

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1013 Legislative Ratification/Workers' Compensation Law

**SPONSOR(S):** Insurance & Banking Subcommittee; Hager

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 1060

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee	12 Y, 0 N	Stranburg	Rubottom
2) Insurance & Banking Subcommittee	11 Y, 1 N, As CS	Lloyd	Cooper
3) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

The Department of Financial Services (DFS) adopts rules establishing the policies and processes governing the provision, billing, and reimbursement of medical services under Florida's Workers' Compensation Law. Those rules include the maximum reimbursement allowances approved by a three-member panel. The three-member panel is composed of the Chief Financial Officer of the State of Florida (CFO), or the CFO's designee, and a representative of employers and a representative of employees. The Governor's appointees must be confirmed by the Senate. The DFS, in cooperation with and support of the three-member panel, adopts a series of reimbursement manuals related to workers' compensation medical services. There are three such reimbursement manuals; one each for individual health care providers, hospitals, and ambulatory surgical centers. The reimbursement manuals incorporate the maximum reimbursement allowances approved by the three-member panel. Whenever the three-member panel approves revised maximum reimbursement allowances, which are required annually, a legislative ratification may be triggered when they are incorporated into a rule.

The Florida Administrative Procedure Act (APA) requires state agencies to assess whether a Statement of Estimated Regulatory Cost (SERC) must be prepared in conjunction with the promulgation of an administrative rule. The preparation of a SERC is required if a proposed rule will have an adverse impact on small business, or if it is likely to directly or indirectly increase regulatory costs by more than \$200,000 within one year of implementation. If the SERC analysis indicates the rule is likely to have an aggregate economic impact exceeding \$1 million in the first five years from implementation, then the rule must be ratified by the Legislature before going into effect. The APA requires that the rule be submitted to the President of the Senate and the Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and the rule may not take effect until it is ratified by the Legislature.

In September 2011, the DFS adopted rule 69L-7.020, F.A.C., which incorporated a revised edition of the health care provider reimbursement manual, including the three-member panel's approved maximum reimbursement allowances. This rule change met the legislative ratification threshold. The rule was submitted to the Legislature for ratification in 2012 and has not been ratified to date. The DFS withdrew the 2011 rule change in February 2015 and began the rulemaking process to adopt an updated revised edition of the manual, including a new set of maximum reimbursement allowances approved by the three-member panel. The 2015 revision may be adopted, pending legislative ratification, during the 2015 Regular Session.

The bill requires the DFS to adopt, by order, the maximum reimbursement allowances approved by the three-member panel. The DFS order will be subject to an administrative hearing and judicial review under the APA. The bill does not impact the private sector. It has an indeterminate, but likely positive, impact on state government and no impact on local government.

The bill is effective July 1, 2015.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

Florida's Workers' Compensation Law<sup>1</sup> requires employers to provide injured employees all medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require.<sup>2</sup> The Department of Financial Services, Division of Workers' Compensation (DFS), provides regulatory oversight of Florida's workers' compensation system. The law specifies certain reimbursement formulas and methodologies to compensate workers' compensation health care providers<sup>3</sup> that provide medical services to injured employees. Where a reimbursement amount or methodology is not specifically included in statute, the three-member panel is authorized to annually adopt statewide schedules of maximum reimbursement allowances (MRAs) to provide uniform fee schedules for the reimbursement of various medical services.<sup>4</sup> DFS incorporates the MRAs approved by the three-member panel in reimbursement manuals<sup>5</sup> through the rulemaking process provided by the Administrative Procedures Act.<sup>6</sup>

#### **The Three-Member Panel**

The three-member panel is created by statute to adopt MRAs and report on and make recommendations regarding the state of the workers' compensation health care delivery system.<sup>7</sup> The panel is made up of the Chief Financial Officer, or the Chief Financial Officer's designee, and two members appointed by the Governor. The Governor's appointees are subject to confirmation by the Senate. One of the Governor's appointees is a representative of employers, while the other is a representative of employees.<sup>8</sup> The panel has approved three sets of MRAs. The MRAs establish the expected reimbursement amounts for medical services rendered by individual health care providers, hospitals, and ambulatory surgical centers. The three-member panel does not have rulemaking authority. The DFS is charged with providing administrative support to the three-member panel and implements the three-member panels MRA approvals through its rules. The three-member panel holds publicly noticed open meetings to implement their duties and obligations.

#### **Reimbursement Manuals**

The DFS periodically adopts rules implementing the administrative policies and procedures that govern the provision, billing, and reimbursement of medical services in the workers' compensation health care delivery system. There are three reimbursement manuals adopted by the DFS. They are the *Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2008 Edition*;<sup>9</sup> the *Florida Workers' Compensation Reimbursement Manual for Ambulatory Surgical Centers, 2011 Edition*;<sup>10</sup> and, the *Florida Workers' Compensation Reimbursement Manual for Hospitals, 2014 Edition*.<sup>11</sup> The DFS has rulemaking authority to develop the reimbursement manuals. The DFS can choose the organization of their rules and currently incorporates each set of MRAs into the related reimbursement manual as a single document. In the alternative, the DFS could choose to adopt two sets of rules, one set that

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

<sup>2</sup> Section 440.13(2)(a), F.S.

<sup>3</sup> The term "health care provider" includes a physician or any recognized practitioner licensed to provide skilled services pursuant to a prescription or under the supervision or direction of a physician. It also includes any hospital licensed under chapter 395 and any health care institution licensed under chapter 400 or chapter 429. Section 440.13(1)(g), F.S.

<sup>4</sup> Section 440.13(12), F.S.

<sup>5</sup> Subsections 440.13(12) and (13), F.S. Chapter 69L-7, F.A.C.

<sup>6</sup> Chapter 120, F.S.

<sup>7</sup> Section 440.13(12), F.S.

<sup>8</sup> Section 440.13(a), F.S.

<sup>9</sup> Rule 69L-7.020, F.A.C.

<sup>10</sup> Rule 69L-7.100, F.A.C.

<sup>11</sup> Rule 69L-7.501, F.A.C.

establishes the processes for provision and billing of medical services and another set to deliver the three-member panel's approved MRAs.

Each of the reimbursement manuals incorporates one of the three sets of MRAs. The DFS incorporates the MRAs into the reimbursement manuals as those manuals proceed through the APA's rulemaking process. The DFS analyses the economic impact of the entire reimbursement manual to identify whether the legislative ratification threshold is met. However, the three-member panel's revisions to the MRAs are typically the cost driver in this analysis and can trigger ratification because of the significant economic impact that uniform changes to provider reimbursements can create.

In September 2011, the Department adopted Rule 69L-7.020, F.A.C., adopting the 2011 Edition of the health care provider reimbursement manual. The approved MRAs that were included in the manual were estimated to have an economic impact in excess of the legislative ratification threshold. The rule was not ratified by the Legislature in the 2012, 2013, or 2014 Regular Sessions. In 2013, HB 1165 was filed, to ratify the rule. HB 1165 was not considered and no other bills were filed for this purpose during these sessions. In February 2015, the DFS withdrew the rule development that adopted the 2011 Edition, pending legislative ratification. The DFS also proposed an updated edition, including a new set of MRAs approved by the three-member panel.<sup>12</sup>

### 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>13</sup> Rulemaking authority is delegated by the Legislature<sup>14</sup> through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"<sup>15</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>16</sup> To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>17</sup> The grant of rulemaking authority itself need not be detailed.<sup>18</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>19</sup>

An agency begins the formal rulemaking process by filing a notice of the proposed rule.<sup>20</sup> The notice is published by the Department of State in the Florida Administrative Register<sup>21</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>22</sup>

The economic analysis mandated for each SERC must analyze several factors regarding 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>23</sup> Next is the likely adverse impact on business competitiveness,<sup>24</sup> productivity, or

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<sup>12</sup> See Florida Administrative Register, Vol. 41/39, published February 26, 2015, and Vol. 41/21, published February 2, 2015. The Florida Administrative Register is available on the Internet at [www.flrules.org](http://www.flrules.org).

<sup>13</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>14</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>15</sup> Section 120.52(17).

<sup>16</sup> Section 120.54(1)(a), F.S.

<sup>17</sup> Section 120.52(8) & s. 120.536(1), F.S.

<sup>18</sup> *Save the Manatee Club, Inc.*, supra at 599.

<sup>19</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>20</sup> Section 120.54(3)(a)1., F.S.

<sup>21</sup> Section 120.55(1)(b)2., F.S.

<sup>22</sup> Section 120.541(2)(a), F.S.

<sup>23</sup> Section 120.541(2)(a)1., F.S.

innovation.<sup>25</sup> Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.<sup>26</sup> If the analysis shows the projected aggregate impact of the proposed rule in any one of these areas will exceed \$1 million in the first 5 years of implementation, 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>27</sup> A rule must be filed for adoption before it may go into effect<sup>28</sup> and cannot be filed for adoption until completion of the rulemaking process.<sup>29</sup> A rule projected to have a specific economic impact exceeding \$1 million in the aggregate over 5 years<sup>30</sup> must be ratified by the Legislature before going into effect.<sup>31</sup> Therefore, such a rule a rule must be filed for adoption before being submitted for legislative ratification and becomes effective when the ratification bill becomes law.

### **Effect of the BILL**

The bill amends s. 440.13(12), F.S., removing the obligation of the three-member panel to annually adopt MRAs. It permits the three-member panel to review and revise the MRAs as necessary. The bill requires the DFS to adopt the three-member panel’s approved MRAs by order. The order adopting the MRAs is subject to the notice, petition, and hearing requirements of ss. 120.569 and 120.57, F.S. This gives any substantially affected person the right to challenge the order and have their rights determined through the administrative law process. The resulting final order is subject to judicial review under s. 120.68, F.S. Persons that are adversely affected by the final order have the right to an appeal to the state’s District Courts of Appeal.<sup>32</sup> The MRA adoption process will no longer be conducted by rule and will not be subject to legislative ratification.

#### **B. SECTION DIRECTORY:**

**Section 1:** Amends s. 440.13, F.S., providing that adoption of statewide schedules of maximum reimbursement allowances approved by the three-member panel shall be by order of the Department of Financial Services and subject to the administrative law proceedings of ss. 120.569 and 120.57, F.S., and judicial review under s. 120.68, F.S.

**Section 2:** Provides an effective date of July 1, 2015.

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

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

##### **1. Revenues:**

None.

##### **2. Expenditures:**

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<sup>24</sup> This consideration includes the effect on the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>25</sup> Section 120.541(2)(a) 2., F.S.

<sup>26</sup> Section 120.541(2)(a) 3., F.S.

<sup>27</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>28</sup> Id.

<sup>29</sup> Section 120.54(3)(e), F.S.

<sup>30</sup> Section 120.541(2)(a), F.S.

<sup>31</sup> Section 120.541(3), F.S.

<sup>32</sup> Section 120.68, F.S., usually results in appellate jurisdiction in the District Court of Appeal (DCA) where the agency is headquartered. Since the DFS is headquartered in Leon County, the 1<sup>st</sup> DCA will usually be the venue for review of the order. The 1<sup>st</sup> DCA is also the primary venue for workers’ compensation cases in general and has a workers’ compensation appellate law unit on staff.

The bill has an indeterminate, but likely positive, impact on state government expenditures. The bill changes the process for adopting revisions to the three-member panel approved MRAs. To the extent that it increases efficiency in adopting the revisions, it will have a positive impact.

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

1. Revenues:

None.

2. Expenditures:

None.

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

None.

**D. FISCAL COMMENTS:**

None. Changing the process of adopting and making the three-member panel's actions effective is not expected to have an economic or fiscal impact. The bill has the effect of changing the process, but it does not directly result in the adoption of any MRAs.

**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:**

The bill removes the oversight of legislative ratification from statewide schedules of maximum reimbursement allowances approved by the three-member panel currently adopted by rule. They will be adopted by DFS order subject to an administrative hearing and judicial review.

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

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 18, 2015, the Insurance & Banking Subcommittee considered a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute reflects multiple changes, as follows:

- Removed the provision creating a rule ratification exemption for maximum reimbursement allowances and manuals adopted by three-member panel.

- Added a provision requiring the Department of Financial Services to adopt the three-member panel's approved maximum reimbursement allowances by order and subjecting the order to administrative proceedings and judicial review, if requested.
- Clarified that the three member panel must annually review and revise maximum reimbursement allowances, as necessary, rather than annually adopt them.

The staff analysis has been updated to reflect the committee substitute.