

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB EDTS 11-01 Unemployment Compensation

**SPONSOR(S):** Economic Development & Tourism Subcommittee

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Economic Development & Tourism Subcommittee		Kruse	Tinker

### SUMMARY ANALYSIS

The bill addresses aspects of the state's unemployment compensation (UC) system related to a claimant's state and federal benefits, how a claimant can be qualified to receive state benefits, a claimant's appeal of a benefit determination, and employer UC taxes.

Related to a claimant's state and federal benefits, the bill:

- Ties a UC claimant closer to the workforce system by requiring a claimant, at the time an application for benefits is undertaken, to complete an initial skills review which results are reported to the workforce system;
- Matches up state law with federal law changes to allow for federally-funded extended benefits to be drawn down to the unemployed;
- Reduces the number of available benefit weeks and ties the number of available benefit weeks to the unemployment rate, meaning the higher the unemployment rate the greater the number of available benefit weeks and vice-versa.

Relating to qualification for benefits, the bill:

- Revises how employee misconduct is determined and defined by revising standards of statutory construction and review, and specifying certain forms of misconduct such as chronic absenteeism or tardiness;
- Expands when an employee is disqualified from benefits related to committing a crime connected with work so that the crime does not have to be punishable by imprisonment for it to be used for disqualification, and specifies that a claimant in prison is disqualified from benefits.

Regarding appeals of benefit determinations, the bill:

- Codifies certain agency rules related to the exclusion of evidence that is irrelevant or repetitious, and revises the admissibility of hearsay evidence to allow it to be used to establish a fact under certain circumstances;
- Allows a claimant to file an appeal of a benefit determination made by the Unemployment Appeals Commission in the appellate court near the claimant.

Relating to employer taxes, the bill:

- Reduces most employers' tax rates by revising their benefit ratio calculation downward 10% which is used to compute their ultimate tax rate;
- Allows employers to continue to have the option to pay their UC taxes in installments over the course of the year in 2012, 2013, and 2014.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Issue Background:**

Florida's businesses and residents continue to struggle due to the state's economic conditions. For 2010, the Department of Revenue reports that 75,832 employers went out of business. Florida's unemployment rate has remained at or near 12 percent for the past year. These conditions have placed unprecedented stress on the unemployment system causing the Unemployment Trust Fund to become insolvent in August 2009. Since that time, Florida has borrowed over \$2 billion from the federal government to pay benefit claims. Further, the unemployment tax on Florida's businesses has seen a dramatic increase, going from \$8.40 per employee in 2009 to \$72.10 per employee in 2011 for those paying the minimum UC tax rate.

The state's unemployment compensation (UC) system has its historical roots from the late 1930s. Current parts of the definitions and benefit amounts are based on law and practice from the early establishment of other states' UC systems which were adopted into Florida's system decades ago. This bill addresses some of those issues and makes changes to benefit amounts, benefit determination procedures and appeals, and provides relief to businesses on their UC taxes.

##### **Federal-State Unemployment Insurance Program**

The federal-state Unemployment Insurance Program provides unemployment benefits to eligible workers who are unemployed through no-fault of their own (as determined under state law) and who meet the requirements of state law. The program is administered as a partnership of the federal government and the states. There are 53 state programs, including the 50 states, Puerto Rico, the Virgin Islands, and the District of Columbia.

The individual states collect unemployment compensation (UC) payroll taxes on a quarterly basis, which are used to pay benefits, while the Internal Revenue Service collects an annual federal payroll tax under the Federal Unemployment Tax Act (FUTA).<sup>1</sup> States are permitted to set eligibility conditions for UC benefit recipients, the amount and duration of benefits, and the state tax structure so long as the state provisions are not in conflict with FUTA or Social Security Act requirements. Florida's UC program was created by the Legislature in 1937 as part of the national unemployment insurance system.<sup>2</sup> Florida's UC system is funded solely by employers who pay federal and state UC taxes, and is provided at no cost to the workers who receive the benefits.

##### **Program Administration**

The Agency for Workforce Innovation (AWI) is the agency responsible for administering Florida's UC laws.<sup>3</sup> AWI contracts with the Department of Revenue to provide unemployment tax collections services.

The United States Department of Labor (USDOL) provides AWI with administrative resource grants from the taxes collected from employers pursuant to FUTA. These grants are used to fund the operations of the state's UC program. Florida received a base grant of \$81.1 million for federal FY 2010 and USDOL estimates that Florida's base grant for federal FY 2011 is \$80.2 million. These funds finance the processing of claims for benefits by AWI, state unemployment tax collections performed by the Department of Revenue, appeals conducted by AWI and the Unemployment Appeals Commission, and related administrative functions.

---

<sup>1</sup> FUTA is codified at 26 U.S.C. 3301-3311.

<sup>2</sup> Chapter 18402, L.O.F.

<sup>3</sup> Sections 20.50 and 443.171, F.S.

AWI administers Florida's UC laws through its Office of Unemployment Compensation Services. The Office of Unemployment Compensation Services consists of the Unemployment Compensation Benefits Section, the Benefits Payment Control Section, and the Office of Appeals. The Unemployment Compensation Benefits Section handles initial claims, questions about unemployment benefits, and other related issues. The Benefits Payment Control Section monitors the payment of unemployment benefits in an effort to detect and deter overpayment and to prevent fraud. The Office of Appeals holds hearings and issues decisions to resolve disputed issues related to eligibility and claims for unemployment compensation and the payment and collection of unemployment compensation taxes.

The Office of Unemployment Compensation Services also administers special unemployment compensation programs, such as disaster unemployment assistance, trade adjustment assistance, and UC for ex-service members and federal civilian employees.

### **Benefit Structure**

State UC taxes are deposited into the UC Trust Fund to pay benefits. Qualified claimants may receive state UC benefits equal to 25 percent of their wages, not to exceed \$7,150 in a benefit year.<sup>4</sup> Benefits range from a minimum of \$32 to a maximum weekly benefit amount of \$275 for up to 26 weeks, depending on the claimant's length of prior employment and wages earned.<sup>5</sup> To receive UC benefits, claimants must meet certain monetary and non-monetary eligibility requirements.<sup>6</sup> Key eligibility requirements involve a claimant's earnings during a certain period of time, the manner in which the claimant became unemployed, and the claimant's efforts to find new employment.

### Monetary Eligibility

Pursuant to s. 443.111(2), F.S., in order to establish a benefit year from which UC benefits can be paid, an individual must:

- Have been paid wages in two or more calendar quarters in the base period; and
- Have minimum total base period wages equal to the high quarter wages multiplied by 1.5, but at least \$3,400 in the base period.

The base period is the first four of the last five completed calendar quarters immediately before the individual filed a valid claim for benefits.<sup>7</sup> The most recent quarter of work (or fifth completed calendar quarter) is not used to determine monetary eligibility and cannot be credited toward the two-quarter requirement or the \$3,400 requirement.

### Non-Monetary Determinations

The state's UC laws contemplate that a claimant was employed in the capacity of an employee, and not an independent contractor. A claimant must be unemployed due to layoffs or otherwise through no fault of their own to be eligible for benefit payments.

An individual may be disqualified from receiving UC benefits for voluntarily leaving work without good cause, or being discharged by his or her employing unit for misconduct connected with the work. The term "good cause" includes only that cause attributable to the employer or which consists of illness or disability of the individual requiring separation from work. An individual who voluntarily quits work for a good cause not related to any of the conditions specified in statute will be disqualified from receiving benefits.<sup>8</sup>

Other circumstances under which an individual would be disqualified from receiving unemployment compensation benefits include:<sup>9</sup>

---

<sup>4</sup> Section 443.111(5), F.S.

<sup>5</sup> Section 443.111(3), F.S. A claim week begins on Sunday and ends on Saturday.

<sup>6</sup> Section 443.091(1), F.S.,

<sup>7</sup> Section 443.036(7), F.S.

<sup>8</sup> Section 443.101, F.S.

<sup>9</sup> Section 443.101, F.S. The statute specifies the duration of the disqualification depending on the reason for the disqualification.

- Failing to apply for available suitable work when directed by AWI or the one-stop career center, to accept suitable work when offered, or to return to suitable self-employment when directed to do so;
- Receiving remuneration in the form of wages, or compensation for temporary total disability or permanent total disability under the workers' compensation law of any state with a limited exception;
- Receiving benefits from a retirement, pension, or annuity program with certain exceptions;
- Receiving unemployment compensation from another state;
- Termination from employment for a crime punishable by imprisonment, or any dishonest act in connection with his or her work;
- Making false or fraudulent representations in filing for benefits;
- Discharge from employment due to drug use;
- Involvement in an active labor dispute which is responsible for the individual's unemployment; or
- Illegal immigration status.

Wages in lieu of notice is income deemed to have been earned in connection with employment. Under current law, severance pay is not regarded as earned income, and therefore is not offset against benefits.

An individual is not disqualified for voluntarily leaving temporary work to return immediately when called to work by his or her former permanent employer that temporarily terminated his or her work within the previous 6-calendar months. Additionally, an individual is not disqualified for voluntarily leaving work to relocate as a result of his or her military-connected spouse's permanent change of station orders, activation orders, or unit deployment orders. Claimants who also attend training approved by AWI, or approved under s. 236(a)(1) of the Trade Act of 1974, may not be denied benefits for any week in which he or she was in training, provided that the claimant satisfies eligibility conditions set in rule.<sup>10</sup>

#### Misconduct

States have established detailed interpretations of what constitutes misconduct for the purpose of non-monetary eligibility.<sup>11</sup> Under s. 443.036(29), F.S., Florida disqualifies claimants that demonstrate:

- Conduct that is a willful or wanton disregard of an employer's interests and the standards of behavior which the employer has a right to expect of the employee; or
- Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

These two descriptions of behavior are considered to stand alone as independent types of misconduct.<sup>12</sup>

#### Reemployment

To maintain eligibility for benefits, an individual must also be ready, willing, and able to work and actively seeking work.<sup>13</sup> An individual must make a thorough and continued effort to obtain work and take positive actions to become reemployed. Claimants are automatically registered with their local One-Stop Career Center when their claims are filed.

<sup>10</sup> Rule 60BB-3.022, F.A.C.

<sup>11</sup> In determining what constitutes misconduct, many states rely on the definition established in the 1941 Wisconsin Supreme Court Case, *Boynton Cab Co. v. Neubeck*

<sup>12</sup> *Trinh Trung Do v. Amoco Oil Company*, 510 So.2d 1063 (Fla. 4th DCA 1987)

<sup>13</sup> Section 443.036(1) and (6), F.S., provide the meaning of the phrases "able to work" and "available for work" as:

- "Able to work" means physically and mentally capable of performing the duties of the occupation in which work is being sought.
- "Available for work" means actively seeking and being ready and willing to accept suitable employment.

Additionally, AWI has adopted criteria, as directed in the statute, to determine an individual's ability to work and availability for work in Rule 60BB-3.021, F.A.C.

The One-Stops provide job search counseling and workshops, occupational and labor market information, referral to potential employers, and job training assistance. Claimants may also receive an e-mail from Employ Florida Marketplace with information about employment services or available jobs.<sup>14</sup> Additionally, a claimant may be selected to participate in reemployment assistance services, such as Reemployment and Eligibility Assessments (REAs).<sup>15</sup>

### Statutory Construction

Generally, through court interpretation and not statutorily, most states construe their unemployment statutes in favor of a claimant. Courts have held that the unemployment laws are remedial in nature, and thus should be liberally and broadly construed.<sup>16</sup> Section 443.031, F.S., states that ch. 443, F.S., “shall be liberally construed in favor of a claimant of unemployment benefits who is unemployed through no fault of his or her own.” Remedial statutes are those that provide a remedy or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries. Florida courts have held that the unemployment statutes are “remedial, humanitarian legislation.”

“[A] statute enacted for the public benefit should be construed liberally in favor of the public even though it contains a penal provision. In this posture a reasonable construction should be applied giving full measure to every effort to effectuate the legislative intent.”<sup>17</sup>

### Determination of Eligibility

Based upon information provided with filed claims for benefits, AWI makes an initial determination on entitlement to benefits. A determination becomes final after 20 days have expired.

### Appeals

Under s. 443.151(4), F.S., a claimant may appeal an adverse decision to an appeals referee within 20 days after the date of mailing of the notice. Unless the appeal is withdrawn, the appeals referee will set up a hearing between the employer and employee. The procedures and evidentiary rules for the hearing are governed by ch. 120, F.S., and rule 60BB-5.024. The rule does not allow irrelevant, immaterial, and unduly repetitious evidence and the rule and s. 120, F.S., both do not allow hearsay evidence to support a finding of fact unless it would be admissible over an objection in civil court.

The Unemployment Appeals Commission is administratively housed in the AWI, but is a quasi-judicial administrative appellate body independent of AWI.<sup>18</sup> The commission is 100 percent federally funded and consists of a three member panel that is appointed by the governor. It is the highest level for administrative review of contested unemployment cases decided by the Office of Appeals referees. The Unemployment Appeals Commission can affirm, reverse, or remand the referee’s decision for further proceedings. A party to the appeal who disagrees with the commission’s order may seek review of the decision in the Florida district courts of appeal.<sup>19</sup>

---

<sup>14</sup> Employ Florida Marketplace is a partnership of Workforce Florida, Inc., and AWI. It provides job-matching and workforce resources. <https://www.employflorida.com>

<sup>15</sup> REAs are in-person interviews with selected UC claimants to review the claimants’ adherence to state UC eligibility criteria, determine if reemployment services are needed for the claimant to secure future employment, refer individuals to reemployment services, as appropriate, and provide labor market information which addresses the claimant’s specific needs. Florida administers the REA Initiative through local One-Stop Career Centers. Rule 60BB-3.028, F.A.C., further sets forth information on reemployment services and requirements for participation.

<sup>16</sup> See J.W. Williams v. State of Florida, Department of Commerce, 260 So.2d 233 (1st DCA, 1972); and Williams v. Florida Industrial Commission, 135 So.2d 435 (3rd DCA, 1961).

<sup>17</sup> City of Miami Beach v. Berns, 245 So.2d 38, 40 (Fla. 1971).

<sup>18</sup> Section 20.50(2)(d), F.S. “The Unemployment Appeals Commission, authorized by s. 443.012, F.S., is not subject to control, supervision, or direction by the Agency for Workforce Innovation in the performance of its powers and duties but shall receive any and all support and assistance from the agency that is required for the performance of its duties.”

<sup>19</sup> Section 443.151(4)(c), (d), and (e), F.S.

## Temporary Extended Benefits

The Legislature enacted, in 2009, a temporary extended benefits program for unemployed individuals in order to qualify for federal funds.<sup>20</sup> Under this program, the federal government pays 100 percent of temporary extended benefits to former private sector employees.

Florida already had an extended benefits program in statute,<sup>21</sup> but in order to participate in the federal program, Florida was able to enact a temporary extended benefits program with an alternate trigger rate based upon the average total unemployment rate (TUR). Florida's regular extended benefits program triggers "on" based upon a higher individual unemployment rate (IUR). The federal funds are paid from a separate federal account and do not affect the balance of Florida's UC Trust Fund.

Florida's temporary extended benefits program was effective between February 1, 2009, and April 5, 2010.<sup>22</sup> In July of 2010, Congress extended this program retroactively from April 6, 2010, to November 30, 2010. Because the Legislature was not in session, Governor Crist signed an executive order implementing the state program.<sup>23</sup> On December 17, 2010, Congress extended this program a second time with the enactment of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the 2010 Tax Act). This extension provides up to 20 weeks of 100% federally-funded extended benefits for former private-sector employees through January 4, 2012. Governor Crist signed an additional executive order on December 17, 2010 extending the state program after the federal bill was signed into law.

Extended benefits for former state and local employees do not qualify for federal funding, due to the fact that these entities are self-insured and the federal law does not allow for their participation in federal sharing. The temporary extended benefits for these former employees must be paid by the governmental entity. The cost for the current extension is estimated to total \$18.4 million, approximately \$5.4 million from state funds and \$13 million from local government funds. In order to participate in federal sharing, the temporary extended benefits program had to encompass unemployed individuals of both the private and public sectors.

## Emergency Unemployment Compensation

Emergency unemployment compensation (EUC) is specially extended benefits available to individuals who have exhausted all rights to regular state benefits. The benefits of this program are 100 percent federally funded and do not impact Florida's UC Trust Fund balance. Under the 2010 Tax Act, Congress extended EUC program eligibility window through January 1, 2012. The EUC extension provides 4 tiers of benefits totaling up to 53 weeks of benefits. When the extension expires, individuals receiving EUC are locked into the current tier of benefits they are in, and may collect any remaining benefits in that tier until June 9, 2012. The AWI estimate for total payments is \$3.5 billion.

## Tax Structure

Through the Federal Unemployment Tax Act (FUTA), the IRS levies an unemployment tax of 6.2% on employers. However, employers in Florida currently receive a 5.4% credit against that tax, resulting in an effective federal tax rate of 0.8% applied to taxable wages. To receive the maximum federal tax credit, Florida has established a taxable wage base for state UC taxes at least equal to the federal taxable wage base – currently \$7,000.<sup>24</sup> Employers pay quarterly taxes on the first \$7,000 of each employee's annual wages.<sup>25</sup>

---

<sup>20</sup> Chapter 2009-99, L.O.F. Temporary extended benefits was originally created and funded by the American Recovery and Reinvestment Act of 2009. Section 2005, Public Law No. 111-5.

<sup>21</sup> Section 443.1115, F.S.

<sup>22</sup> The temporary extended benefits were to be available for 13 to 20 weeks, depending on the average total rate of unemployment. Because of Florida's high unemployment rate, temporary extended benefits were available for the 20 week time period.

<sup>23</sup> Public Law No. 111-312 (H.R. 4853)

<sup>24</sup> Section 443.1217(2), F.S.

<sup>25</sup> Section 443.131(1), F.S.

### State Unemployment Compensation Tax

In addition to FUTA, Florida employers pay a state UC tax which funds the state Unemployment Compensation Trust Fund, an account used to pay weekly benefits. Under current law, employers pay quarterly state UC taxes on the first \$7,000 of each employee's annual wages. However, the Legislature can and has raised the taxable wage base above the federal minimum, most recently in the 2009 regular session. An employer's initial state tax rate is 2.7 percent.<sup>26</sup> After an employer is subject to benefit charges for 8-calendar quarters, the standard tax rate is 5.4 percent, but may be adjusted down to a low of 0.1 percent.<sup>27</sup> The adjustment in the tax rate is determined by calculating a statutory formula that incorporates the benefit ratio, socialized costs, and the trust fund factor.

### Trust Fund Triggers

Florida's tax calculation method is closer to a "pay as you go" approach, in which taxes increase rapidly after a surge in benefit costs. Economic conditions resulting in abnormally high unemployment accompanied by high benefit charges can cause a severe drain on the UC Trust Fund. This effect triggers the positive fund balance adjustment factor, which consequently increases tax rates for all employers. Conversely, when unemployment and benefit charges are low, the negative fund balance adjustment factor triggers, and tax rates for employers are reduced accordingly.<sup>28</sup>

The basis for the adjustment factors is the level of the trust fund on September 30th of each calendar year compared to the taxable payrolls for the previous year. Each adjustment factor remains in effect until the balance of the trust fund rises above or falls below the respective trigger percentage. However, CS/HB 7033 enacted in the 2010 Session delayed the calculation of any automatic increase due to the positive adjustment tax rate factor until 2012. This action was taken to avoid a significant tax increase on businesses during the severe economic downturn.

### Installment Payment Option

Current law allows employers to make their 2010 and 2011 UC tax payments in quarterly installments without interest or penalties as long as the employer makes the quarterly filing and payment according to the new schedule. However, any penalties, interest, or fees that were due prior to this new schedule will continue to accrue as well as on any missed filings under the new schedule. The Department of Revenue is authorized to charge an annual fee of up to \$5 to employers that choose to participate in the installment payment option. This annual fee was estimated to generate \$100,000 in both FY 2009-10 and FY 2010-11 for the Department of Revenue to administer the quarterly payment plan.<sup>29</sup>

### **Unemployment Compensation Trust Fund**

Economic conditions resulting in abnormally high unemployment accompanied by high benefit charges can cause a severe drain on the UC Trust Fund. The federal government allows for advances to be made to state UC Trust Funds to pay UC benefits. On August 24, 2009, the Florida UC Trust Fund balance fell to \$0 and federal advance monies were drawn down. As of January 2011, over \$2 billion has been drawn down. Unless the federal advances are repaid prior to November 10, 2011, Florida employers will most likely lose a portion of their federal UC tax credit in 2011. Employers lose 0.3% of the credit for each year the loan has been outstanding. Any loss of the credit goes to repay the outstanding loan balance.

Loans to the state UC trust fund also accrue interest charges on a federal fiscal year basis and payments are due no later than September 30th each year. The American Recovery and Reinvestment Act of 2009 effectively waived interest accrued on advances until December 31, 2010, but interest began to accrue on unpaid loans on January 1, 2011. In order to repay interest coming due in September 2011, employers will be assessed a per-employee fee in February 2011 separate from their

---

<sup>26</sup> Section 443.131(2)(a), F.S.

<sup>27</sup> Section 443.131(2)(b), F.S.

<sup>28</sup> Currently, the negative adjustment factor is not available until January 1, 2015, and then not in any calendar year in which a federal advance, or loan, from the federal government is still in repayment for the principal amount of the loan.

<sup>29</sup> The annual employer installment fees generated are based on a Revenue Estimating Conference from June 3, 2010.

<http://edr.state.fl.us/Content/conferences/revenueimpact/archives/2010/pdf/page%2047-59.pdf>

(last visited on February 2, 2011)

unemployment taxes which will be due June 2011. The interest due is projected to be \$61.5 million. If the interest is not paid when due, the federal government will not certify the state program and can withhold all administrative funding.

### **Payroll Service Providers**

Payroll Service Providers can be generally defined as an accounting business whose main focus is the preparation and management of payroll for other businesses. Payroll service providers that represent clients on unemployment tax matters before the Department of Revenue must file a power of attorney for each of their clients. Under current law, a provider with at least 500 clients has the option to file a single memorandum of understanding with the Department in lieu of the 500 individual powers of attorney.<sup>30</sup> The Department has recommended that the provider requirement to have at least 500 clients be reduced to 100 clients to allow the Department to enter into more memorandums of understanding and reduce the number of powers of attorney being filed.

### **Changes Made By the Bill:**

The bill addresses several topics related to unemployment compensation: state and federal benefits; revising how an employee's behavior affects benefit determinations; revising appeals of benefit determinations; and revising employers' UC tax rates.

#### State and Federal Benefits

Sections 4 and 6 of the bill make several changes to a claimant's state benefits. Section 4 requires a claimant to complete an initial skills review at the time of completing an application for UC benefits. The initial skills review administrator must report the results of the review to the Agency for Workforce Innovation and the appropriate workforce board or one-stop career center. The workforce board or one-stop career center could then determine if the claimant required further job skills or job search assistance.

Section 6 reduces the maximum number of benefit weeks from 26 to 20 and the associated benefit total amount available from \$7,150 to \$5,500 (maximum weekly benefit amount is \$275 times 20 weeks equals \$5,500). In conjunction with this change, the bill creates a definition of "Florida average unemployment rate" which is calculated by looking at the most recent year's third quarter and averaging the unemployment rate for those three months. That unemployment rate calculation is then used to determine how many weeks a claimant could receive, depending on the unemployment rate. The bill provides that if the Florida average unemployment rate is 9% or higher, a claimant is eligible for the maximum number of weeks-20. If the Florida average unemployment rate is 5% or below, the number of available weeks is 12. Each 0.5% increment above 5% adds an additional week of benefits.

The effect of reducing the number of benefit weeks from 26 to 20 is muted by the current availability of federal UC benefits. When a claimant exhausts his or her state benefits, the claimant will automatically move into the first federal Tier at whatever weekly amount the claimant was receiving under their state benefit. Four federal tiers and a period of temporary extended benefits are available for a possible total of 58 weeks. Combined with the total number of state benefits, 20 weeks under the provisions of the bill, the total is 78 weeks. Eligibility for the federal tiers is scheduled to expire January 1, 2012, and any tier a claimant is in after that date is phased out completely by June 9, 2012.

Sections 11 and 12 match up state law with federal changes made last year to extend federally-funded extended benefits which will provide additional weeks of unemployment compensation to the unemployed.

#### Employee Behavior

Sections 2, 3, and 5 address employee behavior or how that behavior is construed in the law. Section 2 revises the rule of construction for UC statutes to be construed on a neutral basis between an employer and an employee. Current law provides that the statutes are to be liberally construed in favor of a claimant.

---

<sup>30</sup> Section 213.053(4), F.S.

Section 3 addresses employee misconduct specifically. The current law is based on a 1941 Wisconsin Supreme Court decision (see footnote 11) that stated a definition of misconduct. The bill revises the definition of misconduct by changing the high standard for an employer to prove, “willful or wanton” disregard, to a lower standard, “conscious” disregard. The effect of the change is to somewhat reduce the burden of proof on an employer when attempting to prove employee misconduct was the reason for the employment separation. A finding of employee misconduct disqualifies an employee from receiving benefits. However, the employer must still show that the employee had a level of awareness that their conduct disregarded the employer’s interests or disregarded reasonable standards of behavior that the employer should expect from the employee. The bill also strikes “evil design” in the second form of behavior that can be classified as misconduct that may be a historic relic. Research is unclear as to how an employer could prove an employee had an “evil design” as it is unclear what elements might constitute that term.

This section also expands the definition of misconduct to include actions that can jeopardize a business’ ability to remain open, chronic employee behavior such as absenteeism or tardiness, and violations of employer rules, with certain rights granted to an employee who is unaware of or could not comply with such rule. Misconduct that could jeopardize an employer’s ability to remain open is defined as a willful and deliberate violation of a state standard or regulation that could cause the employer to be sanctioned or have its license or certification suspended by the state. The “willful and deliberate” standard is a higher standard for an employer to prove than the “conscious” disregard standard described in the previous paragraph. The bill requires that for chronic absenteeism or tardiness to be considered misconduct that the employee must deliberately violate a known policy of the employer or have one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence. The bill provides that a violation of an employer’s rules is misconduct unless the employee shows that the employee could not know and could not reasonably know of the rule’s requirements, the rule is not lawful or reasonably related to the job environment and performance, or the rule is not fairly or consistently enforced. This change means that a violation of an employer’s rules, whether in written form or orally provided, can be the basis for finding misconduct, but the employee is given an opportunity to provide evidence as to why the rule was not followed.

Section 5 also deals with employee behavior and what may disqualify an employee from an award of benefits. Currently, if an employee voluntarily leaves work without “good cause,” the employee is disqualified from an award of benefits. The bill revises the term “good cause” to require that “good cause” attributable to the employer must be something that would compel a reasonable employee to cease his or her work. The bill further expands disqualification from an award of benefits to include being fired for any crime committed in connection with work for which the employee was convicted or entered a plea of guilty or nolo contendere. Current law requires the crime to be punishable by imprisonment. The bill also adds that disqualification may occur for a crime that affects an employee’s ability to perform his or her work. The bill also provides for disqualification from benefits if the employee is in prison. In addition, the bill provides that an employee is disqualified from benefits in an amount based on a formula if the employee has received severance pay from an employer.

#### Appeals of Benefit Determinations

Section 9 makes changes to a claimant’s appeals process. The bill codifies the Agency for Workforce Innovation’s current rule that does not allow irrelevant, immaterial, or unduly repetitious evidence whether or not the evidence would have been admissible in a court. Currently, hearsay evidence may only be used to support a finding of fact if it would be admissible over an objection in a civil court. The bill allows hearsay evidence to be used in support of other evidence and, additionally, allows hearsay evidence to support a finding of fact if the parties have time to review the evidence prior to the hearing and the appeals referee finds, after review, that the hearsay evidence is appropriate under the circumstances. The bill also allows an appeal of an Unemployment Appeals Commission order to be made in the appellate district where the claimant resides or the job separation arose. If the appeal is filed with the Commission, the Commission must file the notice in the district court of appeal in which the order was issued. This change may be more convenient for a claimant since the appeal may be located nearer to the claimant’s home or where the job separation occurred.

Related to appeals and other documents mailed to claimants, section 10 of the bill provides that the date on the Agency document mailed to the claimant is considered the date the document was mailed, absent any evidence provided by the claimant to the contrary. If there is a controversy regarding when a document is mailed, a claimant could produce the envelope in which the document was mailed to show the postmark.

#### Employers UC Tax Rates

Sections 7 and 8 address employers tax rates and quarterly payments of the UC tax bills. Section 7 reduces most employers' tax rates by revising their benefit ratio calculation downward 10% which is used to compute their ultimate tax rate. Since the lookback for computing an employer's tax rate is the past three years of experience, this change will have an effect on rates over the next several years. This change is also a method to immediately approximate the longer term effects of the bill's benefit changes on tax rates (See Fiscal Comments section below). Section 8 allows employers to continue to have the option to pay their UC taxes in installments over the course of the year in 2012, 2013, and 2014.

#### **Other Bill Provisions:**

Section 1 of the bill changes the number of clients a payroll service provider must represent from 500 to 100 in order to enter into a memorandum of understanding with the Department of Revenue which will reduce the number of powers of attorney that must be filed with the Department by a payroll service provider.

Section 13 states that the bill fulfills an important state interest and section 14 states that the bill takes effect upon becoming law, unless otherwise specified in the bill.

#### **B. SECTION DIRECTORY:**

- Section 1. Amends s. 213.053, F.S., relating to payroll service providers filing powers of attorney with the Department of Revenue.
- Section 2. Amends s. 443.031, F.S., relating to rules of construction.
- Section 3. Amends s. 443.036, F.S., relating to employee misconduct.
- Section 4. Amends s. 443.091, F.S., relating to a UC claimant completing an initial skills review.
- Section 5. Amends s. 443.101, F.S., relating to disqualification for benefits.
- Section 6. Amends s. 443.111, F.S., relating to payment of benefits.
- Section 7. Amends s. 443.131, F.S., the calculation of an employer's benefit ratio used to determine the employer's tax rate.
- Section 8. Amends s. 443.141, F.S., relating to employer quarterly tax payments for 2012, 2013, and 2014.
- Section 9. Amends s. 443.151, F.S., relating to procedures concerning claims.
- Section 10. Amends s. 443.171, F.S., relating to evidence of mailing.
- Section 11. Amends s. 443.1117, F.S., relating to extended benefits.
- Section 12. Providing for applicability of claims under the provisions of s. 443.1117, F.S.
- Section 13. Provides that the bill fulfills an important state interest.

Section 14. Provides that unless otherwise specified in the bill, the bill takes effect upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The \$5 administrative fee to participate in the installment payment program for UC taxes is a per year fee. The amount of money generated from the fee depends on the number of businesses electing to participate. In 2010, out of 450,000 employers, only about 5,000 elected to participate in this option (representing a total of \$127 million in UC taxes). However, due to the expected significant increases in the UC tax in future years, more employers may elect to participate in the installment option.

#### 2. Expenditures:

None. (See Fiscal Comments)

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None. (See Fiscal Comments)

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

The reduction in employer taxes and the reduction in number of benefit weeks will reduce costs on businesses in the state which may allow them to make investments and hire additional employees.

### D. FISCAL COMMENTS:

Compared to current law, the legislation reduces taxes in 2011 and is expected to do so in subsequent years. The lower taxes will generally be accompanied by and attributable to lower benefit payments. Consequently, the impact of the lower taxes on the trust fund balance and on the need to borrow from the federal government will be partially or completely offset by lower outflows from the fund (i.e. benefit payments). At present, estimates of the net impact on the trust fund are being developed.

Extended benefits for former state and local employees do not qualify for federal funding due to the fact that these entities are self-insured and the federal law does not allow for their participation in federal sharing. The cost, incurred from the time Governor Crist issued his executive orders, is estimated to be \$5.4 million from state funds and \$13 million from local government funds.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

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

The bill codifies Governor Crist's previously issued executive orders regarding temporary extended benefits. Costs associated with the benefits began to be incurred by the state and local governments at that time. To the extent this bill requires cities and counties to expend funds to pay state extended benefits for eligible former employee, the provisions of Section 18(a) of Article VII of the State Constitution may apply. If those provisions do apply, in order for the law to be binding upon the cities

and counties, the Legislature must find that the law fulfills an important state interest (see section 13 of the bill) and one of the following relevant exceptions:

- a. Appropriate funds estimated at the time of enactment to be sufficient to fund such expenditures;
- b. Authorize a county or municipality to enact a funding source not available for such local government on February 1, 1989, that can be used to generate the amount of funds necessary to fund the expenditures;
- c. The expenditure is required to comply with a law that applies to all persons similarly situated, including state and local governments; or
- d. The law is either required to comply with a federal requirement or required for eligibility for a federal entitlement.

Similarly situated refers to those laws affecting other entities, either private or governmental, in addition to counties and municipalities. To whatever extent the bill requires expenditure of funds, the bill impacts all persons similarly situated, so that particular exception appears to apply.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**