

**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.)

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Prepared By: The Professional Staff of the Budget Subcommittee on Health and Human Services Appropriations

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BILL: CS/CS/SB 208

INTRODUCER: Criminal Justice Committee; Health Regulation Committee; and Senator Joyner

SUBJECT: Health Care Fraud

DATE: January 20, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davlantes</u>	<u>Stovall</u>	<u>HR</u>	<u>Fav/CS</u>
2.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
3.	<u>Bradford</u>	<u>Hendon</u>	<u>BHA</u>	<u>Pre-meeting</u>
4.	_____	_____	<u>BC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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

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

**I. Summary:**

The bill amends current law relating to the licensure responsibility and authority of the Department of Health (DOH) over health professions and occupations. The bill also amends current law relating to the grounds for a board, or the DOH if there is no applicable board, to refuse to admit certain candidates seeking licensure to any examination and refuse to issue or renew a license, certificate, or registration to certain applicants.

The bill will result in a recurring increase in workload to the DOH to implement and in non-recurring costs for rulemaking. The bill will also result in a recurring increase in workload and costs to the Agency for Health Care Administration (AHCA) concerning data sharing infrastructure with the DOH. Costs are indeterminate.

This bill substantially amends sections 456.036 and 456.0635, Florida Statutes.

This bill has an effective date of July 1, 2012.

## II. Present Situation:

The Legislature created s. 456.0635, F.S., in 2009 with the enactment of CS/CS/CS/SB 1986, a comprehensive bill designed to address systemic health care fraud in Florida. That bill increased the Medicaid program's authority to address fraud, particularly as it relates to home health services; increased health care facility and health care practitioner licensing standards to keep fraudulent actors from obtaining a health care license in Florida; and created disincentives to commit Medicaid fraud by increasing the administrative penalties for committing such fraud, posting sanctioned and terminated Medicaid providers on the AHCA website, and creating additional criminal felonies for committing health care fraud; among other anti-fraud provisions.<sup>1</sup>

### **Health Care Practitioner Licensure Authority of the Department of Health**

The DOH is responsible for the licensure of most health care practitioners in the state. Chapter 456, F.S., provides general provisions for the regulation of health care professions in addition to the regulatory authority in specific practice acts for each profession or occupation. Section 456.001, F.S., defines "health care practitioner" as any person licensed under:

- Chapter 457 (acupuncture)
- Chapter 458 (medical practice)
- Chapter 459 (osteopathic medicine)
- Chapter 460 (chiropractic medicine)
- Chapter 461 (podiatric medicine)
- Chapter 462 (naturopathy)
- Chapter 463 (optometry)
- Chapter 464 (nursing)
- Chapter 465 (pharmacy)
- Chapter 466 (dentistry)
- Chapter 467 (midwifery)
- Part I, part II, part III, part V, part X, part XIII, or part XIV of chapter 468 (speech-language pathology and audiology; nursing home administration; occupational therapy; respiratory therapy; dietetics and nutrition practice; athletic trainers; and orthotics, prosthetics, and pedorthics)
- Chapter 478 (electrolysis)
- Chapter 480 (massage practice)
- Part III or part IV of chapter 483 (clinical laboratory personnel and medical physicists)
- Chapter 484 (dispensing of optical devices and hearing aids)
- Chapter 486 (physical therapy practice)
- Chapter 490 (psychological services)
- Chapter 491 (clinical, counseling, and psychotherapy services)

Current law<sup>2</sup> prohibits the DOH and the medical boards within the DOH from allowing any person to sit for an examination who has been:

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<sup>1</sup> See ch. 2009-223, L.O.F.

<sup>2</sup> See s. 456.0635, F.S.

- Convicted of, or entered a plea of guilty or nolo contendere to, regardless of adjudication, a felony under ch. 409, F.S.,<sup>3</sup> ch. 817, F.S.,<sup>4</sup> ch. 893, F.S.,<sup>5</sup> 21 U.S.C. ss. 801-970,<sup>6</sup> or 42 U.S.C. ss. 1395-1396,<sup>7</sup> unless the sentence and any subsequent period of probation for such conviction or pleas ended more than 15 years prior to the date of the application;
- Terminated for cause from the Florida Medicaid program, unless the applicant has been in good standing with the Florida Medicaid program for the most recent 5 years; or
- Terminated for cause, pursuant to the appeals procedures established by the state or Federal Government, from any other state Medicaid program or the federal Medicare program, unless the applicant has been in good standing with a state Medicaid program or the federal Medicare program for the most recent 5 years and the termination occurred at least 20 years prior to the date of application.

The DOH and the medical boards must refuse to issue or renew a license, certificate, or registration if an applicant or person affiliated with that applicant has violated any of the provisions listed above.

#### **Implementation of Current Law by the Department of Health**

Neither the DOH nor the boards deny licensure based on an applicant's termination for cause from the federal Medicare program because federal law does not implement such terminations "for cause." The DOH does not deny licensure renewal based on an applicant's termination for cause from the federal Medicare program for the same reason.

The DOH applies the denial of renewals to offenses occurring after July 1, 2009, when s. 456.0635, F.S., took effect.

### **III. Effect of Proposed Changes:**

**Section 1** amends s. 456.0635, F.S. The catch line is changed from "Medicaid fraud; disqualification for license, certificate, or registration," to "Health care fraud; disqualification for license, certificate, or registration." Other references in the statute to the general subject of "Medicaid fraud" are changed to "health care fraud." References to "candidate" vs. "candidate or applicant" are also standardized throughout the bill.

The bill separates the disqualifications for licensure, certification, or registration from those relating to licensure renewal into two different statutory subsections.

The bill requires a board or the DOH to refuse to admit a candidate to any examination and to refuse to issue a license to any applicant who has been convicted of, or entered a plea of guilty or nolo contendere to, regardless of adjudication, a felony under ch. 409, F.S., ch. 817, F.S., ch. 893, F.S., or similar felony offenses committed in another state or jurisdiction. The bill

<sup>3</sup> Ch. 409, F.S., "Social and Economic Assistance," is in Title XXX, "Social Welfare," and includes the Florida Medicaid and Kidcare programs, among other programs.

<sup>4</sup> Ch. 817, F.S., "Fraudulent Practices," is in Title XLVI, "Crimes."

<sup>5</sup> Ch. 893, F.S., "Drug Abuse Prevention and Control," is in Title XLVI, "Crimes."

<sup>6</sup> 21 U.S.C. ss. 801-970 create the Controlled Substances Act, which regulates the registration of manufacturers, distributors, and dispensers of controlled substances at the federal level.

<sup>7</sup> 42 U.S.C. ss. 1395-1396 create the federal Medicare, Medicaid, and Children's Health Insurance programs.

deletes the provision in current law that nullifies the prohibition if the sentence and probation period ended more than 15 years prior to the date of application, and replaces it with the following provisions:

- For felonies of the first or second degree, the prohibition expires when the sentence and probation period have ended more than 15 years before the date of application.
- For felonies of the third degree, the prohibition expires when the sentence and probation period have ended more than 10 years before the date of application, except for felonies of the third degree under s. 893.13(6)(a), F.S.<sup>8</sup>
- For felonies of the third degree under s. 893.13(6)(a), F.S., the prohibition expires when the sentence and probation period have ended more than 5 years before the date of application.

An applicant or candidate who has been convicted of or pled guilty or nolo contendere to any state felony listed above is eligible for initial licensure without any prohibition if he or she successfully completes a drug court program for that felony and provides proof that the plea has been withdrawn or the charges have been dismissed.<sup>9</sup> As a result of this provision and a similar provision relevant to renewals (described below), the DOH or the board will have statutory authority to not deny licensure or renewal based upon the original plea. This change will also allow the DOH to not rule on applications filed while the applicant is enrolled in the drug court program.

The bill moves into a new paragraph the requirement for a board or the DOH to refuse to admit a candidate to any examination and to refuse to issue a license to any applicant who has been convicted of, or entered a plea of guilty or nolo contendere to, regardless of adjudication, a felony under 21 U.S.C. ss. 801-970 or 42 U.S.C. ss. 1395-1396, unless the sentence and any probation period for such conviction or plea ended more than 15 years before the date of the application.

The bill deletes reference to “terminated for cause” from the federal Medicare program as a ground for which a board or the DOH is required to deny a license and creates a new standard to exclude applicants currently listed on the U.S. Department of Health and Human Services Office of Inspector General’s List of Excluded Individuals and Entities.

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<sup>8</sup> Section 893.13(6)(a), F.S. makes it unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or to be in actual or constructive possession of a controlled substance except as otherwise authorized by ch. 893, F.S.

<sup>9</sup> This provision and a somewhat similar provision included in the section relevant to licensure renewals are intended to address individuals who have pled guilty or nolo contendere in order to avail these individuals of the transfer provisions of s. 910.035, F.S. Section 910.035(1), F.S., which applies in cases where an indictment or information is pending, provides that “a defendant arrested or held in a county other than that in which an indictment or information is pending against him or her may state in writing that he or she wishes to plead guilty or nolo contendere, to waive trial in the county in which the indictment or information is pending.” Section 910.035(2), F.S., which applies in cases where an indictment or information is not pending, provides that “a defendant arrested on a warrant issued upon a complaint in a county other than the county of arrest may state in writing that he or she wishes to plead guilty or nolo contendere, to waive trial in the county in which the warrant was issued, and to consent to disposition of the case in the county in which the defendant was arrested, subject to the approval of the prosecuting attorney of the court in which the indictment or information is pending.” Finally, s. 910.035(5), F.S., provides any person eligible for participation in a drug court treatment program pursuant to s. 948.08(6), F.S., may be eligible to have the case transferred to a county other than that in which the charge arose if the drug court program agrees and several conditions are met.

The bill specifies that the prohibitions above relating to examination, licensure, certification, or registration do not apply to applicants for initial licensure or certification who were enrolled in a DOH- or board-recognized educational or training program on or before July 1, 2009, and who applied for licensure after July 1, 2012.

The bill creates a new statutory subsection relating to license *renewal* that requires a board or the DOH to deny renewal to applicants who, after July 1, 2009, have been convicted of or pled guilty or nolo contendere to the same felony offenses listed under the subsection on initial licensure. The same 5, 10, and 15-year prohibition periods apply concerning eligibility for relicensure after a felony as for initial licensure after a felony. Applicants who have been convicted of or pled guilty or nolo contendere to specified state felonies are eligible for license renewal without any prohibition period if they are currently enrolled in a drug court program that allows the withdrawal of the plea for that felony upon successful completion of the program.

The bill also includes the same provisions for denying licensure renewal as those described above for initial examination, licensure, certification, and registration, relative to exclusion from the Medicare program and termination from Medicaid programs in Florida or in other states.

**Section 2** amends s. 456.036, F.S. Any person who has been denied renewal of licensure, certification, or registration under s. 456.0635(3), F.S., may only regain licensure, certification, or registration by undergoing the procedure for initial licensure as defined by a board or the department. However, a person who was denied renewal between July 1, 2009 and June 30, 2012 is not required to retake any examinations which would otherwise be necessary for initial licensure.

**Section 3** provides that the effective date of the bill is July 1, 2012.

#### **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 this 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:**

None.

**B. Private Sector Impact:**

The bill will affect the ability of certain applicants to become licensed or to renew a license, thereby affecting their ability to qualify or remain qualified for gainful employment within certain occupations regulated by the DOH. The bill will apply the statutory licensure prohibitions to persons with felony convictions or pleas effective in other states the same as they are applied to persons with felony convictions or pleas effective in Florida. This will create more equity in the application of the law and should result in more mandatory denials among persons within that demographic. However, the bill also relaxes the standards in other ways, such as the “sliding scale” for the prohibition’s duration based on the type of felony, which should result in fewer mandatory denials under those circumstances.

**C. Government Sector Impact:**

The DOH will experience a recurring increase in workload to implement the bill and non-recurring costs for rulemaking, the costs of which are indeterminate. Increased workload will derive from the additional screening procedures that the DOH will conduct on applicants and re-applicants, including.<sup>10</sup>

- Analyzing the laws of other states to determine which are similar to chs. 409, 817, or 893, F.S., and which applicants have violated such laws.
- Verifying that the applicants have not committed Medicaid fraud in other states or federal health care fraud.
- Determining whether enough time has passed between applicants’ criminal convictions under chs. 409, 817, or 893, F.S., and their requests for licensure.

The AHCA will also experience a recurring increase in workload and costs to build and maintain an information sharing infrastructure with the department for the additional data which will be collected by the DOH under this bill. The exact fiscal impact is indeterminate.<sup>11</sup>

**VI. Technical Deficiencies:**

Under the bill, persons who have been convicted of or pled guilty or nolo contendere to certain state felonies are eligible for initial licensure, certification, or registration without a prohibition period if they successfully complete a pretrial intervention or drug diversion program for that

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<sup>10</sup> Department of Health, *2012 Bill Analysis, Economic Statement, and Fiscal Note for SB 208*. A copy of this analysis is on file with the Senate Health Regulation Committee.

<sup>11</sup> Agency for Health Care Administration, *2012 Bill Analysis and Economic Impact Statement for SB 208*. A copy of this analysis is on file with the Senate Health Regulation Committee.

felony. There is also a somewhat similar provision concerning pretrial intervention or drug diversion programs in the section relevant to licensure renewals.

According to the department, while pretrial intervention programs cover many of the offenses that disqualify a person from licensure, they do not require a plea or conviction, and therefore, participation in pretrial intervention programs currently is not disqualifying and need not be addressed in statute.

## **VII. Related Issues:**

Since s. 456.0635, F.S., was enacted, 21 U.S.C. Subchapter 13, the Controlled Substances Act, has been amended to include a s. 971, regarding notification, suspension of shipment, and penalties with respect to importation and exportation of certain chemicals. The bill as currently written does not authorize initial or renewal license disqualification of health care professionals for violations of this section; only felonies under 21 U.S.C. ss. 801-970 may result in denial of licensure.

The bill does not contain any guidance or standards for determining what constitutes a “similar felony offense committed in another state or jurisdiction.” Criminal statutes are different in every state. When licensure or renewal is denied based on a “similar” felony committed in another state or jurisdiction, the applicant may be encouraged to challenge the denial and argue that without specific standards within Florida law, the characteristics of the out-of-state felony cannot be justified by the DOH in keeping with legislative intent as being adequately “similar” to any certain offense within chs. 409, 817, or 893, F.S. However, a counterargument is that there are numerous statutes which require a determination of whether an offense in another jurisdiction is similar to a Florida offense and which do not provide any guidance or standards for making that determination.<sup>12</sup>

## **VIII. Additional Information:**

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

#### **CS by Criminal Justice on January 12, 2012:**

The CS clarifies provisions relating to pleas. An applicant or candidate who has been convicted of or pled guilty or nolo contendere to a specified state felony is eligible for initial licensure without any prohibition if he or she successfully completes a drug court program for that felony and provides proof that the plea has been withdrawn or the charges have been dismissed. Applicants who have been convicted of or pled guilty or nolo contendere to a specified state felony are eligible for license renewal without any prohibition period if they are currently enrolled in a drug court program that allows the withdrawal of the plea for that felony upon successful completion the program.

#### **CS by Health Regulation on November 3, 2011:**

The CS clarifies that persons who have been convicted of or pled guilty or nolo

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<sup>12</sup> See e.g., ss. 39.0139, 311.12, 322.03, 373.6055, 393.0655, 408.809, 430.0402, 435.03, 435.04, 464.018, 468.3101, 744.474, 775.21, 943.0435, 948.30, 985.644, and 1012.467, F.S.

contendere to certain state felonies are eligible for initial licensure, certification, or registration without a prohibition period if they successfully complete a pretrial intervention or drug diversion program for that felony. A similar provision concerning pretrial intervention or drug diversion programs has been clarified in the subsection of the CS concerning license renewals.

The CS alters the time frame for an exemption to the above provisions for students. Students who were enrolled in a department-approved training program before July 1, 2009 and who applied for initial licensure after July 1, 2012 are eligible regardless of the presence or timing of past state or federal felonies. Both of these dates were July 1, 2011 in SB 208.

The CS amends the effective dates relating to license renewals for applicants with felony convictions or plea of guilty or nolo contendere (both effective dates are changed to July 1, 2009). It also applies the tiered waiting periods described under the initial licensure provisions to renewals as well.

The CS replaces section 2 of SB 208 with a provision that any person who was denied license renewal under s. 456.0635(3), F.S., may only regain his or her license by undergoing the initial licensure procedures defined by the relevant board or the department. The CS provides an exception for persons who were denied renewal between July 1, 2009 and June 30, 2012; these applicants are not required to retake any examinations normally needed for initial licensure.

**B. Amendments:**

None.