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:	SB 1862
INTRODUCER:	Senator Broxson
SUBJECT:	Physician Fee Sharing
DATE:	February 5, 2018
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall	HP	**Favorable**
2.	Davis	Cibula	JU	**Favorable**
3.			RC	

I. Summary:

SB 1862 provides two new exceptions to the statutes that prohibit allopathic[1] and osteopathic[2] physicians from entering into fee-splitting arrangements or from receiving any commission, bonus, kickback, or rebate for patients who are referred for health care goods and services. The exceptions created by the bill:

- Allow an allopathic or osteopathic physician to enter into an alternative payment arrangement that otherwise complies with state and federal law; and
- If the compensation payments comply with state and federal law, allow a physician who is an employee or independent contractor of the entity compensating the physician to receive a share of:
  - Profits, collections, or revenues based on the professional services provided by the physician, or directly supervised by the physician, which are provided on behalf of the entity compensating the physician; or
  - Overall profit or revenue of the entity compensating the physician as long as the share is not determined in a manner that directly takes into account the volume or value of services ordered by the physician but not performed by the physician or under the supervision of the physician.

[1] Physicians are licensed under ch. 458, F.S. Physicians who are not osteopathic physicians are sometimes referred to as allopathic physicians.

[2] Osteopathic physicians are licensed under ch. 459 F.S.

II. Present Situation:

The Patient Self-Referral Act of 1992

Section 456.053, F.S., entitled the "Patient Self-Referral Act of 1992," was enacted by the Legislature to safeguard the people of Florida from unnecessary and costly health care expenditures while providing guidance to health care providers on prohibited patient referrals.[3] The Act applies to any physician licensed under chapters 458, 459, 460, or 461, F.S., or any health care provider licensed under chapter 463 or 466, F.S.[4]

The Act has differing limitations and prohibitions on patient referrals depending on the type of health care service to be provided as follows:

- A health care provider may not refer a patient for the provision of designated health services[5] to an entity in which the health care provider is an investor[6] or has an investment interest.[7,8]
- A health care provider may not refer a patient for the provision of any other health care services or items (non-designated health services) to an entity in which the health care provider is an investor unless:[9]
  - For entities whose shares are publicly traded:
    - The provider's investment interest is in registered securities purchased over a national exchange or over-the-counter market; and
    - The entity's total assets at the end of the last fiscal quarter exceed $50 million;
  - For entities whose shares are not publicly traded:
    - No more than 50 percent of the value of the investment interests are held by investors in a position to make referrals to the entity;
    - The terms of an investment interest offered to an investor are the same regardless of whether the investor is in a position to make referrals;
    - The terms offered to an investor are not related to the previous or expected volume of referrals; and
    - There is no requirement that an investor refer patients to the entity as a condition for becoming or remaining an investor.

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[3] Section 456.053(2), F.S.

[4] Allopathic, osteopathic, chiropractic, and podiatric physicians, certified optometrists, and dentists are health care providers under the Act.

[5] Section 456.053(3)(c), F.S., defines "designated health services" as clinical laboratory services, physical therapy services, comprehensive rehabilitative services, diagnostic-imaging services, and radiation therapy services.

[6] Section 456.053(3)(l), F.S., defines "investor" as a person or entity owning a legal or beneficial ownership or investment interest, directly or indirectly, including, without limitation, through an immediate family member, trust, or another entity related to the investor within the meaning of 42 C.F.R. s. 413.17, in an entity.

[7] Section 456.053(3)(k), F.S., defines "investment interest" to include an equity or debt security issued by an entity, including, without limitation, shares of stock in a corporation, units or other interests in a partnership, bonds, debentures, notes, or other equity interests or debt instrument. Certain investment interests are excepted from the definition including an investment interest in a sole provider of health care services in a rural area; an investment interest in the form of certain notes, bonds, debentures, or other debt instruments that matured prior to Oct. 1, 1996; an investment interest in real property resulting in a landlord-tenant relationship between the entity and the referring healthcare provider unless the rent is determined by the volume of referrals; and an investment interest in an entity which owns or leases and operates a hospital or nursing home.

[8] Section 456.053(5)(a), F.S. Offices providing radiation therapy services are exempt from these requirements if they were in business before April 1, 1991. (*See* s. 456.053(5)(i), F.S.).

[9] Section 456.053(5)(b), F.S.

- Entities accepting outside referrals for diagnostic imaging must meet additional conditions including conditions for the physician make-up of the solo or group practice as well as physician performance of diagnostic imaging services, conditions on billing practices, restrictions on contracting with outside providers, and conditions on reporting accepted outside referrals to the Agency for Health Care Administration (AHCA).[10]

A health care provider who refers a patient to an entity that the health care provider has an investment interest in must disclose such interest to the patient on a written form that details the patient's right to obtain the services elsewhere along with at least two alternative sources from which the patient could receive the services.[11]

A health care provider found to have violated the Act could be subject to one or more disciplinary actions or penalties including:

- A penalty of up to $100,000 for each arrangement if a health care provider or other entity enters into an arrangement that has the principal purpose of assuring referrals between the provider and the entity.[12]
- Discipline by his or her appropriate board and hospitals are subject to penalties imposed by the AHCA.[13]
- Being charged with a first degree misdemeanor and subject to additional penalties and disciplinary action by his or her respective board if a health care provider fails to comply with the notice provisions of the Act and s. 456.052, F.S.[14]

A claim for payment for a service provided pursuant to a referral prohibited by the Act may not be made and any such payments received must be refunded. Additionally, any person who knows or should know that such a claim is prohibited and who presents or causes to be presented such a claim, is subject to a fine of up to $15,000 per service to be imposed and collected by that person's regulatory board.[15]

The Federal Stark Law

The federal Physician Self-Referral Law,[16] also known as the Stark law, is similar to the Act. It prohibits a physician from referring Medicare or Medicaid patients to an entity that provides designated health services if the physician or his or her immediate family member has a financial relationship with the entity, unless an exception applies.[17] Under Stark, designated health services include:

- Clinical laboratory services;
- Physical therapy, occupational therapy, and outpatient speech-language pathology services;
- Radiology and certain other imaging services;

[10] Section 456.053(4), F.S.
[11] Sections 456.053(5)(j) and 456.052, F.S.
[12] Section 456.053(5)(f), F.S.
[13] Section 456.053(5)(g), F.S.
[14] Section 456.052(3), F.S.
[15] Section 456.053(5)(c)-(e), F.S.
[16] 42 U.S.C. s. 1395nn.
[17] U.S. Dept. of Health & Human Services, Office of the Inspector General: *A Roadmap for New Physicians: Fraud and Abuse Laws*, available at http://oig.hhs.gov/compliance/physician-education/01laws.asp, (last visited Feb. 1, 2018).

- Radiation therapy services and supplies;
- Durable medical equipment and supplies;
- Parenteral and enteral nutrients, equipment, and supplies;
- Prosthetics, orthotics, and prosthetic devices and supplies;
- Home health services;
- Outpatient prescription drugs; and
- Inpatient and outpatient hospital services.[18]

The Stark law, in legal terms, is a strict liability statute. This means that liability does not depend on proof of a specific intent to violate the law. Stark prohibits someone from submitting, or causing someone to submit, claims that violate the law's restrictions on referrals. The penalties for physicians who violate this law include fines and exclusion from participating in the Federal health care programs.[19]

The exceptions to Stark's self-referral prohibitions include:

- Exceptions for certain services:
  - Most referrals of a patient for physician's services and in-office ancillary services provided by the same physician or another physician in the same group practice; and
  - Referrals for services furnished by an organization that has a contract with a health maintenance organization or a prepaid health plan.[20]
- Exceptions related to ownership or investment interests:
  - Ownership of investment securities that are publically traded and held in a corporation having equity exceeding $75 million on average during the previous 3 fiscal years and which were purchased on terms generally available to the public; and
  - Ownership of shares in an investment company if the company has total assets exceeding $75 million on average during the previous 3 fiscal years.[21]
  - Ownership of certain hospitals including hospitals in Puerto Rico, in rural areas, and certain hospitals in which the referring physician is authorized to perform services.[22]
- Exceptions related to other compensation arrangements:
  - The rental of office space or equipment with terms that are consistent with fair market value and without consideration of any past or future referrals made between the parties;
  - Bona fide employment relationships with remuneration that does not take into account the volume or value of referrals by the referring physician;
  - Personal services arrangements with terms that do not exceed fair market value and do not take into account the volume or value of any referrals or other business generated between the parties;
  - Physician incentive plans if no specific payment is made to reduce or limit medically necessary services provided with respect to a specific individual enrolled with the entity;

[18] 42 U.S.C. s. 1395nn(h)(6).When compared to Florida law, it can be seen that the list of designated health services under Stark includes the services listed as designated health services under the Act but also includes additional services not included in Florida law.
[19] See supra note 17.
[20] 42 U.S.C. s. 1395nn(b).
[21] 42 U.S.C. s. 1395nn(c).
[22] 42 U.S.C. s. 1395nn(d).

- Remuneration provided by a hospital to a physician that is unrelated to designated health services;
- Physician recruitment bonuses paid by a hospital that do not take into account the volume or value of referrals;
- Certain isolated transactions;
- Certain group practice arrangements made with hospitals that began before December 19, 1989; and
- Payments made by a physician for laboratory services or other items or services if paid at fair market value.[23]

Additional Restrictions on Agreements between Referring Health Care Providers and Providers of Health Care Services

Federal and State Anti-Kickback Statutes

Both Florida and Federal law include a prohibition on providing any sort of kickback for the referral of patients from a health care provider to a licensed facility. Section 395.0185, F.S., prohibits any person from paying a commission, bonus, kickback, or rebate or engaging in any form of split-fee arrangement with a physician, surgeon, organization, or person for patients referred to a licensed facility. The AHCA is required to enforce the provisions of the law and, if the violator is not licensed by the AHCA, the law authorizes the AHCA to impose a fine of up to $1,000, and if applicable, to recommend disciplinary action to the appropriate licensing board. Section 456.054, F.S., prohibits a health care provider or provider of health care services to offer, pay, solicit, or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients.[24]

Federal law also prohibits payments for the referral of an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made under a Federal health care program.[25] A violation of the federal anti-kickback statute is punishable as a felony and a fine of not more than $25,000, or up to 5 years imprisonment, or both. However, there are several exceptions to the federal statute including, but not limited to:

- Discounts properly disclosed and appropriately reflected in the costs claimed and charges made by the provider or entity;
- Payments between employers and employees for employment in the provision of covered items or services;
- Certain amounts paid to vendors;
- Waivers of co-insurance; and
- The waiver of any cost-sharing provisions by a pharmacy.

Anti-Trust Laws

Additionally, both Florida and Federal law prohibit price-fixing and unfair trade practices which may be applicable to certain relationships between referring health care providers and providers

[23] 42 U.S.C. s. 1395nn(e).
[24] Violations of this section are considered patient brokering and are punishable as provided in s. 817.505, F.S., which can include criminal penalties (felony of the third degree) and other civil, administrative, or criminal penalties.
[25] 42 U.S.C. s. 1320a-7b(b)(2)(A).

of health care services. The Florida Deceptive and Unfair Trade Practices Act[26] generally prohibits unfair methods of competition, as well as deceptive acts or practices, in the conduct of trade or commerce. Also, Federal anti-trust laws, including the Sherman Act, generally prohibit unreasonable restraints on fair trade created by contract, combination, or conspiracy.[27]

Sections 458.331(1)(i) and 459.015(1)(j), F.S.

In addition to the prohibitions detailed above, the practice acts for both allopathic and osteopathic physicians include a restriction against referring patients for compensation. These sections restrict a physician from paying or receiving any commission, bonus, kickback, or rebate, or engaging in any split-fee arrangement in any form whatsoever with a physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services, including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies.[28]

These sections have been interpreted by the courts to prohibit an employer from sharing profits with a physician employee. In *Crow v. the Agency for Health Care Administration*, the Florida Fifth District Court of Appeal found that "[t]o the extent that the arrangement proposed by Petitioner would provide for either a salary or a year-end bonus based upon total revenues generated by Petitioner for [the employer], such an arrangement would be in violation of the prohibition set forth in Subsection 458.331(1)(i), Florida Statutes."[29] This interpretation is narrower than other state and federal laws (detailed above) that provide exceptions in certain situations, such as for health care practitioners in a group practice.

III. Effect of Proposed Changes:

SB 1862 provides two new exceptions to the prohibition against allopathic physicians[30] and osteopathic physicians entering into fee-splitting arrangements or receiving any commission, bonus, kickback, or rebate for patients who are referred for health care goods and services. The exceptions created by the bill:

- Allow an allopathic and osteopathic physician to enter into an alternative payment arrangement that otherwise complies with state and federal law; and
- If the compensation payments comply with state and federal law, allow a physician who is an employee or independent contractor of the entity compensating the physician to receive a share of:
  - Profits, collections, or revenues based on the professional services provided by the physician, or directly supervised by the physician, which are provided on behalf of the entity compensating the physician; or
  - Overall profit or revenue of the entity compensating the physician as long as the share is not determined in a manner that directly takes into account the volume or value of services ordered by the physician but not performed by the physician or under the supervision of the physician.

[26] Sections 501.201 and 501.204, F.S.
[27] Federal Trade Commission, *The Antitrust Laws*, available at: https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws, (last visited Feb. 1, 2018).
[28] Section 817.505, F.S., has a similar prohibition related to patient brokering.
[29] See *Crow v. Agency for Health Care Administration*, 669 So. 2d 1160, 1162 (Fla. 5th DCA 1996).
[30] Licensed under ch. 458, F.S.

The effective date of the bill is July 1, 2018.

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:

Physicians and employers may see an indeterminate fiscal impact from being authorized to enter into compensation arrangements allowed by the bill.

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: 458.331 and 459.015.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None