

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 271 Workers' Compensation

SPONSOR(S): Regulatory Affairs Committee; Government Operations Appropriations Subcommittee; Cummings and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 444

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	11 Y, 0 N	Reilly	Cooper
2) Government Operations Appropriations Subcommittee	13 Y, 0 N, As CS	Keith	Topp
3) Regulatory Affairs Committee	17 Y, 0 N, As CS	Reilly	Hamon

SUMMARY ANALYSIS

If an employer fails to comply with workers' compensation coverage requirements, the Department of Financial Services (DFS) must issue a stop-work order (SWO) within 72 hours. SWOs require the employer to cease all business operations. Additionally, employers are assessed a penalty equal to 1.5 times what the employer would have paid in workers' compensation premiums for all periods of non-compliance during the preceding 3-year period or \$1,000, whichever is greater. SWOs remain in effect until the employer secures appropriate coverage and the DFS issues (1) an order releasing the SWO (for employers that have paid the assessed penalty) or (2) an order of conditional release (for employers that have agreed to pay the penalty in installments under a payment agreement schedule).

The bill amends provisions related to SWOs and associated penalties as follows:

- Increases from 5 to 10 business days after receipt of a written request from the DFS the time within which an employer must produce requested business records or be subject to an SWO.
- Authorizes the DFS to issue an order of conditional release from an SWO to an employer that has secured appropriate coverage if the employer pays \$1,000 as a down payment on the assessed penalty *and* agrees to pay the remainder of the penalty in full or pursuant to a payment agreement schedule.
- Credits the initial payment of premium made to secure coverage against the assessed penalty for employers that have not previously been issued an SWO. When coverage is obtained through an employee leasing company, the credit is based on the amount attributable to the initial workers' compensation expense.
- Reduces the look-back period for failure to comply with coverage requirements from 3 to 2 years and increases the penalty multiplier from 1.5 to 2 times the amount of unpaid premiums.

Generally, workers' compensation benefits are payable at 66 2/3 percent of the employee's average weekly wage (AWW) up to the maximum weekly benefit for the year of injury. To address a court decision concerning the compensation rate, the bill allows such benefits to be paid at either 66 2/3 or 66.67 percent of the employee's AWW.

The bill changes the methodology for calculating the Workers' Compensation Special Disability Trust Fund (SDTF) assessment. It requires the DFS to calculate the assessment based upon the net premiums written by carriers, the amount of premiums calculated by the DFS for self-insured employers, and the anticipated fund balance and expenses of the SDTF. The bill also reduces the statutory rate cap on the SDTF from 4.52 to 2.5 percent.

The DFS indicates that the bill has a negligible, yet indeterminate fiscal impact on revenues deposited into the Workers' Compensation Administration Trust Fund. The changes to the penalty calculation formula will likely result in increased fines in some cases and decreased fines in other cases. The DFS indicates that revising the SDTF assessment calculations and rate cap will allow the Division of Workers' Compensation to draw down the fund balance of the SDTF and pay approved reimbursement requests that are awaiting payment, without increasing the SDTF assessment rate for Calendar Year 2015. The change in the SDTF assessment calculations and rate cap will eliminate the generation of excess revenue (of approximately \$2.2 million) that would otherwise be deposited into the SDTF, which is not needed for the payment of claims.

The bill is effective July 1, 2014.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0271e.RAC

DATE: 3/7/2014

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Whether an employer is required to have workers' compensation insurance depends upon the employer's industry (construction, non-construction, or agricultural) and the number of employees. Construction industry employers with 1 or more employees are required to have workers' compensation insurance.¹ Non-construction industry employers with 4 or more employees are required to have workers' compensation insurance. Agricultural employers with more than 5 regular employees and 12 or more employees at one time for seasonal agricultural labor who work more than 30 days are required to have workers' compensation insurance.²

Failure to Comply with Coverage Requirements³

If an employer fails to comply with workers' compensation coverage requirements, the Department of Financial Services (DFS) must issue a stop-work order (SWO) within 72 hours of determining non-compliance. SWOs, which require the employer to cease all business operations, remain in effect until the employer secures appropriate coverage and the DFS issues (1) an order releasing the SWO (for employers that have paid the assessed penalty) or (2) an order of conditional release (for employers that have agreed to pay the penalty in installments pursuant to a payment agreement schedule with the DFS). Additionally, employers are assessed a penalty equal to 1.5 times what the employer would have paid in workers' compensation premiums for all periods of non-compliance during the preceding 3-year period or \$1,000, whichever is greater. Thus, for penalty calculation purposes, the employer must provide 3 years of payroll records. The DFS informs that employers are often unable to quickly provide all records required to calculate the penalty. Until the DFS has calculated the penalty, the SWO remains in effect and the employer cannot conduct business.

SWOs are issued for the following violations: failure to obtain workers' compensation insurance that meets the requirements of Chapter 440, F.S.; materially understating or concealing payroll; materially misrepresenting or concealing employee duties to avoid paying the proper premium; materially misrepresenting or concealing information pertinent to the calculation of an experience modification factor; and failure to produce business records within 5 business days after receiving a written request for such records from the DFS. For fiscal year 2012-2013, 2,444 SWOs were issued.⁴ As a condition of release from an SWO, the DFS may require an employer to file periodic reports for up to 2 years to show the employer's continued compliance with coverage requirements.

The bill amends provisions relating to SWOs and calculation of the assessed penalty as follows:

- Increases from 5 to 10 business days after receipt of a written request from the DFS the time within which an employer must produce requested business records or be subject to an SWO.
- Reduces the look-back period for failure to comply with coverage requirements from 3 to 2 years and increases the penalty multiplier from 1.5 to 2 times the amount of unpaid premiums.
- Authorizes the DFS to issue an order of conditional release from an SWO to an employer that has secured appropriate coverage if the employer pays \$1,000 as a down payment on the assessed penalty *and* agrees to pay the remainder of the penalty in periodic installments pursuant to a payment agreement schedule with the DFS or to pay the remaining penalty in full. Provides for immediate reinstatement of the SWO if the employer does not pay the penalty in full or enter into a payment agreement with the DFS within 28 days after service of the SWO upon the employer.
- Credits the initial payment of the estimated annual workers' compensation policy premium, as determined by the carrier, against the penalty for employers that have not previously been issued an SWO. Provides that the credit is based on the dollar or percentage amount attributable to the

¹ Section 440.02(17)(b)2, F.S.

² Section 440.02(17)(c)2, F.S.

³ See s. 440.107, F.S.

⁴ "2013 Florida Division of Workers' Compensation Results and Accomplishments." Available at:

<http://www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/Default.htm> (Last accessed: March 3, 2014).

initial workers' compensation expense when the employer secures coverage through a licensed employee leasing company. Requires employers to provide the DFS with documentation that the employer has secured the payment of compensation and proof of payment to the carrier. See the section below entitled "Employee Leasing Companies" for documentation required for the credit to be applied when the employer has secured the payment of compensation by entering into an employee leasing contract with a licensed employee leasing company. Provides for assessment of the \$1,000 penalty against the employer even when the calculated penalty after the credit is applied is less than this amount.

- Repeals reporting requirements for a probationary period to demonstrate an employer's continued compliance with coverage requirements.

The bill also requires SWO information to be made available on the Division of Workers' Compensation's (DWC) website for at least 5 years. This codifies the current practice of the DWC.

Employee Leasing Companies

In a traditional employee leasing arrangement, an employee leasing company will enter into an arrangement with an employer (the client company) under which all or most of its client workforce is employed by the leasing company and then leased to the client company. The Board of Employee Leasing Companies within the Department of Business and Professional Regulation licenses and regulates employee leasing companies under part XI, ch. 468, F.S. The term "employee leasing" is defined as "...an arrangement whereby a leasing company assigns its employees to a client and allocates the direction of and control over the leased employees between the leasing company and the client."⁵ The law excludes temporary help arrangements from the definition of employee leasing.

For employers that have not previously been issued an SWO, the bill credits the dollar or percentage amount attributable to the employer's initial workers' compensation expense in securing coverage through a licensed employee leasing company against the penalty assessed for failure to comply with coverage requirements. For the credit to be applied, the bill requires the employer to provide the DFS with a written confirmation by a representative from the employee leasing company of the dollar or percentage amount attributable to the initial estimated workers' compensation expense for leased employees, and proof of payment to the employee leasing company.

Workers' Compensation Indemnity Benefits

Workers' compensation indemnity (monetary) benefits are payable to employees who miss at least 8 days of work due to a covered (compensable) injury. However, the benefits are payable retroactively from the first day of disability (to include compensation for the first 7 days missed) to employees who miss more than 21 days of work due to a compensable injury.⁶ In most cases, indemnity benefits are payable at 66 2/3 percent of the employee's average weekly wage (AWW) up to the maximum weekly benefit for the year of injury. For example, s. 440.15(1)(a), F.S., provides for permanent total disability benefits to be paid at 66 2/3 percent of the employee's AWW up to the maximum weekly benefit established by the workers' compensation law.⁷

In *Escambia County School District v. Vickery-Orso*,⁸ the employer calculated the compensation rate for an employee with a permanent total disability by multiplying the AWW by .66667. This resulted in the employer paying more than 66 2/3 percent of the AWW (a weekly benefit of \$529.48 rather than \$529.47, when rounded to cents). The Judge of Compensation Claims (JCC), however, determined that the appropriate multiplier was .6667 (AWW x .6667), which resulted in a weekly benefit of \$529.50. The JCC ordered the employer to pay this benefit amount and awarded associated penalties, interest, costs, and fees to the employee. On Appeal, the First District Court of Appeal held that the JCC erred in requiring the employer to pay a greater benefit because the employer had not paid less than the compensation rate (66 2/3 percent of the AWW) required by statute.

⁵ Section 468.520(4), F.S.

⁶ Section 440.12(1), F.S.

⁷ The maximum weekly compensation rate for work-related injuries and illnesses occurring on or after January 1, 2014 is \$827.00. See Informational Bulletin DFS-03-2013 (December 19, 2013). Available at: <http://www.myfloridacfo.com/division/wc/pdf/DFS-03-2013.pdf> (Last accessed: January 3, 2014).

⁸ 109 So.3d 1242 (2013).

The bill addresses the *Escambia* decision by authorizing employers to pay compensation at either 66 2/3 percent or 66.67 percent of the AWW. The latter calculation produces a slightly higher compensation rate for injured employees and removes the need for employers/carriers that have been paying benefits at 66.67 percent of the AWW to incur reprogramming costs.

Workers' Compensation Special Disability Trust Fund

The Workers' Compensation Special Disability Trust Fund (SDTF) was originally established to encourage employers to hire workers with pre-existing permanent physical impairments. Specifically, the SDTF will reimburse employers (or their carriers) for excess workers' compensation benefits they have provided to an employee with a pre-existing impairment who is subsequently injured in a workers' compensation accident. As a step in the reimbursement process, the SDTF determines whether claims are eligible to receive reimbursements in addition to performing audits and processing reimbursement requests. Claims are only eligible for reimbursement if the injury occurred before January 1, 1998, any injuries on or after that date are not eligible. Due to this eligibility requirement, the fund balance of the SDTF is currently in run-off.⁹ However, reimbursements can be sought for claims that meet the eligibility requirements. After a claim has been accepted, a request for reimbursement of additional expenses may be submitted annually.

Revenues deposited into the SDTF are generated through annual assessments on premiums for carriers and self-insured employers. The current assessment rate formula is calculated by the DFS using the previous three calendar years of SDTF expenditures. Current statute provides that the assessment rate must produce an amount equal to the average of the sum of disbursements during the immediate past three calendar years and two times the disbursements of the most recent calendar year. The current assessment rate is capped at 4.52 percent. This current formula and rate cap were established during a time of growth in SDTF reimbursements. The number of reimbursement requests and total dollar amount of expenditures from the SDTF are currently decreasing. Due to both of these figures becoming more predictable, the Division can more accurately estimate the expenditures for each calendar year.

The bill amends provisions relating to the Workers' Compensation Special Disability Trust Fund and calculation of the assessed rate as follows:

- Revises the assessment rate calculation for the Workers' Compensation Special Disability Trust Fund by providing that the rate calculation will be based upon net premiums written by carriers, the amount of premiums calculated by the DFS for self-insured employers, and the anticipated fund balance and expenses of the Workers' Compensation Special Disability Trust Fund.
- Reduces the statutory rate cap on the Workers' Compensation Special Disability Trust Fund from 4.52 percent to 2.5 percent.

The bill is effective July 1, 2014.

B. SECTION DIRECTORY:

Section 1. Amends s. 440.107, F.S., relating to the authority of the DFS to enforce employer compliance with workers' compensation coverage requirements.

Section 2. Amends s. 440.15, F.S., relating to compensation for disability.

Section 3. Amends s. 440.16, F.S., relating to compensation for death.

Section 4. Amends s. 440.49, F.S., relating to the Workers' Compensation Special Disability Trust Fund.

Section 5. Provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

⁹ Department of Financial Services bill analysis (January 29, 2014) on file with the Insurance & Banking Subcommittee.

1. Revenues:

The DFS indicates that revising the SDTF assessment calculations and rate cap will allow the Division to draw down the fund balance of the SDTF and pay approved reimbursement requests that are awaiting payment, without increasing the SDTF assessment rate for Calendar Year 2015. The change in the SDTF assessment calculations and rate cap will eliminate the generation of excess revenue (of approximately \$2.2 million) that would otherwise be deposited into the SDTF, which is not needed for the payment of claims.¹⁰

2. Expenditures:

Currently, reimbursements that are scheduled for payment during the calendar year are \$57,178,000.¹¹ With the revision of the assessment rate calculation and rate cap, the Division expects to draw down the fund balance of the SDTF by \$27,747,775 for a one-time, additional distribution of reimbursement requests that are awaiting payment. This brings the total reimbursement amount for the 2014 calendar year to \$84,925,775 million.

The DFS estimates that after all 2014 reimbursements are paid, the SDTF fund balance will be approximately \$80.6 million as of December 31, 2014.¹² The year-end fund balance of the SDTF along with projected 2015 revenues will ensure sufficient funds are available for the payment of reimbursements in future years.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Requiring employers to whom SWOs have been issued to supply two years of payroll records (rather than three years) for penalty calculation purposes decreases the regulatory burden on such employers. Employers that can more readily provide the required records will have their penalty calculated more quickly by the DFS and can take the steps necessary to be released from the SWO and return to work.

With the decreased look-back period, the amount of some fines assessed may decrease, even though the multiplier has been increased. In other cases, the increased penalty multiplier will increase the penalty, even though the look-back period has been shortened.

For employers that have not previously been issued an SWO, crediting the initial payment of premium made to secure coverage (or the dollar or percentage amount attributable to the initial workers' compensation expense for leased employees) against the assessed penalty will decrease the amount of the penalty to be paid by the employer.

The DFS indicates that changing the assessment calculation will benefit the private sector by allowing the department to draw down the fund balance of the SDTF to pay approved reimbursement requests that are awaiting payment, without increasing the SDTF assessment rate. In addition, reducing the statutory assessment cap of 4.52 percent to 2.5 percent lowers the maximum assessment that could be applied to employers.

¹⁰ Department of Financial Services bill analysis (January 29, 2014) on file with the Insurance & Banking Subcommittee.

¹¹ Email correspondence with the Department of Financial Services (February 13, 2014) on file with the Insurance & Banking Subcommittee.

¹² Email correspondence with the Department of Financial Services (February 17, 2014) on file with the Insurance & Banking Subcommittee.

D. FISCAL COMMENTS:

According to information provided by the DFS, amending the penalty assessed against employers that do not comply with workers' compensation coverage requirements will have a negligible impact on the Workers' Compensation Administration Trust Fund. The DFS states that providing for a 66.67 percent compensation rate reflects current carrier claims payment procedures.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or, reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 11, 2014, the Government Operations Appropriations Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Revised the assessment rate calculation for the Workers' Compensation Special Disability Trust Fund, providing that the rate calculation will be based upon net premiums written by carriers, the amount of premiums calculated by the DFS for self-insured employers, and the anticipated fund balance and expenses of the Workers' Compensation Special Disability Trust Fund.
- Reduced the statutory rate cap on the Workers' Compensation Special Disability Trust Fund from 4.52% to 2.5%.

This analysis is drafted to the committee substitute as passed by the Government Operations Appropriations Subcommittee.

On March 6, 2014, the Regulatory Affairs Committee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Clarified the credit to be applied against the penalty assessed against an employer for failure to comply with workers' compensation coverage requirements when coverage is subsequently obtained through a licensed employee leasing company.
- Required stop-work order information to be made available on the Division of Workers' Compensation website for at least 5 years.

The analysis is drafted to the committee substitute as passed by the Regulatory Affairs Committee.