

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 Committee on Banking and Insurance

BILL: CS/SB 1568

INTRODUCER: Banking and Insurance Committee and Senator Farmer

SUBJECT: Prohibited Activities under the Workers' Compensation Law

DATE: February 20, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	Fav/CS
2.			CM	
3.			RC	

I. Summary:

CS/SB 1568 revises provisions relating to workers' compensation prohibited acts and insurance fraud. Chapter 440, F.S., governs the administration of the workers' compensation system in Florida. The bill:

- Provides that any statement or documentation containing incomplete or inaccurate information or documentation of an employee's citizenship, residency, or other employment status may not constitute a basis for denying compensation or benefits.
- Revises prohibited acts that constitute insurance fraud by eliminating the provision that it is unlawful to knowingly present, or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits.

Under current law, an employee is not entitled to compensation or benefits under ch. 440, F.S., if a judge of compensation claims, administrative law judge, court, or jury convened in this state determines that the employee has knowingly or intentionally engaged in any of the prohibited acts described in s. 440.105, F.S., or any criminal act for the purpose of securing workers' compensation benefits. Section 440.105(4)(b)9., F.S., provides that it is unlawful for any person to knowingly present or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits.

II. Present Situation:

Florida Workers' Compensation System

Chapter 440, F.S., governs the administration of the workers' compensation system in Florida. The Division of Workers' Compensation within the Department of Financial Services is responsible for administering ch. 440, F.S. Workers' compensation is the injured employee's

remedy for “compensable” workplace injuries.¹ Employees generally cannot sue a covered employer for workplace injuries.² The Office of Judges of Compensation Claims is responsible for resolving workers’ compensation benefit disputes.³

Due to growing concerns regarding the availability and affordability of workers’ compensation insurance in Florida, legislation was enacted in 2003 that substantially revised many aspects of the workers’ compensation law.⁴

2003 Legislative Reforms

Generally, an accident is deemed compensable under ch. 440, F.S., if it occurred during the course and scope of the injured employee’s employment. One major exception to this compensability is the fraud defense. An employee is not entitled to compensation or benefits under ch. 440, F.S., if a judge of compensation claims, administrative law judge, court, or jury convened in this state determines that the employee has knowingly or intentionally engaged in any of the prohibited acts described in s. 440.105, F.S., or any criminal act for the purpose of securing workers’ compensation benefits.⁵ A person violating any provision of s. 440.105(4), F.S., commits insurance fraud. The 2003 legislation creates a criminal penalty that potentially affect the issue of whether unauthorized aliens are entitled to receive workers’ compensation benefits if injured on the job. The provision⁶ states that it is unlawful for any person:

To knowingly present or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers’ compensation benefits.

With the passage of this act, it is a felony and insurance fraud for a person to knowingly present any false or misleading oral or written statement as evidence of identity for obtaining employment. Therefore, if a worker obtains his or her employment by misrepresenting his identity in order to get a job, then that worker could be found to have committed insurance fraud⁷ and thus denied benefits if injured on the job.⁸

According to representatives with the Division of Insurance Fraud⁹ within the Department of Financial Services, the purpose of this 2003 amendment was to facilitate the arrest and

¹ “Compensable” means a determination by a carrier or judge of compensation claims that a condition suffered by an employee results from an injury arising out of and in the course of employment. s. 440.13(1)(d), F.S.

² Section 440.11(1), F.S. Employers who fail to obtain required workers’ compensation coverage may be sued by an injured worker in civil court. Likewise, an employee who is either exempt or excluded from workers’ compensation coverage requirements may sue their employer in civil court for work-related injuries, even if the employer has coverage for their other employees.

³ Section 440.192, F.S.

⁴ ch. 2003-312, Laws of Fla., Senate Bill 50-A.

⁵ Section 440.09(4)(a), F.S.

⁶ Section 440.105(4)(b)9., F.S.

⁷ The penalties for committing insurance fraud range from a third to a first-degree felony, depending on the monetary value of the violation.

⁸ Section 440.09(4)(a), F.S.

⁹ Now known as the Division of Investigative and Forensic Sciences.

prosecution of unauthorized aliens who have lied about their identity in order to obtain employment and then falsified their on-the-job injury.¹⁰ The division staff stated that it is often easier to prove that the unauthorized alien lied about his identity in order to obtain work than it is to prove the job-related injury was fabricated.¹¹ Many times unauthorized aliens are in league with unethical doctors and lawyers who bilk the workers' compensation system, these officials claim.¹² The Senate report notes that some persons who are critical of this provision contend this provision could provide an incentive for employers to seek out unauthorized aliens as employees (and deny they knew their unauthorized work status at the time of hire), in order to avoid paying benefits if such workers were injured, and thus obtain a competitive advantage.¹³

The 2003 law also makes it a first-degree misdemeanor¹⁴ for an employer to commit the following act:

It shall be unlawful for any employer to knowingly participate in the creation of the employment relationship in which the employee has used any false, fraudulent, or misleading oral or written statement as evidence of identity.

This provision penalizes employers if they have knowledge of the employee's use of a false or misleading statement as evidence of identity relating to an employment relationship.

Benefits for Unauthorized Aliens

Unauthorized aliens are not precluded from receiving benefits for compensable, work-related injuries under Florida's workers' compensation law. The definition of the term, "employee," includes "any person who receives remuneration from any employer...whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors."¹⁵

Florida Cases

In *Gene's Harvesting v. Rodriguez*, the First District Court of Appeal found that the workers' compensation law did not exclude from coverage workers not lawfully immigrated so that an alien was entitled to workers' compensation benefits for a work-related injury even though he or she was not authorized to be in the country.¹⁶ Later, the Florida Supreme Court struck down a provision in the law that had limited death benefits for nonresident alien beneficiaries of deceased workers who were not residents of Canada to \$1,000, rather than the \$100,000 otherwise available, as violative of both Federal and state equal protection provisions.¹⁷

¹⁰ See Senate Banking and Insurance Committee, *Review of the 2003 Workers' Compensation Act, Interim Project Report 2004-110*, (Dec. 2003) (on file with Senate Committee on Banking and Insurance).

¹¹ *Id.* at p. 6.

¹² *Id.*

¹³ *Id.*

¹⁴ Section 440.105(3)(b), F.S.

¹⁵ Section 440.02(15)(a), F.S.

¹⁶ See *Gene's Harvesting v. Rodriguez*, 421 So.2d 701 (Fla. 1st DCA 1982). See also, *Cenvill Development Corp. v. Candelo*, 478 So.2d 1168 (Fla. 1st DCA 1985).

¹⁷ *De Ayala v. Florida Farm Bureau Casualty Insurance Co.*, 543 So.2d 204 (Fla. 1989).

In *Matrix Employee Leasing v. Hernandez*,¹⁸ the court concluded it was “clear that claimant violated section 440.105(4)(b)(9), by procuring work with a false social security card.” However, the First District Court concluded that this violation did not preclude entitlement to workers' compensation benefits by Hernandez. The record contains no evidence that the claimant violated s. 440.105(4)(b)9, F.S., for the purpose of securing workers' compensation benefits.

In *State of Florida v. Brock*,¹⁹ the defendant applied for a job but used a social security number that was not issued to him. He did not file a workers' compensation claim, but was charged with one count of fraud under s. 440.104(4)(b)(9), F.S. The circuit court dismissed the charges against the defendant on the grounds that ch. 440, F.S., is an insurance coverage and regulation statute. In April 2014, the Fourth District Court of Appeals reversed the trial court's dismissal, and opined that s. 440.105(4)(b)9, F.S., makes it a crime to “present . . . any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment . . .” Further, the fact that this clause is followed by the word “or” is important as it indicates the statute may be violated in more than one way: by presenting false or fraudulent documents for the purpose of obtaining employment or providing the false or fraudulent documents to file or support a workers' compensation claim.²⁰

In 2011, the District Court of Appeals heard a case involving an injured worker who was an unauthorized alien. The Judge of Compensation Claims (JCC) found that the employer knew or should have known that a claimant, an unauthorized immigrant from Mexico, was without the legal right to work in the United States. The JCC further found that, notwithstanding this knowledge, the employer hired and continued to unlawfully employ claimant, until he was injured in a significant workplace accident. After claimant suffered injury, the employer and its workers' compensation carrier attempted to assert, as a defensive matter, claimant's unauthorized status to defeat a claim for permanent total disability (PTD) benefits. The Court noted the employer could have avoided the entirety of the loss by refraining from knowingly hiring illegal labor.²¹

Florida Labor Regulations

Under current Florida law, it is a violation for any person to knowingly employ, hire, or recruit, for private or public employment within the state, an alien who is not duly authorized to work by the immigration laws or the Attorney General of the United States.²² The first violation of this provision is a noncriminal violation as defined in s. 775.08(3), F.S., and, upon conviction, is punishable as provided in s. 775.082(5), F.S., by a civil fine of not more than \$500, regardless of the number of aliens with respect to whom the violation occurred. Any person who has been previously convicted for a violation and who thereafter violates this provision is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S. Any such subsequent violation of this section shall constitute a separate offense with respect to each unauthorized alien.

¹⁸ *Matrix Employee Leasing v. Hernandez* 975 So. 2d 612 (Fla. 2008).

¹⁹ *State of Florida v. Brock*, 39 Fla. L. Weekly D907 (4th DCA April 30, 2014). On December 30, 2014, the Florida Supreme court declined to accept jurisdiction and ordered that the petition for review denied.

²⁰ *Id.*

²¹ *HDV Const. Systems, Inc. v. Aragon*, 66 So.3d 331 (1st Dist. 2011).

²² Section 448.09, F.S.

Federal Labor and Immigration Regulations

Immigration and Nationality Act

The immigration policy of the United States is governed largely by the Immigration and Nationality Act²³ (INA), which was first codified in 1952 and has been amended significantly several times. This act is a comprehensive set of laws governing legal immigration, naturalization, work authorization, and the entry and removal of aliens. Implementation of the INA policies is administered by multiple executive branch agencies. The Department of Homeland Security has primary responsibility for immigration functions through several agencies: U.S. Citizenship and Immigration Services, Customs and Border Protection, and Immigration and Customs Enforcement. The Department of State issues visas to foreign nationals overseas, and the Department of Justice operates immigration courts through its Executive Office of Immigration Review.

The Immigration Reform and Control Act of 1986 (IRCA),²⁴ which amended INA, establishes an extensive employment verification system to deny employment to aliens who are not lawfully present in the U.S., or are not lawfully authorized to work in the U.S. Under the IRCA, employers must verify the identity and eligibility of all new hires by examining specified documents before they begin work.

Title 8, U.S.C. s. 1324a defines unlawful employment of aliens and provides civil and criminal sanctions. For example, subsection 1324(a)(1)(i)-(v) prohibits alien smuggling, domestic transportation of unauthorized aliens, concealing or harboring unauthorized aliens, encouraging or inducing unauthorized aliens to enter the United States, and engaging in a conspiracy or aiding and abetting any of the preceding acts. Title 8 U.S.C. s. 1324b relates to unfair immigration-related employment practices, such as discrimination based on national origin or citizenship status. Title 8 s. 1324c delineates prohibited activities relating to document fraud and provides penalties.

Immigration Fraud

Document fraud and benefit fraud are two general types of immigration fraud. Some view immigration fraud as a continuum of events, because people may commit document fraud to engage in benefit fraud. The INA addresses immigration fraud in several ways. It makes “misrepresentation” (e.g., obtaining a visa by falsely representing a material fact or entering the United States by falsely claiming U.S. citizenship) a ground for inadmissibility.²⁵ The INA also has civil enforcement provisions, distinct from removal or inadmissibility proceedings, to prosecute individuals and entities that engage in immigration document fraud.²⁶ Apart from the INA, the U.S. Criminal Code classifies knowingly producing or using fraudulent immigration documents (e.g., visas, border-crossing cards) as criminal offenses.²⁷

²³Pub. Law 82-414 at 8 U.S.C. s. 1101 *et seq.*

²⁴ 8 U.S.C. ss. 1324a-1324b.

²⁵ 8 U.S.C. s. 1182.

²⁶ 8 U.S.C. s. 1324c.

²⁷ 18 U.S.C. s. 1546.

Employment Practices

It is unlawful for employers to knowingly hire workers who lack authorization and for employees to use fraudulent documents to establish employment eligibility. Its provisions, sometimes referred to as employer sanctions, make it unlawful for an employer to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is not authorized to be so employed.²⁸ The INA prohibits unfair immigration-related employment practices and provides penalties for noncompliance.²⁹ Employers who violate prohibitions on unauthorized employment may be subject to civil monetary penalties or criminal penalties.³⁰

Related Federal Litigation

The Supremacy Clause of the Constitution establishes that federal law, treaties, and the Constitution itself are “the supreme Law of the Land.”³¹ Accordingly, one essential aspect of the federal structure of government is that states can be precluded from taking actions that are otherwise within their authority if federal law is thereby thwarted. States and local governments have generally been preempted or otherwise barred from adopting measures that would deter unauthorized aliens from remaining in their jurisdictions by paralleling federal immigration laws. The U.S. Department of Justice (DOJ) has challenged measures enacted by several states, which are intended to deter the presence of unlawfully present aliens within their jurisdiction.

Arizona v. United States³²

In June 2012, the Supreme Court issued its decision in *Arizona v. United States*, ruling that some aspects of an Arizona statute intended to deter unlawfully present aliens from remaining in the state were preempted by federal law, but also holding that Arizona police were not facially preempted from running immigration status checks on persons stopped for state or local offenses.³³ In reaching these conclusions, the Supreme Court made clear that opportunities for states to take independent action in the field of immigration enforcement are more limited than some had previously believed. In recent years, several states and localities have adopted measures intended to deter the presence of unauthorized aliens within their jurisdiction. In particular, the Court’s decision would suggest that mirroring federal law when imposing criminal penalties upon conduct that could facilitate the presence of unauthorized aliens within a jurisdiction does not suffice to avoid preemption. While the majority opinion acknowledged the importance of immigration policy to the states, and in particular, those like Arizona, which bear many of the consequences of unlawful immigration,³⁴ it nonetheless viewed state and local laws to be permissible only to the extent that they are not in conflict or at cross-purposes with the immigration framework created by the national government.

²⁸ 8 U.S.C. s. 1324a.

²⁹ 8 U.S.C. s. 1324b.

³⁰ The IRCA requires all employers to verify identity and work authorization by examining documents presented by new hires and to complete and retain employment eligibility verification (I-9) forms.

³¹ U.S. CONST., art. VI, cl. 2.

³² *Arizona v. United States*, 132 S. Ct. 2492 (2012).

³³ *Id.*

³⁴ *Id.* at 2500.

Recent Florida Workers' Compensation Report Relating to Unauthorized Workers³⁵

According to a 2017 report, almost 800 unauthorized aliens in Florida were charged with workers' compensation fraud for using illicit Social Security numbers to obtain employment, file for workers' compensation benefits, or both.³⁶ The report noted that more than 560 unauthorized aliens did not file workers' compensation claims, but were charged with fraud. Further, the report notes that an additional 130 unauthorized aliens incurred workplace injuries but were denied benefits and prosecuted.³⁷ According to the report, at least 163 of these injured, unauthorized aliens in Florida were charged since 2004 with a felony of providing false identification after they were injured. In at least 159 cases, their employer or carrier reported them.³⁸ Further, about 80 percent of these injured workers reported between 2013 and 2016 worked for employee leasing companies.

Workers' Compensation Fraud Data

The Division of Investigative and Forensic Sciences is responsible for all law enforcement and forensic components residing within the Department of Financial Services (DFS), which includes insurance fraud investigations of employees, employers, providers, and others.³⁹ The DFS provided data concerning claimant fraud relating to employment status and identity theft of Social Security number or name.

Employment Status

Claimant fraud can include various types of insurance fraud. This may include employees who claim they are injured and unable to return to work but are able to work. Another type of workers' compensation fraud that the DFS investigates includes a person claiming a compensable injury and an inability to work in order to collect workers' compensation benefits while working for another employer without disclosing it to the carrier.

The DFS provided a recent case of an employee who claimed an inability to work and received benefits while employed elsewhere, which resulted in a successful conviction.⁴⁰ An investigation by DFS revealed that the individual knowingly failed to report that he was receiving earned income from an employer as requested on the DWC-19 forms in sections (2) and (4). At the bottom of each DWC-19 form, the fraud claim warning reads: *Any person who, knowingly and*

³⁵ ProPublica and National Public Radio reviewed 14 years of state insurance fraud data and associated court records as part of this study. See National Public Radio, *They Got Hurt At Work — Then They Got Deported*, (Aug. 16, 2017) available at <https://www.npr.org/2017/08/16/543650270/they-got-hurt-at-work-then-they-got-deported> (last viewed Feb. 18, 2018).

³⁶ National Public Radio, *Florida Lawmakers to Review Law Targeting Injured Undocumented Workers* (Aug. 9, 2017), available at <https://www.npr.org/sections/thetwo-way/2017/08/24/545688331/florida-lawmakers-to-review-law-targeting-injured-undocumented-workers> (last viewed Feb. 18, 2018).

³⁷ *Id.*

³⁸ Naples News, *Florida's disposable workers: Companies profit from undocumented laborers, dump them after injuries*, (Dec. 14, 2017) available at <https://www.naplesnews.com/story/news/special-reports/2017/12/14/floridas-disposable-workers-companies-profit-immigrants-reported-after-work-injuries-workers-comp/863286001/> (last viewed Feb. 18, 2018).

³⁹ See Division of Investigative and Forensic Sciences website available at <https://www.myfloridacfo.com/Division/DIFS/> (visited Feb. 20, 2018).

⁴⁰ DFS Case Number 15-1829. Restitution on this case was \$13,738.78 (on file with Senate Banking and Insurance Committee).

with intent to injure, defraud, or deceive any employer or employee, insurance company, or self-insured program, files a statement of claim containing any false or misleading information commits insurance fraud, punishable as provided in s. 817.234, Section 440.105(7) F.S. The employer acknowledged that he completed, signed and submitted to the forms to the carrier for submission of payment. Furthermore, copies of cancelled checks obtained from the employer and the bank records of the employer clearly indicated that he was receiving income while collecting workers' compensation indemnity benefits from the carrier from June 2014, through January 2015.

The DFS provided the following statistics on workers' compensation fraud related to employment status.⁴¹

Year	2016	2017
Arrests	47	31
Presentations for Prosecutions	71	53

Employee/Claimant Restitution Totals for Calendar Years 2016 and 2017

Calendar Year	2016	2017
Restitution Requested	\$ 4,025,455.83	\$ 2,848,289.01
Restitution Ordered	\$ 375,450.62	\$ 156,437.41
Inv. ⁴² Cost Requested	\$ 81,826.55	\$ 51,556.75
Inv. Cost Ordered	\$ 35,075.86	\$ 22,360.26

Prosecution of Identity Theft of Social Security Number or Name

The DFS⁴³ provided the following data relating to prosecutions of identity theft of Social Security number or name for FYs 2013/2014, through FY 2017/2018, year to date:

⁴¹ DFS information (Feb. 21, 2018) (on file with the Senate Banking and Insurance Committee).

⁴² Inv. is investigation cost requested.

⁴³ The Division of Investigative and Forensic Sciences is responsible for all law enforcement and forensic components residing within the Department of Financial Services, which includes insurance fraud investigations. See <https://www.myfloridacfo.com/Division/DIFS/> (last viewed Feb. 18, 2018) (on file with the Senate Banking and Insurance Committee).

SUB TYPE	FY 13/14	FY 14/15	FY 15/16	FY 16/17	FY 17/18 YTD
AGENT PREMIUM	2	0	0	0	0
BY ATTORNEY	0	0	0	0	0
BY EMPLOYEE CLAIMANT	53	46	43	31	14
BY EMPLOYER	20	12	14	8	7
BY PROVIDER	0	0	1	1	1
EMPLOYEE PAYROLL DEDUCTION	0	0	0	0	0
EMPLOYER PREMIUM	12	28	13	19	13
FICTITIOUS CERTIFICATE OF EXEMPTION	1	0	3	2	1
FICTITIOUS CERTIFICATE OF INSURANCE	11	10	14	9	6
ID THEFT OF NUMBER OR NAME	128	142	33	22	7
LEASING COMPANY	0	0	0	1	0
MONEY SERVICE BUSINESS	1	12	2	1	0
VIOLATION OF STOP WORK ORDER	40	43	27	26	16
WORKING WITHOUT COVERAGE	92	158	236	239	116
TOTAL	360	451	386	360	181

III. Effect of Proposed Changes:

Section 1 amends s. 440.09, F.S., relating to entitlement to compensation or benefits under ch. 440, F.S. The bill provides that any written or oral statements of an employee provided to an employer/carrier or others containing incomplete or inaccurate information or documentation of an employee's citizenship, residency, or other employment status may not constitute a basis for denying compensation or benefits under ch. 440, F.S.

Section 440.09(4)(a), F.S., currently provides that an employee is not entitled to compensation or benefits under ch. 440, F.S., if a judge of compensation claims, administrative law judge, court, or jury convened in this state determines that the employee has knowingly or intentionally engaged in any of the prohibited acts described in s. 440.105, F.S., or any criminal act for the purpose of securing workers' compensation benefits.

Section 2 amends s. 440.105, by repealing the prohibited act found in s. 440.105(4)(b)9., F.S., that provides that it is unlawful to present misstatements to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits. Under current law, any person who violates subsection (4)(b) commits insurance fraud.

Section 3 provides the act will take effect October 1, 2018.

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:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate. The provisions in the bill may result in fewer employees being denied workers' compensation benefits and being prosecuted and convicted of insurance fraud.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

According to the DFS, the bill limits the ability of DFS to investigate many criminal offenses relating to residency and employment status that constitute insurance fraud. These include an employee working for another employer while collecting benefits (double dipping), or an employee claiming to be unable to work but not being injured or being able to return to work.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 440.09 and 440.105.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

Banking and Insurance on February 20, 2018:

The CS provides the following changes:

- Revises conditions for compensability by providing an exception to current denial of coverage. The CS provides that any statement or documentation of an employee containing incomplete or inaccurate information or documentation of an employee's citizenship, residency, or other employment status may not constitute a basis for denying compensation or benefits.
- Eliminates provision of the bill that would require employers to comply with specified federal laws relating to immigration and employment.
- Reinstates current law providing that it is unlawful for an employer to knowingly participate in the creation of an employment relationship in which the employee has used any false, fraudulent, or misleading statement as evidence of identity.
- Eliminates current law providing that it is unlawful to knowingly present or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits.

B. Amendments:

None.