

**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.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: SB 542

INTRODUCER: Senator Rodriguez

SUBJECT: Evidentiary Standards for Actions Arising During an Emergency

DATE: January 19, 2022

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>McMillian</u>	<u>McKay</u>	<u>CM</u>	<b>Favorable</b>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
3.	<u>McMillian</u>	<u>Phelps</u>	<u>RC</u>	<b>Favorable</b>

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**I. Summary:**

SB 542 creates a new statute in ch. 448, the General Labor Regulations chapter, which applies during a declared public health emergency. The bill identifies certain actions taken by a business during a declared public health emergency that may not be used as evidence against the business in a civil action to change a worker’s classification such that the individual is entitled to receive benefits that he or she would not have previously received from the business.

Specifically, the following actions may not be used as evidence against the business to establish the existence of an employer-employee relationship in certain enumerated civil causes of action:

- Providing financial assistance to previously engaged individuals who are unable to work because of health and safety concerns.
- Directly providing benefits related to the health and safety of engaged individuals, including medical or cleaning supplies, personal protective equipment, health checks, or medical testing.
- Providing training or information related to the health and safety of engaged individuals or the public.
- Taking any action, including action required or suggested by any federal, state, or local law, ordinance, order, or directive intended to protect public health and safety.

The term “engaged individual” means an individual who provides a good or service to a business or on behalf of a business and who is remunerated for the good or service, regardless of the individual’s classification as an employee or independent contractor.

The bill applies to civil actions relating to workers’ compensation, retaliatory personnel actions, state minimum wage, labor pool violations, devices used in payment for labor, and unclaimed wages. Additionally, the bill applies to civil actions to recover lost wages, salary, employment benefits, or other compensation.

The bill takes effect July 1, 2022.

## II. Present Situation:

### Public Health Emergency

In Florida, the State Health Officer is responsible for declaring public health emergencies, issuing public health advisories, and ordering isolation or quarantines.<sup>1</sup> A “public health emergency” means any occurrence, or threat of occurrence, which may result in substantial injury or harm to the public health from infectious disease, chemical agents, nuclear agents, biological toxins, or situations involving mass casualties or natural disasters.<sup>2</sup>

### Classification of Independent Contractors and Employees

When a business hires an individual, it is important that the person be correctly classified as either an independent contractor or an employee because tax and labor laws apply differently to each classification. An independent contractor is deemed to be self-employed by the Internal Revenue Service and works for herself or himself. The independent contractor is not technically employed by the business she or he serves and must pay self-employment tax.<sup>3</sup> While an employer has control over the independent contractor’s work, it does not control how the work is completed.<sup>4</sup>

For employees, a business must withhold income taxes, Social Security, and Medicare taxes<sup>5</sup> and pay certain forms of insurance coverage, such as workers’ compensation and unemployment coverage. State and federal labor laws also might require the payment of additional overtime wages and leave plans. However, and in contrast, when an individual is an independent contractor, these same tax and labor requirements do not apply because the individual is deemed to be in business for herself or himself.<sup>6</sup>

If a business misclassifies a person as an independent contractor when it should have classified the person as an employee, the miscalculation can be costly. If it is determined, either by the Internal Revenue Service or in a civil proceeding, that a worker was misclassified, the individual may receive a substantial monetary award in the form of back wages, vacation pay, overtime, sick leave, and healthcare benefits. Additionally, the Internal Revenue Service or another government agency may require the business to pay significant penalties and back taxes.<sup>7</sup>

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<sup>1</sup> Section 381.00315, F.S.

<sup>2</sup> Section 381.00315(1)(c), F.S.

<sup>3</sup> Internal Revenue Service, *Independent Contractor Defined*, (updated Oct. 14, 2021) <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined>. See also U.S. Small Business Administration, *Hire and Manage Employees*, <https://www.sba.gov/business-guide/manage-your-business/hire-manage-employees>.

<sup>4</sup> Patrick Proctor, Business News Daily, *Understanding What an Independent Contractor Is*, (updated Dec. 13, 2021). <https://www.businessnewsdaily.com/15853-independent-contractor-employee-differences.html>.

<sup>5</sup> Internal Revenue Service, *supra* note 3.

<sup>6</sup> Stephen Fishman, J.D., NOLO, *Employees vs. Independent Contractors*; <https://www.nolo.com/legal-encyclopedia/employees-vs-independent-contractors.html>.

<sup>7</sup> *Id.*

## Florida Workers' Compensation System

Each employer and employee is bound by Florida's Workers' Compensation Law.<sup>8</sup> An employer must pay compensation or furnish benefits required by the Workers' Compensation Law if an employee suffers an accidental compensable injury or death arising out of work performed in the course and scope of employment.<sup>9</sup> The injury must be established to a reasonable degree of medical certainty, based on objective relevant medical findings, and the accidental compensable injury must be the major contributing cause of any resulting injuries.<sup>10</sup> Generally, employers may secure coverage from an authorized carrier, qualify as a self-insurer,<sup>11</sup> or purchase coverage from the Workers' Compensation Joint Underwriting Association, the insurer of last resort.<sup>12</sup>

An employee has a civil cause of action against his or her employer if the employer:

- Fails to carry sufficient workers' compensation coverage;
- Deliberately intends to injure the employee; or
- Engages in conduct that he or she knows is virtually certain to result in the employee's injury or death in certain situations.<sup>13</sup>

## Retaliatory Personnel Actions

An employer may not take any retaliatory personnel action<sup>14</sup> against an employee because the employee has:

- Disclosed or threatened to disclose, to any appropriate governmental agency, under oath, in writing, any activity, policy or practice of the employer that violates a law, rule, or regulation;
- Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer; or
- Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.<sup>15</sup>

An employee who is the object of a retaliatory personnel action has a civil cause of action against his or her employer for the following relief:

- An injunction restraining a continued violation;
- The employee's reinstatement to the same position held before the retaliatory personnel action or to an equivalent position;
- Reinstatement of the employee's full fringe benefits and seniority rights;
- Compensation for lost wages, benefits, and other remuneration; and

<sup>8</sup> Sections 440.03 and 440.10, F.S.

<sup>9</sup> Section 440.09(1), F.S.

<sup>10</sup> *Id.*

<sup>11</sup> Section 440.38, F.S.

<sup>12</sup> Section 627.311(5)(a), F.S.

<sup>13</sup> Section 440.11, F.S.

<sup>14</sup> "Retaliatory personnel action" means the discharge, suspension, or demotion by an employer of an employee or any other adverse employment action taken by an employer against an employee in the terms and conditions of employment. *See* s. 448.101(5), F.S.

<sup>15</sup> Section 448.102, F.S.

- Any other compensatory damages allowable at law.<sup>16</sup>

### Minimum Wage

The Florida Constitution requires an employer to pay employees a minimum wage.<sup>17</sup> On September 30, 2021, the minimum wage increased to \$10.00 per hour, and will increase each September 30<sup>th</sup> by \$1.00 per hour until the minimum wage reaches \$15.00 per hour on September 30, 2026.<sup>18</sup> An employee not paid the minimum wage may bring a civil cause of action against his or her employer to recover the full amount of back wages unlawfully withheld, plus the same amount as liquidated damages.<sup>19</sup> An employee bringing such an action may also be entitled to legal or equitable relief, including employment reinstatement or injunctive relief.<sup>20</sup>

### Labor Pool Violations

A labor pool<sup>21</sup> must not:

- Charge a day laborer<sup>22</sup> for safety equipment, clothing, accessories, any other items required by the nature of the work, more than a reasonable amount to transport a worker to or from the designated worksite, or for directly or indirectly cashing a worker's check;<sup>23</sup>
- Request or require that any day laborer sign any document waiving statutory protections;<sup>24</sup>
- Charge more than the actual cost of providing lunch, if the labor pool provides lunch at the worksite;<sup>25</sup> or
- Restrict a day laborer's right to accept a permanent position with a third-party user to whom the laborer is referred for temporary work, or to restrict the right of such a third-party user to offer such employment to an employee of the labor pool.<sup>26</sup>

<sup>16</sup> Section 448.103(2), F.S.

<sup>17</sup> FLA. CONST. art. X, s. 24(a).

<sup>18</sup> Florida Department of Economic Opportunity, *Florida's Minimum Wage* (Updated Sep. 24, 2021)

[https://floridajobs.org/docs/default-source/business-growth-and-partnerships/for-employers/posters-and-required-notice/2021-minimum-wage/september-2021/florida-minimum-wage-september-2021-announcement.pdf?sfvrsn=c12151b0\\_4#:~:text=Effective%20September%2030%2C%202021%2C%20the,per%20hour%20in%20September%202026](https://floridajobs.org/docs/default-source/business-growth-and-partnerships/for-employers/posters-and-required-notice/2021-minimum-wage/september-2021/florida-minimum-wage-september-2021-announcement.pdf?sfvrsn=c12151b0_4#:~:text=Effective%20September%2030%2C%202021%2C%20the,per%20hour%20in%20September%202026). On September 30<sup>th</sup>, 2027 and each subsequent September 30<sup>th</sup>, the State Agency for Workforce Innovation must calculate an adjusted minimum wage rate in the manner specified in the State Constitution. See also s. 448.110, F.S.

<sup>19</sup> FLA. CONST. art. X, s. 24(e).

<sup>20</sup> *Id.*

<sup>21</sup> "Labor pool" means a business entity that operates a labor hall by one or more of the following methods: contracting with third-party users to supply day laborers on a temporary basis; hiring, employing, recruiting, or contracting with workers to fulfill these temporary labor contracts for day labor; or fulfilling any contracts for day labor in accordance with this subsection, even if the entity also conducts other business. See s. 448.22(1), F.S.

<sup>22</sup> "Day labor" means temporary labor or employment that is occasional or irregular for which the worker is employed for not longer than the time period required to complete the temporary assignment for which the individual worker was hired, although an individual may be eligible for additional temporary assignments when available. See s. 448.22(2), F.S.

<sup>23</sup> Section 448.24(1), F.S.

<sup>24</sup> Section 448.24(3), F.S.

<sup>25</sup> Section 448.24(4), F.S.

<sup>26</sup> Section 448.24(6), F.S.

A labor pool must:

- Provide restroom facilities, drinking water, and sufficient seating for a worker waiting at the labor hall for a job assignment;<sup>27</sup>
- Select cash, commonly accepted negotiable instruments that are payable in cash, a payroll debit card, or an electronic fund transfer, to pay a day laborer for work performed;<sup>28</sup>
- Notify a day laborer of the payment method that the labor pool intends to use and the day laborer's options to elect a different payment method;<sup>29</sup>
- If selecting to pay a day laborer by payroll debit card, offer the day laborer the option to elect payment by electronic fund transfer and provide the day laborer with a list, including the address, of a nearby business that does not charge a fee to withdraw the debit card's contents;<sup>30</sup>
- Compensate day laborers at or above the minimum wage;<sup>31</sup>
- Comply with the requirements of workers' compensation;<sup>32</sup>
- Insure any motor vehicle owned or operated by the labor pool and used for worker transportation;<sup>33</sup>
- Furnish each worker with a written itemized statement showing in detail each wage deduction;<sup>34</sup> and
- Give each worker an annual earnings statement summary.<sup>35</sup>

Any worker harmed by a labor pool violation may bring a civil action against the labor pool to recover actual and consequential damages, or \$1,000, whichever is greater, for each violation.<sup>36</sup>

### **Devices Issued in Payment for Labor**

Any order, check, draft, note, memorandum, payroll debit card, or other acknowledgement of indebtedness for wages due must be negotiable and payable in cash, on demand, without discount, at some established place of business in Florida.<sup>37</sup>

Any person issuing a coupon, punch-out, ticket, tokens, or other device in lieu of cash as payment for labor is:

- Liable for the full face value thereof in current legal tender on or after the 30th day after the date of issuance;
- Liable for payment in legal tender; and

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<sup>27</sup> Section 448.24(5), F.S.

<sup>28</sup> Section 448.24(2), F.S.

<sup>29</sup> Section 448.24(2)(b), F.S.

<sup>30</sup> Section 448.24(2)(c), F.S.

<sup>31</sup> Section 448.24(2)(d), F.S.

<sup>32</sup> Section 448.24(2)(e), F.S.

<sup>33</sup> Section 448.24(2)(f), F.S.

<sup>34</sup> Section 448.24(2)(g), F.S.

<sup>35</sup> Section 448.24(2)(h), F.S.

<sup>36</sup> Section 448.25, F.S.

<sup>37</sup> The business's name and address must appear on the instrument or in the payroll debit card issuing materials. At the time of its issuance, and for at least 30 days thereafter, the maker or drawer must have sufficient funds or credit, arrangement, or understanding with the drawee for its payment. *See* s. 532.01, F.S.

- Subject to suit brought in any court of competent jurisdiction.<sup>38</sup>

Additionally, an employer may not terminate an employee solely for refusing to authorize the direct deposit of wages.<sup>39</sup> An employee may bring a civil action against an employer for equitable relief.<sup>40</sup>

### **Unclaimed Wages**

Unpaid wages owing in the ordinary course of the holder's business that have not been claimed by the owner for more than 1 year after becoming payable are presumed unclaimed.<sup>41</sup> Every holder of unclaimed wages must report the unclaimed wages to the Department of Financial Services (DFS) before May 1 of each year and must simultaneously pay to DFS all unclaimed wages required to be reported.<sup>42</sup> Employers violating these requirements face penalties imposed by DFS.<sup>43</sup>

### **III. Effect of Proposed Changes:**

The bill creates s. 448.111, F.S., which identifies actions taken by a business during a declared public health emergency that may not be used as evidence against the business in a civil action to change a worker's classification such that the individual is entitled to receive benefits that he or she did not previously receive .

When a public health emergency is declared by the State Health Officer, the following actions taken by a business may not be used as evidence against the business to establish the existence of an employer-employee relationship in specified civil causes of action:

- Providing financial assistance to previously engaged individuals who are unable to work because of health and safety concerns.
- Directly providing benefits related to the health and safety of engaged individuals, including medical or cleaning supplies, personal protective equipment, health checks, or medical testing.
- Providing training or information related to the health and safety of engaged individuals or the public.
- Taking any action, including action required or suggested by any federal, state, or local law, ordinance, order, or directive intended to protect public health and safety.

The bill defines the term "engaged individual" to mean an individual who provides a good or service to a business or on behalf of a business and who is remunerated for the good or service, regardless of the individual's classification as an employee or independent contractor.

<sup>38</sup> The legal holder's recovery must include the full face value of the device, with legal interest from the date of demand. *See* s. 532.02, F.S.

<sup>39</sup> Section 532.04(2), F.S.

<sup>40</sup> Section 532.04(3), F.S.

<sup>41</sup> Section 717.115, F.S.

<sup>42</sup> Sections 717.117 and 717.119, F.S.

<sup>43</sup> *Id.*; Ch. 69I-20, F.A.C.

The bill applies to civil actions relating to workers' compensation, retaliatory personnel actions, state minimum wage, labor pool violations, devices used in payment for labor, and unclaimed wages. Additionally, the bill applies to civil actions to recover lost wages, salary, employment benefits, or other compensation.

The bill takes effect July 1, 2022.

#### **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:

None identified.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

SB 542 provides that specified actions taken by a business during a public health emergency may not be used as evidence against the business to establish the existence of an employer-employee relationship in specified civil causes of action. Thus, the bill potentially protects businesses from being categorized as a plaintiff's employer if the categorization is based exclusively on the specified actions taken by a business during a public health emergency.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

The bill creates section 448.111 of the Florida Statutes.

**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.