

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 Appropriations

BILL: SB 6-B

INTRODUCER: Senator Hutson and others

SUBJECT: Florida Occupational Safety and Health State Plan

DATE: November 15, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Ravelo</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Hrdlicka</u>	<u>Sadberry</u>	<u>AP</u>	Pre-meeting

I. Summary:

SB 6-B provides legislative intent to establish a Florida Occupational Safety and Health State Plan. Currently, the federal Occupational Safety and Health Administration (OSHA) has jurisdiction over health and safety regulations for most private sector employers in this state. OSHA's authority includes a variety of administrative regulations such as overtime requirements for employees, as well as workplace safety requirements such as respiratory protection at certain construction sites.

Federal law allows for a state to assert its own regulatory state plan in lieu of the standard OSHA regulations so long as the state plan is at least as effective as OSHA and applies to public sector employees. There are 27 states plus the U.S. Virgin Islands that operate an OSHA-approved plan of some form.

The bill directs the Executive Office of the Governor to develop a proposal for a state plan and requires the office to submit a status report of its efforts to the President of the Senate and the Speaker of the House of Representatives by January 17, 2022.

The bill appropriates \$1 million to the Executive Office of the Governor from the General Revenue Fund to implement the bill.

The bill is effective upon becoming a law.

II. Present Situation:

Federal Occupational Safety & Health Administration Standards

The Occupational Safety and Health Administration (OSHA) is a regulatory agency within the United States Department of Labor. Pursuant to federal legislation signed into law in 1970, OSHA's mission is "to ensure safe and healthful working conditions for workers by setting and

enforcing standards and by providing training, outreach, education and assistance.”¹ The Occupational Safety and Health Act (OSH Act) regulates most private sector employers as well as certain public sector employers. The OSH Act applies to employees of an organization and does not apply to self-employed workers, immediate family members of farm employers, volunteers, or unpaid students.²

OSHA standards are designed to protect workers from a wide range of serious workplace hazards. Examples of these standards include requirements for employers to:

- Provide fall protection;
- Prevent trenching cave-ins;
- Prevent exposure to some infectious diseases;
- Ensure the safety of workers who enter confined spaces;
- Prevent exposure to harmful chemicals;
- Put guards on dangerous machines;
- Provide respirators or other safety equipment; and
- Provide training for certain dangerous jobs in a language and vocabulary workers can understand.³

State Run OSHA Programs

Under the OSH Act, states are generally preempted from regulating any health or safety issues governed by the federal OSHA requirements.⁴ A state may, however, submit a “state plan” to OSHA for approval to assume responsibility for the development and enforcement of regulations.⁵ Currently, 22 states have an OSHA approved state program. Additionally, five states and the U.S. Virgin Islands have OSHA approved state plans that only cover public sector employers.⁶

¹ Occupational Health and Safety Administration, United States Department of Labor, *About OSHA*, available at <https://www.osha.gov/aboutosha> (last visited Nov. 4, 2021).

² Occupational Health and Safety Administration, United States Department of Labor, *All About OSHA* at 8, available at https://www.osha.gov/sites/default/files/publications/all_about_OSHA.pdf (last visited Nov. 4, 2021). Regarding volunteers, OSHA has previously interpreted the OSH Act to exclude “volunteers, unless they are compensated in some way and would therefore be considered employees.” Occupational Health and Safety Administration, United States Department of Labor, *Standard Interpretations, OSHA does not cover volunteers, but EPA does in Hazardous Waste Operations*, Standard No. 1975.3;1910.120 (Feb. 12, 1992), available at <https://www.osha.gov/laws-regs/standardinterpretations/1992-02-12>. In a separate interpretation regarding unpaid students shadowing employees in a health care facility, OSHA found that because job shadowing “involves no payment of wage or salary to the student,” the students were not covered under OSHA regulations. Occupational Health and Safety Administration, United States Department of Labor, *Standard Interpretations, OSHA coverage does not extend to unpaid students*, Standard No. 1973.3 (Mar. 5, 1999), available at <https://www.osha.gov/laws-regs/standardinterpretations/1999-03-05>.

³ Occupational Safety and Health Administration, *supra* n. 2, at 11.

⁴ States are not, however, preempted from regulating occupational safety or health issues where no federal standard is in effect. Under 29 U.S.C. § 667(a), states are not preempted from regulations that are not covered under the OSH Act, and the courts have held that states may regulate areas where no federal standard is in effect. *Puffer’s Hardware, Inc. v. Donovan*, 742 F.2d 12, 16 (1st Cir. 1984). Section 448.05, F.S., for example, has specific requirements for employers to provide suitable seating for employees who are required to stand or walk during their active duties.

⁵ 29 U.S.C. § 667(b).

⁶ Occupational Health and Safety Administration, United States Department of Labor, *State Plans*, available at <https://www.osha.gov/stateplans/> (last visited Nov. 4, 2021).

Each state plan must include coverage of public employees of the state, and it must, at a minimum, be at least as effective as the OSHA protections included for private sector employees.⁷ If a state fails to provide protection at least as effective as the standard OSHA guidelines would, the state risks losing the authority to run the program.

Process to Develop and OSHA-Approved State Plan

Congress through the OSH Act encourages states to take actions to protect worker health and safety.⁸ Consistent with this directive, the OSH Act authorizes states to “assume responsibility for development and enforcement . . . of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . [and to] submit a State plan for the development of such standards and their enforcement.”⁹ Significantly, state plans must provide standards for worker protection that are at least as effective as OSHA standards.¹⁰ Once a state plan is approved, the federal government may grant the state up to 50 percent of the costs of the state program.¹¹ The steps for the development and approval of a state plan are summarized in the table below.

State Plan Approval Process¹²
Step 1: Developmental Plan To gain initial approval under Section 18(b) of the OSH Act, a state must assure OSHA that within three years it will have in place all the structural elements necessary for an effective occupational safety and health program. These elements include: appropriate legislation; regulations and procedures for standards setting, enforcement, and review of citations and penalties; and a sufficient number of qualified enforcement personnel.
Step 2: Certification Certification of completion of the state’s developmental steps. This renders no judgment as to actual state performance but merely attests to the structural completeness of the plan.
Step 3: Operational Status Agreement

⁷ OSHA does not have regulation authority over state and local public sector employers. However, any state run plan must include coverage of public sector employers, including public schools and local governments.

⁸ Occupational Safety and Health Administration, United States Department of Labor, State Plan Frequently Asked Questions, *What is an OSHA-Approved State Plan?*, available at <https://www.osha.gov/stateplans/faqs> (last visited Nov. 5, 2021); see 29 U.S.C. § 651(b)(11), which states:

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

....

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith[.]

⁹ 29 U.S.C. § 667.

¹⁰ 29 U.S.C. § 667(c)(2).

¹¹ 29 U.S.C. § 672(g).

¹² This table is adapted from Occupational Safety and Health Administration, U.S. Department of Labor, OSHA Instruction, *State Plan Policies and Procedures, Manual Appendix B*, Directive No. CSP 01-00-005, (effective May 6, 2020) available at https://www.osha.gov/sites/default/files/enforcement/directives/CSP_01-00-005.pdf.

At any time after initial plan approval, when it appears that the state is capable of independently enforcing standards, OSHA may enter into an “operational status agreement” with the state. This commits OSHA to suspend the exercise of discretionary federal enforcement in all or certain activities covered by the State Plan.

Step 4: Final Approval

When OSHA grants final approval to a state under Section 18 (e) of the OSH Act (29 U.S.C.A § 667), it relinquishes its authority to cover occupational safety and health matters covered by the state. After at least one year following certification, the state becomes eligible for final approval if OSHA determines that it is providing, in actual operation, worker protection “at least as effective” as the protection provided by the federal program. The state also must meet 100 percent of the established compliance staffing levels (benchmarks) and participate in OSHA’s computerized inspection data system before OSHA can grant final approval.

State Plans to Incorporate Changes to OSHA Standards

Within 6 months after a new federal standard is adopted or an existing standard is made more stringent, a state plan must generally adopt the federal standard or a standard that is at least as effective as the federal standard.¹³ However, if the new federal standard is an emergency temporary standard (ETS) a state plan must adopt a state emergency temporary standard within 30 days after the adoption of the federal standard.¹⁴ However, the adoption of the ETS is not required if the state demonstrates that it has a standard that is the same as or at least as effective as the ETS.

Withdrawal of Approval of State Plan

The U.S. Department of Labor (USDOL) may withdraw approval of a state plan or a portion of a state plan if it fails to adopt standards that are at least as effective as new or more restrictive federal standards. Before a notice of a formal proceeding to withdraw approval, the USDOL begins the process with a show-cause letter that gives a state 45 days to show cause why approval of the state plan should not be withdrawn.¹⁵ If the USDOL determines that approval of the state plan should be withdrawn, the department will publish and serve a complaint on the state for a formal proceeding, to which the state has up to 30 days to respond.¹⁶ An administrative law judge presides over a formal hearing and issues a decision.¹⁷ Within 30 days after the judge’s decision, any exceptions to the decision can be appealed to the secretary of the USDOL, who issues a final decision.¹⁸ A final decision by the secretary is final 30 days after issuance and a state may request review by a federal appellate court.¹⁹

¹³ 29 C.F.R. § 1953.5(a)(1).

¹⁴ 29 C.F.R. § 1953.5(b)(1).

¹⁵ 29 C.F.R. § 1955.10(a).

¹⁶ 29 C.F.R. §§ 1955.10 and 1955.11.

¹⁷ See 29 C.F.R. § 1955, Subparts B and E, generally.

¹⁸ 29 C.F.R. §§ 1955.41, 1955.42, and 1955.44. The administrative law judge’s decision is final if no exceptions are filed.

¹⁹ 29 U.S.C. § 667(g); 29 C.F.R. §§ 1955.44(b), 1955.45, 1955.46, and 195.47.

III. Effect of Proposed Changes:

The bill provides legislative intent to establish a Florida Occupational Safety and Health State Plan. The bill finds that a state plan will “enhance occupational safety and health in this state through the implementation and maintenance of policies, procedures, practices, rules, and standards that reduce the incidence of employee accidents, occupational diseases, and fatalities, while providing the state with the flexibility to adequately address the needs of businesses and employees in this state.” The state plan contemplated by the bill will assume responsibility for the development and enforcement of regulations under the federal Occupational Safety and Health Act.

The bill requires the Executive Office of the Governor to develop a proposal for the state plan. The office may designate or hire appropriate staff as necessary to develop the proposal, and the Department of Health, the Department of Business and Professional Regulation, and the Division of Risk Management, and the Division of Workers’ Compensation within the Department of Financial Services must assist the Executive Office of the Governor with the development of the proposal for the state plan, upon request.

The bill requires the Executive Office of the Governor to submit a status report on its development of a state plan to the President of the Senate and the Speaker of the House of Representatives by January 17, 2022. The status report must include at a minimum:

- A timeline for the completion of proposal and a timeline for completion of the state plan, including the establishment of an agency to oversee the state plan, legislation necessary to implement the state plan, and the scope of coverage to employees covered under, and excluded from, the state plan; and
- An explanation of whether additional employees, consultants, or contractors need to be hired to assist with the development of the state plan and whether additional funds need to be appropriated for that purpose.

The bill appropriates \$1 million to the Executive Office of the Governor from the General Revenue Fund for the purpose of developing a proposal for a state plan to assert state jurisdiction over occupational safety and health issues for government and private employees.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Regulations issued by the federal Occupational Safety and Health Administration which are within OSHA's authority and properly promulgated preempt state laws regulating the same matter.²⁰

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

SB 6-B requires the Executive Office of the Governor to develop a proposal for a state plan to assert state jurisdiction over occupational safety and health issues for government and private employees. The bill appropriates \$1 million from the General Revenue Fund for Fiscal Year 2021-2022 to implement the bill.

The bill also requires the following state agencies to assist in the development of a plan to assert state jurisdiction over occupation safety and health issues for government and private employees: the Department of Health, the Department of Financial Services, and the Department of Business and Professional Regulation. These agencies can likely assist using existing resources.

The bill requires the Executive Office of the Governor to provide a status report in January 2022, which will include information about the necessity of appropriation of additional resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

²⁰ See *Gade v. National Solid Wastes Management Ass'n.*, 505 U.S. 88, 99-100 (1992); *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013) (stating that “[n]o matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*”)

VIII. Statutes Affected:

This bill creates an undesignated section of Florida law.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
