

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1205 Sovereign Immunity for Dentists and Dental Hygienists

**SPONSOR(S):** Health Quality Subcommittee; Magar and others

**TIED BILLS:**           **IDEN./SIM. BILLS:** SB 1016

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	11 Y, 0 N, As CS	Holt	O'Callaghan
2) Appropriations Committee			
3) Health & Human Services Committee			

### SUMMARY ANALYSIS

The bill amends s. 766.1115, F.S., the Access to Health Care Act (Act), to allow a patient, parent, or a guardian of the patient, to voluntarily contribute a fee to cover the cost of dental laboratory work related to dental services provided to the patient by a health care provider under contract with the Department of Health. Currently, under the Act, the health care provider is prohibited from being compensated for services. Otherwise, the health care provider compromises its sovereign immunity. Authorizing this voluntary payment preserves the health care provider's sovereign immunity, as long as the contribution does not exceed the actual cost of dental laboratory charges.

The bill appears to have no fiscal impact on the state or local governments.

The bill takes effect on July 1, 2013.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Access to Health Care Act

Section 766.1115, F.S., is entitled the "Access to Health Care Act" (Act). The Act was enacted in 1992 to encourage health care providers to provide care to low-income persons.<sup>1</sup> The Act extends sovereign immunity to health care providers who execute a contract with a governmental contractor and who provide volunteer, uncompensated health care services to low-income individuals as an agent of the state. Health care providers are considered agents of the state under s. 768.28(9), F.S., for purposes of extending sovereign immunity while acting within the scope of duties required under the Act.

A governmental contractor is defined to mean the Department of Health (DOH), county health departments, a special taxing district with health care responsibilities, or a hospital owned and operated by a governmental entity.<sup>2</sup>

Health care providers are defined to include a dentist or dental hygienist licensed under ch. 466, F.S., and the following:<sup>3</sup>

- A birth center licensed under ch. 383, F.S.
- An ambulatory surgical center licensed under ch. 395, F.S.
- A hospital licensed under ch. 395, F.S.
- A physician or physician assistant licensed under ch. 458, F.S.
- An osteopathic physician or osteopathic physician assistant licensed under ch. 459, F.S.
- A chiropractic physician licensed under ch. 460, F.S.
- A podiatric physician licensed under ch. 461, F.S.
- A registered nurse, nurse midwife, licensed practical nurse, or advanced registered nurse practitioner licensed or registered under part I of ch. 464, F.S.
- Any facility which employs nurses licensed or registered under part I of ch. 464, F.S., to supply all or part of the care delivered under the Act.
- A midwife licensed under ch. 467, F.S.
- A health maintenance organization certified under part I of ch. 641, F.S.
- A health care professional association and its employees or a corporate medical group and its employees.
- Any other medical facility, the primary purpose of which is to deliver human medical diagnostic services or which delivers nonsurgical human medical treatment, and which includes an office maintained by a provider.
- A free clinic that delivers only medical diagnostic services or nonsurgical medical treatment free of charge to all low-income recipients.
- Any other health care professional, practitioner, provider, or facility under contract with a governmental contractor, including a student enrolled in an accredited program that prepares the student for licensure in any one of the health care professions listed above.
- Any nonprofit corporation qualified as exempt from federal income taxation under s. 501(a) of the Internal Revenue Code, and described in s. 501(c) of the Internal Revenue Code, which delivers health care services provided by the listed licensed professionals, any federally funded

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<sup>1</sup> Low-income persons are defined in the Act as a person who is Medicaid-eligible, a person who is without health insurance and whose family income does not exceed 200 percent of the federal poverty level, or any eligible client of DOH who voluntarily chooses to participate in a program offered or approved by DOH. *See* s. 766.1115(3)(e), F.S.

<sup>2</sup> Section 766.1115(3)(c), F.S.

<sup>3</sup> Section 766.1115(3)(d), F.S.

community health center, and any volunteer corporation or volunteer health care provider that delivers health care services.

### Contract Requirements

Section 766.1115(3)(a), F.S., provides that the contract must be for volunteer, uncompensated services. For services to qualify as volunteer, uncompensated services the health care provider must receive no compensation from the governmental contractor for any services provided under the contract and may not bill or accept compensation from the recipient, or any public or private third-party payor, for the specific services provided to the low-income recipients covered by the contract.<sup>4</sup>

The Act further stipulates that:<sup>5</sup>

- The governmental contractor retains the right of dismissal or termination of any health care provider delivering services under the contract.
- The governmental contractor has access to the patient records of any health care provider delivering services under the contract.
- The health care provider must report adverse incidents and information on treatment outcomes.
- The governmental contractor must make patient selection and initial referrals.
- The health care provider must accept all referred patients; however, the contract may specify limits on the number of patients to be referred.
- Patient care, including any follow-up or hospital care is subject to approval by the governmental contractor.
- The health care provider is subject to supervision and regular inspection by the governmental contractor.

The governmental contractor must provide written notice to each patient, or the patient's legal representative, receipt of which must be acknowledged in writing, that the provider is covered under s. 768.28, F.S., for purposes of actions related to medical negligence.<sup>6</sup>

The individual accepting services through this contracted provider may not have medical or dental care coverage for the illness, injury, or condition in which medical or dental care is sought.<sup>7</sup> The services not covered under this program include experimental procedures and clinically unproven procedures.<sup>8</sup> The governmental contractor has the authority to determine whether or not a procedure is covered.<sup>9</sup>

Additionally, the health care provider may not subcontract for the provision of services under the Act.<sup>10</sup>

### Sovereign Immunity

The term "sovereign immunity" originally referred to the English common law concept that the government may not be sued because "the King can do no wrong." Sovereign immunity bars lawsuits against the state or its political subdivisions for the torts of officers, employees, or agents of such governments unless the immunity is expressly waived.

Article X, s. 13, of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the right to waive such immunity in part or in full by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state.

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<sup>4</sup> Section 766.1115(3)(a), F.S.

<sup>5</sup> Section 766.1115(4), F.S.

<sup>6</sup> Section 768.28, F.S., provides a waiver of sovereign immunity in tort actions and sets limitations on recovery, attorney fees, and a statute of limitations.

<sup>7</sup> Rule 64I-2.002, F.A.C.

<sup>8</sup> Rule 64I-2.006, F.A.C.

<sup>9</sup> *Id.*

<sup>10</sup> *Supra* fn 5.

Under this statute, officers, employees, and agents of the state will not be held personally liable for a tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Instead, the state steps in as the party litigant and defends against the claim. Section 768.28(5), F.S., limits the recovery of any one person to \$200,000 for one incident and limits all recovery related to one incident to a total of \$300,000. The sovereign immunity recovery caps do not prevent a plaintiff from obtaining a judgment in excess of the caps but the plaintiff cannot recover the excess damages without action by the Legislature.<sup>11</sup>

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.<sup>12</sup> In *Stoll v. Noel*, the Florida Supreme Court explained that independent contractor physicians may be agents of the state for purposes of sovereign immunity:

One who contracts on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also independent contractor.<sup>13</sup>

The court examined the employment contract between the physicians and the state to determine whether the state's right to control was sufficient to create an agency relationship and held that it did.<sup>14</sup>

### **Effects of Proposed Changes**

The bill amends s. 766.1115(4), F.S., relating to contract requirements under the Act, to allow a patient, parent, or guardian of the patient receiving services performed by a dentist or dental hygienist licensed under ch. 466, F.S., to contribute to the cost of dental laboratory expenses without compromising the health care provider's sovereign immunity. The bill states that the contribution may not exceed the actual cost.

The bill also clarifies that the voluntary contribution toward the cost of dental laboratory work is not in conflict with other provisions contained in the Act that prohibit compensation for services.

#### **B. SECTION DIRECTORY:**

**Section 1.** Amends s. 766.1115, F.S., relating to health care providers; and the creation of agency relationships with governmental contractors.

**Section 2.** Provides an effective date of July 1, 2013.

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<sup>11</sup> Section 768.28(5), F.S.

<sup>12</sup> *Stoll v. Noel*, 694 So. 2d 701, 703(Fla. 1997).

<sup>13</sup> *Stoll v. Noel*, 694 So. 2d 701, 703(Fla. 1997) (quoting The Restatement of Agency).

<sup>14</sup> *Supra* fn 11.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

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

A small number of health care providers may be compensated for dental laboratory work.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

The DOH has sufficient authority to promulgate rules to implement the provisions of the bill.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 19, 2013, the Health Quality Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Deletes the definition of “uncompensated services.”
- Authorizes, under the Access to Health Care Act, a health care provider to receive a voluntary contribution to cover the actual cost of dental laboratory services, and clarifies such contribution is not in conflict with other provisions in the Act prohibiting compensation for services.

This analysis is drafted to the committee substitute as passed by the Health Quality Subcommittee.