

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 Committee on Judiciary

BILL: CS/CS/SB 976

INTRODUCER: Judiciary Committee; Health Policy Committee; and Senator Bean

SUBJECT: Home Health Care

DATE: April 3, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Looke</u>	<u>Stovall</u>	<u>HP</u>	<u>Fav/CS</u>
2.	<u>Munroe</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>AHS</u>	_____
4.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 976 amends s. 400.506, F.S., to clarify that a registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide that is referred by a nurse registry is an independent contractor and not an employee of that nurse registry regardless of the regulatory obligation imposed on the nurse registry under ch. 400, F.S.

The bill also clarifies that a nurse registry is not responsible for monitoring, supervising, managing, or training the nurses, companions or homemakers, and home health aides it refers or for reviewing or acting on any records required to be filed with it by ch. 400, F.S., and maintained under the Agency for Health Care Administration (Agency) rule. However, the registry must ensure that a caregiver it refers has credentials demonstrating that the caregiver is adequately trained to perform the task of a home health aide in the home setting. Additionally, a registry must inform patients that the registry is not obligated to monitor, supervise, manage or train the referred caregivers and that the referred caregivers are independent contractors.

The bill requires that if a nurse registry becomes aware of a violation of law, misconduct, or a deficiency in credentials of a nurse, companion or homemaker, or home health aide, then it must advise the patient to terminate the referred person's contract along with a reason for the recommendation, cease referring the contractor to other patients or facilities, and notify the applicable licensing board if practice violations are involved.

The bill does not affect or negate any obligations imposed on a nurse registry under ch. 400, F.S., or ch. 408, F.S., relating to health care administration.

Lastly, the bill exempts home health agencies from a requirement that they be accredited by a recognized organization as a prerequisite to licensure if the agencies are not Medicare or Medicaid certified.

II. Present Situation:

A nurse registry is defined to mean “any person that procures, offers, promises, or attempts to secure health care-related contracts for registered nurses, licensed practical nurses, certified nursing assistants, home health aides, companions, or homemakers, who are compensated by fees as independent contractors, including but not limited to, contracts for the provision of services to patients and contracts to provide private duty or staffing services to health care facilities licensed under ch. 395, [ch. 400], or ch. 429 or other business entities.”¹ Nurse registries operate by referring qualified health care workers to patients, health care facilities, or other business entities who hire such health care workers as independent contractors.²

Nurse registries are regulated under the Home Health Services Act found in part III of ch. 400, F.S., specifically s. 400.506, F.S., and part II of ch. 408, F.S., the general licensing provisions for health care facilities regulated by the Agency. A license issued by the Agency is required to operate a nurse registry. As of February 27, 2014, 518 nurse registries were licensed with the Agency.^{3,4}

Some of the responsibilities of a nurse registry as established in statute and rule include:

- Referring independent contractors capable of delivering services as defined in a specific medical plan of treatment for a patient or services requested by a client;⁵
- Keeping clinical records received from the independent contractors for 5 years following the termination of that contractor’s service;⁶
- Disseminating to the independent contractors the procedures governing the administration of drugs and biologicals to patients required by ch. 464, F.S., and Agency rules, as well as all the information required by 59A-18.005(1), F.A.C.;⁷
- Initially confirming and annually reconfirming the licensure or certification of applicable independent contractors;⁸

¹ Section 400.462(21), F.S.

² Agency for Health Care Administration, *2014 Agency Legislative Bill Analysis for SB 976* (February 13, 2014) (on file with the Senate Judiciary Committee).

³ Multiple nurse registries that are located in the same county may be included in one license and each operational site must be listed on the license.

⁴ On-line report of active nurse registries generated from the FloridaHealthFinder.gov website available at: <http://www.floridahealthfinder.gov/facilitylocator/ListFacilities.aspx>, (Last visited March 19, 2014).

⁵ Rule 59A-18.010(2), F.A.C.

⁶ Rule 59A-18.012(7), F.A.C.

⁷ Rule 59A-18.013(1), F.A.C.

⁸ Rule 59A-18.005(3) and (4), F.A.C.

- Annually requesting performance outcome evaluations from the health care facilities where the independent contractor provided services and maintaining those evaluations in that independent contractor's file;⁹
- Establishing a system for recording a following-up on complaints involving independent contractors referred by the nurse registry;¹⁰
- Informing a health care facility or other business entity that a referred independent contractor is on probation with his or her professional licensing board or certifying agency or has had other restrictions placed on his or her license or certification when the nurse registry has received such information;¹¹
- Preparing and maintaining a written comprehensive emergency management plan;¹² and
- Complying with the background screening requirements in s. 400.512, F.S., requiring a level II background check for all employees and contractors.¹³

Because nurse registries operate as referral services with the referred health care workers working as independent contractors for a patient or facility that is responsible for hiring, firing, and paying the referred health care workers, nurse registries are not required to meet the minimum wage and overtime requirements for employers as set out in the federal Fair Labor Standards Act (FLSA). Nonetheless, it is possible for a nurse registry to be considered an employer for the purposes of the FLSA under certain circumstances.^{14,15} Currently, even if a nurse registry is found to be an employer, it is still exempt from the requirements of the FLSA relating to minimum wage and overtime due to an exception made for the provision of companionship services.¹⁶ Companionship services have been interpreted to include “essentially all workers providing services in the home to elderly people or people with illnesses, injuries, or disabilities regardless of the skill the duties performed require.”¹⁷

Under a pending change to federal regulation that will take effect on January 1, 2015, the definition of companionship services will be significantly narrowed to specifically exclude “the performance of medically related services.”¹⁸ If a nurse registry is found to be an employer after January 1, 2015, it would have to comply with the requirements of the FLSA relating to minimum wage and overtime or be in violation of federal law.

⁹ Rule 59A-18.017, F.A.C.

¹⁰ *Id.*

¹¹ *Id.*

¹² 59A-18.018(1), F.A.C.

¹³ Section 400.506(9), F.S.

¹⁴ In order to determine whether or not employment or joint employment exists, a person must look at all the facts in a particular case and assess the economic reality of the work relationship. Factors to consider may include whether an employer has the power to direct, control, or supervise the worker(s) or the work performed; whether an employer has the power to hire or fire, modify the employment conditions or determine the pay rates or the methods of wage payment for the worker(s); the degree of permanency and duration of the relationship; where the work is performed and whether the tasks performed require special skills; whether the work performed is an integral part of the overall business operation; whether an employer undertakes responsibilities in relation to the worker(s) which are commonly performed by employers; whose equipment is used; and who performs payroll and similar functions. See *Federal Register*, Vol. 78, No. 190, October 1, 2013, at 60483.

¹⁵ Currently, AHCA rule 59A-18.005(8)(d) requires a nurse registry to record and follow up on complaints that are filed involving individuals it refers. This oversight may meet the supervisory test as stated in note 4.

¹⁶ 29 CFR 552.6.

¹⁷ *Supra* n. 14 at 60455.

¹⁸ *Id.*

III. Effect of Proposed Changes:

The bill clarifies the role of a nurse registry to reduce the likelihood that it would be deemed an employer under the FLSA, as follows:

- A registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide referred for contract by a nurse registry is an independent contractor and not an employee of that nurse registry regardless of the regulatory obligations imposed on the nurse registry by ch. 400, F.S., and Agency rule.
- A nurse registry is not obligated to monitor, supervise, manage, or train a registered nurse, licensed practical nurse, certified nursing assistant, or home health aide it refers.
- If a nurse registry becomes aware of a violation of law, misconduct, or a deficiency in the credentials of a registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide it refers, the registry has the obligation to advise the patient to terminate the referred person's contract and provide a reason to the patient for the recommended termination, cease referring that contractor to other patients or facilities, and notify the appropriate licensing board if practice violations are involved.
- Records required to be filed with the nurse registry by ch. 400, F.S., must be kept in accordance with Agency rules solely as a repository of records and the nurse registry has no obligation to review or act upon such records other than as detailed above.

The bill requires that a nurse registry obtain credentials from each home health aide referred for contract demonstrating that the caregiver is adequately trained to perform the tasks of a home health aide in the home setting. The bill requires a nurse registry to notify patients, in a private residence or facility, upon the referral of a registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide that the caregiver referred by the nurse registry is an independent contractor and that it is not the obligation of a nurse registry to monitor, supervise, manage, or train a caregiver referred for contract. The bill does not affect or negate any obligations imposed on a nurse registry under ch. 400, F.S., or ch. 408, F.S., relating to health care administration.

Since 2008, home health agencies applying for licensure must be accredited by an accrediting organization that is recognized by the agency as having standards comparable to those required under ch. 400, F.S. and part II of ch. 408, F.S.¹⁹ The bill exempts from accreditation standards home health care agencies that are not Medicare or Medicaid certified. Such home health care agencies typically provide unskilled services to clients in the home setting.

The effective date of the bill is July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹⁹ Chapter 2008-246, s. 3, Laws of Fla. (creating s. 400.471(1)(h), F.S., effective July 1, 2008).

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 400.506 and 400.471 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on April 2, 2014:

The committee substitute requires a nurse registry to obtain credentials from each home health aide referred for contract demonstrating that the caregiver is adequately trained to perform the tasks of a home health aide in the home setting. The committee substitute requires a nurse registry to notify patients upon the referral of a registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide that the caregiver referred by the nurse registry is an independent contractor and that it is not the obligation of a nurse registry to monitor, supervise, manage, or train a caregiver referred for contract. The committee substitute does not affect or negate any obligations imposed on a nurse registry under ch. 400, F.S., or ch. 408, F.S., relating to health care

administration. The committee substitute creates an exemption from accreditation standards for home health care agencies that are not Medicare or Medicaid certified.

CS by Health Policy on March 5, 2014:

The CS amends SB 976 to include companions and homemakers in the clarifications made to a nurse registry's duties. The amendment also adds to the duties of a nurse registry when it becomes aware of illegal activity, misconduct, or a deficiency in credentials of one of its independent contractors by requiring the registry to provide a reason for the suggested termination, to cease referring that contractor, and to notify the licensing board if practice violations are involved.

B. Amendments:

None.