

**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 Committee on Judiciary

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BILL: CS/SB 1146

INTRODUCER: Health Policy Committee and Senator Simmons

SUBJECT: Agency Relationships with Governmental Health Care Contractors

DATE: March 23, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stovall</u>	<u>Stovall</u>	<u>HP</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1146 revises the description of volunteer, uncompensated services under the Access to Health Care Act (the act) that is established in s. 766.1115, F.S. Under the act, sovereign immunity applies for services provided by a health care provider that has entered into a contractual relationship to provide health care services to low-income recipients as an agent of the governmental contractor.

Specifically, the bill authorizes a free clinic to receive and use appropriations or grants from a governmental entity or nonprofit corporation to support the delivery of the contracted services by volunteer health care providers, which may include employing providers to supplement, coordinate, or support the volunteers. The monies do not constitute compensation under this act from the governmental contractor for services provided under the contract.

The bill also authorizes a free clinic, while acting as an agent of the governmental contractor to allow a patient, or a parent or guardian of the patient, to pay a nominal fee per visit, not to exceed \$10, for administrative costs related to the services provided under the contract.

The bill also clarifies that employees and agents of a health care provider fall within the sovereign immunity protections of the contracted health care provider when providing health care services pursuant to the contract. Section 768.28, F.S., is likewise amended to specifically include a health care provider's employees or agents to avoid any potential ambiguity between the provisions in that section of law and the act.

The bill provides for efficiencies in health care delivery under the contract by requiring the patient, or the patient's legal representative, to acknowledge in writing receipt of the notice of agency relationship between the governmental contractor and the health care provider at the initial visit only. Thereafter, the notice requirement is met by posting the notice in a place conspicuous to all persons.

The bill has no fiscal impact on governmental entities.

## II. Present Situation:

### Access to Health Care Act

Section 766.1115, F.S., is entitled "The Access to Health Care Act" (the act). It was enacted in 1992 to encourage health care providers to provide care to low-income persons.<sup>1</sup> The act is administered by the Department of Health (department) through the Volunteer Health Services Program.<sup>2</sup>

This section of law extends sovereign immunity to health care providers who execute a contract with a governmental contractor and who, as agents of the state, provide volunteer, uncompensated health care services to low-income individuals. These 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 contract under the act must pertain to 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 must 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>3</sup>

Health care providers under the act include:<sup>4</sup>

- A birth center licensed under ch. 383, F.S.<sup>5</sup>
- An ambulatory surgical center licensed under ch. 395, F.S.<sup>6</sup>
- A hospital licensed under ch. 395, F.S.<sup>7</sup>

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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 the Department of Health who voluntarily chooses to participate in a program offered or approved by the department. Section 766.1115(3)(e), F.S. A single individual whose annual income does not exceed \$23,540 is at 200 percent of the federal poverty level using Medicaid data. See *2015 Poverty Guidelines, Annual Guidelines* at: <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Downloads/2015-Federal-Poverty-level-charts.pdf> (last visited Mar. 7, 2015).

<sup>2</sup> See Florida Department of Health, *Volunteerism Volunteer Opportunities*, (last visited Mar. 7, 2015) <http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteerism-volunteer-opportunities/index.html>; Rule Chapter 64I-2, F.A.C.

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

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

<sup>5</sup> Section 766.1115(3)(d)1., F.S.

<sup>6</sup> Section 766.1115(3)(d)2., F.S.

<sup>7</sup> Section 766.1115(3)(d)3., F.S.

- A physician or physician assistant licensed under ch. 458, F.S.<sup>8</sup>
- An osteopathic physician or osteopathic physician assistant licensed under ch. 459, F.S.<sup>9</sup>
- A chiropractic physician licensed under ch. 460, F.S.<sup>10</sup>
- A podiatric physician licensed under ch. 461, F.S.<sup>11</sup>
- A registered nurse, nurse midwife, licensed practical nurse, or advanced registered nurse practitioner licensed or registered under part I of ch. 464, F.S., or any facility that 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.<sup>12</sup>
- A dentist or dental hygienist licensed under ch. 466, F.S.<sup>13</sup>
- A midwife licensed under ch. 467, F.S.<sup>14</sup>
- A health maintenance organization certificated under part I of ch. 641, F.S.<sup>15</sup>
- A health care professional association and its employees or a corporate medical group and its employees.<sup>16</sup>
- 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.<sup>17</sup>
- A free clinic that delivers only medical diagnostic services or nonsurgical medical treatment free of charge to all low-income recipients.<sup>18</sup>
- 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 as a physician, physician assistant, nurse, or midwife.<sup>19</sup>
- 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, that delivers health care services provided by the listed licensed professionals, any federally funded community health center, and any volunteer corporation or volunteer health care provider that delivers health care services.

A governmental contractor is defined in the act as the department, a county health department, a special taxing district having health care responsibilities, or a hospital owned and operated by a governmental entity.<sup>20</sup>

The act further specifies additional contract requirements. The contract must provide that:

- The governmental contractor retains the right of dismissal or termination of any health care provider delivering services under the contract.

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<sup>8</sup> Section 766.1115(3)(d)4., F.S.

<sup>9</sup> Section 766.1115(3)(d)5., F.S.

<sup>10</sup> Section 766.1115(3)(d)6., F.S.

<sup>11</sup> Section 766.1115(3)(d)7., F.S.

<sup>12</sup> Section 766.1115(3)(d)8., F.S.

<sup>13</sup> Section 766.1115(3)(d)13., F.S.

<sup>14</sup> Section 766.1115(3)(d)9., F.S.

<sup>15</sup> Section 766.1115(3)(d)10., F.S.

<sup>16</sup> Section 766.1115(3)(d)11., F.S.

<sup>17</sup> Section 766.1115(3)(d)12., F.S.

<sup>18</sup> Section 766.1115(3)(d)14., F.S.

<sup>19</sup> Section 766.1115(3)(d)15., F.S.

<sup>20</sup> Section 766.1115(3)(c), F.S.

- 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 or the health care provider must make patient selection and initial referrals.
- The health care provider is subject to supervision and regular inspection by the governmental contractor.<sup>21</sup>
- The health care provider must accept all referred patients; however, the contract may specify limits on the number of patients to be referred.<sup>22</sup>

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 legal actions alleging medical negligence.<sup>23</sup>

The individual accepting services through this contracted provider may not have medical or dental care insurance coverage for the illness, injury, or condition for which medical or dental care is sought.<sup>24</sup> Services not covered under the act include experimental procedures and clinically unproven procedures. The governmental contractor must determine whether a procedure is covered.

The health care provider may not subcontract for the provision of services under this chapter.<sup>25</sup>

In 2014, the Legislature amended the act to authorize dentists providing services as an agent of the governmental contractor to allow a patient to voluntarily contribute a monetary amount to cover costs of dental laboratory work related to the services provided under the contract to the patient.<sup>26</sup>

According to the department, from July 1, 2012, through June 30, 2013, 13,543 licensed health care volunteers (plus an additional 26,002 clinic staff volunteers) provided 427,731 health care patient visits with a total value of donated goods and services of \$294,427,678 under the act.<sup>27</sup> The Florida Department of Financial Services, Division of Risk Management, reported on February 14, 2014, that 10 claims had been filed against the Volunteer Health Care Provider Program under s. 766.1115, F.S., since February 15, 2000.<sup>28</sup>

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<sup>21</sup> Section 766.1115(4), F.S.

<sup>22</sup> Rule 64I-2.003(2), F.A.C.

<sup>23</sup> Section 766.1115(5), F.S.

<sup>24</sup> Rule 64I-2.002(2), F.A.C.

<sup>25</sup> Rule 64I-2.004(2), F.A.C.

<sup>26</sup> Chapter 2014-108, s. 1, Laws of Fla.

<sup>27</sup> Department of Health, *Volunteer Health Services 2012-2013 Annual Report*, available at:

<http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteerism-volunteer-opportunities/vhs1213annualreport2.pdf>, (last visited Mar. 7, 2015).

<sup>28</sup> Correspondence from Lewis R. Williams, Chief of State Liability and Property Claims, to Duane A. Ashe, Department of Health (Feb. 14, 2014) (on file with the Senate Committee on Health Policy).

### **Legislative Appropriation to Free and Charitable Clinics**

The Florida Association of Free and Charitable Clinics received a \$4.5 million appropriation in the 2014-2015 General Appropriations Act through the department.<sup>29</sup> The department restricted the use of these funds by free and charitable clinics that were health care providers under the act to clinic capacity building purposes in the contract which distributed this appropriation. The clinic capacity building was limited to products or processes that increase skills, infrastructure and resources of clinics. The department did not authorize these funds to be used to build capacity through the employment of clinical personnel. The department cautiously interpreted the provision in the act relating to volunteer, uncompensated services, which states that a health care provider must receive no compensation from the governmental contractor for any services provided under the contract. Accordingly, the department's interpretation precluded the use of the appropriation for this purpose.

### **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, section 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the power to waive 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. Under this statute, officers, employees, and agents of the state will not be held personally liable in 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. However, personal liability may result from actions committed 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. The recovery by any one person is limited to \$200,000 for one incident and the total for all recoveries related to one incident is limited to \$300,000.<sup>30</sup> 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>31</sup>

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.<sup>32</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:

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<sup>29</sup> Chapter 2014-51, Laws of Fla., line item 461.

<sup>30</sup> Section 768.28(5), F.S.

<sup>31</sup> *Id.*

<sup>32</sup> *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997).

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>33</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>34</sup> The court explained:

Whether CMS [Children's Medical Services] physician consultants are agents of the state turns on the degree of control retained or exercised by CMS. This Court has held that the right to control depends upon the terms of the employment contract. . . . CMS requires each consultant, as a condition of participating in the CMS program, to agree to abide by the terms published in its HRS<sup>35</sup> Manual and CMS Consultant's Guide which contain CMS policies and rules governing its relationship with the consultants. The Consultant's Guide states that all services provided to CMS patients must be authorized in advance by the clinic medical director. The language of the HRS Manual ascribes to CMS responsibility to supervise and direct the medical care of all CMS patients and supervisory authority over all personnel. The manual also grants to the CMS medical director absolute authority over payment for treatments proposed by consultants. The HRS Manual and the Consultant's Guide demonstrate that CMS has final authority over all care and treatment provided to CMS patients, and it can refuse to allow a physician consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons.

Our conclusion is buttressed by HRS's acknowledgement that the manual creates an agency relationship between CMS and its physician consultants, and despite its potential liability in this case, HRS has acknowledged full financial responsibility for the physicians' actions. HRS's interpretation of its manual is entitled to judicial deference and great weight.<sup>36</sup>

### III. Effect of Proposed Changes:

#### Access to Health Care Act (Section 1)

The bill authorizes a free clinic<sup>37</sup> to receive and use appropriations or grants from a governmental entity or nonprofit corporation to support the delivery of contracted services by volunteer health care providers under the Access to Health Care Act (the act) without those funds being deemed compensation which might jeopardize the sovereign immunity protections afforded in the act. The bill authorizes these appropriations or grants to be used for the employment of health care providers to supplement, coordinate, or support the delivery of services by volunteer health care providers. The bill states that the receipt and use of the

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<sup>33</sup> *Id.* at 703, quoting from the *Restatement (Second) of Agency* s. 14N (1957).

<sup>34</sup> *Id.* at 703.

<sup>35</sup> Florida Department of Health and Rehabilitative Services.

<sup>36</sup> *Stoll*, 694 So. 2d at 703 (Fla. 1997) (internal citations omitted).

<sup>37</sup> A free clinic for purposes of this provision is a clinic that delivers only medical diagnostic services or nonsurgical medical treatment free of charge to all low-income recipients.

appropriation or grant does not constitute the acceptance of compensation for the specific services provided to the low-income recipients covered by the contract.

The bill also authorizes a free clinic to allow a patient, or a parent or guardian of the patient, to pay a nominal fee for administrative costs related to the services provided to the patient under the contract without jeopardizing the sovereign immunity protections afforded in the act. The fee may not exceed \$10 per visit and is a voluntary payment.

The bill inserts the phrase “employees or agents” in several provisions in the act to clarify that employees and agents of a health care provider, which typically are paid by a health care provider, fall within the sovereign immunity protections of the contracted health care provider when acting pursuant to the contract. Subsection (5) of the act currently recognizes employees and agents of a health care provider. This subsection requires the governmental contractor to provide written notice to each patient, or the patient’s legal representative, that the provider is an agent of the governmental contractor and that the exclusive remedy for injury or damage suffered as the result of any act or omission of the provider *or any employee or agent thereof* acting within the scope of duties pursuant to the contract is by commencement of an action pursuant to the provisions of s. 768.28, F.S.

The bill provides for efficiencies in health care delivery under the contract by requiring the patient, or the patient’s legal representative, to acknowledge in writing receipt of the notice of agency relationship between the government contractor and the health care provider at the initial visit only. Thereafter, the notice requirement is met by posting the notice in a place conspicuous to all persons.

### **Sovereign Immunity (Section 2)**

Section 768.28, F.S., is likewise amended to specifically include a health care provider’s employees or agents so as to avoid any potential ambiguity between the provisions in that section of law and the act.

### **Additional Provisions and Effective Date**

The bill removes obsolete language and makes technical and grammatical changes.

The effective date of the bill is July 1, 2015.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

This bill does not appear to have an impact on cities or counties and as such, it does not appear to be a mandate for constitutional purposes.

### **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:

Free clinics may receive up to \$10 per visit from patients who choose to pay the fee to cover administrative costs. The amount that may be collected is indeterminate. Likewise, some patients or recipients may voluntarily pay up to \$10 per visit to cover administrative costs.

Contracted free clinics may receive or continue to receive governmental funding in the form of an appropriation or grant without the concern of restrictions on such funding for certain uses that might be imposed by the act. The receipt of any such funding is speculative at this point and therefore the amount is indeterminate.

C. Government Sector Impact:

None.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 766.1115 and 768.28.

IX. **Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

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

**CS by Health Policy on March 10, 2015:**

The CS reinstates current law that in order to qualify as volunteer, uncompensated services, the health care provider may not receive compensation from the governmental contractor for any services provided under the contract. It adds authorization for a free clinic to receive and use appropriations or grants from a governmental entity or nonprofit



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corporation to support the delivery of the contracted services by volunteer health care providers, which may include employing providers to supplement, coordinate, or support the volunteers. Additionally, it limits the administrative fee to free clinics and couches it in terms of “allowing” the patient to pay as opposed to the clinic “charging” the fee. The administrative fee is authorized per visit.

**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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