

## **FINAL BILL ANALYSIS**

**BILL #:** CS/CS/HB 155

**FINAL HOUSE FLOOR ACTION:**

88 Y's 30 N's

**SPONSOR:** Rep. Brodeur

**GOVERNOR'S ACTION:** Approved

**COMPANION BILLS:** CS/CS/CS/SB 432

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### **SUMMARY ANALYSIS**

CS/CS/HB 155 passed the House on April 26, 2011, and subsequently passed the Senate on April 28, 2011. The bill was approved by the Governor on June 2, 2011, chapter 2011-112, Laws of Florida, and became effective on that date.

The bill creates s. 790.338, F.S., entitled "Medical privacy concerning firearms," that prohibits a licensed health care practitioner or licensed health care facility from intentionally entering any disclosed information concerning firearm ownership into a patient's health record if the information is not relevant to the patient's medical care or safety, or the safety of others. Additionally, licensed health care providers and health care facilities are:

- To refrain from inquiring, whether oral or written, about the ownership of firearms or ammunition unless the information is relevant to the patient's medical care or safety, or the safety of others.
- Prohibited from discriminating against a patient based upon whether patient exercises his or her constitutional right to own and possess firearms or ammunition.
- To respect a patient's right to own or possess a firearm and refrain from harassing a patient about firearm ownership during an examination.

Patients are permitted to decline to answer or provide any information concerning the ownership of a firearm and a decision not to answer does not alter existing law regarding a physician's authority to choose patients.

The bill provides an emergency medical technician (EMT) or paramedic the authority to inquire in good faith, about the possession or presence of a firearm if they believe that it is relevant to the treatment of a patient during the course and scope of a medical emergency or if the presence or possession of a firearm poses a threat of imminent danger to the patient or others.

The bill provides for certain patient's rights concerning the ownership of firearms or ammunition under the Florida Patient's Bill of Rights and Responsibilities. The bill provides for disciplinary action for non-compliance by licensed health care practitioners and health care facilities.

The bill provides that insurers issuing the types of policies regulated pursuant to ch. 627, F.S., are prohibited from discriminating, denying coverage, or increasing premiums on the basis that an insured or applicant possesses or owns a firearm or ammunition. However, insurers are allowed to consider the fair market value of firearms or ammunition when setting premiums for personal property coverage.

The bill appears to have an indeterminate, but likely insignificant negative fiscal impact on the Medical Quality Assurance Trust Fund within the Department of Health.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Current Situation

##### Physicians Inquiring About Firearms

In recent months, there has been media attention surrounding an incident in Ocala, Florida, where, during a routine doctor's visit, a pediatrician asked a patient's mother whether there were firearms in the home. When the mother refused to answer, the doctor advised her that she had 30 days to find a new pediatrician.<sup>1</sup> The doctor stated that he asked all of his patients the same question in an effort to provide safety advice in the event there was a firearm in the home.<sup>2</sup> He further stated that he asked similar questions about whether there was a pool at the home, and whether teenage drivers use their cell phone while driving for similar reasons – to give safety advice to patients. The mother, however, felt that the question invaded her privacy.<sup>3</sup> This incident has led many to question whether it should be an accepted practice for a doctor to inquire about a patient's firearm ownership.

Various professional medical groups have adopted policies that encourage or recommend that physicians ask patients about the presence of a firearm in the home. For example, the American Medical Association (AMA) encourages its members to inquire as to the presence of household firearms as a part of childproofing the home and to educate patients to the dangers of firearms to children.<sup>4</sup> Additionally, the American Academy of Pediatrics recommends that pediatricians incorporate questions about guns into their taking of patient history.<sup>5</sup>

Florida law contains numerous provisions relating to the regulation of the medical profession, regulation of medical professionals, and the sale, purchase, possession, and carrying of firearms.<sup>6</sup> However, Florida law does not contain any provision that prohibits physicians or other medical staff from asking a patient whether he or she owns a firearm or whether there is a firearm in the patient's home.

##### Health Care Practitioners and Licensed Facilities

The Department of Health (DOH) and the relevant boards<sup>7</sup> within DOH regulate health care practitioners. Section 456.001(4), F.S., defines the term "health care practitioner" to include any individual licensed under the following chapters:

- Acupuncture (ch. 457, F.S.)

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<sup>1</sup> Family and pediatrician tangle over gun question, <http://www.ocala.com/article/20100723/news/100729867/1402/news?p=1&tc=pg> (last accessed January 27, 2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> H-145.990 Prevention of Firearm Accidents in Children <https://ssl3.ama-assn.org/apps/ecommm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fama1%2fpub%2fupload%2fmm%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-145.990.HTM> (last accessed January 28, 2011).

<sup>5</sup> American Academy of Pediatrics: Firearm-Related Injuries Affecting the Pediatric Population. *Pediatrics* Vol. 105 No. 4, April 2000, pp. 888-895. <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;105/4/888> (last accessed January 28, 2011).

<sup>6</sup> *See, e.g.*, chapters 456, 458 and 790, F.S.

<sup>7</sup> "Board" is a statutorily created entity that is authorized to exercise regulatory or rulemaking functions within the Department of Health, Division of Medical Quality Assurance. *See* s. 456.001(1), F.S.

- Medical Practice (ch. 458, F.S.)
- Osteopathic Medicine (ch. 459, F.S.)
- Chiropractic Medicine (ch. 460, F.S.)
- Podiatric Medicine (ch. 461, F.S.)
- Naturopathy (ch. 462, F.S.)
- Optometry (ch. 463, F.S.)
- Nursing (ch. 464, F.S.)
- Pharmacy (ch. 465, F.S.)
- Dentistry, Dental Hygiene, and Dental Laboratories (ch. 466, F.S.)
- Midwifery (ch. 467, F.S.)
- Speech-Language Pathology and Audiology (part I of ch. 468, F.S.)
- Nursing Home Administration (part II of ch. 468, F.S.)
- Occupational Therapy (part III of ch. 468, F.S.)
- Respiratory Therapy (part V of ch. 468, F.S.)
- Dietetics and Nutrition Practice (X of ch. 468, F.S.)
- Athletic Trainers (part XIII of ch. 468, F.S.)
- Orthotic, Prosthetics, and Pedorthics (part XIV of ch. 468, F.S.)
- Electrolysis (ch. 478, F.S.)
- Massage Practice (ch. 480, F.S.)
- Clinical Laboratory Personnel (part III of ch. 483, F.S.)
- Medical Physicists (part IV of ch. 483, F.S.)
- Dispensing of Optical Devices and Hearing Aids (ch. 484, F.S.)
- Physical Therapy Practice (ch. 486, F.S.)
- Psychological Services (ch. 490, F.S.)
- Clinical, Counseling, and Psychotherapy Services (ch. 491, F.S.)

Section 456.072(2), F.S., provides various grounds for disciplinary action against health care practitioners. Penalties include:

- Refusal to certify, or to certify with restrictions, an application for a license.
- Suspension or permanent revocation of a license.
- Restriction of practice or license.
- Imposition of an administrative fine not to exceed \$10,000 for each count or separate offense.
- Issuance of a reprimand or letter of concern.
- Placement of the licensee on probation for a period of time and subject to such conditions as the board or the DOH may specify.
- Corrective action.
- Imposition of an administrative fine in accordance with s. 381.0261, F.S., for violations regarding patient rights.
- Refund of fees billed and collected from the patient or a third party on behalf of the patient.
- Requirement that the practitioner undergo remedial education.

The Agency for Health Care Administration (AHCA) regulates health care facilities under chapter 408 and chapter 395. Section 395.002(16), F.S., defines the term “licensed facility” as a licensed hospital, ambulatory surgical center, or mobile surgical facility. Section 395.1055, F.S., authorizes AHCA to adopt rules for these facilities, but does not expressly address disciplinary action. Section 395.003, F.S., authorizes AHCA to deny, modify, suspend, and revoke licenses for violations of applicable provisions of chapters 408 and 395, F.S.

### Terminating the Doctor - Patient Relationship

The relationship between a physician and a patient is generally considered a private relationship and contractual in nature. According to the AMA, both the patient and the physician are free to enter into or decline the relationship.<sup>8</sup> Once a physician-patient relationship has been established, patients are free to terminate the relationship at any time.<sup>9</sup> Generally, doctors can only terminate existing relationships after giving the patient notice and a reasonable opportunity to obtain the services of another physician.<sup>10</sup> Florida's statutes do not currently contain any provisions that dictate when physicians and patients can terminate a doctor-patient relationship.

### Health Insurance Portability and Accountability Act

In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). HIPAA contains detailed requirements for the use or disclosure of protected health information (PHI). PHI is defined as all "individually identifiable health information" which includes information relating to:

- the individual's past, present or future physical or mental health or condition,
- the provision of health care to the individual, or
- the past, present, or future payment for the provision of health care to the individual,

and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.<sup>11</sup> Covered entities may only use and disclose PHI as permitted by HIPAA or more protective state rules.<sup>12</sup> HIPAA establishes both civil monetary penalties and criminal penalties for the knowing use or disclosure of individually identifiable health information in violation of HIPAA.<sup>13</sup>

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<sup>8</sup> AMA Code of Medical Ethics, Opinion 9.12, *Patient-Physician Relationship: Respect for Law and Human Rights*, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion912.shtml> (last accessed February 7, 2011). Doctors who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination.

<sup>9</sup> AMA's Code of Medical Ethics, Opinion 9.06 *Free Choice*. <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.shtml> (last accessed February 7, 2011).

<sup>10</sup> A health care provider owes a duty to the patient to provide the necessary and appropriate medical care to the patient with due diligence and to continue providing those services until: they are no longer needed by the patient; the relationship is ended with the consent of or at the request of the patient; or the health care provider withdraws from the relationship after giving the patient notice and a reasonable opportunity to obtain the services of another health care provider. The relationship typically terminates when the patient's medical condition is cured or resolved, and this often occurs at the last visit when the health care provider notes in his records that the patient is to return as needed. *See Saunders v. Lischkoff*, 188 So. 815 (Fla. 1939). *See also, Ending the Patient-Physician Relationship*, AMA White Paper <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/ending-patient-physician-relationship.shtml> (last accessed February 7, 2011); AMA's Code of Medical Ethics, Opinion 8.115 *Termination of the Physician-Patient Relationship*. <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8115.shtml> (last accessed February 7, 2011).

<sup>11</sup> 45 C.F.R. s. 160.103

<sup>12</sup> In general, covered entities may use PHI for the purposes of treatment, payment and health care operations (TPO) without any special permission from a patient. Special permission, called an authorization, must be obtained for uses and disclosures other than for TPO. For some uses and disclosures, a covered entity need not obtain an authorization but must give the patient the opportunity to agree or object (e.g., give patients the option to disclose health information to family or friends). Finally, in some situations, such as reporting to public health authorities, emergencies, or in research studies in which a waiver has been obtained from an Institutional Review Board (IRB), a covered entity does not need to obtain an authorization or provide an opportunity to agree or object. *Health Insurance Portability and Accountability Act*. <http://hipaa.yale.edu/overview/index.html> (last accessed February 4, 2011).

<sup>13</sup> *Health Insurance Portability and Accountability Act*. <http://hipaa.yale.edu/overview/index.html> (last accessed February 4, 2011). Fines range from \$100 to \$50,000 per violation with specified annual caps. Criminal penalties include fines ranging from \$50,000 to \$250,000 and imprisonment of up to 10 years. *HIPAA Violations and Enforcement*. <http://www.ama->

### Confidentiality of Medical Records in Florida

Under s. 456.057(7), F.S., medical records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, medical records may be released without written authorization in the following circumstances:<sup>14</sup>

- When any person, firm, or corporation has procured or furnished such examination or treatment with the patient's consent.
- When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff.
- In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.
- For statistical and scientific research, provided the information is abstracted in such a way as to protect the identity of the patient or provided written permission is received from the patient or the patient's legal representative.
- To a regional poison control center for purposes of treating a poison episode under evaluation, case management of poison cases, or compliance with data collection and reporting requirements of s. 395.1027, F.S., and the professional organization that certifies poison control centers in accordance with federal law.

The Florida Supreme Court has addressed the issue of whether a health care provider, absent any of the above-referenced circumstances, can disclose confidential information contained in a patient's medical records as part of a medical malpractice action.<sup>15</sup> The Florida Supreme Court ruled that, pursuant to s. 455.241, F.S. (the predecessor to current s. 456.057(7)(a), F.S.), only a health care provider who is a defendant, or reasonably expects to become a defendant, in a medical malpractice action can discuss a patient's medical condition.<sup>16</sup> The Court also held that the health care provider can only discuss the patient's medical condition with his or her attorney in conjunction with the defense of the action.<sup>17</sup> The Court determined that a defendant's attorney cannot have ex parte discussions about the patient's medical condition with any other treating health care provider.

### Regulation of Insurance

Florida's Insurance Code consists of chapters 624 through 651, F.S. Chapter 627, F.S., specifies rate and contract requirements for the following types of insurance:

- Life
- Annuity Contracts
- Health
- Medicare Supplements
- Credit Life
- Disability
- Property

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[assn.org/ama/pub/physician-resources/solutions-managing-your-practice/coding-billing-insurance/hipaahealth-insurance-portability-accountability-act/hipaa-violations-enforcement.shtml](http://assn.org/ama/pub/physician-resources/solutions-managing-your-practice/coding-billing-insurance/hipaahealth-insurance-portability-accountability-act/hipaa-violations-enforcement.shtml) (last accessed February 4, 2011).

<sup>14</sup> Section 456.057(7)(a), F.S.

<sup>15</sup> *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).

<sup>16</sup> *Id.*

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

- Motor Vehicle
- Surety
- Title
- Long-term Care

Chapter 641, F.S., provides requirements for Health Maintenance Organizations and Prepaid Health Clinic Plans.

Section 626.9541, F.S., prohibits unfair methods of competition and deceptive acts or practices in the sale of insurance policies and the operation of insurance companies. Examples of prohibited acts include:

- Unlawful rebates.
- Misrepresentations and false advertising of insurance policies.
- Defamation.
- Boycott, coercion and intimidation.
- Unfair claim settlement practices.
- Illegal dealings in premiums, including excess or reduced charges for insurance.
- Refusal to insure on the basis of race, color, creed, marital status, or sex.
- Misrepresentation of agent qualifications.

Section 626.9541(1)(g), F.S., specifically prohibits unfair discrimination between individuals of the same actuarially supportable class for life, disability, and health insurance. Additionally, a health insurer, life insurer, disability insurer, property and casualty insurer, automobile insurer, or managed care provider may not discriminate against a person who sought medical or psychological treatment for abuse.

The penalty for violations of s. 626.9541, F.S.,<sup>18</sup> is a fine not greater than \$5,000 for each nonwillful violation and not greater than \$40,000 for each willful violation. Fines imposed against an insurer may not exceed an aggregate amount of \$20,000 for all nonwillful violations arising out of the same action or an aggregate amount of \$200,000 for all willful violations arising out of the same action.

### **Effect of the Bill**

The bill creates s. 790.338, F.S., entitled “Medical privacy concerning firearms,” which prohibits licensed health care practitioners and health care facilities from intentionally entering any disclosed information concerning firearm ownership into a patient’s health record if the information is not relevant to the patient’s medical care or safety, or the safety of others.

Additionally, licensed health care providers and health care facilities are:

- To refrain from inquiring, whether oral or written, about the ownership of firearms or ammunition unless the information is relevant to the patient’s medical care or safety, or the safety of others.
- Prohibited from discriminating against a patient based upon whether patient exercises his or her constitutional right to own and possess firearms or ammunition.
- To respect a patient’s right to own or possess a firearm and refrain from harassing a patient about firearm ownership during an examination.

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<sup>18</sup> Section 624.9541, F.S., contains enhanced penalties for specific violations of s. 626.9541, F.S., that are deemed fraudulent.

The bill specifies that non-compliance by licensed health care practitioners and health care facilities constitutes grounds for disciplinary action under ss. 456.072(2), and 395.1055, F.S.

Patients are permitted to decline to answer or provide any information concerning the ownership of a firearm and a decision not to answer does not alter existing law regarding a physician's authority to choose patients.

The bill provides an EMT or paramedic the authority to inquire in good faith, about the possession or presence of a firearm if they believe that it is relevant to the treatment of a patient during the course and scope of a medical emergency or if the presence or possession of a firearm poses a threat of imminent danger to the patient or others.

Insurers issuing the types of policies regulated pursuant to Chapter 627 are prohibited from discriminating, denying coverage, or increasing premiums on the basis that an insured or applicant possesses or owns a firearm or ammunition. However, insurers are allowed to consider the fair market value of firearms or ammunition when setting premiums for scheduled personal property coverage.

The bill amends the Florida's Patient's Bill of Rights and Responsibilities (s. 381.026, F.S.) specifying that:

- Health care providers and health care facilities should refrain from inquiring, whether oral or written, about the ownership of firearms or ammunition unless the information is relevant to the patient's medical care or safety, or the safety of others.
- Patients have the right to decline to answer or provide any information concerning the ownership of a firearm and a decision not to answer does not alter existing law regarding a physician's authority to choose patients.
- Health care providers and health care facilities are prohibited from discriminating against a patient based upon whether patient exercises his or her constitutional right to own and possess firearms or ammunition.
- Health care providers and health care facilities are to respect a patient's right to own or possess a firearm and refrain from harassing a patient about firearm ownership during an examination.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

**2. Expenditures:**

DOH may see an increase in disciplinary cases of licensed health care practitioners who do not comply with s. 790.338, F.S. The increase in workload is unknown at this time, but most likely insignificant and could be handled within existing resources.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

None.

**2. Expenditures:**

None.

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

None.

**D. FISCAL COMMENTS:**

None.