

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1165 Ratification of Rules Implementing Workers' Compensation Law

**SPONSOR(S):** Brodeur

**TIED BILLS:**                   **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee		Miller	Rubottom
2) Insurance & Banking Subcommittee			
3) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

The Department of Financial Services adopted amendments to the rule incorporating by reference the Florida Workers' Compensation Health Care Provider Reimbursement Manual. The Manual sets out the policies, guidelines, codes, and maximum reimbursement allowances for services and supplies furnished by health care providers under the Workers' Compensation statutes. The Manual also states the reimbursement policies and payment methodologies for pharmacists and medical suppliers pertaining to Workers' Compensation.

The Statement of Estimated Regulatory Costs showed Rule 69L-7.020, F.A.C., *Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2011 Edition*, would have a specific, adverse economic effect, or would increase regulatory costs, exceeding \$1 million over the first 5 years the rule was in effect. Accordingly, the Rule must be ratified by the Legislature before it may go into effect.

The Rule was adopted on October 24, 2011, and initially submitted for ratification on December 21, 2011. The Department resubmitted the ratification request on February 1, 2013.

The proposed bill authorizes the Rule to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

Florida's workers' compensation law<sup>1</sup> provides medically necessary treatment and care for injured employees, including medications. The Department of Financial Services, Division of Workers' Compensation, (DFS) provides regulatory oversight of Florida's workers' compensation system. The law provides for reimbursement formulas and methodologies to compensate providers of health services to compensation claimants, subject to maximum reimbursement allowances (MRAs).<sup>2</sup> DFS incorporates the uniform schedules MRAs by rule in reimbursement manuals.<sup>3</sup>

Currently, the reimbursement schedules for individual licensed providers are contained in the Florida Workers' Compensation Health Care Provider Reimbursement Manual (Manual), 2008 Edition. On December 18, 2009, the Three-Member Panel approved a revised uniform schedule of MRAs for physicians and other recognized practitioners. DFS initiated rulemaking to update the Manual and On October 24, 2011, adopted the amended version of Rule 69L-7.020, F.A.C., incorporating by reference the 2011 Edition of the Manual and updating incorporating references to other materials used for provider reimbursement together with the Manual. According to the Statement of Estimated Regulatory Costs (SERC), the revisions to MRAs in the updated Manual will result in increased costs to the overall compensation system of \$17.5 million over the next five years.<sup>4</sup>

#### Reimbursement for Prescriptions

The Manual interprets the statutory reimbursement rate for dispensing prescription medications. Under the workers' compensation law, reimbursement for prescription medications is the average wholesale price (AWP) plus a \$4.18 dispensing fee, except where the workers' compensation insurance carrier has contracted for a lower amount.<sup>5</sup> AWP is not defined in the worker's compensation law. The 2008 Edition of the Manual states:

#### **SECTION V: DISPENSING OF MEDICATION.**

##### A. Medicinal drugs.

...

##### 5. Reimbursement limitations.

...

##### b. Reimbursement for prescription drugs shall be as follows:

##### (1) The pharmaceutical reimbursement formula:

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<sup>1</sup> Chapter 440, F.S.

<sup>2</sup> Section 440.13(12), F.S. The law creates the Three-Member Panel (CFO or CFO designee and 2 Governor appointees subject to Senate confirmation) that sets all MRAs.

<sup>3</sup> Section 440.13(12), (14)(b), F.S. Chapter 69L-7, F.A.C. Currently there are three such manuals: the Florida Workers' Compensation Health Care Provider Reimbursement Manual (Rule 69L-7.020, F.A.C.), Florida Workers' Compensation Reimbursement Manual for Ambulatory Surgical Centers (Rule 69L-7.100, F.A.C.), and Florida Workers' Compensation Reimbursement Manual for Hospitals (Rule 69L-7.501, F.A.C.). Each manual is adopted by reference in the indicated rule.

<sup>4</sup> DFS, "Statement of Estimated Regulatory Costs for Legislative Review and Ratification of Proposed Rule Change, Pursuant to Section 120.541, Florida Statutes" (12/9/2011).

<sup>5</sup> Section 440.13(12)(c), F.S., reads: "As to reimbursement for a prescription medication, the reimbursement amount for a prescription shall be the average wholesale price plus \$4.18 for the dispensing fee, except where the carrier has contracted for a lower amount. Fees for pharmaceuticals and pharmaceutical services shall be reimbursable at the applicable fee schedule amount. Where the employer or carrier has contracted for such services and the employee elects to obtain them through a provider not a party to the contract, the carrier shall reimburse at the schedule, negotiated, or contract price, whichever is lower. No such contract shall rely on a provider that is not reasonably accessible to the employee."

Average Wholesale Price (AWP) + \$4.18 dispensing fee = Reimbursement; or

(2) the contracted reimbursement amount determined in accordance with the contractual arrangement between the provider and insurer.<sup>6</sup>

The version of this provision in the 2011 Edition of the Manual states:

### **Dispensing Medications**

...  
Reimbursement is the lesser of:

- Average Wholesale Price (AWP) + \$4.18 = Reimbursement; or
- The amount the carrier has contracted for pursuant to s. 440.13(12)(c), F.S.

The concern has been expressed that the 2011 provision may not as clearly conform to the statute being implemented as the 2008 provision now in effect.

No concern has been brought to the attention of House staff regarding any other provision of the Manual.

### Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.<sup>7</sup> Rulemaking authority is delegated by the Legislature<sup>8</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>9</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>10</sup> To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>11</sup> The grant of rulemaking authority itself need not be detailed.<sup>12</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>13</sup>

An agency begins the formal rulemaking process by filing a notice of the proposed rule.<sup>14</sup> The notice is published by the Department of State in the Florida Administrative Weekly<sup>15</sup> and must provide certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule’s adverse effect on specified aspects of the state’s economy or increase in regulatory costs.<sup>16</sup>

The economic analysis mandated for each SERC must analyze a rule’s potential impact over the 5 year period from when the rule goes into effect. First is the rule’s likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.<sup>17</sup> Next is the likely adverse

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<sup>6</sup> Florida Workers’ Compensation Health Care Provider Reimbursement Manual, 2008 Edition, p. 16-17.

<sup>7</sup> Section 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>8</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>9</sup> Section 120.52(17).

<sup>10</sup> Section 120.54(1)(a), F.S.

<sup>11</sup> Section 120.52(8) & s. 120.536(1), F.S.

<sup>12</sup> *Save the Manatee Club, Inc.*, supra at 599.

<sup>13</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>14</sup> Section 120.54(3)(a)1, F.S..

<sup>15</sup> Section 120.55(1)(b)2, F.S.

<sup>16</sup> Section 120.541(2)(a), F.S.

<sup>17</sup> Section 120.541(2)(a)1., F.S.

impact on business competitiveness,<sup>18</sup> productivity, or innovation.<sup>19</sup> Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.<sup>20</sup> If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being “adopted” and becoming enforceable or “effective.”<sup>21</sup> A rule must be filed for adoption before it may go into effect<sup>22</sup> and cannot be filed for adoption until completion of the rulemaking process.<sup>23</sup> A rule projected to have a specific economic impact exceeding \$1 million in the aggregate over 5 years<sup>24</sup> must be ratified by the Legislature before going into effect.<sup>25</sup> As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

### Impact of Rule

The Rule incorporates by reference the 2011 Edition of the Manual, providing for reimbursement of health care providers under the increased MRAs approved by the Three-Member Panel.

### Effect of Proposed Change

The bill ratifies Rule 69L-7.020, F.A.C., allowing the rule to go into effect.

#### B. SECTION DIRECTORY:

Section 1: Ratifies Rule 69L-7.020, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. Expressly limits ratification to the effectiveness of the rules. Directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill creates no additional source of state revenues.
2. Expenditures: The bill requires no state expenditures.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill itself has no impact on local government revenues.
2. Expenditures: The bill does not impose additional expenditures on local governments. To the extent local governments are responsible for paying workers' compensation claims or obtain workers' compensation insurance, they will incur increased costs due to the increase in maximum reimbursements for providers.

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<sup>18</sup> Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>19</sup> Section 120.541(2)(a) 2., F.S.

<sup>20</sup> Section 120.541(2)(a) 3., F.S.

<sup>21</sup> Section 120.54(3)(e)6. Before a rule becomes enforceable, thus “effective,” the agency first must complete the rulemaking process and file the rule for adoption with the Department of State .

<sup>22</sup> Section 120.54(3)(e)6, F.S.

<sup>23</sup> Section 120.54(3)(e), F.S.

<sup>24</sup> Section 120.541(2)(a), F.S.

<sup>25</sup> Section 120.541(3), F.S.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill itself does not directly impact the private sector. Private employers responsible for paying workers' compensation claims or obtaining workers' compensation insurance will incur increased costs due to the increase in maximum reimbursements for providers.

**D. FISCAL COMMENTS:**

The economic impacts projected in the statement of estimated regulatory costs would result from the operation of the new provider reimbursement provisions of the Manual incorporated in the rule.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

**1. Applicability of Municipality/County Mandates Provision:**

The legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

**2. Other:**

No other constitutional issues are presented by the bill.

**B. RULE-MAKING AUTHORITY:**

The bill meets the final statutory requirement for the department to exercise its rulemaking authority concerning the periodic adjustment of Workers' Compensation health care provider reimbursement policies and rates. No additional rulemaking authority is required.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

For clarity it is suggested the bill include that the Manual also relates to the payment methodologies for pharmacists and medical suppliers.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**