

**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 208

INTRODUCER: Senator Joyner

SUBJECT: Health Care Fraud

DATE: November 1, 2011      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davlantes	Stovall	HR	<b>Pre-meeting</b>
2.			BC	
3.				
4.				
5.				
6.				

**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 ss. 456.036 and 456.0635, F.S.

**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:

- 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

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<sup>1</sup> See ch. 2009-223, Laws of Florida.

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

<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.

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."

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

The bill expands the current provisions that require 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., or ch. 893, F.S., to include similar felony offenses committed in another state or jurisdiction. The bill 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.

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

- 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.

Notwithstanding s. 120.60, F.S., for felonies in which the defendant entered a plea of guilty or nolo contendere in an agreement with the court to enter a pretrial intervention or drug diversion program, the board, or the DOH if there is no board, may not approve or deny the application for a license, certificate, or registration until the final resolution of the case.

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 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 grounds for which 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.

The bill specifies that the prohibitions above relating to examination, licensure, certification, and registration do not apply to applicants for initial licensure or certification who were enrolled in an educational or training program on or before July 1, 2011, which was recognized by a board, or by the DOH if there is no applicable board, and who applied for licensure after July 1, 2011. Section 456.0635, F.S., went into effect in 2009; the bill as written provides exemptions for students who enrolled as late as 2011, two years later.

The bill creates a new statutory subsection relating to licensure *renewal* that requires the DOH to deny renewal for the same felony offenses referenced above, except that in order to trigger the renewal prohibition, the conviction or plea must have occurred after July 1, 2010, or July 1, 2011, for felonies under 21 U.S.C. ss. 801-970 or 42 U.S.C. ss. 1395-1396, rather than July 1, 2009, when s. 456.0635, F.S. became effective. The bill includes the same provisions for denying licensure renewal as those described above for examination, licensure, certification, and registration, relative to exclusion from the Medicare program and termination from Medicaid programs in Florida or other states, as well as identical provisions regarding applicants who have entered a pretrial intervention or drug diversion program.

**Section 2** amends s. 456.036, F.S. For licensure renewals, current law requires a delinquent licensee to apply for active or inactive status during the licensure cycle in which the license becomes delinquent; otherwise, the license will automatically become null. The amendment of

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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.

s. 456.036, F.S., will prevent such licenses from automatically becoming null while a case under s. 450.0635, F.S., against the licensee is being resolved. Upon final resolution of the case, the licensee must apply to have his or her license placed back into active or inactive status during the licensure cycle in which the case achieves final resolution. Otherwise, the license automatically becomes null.

**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 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:**

None.

##### **B. Private Sector Impact:**

The bill will affect the ability of certain applicants to become licensed or to renew a license and thereby affect 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>9</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>10</sup>

## **VI. Technical Deficiencies:**

In lines 11 and 120, "Medicaid" should be changed to "health care" to maintain consistency with similar changes throughout the remainder of the bill.

## **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. SB 208 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.

Lines 89-93 impact relicensing of health care professionals who have been convicted of violating chs. 409, 817, or 893, F.S., or convicted of similar violations in another state or jurisdiction since July 1, 2010. Lines 94-97 provide restrictions on relicensing of health care professionals who have been convicted of violating 21 U.S.C. 801-970 or 42 U.S.C. 1395-1396 since July 1, 2011. It is unclear why different effective dates appear in lines 93 and 97.

In lines 85-97, the bill provides that applicants who have been convicted of certain state or federal felonies since July 2010 or July 2011, respectively, are not eligible to renew their licenses. Unlike the bill's provisions concerning initial licensure, the language concerning renewals does not provide a time frame after which a convicted applicant becomes re-eligible for renewal; rather, a person convicted of a specified felony after 2010 or 2011 is barred from all future license renewal.

Lines 112-117 state that for any applicant who enters a plea of guilty or nolo contendere in an agreement with the court to enter a drug diversion program, the department may not approve or

<sup>9</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>10</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.

deny the application for license renewal until the final resolution of the case. However, lines 85-97 state that anyone who enters a plea of guilty or nolo contendere to the felonies mentioned in the bill, regardless of adjudication, will be denied license renewal. If the intention for the extension of a determination on the application for license renewal is to allow license renewal for a person who has successfully completed the pretrial intervention or drug diversion program, it is not apparent that this language authorizes such renewal.

The bill contains no 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 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>11</sup>

#### **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:**

None.

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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>11</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.