

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 43 Public Officers

SPONSOR(S): State Affairs Committee, Government Operations Subcommittee, Smith and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 88

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	9 Y, 3 N, As CS	McDonald	Williamson
2) State Affairs Committee	12 Y, 3 N, As CS	McDonald	Hamby

SUMMARY ANALYSIS

Extra compensation claims are prohibited under current law, with some exceptions. No extra compensation may be made to any officer, agent, employee, or contractor after service has been rendered or the contract made, with the following exceptions:

- Extra compensation given to state employees who are included within the senior management group pursuant to rules adopted by the Department of Management Services;
- Extra compensation given to county, municipal, or special district employees pursuant to policies adopted by county or municipal ordinances or resolutions of governing boards of special districts or to employees of the clerk of the circuit court pursuant to written policy of the clerk; or
- A clothing and maintenance allowance given to plainclothes deputies.

Notwithstanding the prohibition against extra compensation, cities and counties may, under their respective governing statutes, provide for an extra compensation program, including a lump-sum bonus payment program, to reward outstanding employees whose performance exceeds standards, if the program provides that a bonus payment may not be included in an employee's regular base rate of pay and may not be carried forward in subsequent years.

Severance pay for water management district employees is specifically prohibited.

The bill makes the following changes with respect to public employee compensation:

- Requires a unit of government that enters into a contract or employment agreement or renews or renegotiates an existing contract or agreement to include in the contract a limitation on the compensation of not greater than 20 weeks, unless the unit of government approves the amount by a two-thirds voted of the membership of the approving body. Also, requires inclusion of a provision prohibiting severance pay when the officer, agent, employee, or contractor has been fired for misconduct, as defined in s. 443.026(29), F.S., by the unit of government.
- Provides for exceptions to requirements for severance pay.
- Restricts bonus schemes;
- Deletes provisions of law inconsistent with these restrictions; and
- Prohibits confidentiality provisions in any employment agreement or contract involving extra compensation.

The bill has an indeterminate fiscal impact. See "Fiscal Comments."

The bill takes effect July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Extra compensation claims are prohibited under s. 215.425, F.S., with some exceptions. The section provides that no extra compensation may be made to any officer, agent, employee, or contractor after service has been rendered or the contract made, with the following exceptions:

- Extra compensation given to state employees who are included within the senior management group pursuant to rules adopted by the Department of Management Services;
- Extra compensation given to county, municipal, or special district employees pursuant to policies adopted by county or municipal ordinances or resolutions of governing boards of special districts or to employees of the clerk of the circuit court pursuant to written policy of the clerk; or
- A clothing and maintenance allowance given to plainclothes deputies pursuant to s. 30.49, F.S.

Numerous attorney general opinions have been issued interpreting this section of law.¹ According to the Attorney General opinions, the following forms of remuneration violate s. 215.425, F.S.:

- Severance pay or wages in lieu of notice of termination;²
- Bonuses to existing employees for services for which they have already performed and been compensated, in the absence of a preexisting employment contract making such bonuses a part of their salary;³ and
- Lump-sum payments made as an incentive for an employee to end his or her employment.

The following do not violate s. 215.425, F.S.:

- Certain settlements;
- Lump-sum supplemental payments as an increased benefit to qualified current employees who elect early retirement; and
- Accrued annual or sick leave.⁴

The key issue in the Attorney General opinions seems to be whether the benefits are benefits that were anticipated as part of the initial contract or hiring policy, or whether they are additional payment for services over and above that fixed by contract or law when the services were rendered.⁵ Benefits that were anticipated as part of the hiring process are deemed to be included in the salary or payment for services. Whereas, additional benefits not anticipated at the hiring date or available to all employees as part of a retirement plan, are deemed to be extra compensation prohibited by current law.

Notwithstanding the prohibition against extra compensation set forth in s. 215.425, F.S., cities and counties are allowed, under their respective governing statutes, to "provide for an extra compensation program, including a lump-sum bonus payment program, to reward outstanding employees whose performance exceeds standards, if the program provides that a bonus payment may not be included in an employee's regular base rate of pay and may not be carried forward in subsequent years."⁶

Section 110.1245, F.S., tasks the Department of Management Services (DMS) with paying bonuses when funds are specifically appropriated by the Legislature for bonuses. Statutory eligibility criteria include the following:

¹ See Op. Att'y Gen. Fla. 2009-03 (2009); Op. Att'y Gen. Fla. 2007-26 (2007); Op. Att'y Gen. Fla. 97-21 (1997); and Op. Att'y Gen. Fla. 91-51 (1991).

² Op. Att'y Gen. Fla. 2007-26 (2007); Op. Att'y Gen. Fla. 91-51 (1991).

³ Op. Att'y Gen. Fla. 91-51 (1991).

⁴ Op. Att'y Gen. Fla. 2009-03 (2009).

⁵ Op. Att'y Gen. Fla. 2007-26 (2007).

⁶ See ss. 166.021(7) and 125.01(1)(bb), F.S.

- The employee must be employed prior to July 1 of that fiscal year and be continuously employed through the date of distribution.
- The employee may not be on leave, without pay, consecutively for more than 6 months during the fiscal year.
- The employee may not have sustained disciplinary action during the period beginning July 1 through the date the bonus checks are distributed. Disciplinary actions include written reprimands, suspensions, dismissals, and involuntary or voluntary demotions that were associated with a disciplinary action.
- The employee must demonstrate a commitment to the agency mission by reducing the burden on those served, continually improving the way business is conducted, producing results in the form of increased outputs, and working to improve processes.
- The employee must demonstrate initiative in work and exceed normal job expectations.
- The employee must display agency values of fairness, cooperation, respect, commitment, honesty, excellence, and teamwork.

DMS also has rules for:

- A process for peer input that is fair, respectful of employees, and affects the outcome of the bonus distribution.
- A division of the agency by work unit for purposes of peer input and bonus distribution.
- A limitation on bonus distributions equal to 35 percent of the agency's total authorized positions. This requirement may be waived by the Office of Policy and Budget in the Executive Office of the Governor upon a showing of exceptional circumstances.

Bonuses are authorized in specified circumstances to leased employees authorized by the legislature, an agency, or the judicial branch.⁷

Severance pay for water management district employees is specifically prohibited under s. 373.0795, F.S. Severance pay is defined as the actual or constructive compensation, in salary, benefits or perquisites, of an officer or employee of a water management district, or any subdivision or agency thereof, for employment services yet to be rendered for a term greater than 4 weeks before or immediately following termination of employment (excluding leave time and retirement).

Effect of Changes

The bill revises existing law that prohibits extra compensation made to a public employee after service has been rendered or the contract made by deleting current provisions allowing counties, municipalities, special districts, and clerks of the circuit court from giving bonuses as long as they had policies in place. The bill creates requirements for any policy, ordinance, rule, or resolution designed to implement a bonus scheme. The scheme must:

- Base the award of a bonus on work performance;
- Describe the performance standards and evaluation process by which a bonus will be awarded;
- Notify all employees of the policy, ordinance, rule, or resolution before the beginning of the evaluation period on which a bonus will be based; and
- Consider all employees for the bonus.

The bill requires a unit of government that enters into a contract or employment agreement with an officer, agent, employee, or contractor, or that renews or renegotiates an existing contract or agreement to include the following in the contract:

- A limitation on the compensation of not greater than 20 weeks, unless the unit of government approves the amount by a two-thirds vote of the membership of the approving body.
- A prohibition of severance pay when the officer, agent, employee, or contractor has been fired for misconduct, as defined in s. 443.026(29), F.S., by the unit of government.⁸

⁷ See s. 110.191, F.S.

⁸ "Misconduct" includes, but is not limited to, the following, which may not be construed in pari material with each other: (a) Conduct demonstrating willful, or wanton disregard of an employer's interests and found to be a deliberate violation or disregard of

Notwithstanding the requirements for contract provisions, the bill provides that on or after July 1, 2011, severance pay may be received by an officer, agent, employee, or contractor if:

- The severance pay is paid wholly from private funds and is not a violation of the employee code of ethics⁹; or
- It is part of an interstate interchange of employees.¹⁰

The bill clarifies that it does not create an entitlement to severance pay in the absence of its authorization.

Additionally, the term "severance pay" is defined as the actual or constructive compensation, including salary, benefits, or perquisites, for employment services yet to be rendered which is provided to an employee who has recently been or is about to be terminated. The term does not include the following:

- Compensation for earned and accrued annual, sick, compensatory, or administrative leave;
- Early retirement under provisions established in an actuarially funded pension plan subject to part VII of chapter 112, F.S.; or
- Any subsidy for the cost of a group insurance plan available to an employee upon normal or disability retirement that is by policy available to all employees of the unit of government pursuant to the unit of government's health insurance plan.

The provision relating to subsidy for the cost of a group insurance plan must not be construed to limit the ability of a unit of government to reduce or eliminate the subsidy.

On or after July 1, 2011, any agreement or contract entered into, or any renewal or renegotiation of an existing contract, involving extra compensation between a unit of government and an officer, agent, employee, or contractor cannot include any provision that limits the ability of a party to the agreement or contract to discuss such agreement or contract.

Finally, the bill deletes provisions in other sections of law that specifically give municipalities and counties the authority to provide extra compensation programs and repeals a section of law governing severance pay for water management districts because of inconsistencies in definitions.

B. SECTION DIRECTORY:

Section 1 amends s. 215.425, F.S., deleting current provisions exempting counties, municipalities, or special districts or clerks of the circuit court from the provisions of the section if they have policies in place; creating requirements for implementation of a bonus scheme; requiring a unit of government to include certain provisions in any contract or employment agreement that includes a provision relating to severance pay; providing certain conditions under which a person may receive severance pay; clarifying that an entitlement to severance pay is not created in the absence of its authorization; defining the term "severance pay"; prohibiting any agreement or contract involving extra compensation in certain circumstances.

Section 2 deletes paragraph (bb) of s. 125.01(1), F.S., allowing counties to provide extra compensation programs.

Section 3 deletes subsection (7) of s. 166.021, F.S., allowing municipalities to provide extra compensation programs.

Section 4 amends s. 112.061, F.S., conforming cross references.

Section 5 repeals s. 373.0795, F.S., which prohibits severance pay for water management districts.

the standards of behavior which the employer has a right to expect of his or her employee; or (b) 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.

⁹ Under part III of chapter 112, F.S.

¹⁰ Under part II of chapter 112, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate. See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Indeterminate. See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Cost savings may arise from the requirement that any new, renewed, or renegotiated contract or employment agreement that contains a provision on severance pay must limit the compensation to no greater than 20 weeks, unless approved by two-thirds vote of the approving body of the unit of government.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 21, 2011, the State Affairs Committee adopted three amendments to CS/HB 43 and passed the bill as a committee substitute. The committee substitute differs from CS/HB 43 in the following ways:

- Requires a unit of government that enters into a contract or employment agreement with an officer, agent, employee, or contractor, or that renews or renegotiates an existing contract or agreement to include the following in the contract:
 - A limitation on the compensation of not greater than 20 weeks, unless the unit of government approves the amount by a two-thirds vote of the membership of the approving body.
 - A prohibition of severance pay when the officer, agent, employee, or contractor has been fired for misconduct, as defined in s. 443.026(29), F.S., by the unit of government.
- Provides that on or after July 1, 2011, notwithstanding the requirements for contract provisions, severance pay may be received by an officer, agent, employee, or contractor if the severance pay is paid wholly from private funds and is not a violation of the employee code of ethics or it is part of an interstate interchange of employees.
- Adds exclusions to the definition of "severance pay".

On March 29, 2011, the Government Operations Subcommittee passed HB 43 as a committee substitute. The committee substitute differs from the original bill in the following ways:

- Amends s. 215.425, F.S., relating to extra compensation claims prohibited, to include bonuses and severance pay. Deletes a provision allowing counties, municipalities, or special districts to give bonuses as long as they have policies in place. Creates requirements for any policy, ordinance, rule, or resolution designed to implement a bonus scheme. Revises language on severance pay from the original bill as follows:
 - Changes the prohibition on severance from covering nonelected public officers to a prohibition on any local government entering into a contract or employment agreement containing a severance pay provision with an officer, agent, employee, or contractor.
 - Adds an exception to the prohibition for contracts for employment entered into before July 1, 2011, if those contracts contained a severance pay provision.
 - Excludes reference to "a term greater than 4 weeks" in the definition of "severance pay."
- Deletes provisions in ss. 166.021 and 125.01(1)(bb), F.S., allowing those respective units of local government to pay extra compensation.
- Repeals s. 373.0795, F.S., prohibiting severance pay in water management districts.
- Makes cross-reference changes.