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SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 8, 1998 Revised: \_\_\_\_\_

Subject: Workers' Compensation Compliance and Fraud

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable/CS</u>
2.	<u>Sadberry</u>	<u>Smith</u>	<u>WM</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

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**I. Summary:**

The CS/CS/SB 1406 authorizes the Division of Workers' Compensation (Department of Labor and Employment Security) to enter any place of business and inspect records to ascertain employer compliance with the workers' compensation coverage requirements under chapter 440, F.S. Employers would be required to keep true and accurate records, to maintain such records within this state and make them available for review by the division. The enforcement powers of the division would be broadened to include subpoena authority to compel the attendance of witnesses and production of records.

The division would be authorized to disapprove or revoke the certificate of exemption of a sole proprietor, partner or corporate officer if such exemption is based on invalid information. The bill provides that sole proprietors, partners, and corporate officers in the construction industry who file notices of election to be exempt from workers' compensation coverage requirements would have to file such notices every 2 years. The fees for filing notices would be a mandatory \$50 fee. Persons not involved in the construction industry who file notices of election to be exempt and persons filing notices to be included for workers' compensation coverage would not be affected by the fee provisions of this bill. Certain documentation is required to be submitted with the exemption notice to the division by the person seeking the exemption and the bill provides that knowingly making false statements on an exemption notice is a third-degree felony and mandates a warning on every exemption notice to this effect.

The bill clarifies that independent contractors do not need to obtain a certificate of exemption from the division and, accordingly, revises the documentation that must be presented to a general contractor in order for an individual to be deemed an independent contractor, including a sworn affidavit and proof of insurance on any employees. Independent contractors may provide the

sworn affidavit as proof sufficient to receive a building permit. Additionally, carriers are required to accept the sufficiency of such sworn affidavits from independent contractors for coverage purposes. The bill provides that effective July 1, 1998, the division must notify affected persons of the requirements of certain provisions of the bill.

The bill increases the liquidated damages awarded to a prevailing plaintiff who loses a bid on a construction contract to a person who knew or should have known that he/she violated certain workers' compensation requirements. The words "minimum premium policy" or the equivalent thereof must be placed on insurance policies.

The bill revises penalties for various offenses relating to workers' compensation fraud depending on the value of the money or property involved in the offense. If the amount is less than \$20,000, the current third-degree felony penalties would apply. If the amount is \$20,000 or more, but less than \$100,000, the offense would be a second-degree felony. If the amount is \$100,000 or more, the offense would be a first-degree felony. The statute of limitations provision, currently 3 years, would be lengthened to 5 years.

The bill clarifies that a judge of compensation claims and an administrative law judge may deny workers' compensation benefits if the employee has intentionally committed fraud.

The bill provides for the expiration of the term of office for members of the Statewide Nominating Commission which nominates persons to the Governor for appointment as Judges of Compensation Claims, as well as staggered terms for new appointments. The bill bifurcates the nomination process of judges by requiring that the nominating commission first determine if a current judge's performance is satisfactory, then, if the Governor does not reappoint the judge, the commission would submit a list of three nominees. The bill also revises the term of office, qualifications, and method of nomination for the Chief Judge of the Office of the Judges of Compensation Claims.

The bill provides for an appropriation of \$1.1 million from the Workers' Compensation Administration Trust Fund and 15 FTE's to the Department of Labor and Employment Security to carry out the provisions of the act which is to be effective July 1, 1998. The bill's effective date is January 1, 1999, except that effective July 1, 1998, the Division of Workers' Compensation must begin notifying persons with construction exemptions of the requirements as to refiling for an exemption.

This bill amends the following sections of the Florida Statutes: 440.02, 440.05, 440.09, 440.10, 440.103, 440.104, 440.105, 440.107, 440.45, and 627.413.

## **II. Present Situation:**

Under chapter 440, F.S., the Division of Workers' Compensation is charged with ensuring that employers comply with the mandate of providing workers' compensation insurance coverage for both themselves and their employees and with sanctioning those employers who do not obtain

such coverage. Under s. 440.107, F.S., the division's arsenal of enforcement tools range from assessing monetary penalties and issuing stop-work orders to obtaining court injunctions. Division investigators visit job sites to determine compliance with the law and often must review work or business records. However, express statutory authority to enter and inspect workplaces, to obtain and copy work records, and to issue subpoenas is not currently provided. Prior to 1993, the specific authority to enter and inspect workplaces was an enumerated power of the division, but that provision was transferred to the safety division under s. 442.006, F.S., during the 1993 Workers' Compensation Special Session.

The present law provides third-degree felony penalties (up to 5 years in prison and a fine of up to \$5,000) for various offenses relating to false or fraudulent workers' compensation insurance claims or applications and for certain solicitations of injured persons. The general felony statute of limitations provides that prosecution must be commenced within 4 years after the commission of a first-degree felony and within 3 years after commission of any other felony.

Currently, exemption from chapter 440, F.S., is automatically conferred upon non-construction sole proprietors and partners. Non-construction corporate officers, and construction sole proprietors, partners and corporate officers are eligible for exempt status, but must affirmatively apply for exemption. Any individual who meets the definition of an *independent contractor* in s. 440.02, F.S., is deemed not to be an employee and is not covered by workers' compensation. It is not required that an independent contractor file for an exemption from the division. However, this issue has been confused due to s. 440.10(1)(g) F.S., which provides that a person is conclusively presumed to be an independent contractor if he or she provides the general contractor with: (1) an affidavit stating that he or she meets all the requirements of the statutory definition of independent contractor and, (2) provides either a valid certificate of exemption issued by the division or a valid certificate of workers' compensation insurance. The division does not currently have the authority to approve or revoke certificates of those persons who elect to be exempt from workers' compensation coverage.

In July 1997, the Workers' Compensation Oversight Board issued a report entitled "Recommendations and Report of the Fraud and Noncompliance Committee" which was issued after reviewing various compliance issues involving the division. The report stated that "noncompliance with (workers' compensation) coverage requirements is closely linked with fraudulent activity" by employers and that the division was too lenient in its imposition of civil penalties against employers. It further found that "exemptions are still improperly or fraudulently used to excuse employers from providing workers' compensation coverage." The report concluded that certain changes were necessary to strengthen the enforcement arm of the division and recommended specific legislative changes including: increasing the criminal penalties for workers' compensation insurance fraud as the economic value of the fraud increased; providing greater authority for the division to enter, inspect and copy business records as well as to issue subpoenas to witnesses; and, providing authority for the division to approve or revoke certificates of exemption where such exemptions are based on invalid information. In February of this year, the Statewide Grand Jury issued its report after reviewing many of the same matters addressed in the Oversight Report and made similar recommendations.

Section 440.104, was enacted in 1993 as a means for the construction industry to monitor itself in the context of competitive bidding. Under this provision, a person (plaintiff) who loses a competitive bid for a contract may sue to recover damages from the winning bidder if he/she can show that the winning bidder knowingly violated certain workers' compensation provisions while performing work under contract. Liquidated damages of 10 percent of the total amount bid by the plaintiff may be awarded to the prevailing plaintiff or \$5,000, whichever is greater. Proponents of the bill argue that the "knowingly" standard is too difficult to overcome and that the amount of damages is not sufficient.

*Office of the Judges of Compensation Claims* -- Pursuant to s. 440.45, F.S., a worker may request a hearing before a judge of compensation claims for any workers' compensation claim for benefits denied by an employer or insurance carrier. The Office of the Judges of Compensation Claims is organizationally located within the Department of Labor and Employment Security and headed by a Chief Judge, who serves at the pleasure of the Governor and Cabinet. The Chief Judge is appointed by the Governor and confirmed by the Cabinet from a list of two names submitted by each of the District Court Judicial Nominating Commission.

In order to be nominated or appointed as a judge of compensation claims (JCC), a person must have been admitted to the Florida Bar for at least 5 years and knowledgeable in the law of workers' compensation. JCCs are appointed for a term of 4 years. A minimum of three nominations are submitted to the Governor for appointment by the Statewide Nominating Commission (commission). A JCC may be removed for cause by the Governor or may not be recommended for reappointment by the commission.

The commission is composed of 15 members. The Florida Bar appoints five members, the Governor appoints five members, and these 10 members elect five additional members. At least three members must be a member of a minority group, as defined in s. 288.703(3), F.S. Members shall reside in each of the territorial jurisdictions of the district courts of appeal.

Prior to the expiration of a judge's term of office, the commission reviews the judge's conduct. Included in the evaluation are questions relating to timeliness of decisions, diligence, availability, and other criteria. The commission is required to report its findings to the Governor no later than 6 months prior to the expiration of the judge's term. The report of the commission is required to include a list of three candidates for appointment. The report may include the judge, whose term is expiring, if the judge desires reappointment and the commission has deemed that the judge's performance was satisfactory. A current problem that has been raised is the reluctance of potential candidates to seek appointment when they may be practicing before a sitting JCC.

If a vacancy occurs during a judge's unexpired term, the commission shall issue a report to the Governor which includes a list of three candidates. The Governor may select one of the three. However, if no candidate is selected, the Governor is required to notify the commission and the commission shall submit a list of three more candidates.

### III. Effect of Proposed Changes:

**Section 1.** Amends s. 440.02, F.S., to define corporate officer, partner and sole proprietor as follows:

- (1) *Corporate officer* means any person who fills an office provided for in the corporate charter or articles of incorporation filed with the Division of Corporations with the Department of State or as required by ch. 607, F.S. (corporation law).
- (2) *Partner* is limited to general partner status and means any person who is a member of a partnership which is formed by two or more persons to carry on as co-owners of a business with the understanding that there will be a proportional sharing of the profits and losses between them. For the purposes of ch. 440, F.S., a partner is a person who participates fully in the management of the partnership and who is personally liable for its debts. Therefore, a limited partner actively engaged in the construction industry would not be eligible for an exemption. (Section 440.02(13)(c), F.S., currently provides that partners or sole proprietors actively engaged in the construction industry are considered employees unless they elect to be exempt.)
- (3) Sole proprietor means any natural person who owns a form of business in which that person owns all the assets of the business and is solely liable for all the debts of the business.

**Section 2.** Amends s. 440.05, F.S., to require the following:

- (1) Certain documentation must be submitted to the Division of Workers' Compensation by the sole proprietor, partner and corporate officer seeking to be exempt from ch. 440, F.S., coverage requirements, i.e., registration number of corporation or partnership filed with Division of Corporations, occupational license, and IRS documentation as specified by the division. Current law already requires information as to social security number, federal tax identification number, and licenses pursuant to ch. 489 and that the exemption form be notarized and under oath.
- (2) The division may disapprove or revoke the notices of election to be exempt for sole proprietors, partners or corporate officers if the information contained in the notice is invalid or does not meet the requirements for exemption.
- (3) Requires an anti-fraud declaration to be contained within the notice of election to be exempt from workers' compensation requirements specifying that it is a third degree felony for any person to intentionally file a notice to the division containing any false information. Each person must sign the notice and attest that they have reviewed, understand, and acknowledge the notice. (See Section 7, below, which specifies that this act is a felony.)
- (4) Specifies that persons who receive construction industry certificates of election to be exempt be renewed every 2 years and provides that any person who has received a construction industry exemption certificate from the division which is in effect on December 31, 1998, must file for their new notice of election to be exempt by the last day of their birth month following December 31, 1998. The fees for construction industry sole proprietors, partners, and corporate officers electing to be exempt from workers' compensation coverage requirements are established at a mandatory \$50 fee (currently the division assesses a \$25

fee). The fee for those persons electing to be included within the coverage requirements and for persons not in construction see to be exempt is not changed under this bill (currently the division does not assess a fee although they have authority to do so up to \$50).

**Section 3.** Amends s. 440.09, F.S., to provide that a judge of compensation claims and an administrative law judge may deny workers' compensation benefits if the employee has intentionally committed fraud. This is a technical correction to current law that only refers to administrative hearing officers, courts, and juries.

**Section 4.** Amends s. 440.10, F.S., to revise the documentation that must be presented to a general contractor in order for an individual to be conclusively presumed to be an independent contractor. The bill deletes the requirement for providing a valid certificate of exemption by the independent contractor and instead requires a person claiming to be an independent contractor to provide the general contractor with a sworn affidavit attesting under penalty of perjury, that he/she meets all the requirements of the statutory definition (under s. 440.02(14)(d)) of an independent contractor. Violation of such a perjury provision is a first degree misdemeanor. The bill clarifies that the independent contractor must provide the general contractor with a valid certificate of workers' compensation insurance covering each employee of the independent contractor. The bill further specifies that independent contractors who provide the sworn affidavit may not recover benefits or compensation under the workers' compensation law. This section addresses the inconsistency in the current law by clarifying that independent contractors are not required to file notices of election to be exempt because any individual who meets the definition of an independent contractor in s. 440.02, F.S., is not an employee and, therefore, is not covered by workers' compensation.

The bill provides that carriers must recognize the sufficiency of the sworn affidavit provided by the independent contractor under this section and may not consider any such person as an employee in determining the appropriate premium for workers' compensation coverage.

**Section 5.** Amends s. 440.103, F.S., to provide that an independent contractor may, as a condition to receiving a building permit, present a sworn affidavit attesting he/she meets the definition of an independent contractor for workers' compensation purposes. This section also inserts a reference to s. 627.413, F.S., to require that the insurance carrier ensure that "minimum premium policies" are identified as such on the certificates of coverage.

**Section 6.** Amends s. 440.104, F.S., to change the requirement that a plaintiff who loses a bid on a construction contract must prove a knowing violation of provisions of the workers' compensation law. The bill provides that a plaintiff may prevail if it is shown that the winning bidder knew or should have known of a violation of s. 440.10, s. 440.105, or s. 440.38, while performing work under contract. Additionally, this section increases the liquidated damages awarded to a prevailing plaintiff to 30 percent of the total amount bid (currently 10 percent) on the contract by the plaintiff or \$15,000 (currently \$5,000), whichever is greater.

**Section 7.** Amends s. 440.105, F.S., to revise the penalties for various offenses relating to workers' compensation fraud depending on the value of the money or property involved in the offense. If the amount is less than \$20,000, the current third-degree felony penalties would apply. If the amount is \$20,000 or more, but less than \$100,000, the offense would be a second-degree felony. If the amount is \$100,000 or more, the offense would be a first-degree felony. The statute of limitations provision, currently 3 years, would be lengthened to 5 years. The bill would provide a 5-year statute of limitations for violations of s. 440.105(4), F.S., rather than the general 3-year and 4-year statutes of limitations applicable to most felonies. The statute of limitations would be tolled, i.e., suspended for up to an additional year while the defendant is outside of the state, and would also be tolled for the duration of a proceeding to punish, prevent, or restrain violations of s. 440.105(4), F.S., and for 2 years thereafter if that prosecution is based on the same matters as the prosecution of the defendant.

The bill makes it a third degree felony to knowingly present to any person a false, fraudulent, or misleading oral or written statement as evidence of eligibility for a certificate of exemption under s. 440.05, F.S. (As required by Section 2 of the bill, above, notices of election to be exempt must contain a warning that such false statements are a felony.)

**Section 8.** Amends s. 440.107, F.S., to provide legislative intent language and provide explicit authority for the division to enter and inspect businesses at reasonable times and for the limited purpose of investigating employer compliance with the provisions of ch. 440, F.S. It requires that business records kept by an employer be true, accurate, and contain information as the division may prescribe by rule, as necessary for the division to determine compliance with workers' compensation coverage requirements. It requires such records to be maintained within this state by the business and be accessible within a reasonable time upon request by the division and open for inspection and available for copying by the division. The bill authorizes the division to subpoena witnesses and business documents and provides that refusal to obey a subpoena would subject the person to be held in contempt, subject to a court determination.

**Section 9.** Amends s. 440.45, F.S., relating to the Office of the Judges of Compensation Claims, to revise the term of office and procedures for nomination and appointment. The Chief Judge would be appointed by the Governor for a term of 4 years from a list of three names submitted by the Statewide Nominating Commission (commission). The Chief Judge is required to possess the same qualifications for appointment as a judge of compensation claims, and the procedures for reappointment of the Chief Judge would be the same as for a judge of compensation claims.

The term of office of each member of the commission would be staggered. On July 1, 1999, the term of office of members appointed by the Board of Governors of the Florida Bar expires. The Board would be required to appoint members who reside in the odd-numbered district court of appeals jurisdictions to 4-year terms each, beginning July 1, 1999, and members who reside in even-numbered district court of appeals jurisdictions would be appointed to 2-year terms each, beginning July 1, 1999. Subsequently, each member would be appointed to a 4-year term. On July 1, 1999, the term of office of members appointed by the Governor expires. The Governor would

be required to appoint members who reside in the odd-numbered district court of appeals jurisdictions to 2-year terms each, beginning July 1, 1999, and members who reside in even-numbered district court of appeals jurisdictions would be appointed to 4-year terms each, beginning July 1, 1999.

On October 1, 1999, the term of office of each person appointed to the commission by the other members expires. A majority of the other members of the commission would appoint members who reside in odd-numbered district court of appeal jurisdictions to 2-year terms each, beginning October 1, 1999. Members who reside in the even-numbered district court of appeals jurisdiction would be appointed to 4-year terms each, beginning October 1, 1999. Subsequently, each member would be appointed for a 4-year term. Any vacancy on the commission would be filled by the original appointing authority for the unexpired balance of the term.

In addition to being a member of the Florida Bar in good standing for the previous 5 years, an individual would be required to be knowledgeable in the practice of law of workers' compensation, in order to be considered for nomination as a judge of compensation claims.

Prior to the expiration of a judge's term, the commission would review the judge's performance to determine if it was satisfactory. The commission shall report its findings to the Governor. The Governor may reappoint the judge for an additional 4-year term. If the Governor does not reappoint the judge, the Governor would inform the commission and the judge would remain in office until the Governor had appointed a successor judge from a list of three nominations submitted by the commission.

In the event a vacancy occurs during a judge's unexpired term, the commission does not find a judge's performance satisfactory, or the Governor does not reappoint the judge, the Governor would appoint a successor judge for a term of 4 years from the list of three nominations submitted by the commission.

**Section 10.** Provides that the term of the Chief Judge of Compensation Claims expires on July 1, 1999. The commission is directed to submit a list of three names to the Governor, pursuant to s. 440.45(1), F.S., by March 1, 1999.

**Section 11.** Provides that the revised nomination and appointment process for judges of compensation claims is effective July 1, 1999.

**Section 12.** Provides that any member of the judicial nominating commission whose term of office expires as a result of the amendment to s. 440.45, F.S., is eligible for reappointment. This would apply to the members appointed by the Board of Governors of the Florida Bar, the Governor, and the members selected by appointees of the Florida Bar and the Governor.

**Section 13.** Amends s. 627.413, F.S., to require insurers to include on the certificate of coverage of any minimum premium policy, the words "minimum premium policy" or equivalent language.

This section provides that the Department of Insurance may impose an administrative fine if it finds a violation of this subsection.

**Section 14.** Provides that effective July 1, 1998, the Division of Workers' Compensation shall notify all persons holding a construction industry certificate of election of exemption of the requirements of s. 440.05, F.S., as amended by this act.

**Section 15.** Provides for an appropriation to the Department of Labor and Employment Security of \$1.1 million from the Workers' Compensation Administrative Trust Fund for FY 1998-1999 and for 15 positions to enforce the provisions of this act. This provision will take effect July 1, 1998.

**Section 16.** Effective date of January 1, 1999.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

A companion bill, CS/SB 1408, exempts from disclosure under the Public Records Law information from employer work records which reveals the identity of the employer or of any individual relating to such records which are obtained by the division pursuant to its administration of chapter 440, F.S.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

The fee for filing a construction industry notice of election to be exempt from workers' compensation coverage requirements would be a mandatory \$50, which currently is set at \$25, but may be up to \$50. This fee must be paid every 2 years (rather than a one-time fee) and would be limited to construction industry sole proprietors, partners and corporate officers who seek the exemption. Those persons who are not in construction who file an election to be exempt or persons who elect to be covered under workers' compensation requirements are not covered by the provisions of this bill and currently do not pay a fee, although the division has fee assessment authority of up to \$50.

**B. Private Sector Impact:**

Persons who commit workers' compensation fraud will be subject to harsher penalties depending on the value of the money or property involved in the offense. Persons who file construction industry notices of election to be exempt will be subject to the increased exemption fee, described above, and having their work records reviewed by the division. Filing fraudulent notices will subject those persons to criminal prosecution. The effect of providing greater enforcement authority will likely increase the premiums coming into the Workers' Compensation Administration Trust Fund, but it is difficult to determine the exact amount of such revenue.

**C. Government Sector Impact:**

Providing greater enforcement authority and authorizing the division to approve and revoke exemptions will result in increased costs to fund the operation of the division. The division estimates it will need \$1,100,000 to fund 15 new FTE's to implement the bill's provisions which are appropriated from the Workers' Compensation Administrative Trust Fund. Additional revenue to offset these costs will be generated by the increase in fees due to construction industry sole proprietors, partners and corporate officers filing notices of election to be exempt. The revenue generated by the fee is estimated by the division to be \$12.4 million for FY 1998-1999.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.