

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 786

SPONSOR: Health, Aging and Long-Term Care Committee and Senator Wasserman Schultz

SUBJECT: Opticianry

DATE: March 22, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HC	Favorable/CS
2.	_____	_____	APJ	_____
3.	_____	_____	AP	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill enhances the criminal penalty applicable to existing offenses under the opticianry practice act from a second-degree misdemeanor to a third degree felony. The bill provides a definition of the term “contact lenses,” to mean a prescribed medical device intended to be worn directly against the cornea of the eye to correct vision conditions, act as a therapeutic device, or provide a cosmetic effect. In effect, persons who are not licensed to practice opticianry in Florida and who are not otherwise exempt from opticianry licensure may not prepare or dispense contact lenses as defined in the bill without a prescription from a duly licensed physician or optometrist. The new offense is a third degree felony punishable by a maximum prison sentence of 5 years and maximum fine of \$5,000.

The bill replaces references to the term “medical doctor” with the term “allopathic or osteopathic physician” and revises requirements for prescribing optical devices to clarify that such prescriptions must be written by licensed allopathic or osteopathic physicians. The bill revises the Criminal Punishment Code to specify that practicing opticianry without a license (a third degree felony) is a level 7 offense, for purposes of a minimum sentence calculation.

Additionally, the bill expands the inspection authority of the Department of Health from establishments where optical devices are *prepared and dispensed* to include establishments of *any kind* in the State in which lenses, spectacles, eyeglasses, contact lenses, and any other optical device is *prepared or dispensed*.

This bill amends sections 484.002, 484.006, 484.012, 484.013, 484.015, and 921.0022, Florida Statutes:

II. Present Situation:

Unlicensed Activity

Chapter 456, F.S., provides the general regulatory provisions for health care professions regulated under the Department of Health. Section 456.065, F.S., authorizes the Department of Health to issue and deliver a notice of cease and desist to any person when the department has probable cause to believe that that person is not licensed by the department or the appropriate regulatory board, and has violated any provision in ch. 456, F.S., or any statute that relates to the practice of a profession regulated by the department, or any administrative rule adopted thereto. The department may issue a notice of cease and desist to any person who aids and abets the unlicensed practice of a profession by employing the unlicensed person. To enforce a cease and desist order the Department of Health may file a proceeding in the name of the state seeking issuance of an injunction or a writ of mandamus against any person who violates any provisions of such order. In addition, the Department of Health may impose an administrative penalty not to exceed \$5,000 per incident of unlicensed activity. The Department of Health may seek the imposition of a civil penalty through a circuit court for any violation for which the department may not issue a notice of cease and desist. The civil penalty may not be less than \$500 or greater than \$5,000 for each offense. The court may award court costs and reasonable attorney's fees to the prevailing party, and the court may award the department reasonable costs of investigation.

Regulation of Opticianry

Part I, ch. 484, F.S., contains provisions which regulate the practice of opticianry. Opticianry is defined to mean the preparation and dispensing of lenses, spectacles, eyeglasses, contact lenses, and other optical devices to the intended user or agent, upon the written prescription of a medical doctor or optometrist duly licensed to practice or upon presentation of a duplicate prescription. The Board of Opticianry has regulatory jurisdiction over the practice of opticianry. Under s. 484.006(3), F.S., no rule or policy of the board may prohibit the sale of spectacles for reading purposes; toy glasses; goggles or sunglasses consisting of plano white, plano colored, or plano tinted glasses; or readymade nonprescription glasses; nor shall *anything in this part* be construed to affect in any way the manufacturing and sale of plastic or glass artificial eyes or any person engaged in the manufacturing or sale of plastic or glass artificial eyes.

Section 484.007(3), F.S., requires any person who operates an optical establishment to obtain a permit from the Department of Health. An optical establishment is any establishment in the State that offers, advertises, and performs opticianry services for the general public. Duly authorized agents and employees of the Department of Health have the power to inspect in a lawful manner at all reasonable hours any establishment in the State in which lenses, spectacles, eyeglasses, contact lenses, and any other optical devices are prepared *and* dispensed, for the purpose of: determining whether any provision of part I, ch. 484, F.S., is being violated; securing samples or specimens of lenses; or securing evidence needed for prosecution under part I, ch. 484, F.S.

Criminal Penalties

Section 484.013, F.S., contains criminal penalty provisions, as follows:

- (1) It is unlawful for any *person*:
 - (a) To make a false or fraudulent statement, either for herself or himself or for another person, in any application, affidavit, or statement presented to the board or in any proceeding before the board.
 - (b) To prepare or dispense lenses, spectacles, eyeglasses, contact lenses, or other optical devices when such person is not licensed as an optician in this state.
 - (c) To prepare or dispense lenses, spectacles, eyeglasses, contact lenses, or other optical devices without first being furnished with a prescription as provided for in s. 484.012.
- (2) It is unlawful for any person other than an optician licensed under this part to use the title “optician” or otherwise lead the public to believe that she or he is engaged in the practice of opticianry.
- (3) It is unlawful for any optician to engage in the diagnosis of the human eyes, attempt to determine the refractive powers of the human eyes, or, in any manner, attempt to prescribe for or treat diseases or ailments of human beings.
- (4) It is unlawful for any person to open or operate, either alone or with any other person or persons, an optical establishment which does not have the permit required by this part.
- (5) Any person who violates a provision of this section commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

The criminal penalty for a violation of s. 484.013, F.S., constitutes a second degree misdemeanor punishable by incarceration of up to 60 days and a fine of up to \$500.

By way of comparison, other health care professional practice acts contain similar provisions making the unlicensed practice of the profession a second degree misdemeanor: s. 468.1285, F.S., for audiology and speech language pathology; s. 468.1745, F.S., for nursing home administration; s.468.223, F.S., for occupational therapy; and s. 468.809, F.S., for orthotics, prosthetics, and pedorthics.

The practice acts of the following health care professions make the unlicensed practice of the profession a first degree misdemeanor punishable by incarceration for up to 1 year and a fine of up to \$1,000: s. 468.517, F.S., for dietetics and nutrition practice; s. 468.717, F.S., for athletic training; s. 478.53, F.S., for electrology or electrolysis; s. 480.047, F.S., for massage; s. 486.151, F.S., for physical therapy; s. 490.012, F.S., for psychology or school psychology; and s. 491.012, F.S., for clinical social work, marriage and family therapy, and mental health counseling.

The practice acts of the following health care professions make the unlicensed practice of the profession a third degree felony: s. 458.327, F.S., for medicine; s. 459.013, F.S., for osteopathic medicine; s. 460.411, F.S., for chiropractic medicine; s. 461.012, F.S., for podiatric medicine; s. 462.17, F.S., for naturopathy; s. 463.015, F.S., for optometry; s. 464.016, F.S., for nursing; s. 465.015, F.S., for pharmacy; s. 466.026, F.S., for dentistry and dental hygiene; s. 467.201, F.S., for midwifery; s. 468.366, F.S., for respiratory care services; s. 483.828, F.S., for clinical laboratory personnel; s. 483.901, F.S., for medical physics; and s. 484.053, F.S., for hearing aid specialists.

Section 456.065(2)(d)1., F.S., makes the unlicensed practice, attempt to practice, or offer to practice a health care profession without an active valid license to practice a health care

profession a third degree felony. The minimum penalty for a violation of this subparagraph is a fine of \$1,000 and a minimum mandatory period of incarceration of 1 year.

Section 456.065(2)(d)2., F.S., makes the practice of a health care profession without an active, valid Florida license to practice that profession when such practice results in serious bodily harm a second degree felony. The minimum penalty for a violation of this subparagraph is a fine of \$1,000 and a minimum mandatory period of imprisonment of incarceration of 1 year.

Section 456.065(2)(d)3., F.S., makes practicing, attempting to practice, or offering to practice a health care profession with an inactive or delinquent license for a period of time of 12 months or more a third degree felony. Practicing without an active, valid license includes practicing on a suspended, revoked, or void license. Practicing, attempting to practice, or offering to practice with an inactive or delinquent license for a period of up to 12 months is a first degree misdemeanor. The minimum penalty for a violation of this subparagraph is a term of imprisonment of 30 days and a fine of \$500.

Offense Level Ranking

All felony offenders whose offenses were committed on or after October 1, 1998, are sentenced under the Criminal Punishment Code. The Code allows the trial judge to sentence any felony offender to the statutory maximum for the offense degree. As stated above the unlicensed practice of several health care professions (medicine, osteopathic medicine, naturopathy, optometry, nursing, pharmacy, dentistry and dental hygiene, midwifery, respiratory care services, clinical laboratory personnel, medical physics, and hearing aid specialists) is a third degree felony. A third degree felony carries a maximum prison sentence of 5 years and maximum fine of \$5,000.

The Criminal Punishment Code codified in s. 921.00265, F.S., provides for a “lowest permissible sentence” below which the judge may not sentence an offender without providing written reasons. Under s. 921.0024, F.S., the minimum sentence is calculated by computing various factors like victim injury and prior record. The Code’s offense severity ranking chart codified in s. 921.0022, F.S., ranks most felony offenses from levels 1 to 10, and is the primary factor which goes into the minimum sentence calculation. A level 10 offense scores highest; level 1 and level “M” score lowest. When an offense is ranked as level 1 offense under s. 921.0022, F.S., and the first time offender has committed no additional offense and did not injure his or her victim, the offense scores a “lowest permissible sentence” of any nonstate prison sanction, i.e., probation, community control, or a county jail sentence of less than 1 year. Any felony offense which is not specifically listed, by virtue of default is ranked as a level 1 offense.

Under s. 921.0022, F.S., the offense of unlicensed practice of medicine, osteopathic medicine, naturopathy, optometry, nursing, pharmacy, dentistry and dental hygiene, midwifery, respiratory care services, clinical laboratory personnel, medical physics, and hearing aid specialists is specifically listed as a level 7 offense in the offense severity ranking chart.

III. Effect of Proposed Changes:

The bill makes three substantive changes to the existing violations of the opticianry practice act in s. 484.013, F.S. First, the bill enhances the criminal penalty applicable to the existing offenses under the opticianry practice act from a second degree misdemeanor to a third degree felony. A second degree misdemeanor carries a maximum sentence of 60 days in jail and a maximum fine of \$500. A third degree felony carries a maximum prison sentence of 5 years and maximum fine of \$5,000. The enhanced penalty applies to a person who intentionally makes a false or fraudulent statement to the Board of Opticianry; who prepares or dispenses lenses, spectacles, eyeglasses, contact lenses, or other optical devices when the person is not licensed as an optician in this State; who is not a Florida-licensed optician and who uses the protected title "optician" or otherwise leads the public to believe that she or he is engaged in the practice of opticianry; who is an optician who engages in the diagnosis of the human eyes, attempts to determine the refractive powers of the human eyes, or attempts to prescribe for or treat diseases or ailments of human beings; or who opens or operates an optical establishment that does not have the required permit.

Second, the bill specifies that making false or fraudulent statements to the Board of Opticianry must be intentional in order to be considered a violation subject to the penalties.

Third, the bill defines the term "contact lenses," to mean a prescribed medical device intended to be worn directly against the cornea of the eye to correct vision conditions, act as a therapeutic device, or provide a cosmetic effect. In effect, persons who are not licensed to practice opticianry in Florida and who are not otherwise exempt may not prepare or dispense contact lenses as defined in the bill without a prescription from a duly licensed physician or optometrist. The new offense is a third degree felony punishable by a maximum prison sentence of 5 years and maximum fine of \$5,000.

The bill replaces references to the term "medical doctor" with the term "allopathic or osteopathic physician" and revises requirements for prescribing optical devices to clarify that such prescriptions must be written by licensed allopathic or osteopathic physicians.

The bill revises the Criminal Punishment Code to specify that practicing opticianry without a license (a third degree felony) is a level 7 offense, for purposes of a minimum sentence calculation.

Additionally, the bill expands the inspection authority of the Department of Health from establishments where optical devices are *prepared and dispensed* to include establishments of *any kind* in the State in which lenses, spectacles, eyeglasses, contact lenses, and any other optical device is *prepared or dispensed*.

The effective date of the bill is October 1, 2001.

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 Art. VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 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 Art. III, s. 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

Establishments that prepare or dispense contact lenses as defined by the bill, without first being furnished with a prescription from a licensed physician or optometrist, or who perform comparable acts and who wish to continue to perform such acts may be required to obtain a permit as an optical establishment.

B. Private Sector Impact:

Those persons who practice opticianry in violation of the bill's requirements will be subject to the bill's minimum penalties when interpreted with current law under s. 456.065(2)(d)2., F.S., calling for a fine of \$1,000 and a minimum mandatory period of incarceration of 1 year.

Persons who prepare or dispense contact lenses as defined by the bill, or who perform comparable acts and who wish to continue to perform such acts or services will incur costs to get licensed as an optician or to hire a licensed optician.

Physicians and optometrists may obtain additional income to the extent the bill requires consumers to obtain a written prescription for contact lenses as defined by the bill. Consumers will incur the expense of seeking a physician or optometrist to obtain a prescription for any contact lenses.

C. Government Sector Impact:

The Department of Health will incur additional costs to enforce and administer the bill's requirements to expand the practice of opticianry to include the preparation or dispensing of contact lenses as defined by the bill, and comparable acts. The department will incur costs to

make the necessary inspections of establishments that provide opticianry services as revised by the bill.

This bill enhances the penalty applicable to six offenses of the opticianry practice act from a second degree misdemeanor to a third degree felony and by implication provides for a minimum mandatory sentence of 1 year incarceration for an existing offense of unlicensed practice of opticianry. Consequently, the bill could have an impact on the courts, county jails and state prison system. The Criminal Justice Estimating Conference is statutorily charged with reviewing the potential impact of newly created crimes on the state prison system. As of March 21, 2001, the Conference has not reviewed this bill's prison bed impact. Staff anticipates that the Conference will conclude that this bill's impact will be insignificant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill enhances the penalty for the offense of intentionally making a false or fraudulent statement in any application, affidavit, or statement presented to the Board of Opticianry or any proceeding before the board from a second degree misdemeanor punishable by incarceration of up to 60 days and a fine of up to \$500 to a third degree felony punishable by a maximum prison sentence of 5 years and a maximum fine of \$5,000. Comparable practice acts make similar violations a first degree misdemeanor. (See s. 458.327(2)(a) and (b), F.S., for medical physicians; s. 459.013(2)(a) and (b), F.S., for osteopathic physicians; s. 460.411(2)(b), F.S., for chiropractic physicians; and s. 461.012(2)(b), F.S., for podiatric physicians). Such violation is a second degree misdemeanor for some practice acts. (See s. 463.015, (2)(d), F.S., for optometrists; s. 468.1285(1)(f), F.S., for speech-language pathologists and audiologists; s. 468.223(1)(d), F.S., for occupational therapists; s. 468.517(1)(d), F.S., for dietitian/nutritionists; and s. 468.809(1)(a), F.S., for prosthetists/orthotists). Such violation is a third degree felony for pharmacists (See s. 465.015(2)(a), F.S.).

The bill makes it unlawful for any person to prepare or dispense contact lenses for cosmetic purposes without first being furnished with a prescription from a licensed physician or optometrist. In effect, persons who are not licensed to practice opticianry in Florida and who are not otherwise exempt from opticianry licensure may not prepare or dispense contact lenses for cosmetic purposes without a prescription from a duly licensed physician or optometrist. Violation of this offense is punishable by a maximum prison sentence of 5 years and a maximum fine of \$5,000 and appears to apply to both licensed opticians and unlicensed persons. The offense does not clarify whether it is limited to acts that occur in Florida. In addition, s. 456.065(2)(d)1., F.S., currently makes the unlicensed practice, attempt to practice, or offer to practice a health care profession without an active valid license to practice a health care profession a third degree felony. The minimum penalty for a violation of this subparagraph is a fine of \$1,000 and a minimum mandatory period of incarceration of 1 year.

Under current law, "optical establishment" is defined to mean any establishment in Florida which offers, advertises, and performs opticianry services for the public. It is also unclear

whether establishments which sell or manufacture contact lenses solely for cosmetic effect would be required under the bill to obtain a permit as an optical establishment.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
