

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 311 Local Business Taxes

**SPONSOR(S):** Economic Affairs Committee, Finance & Tax Committee, Business & Consumer Affairs Subcommittee, Roberson and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 582

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Consumer Affairs Subcommittee	15 Y, 0 N, As CS	Livingston	Creamer
2) Finance & Tax Committee	23 Y, 0 N, As CS	Aldridge	Langston
3) Economic Affairs Committee	15 Y, 0 N, As CS	Livingston	Tinker

### SUMMARY ANALYSIS

The bill creates an exemption from local business taxes for an individual who engages in or manages a business, profession, or occupation as an employee of another person. The bill provides that the exempt employee is not required to pay a local business tax, obtain a local business tax receipt, or apply for an exemption from a local business tax.

The bill provides that the exemption created by the bill does not apply to business taxes imposed by municipalities or counties on individual employees pursuant to a resolution or ordinance adopted prior to October 13, 2010 and the local authority may continue to impose and collect the tax.

The bill removes statutory language which requires the Department of Business and Professional Regulation, by August 1 of each year, to submit to the local official who issues local business tax receipts a current list of professions the department regulates and information regarding those practitioners who should not be allowed to renew their local business tax receipt due to suspension, revocation, or inactivation of a state license, certification, or registration.

The bill expands the prohibition against local governments issuing a business tax receipt unless a practitioner exhibits confirmation of an active state certificate, registration, or license to include practitioners of professions regulated by "the Florida Supreme Court, or any other state regulatory agency" not just the current statutory list of certain practitioners and certain state regulatory agencies.

For purposes of the application of the provisions relating to renewal of local business tax receipts, the bill specifies that a person operating as a real estate broker associate or a real estate sales associate is considered to be an employee. The bill specifies that an employee does not include an independent contractor.

The bill specifies that "independent contractor" means an entity which satisfies at least 4 of the 6 criteria listed in s. 440.02(15), F.S., the workers' compensation statute. Additionally, the bill further specifies that if at least 4 of the 6 criteria are not met, an individual may still be presumed to be an independent contractor and not an employee based on consideration of 7 specified work conditions created in the bill.

The Revenue Estimating Conference has not estimated the revenue impact of the committee substitute.

**This bill may be a county or municipal mandate requiring a two-thirds vote of the membership to be enacted. See Section III.A.1 of the analysis.**

The effective date of the bill is July 1, 2011, except that section 2, which creates the tax exemption, of the bill operates retroactive to October 13, 2010.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present situation

In 1972 the Florida Legislature elected to stop administering occupational license taxes at the state level and gave the authority to local governments. Local governments were then authorized to levy occupational license taxes according to the provisions of the “Local Occupational License Act.”<sup>1</sup>

In 2006, 368 of the 404 municipalities and 52 of the 67 counties in Florida had some sort of local occupational license tax in place.<sup>2</sup> Although the local occupational license tax was designed to be purely revenue producing in nature, it had unintentionally become a measure of profession and business qualification to engage in a specified activity.<sup>3</sup> Chapter 2006-152, L.O.F., renamed the act as the “Local Business Tax Act” to reflect that the business or individual has merely paid a tax and it alone does not authenticate the qualifications of a business or individual.<sup>4</sup> The legislation removed the term “occupational license” and added the terms “local business tax” and “local business tax receipt.”

Currently, “local business tax” means the fees charged and the method by which a local governing authority grants the privilege of engaging in or managing any business, profession, or occupation within its jurisdiction.<sup>5</sup> It does not mean any fees or licenses paid to any board, commission, or officer for permits, registration, examination, or inspection.<sup>6</sup> Unless otherwise provided by law, these are deemed to be regulatory and in addition to, but not in lieu of, any local business tax imposed under the provisions of ch. 205, F.S.<sup>7</sup>

“Business,” “profession,” and “occupation” do not include the customary religious, charitable, or educational activities of nonprofit religious, nonprofit charitable, and nonprofit educational institutions in this state.<sup>8</sup>

Under current law, a county or municipality may, by appropriate resolution or ordinance, impose a local business tax for the privilege of engaging in or managing a business, profession, or occupation within its jurisdiction.<sup>9</sup> The amount of the tax and the occupations and businesses the tax is imposed on are determined at the discretion of the local government within the limitations of ch. 205, F.S. However, a Florida county or municipality may not levy a business tax if any person engaging in or managing a business, profession, or occupation regulated by the Department of Business and Professional Regulation (DBPR) has paid a business tax for the current year to the county or municipality in the state where the company’s permanent business location or branch office is maintained.<sup>10</sup>

Section 205.194, F.S., prohibits local governments from imposing a “local business tax” for professions regulated by the DBPR without the local government verifying that the person has satisfied the DBPR qualification requirements. Applicants are required to submit proof of registration, certification, or licensure issued by the DBPR upon initial licensure in the local jurisdiction. By August 1 of each year, DBPR is required to supply local officials with a list of the professions it regulates and persons that

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<sup>1</sup> 2010 Florida Tax Handbook, Florida Revenue Estimating Conference, Local Business Taxes, pg. 227.

<sup>2</sup> 2006 bill analysis on HB 1269 (ch. 2006-152, L.O.F.) by the House Fiscal Council, dated 4/21/2006, and citing data provided by the Legislative Committee on Intergovernmental Relations.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> s. 205.022(5), F.S.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> s. 205.022(1), F.S.

<sup>9</sup> ss. 205.032 and 205.042, F.S.

<sup>10</sup> s. 205.065, F.S.

should not be allowed to renew their local business tax receipt due to suspension, revocation, or inactivation of their state license, certification, or registration.

Several other sections of ch. 205, F.S., require additional verification from state regulatory agencies, such as the Department of Agriculture and Consumer Services and the Agency for Health Care Administration, before a local government may issue a business tax receipt.

### **Attorney General Opinion 2010-41**

In 2010, the attorney general was asked to provide an opinion on, among other things, the following questions:

- Must a municipality impose a local business tax on professionals licensed by the state if such professionals are employed by another person or entity?
- May a municipality amend its local business tax ordinance ... to exempt state-licensed professionals employed by another?

On October 13, 2010, the attorney general issued AGO 2010-41. It provides in pertinent part that:

- A municipality must impose a business tax on all businesses, professions, or occupations within its jurisdiction when adopting a tax pursuant to s. 205.042, F.S., and exempt only those businesses, professions, or occupations addressed [exempted or allowed to be exempted] in ch. 205, F.S.
- For the purposes of the statute, a "person" means "any individual, firm, partnership, joint adventure, syndicate, or other group or combination acting as a unit, association, corporation, estate, trust, business trust, trustee, executor, administrator, receiver, or other fiduciary, and includes the plural as well as the singular." Thus, the local business tax law applies to and operates on any person, engaged in any business, profession, or occupation who exercises the taxable privilege within a municipality's jurisdiction and is not excepted or exempted from the license tax by the terms of ch. 205, F.S., or other applicable general law.
- A city may apply only the exemptions set forth in ch. 205, F.S., to exclude individuals or entities from its local business tax.

There is no exemption in ch. 205, F.S., for individuals who are employees of another person.

### **Effect of proposed changes**

The bill creates an additional exemption from local business taxes under ch. 205, F.S., for individuals who are employees of another person. The bill provides that an individual who engages in or manages a business, profession, or occupation as an employee of another person is not required to pay a local business tax, obtain a local business tax receipt, or apply for an exemption from a local business tax. The bill specifies that an individual exempt under this section may not be required by any local governing authority to apply for an exemption from a local business tax, otherwise prove his or her exempt status, or pay any tax or fee related to a local business tax.

The bill provides that the exemption created by the bill does not apply to business taxes imposed by municipalities or counties on individual employees pursuant to a resolution or ordinance adopted prior to October 13, 2010 and the local authority may continue to impose and collect the tax.

The bill provides that an employee may not be held liable by any local governing authority for the failure of a principal or employer to pay a local business tax, obtain a local business tax receipt, or apply for an exemption from a local business tax. A principal or employer who is required to obtain a local business

tax receipt may not be required by a local governing authority to provide personal or contact information for individuals who are exempt in order to obtain a local business tax receipt.

The bill expands the prohibition against local governments issuing a business tax receipt unless a practitioner exhibits confirmation of an active state certificate, registration, or license to include all “state regulatory agencies” not just the current statutory list of certain practitioners and certain state regulatory agencies.

For purposes of the application of the provisions of ch. 205, F.S., relating to renewal of local business tax receipts, the bill specifies that a person operating under ch. 475, F.S., as a real estate broker associate or a real estate sales associate is considered to be an employee of a ch. 475, F.S., licensee.

The bill also removes statutory language which requires the Department of Business and Professional Regulation, by August 1 of each year, to submit to the local official who issues local business tax receipts a current list of professions the department regulates and information regarding those practitioners who should not be allowed to renew their local business tax receipt due to suspension, revocation, or inactivation of a state license, certification, or registration.

The bill specifies that an individual acting in the capacity of an independent contractor is not an employee. The bill defines “independent contractor” by referring to the definition of independent contractor in the workers’ compensation statute.<sup>11</sup> That definition specifies that “independent contractor” means an entity which satisfies at least 4 of the 6 statutorily listed criteria created in the bill which are:

- The independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations;
- The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations;
- The independent contractor receives compensation for services rendered or work performed and such compensation is paid to a business rather than to an individual;
- The independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation;
- The independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his or her own election without the necessity of completing an employment application or process; or
- The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists.

Additionally, the definition further specifies that if 4 of the 6 criteria do not exist for evaluation relating to being an independent contractor, an individual may still be presumed to be an independent contractor and not an employee based on consideration of 7 specified work conditions:

- The independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work;
- The independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform;
- The independent contractor is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform;
- The independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis;

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<sup>11</sup> s. 440.02(15), F.S.

- The independent contractor may realize a profit or suffer a loss in connection with performing work or services;
- The independent contractor has continuing or recurring business liabilities or obligations; or
- The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

#### B. SECTION DIRECTORY:

Section 1. Amends s. 205.022, F.S., to define the term "independent contractor" for purposes of the application of the provisions of ch. 205, F.S.

Section 2. Creates s. 205.066, F.S., to exempt an individual who engages in or manages a business, profession, or occupation as an employee of another person and the employee is not required to apply for an exemption from a local business tax, pay a local business tax, or obtain a local business tax receipt; specifies that a person operating as a real estate broker associate or a real estate sales associate is considered to be an employee

Section 3. Amends s. 205.194, F.S., to delete a requirement that DBPR provide certain professional regulation information to local officials who issue business tax receipts; to delete a provision prohibiting a local official who issues business tax receipts from renewing a license under certain circumstances; requires confirmation of an active state certificate, registration, or license to include practitioners of professions regulated by "...the Florida Supreme Court, or any other state regulatory agency"; and specifies that local business tax receipts may be renewed based on an online electronic confirmation of active status.

Section 4. Provides an effective date of July 1, 2011, except that section 2 of the bill operates retroactive to October 18, 2010.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The Revenue Estimating Conference has not estimated the revenue impact of the CS/CS/CS.

##### 2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The Revenue Estimating Conference has not estimated the revenue impact of the CS/CS/CS.

##### 2. Expenditures:

None.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill creates an exemption from local business taxes for individuals who are employees of another person, but that exemption only applies to local business taxes imposed by resolution or ordinance after October 13, 2010.

#### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, section 18, of the Florida Constitution may apply because this bill reduces the authority that counties or municipalities have to raise revenues in the aggregate. The reduction in authority comes from the exemption for local business taxes created by the bill. Because the magnitude of the reduction in authority is unknown it is unclear whether or not the bill qualifies for an exemption. If the bill does qualify as a mandate, final passage must be approved by two-thirds of the membership of each house of the Legislature.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 8, 2011, the Business & Consumer Affairs Subcommittee took up the bill, adopted two amendments, and passed the bill as a committee substitute (CS) by a vote of 15-0.

The CS differs from the bill as filed in the following areas:

- For purposes of the application of the provisions of ch. 205, F.S., relating to renewal of local business tax receipts, the CS specifies that a person operating under ch. 475, F.S., as a real estate broker associate or a real estate sales associate is considered to be an employee of a ch. 475, F.S., licensee.
- Expands the prohibition against local governments issuing a business tax receipt unless a practitioner exhibits confirmation of an active state certificate, registration, or license to include all "state regulatory agencies" not just the current statutory list of certain practitioners and certain state regulatory agencies.
- Specifies that local business tax receipts may be renewed based on an online electronic confirmation of an active state certificate, registration, or license.

On March 24, 2011, the Finance & Tax Committee adopted three amendments and passed the bill as a CS. The CS/CS/HB 311 differs from CS/HB 311 as follows:

- The CS removes the lengthy definition of "independent contractor" from the bill and instead cites to the definition of "independent contractor in the workers' compensation statute- s. 440.02(15)(d)1.a. and b, F.S.
- Provides that the exemption for individual employees created by the bill does not apply to business taxes imposed by municipalities or counties on individual employees pursuant to a resolution or ordinance adopted prior to October 13, 2010.
- Provides an effective date of July 1, 2011, except that section 2 of the bill operates retroactive to October 18, 2010.

The analysis has been updated to reflect the committee substitute.

On April 21, 2011, the Economic Affairs Committee took up the bill, adopted one amendment, and passed the bill as a CS/CS/CS by a vote of 15-0.

The CS/CS/CS/HB 311 differs from the bill as filed in the following area:

- Expands the application of the retroactive provisions to specifically state that a local authority that had imposed a local tax and had a classification system that was in compliance with chapter 205, F.S., and that actually resulted in individual employees paying a business tax may continue to impose the tax.