

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 Rules

BILL: CS/SB 1034

INTRODUCER: Judiciary Committee and Senator Simmons

SUBJECT: Health Care Providers

DATE: February 23, 2016

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|------------------|
| 1. | Lloyd | Stovall | HP | Favorable |
| 2. | Davis | Cibula | JU | Fav/CS |
| 3. | Lloyd | Phelps | RC | Favorable |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1034 allows a free clinic using volunteer health care providers to receive a grant or legislative appropriation to support the delivery of services while retaining the sovereign immunity protections under existing law. This financial support may be used to employ providers to supplement, coordinate, or otherwise support the volunteers.

The definition of a health care provider or provider in the Access to Health Care Act is expanded to include a pharmacy or licensed pharmacist. Accordingly, a pharmacy or pharmacy providing services under the act is given sovereign immunity as an agent of the state.

The bill also provides that employees and agents of the free clinics are protected from lawsuits under the state's sovereign immunity protections.

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.¹ The act is

¹ 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),

administered by the Department of Health (department) through the Volunteer Health Services Program.² Volunteers complete an enrollment application with the department which requires a personal reference and background checks.³

The act 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.⁴

Health care providers under the act include:⁵

- A birth center licensed under ch. 383, F.S.⁶
- An ambulatory surgical center licensed under ch. 395, F.S.⁷
- A hospital licensed under ch. 395, F.S.⁸
- A physician or physician assistant licensed under ch. 458, F.S.⁹
- An osteopathic physician or osteopathic physician assistant licensed under ch. 459, F.S.¹⁰
- A chiropractic physician licensed under ch. 460, F.S.¹¹
- A podiatric physician licensed under ch. 461, F.S.¹²
- 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.¹³
- A dentist or dental hygienist licensed under ch. 466, F.S.¹⁴

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* (September 3, 2015), available at <http://aspe.hhs.gov/poverty/15poverty.cfm>.

² See Florida Dep't of Health, Division of Public Health Statistics and Performance Management, *Volunteer Health Services*, available at <http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteerism-volunteer-opportunities/index.html> (last visited Jan. 8, 2016); and Rule Chapter 64I-2, F.A.C.

³ Florida Dep't of Health, Division of Public Health Statistics and Performance Management, *Volunteer Services Policy*, pp. 12-13, available at <http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteer-health-services-opportunities/VHS2PolicyDOHP380-7-14.pdf> (last visited Feb. 5, 2016).

⁴ Section 766.1115(3)(a), F.S.

⁵ Section 766.1115(3)(d), F.S.

⁶ Section 766.1115(3)(d)1., F.S.

⁷ Section 766.1115(3)(d)2., F.S.

⁸ Section 766.1115(3)(d)3., F.S.

⁹ Section 766.1115(3)(d)4., F.S.

¹⁰ Section 766.1115(3)(d)5., F.S.

¹¹ Section 766.1115(3)(d)6., F.S.

¹² Section 766.1115(3)(d)7., F.S.

¹³ Section 766.1115(3)(d)8., F.S.

¹⁴ Section 766.1115(3)(d)13., F.S.

- A midwife licensed under ch. 467, F.S.¹⁵
- A health maintenance organization certificated under part I of ch. 641, F.S.¹⁶
- A health care professional association and its employees or a corporate medical group and its employees.¹⁷
- 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.¹⁸
- A free clinic that delivers only medical diagnostic services or nonsurgical medical treatment free of charge to all low-income recipients.¹⁹
- 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.²⁰
- 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.²¹

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.
- 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.²²
- The health care provider must accept all referred patients; however, the contract may specify limits on the number of patients to be referred.²³

¹⁵ Section 766.1115(3)(d)9., F.S.

¹⁶ Section 766.1115(3)(d)10., F.S.

¹⁷ Section 766.1115(3)(d)11., F.S.

¹⁸ Section 766.1115(3)(d)12., F.S.

¹⁹ Section 766.1115(3)(d)14., F.S.

²⁰ Section 766.1115(3)(d)15., F.S.

²¹ Section 766.1115(3)(c), F.S.

²² Section 766.1115(4), F.S.

²³ Rule 64I-2.003(2), F.A.C.

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.²⁴

According to the department, from July 1, 2014, through June 30, 2015, 12,569 licensed health care volunteers (plus an additional 9,938 clinic staff volunteers) provided 373,588 health care patient visits with a total value of donated goods and services of more than \$271 million, under the act.²⁵ The Florida Department of Financial Services, Division of Risk Management, reported that as of January 7, 2015, that 10 claims had been filed against the Volunteer Health Care Provider Program under s. 766.1115, F.S., since February 15, 2000.²⁶

Legislative Appropriation to Free and Charitable Clinics

The use of prior fiscal year appropriations by the Florida Association of Free and Charitable Clinics under the act had been restricted to clinic capacity building purposes via the contract with the department which distributed the appropriations. 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.

The Florida Association of Free and Charitable Clinics received a \$9.5 million appropriation in the 2015-2016 General Appropriations Act through the department.²⁷ However, this fiscal year's appropriation was vetoed by the Governor "because the funds could not be used for services, and therefore it is not a statewide priority for improving cost, quality, and access in healthcare."²⁸

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 those 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.

²⁴ Section 766.1115(5), F.S.

²⁵ Florida Dep't of Health, *Volunteer Health Services 2014-2015 Annual Report* (December 1, 2015), available at <http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteer-health-services-opportunities/VHS1415annualreport.pdf> (last visited Jan. 7, 2016).

²⁶ Id at A-1.

²⁷ Chapter 2015-232, Laws of Fla., line item 441.

²⁸ Governor Rick Scott, *Veto Message to Secretary of State Ken Detzner* (June 23, 2015), p. 35, available at <http://www.flgov.com/wp-content/uploads/2015/06/Transmittal%20Letter%206.23.15%20-%20SB%202500-A.pdf> (last visited Jan. 7, 2016).

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 \$300,000.²⁹ 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.³⁰

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.³¹ 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.³²

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.³³ 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 HRS³⁴ 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

²⁹ Section 768.28(5), F.S.

³⁰ *Id.*

³¹ *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997).

³² *Id.* at 703, quoting from the *Restatement (Second) of Agency* s. 14N (1957).

³³ *Id.* at 703.

³⁴ Florida Department of Health and Rehabilitative Services.

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.³⁵

III. Effect of Proposed Changes:

Access to Health Care Act (Section 1)

The bill authorizes a free clinic³⁶ 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 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 receipt and use of the appropriation or grant, according to the bill, does not constitute the acceptance of compensation for the specific services provided to the low-income recipients covered by the contract.

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.

Additionally, a pharmacy or pharmacist licensed under chapter 465, the pharmacy act, is granted sovereign immunity under the bill. This is done by including a pharmacy or pharmacist in the definition of a "health care provider" or "provider."

Subsection (5) 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 of 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

³⁵ *Stoll*, 694 So. 2d at 703 (Fla. 1997) (internal citations omitted).

³⁶ 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.

to all persons. According to a Department of Health analysis of the bill, patients are currently informed that the provider is an agent of a governmental contractor at each visit.³⁷

Sovereign Immunity (Section 2)

Section 768.28, F.S., which pertains to the waiver of sovereign immunity in tort actions, is amended to specifically include a health care provider's employees or agents in the definition of an "officer, employee, or agent." This is done to avoid any potential ambiguity between the provisions in that section of law and the Access to Health Care 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, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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:

Contracted free clinics may 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.

Private health care providers currently delivering services to uninsured individuals may see a reduction in their uncompensated care costs as these individuals seek care in these clinics with expanded resources.

³⁷ Florida Department of Health, *Senate Bill 1034 Legislative Bill Analysis* (Dec. 7, 2015) (on file with the Senate Committee on Judiciary).

C. **Government Sector Impact:**

The department will be responsible for management of the contracts with the clinics.

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 Changes:**

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

CS by Judiciary on February 16, 2016:

The definition of “health care provider” or “provider” in the Access to Health Care Act is expanded to include a pharmacy or pharmacist. With this addition, a pharmacy or pharmacist is added to the list of those entities or individuals for whom sovereign immunity applies for purposes of protection from lawsuits under the act.

B. **Amendments:**

None.