

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1305 Workers' Compensation Insurance for Employee Leasing Companies

SPONSOR(S): Insurance & Banking Subcommittee, Giallombardo and Fabricio

TIED BILLS: **IDEN./SIM. BILLS:** SB 1458

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|------------------|---------|--|
| 1) Insurance & Banking Subcommittee | 15 Y, 3 N, As CS | Rowley | Luczynski |
| 2) State Administration & Technology Appropriations Subcommittee | | | |
| 3) Commerce Committee | | | |

SUMMARY ANALYSIS

The workers' compensation law (ch. 440, F.S) requires an employer, subject to certain exceptions, to obtain coverage for its "employees" that provides for lost income and all medically necessary remedial treatment, attendance, and care, resulting from work-related injuries and occupational diseases. Employee leasing is a contractual arrangement in which a leasing company, or professional employer organization (PEO), assigns its employees to a client and allocates the direction of and control over the leased employees between the leasing company and the client. An employee leasing company is the legal employer of leased employees and is responsible for providing them with workers' compensation coverage.

The bill makes changes to workers' compensation law by providing that if an employee leasing company and a subcontractor engaged in the construction industry have a contractual arrangement, all leased and nonleased employees of the subcontractor, including any employees who are hired by the subcontractor, commence work for the subcontractor, or are hired directly by the employee leasing company, are deemed employees of the employee leasing company for purposes of workers' compensation coverage. The bill requires that before terminating a contractual arrangement with a subcontractor engaged in the construction industry, the employee leasing company must give at least 10 days' notice to the subcontractor, and if the termination is for cause, allow the subcontractor to cure any contractual defaults or deficiencies within that time frame. The employee leasing company must also send notice to the last known address of each employee of the subcontractor and all known contractors with whom the subcontractor has contracted. In addition, the employee leasing company must continue to provide workers' compensation coverage for 20 days after termination of the contractual arrangement.

The bill has no impact on state or local government revenues or expenditures. It has an unknown direct economic impact on the private sector.

The bill has an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Overview of Florida's Workers' Compensation System

Chapter 440, F.S., is Florida's workers' compensation law. It is the stated intent of the Legislature that the workers' compensation system be self-executing and for the law to be interpreted to "assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer."¹ For work-related injuries, workers' compensation provides all medically necessary remedial treatment, care, and attendance, including medications, medical supplies, durable medical equipment, and prosthetics.² It also provides compensation for disability when the injury causes an employee to miss more than seven days of work.³

Workers' compensation is the injured employee's remedy for "compensable" workplace injuries.⁴ Employees generally cannot sue a covered employer for workplace injuries.⁵ The law requires that all employers, with limited exceptions, provide workers' compensation insurance for their employees.

Whether an employer is required to have workers' compensation insurance depends upon the employer's industry and the number of employees. Employers may secure coverage by purchasing a workers' compensation insurance policy or qualifying as a self-insurer. An employer in a non-construction industry employing four or more part- or full-time employees must secure insurance.⁶ An employer engaged in the construction industry must secure workers' compensation insurance if it employs one or more part- or full-time employees.⁷ No more than three officers of a corporation or members of a limited liability company who are engaged in the construction industry may elect to be exempt from this requirement, if certain conditions are met.⁸ Corporate officers and members of a non-construction LLC can elect to be exempt from workers' compensation coverage requirements.⁹

Section 440.10, F.S., makes a contractor the "statutory employer" of its subcontractor.¹⁰ Thus, the contractor is responsible for providing workers' compensation insurance for a subcontractor's employees, unless the subcontractor has its own workers' compensation policy. While this does not relieve a subcontractor of its legal duty to provide workers' compensation insurance, it ensures that employees will have workers' compensation coverage in the event the subcontractor does not have coverage.

Employee Leasing

"Employee leasing" is a contractual arrangement in which a leasing company, or PEO, assigns its employees to a client and allocates the direction of and control over the leased employees between the leasing company and the client.¹¹ It is unlawful to operate as an employee leasing company without a

¹ S. 440.015, F.S.

² S. 440.13(2)(a), F.S.

³ S. 440.12(1), F.S.

⁴ "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.

⁵ S. 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 his or her employer in civil court for work-related injuries, even if the employer has coverage for other employees.

⁶ S. 440.02, F.S.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ S. 440.10(1)(b), F.S.

¹¹ S. 468.520(4), F.S. Temporary help arrangements are excluded from the definition of employee leasing.

license, and licensed employee leasing companies may lease employees only through contractual arrangements with client companies that satisfy certain conditions, including retaining responsibility for the management of workers' compensation claims. An employee leasing company is considered the employer of leased employees¹² and is responsible for providing them with workers' compensation coverage.¹³ According to the Office of Program Policy Analysis and Government Accountability (OPPAGA), there were 760 PEOs in the state as of March 2020 and the construction industry was the industry that used PEOs the most.¹⁴

Workers' compensation insurance requirements for employee leasing companies are set forth in s. 627.192, F.S. An employee leasing contractual arrangement generally provides that the leasing company secures workers' compensation coverage only for leased employees listed with the employee leasing company and that the client company remains responsible for coverage for all nonleased employees.¹⁵ A leasing company's insurance carrier policy typically covers only those employees of a client company that have been processed through its payroll system.¹⁶ Thus, new hires who are injured prior to being processed through payroll may not be covered by the policy.¹⁷ This can lead to problems for contractors, who are statutorily responsible for their subcontractors' employees, unless the subcontractors have other workers' compensation coverage.¹⁸

The Department of Business and Professional Regulation, through its Board of Employee Leasing Companies, licenses and regulates employee leasing companies.¹⁹ An employee leasing company may be disciplined for violating ch. 455, F.S., and ch. 468, F.S., for failing to maintain workers' compensation or misclassifying employees. The Department of Financial Services (DFS) is responsible for enforcing employer compliance with workers' compensation coverage requirements. If an employer fails to comply with those requirements, the DFS must issue a stop-work order within 72 hours of determining noncompliance.²⁰

Effect of the Bill

The bill makes changes to workers' compensation law by providing that if an employee leasing company and a subcontractor engaged in the construction industry have a contractual arrangement, all leased and nonleased employees of the subcontractor, including any employees who are hired by the subcontractor, commence work for the subcontractor, or are hired directly by the employee leasing company, are deemed employees of the employee leasing company for purposes of workers' compensation coverage. The bill requires that before terminating a contractual arrangement with a subcontractor engaged in the construction industry, the employee leasing company must give at least 10 days' notice to the subcontractor, and if the termination is for cause, allow the subcontractor to cure any contractual defaults or deficiencies within that time frame. The employee leasing company must also send notice to the last known address of each employee of the subcontractor and all known contractors with whom the subcontractor has contracted. In addition the employee leasing company must continue to provide workers' compensation coverage for 20 days after termination of the contractual arrangement.

¹² A "leased employee" is defined in s. 627.192, F.S., as "a person performing services for a lessee under an employee leasing arrangement."

¹³ S. 468.529(1), F.S.

¹⁴ OPPAGA, Report 21-04, *Review of Professional Employer Organizations and Workers' Compensation*, pp. 7-8 (Mar. 2021), <https://oppaga.fl.gov/Documents/Reports/21-04.pdf> (last visited Mar. 15, 2021).

¹⁵ *Id.* at p. 2.

¹⁶ *Id.* at p. 12.

¹⁷ *Id.*

¹⁸ See Florida United Business Association, *The Perils of PEOs for Florida's Construction Industry* (Jan. 31, 2019), <https://fuba.org/2019/01/31/the-perils-of-peos-for-floridas-construction-industry/> (last visited Mar. 14, 2021).

¹⁹ According to OPPAGA, the Board of Employee Leasing Companies "rarely finds that employee leasing companies violated workers' compensation requirements." OPPAGA, Report 21-04, *Review of Professional Employer Organizations and Workers' Compensation*, p. 4 (Mar. 2021), <https://oppaga.fl.gov/Documents/Reports/21-04.pdf> (last visited Mar. 15, 2021).

²⁰ S. 440.107, F.S.

B. SECTION DIRECTORY:

Section 1. Amends s. 440.10, F.S., relating to liability for compensation.

Section 2. Amends s. 468.525, F.S., relating to license requirements.

Section 3. Amends s. 468.529, F.S., relating to licensee's insurance; employment tax; benefit plans.

Section 4. Reenacts s. 468.532, F.S., relating to discipline.

Section 5. Provides applicability.

Section 6. Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive, indeterminate fiscal impact on contractors by reducing the costs of their workers' compensation insurance policies. The bill may have a negative, indeterminate fiscal impact on subcontractors by making it more expensive to do business with employee leasing companies/PEOs. There may be a negative, indeterminate fiscal impact on employee leasing companies/PEOs. The impact on PEOs may depend on how well they can anticipate exposure and adjust the costs of their leasing arrangements.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not provide a grant of rulemaking authority, nor does it require rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 23, 2021, the Insurance & Banking Subcommittee considered the bill, adopted one amendment, and reported the bill favorably as a committee substitute. The amendment:

- Provides that during the term of the contractual arrangement, if the client company is a subcontractor engaged in the construction industry, all leased and nonleased employees of the subcontractor, including any employees who are hired by the subcontractor, commence work for the subcontractor, or are hired directly by the employee leasing company, are deemed employees of the employee leasing company for purposes of workers' compensation coverage.
- Requires that if an employee leasing company terminates a contractual arrangement with a subcontractor engaged in the construction industry:
 - The employee leasing company must give at least 10 days' notice to the subcontractor, and if the termination is for cause, allow the subcontractor to cure any contractual defaults or deficiencies within that time frame. Notice must also be sent to the last known address of each employee and all known contractors with whom the subcontractor has contracted.
 - Workers' compensation coverage must continue to be provided by the employee leasing company for 20 days after termination of the contractual arrangement.
- Clarifies that the bill applies to contracts for leasing arrangements entered into or renewed on or after July 1, 2021.

The analysis is drafted to the committee substitute as passed by the Insurance & Banking Subcommittee.