

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL: SB 472

INTRODUCER: Senators Evers, Detert, and others

SUBJECT: Prepaid Limited Health Service Organizations/Taxes

DATE: April 11, 2011

REVISED: 4/12/11

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Stovall	HR	<b>Fav/1 amendment</b>
2.			BC	
3.				
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/>            | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input checked="" type="checkbox"/> | Significant amendments were recommended |

**I. Summary:**

The bill amends Florida Statutes to exempt the premiums, contributions, and assessments received by a prepaid limited health service organization, under contract with Medicaid<sup>1</sup> solely to provide services to Medicaid recipients, from a specific insurance premium tax.

The bill provides for remedial retroactive application of the exemption to December 31, 1998. The bill expressly states that the retroactive application does not create a right to a refund for any tax, penalty, or interest on certain premium taxes paid to the Department of Revenue (DOR) prior to the effective date.

This bill substantially amends the following section of the Florida Statutes: 636.0145.

<sup>1</sup> Section 409.902, F.S., provides that the Agency for Health Care Administration is designated as the single state agency authorized to make payments for medical assistance and related services under Title XIX of the Social Security Act and that this program of medical assistance is designated the "Medicaid program."

## II. Present Situation:

Part I of ch. 636, F.S., regulates the operation and administration of prepaid limited health service organizations<sup>2</sup> (PLHSOs) and discount medical plan organizations in the state of Florida. PLHSOs solely providing services to Medicaid recipients under a contract with Medicaid are exempt from several provisions of ch. 636, F.S., including those related to rates and charges;<sup>3</sup> changes in rates and benefits, material modifications, and the addition of limited health services;<sup>4</sup> restrictions upon expulsion or refusal to issue or renew a contract;<sup>5</sup> notice of cancellation of contract;<sup>6</sup> and extension of benefits.<sup>7</sup>

Since 1994, Florida law has imposed a tax on the insurance premiums, contributions, and assessments received by a PLHSO.<sup>8</sup> The premium tax is to be paid annually and is calculated at a rate of 1.75 percent of the gross amount of premiums, contributions, and assessments collected on health insurance policies issued by PLHSOs.<sup>9</sup>

There are currently four PLHSOs which provide mental health services to Medicaid recipients through a contract with the Agency for Health Care Administration (AHCA) that are subject to this tax.<sup>10</sup> One organization, Lakeview Center, Inc. (Lakeview), filed a legal challenge in 2007 to the imposition of the tax by the Department of Revenue (DOR).<sup>11</sup> According to the court's order, Lakeview had been paying the premium tax under s. 624.509, F.S., since 2003. Lakeview subsequently came to believe that the tax was paid in error and sought a refund from the DOR. The request for refund was denied and Lakeview timely filed a Complaint with the Circuit Court for the Second Circuit in Tallahassee.

The court found that Lakeview contracted with the AHCA to provide mental health and other services to Medicaid recipients. Lakeview was paid a fixed sum by the AHCA to provide the stated services. Lakeview argued that the fixed sum paid by the AHCA under the contract did not constitute a "premium" to trigger the imposition of the premium tax under s. 624.509, F.S. The court disagreed, finding that a rule established by the Office of Insurance Regulation (OIR), which regulated Lakeview as an insurer in the state of Florida, defined "premium"<sup>12</sup> and

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<sup>2</sup> Section 636.003(7), F.S., defines a "prepaid limited health service organization" as "any person, corporation, partnership, or any other entity which, in return for a prepayment, undertakes to provide or arrange for, or provide access to, the provision of a limited health service to enrollees through an exclusive panel of providers, and s. 636.003(5), F.S., defines a "limited health service" as ambulance services, dental care services, vision care services, mental health services, substance abuse services, chiropractic services, podiatric care services, and pharmaceutical services.

<sup>3</sup> Section 636.017, F.S.

<sup>4</sup> Section 636.018, F.S.

<sup>5</sup> Section 636.022, F.S.

<sup>6</sup> Section 636.028, F.S.

<sup>7</sup> Section 636.034, F.S.

<sup>8</sup> Section 636.066(1), F.S.

<sup>9</sup> Section 624.509(1)(a), F.S.

<sup>10</sup> Email from the Agency for Health Care Administration to the Senate Committee on Health Regulation, Feb. 11, 2011, 4:40 p.m., on file with the Committee. The four PLHSOs are: Lakeview Center, Inc. (d/b/a Access Behavioral Health), Magellan Behavioral Health of Florida, Inc., North Florida Behavioral Health Partners, Inc., and Florida Health Partners, Inc.

<sup>11</sup> See *Lakeview Center, Inc. v. State of Florida, Dept. of Revenue*, No. 2007-CA-1255 (Fla. 2<sup>nd</sup> Cir. Co. Jan 23, 2008).

<sup>12</sup> Rule 69O-203.013(6), F.A.C. (2007), defined "premium" as "[t]he contracted sum paid by or on behalf of a subscriber or group of subscribers on a prepaid per capita or a prepaid aggregate basis for limited health services rendered by or through the PLHSO."

concluded that the fixed rate paid to Lakeview by the AHCA met the definition and was taxable. Lakeview appealed the circuit court ruling to Florida's First District Court of Appeal, but the lower court's ruling was per curiam affirmed by the appellate court.<sup>13,14</sup>

Currently, one or more PLHSOs have been paying the premium tax and others have not. Additional information regarding the identity of those PLHSOs, the amount of taxes that have been paid, and the amount of taxes still owed is not available from the DOR due to state confidentiality provisions.<sup>15</sup> However, according to the AHCA, the state has paid over \$844 million to PLHSOs for the provision of Medicaid behavioral health services over a 13-year period beginning in state fiscal year 1997-98 through state fiscal year 2009-10. The application of a 1.75 percent premium tax on capitations paid to such PLHSOs in state fiscal year 2009-10 would amount to \$3.2 million.

### **PLHSO Capitation Rates**

The PLHSOs under contract with the AHCA solely for the provision of Medicaid behavioral health services are managed care plans known as "prepaid mental health plans" or PMHPs. The AHCA contracts with PMHPs by competitive procurement under s. 409.912(4)(b), F.S., and pays them a fixed, lump-sum payment per beneficiary on a monthly basis, typically at the beginning of the month. These prepayments are designed to cover services needed in the aggregate for any given month in a 12-month period. Such a fixed, prepayment is known as a "capitation."<sup>16</sup>

Managed care plans that provide for services on a prepaid, capitated basis agree to accept the capitation payment and assume financial risk for delivering the covered services, regardless of whether the capitation fully covers the cost for all services that need to be provided. Capitated entities sometimes assume full risk, i.e. the coverage is comprehensive with no mitigation factors for the risk assumed, and others assume partial risk, i.e. the coverage is limited as opposed to comprehensive and/or the risk may be mitigated by loss prevention or shared-savings arrangements. PMHPs assume partial risk since they cover only behavioral health services. Payment systems based on capitation are designed to provide the state with less risk and more predictability for Medicaid spending and to incent the capitated entities to manage the provision of services in a cost-effective manner.<sup>17</sup>

### **Actuarial Soundness**

Florida law and federal regulations require that capitation rates for Medicaid managed care plans must be actuarially sound. The federal Centers for Medicare and Medicaid Services (CMS) requires Medicaid capitation rates developed at the state level to be actuarially certified prior to

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<sup>13</sup> Lakeview Center, Inc. v. State of Florida, Dept. of Revenue, 8 So.3d 1136 (Fla. 1<sup>st</sup> DCA 2009)(unpublished disposition).

<sup>14</sup> "Per curiam affirmed," or PCA, refers to a decision of a court, without identifying any judges by name, finding that the decision of a lower court was correct. Such a decision is often made without rendering an opinion and the lack of record for its basis can preclude further review.

<sup>15</sup> Section 213.053(2)(a), F.S.

<sup>16</sup> Senate Committee on Health Regulation, *Issue Brief 2011-221: Overview of the Medicaid Managed Care Programs in Florida*, November 2010, available at <http://flsenate.gov/Committees/InterimReports/2011/2011-221hr.pdf>, (Last visited on April 9, 2011).

<sup>17</sup> *Id.*

CMS approval. The AHCA has contracted with Milliman, Inc., for actuarial services related to capitation rates for PMHPs, both to develop the rates and to certify them as actuarially sound.<sup>18</sup>

Following the First District Court of Appeal's 2009 per curiam affirmation of the Second Circuit Court's ruling against Lakeview, the AHCA instructed Milliman that because PMHPs that are PLHSOs<sup>19</sup> would presumably be required to pay the 1.75 percent premium tax under s. 624.509(1)(a), F.S., Milliman should take the tax under consideration when calculating and certifying the 2010-11 capitation rates for PMHPs, in the interest of maintaining actuarial soundness.

The following passage is from Milliman's actuarial certification of the 2010-11 PMHP rates:<sup>20</sup>

**PMHP Administrative Costs and Premium Taxes:**

We added a 14.75% allowance (as a percentage of the capitation rate) for PMHP administrative services and state premium taxes. The encounter data rate must include an allowance for administrative service because it is based on the actual utilization of services by PMHP enrollees. We selected a 13% administration load based on typical administrative costs of behavioral health organizations across the country, a 2% of revenue margin allowance, and our judgment. The state premium tax allowance is 1.75% of revenue.

In this way, capitation rates for PMHPs that are PLHSOs were increased by 1.75 percent for the current contract year in order to offset an expected tax payout by the PMHPs to the DOR reflecting the same percent of revenue paid by the AHCA to the PMHPs. The AHCA has indicated that the 1.75 percent offset (i.e. increased payments by the AHCA to the PMHPs) is to be maintained in perpetuity for PMHPs subject to the 1.75 percent premium tax.

The effect of this offset is that capitation rates for PLHSOs have been increased with Medicaid dollars so that the PLHSOs can pay the premium taxes to the DOR, without harming the actuarial soundness of the capitation rates.

**III. Effect of Proposed Changes:**

**Section 1** amends s. 636.0145, F.S., to exempt any entity providing services solely to Medicaid recipients through a contract with Medicaid from payment of the premium tax required by s. 624.509, F.S.

**Section 2** creates a non-statutory provision of law for retroactive application of the exemption to December 31, 1998. The bill provides that the retroactive application is remedial in nature and does not create the right to a refund of any tax, penalty, or interest to any company that has paid the tax, penalty, or interest prior to July 1, 2011.

<sup>18</sup> Senate Committee on Health Regulation, *Issue Brief 2011-226: Medicaid Managed Care Rate-setting*, November 2010, available at <http://flsenate.gov/Committees/InterimReports/2011/2011-226hr.pdf>, (Last visited on April 9, 2011).

<sup>19</sup> One PMHP currently under AHCA contract is not a PLHSO and is therefore not subject to the premium tax.

<sup>20</sup> Milliman, Inc., *State of Florida Agency for Health Care Administration, September 1, 2010 – August 31, 2011 Prepaid Mental Health Plan Capitation Rate Development*, August 19, 2010, p. 7. On file with staff of the Senate Committee on Health Regulation.

**Section 3** provides an effective date for the bill of July 1, 2011.

**Other Potential Implications:**

Exempting PLHSOs from the tax on premiums, contributions, and assessments would impact the way in which the AHCA's actuarial contractor currently calculates capitation rates for those organizations. The 1.75 percent increase in the capitation rates for 2010-11 to offset the tax would be eliminated prospectively since it would no longer be necessary.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

The bill would exempt the specified PLHSOs from taxes on premiums, contributions, and assessments that are currently in place under s. 624.509, F.S.

B. Private Sector Impact:

Prospectively, the bill should have a neutral effect on private-sector PLHSOs currently subject to the tax because the amount of the bill's tax relief should be offset by an equivalent reduction in their capitation rates.

However, to the degree that one or more PLHSOs might owe unpaid taxes that were due in prior years, those PLHSOs would be positively impacted by the bill's retroactive application of the tax exemption because any unpaid taxes owed from prior years would become nullified by the bill.

C. Government Sector Impact:

On February 25, 2011, the Revenue Estimating Conference (Conference) reviewed the bill for fiscal impact. The Conference was unable to publicly disclose the names of the potential taxpayers or the amounts of taxes paid or owed, due to confidentiality concerns.

However, the Conference determined the bill has a non-recurring negative fiscal impact to the state General Revenue Fund (GR) of \$11.2 million for state fiscal year 2011-12 and a recurring negative impact to GR of \$1.6 million beginning that same year.<sup>21</sup> The combination of recurring and non-recurring dollars for state fiscal year 2011-12 brings the total negative GR impact to \$12.8 million for that year.

*Non-Recurring Negative Fiscal Impact: \$11.2 million*

The non-recurring negative GR impact for 2011-12 would presumably result from the bill's retroactive application of the tax exemption, which would render the DOR unable to collect unpaid taxes from prior years during the 2011-12 state fiscal year.

*Recurring Negative Fiscal Impact: \$1.6 million*

There would be a recurring negative impact to GR, even though the bill's recurring impact to the private sector might be neutral. Medicaid dollars that are being used to boost the PLHSOs' capitation rates are a mixture of state funds and federal matching funds, with federal match accounting for 64.82 percent in the current state fiscal year.<sup>22</sup> However, when the law calls for PLHSOs to pay the premium tax after the end of each calendar year,<sup>23</sup> the tax dollars are to be deposited into GR.<sup>24</sup> In this way, the bill would cause a negative recurring impact to GR despite the neutral recurring impact to the private sector.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

*Penalties, Interest, and the Rate of Taxation*

In its presentation to the Conference on February 25, 2011, the DOR indicated that interest pertaining to any unpaid taxes would likely be applied but penalties would likely be waived. Further, due to certain tax credits that would apply to PLHSOs in these cases,<sup>25</sup> the net tax rate actually paid by the PLHSOs would be less than 1.75 percent. Because of those tax credits, the Conference assumed a net tax rate of 0.7 percent instead of 1.75 percent when determining the fiscal impact described above.<sup>26</sup>

*Tax Payments for 2011*

It is unclear what would happen under the bill to dollars currently being used to boost capitation rates for PLHSOs in the 2010-11 contract year (for the purpose of offsetting the tax) if the PLHSOs are no longer required to pay the tax for the 2011 calendar year. It is also unclear how

<sup>21</sup> See <http://edr.state.fl.us/Content/conferences/revenueimpact/pdf/page76.pdf>, (Last visited on April 9, 2011).

<sup>22</sup> Social Services Estimating Conference, *Medicaid Federal Share of Matching Funds*, March 1, 2011, available at <http://edr.state.fl.us/Content/conferences/medicaid/fmap.pdf> (last visited April 11, 2011).

<sup>23</sup> Section 624.509(1), F.S.

<sup>24</sup> Section 624.509(3), F.S.

<sup>25</sup> Section 624.509(5), F.S.

<sup>26</sup> *Supra* note 21.

the difference between the assumed tax rate of 1.75 percent, which was used to boost the current capitation rates,<sup>27</sup> and the estimated net tax rate of 0.7 percent would be resolved.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

**Barcode 386990 by Health Regulation on April 12, 2011:**

The amendment removes the tax exemption's retroactivity. The amendment provides that the bill applies prospectively and that the prospective operation does not provide a basis for an assessment of taxes not paid nor a basis for determining any right to a refund of taxes paid, prior to the bill's effective date. (WITH TITLE AMENDMENT)

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>27</sup> *Supra* note 20.