but need not, be represented by a capital account or, in the case of a foreign limited liability company, has been admitted to a limited liability company as a member in accordance with the laws of the state or foreign country or other foreign jurisdiction under which the foreign limited liability company is organized."¹

Corporate Officers

The term "employee" is further defined to include corporate officers.² A "corporate officer" is in turn defined as any person who fills a position provided for in the articles of incorporation filed with the Division of Corporations of the Department of State, or as permitted or required by ch. 607, F.S.³ Specifically as to the construction industry, the term "corporate officer" includes a member owning at least 10 percent of an LLC created and approved under ch. 608, F.S. Corporate officers (both generally and specifically as to the construction industry) may elect to be exempt from workers' compensation law by mailing a written notice of the election to DFS on a form prescribed by the Department.⁴

That prescribed form (DWC-Form 250) in turn calls for, among other things, the corporate officer's name, social security number, federal tax identification number, all certified or registered licenses issued pursuant to ch. 489, F.S. held by the person seeking the exemption, the registration number of the corporation, and sworn notarization of the corporate officers signature. For construction corporate officers, the form further calls for a \$50 filing fee and documentary proof of the required 10 percent ownership in the corporation.⁵

Upon receipt of the notice of exemption, DFS has 30 days to determine if the corporate officer is eligible for exemption. If the requirements are met, DFS will issue a Certificate of Election to be Exempt.⁶ During FY 2010-2011, DFS issued 73,741 exemptions.⁷

¹ Section 608.402(21), F.S.

² Section 440.02(15)(b), F.S.

³ Section 440.02(9), F.S.

⁴ See section 440.05(1), and (3), F.S.

⁵ Section 440.05(8)(a), F.S.

⁶ Section 44.05(5), F.S.

⁷ DFS Staff Review, November 16, 2011, on file with the Senate Committee on Commerce and Tourism.

Expiration of Certificate

Construction certificates of election are valid for 2 years from issuance and, within 60 days prior to the expiration date of the certificate, DFS must send to the certificateholder both a notice of the expiration date and an application for renewal.⁸

III. Effect of Proposed Changes:

SB 676 amends laws related to the workers' compensation certificate of exemption process.

First, Section 1 amends section 440.02, F.S., to allow a member of a non-construction LLC who devotes full time to the LLC to elect to be included in the definition of employee for the purposes of workers' compensation. If no election is made, the member would not be considered an employee for premium calculation purposes and would not be eligible for workers' compensation benefits.

Second, Section 2 amends section 440.05, F.S., to require corporate officers in the construction industry to submit their notices of election electronically (as opposed to paper mailing). They will no longer be required to provide their social security number, a copy of relevant documentation as to employment status filed with the Internal Revenue Service as specified by DFS, a copy of the relevant occupational license in the primary jurisdiction of the business, or a copy of the stock certificate evidencing the required ownership; however, they will be newly required to provide their date of birth and Florida driver's license number or Florida identification card number. The notice will no longer need to be notarized under oath. These changes will presumably make the process easier, more efficient, and less expensive for all involved.⁹

Third, Section 3 amends section 440.05, F.S., to apply a 2-year limit to all certificates of election (not just to those issued in the construction industry) issued on or after January 1, 2013. The bill allows DFS to send its notice of the expiration date to the certificateholder via e-mail, and deletes the requirement that it simultaneously provide an application for renewal. This section is effective January 1, 2013.

Finally, Section 4 provides an effective date upon becoming law, except as otherwise provided.

⁸ Section 440.05(6), F.S.

⁹ These changes were made in the subsection of the statute specifically addressing construction corporate officers (section 440.05(3), F.S.). The subsection of the statute addressing corporate officers (as opposed to construction corporate officers) remains unchanged and will continue to require that they "shall mail to the department in Tallahassee [their notice of intent] in accordance with a form prescribed by the department." Section 440.05(1), F.S. Significantly, the "form prescribed by the department" in this context is DWC-Form 250, which DFS uses for both corporate officers and construction corporate officers alike. Changes DFS will necessarily make to its form based on this bill will thus de facto apply to both. Moreover, the term "mail" in section 440.05(1), F.S., can be broadly construed to encompass the electronic submission contemplated in section 440.05(3), F.S. See generally Black's Law Dictionary (9th ed. 2009) (defining "mail" as, among other things, "[o]ne or more written or oral messages sent electronically (e.g., through e-mail or voicemail)"). Thus, while a technical argument can be made otherwise, the changes at issue can be legitimately construed to apply to both corporate officers generally and construction corporate officers specifically.

IV. Constitutional Issues:

a. Municipality/County Mandates Restrictions:

None.

b. Public Records/Open Meetings Issues:

None.

c. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

d. Tax/Fee Issues:

None.

e. Private Sector Impact:

Allowing members of full-time non-construction LLCs the choice on whether to elect to be included in the definition of employee for the purposes of workers' compensation will allow the LLCs to avoid the expense of workers' compensation coverage if they so choose.

The regulatory steps and cost of submitting notices is reduced for employers with the elimination of the notary requirement. DFS will continue to provide walk-in assistance in all district offices and will provide computers in its district offices for exemption applicants who may not have access to a computer.

f. Government Sector Impact:

DFS indicates allowing non-construction LLC's to elect to be considered employees will result in less governmental regulation of similarly situated LLCs and eliminate the time and resources DFS spends on administrative challenges to denials of non-construction certificates of exemption.

According to DFS, requiring an electronic application process for notices of election for exemption would eliminate the need for eight positions who review and process exemptions. This is a 23 percent reduction of exemption processing staff and a savings of \$287,416 in salaries and \$14,000 in benefits for a total of \$301,816 for the FY 2012-2013 budget.¹⁰

¹⁰ DFS Staff Review, November 16, 2011, on file with the Senate Committee on Commerce and Tourism.

VI. **Technical Deficiencies:**

See footnote 9, supra.

VII. **Related Issues:**

None.

VIII. **Additional Information:**

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

None.

h. **Amendments:**

None.

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