

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 7105 PCB RORS 14-03 Health Care Services Rulemaking
SPONSOR(S): Health & Human Services Committee; Rulemaking Oversight & Repeal Subcommittee,
Hutson
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee	11 Y, 0 N	Rubottom	Rubottom
1) Health & Human Services Committee	17 Y, 0 N, As CS	Guzzo	Calamas

SUMMARY ANALYSIS

The bill repeals or revises a number of statutes containing unnecessary or confusing rulemaking directives and references relating to the Agency for Health Care Administration (AHCA) and the Department of Elderly Affairs (DOEA), respecting various licensed or registered health care and related services.

The Administrative Procedure Act (APA) provides clear guidance on when rules are necessary to implement laws. Provisions in the substantive laws that add directives to make rules in addition to any needed rulemaking authority and substantive policy guiding rulemaking are either unnecessary, redundant to the requirements of the APA, or provide for rules that are unnecessary. The bill provides WHEREAS language to clarify the intent not to substantively change rulemaking authority by deleting unnecessary rulemaking mandates and references.

The bill strikes unnecessary rulemaking provisions, or revises statutes providing guidelines for rulemaking to ensure that the APA will be the consistent guide to when rules are needed to implement the particular substantive laws.

The bill only affects rulemaking authority and responsibility of AHCA and DOEA in their health care licensure or registration responsibilities.

The bill does not make substantive changes to law.

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The Agency for Health Care Administration (AHCA) has a number of regulatory responsibilities, among these being the licensure of health care facilities including abortion clinics, nursing homes and clinical laboratories. The Department of Elder Affairs (DOEA) has licensure and rulemaking responsibilities for hospices, adult family day care centers and assisted living facilities.

In recent years, many of the facilities licensed by AHCA have come under increasing regulatory control of federal law relating to Medicaid and Medicare, and state laws providing greater specificity than previously provided. At the same time, frequent changes to many of these overlapping programs have made it difficult for AHCA to maintain rules consistent with current law. Some of this difficulty has related to unnecessary rulemaking mandates, particularly relating to statutes that provide sufficient specificity to enforce without resort to rulemaking.

Rulemaking is required by the Administrative Procedures Act (APA) whenever an agency has express authority to make rules, and must resort to rulemaking in order to implement, interpret or prescribe law, policy or requirements including mandatory forms.¹ Rulemaking is not discretionary under the APA.²

In 2009 and again in 2013, the Joint Administrative Procedures Committee held hearings focusing on 2007 legislation that, on its face, requires AHCA to make rules that have yet to be finally adopted. In some cases, that legislation and similar legislation contemplated rulemaking that was either unnecessary under the APA or already promulgated under previously enacted law.

Subsections 400.23(3) and 400.23(5), F.S., now set very specific staffing ratios for licensed nursing homes. AHCA has been unable to update its rules to incorporate these standards but enforces the staffing standards pursuant to other statutory authority. Rulemaking mandates in these two provisions are unnecessary and inconsistent with the APA and the substantive law that requires enforcement with or without rules.³ Technically, AHCA is out of compliance with these nominal rulemaking mandates, but no practical effect flows from that status.

Section 390.012, F.S., provides for rulemaking by AHCA to implement the provisions of chapter 390, F.S. The statute specifically provides that rules must require abortion clinics to be in compliance with s. 390.0111, F.S. In essence, AHCA has authority and direction to adopt rules to implement chapter 390, including a requirement to require clinics to comply with a particular provision of chapter 390, F.S. This is unnecessary verbiage in statute law and adds nothing to the agency's duties or authority. Moreover, it is inconsistent with the clear intent of the APA that statutes speak for themselves and rules should not reiterate them.⁴

A number of other current provisions include unnecessary rulemaking language that is either redundant as to authority, or provide an express mandate for rulemaking when general APA principles oblige agency rulemaking only as necessary.

Effect of Proposed Changes

¹ Section 120.52(16), F.S., defines "rule" to mean "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute...".

² Section 120.54(1)(a), F.S.

³ Section 120.54(1)(c), F.S., requires "No statutory provision shall be delayed in its implementation pending an agency's adoption of implementing rules unless there is an express statutory provision prohibiting its application until the adoption of implementing rules."

⁴ Section 120.545(1)(c), F.S., directing JAPC to make a determination whether a proposed rules reiterates or paraphrases statutory material.

The bill repeals or revises a number of statutory provisions to eliminate redundant, unnecessary, confusing and unused mandates and references relating to AHCA's rulemaking authority. The bill does not reduce any rulemaking authority possessed by AHCA nor alter any substantive law. The bill provides WHEREAS language to clarify that no change in substantive law or rulemaking authority is intended by the statutory amendments.

An explanation of the particular changes follows:

Section 1 amends s. 390.012(3)(d), F.S., the abortion clinic licensure law, to repeal a provision requiring AHCA to adopt a rule requiring that abortion clinics obey s. 390.0111, F.S., the termination of pregnancy statute. Section 390.012(1), F.S., already provides full rulemaking authority to AHCA to implement ss. 390.011-390.018, F.S., including s. 390.0111, F.S. In addition, s. 390.0111, F.S., has its own rule authorizing provision directed to the Department of Health and the licensing boards. Abortion clinics must obey s. 390.0111, F.S. Thus, a specific rule directing them to obey that law would not add to the force of law. AHCA will retain the power to enforce the relevant standards by rules as necessary. AHCA requested this mandate to be deleted from the statute.

Section 2 amends s. 400.021(11), F.S., to remove an unnecessary rulemaking reference. The generally applicable specifications authorized by provision can only be established by rule.⁵ Therefore, deleting the words "rule of" does not change the law.

Section 3 repeals s. 400.0712(3), F.S., which mandates "necessary" rules. AHCA has the authority and responsibility to adopt rules necessary to the implementation of the laws it enforces. Therefore, the provision being repealed is redundant.

Section 4 amends s. 400.23, F.S., to:

- Clarify the rulemaking authority of AHCA for the regulation of nursing homes.
- Remove the rulemaking requirement to establish minimum staffing ratios, as the staffing ratios are already statutorily established in s. 400.23(3)(a), F.S.
- Clarify various provisions that set standards to remove unnecessary rulemaking references.

Section 5 amends s. 400.487(7), F.S., to remove unneeded rulemaking in a self-executing provision exempting nursing home licensees and staff from civil and criminal liability for following "Do Not Resuscitate" orders. Rules cannot supply civil and criminal immunity. That power is reserved to the Legislature. AHCA requested this change.

Section 6 amends s. 400.497, F.S., to revise a number of provisions to clarify the rulemaking authority of AHCA for the regulation of home health agencies.

Sections 7 and 8 amend s. 400.506, F.S., and s. 400.509, F.S., to remove rulemaking authority that is duplicative of the clear and express provisions of s. 400.497, F.S., as revised in Section 6.

Section 9 amends s. 400.6095(8), F.S. to remove unneeded rulemaking by DOEA in a self-executing provision exempting hospice licensees and staff from civil and criminal liability for following "Do Not Resuscitate" orders. Rules cannot supply civil and criminal immunity. That power is reserved to the Legislature. This conforms to the changes to AHCA rulemaking in s. 400.487(7), F.S., a parallel provision of law, in Section 5 of the bill.

Section 10, amending s. 400.914, F.S., and Section 11, creating s. 400.9141, F.S., to:

- Clarify the rulemaking authority of AHCA for the regulation of prescribed pediatric extended care facilities.
- Clarify various provisions that set standards, removing unnecessary rulemaking references.

⁵ See s. 120.51(16), F.S.

- Transfer standards limiting PPEC services deleted from s. 400.914(2), F.S., to new s. 400.9141, F.S.

Sections 12 and 13 amend ss. 400.934, F.S., and 400.935, F.S., to remove unnecessary rulemaking directives and redundant language and to relocate emergency plan criteria from s. 400.935(9), F.S., to s. 400.934(20), F.S. The provisions deleted from s. 400.935(1)-(8), F.S., are all duplicative.⁶

Section 14 amends s. 400.962(5), F.S., to remove an unnecessary rulemaking mandate. AHCA has sufficient rulemaking authority under s. 400.967(2), F.S., to adopt the standards contemplated by the provision deleted.

Section 15 amends s. 400.967(2)-(3), F.S., to remove unnecessary language including unnecessary rulemaking mandates. AHCA has sufficient rulemaking authority to adopt any rules necessary to implement the relevant laws.

Section 16 amends s. 400.980(2), F.S., to remove unnecessary rulemaking language. The APA requires that requirements and forms be adopted by rulemaking and s. 400.980(8), F.S., provides sufficient authority for AHCA to make any rules necessary to implement subsection (2) as amended by this bill.

Section 17 amends s. 409.912(43), F.S., to remove redundant rulemaking authority. AHCA has sufficient rulemaking authority under s. 409.919, F.S., to implement s. 409.912(43), F.S., as amended by this bill.

Sections 18 and 19 amend ss. 429.255(4), F.S., and 429.73, F.S., to remove unneeded rulemaking by DOEA in a self-executing provision exempting assisted living facility licensees, adult family day care licensees and staff of each from civil and criminal liability for following "Do Not Resuscitate" orders. Rules cannot supply civil and criminal immunity. That power is reserved to the Legislature. This conforms to the changes to AHCA rulemaking in s. 400.487(7), F.S., a parallel provision of law, in Section 5 of the bill. DOEA retains rulemaking authority to implement the substantive provisions of law.⁷

Section 20 amends s. 440.102(10), F.S., to clarify that, in addition to the rulemaking authority under s. 112.0455(13), F.S., related to drug testing laboratories, AHCA may adopt rules as necessary to establish general guidelines for drug testing laboratories.

Section 21 amends s. 483.245, F.S., to remove an unnecessary rulemaking mandate to clarify AHCA's responsibility to enforce the law prohibiting rebates, kickbacks and fee splitting by licensed clinical laboratories. AHCA requested this change. AHCA has full rulemaking authority to enforce the section under s. 483.051, F.S.

Section 22 amends s. 765.541(2), F.S., to clarify rulemaking language with respect to certification of organ and tissue procurement organizations, eliminate an unnecessary rulemaking mandate, and to remove unnecessary language. The APA obliges agency rulemaking only as necessary.

Section 23 repeals s. 765.544(2), F.S., related to administrative fines. The provision is duplicative of provisions in s. 408.813, F.S.

None of the provisions remove authority of AHCA or DOEA to make rules necessary to the enforcement of laws assigned to their agencies. None of the provisions alter the substantive law governing the various areas of health care services governed by the statutes amended.

B. SECTION DIRECTORY:

⁶ See, provisions of: pt. II, ch. 408, F.S. (duplicative of particular provisions in 400.935(1)-(8)); s. 400.933, F.S. (s. 400.935(1)); ss. 400.931, .934, .94 (s. 400.935(3)); ss. 400.934, .94 (s. 400.935(4)-(5)); ss. 400.931(1), .934 (s. 400.935(6), (8)). A more detailed cross-reference chart is available from Rulemaking Oversight & Repeal Subcommittee staff upon request.

⁷ Section 429.41, F.S., provides rulemaking authority to implement ss. 429.01-429.54; s. 429.73, F.S., provides rulemaking authority to implement ss. 429.60-429.87, F.S.

- Section 1:** Amends s. 390.012(3)(d), F.S., by deleting a sentence requiring rules to require clinics to comply with s. 390.0111. The sentence is unnecessary to the enforcement of the provisions of the chapter.
- Section 2:** Amends s. 400.021, F.S., to remove an unnecessary rulemaking reference.
- Section 3:** Repeals s. 400.0712, F.S., which mandates "necessary" rules.
- Section 4:** Amends s. 400.23, F.S., by removing unnecessary rulemaking requirements and references.
- Section 5:** Amends s. 400.487, F.S., by deleting an unnecessary rulemaking mandate.
- Section 6:** Amends s. 400.497, F.S., by removing unnecessary rulemaking mandates.
- Section 7:** Amends s. 400.506, F.S., by eliminating unnecessary rulemaking mandates.
- Section 8:** Repeals s. 400.509, F.S., an unnecessary rulemaking mandate.
- Section 9:** Amends s. 400.6095, F.S., relating to patient admission; assessment; plan of care; discharge; death.
- Section 10:** Amends s. 400.914, F.S., to remove an unnecessary rulemaking mandate and remove a provision recodified elsewhere.
- Section 11:** Creates s. 400.9141, F.S., to recodify standards moved from s. 400.914, F.S.
- Section 12:** Amends s. 400.934, F.S., to remove unnecessary rulemaking directives and redundant language and to recodify language moved from s. 400.935, F.S.
- Section 13:** Amends s. 400.935, F.S., to remove unnecessary redundant language and delete language moved to s. 400.934(20), F.S.
- Section 14:** Amends s. 400.962, F.S., to remove an unnecessary rulemaking mandate.
- Section 15:** Amends s. 400.967, F.S., to remove unnecessary language including unnecessary rulemaking mandates.
- Section 16:** Amends s. 400.980, F.S., to remove unnecessary rulemaking language.
- Section 17:** Amends s. 409.912, F.S., to remove unnecessary rulemaking language.
- Section 18:** Amends s. 429.255, F.S., to remove unnecessary rulemaking language.
- Section 19:** Amends s. 429.73, F.S., to remove unnecessary rulemaking language.
- Section 20:** Amends s. 440.102, F.S., to clarify rulemaking language and remove unnecessary rulemaking language.
- Section 21:** Amends s. 483.245, F.S., to remove an unnecessary rulemaking mandate.
- Section 22:** Amends s. 765.541, F.S., to clarify rulemaking language and remove unnecessary language.
- Section 23:** Repeals s. 765.544(2), deleting a redundant provision of law.
- Section 24:** Provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
None anticipated.
2. Expenditures:
None anticipated.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
None anticipated.
2. Expenditures:
None anticipated.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None anticipated

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:
Not applicable. The bill does not appear to affect county or municipal governments.
2. Other:
None.

B. RULE-MAKING AUTHORITY:

The purpose of the bill is to clarify the administrative authority of AHCA and DOEA to adopt rules as required by the provisions of the APA consistent with the needs of implementation of the relevant substantive laws. Accordingly the bill removes unnecessary, redundant and confusing rulemaking requirements and references.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

One amendment was adopted by the Rulemaking Oversight & Repeal Subcommittee before approving the PCB. Section 18 was amended to include an amendment to s. 429.255(5), F.S., to clarify that the Department of Elder Affairs retains full rulemaking authority for implementing that entire section of law including the use of Do Not Resuscitate Orders in assisted living facilities. The DOEA expressed concern that repeal of the rulemaking mandate in subsection (4) could be misconstrued, notwithstanding the

DOEA's broad rulemaking authority in s. 429.41, F.S., to enforce all ALF statutory responsibilities to their residents.

On March 27, 2014, the Health and Human Services Committee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Removed an inadvertent restriction on the authority of agencies other than AHCA to make rules related to home health agencies and retained current law granting rulemaking authority to AHCA related to home health agencies; and
- Removed rulemaking language to clarify that AHCA shall adopt rules “as necessary” to establish general guidelines for modeling drug-free work-force laboratories under the drug-free workplace program.

This analysis is drafted to the committee substitute as passed by the Health and Human Services Committee.