

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1431 Agency Relationships with Governmental Health Care Contractors

SPONSOR(S): Health Quality Subcommittee, Raulerson

TIED BILLS: **IDEN./SIM. BILLS:** SB 1034

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

SUMMARY ANALYSIS

Section 766.1115, F.S., the Access to Health Care Act (Act), was enacted to provide sovereign immunity to health care professionals who contract with the state to provide free medical care for indigent persons. The contract must be for "volunteer, uncompensated services" for the benefit of low-income recipients.

HB 1431 revises the description of volunteer, uncompensated services to allow a health care provider, as defined by the Act, 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 without jeopardizing the sovereign immunity protections afforded under the Act. This would allow such funds to be used to employ health care providers to supplement, coordinate, or support the volunteer health care providers.

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 appears to have no fiscal impact on state or local government.

The bill provides an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Sovereign Immunity

The legal doctrine of sovereign immunity prevents a government from being sued in its own courts without its consent.¹ According to United States Supreme Court Justice Oliver Wendell Holmes, citing the noted 17th century Hobbes work, *Leviathan*, “a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”² State governments in the United States, as sovereigns, inherently possess sovereign immunity.³

Sovereign Immunity in Florida

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 state⁴ 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.⁵

When an officer, employee, or agency of the state is sued, 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 \$300,000.⁶ 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.⁷

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.⁸ In *Stoll v. Noel*, the Florida Supreme Court explained that independent contractor physicians may be agents of the state for purposes of sovereign immunity:⁹

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.

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.¹⁰ The facts of the case demonstrated the state’s control over the independent contractor physicians and, therefore, the Court held that an agency relationship existed.¹¹

¹ Black’s Law Dictionary, 3rd Pocket Edition, 2006.

² *Kawananakoa v Polyblank*, 205 U.S. 349, 353 (1907).

³ See, e.g., Fla. Jur. 2d, Government Tort Liability, Sec. 1.

⁴ The statutes define state agencies or subdivisions to include executive departments, the legislature, the judicial branch, and independent establishments of the state, such as state university boards of trustees, counties and municipalities, and corporations primarily acting as instrumentalities or agencies of the state, including the Florida Space Authority. Section 768.28(2), F.S.

⁵ Section 768.28(9)(a), F.S.

⁶ Section 768.28(5), F.S.

⁷ *Id.*

⁸ *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997).

⁹ *Id.* at 703, quoting from the *Restatement (Second) of Agency* s. 14N (1957).

¹⁰ *Id.*

¹¹ *Id.* at 703.

Access to Health Care Act

Section 766.1115, F.S., is entitled “The Access to Health Care Act” (Act). It was enacted in 1992 to encourage health care providers to provide care to low-income persons.¹² The Act is administered by the Department of Health (DOH) through the Volunteer Health Services Program.¹³ Volunteers complete an enrollment application with DOH which includes personal reference and background checks.¹⁴

This section of law extends sovereign immunity to health care providers who execute a contract with a governmental contractor¹⁵ 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.¹⁶

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.¹⁷

The Act establishes several contractual requirements for government contractors and health care providers. The contract must require the government contractor to retain the right of dismissal or termination of any health care provider delivering services under the contract¹⁸ and to have access to the patient records of any health care provider delivering services under the contract.¹⁹ The health care provider must, under the contract, report adverse incidents and information on treatment outcomes to the governmental contractor.²⁰ The governmental contractor or the health care provider must make patient selection and initial referrals.²¹ The health care provider is subject to supervision and regular inspection by the governmental contractor.²²

Health care providers under the Act include:²³

- 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., or any facility that employs

¹² Low-income persons include 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 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. *2015 Poverty Guidelines*, U.S. Department of Health and Human Services, September 3 2015 <http://aspe.hhs.gov/poverty/15poverty.cfm> (last visited Jan. 28, 2016).

¹³ *Volunteer Health Services*, DOH <http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteerism-volunteer-opportunities/index.html> (last visited January 2 8, 2016); and Rule Chapter 64I-2, F.A.C.

¹⁴ *Volunteer Services Policy*, DOH pp. 7-8, <http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteer-health-services-opportunities/VHS2PolicyDOHP380-7-14.pdf> (last visited January 28, 2016).

¹⁵ A governmental contractor is DOH, a county health department, a special taxing district having health care responsibilities, or a hospital owned and operated by a governmental entity. Section 766.1115(3)(c), F.S.

¹⁶ Section 766.1115(4), F.S.

¹⁷ Section 766.1115(3)(a), F.S.

¹⁸ Section 766.1115(4)(a), F.S.

¹⁹ Section 766.1115(4)(b), F.S.

²⁰ Section 766.1115(4)(c), F.S.

²¹ Section 766.1115(4)(d), F.S.

²² Section 766.1115(4)(f), F.S.

²³ Section 766.1115(3)(d), F.S.

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 dentist or dental hygienist licensed under ch. 466, F.S.
- A midwife licensed under ch. 467, F.S.
- A health maintenance organization certificated 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 as a physician, physician assistant, nurse, or midwife.
- 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.

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, a health care provider under the Act, has been restricted to clinic capacity building purposes via the contract with DOH. Clinic capacity building was limited to products or processes that increase skills, infrastructure and resources of clinics. DOH did not authorize these funds to be used to build capacity through the employment of clinical personnel.²⁷

The Florida Association of Free and Charitable Clinics received a \$9.5 million appropriation in the 2015-2016 General Appropriations Act through DOH.²⁸ 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."²⁹

Effect of the Bill

Access to Health Care Act

²⁴ Section 766.1115(5), F.S.

²⁵ *Volunteer Health Services 2014-2015 Annual Report*, DOH, December 1, 2015, at <http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteer-health-services-opportunities/VHS1415annualreport.pdf> (last visited January 28, 2016).

²⁶ *Id.* at A-1.

²⁷ Correspondence from DOH staff to the Health Quality Subcommittee dated January 29, 2016, on file with the Health Quality Subcommittee.

²⁸ Chapter 2015-232, Laws of Fla., line item 441.

²⁹ 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 January 28, 2016).

The bill authorizes a health care provider 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 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 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 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. The Act currently recognizes employees and agents of a health care provider under s. 766.1115(5), F.S., which 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 768.28, F.S., is 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.

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

The effective date of the bill is July 1, 2016.

B. SECTION DIRECTORY:

Section 1. Amends s. 766.1115, F.S., relating to health providers; creation of agency relationship with governmental contractors.

Section 2. Amends s. 768.28, F.S., relating to waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; and risk management programs.

Section 3. Provides an effective date of July 1, 2016.

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:

Health care providers contracted under the Act 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.

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

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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 2, 2016, the Health Quality Subcommittee adopted an amendment and reported the bill favorable as a committee substitute. The amendment allows all volunteer health care providers, instead of only free clinics, to receive legislative appropriations or grants to support the delivery of contracted services by volunteer health care providers without compromising the sovereign immunity granted to these providers under the Access to Health Care Act.

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