WORKERS' COMPENSATION COMPLIANCE (SECURING IT AND CONSEQUENCES FOR VIOLATION) AND, STATE AUTHORITY TO ENFORCE

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In light of the devastating storms that have been plaguing the South this year, it is timely to remind those in the construction industry and employers in general of their workers' compensation obligations in the State of Florida. The governing statute, administered by the Department of Financial Services' Division of Workers' Compensation ("Division"), is Ch. 440, Florida Statutes, and presents the casual reader with a maze of references that requires one to flip between them throughout the statute. The overriding principle is however very straightforward. Simply put, every employer in Florida must secure the payment of workers' compensation.[1] The complexity lies in the differentiation in the industry in which one is engaged and is divided into three broad categories of industries – construction, non-construction and agriculture. I now turn to describing each category.

Construction – Any sole proprietor or company operating in the construction industry is required to secure the payment of workers' compensation coverage. Sole proprietors may opt for a "workers' compensation exemption" and not have to secure the payment of workers' compensation insurance, by submitting the appropriate application to the Division.[2] Things can get tricky when a contractor, for example, hires a subcontractor. If that subcontractor fails to secure the payment of workers' compensation insurance, then the subcontractor's employees become the employees of the contractor for whom the contractor should obtain coverage.[3] The Division will penalize both the contractor and subcontractor for violating Ch. 440 of the Florida Statutes. It is important to note that this is also applicable to those employers who opt to utilize a personnel leasing company, where employees are "leased back" to an employer with payroll and coverage being provided by the leasing company. The violation is triggered if a subcontractor fails to obtain coverage under this method for all of its employees.

Non-Construction – Employers with four or more employees must secure the payment of workers' compensation.

Agricultural – Farmers who utilize between six or more regular employees and twelve or more laborers at one time for seasonal labor, that is completed in less than 30 days (the season labor cannot exceed 45 days) must secure the payment of workers' compensation for those employees. This is a crucial part of Ch. 440of the Florida Statutes, that is often overlooked and for which many employers often run afoul of the Division.

Moreover, there exists an exemption for out-of-state employees and employers[4] if the employer provides coverage under the workers' compensation laws of the other state to cover temporary (no more than ten consecutive days or no more than 25 total days in a calendar year) employment while in Florida.

The Division has broad enforcement authority under Ch. 440 of the Florida Statutes and may conduct random investigations either at a work-site or by requesting and inspecting business records at a business' headquarters, typically for the preceding two years. The business records that must be maintained and produced are prescribed by mandated by Division rules.[5] "Failure to secure the payment of workers' compensation," can include failing to obtain coverage, materially understating or concealing payroll; materially misrepresenting or concealing employee duties so as to avoid proper classification for premium calculations; or, materially misrepresenting or concealing information pertinent to the computation and application of an experience modification factor.

If the Division determines that an employer has failed to secure coverage, then the Division has the authority to immediately issue a "stop-work order," as such violation is deemed an immediate serious danger to public health, safety and welfare (very similar to the health department immediately closing a restaurant for a health code violation). After the stop-work order is issued, or an employer is deemed to have engaged in a violation in the preceding two years, a penalty is calculated based on twice the amount of premium an employer would have paid in securing coverage of uncovered employees, and can range from a minimum of $1,000 to millions of dollars. To calculate the penalty, the Division will often request (and can subpoena) records that includes check registers, copies of checks, payroll records, bank account records, insurance records, receipts and other documents deemed necessary to conduct a thorough audit. Failure to provide records can result in the Division "imputing" the payroll using a calculation equal to one and one-half times the statewide average weekly wage. In addition, should the employer violate the terms of a stop-work order, the Division can then assess an additional penalty at the rate of $1,000/day for each day of a violation.

By no means is this blog intended to provide an exhaustive list of requirements, issues, exemptions, or matters that can arise under Ch. 440of the Florida Statutes. It does, however, provide a glimpse into the intricate and complex world of "workers' compensation compliance," and employers are cautioned to be diligent in complying with the statute, because failure to do so could have severe consequences. Having been the Chief Counsel for the Division for many years and engaging in numerous formal administrative hearings and appeals before the state District Courts of Appeals, I would strongly advise employers engage counsel to assist in any workers' compensation compliance matters that may arise under Ch. 440 of the Florida Statutes, as they can be intricate and ultimately costly.

For more information on this topic, please contact the author, Colin Roopnarine, on the firm's Government and Regulatory Team.

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[1] "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. "Employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107. Also, "securing the payment of workers' compensation" means obtaining coverage that meets the requirements of Ch. 440, F.S.

[2] See Sec. 440.05, F.S.

[3] See Sec. 440.10(1)(b), F.S.

[4] See Sec.440.094, F.S.

[5] See generally Rule 69L-6.015, Florida Administrative Code

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