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DATE: May 28, 1998

****FINAL ACTION****
****SEE FINAL ACTION STATUS SECTION****

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
FINANCIAL SERVICES
FINAL BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL # CS/CS/SB 1406, 1st Engrossed
RELATING TO Workers' Compensation
SPONSOR(S): Senate Committees on Ways & Means, Banking & Insurance & Senator Clary
COMPANION BILL(S): HB 4523

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE

- (1) BANKING & INSURANCE YEAS 8 NAYS 0
- (2) WAYS & MEANS YEAS 29 NAYS 0
- (3)
- (4)
- (5)

I FINAL ACTION STATUS

On April 28, 1998, the House took up CS/CS/SB 1406, amended it with the revised substance of HB 4523, and passed CS/CS/SB 1406, as amended, by a vote of 118-0. On April 30, 1998, the Senate concurred and passed CS/CS/SB 1406, as amended by the House, by a vote of 40-0. It was approved by the Governor on May 22, 1998. Chapter 98-174, Laws of Florida.

II SUMMARY:

Within the last year, reports by the Workers' Compensation Oversight Board and the Fourteenth Statewide Grand Jury have prompted the insurance industry, governmental entities, and employers to focus considerable attention on the related issues of workers' compensation fraud and noncompliance. The bill changes to Florida law as follows.

- Defines the terms "corporate officer," "partner," and "sole proprietor,"
- Requires local government authorities to confirm compliance with workers' compensation coverage requirements as a condition to issuing each building permit,
- Modifies the requirements for elections of exemption from workers' compensation in the construction industry and gives the Division of Workers' Compensation the authority to revoke exemptions,
- Provides Judges of Compensation Claims the authority to deny benefits when finding workers' compensation fraud,
- Requires insurers to identify minimum premium policies and notify the Division of Workers' Compensation whenever a minimum premium policy is issued,
- Increases criminal penalties and statute of limitations for workers' compensation fraud,
- Modifies the burden in competitive bidder civil actions;
- Increases insurers' access to employer wage and payroll data,
- Modifies the requirements relating to the nomination of Judges of Compensation Claims,
- Requires a joint performance report from the Division of Insurance Fraud and the Division of Workers' Compensation

This bill provides for an appropriation of \$1,100,000 and 15 FTEs from the Workers' Compensation Administration Trust Fund to the Department of Labor, Division of Workers' Compensation

III. SUBSTANTIVE RESEARCH:

A PRESENT SITUATION

Within the last year, reports by the Workers' Compensation Oversight Board and the Fourteenth Statewide Grand Jury have prompted the insurance industry, governmental entities, and employers to focus considerable attention on the related problems of workers' compensation fraud and noncompliance.

Under chapter 440, employers are required to provide workers' compensation coverage for their employees. Employers secure workers' compensation coverage either by purchasing insurance or meeting the requirements to self-insure. An employer's failure to obtain the appropriate coverage for their employees is a civil violation of the coverage requirements, and, if the employer's conduct is knowing or intentional, may be criminal fraud as well.

Workers' compensation fraud is most frequently associated with efforts to obtain undeserved benefits or payments related to a claim, or efforts to unjustly reduce premiums for a policy. Workers' compensation fraud is but one of several forms of insurance fraud, but one which presents a particular challenge to enforcement officials because of the variety of conduct and schemes it encompasses. This type of fraud impacts the premiums employers pay, and carries negative consequences for insurer revenues, and insurer solvency.

According to the Department of Insurance, as illustrated in Table 1, workers' compensation insurance fraud is costing the industry hundreds of millions of dollars each year.

Table 1. Estimated Annual Losses in Florida From Insurance Fraud	
Description	Estimated Annual Losses
Total Workers' Compensation	\$500 million
- Claimant Fraud	\$100 million
- Other Fraud, including Premium Fraud	\$400 million

Source: Division of Insurance Fraud, Department of Insurance

Workers' compensation fraud encompasses conduct by individuals who participate in the system in a variety of capacities. The law addresses conduct by any of these participants which involves knowing intent to defraud the system in s. 440.105, F.S.

Claimant Fraud

Claimant fraud occurs when an injured employee or allegedly injured employee provides false information to, or conceals information from, the insurance carrier in order to obtain or retain workers' compensation benefits. The most prevalent form of claimant fraud involves claimants who conceal work activity while receiving benefits. According to estimates by the Department of Insurance, claimant fraud conduct accounted for as

much as \$100 million in losses to the workers' compensation system in 1994, and consumed the attention of 19 of 24 workers' compensation fraud investigators in the Department of Insurance.

Premium Fraud

Employer-related premium fraud involves the falsification of policy-related information by the employer or its agent. It can take the form of: (i) concealing payroll dollars, (ii) misclassifying the risk status of positions on the payroll, and (iii) falsifying insurance status when coverage is not obtained, which may include producing false insurance certificates.

Premium fraud can also occur when an insurer or its agent acts in collusion with an employer, or solicits employers to misrepresent premium-related information. The conduct can include: (i) understatement of claims/loss experience as reported by the employer; (ii) understatement of payroll, or (iii) offering coverage under unapproved policy forms.

Fraud Versus Noncompliance

In sifting out employer-related premium fraud, investigators must evaluate an employer's culpability through two different avenues: compliance or fraud. An employer's failure to obtain workers' compensation coverage does not alone reflect an intent to evade the law (e.g., the employer could be ignorant of the coverage requirements). In this instance the compliance enforcement process is invoked. The conduct does not constitute fraud, and is not a criminal violation.

Before an employer's conduct can be classified as fraud, state law requires proof that the employer knowingly or intentionally failed to obtain coverage. For prosecutors to establish probable cause to prosecute, they must show conduct by an employer or its agent, beyond the simple failure to obtain coverage, which reflects knowing intent to defraud an insurer. This is a "fraudulent insurance act" as defined in s. 626.989, F.S.

Investigation and enforcement of compliance with the workers' compensation coverage requirements is reported to be very difficult, especially in the construction industry where an employer's workforce can change from one week to the next depending on the size of a job. Moreover, preventing abuses in the exemption process likewise is equally challenging since the status of a person as an independent contractor or employee can change depending on the type of work being done. Lastly, conduct surrounding workers' compensation fraud is frequently committed in stealth, which makes its detection and prosecution particularly challenging.

The following agencies play a key role in the oversight and enforcement of workers' compensation compliance and fraud:

- the Department of Labor and Employment Security (DLES), Division of Workers' Compensation,
- the Department of Insurance (DOI), Division of Insurance Fraud;
- the Office of the Statewide Prosecutor,

- the various Offices of States Attorneys in the state's judicial circuits; and
- local government authorities through building permit departments

In addition, insurers support anti-fraud efforts through the creation of special investigative units or anti-fraud plans

DLES, Division of Workers' Compensation

The Division of Workers' Compensation is responsible for monitoring and enforcing employer compliance with workers' compensation coverage requirements. The Bureau of Compliance within the Division of Workers' Compensation employs 39 investigators who are responsible for conducting compliance investigations. The Division of Workers' Compensation is also responsible, through its Bureau of Monitoring and Auditing, for conducting audits of insurance carriers to ensure that they are making timely payments of benefits under chapter 440. However, the Division of Workers' Compensation does not audit insurance carriers for the purpose of determining appropriate levels of workers' compensation coverage.

The Division of Workers' Compensation is also a repository of a variety of information relating to the workers' compensation system. For instance, insurance carriers are required to file with the Division of Workers' Compensation injury reports received by employees, information on every policy issued, and notices of cancellation. Moreover, employees are required to file with the Division of Workers' Compensation applications for election of exemption from coverage, which lists all of the employers for which an exemption is elected.

If the Division of Workers' Compensation determines that an employer is not in compliance, the law permits the Division to

- issue warnings or negotiate settlements,
- impose administrative sanctions such as stop-work orders, or financial penalties of either twice the premium amount the employer would have paid during the uncovered period for up to three years, or \$1,000, whichever is greater,
- seek judicial assistance through a circuit court injunction

The Division of Workers' Compensation is only granted civil enforcement authority with respect to compliance. Therefore, if the Division of Workers' Compensation concludes that a criminal intent to defraud exists, it must refer the case to the DOI, Division of Insurance Fraud.

DOI, Division of Insurance Fraud

The Division of Insurance Fraud is a fully staffed law enforcement agency, having broad investigatory and subpoena powers. The Division of Insurance Fraud employs 142 persons, of which 90 are sworn law enforcement officers trained to investigate insurance fraud. These law enforcement officers carry weapons and have the power to make arrests. In 1997, 454 arrests were made. According to the Division of Insurance Fraud,

investigations are separated into four primary categories: workers' compensation fraud, medical fraud, claimant fraud, and agent fraud.

As part of the Division of Insurance Fraud, the Bureau of Workers' Compensation Fraud investigates and prosecutes workers' compensation fraud based on referrals from insurers or the DLES, Division of Workers' Compensation. In FY 1996-1997, the Division received 5,681 referrals. Of these referrals, 1,325 were related to workers' compensation. Of the 1,325 workers' compensation fraud referrals, approximately 80% were related to claims fraud while 20% were related to premium fraud. In FY 1996-1997, 132 workers' compensation related arrests were made, 15% of which were related to premium fraud. Therefore, in FY 1996-1997, approximately 1 arrest was made out of every 10 workers' compensation referrals.

The Division of Insurance Fraud refers confirmed cases of insurance fraud to the state attorney's office and the Office of the Statewide Prosecutor for criminal prosecution. Through the Prosecutorial Reimbursement Program, the Division of Insurance Fraud is authorized to reimburse the state attorney's office for overhead expenses incurred in prosecuting workers' compensation cases.

In addition to the responsibilities for investigating insurance fraud, the Department of Insurance is also responsible for ensuring that workers' compensation insurance carriers are auditing their employer-insureds' payroll and classification data so that the appropriate premium is charged for workers' compensation coverage.

Special Investigative Units

Pursuant to s. 626.9891, F.S., insurance companies admitted in Florida that have \$10 million or more in direct written premium, are required to establish or contract with a unit which purpose is to investigate fraudulent claims. These units are referred to as "special investigative units (SIU's)". In FY 1996-1997, 80% of the referrals received by the Division of Insurance Fraud were received by insurer SIU's.

Self Policing: Competitive Bidding Civil Suit

Pursuant to s. 440.104, F.S., construction businesses can sue each other if it is suspected that a competitor won a competitive bid by not obtaining proper workers' compensation coverage or by engaging in workers' compensation fraud. If a plaintiff is successful under this provision, damages can be assessed in the amount of 10% of the total amount bid on the contract by the plaintiff or \$5,000, whichever is greater.

ISSUES IDENTIFIED IN REPORTS AND INVESTIGATIONS

The Workers' Compensation Oversight Board (WCOB), created in s. 440.4416, F.S., is a 14-member board comprised of the Secretary of the Department of Labor and Employment Security and the Insurance Commissioner (both are non-voting members), and an equal number of representatives of employers and employees. The purpose of the WCOB is to create a forum for the consideration of workers' compensation issues. The WCOB also advises the Division of Workers' Compensation and the Legislature on matters that impact the workers' compensation system. In June 1997, the WCOB issued a report and recommendations regarding workers' compensation fraud and noncompliance.

In August 1997, the Office of the Statewide Prosecutor empaneled the Fourteenth Statewide Grand Jury to investigate insurance fraud, including workers' compensation fraud, in Florida. On February 9, 1998, the Grand Jury released its report and recommendations.

The effectiveness of present compliance and fraud enforcement efforts has been challenged through both the WCOB Report and the Grand Jury Report. The following are criticisms and recommendations from the WCOB Report and/or the Grand Jury Report.

DLES, Division of Workers' Compensation Too Lenient on Employers Not in Compliance With Workers' Compensation Coverage Requirements

Both the WCOB Report and the Grand Jury Report criticize the Division of Workers' Compensation for being what they consider "too lenient" on employers found not to be in compliance with the workers compensation coverage requirements. Currently, s. 440.107, F.S., provides that when the Division finds an employer not in compliance, it may issue a stop-work order and, additionally, a penalty of twice the premium that the employer would have paid or \$1,000, whichever is greater. In the opinion of both the WCOB and Grand Jury, the Division of Workers' Compensation exercised more discretion than is authorized by statute by penalizing all first time offenders \$1,000, regardless of the amount of the premium evaded or the length of time without coverage. Moreover, the Grand Jury asserts that there is no support for the Division's practice of only issuing stop-work orders and larger penalties (twice the evaded premium) to second-time offenders. According to information provided by the Division of Workers Compensation, out of 2,188 compliance sanctions imposed in 1997, only 9 employers were penalized as second-time offenders.

Insufficient Insurance and Minimum Premium Policies

The Grand Jury also alleges that the Division of Workers' Compensation treats employers carrying insufficient insurance as being in compliance with workers' compensation coverage requirements. The Grand Jury asserts that the Division of Workers' Compensation considers having insufficient insurance as being in compliance because of the fact an insurance carrier is obligated to compensate any injured worker, regardless of the payroll figures actually reported to the insurance carrier or the premium paid.

This practice has resulted in many employers purchasing "minimum premium policies" in order to achieve compliance. According to the Grand Jury, "minimum premium policies," defined in the Report as "inexpensive policies sold to employers who report no payroll at the time of purchase", are used by unscrupulous employers as a tool for fraud. Under s. 440.103, F.S., these policies are supposed to be clearly labeled as a "minimum premium policy," but the Grand Jury Report noted that this provision is often ignored. The result is that an employer with 10 employees can purchase a "minimum premium policy," which on its face looks like any other policy, and convince Division of Workers' Compensation inspectors that it is in compliance.

Criminal Penalties for Workers' Compensation Fraud

Conduct constituting workers compensation fraud is listed in s 440.105, F.S. This section treats workers' compensation fraud as a third degree felony regardless of the value of property or amount of premium involved. The statute of limitations for bringing an action under s. 440 105, F.S. , is 3 years. The WCOB Report points out that the criminal penalties for general theft in s 812.014, F S , are more severe than the penalty for insurance fraud if the value of property involved is greater than \$20,000. Under the general theft statute, the criminal penalty for theft increases as the value of the property stolen increases. Also, the statute of limitations for bringing an action under s 812 014, F.S , is 5 years. The WCOB asserts that theft from insurance companies in the form of insurance fraud should not be treated differently than theft from any one else. As such, in order to provide a more appropriate deterrent, the WCOB Report recommends that the criminal penalty for workers compensation insurance fraud be increased to be consistent with the general theft statute. In addition, the WCOB recommends that the statute of limitations for bringing an action for insurance fraud be increased to 5 years to be commensurate with the general theft statute.

Auditing of Employers by Insurers

The Grand Jury Report states that there are 3 primary players involved in the enforcement of chapter 440 the DOI, Division of Insurance Fraud, the DLES, Division of Workers' Compensation, and private insurers. Pursuant to s 440 381(3), F S , insurers are required to conduct periodic audits of the employers that they insure. However, the Grand Jury Report indicates that the requirements of s 440 381, F S , are not strictly adhered to and that insurers are reluctant to conduct audits of their insureds for fear of losing business. Because workers' compensation rates are regulated, the Grand Jury opined that insurers who are overly rigid regarding audits might lose both legitimate and illegitimate business. As a result, many insurers rely on rate increases to cover their losses according to the Grand Jury.

Additionally, the Grand Jury found that insurers that do conduct audits are encountering problems in obtaining accurate information. Pursuant to s. 440 381(4), F S. , employers are required to provide their insurance carrier a copy of the quarterly earning report submitted to the Division of Unemployment Compensation under chapter 443. The Grand Jury found, however, that employers would often report different payroll figures to the Division of Unemployment Compensation than to their insurance carriers.

Abuse of Exemptions from Coverage Under Workers' Compensation

The WCOB and Grand Jury Reports attributed much of the workers' compensation fraud problem to the abuse of exemptions from the workers' compensation system. Under s. 440 05, F S. , corporate officers, partners, and sole proprietors may elect to be exempt from coverage under the workers' compensation system. Also, persons who attest that they are "independent contractors," do not need to be covered under workers' compensation. According to both the WCOB Report and Grand Jury Report, the Division of Workers' Compensation summarily approves applications for exemption without verifying the information provided on the exemption forms. This creates an opportunity for unscrupulous employers to avoid paying workers' compensation insurance for their employees by calling them "corporate officers" or

by pressuring them to file for exemption as "independent contractors," when in reality they do not meet the requirements under s. 440.02(13)(d)1, F.S. Moreover, the Grand Jury Report notes as an additional problem the fact that the Division of Workers' Compensation lacks the authority to revoke certificates of exemption once they are granted.

Claimant Fraud Consumes Most Resources for Enforcement

The WCOB Report reached the conclusion that the balance of resources for fraud enforcement heavily favors claimant fraud, despite the fact that losses from premium fraud far exceed those from claimant fraud

The available data on claimant and premium fraud investigations and prosecutions, detailed in Table 2 below, seems to support this finding. Allegations of claimant fraud are more readily reported by a host of interested parties, including the Division of Workers' Compensation, the Division of Insurance Fraud, insurers, attorneys and employers. In addition, calls received by the Division of Insurance Fraud over the fraud hotline overwhelmingly relate to claimant fraud, as do the vast majority of referrals to the Division of Workers' Compensation and the Division of Insurance Fraud

Description	Workers' Comp Total	Claimant Fraud	Premium Fraud	Time Period
Investigators	24	19	5	FY 96-97
Referrals	1,325	N/A	N/A	FY 96-97
Cases Opened	249	211*	38*	FY 96-97
Prosecutions	226	145	81	Cumulative since 1995
Hotline Calls	2,150	1,685	465	Cumulative since 1994

* estimated
Source: Department of Insurance

Coordination of Compliance and Fraud Oversight is Inadequate

According to the Grand Jury Report, regulators and insurers indicate that the protocols for the transition of compliance investigations into fraud investigations are unclear. While the Division of Insurance Fraud views the Division of Workers' Compensation and insurers as the front line for monitoring in the fraud enforcement effort, the Division of Workers' Compensation staff sees its mission as the verification of coverage, without scrutinizing the legitimacy of that coverage. Thus, it is unclear what circumstances would prompt a referral from Division of Workers' Compensation to the Division of Insurance Fraud.

Additionally, the role insurers actually play in fraud enforcement is unclear. The Legislature's requirement that SIU's be formed placed a responsibility on the industry to more vigorously police its business. Insurers are required to report fraud

to the Division of Insurance Fraud, and enjoy anti-trust immunity in reporting this information. However, as discussed above, the Grand Jury concluded that insurers are reluctant to conduct the required audits due to a fear of losing business, and that audit requirements are not strictly adhered to.

B EFFECT OF PROPOSED CHANGES

The bill makes the following changes to Florida law:

Definitions

The bill defines the terms, "sole proprietor," "partner," and "corporate officer."

Exemptions

The bill requires those in the construction industry to pay a \$50 fee to file for an exemption from the workers' compensation coverage requirements. The bill also requires construction industry exemptions to be renewed every 2 years. Non-construction industry exemptions would be valid until revoked by the certificate holder or the Division of Workers' Compensation and would not have to be renewed. The bill grants the Division of Workers' Compensation the authority to revoke exemptions if the person does not meet the requirements for an exemption or if the information is invalid. Moreover, the bill requires that the Division of Workers' Compensation notify the carriers identified in the request for exemption whenever the Division of Workers' Compensation revokes an exemption.

Judges of Compensation Claims (JCCs) Authority to Find Fraud

The bill grants JCCs the authority to deny benefits to an employee if it finds that the employee knowingly or intentionally engaged in any of the acts described as insurance fraud in s. 440.105, F.S.

Collection of Benefits by Independent Contractors

The bill clarifies that independent contractors who, for purposes of s. 440.10(1)(g), provide a general contractor with an affidavit stating that they meet the requirements of s. 440.02(13)(d) and a certificate of exemption, are not employees and are not entitled to benefits under Chapter 440.

The bill deletes a reference to the phrase, "independent contractor," which erroneously implied that persons receive certificates of exemption under s. 440.05, F.S., because they are an "independent contractor."

Building Permits

The bill re-emphasizes the requirement that the building permit authority check for proof of compliance with workers compensation coverage requirements each time a building permit is pulled.

Competitive Bidder Civil Actions

The bill modifies the burden of proof and increases the damages that can be awarded in a competitive bidder civil action

Minimum Premium Policies

The bill requires carriers to identify minimum premium policies and requires carriers to notify the Division of Workers' Compensation when a minimum premium policy is issued

Increases Criminal Penalties for Workers' Compensation Fraud

The bill increases the criminal penalties associated with workers' compensation fraud based on the amount of the claim or premium involved in the fraud. The criminal penalties established in this section mirror the penalties contained in the general theft statutes, Chapter 812

Increased Statute of Limitations

The bill increases the statute of limitations for prosecuting a workers' comp fraud case from the current 3 years to 5 years

Granting the Division of Workers' Compensation Investigatory, Subpoena, and Inspection Authority

As recommended by the Workers' Compensation Oversight Board and the Grand Jury, the bill grants the Division of Workers' Compensation investigatory, subpoena, and inspection authority. The bill also requires employers to maintain within the state certain employment records which must be made available to the Division of Workers' Compensation. In addition, the bill grants rulemaking authority to the Division of Workers' Compensation for the purpose of determining which records must be kept by an employer.

Release of Unemployment Compensation Data

The bill permits insurance carriers, as a condition to issuance of a policy, to require the employer to release certain employment and wage information maintained by the state pursuant to federal and state unemployment compensation laws. This will allow insurance carriers to compare the unemployment compensation data provided by the employers to the carriers with the unemployment compensation data kept by the state.

Nomination of Judges of Compensation Claims

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.

Joint Performance Report

The bill requires the Division of Insurance Fraud (DOI) and the Division of Workers' Compensation Fraud (DLES) to submit a joint report to the legislature explaining their results in reducing workers' compensation fraud and increasing workers' compensation compliance.

Appropriation

The bill appropriates 15 positions and \$1,100,000 from the Worker's Compensation Administration Trust Fund to carry out the provisions in this act

C APPLICATION OF PRINCIPLES.

1 Less Government

a Does the bill create, increase or reduce, either directly or indirectly

(1) any authority to make rules or adjudicate disputes?

Yes The Division of Workers' Compensation is authorized to adopt the form required to be filed for certificates of exemption under s 440.05. This bill changes the requirements as to what must be on the form required to be filed for a certificate of exemption. See Section by Section Analysis.

The bill also provides authority for the Division of Workers' Compensation to make rules relating to the business records and information which must be kept by all employers pursuant to s 440 107(2), F S

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The bill grants investigatory and subpoena power to the Division of Workers' Compensation for the purpose of ensuring compliance with the workers' compensation coverage requirements. However, this is not a new responsibility -- it is a specific grant of authority to carry out an existing responsibility

(3) any entitlement to a government service or benefit?

N/A

b If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2 Lower Taxes:

a Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

Yes The bill mandates that the Division of Workers' Compensation charge a \$50 fee with all applications for, and renewals of, construction industry exemptions under s 440 05, F S. (Presently, the Division of Workers' Compensation is authorized to charge as much as \$50 with each application for a certificate of exemption, however, it only charges \$25)

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3 Personal Responsibility.

a Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4 Individual Freedom:

- a Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5 Family Empowerment:

- a If the bill purports to provide services to families or children

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

- b Does the bill directly affect the legal rights and obligations between family members?

N/A

- c If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D STATUTE(S) AFFECTED

This bill amends ss 440.02, 440 05, 440 09, 440 10, 440.103, 440.104, 440.105, 440 107, 440 185, 440.42, 440 45, 626 989, 627 413, and 775 15, F S

E SECTION-BY-SECTION RESEARCH

Section 1: Amends s 440.02, F S Currently, chapter 440 does not contain definitions of the terms "corporate officer," "partner," or "sole proprietor." These terms are a part of the exemption process under s 440 05, F S , which permits "corporate officers," "partners," and "sole proprietors" to exempt themselves from coverage under chapter 440

This section defines these three terms.

Section 2: Amends s 440 05, F S Currently, corporate officers, partners, and sole proprietors may elect to be exempt from the workers' compensation system In order to elect exemption, these persons are required to file a notice of election of exemption with the Division of Workers' Compensation along with a fee not to exceed \$50 Upon determining that the requirements for exemption are met, the Division of Workers' Compensation issues a certificate of election of exemption which is valid until the person revokes the exemption Presently, the Division does not have the express authority to revoke certificates of election of exemption once they are issued

This section changes current law by requiring applicants to provide additional documentation when seeking a certificate of exemption. This additional documentation includes IRS information, copy of occupational licenses, and (for corporate officers and partners) the registration number with the Division of Corporations, Department of State This section also grants the Division of Workers' Compensation the authority to revoke certificates of exemption when it finds that a person is no longer entitled to an exemption Upon revocation of a certificate of exemption, the Division of Workers' Compensation is required to notify the insurance carriers listed on the certificate of

exemption. This section limits the validity of construction industry certificates of election of exemption to 2 years and requires that the Division of Workers' Compensation list on each certificate of election of exemption the effective date and the expiration date. This section mandates a fee of \$50 for requests for exemption and a \$50 fee for renewals of construction industry exemptions. This section also provides a time frame for current certificate holders to apply for new certificates of exemption.

Section 3: Amends s. 440.09, F.S. Under current s. 440.09, F.S., only an "administrative hearing officer, court, or jury" may determine that an employee is not entitled to benefits due to engaging in acts described in s. 440.105, F.S. See E.H. v. Temporary Labor Source, Inc., 687 So 2d 884 (Fla. 1st DCA 1997) ("A JCC is not authorized to make a section 440.105 determination under the plain wording of this statute ")

The bill grants JCCs the authority to deny benefits to an employee if it finds that the employee knowingly or intentionally engaged in any of the acts described in s 440.105, F S

Section 4 Amends s 440.10, F.S. Currently, s 440 10, F S , provides that a person is conclusively presumed to be an independent contractor if the person provides (1) an affidavit to the general contractor stating that he or she meets the requirements of s 440 02(13)(d)1 , F S , and (2) a valid certificate of workers's compensation coverage or a valid certificate of exemption

This section does not change current law as to what must be shown in order to be presumed to be an independent contractor. Rather, it clarifies that a person making the showing to a general contractor required by s 440 10(1)(g), F S , is not an employee of the general contractor and is not entitled to receive benefits under chapter 440 The bill also deletes a reference to "independent contractor" to correct the erroneous implication that a person may receive an exemption under s 440 05, F S , by virtue of being an independent contractor Furthermore, the bill states that if a person meets the requirements of s 440 10(1)(g), F.S , the insurance carrier may not deem that person to be an employee for purposes of calculating premium

Section 5: Amends s 440 103, F S. Present s 440 103, F S , requires that an employer show proof of compliance with workers' compensation coverage requirements as a condition of receiving a building permit Such proof can take the form of a certificate of insurance coverage, a valid certificate of exemption, or a copy of an employer's authority to self-insure Section 440 103, F S , requires that in cases where a minimum premium policy is presented as proof of coverage, the certificate of coverage must show on its face the words, "minimum premium policy" or similar language However, no penalty is provided for the failure to identify a policy as a minimum premium policy Moreover, the Grand Jury Report states that the Department of Insurance does not enforce this provision.

This section clarifies the requirement that employers must show proof of compliance with workers' compensation coverage requirements each time they apply for a building permit This section also inserts a reference to s 627 413(5), which requires 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., which was created in 1993 as a means for the construction industry to monitor itself in the competitive bidding context Presently, under s 440.104, F.S., a person who loses a competitive bid for a contract may sue to recover damages from the winning bidder if the plaintiff can show that the winning bidder knowingly violated s. 440.10, s. 440 105, or s 440.38, while performing work under the contract Section 440.104(3), F S , awards a prevailing plaintiff as liquidated damages 10 percent of the total amount bid on the contract by the plaintiff or \$5,000, whichever is greater.

This section changes the requirement that a plaintiff must prove a knowing violation of s 440.10, s 440.105, or s 440 38. Under this section, a plaintiff may now 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 the contract This section also increases the liquidated damages awarded to a prevailing plaintiff to 30 percent of the total amount bid on the contract by the plaintiff or \$15,000, whichever is greater

Section 7: Amends s 440.105, F S. Currently, s 440 105(4) prohibits employers, employees, physicians, attorneys, and other persons from engaging in certain knowing and fraudulent violations of chapter 440 For instance, it is a violation of s 440 105(4), F.S., for a person to knowingly present a false statement as evidence of compliance with the coverage requirements of chapter 440 These prohibited activities constitute third degree felonies regardless of the amount of the claim or workers' compensation premium involved in the prohibited act

This section changes the current law by clarifying that a violation of subsection (4) constitutes insurance fraud. This section also prohibits the presentation of false statements as evidence of eligibility for an exemption under s 440 05, F S In addition, this section changes the penalties provided for violations of subsection (4). This section creates a sliding scale of increasing criminal penalties that is based on the value of the claim or workers' compensation premium involved in the violation of subsection (4) This sliding scale sets the criminal penalty in the same manner as the general theft statute, s 812 014, F S. first degree felony if the value of the claim or premium is \$100,000 or over; second degree felony if the value of the claim or premium involved is \$20,000 or greater, but less than \$100,000; and third degree felony if the value of the claim or premium involved is less than \$20,000.

Section 8: Amends s 440 107, F S. Under the current law, the Division of Workers' Compensation is charged with the responsibility of enforcing compliance with the coverage requirements under chapter 440 However, chapter 440 does not provide the Division of Workers' Compensation with the specific authority to issue subpoenas in the course of their investigations

This section requires employers to maintain and make available for inspection, work records relevant to compliance with workers' compensation coverage requirements. As recommended in both the WCOB Report and the Grand Jury Report, this section also grants investigatory and subpoena power to the Division of Workers' Compensation for the purpose of ensuring compliance with the workers' compensation coverage requirements

Section 9: Amends s. 440.185, F.S. Currently, s. 440 185(7) requires insurance carriers to provide to the Division of Workers' Compensation certain policy information each time a workers' compensation policy is issued.

This section changes current law by requiring that policy information provided by carriers to the Division of Workers' Compensation include notice of whether such policy is a minimum premium policy

Section 10: Amends 440 42, F S , relating to insurance policies issued under chapter 440. Insurance carriers are required under s. 440.381, F.S., to conduct periodic audits of the employers it insures to verify the accuracy of the payroll and employee classification information for each employer. In addition, employers provide quarterly payroll reports to the Department of Labor and Employment Security, Division of Unemployment Compensation as required in chapter 443, and also provide a copy of this report to their insurance carrier as required in s. 440 381(4) However, there currently is no method whereby insurance carriers can access records held by the Division of Unemployment Compensation

This section would permit insurance carriers to require, as a condition of issuing a workers' compensation insurance policy, that employers release certain employment and wage information maintained by the state pursuant to federal and state unemployment compensation laws This section would give insurance carriers the ability to identify discrepancies in payroll information provided by employers by comparing it to information provided to the Division of Unemployment Compensation

Section 11 Amends s 440 45, F S , to provide 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. This section 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 This section also revises the term of office, qualifications, and method of nomination for the Chief Judge of the Office of the Judges of Compensation Claims

Section 12. Provides an expiration date of July 1, 1999, for the Chief Judge of Compensation Claims. Also requires, by March 1, 1999, that the statewide nominating commission submit a list of three names to the Governor pursuant to s 440 45(1), F.S

Section 13: Provides an effective date of July 1, 1999, for the revised process for nomination and appointment of JCCs, as provided in the amendments to s 440 45(2)(c), F S.

Section 14 Provides that any member of the statewide nominating commission whose term expires as a result of the amendment of s 440 45, F S , proposed in this bill is eligible for reapportionment

Section 15 Adds subsection (9) to s 626 989, F.S The DLES, Division of Workers' Compensation and the DOI, Division of Insurance Fraud have separate, but complementary roles regarding the related issues of enforcing compliance with workers' compensation coverage requirements and reducing workers' compensation fraud

In recognition of the complementary roles played by the Division of Workers' Compensation and the Division of Insurance Fraud, this section requires these two Divisions to prepare and submit a joint performance report to the Legislature detailing the results obtained in increasing compliance with workers' compensation coverage requirements and reducing workers' compensation fraud.

Section 16 Adds subsection (5) to s. 627 413, F S Presently, s 627.413, F.S , lists the elements that must be included in an insurance policy

This section of the bill requires insurers to include on the certificate of coverage of any minimum premium policy, the words "minimum premium policy" or equivalent language This section also provides that the Department of Insurance may impose an administrative fine if it finds a violation of this subsection.

Section 17 Amends s. 775 15, F.S. Currently, violations of subsection (4) of s 440 105 are third degree felonies Section. 775.15, F S. currently provides that the statute of limitations for prosecuting a third degree felony is 3 years

This section specifically provides that actions under s. 440 105 must be commenced within 5 years after the violation is committed.

Section 18 Provides that, effective July 1, 1998, the Division of Workers' Compensation shall notify all persons holding a construction industry certificate of exemption of the requirements of this act

Section 19 Appropriates 15 positions and \$1,100,000 from the Worker's Compensation Administration Trust Fund to carry out the provisions in this act

Section 20 Provides that except as otherwise provided in this act, this act shall take effect January 1, 1999

IV. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS

1 Non-recurring Effects

The bill requires the Division of Workers' Compensation to notify all persons in the construction industry who currently hold a certificate of exemption of the requirements of this act. There are approximately 210,000 construction industry exemptions on file with the Division

The Division estimates the total cost of implementing this act at \$1,100,000 for FY 1998-99, which includes the one-time cost of the initial notification of the construction industry exemption holders.

2 Recurring Effects

The Division of Workers' Compensation estimates that 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. The revenue generated by the fee increase in the bill is estimated by the Division to be \$12.4 million for 1999. SEE IV., D , FISCAL COMMENTS, below.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures.

N/A

B FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects

N/A

2 Recurring Effects

N/A

3 Long Run Effects Other Than Normal Growth.

N/A

C DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

1 Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3 Effects on Competition, Private Enterprise and Employment Markets:

N/A

D FISCAL COMMENTS

The bill requires the Division of Workers' Compensation to charge a \$50 fee with each request for, or renewal of, a construction industry certificate of exemption. The bill also requires renewal of construction industry exemptions every two years, whereas before they were valid until revoked by the certificate holder. The Division of Workers'

Compensation estimates that these changes will require \$1,100,000 and 15 FTEs to implement. Additionally, the Division of Workers' Compensation estimates that these changes will result in \$12,400,000 in additional revenue for 1999. However, because FY 1998-99 ends in mid 1999, and because the bill requires certificate holders to refile in their birth month in 1999, approximately half of the revenue will be generated in the latter half of 1999 (or FY 1999-00). Nevertheless, the bill appropriates \$1,100,000 and 15 FTEs to the Division of Workers' Compensation for FY 1998-99 which reflect the needs of the Division of Workers' Compensation in order to process the refiling of all current construction industry certificate holders.

V CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

VI COMMENTS

N/A

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES

N/A

VIII SIGNATURES:

COMMITTEE ON FINANCIAL SERVICES
Prepared by

Legislative Research Director.

ROBERT E. WOLFE JR

STEPHEN HOGGE

STORAGE NAME: s1406s2z fs

DATE May 28, 1998

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FINAL RESEARCH PREPARED BY COMMITTEE ON FINANCIAL SERVICES.

Prepared by:

Legislative Research Director:

ROBERT E. WOLFE, JR.

STEPHEN HOGGE

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.	_____	_____	_____	_____

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