

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 Appropriations Subcommittee on Health and Human Services

BILL: PCS/CS/SB 1120 (137486)

INTRODUCER: Appropriations Subcommittee on Health and Human Services; Children, Families, and Elder Affairs Committee; and Senator Harrell

SUBJECT: Substance Abuse Services

DATE: February 20, 2020 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Delia</u>	<u>Hendon</u>	<u>CF</u>	<u>Fav/CS</u>
2.	<u>Sneed</u>	<u>Kidd</u>	<u>AHS</u>	<u>Recommend: Fav/CS</u>
3.	<u> </u>	<u> </u>	<u>AP</u>	<u> </u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

PCS/CS/SB 1120 addresses individuals who have been disqualified from employment with substance abuse treatment or recovery residence service providers following a failed background screening by requiring the Department of Children and Families (DCF) to provide exemptions from employment disqualification for certain offenses. The bill condenses several background screening sections of ch. 397, F.S., into a single set of requirements. Additionally, the bill modifies patient-brokering laws to exempt discounts, waivers of payment, or payments not prohibited by the federal anti-kickback statute or regulations. The bill also applies such exemptions to all payment methods used by federal health care programs, and provides that patient-brokering constitutes a first-degree misdemeanor.

The bill is expected to have an insignificant fiscal impact on state government. The bill may result in a positive, yet indeterminate fiscal impact on private health care providers.

The bill takes effect on July 1, 2020.

II. Present Situation:

Substance Abuse

Substance abuse refers to the harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs.¹ Substance use disorder occurs when the chronic use of alcohol or drugs causes significant impairment, such as health problems, disability, and failure to meet major responsibilities at work, school, or home.² Repeated drug use leads to changes in the brain's structure and function that can make a person more susceptible to developing a substance use disorder.³ Brain imaging studies of persons with substance use disorders show physical changes in areas of the brain that are critical to judgment, decision making, learning and memory, and behavior control.⁴

Substance Abuse Treatment in Florida

The Department of Children and Families (DCF) administers a statewide system of safety net services for substance abuse and mental health (SAMH) prevention, treatment, and recovery. SAMH programs include a range of prevention, acute interventions (such as crisis stabilization or detoxification), residential, transitional housing, outpatient treatment, and recovery support services.

The DCF provides treatment for substance abuse through a community-based provider system that serves adolescents and adults affected by substance misuse, abuse or dependence.⁵ The department regulates substance abuse treatment by licensing individual treatment components under ch. 397, F.S., and ch. 65D-30, F.A.C.

In 2017 several changes were made to the DCF's licensure program for substance abuse treatment providers in ch. 397, F.S.⁶ The changes included revisions to the licensure application requirements that require applicants to provide detailed information about the clinical services they provide.

Recovery Residences

Recovery residences function under the premise that individuals benefit in their recovery by residing in an alcohol and drug-free environment. Recovery residences are designed to be

¹ World Health Organization. *Substance Abuse*, available at http://www.who.int/topics/substance_abuse/en/ (last visited January 22, 2020).

² Substance Abuse and Mental Health Services Administration, *Substance Use Disorders*, available at <http://www.samhsa.gov/disorders/substance-use> (last visited January 22, 2020).

³ National Institute on Drug Abuse, *Drugs, Brains, and Behavior: The Science of Addiction*, available at <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drug-abuse-addiction> (last visited January 22, 2020).

⁴ *Id.*

⁵ Department of Children and Families, *Treatment for Substance Abuse*, <http://www.myflfamilies.com/service-programs/substance-abuse/treatment-and-detoxification> (last visited January 22, 2020).

⁶ Ch. 2017-173, L.O.F.

financially self-sustaining through rent and fees paid by residents, and there is no limit on the length of stay for those who abide by the rules.⁷

Section 397.311, F.S., defines a recovery residence as a residential dwelling unit, or other form of group housing, offered or advertised through any means, including oral, written, electronic, or printed means, by any person or entity as a residence that provides a peer-supported, alcohol-free, and drug-free living environment. A 2009 Connecticut study notes the following: “Sober houses do not provide treatment, [they are] just a place where people in similar circumstances can support one another in sobriety. Because they do not provide treatment, they typically are not subject to state regulation.”⁸

Voluntary Certification of Recovery Residences in Florida

Florida does not license recovery residences. Instead, in 2015 the Legislature enacted sections 397.487–397.4872, F.S., which establish voluntary certification programs for recovery residences and recovery residence administrators, implemented by private credentialing entities.

While certification is voluntary, Florida law incentivizes certification. Since July 1, 2016, Florida has prohibited licensed substance abuse service providers from referring patients to a recovery residence unless the recovery residence is certified and is actively managed by a certified recovery residence administrator.⁹ Referrals by licensed service providers to uncertified recovery residences are limited to those licensed service providers under contract with a managing entity as defined in s. 394.9082, F.S.; referrals by a recovery residence to a licensed service provider when the recovery residence or its owners, directors, operators, or employees do not benefit, directly or indirectly, from the referral; and referrals before July 1, 2018 by a licensed service provider to that licensed service provider’s wholly owned subsidiary.¹⁰

Background Screening Under Ch. 435, F.S.

Chapter 435, F.S., addresses background screening requirements for persons seeking employment or for employees in positions that require a background screening. An employer¹¹ may not hire, select, or otherwise allow an employee to have contact with a vulnerable person¹² that would place the employee in a role that requires a background screening until the screening process is completed and demonstrates the absence of any grounds for the denial or termination of employment. If the screening process shows any grounds for the denial or termination of employment, the employer may not hire, select, or otherwise allow the employee to have contact

⁷ Department of Children and Families, *Recovery Residence Report* (October 1, 2013), available at <https://www.myflfamilies.com/service-programs/samh/publications/docs/SoberHomesPR/DCFProvisoRpt-SoberHomes.pdf> (last visited February 11, 2020).

⁸ Office of Legislative Services, Connecticut General Assembly, *Sober Homes*, 2009-R-0316 (September 2, 2009), available at <https://www.cga.ct.gov/2009/rpt/2009-R-0316.htm> (last visited February 11, 2020).

⁹ Section 397.4873(1), F.S.

¹⁰ Section 397.4873(2), F.S.

¹¹ Section 435.02(3), F.S., defines “employer” as any person or entity required by law to conduct screening of employees pursuant to ch. 435, F.S..

¹² Section 415.102(28), F.S., defines “vulnerable adult” as a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.

with any vulnerable person that would place the employee in a role that requires background screening unless the employee is granted an exemption for disqualification by the agency¹³ as provided under s. 435.07, F.S.¹⁴

If an employer becomes aware that an employee has been arrested for a disqualifying offense, the employer must remove the employee from contact with any vulnerable person that places the employee in a role that requires a background screening until the arrest is resolved in a way that the employer determines that the employee is still eligible for employment under ch. 435, F.S.¹⁵ The employer must terminate the employment of any of its personnel found to be in noncompliance with the minimum standards of ch. 435, F.S., or place the employee in a position for which background screening is not required unless the employee is granted an exemption from disqualification pursuant to s. 435.07, F.S.¹⁶

An employer may hire an employee to a position that requires a background screening before the employee completes the screening process for training and orientation purposes. However, the employee may not have direct contact with vulnerable persons until the screening process is completed and the employee demonstrates that he or she exhibits no behaviors that warrant the denial or termination of employment.¹⁷

Sections 435.03 and 435.04, F.S., outline the screening requirements. There are two levels of background screening: level 1 and level 2:

- Level 1 screening includes, at a minimum, employment history checks and statewide criminal correspondence checks through the Florida Department of Law Enforcement (FDLE) and a check of the Dru Sjodin National Sex Offender Public Website,¹⁸ and may include criminal records checks through local law enforcement agencies.¹⁹
- Level 2 screening includes, but, is not limited to, fingerprinting for statewide criminal history records checks through the FDLE and national criminal history checks through the Federal Bureau of Investigation (FBI), and may include local criminal records checks through local law enforcement agencies.²⁰

The security background investigations under s. 435.04, F.S., for level 2 screening must ensure that no persons subject to this section have been arrested for and are awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent, and the record has not been sealed or expunged for, any offense listed in s. 435.04(2), F.S., or a similar law of another jurisdiction.²¹

¹³ Section 435.02(1), F.S., defines “agency” as any state, county, or municipal agency that grants licenses or registration permitting the operation of an employer, or is itself an employer, or that otherwise facilitates the screening of employees pursuant to ch.435, F.S. If there is no state agency or the municipal or county agency chooses not to conduct employment screening, “agency” means the Department of Children and Families.

¹⁴ Section 435.06(2)(a), F.S.

¹⁵ Section 435.06(2)(b), F.S.

¹⁶ Section 435.06(2)(c), F.S.

¹⁷ Section 435.06(2)(d), F.S.

¹⁸ The Dru Sjodin National Sex Offender Public Website is a U.S. government website that links public state, territorial, and tribal sex offender registries in one national search site. Available at <https://www.nsopw.gov/> (last visited January 22, 2020).

¹⁹ Section 435.03(1), F.S.

²⁰ Section 435.04(1)(a), F.S.

²¹ Section 435.04(2), F.S.

Additionally, such investigations must ensure that no person subject to s. 435.04, F.S., has been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to any offense that constitutes domestic violence in s. 741.28, F.S., whether such act was committed in this state or another jurisdiction.²²

For both levels of screening, the person required to be screened pursuant to ch. 435, F.S., must submit a complete set of information necessary to conduct a screening under ch. 435, F.S.,²³ and must supply any missing criminal or other necessary information upon request to the requesting employer or agency within 30 days after receiving the request for the information.²⁴ Every employee must attest, subject to penalty of perjury, to meeting the requirements for qualifying for employment pursuant ch. 435, F.S., and agreeing to inform the employer immediately if arrested for any of the disqualifying offenses while employed by the employer.²⁵

For level 1 screening, the employer must submit the information necessary for screening to the Florida Department of Law Enforcement (FDLE) within 5 working days after receiving it. The FDLE must conduct a search of its records and respond to the employer or agency. The employer must inform the employee whether screening has revealed any disqualifying information.²⁶

For level 2 screening, the employer or agency must submit the information necessary for screening to the FDLE within 5 working days after receiving it. The FDLE must perform a criminal history record check of its records and request that the FBI perform a national criminal history record check. The FDLE must respond to the employer or agency, and the employer or agency must inform the employee whether screening has revealed disqualifying information.²⁷

Each employer licensed or registered with an agency must conduct level 2 screening and must submit to the agency annually or at the time of license renewal, under penalty of perjury, a signed attestation attesting to compliance with the provisions of ch. 435, F.S.²⁸

Individuals Requiring Background Screening Under ch. 397, F.S.

Only certain individuals affiliated with substance abuse treatment providers require background screening. Section 397.4073, F.S., requires all owners, directors, chief financial officers, and clinical supervisors of service providers, service provider personnel who have direct contact with children receiving services or with adults who are developmentally disabled receiving services, and peer specialists who have direct contact with individuals receiving services, to undergo level 2 background screenings. The credentialing entity for recovery residences must deny an application if any of these individuals has been found guilty of, plead nolo contendere to, or had an adjudication of guilt withheld for, any offense listed in s. 408.809(4), F.S., unless the department has issued an exemption under s. 397.4073, F.S.

²² Section 435.04(3), F.S.

²³ Section 435.05(1)(a), F.S.

²⁴ Section 435.05(1)(d), F.S.

²⁵ Section 435.05(2), F.S.

²⁶ Section 435.05(1)(b), F.S.

²⁷ Section 435.05(1)(c), F.S.

²⁸ Section 435.05(3), F.S.

Regarding recovery residences, ss. 397.487(6), F.S., 397.4871(5), F.S., and 408.809, F.S., each require level 2 background screening for all recovery residence owners, directors, and chief financial officers, and for administrators seeking certification.

Exemptions from Disqualification for Employment

Section 435.07(1), F.S., authorizes the head of the appropriate agency to grant to any employee otherwise disqualified from employment due to certain disqualifying offenses an exemption from such disqualification. For a felony, three years must have elapsed since the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed. No waiting period applies to misdemeanors.

Additionally, s. 435.07(2), F.S., provides that persons employed, or applicants for employment, by treatment providers who treat adolescents 13 years of age and older who are disqualified from employment solely because of certain crimes may be exempted from disqualification from employment, without applying the 3-year waiting period. The crimes specified under the statute are:²⁹

- Section 796.07(2)(e), F.S., (prostitution-related offenses);
- Section 810.02(4), F.S., (unarmed burglary of a structure);
- Section 812.014(2), F.S., (third degree grand theft);
- Section 817.563, F.S., (sale of imitation controlled substance);
- Section 831.01, F.S., (forgery);
- Section 832.02, F.S., (offenses involving uttering or publishing a forged instrument);
- Section 893.13, F.S., (controlled substances offenses, excluding drug trafficking); and
- Section 893.147, F.S., (drug paraphernalia offenses).

Section 397.4073(4), F.S., authorizes the DCF to grant any service provider personnel an exemption from disqualification as provided in s. 435.07, F.S. Additionally, the department may grant exemptions from disqualification to service provider personnel whose background checks indicate crimes under ss. 817.563, 893.13 (controlled substances offenses, excluding drug trafficking), or 893.147, F.S., or grant exemptions from disqualification which would limit service provider personnel to working with adults in substance abuse treatment facilities. The DCF must render a decision on the application for exemption from disqualification within 60 days after the department receives the completed application. Individuals are permitted to work under supervision for up to 90 days in programs or facilities that treat co-occurring substance use and mental health disorders while the DCF evaluates their applications for an exemption from disqualification, so long as it has been five or more years since the individuals have completed all non-monetary conditions associated with their most recent disqualifying offense.

Section 397.4872(1), F.S., provides that the individual exemptions to staff disqualification or administrator ineligibility may be requested if a recovery residence deems the decision will benefit the program. Requests for exemptions must be submitted in writing to the DCF within 20 days after the denial by the credentialing entity and must include a justification for the exemption. Subsection (2) provides, with some exceptions, the DCF may exempt a person from ss. 397.487(6), and 397.4871(5), F.S., if it has been at least three years since the person has

²⁹ Section 435.07(2), F.S.

completed or been lawfully released from confinement, supervision, or sanction for the disqualifying offense.

Patient Brokering

In Florida, it is unlawful for any person, including a health care provider or health care facility, to engage in patient brokering.³⁰ Patient brokering is paying to induce, or make a payment in return for, a referral of a patient to or from a health care provider or health care facility. Such payments include commissions, benefits, bonuses, rebates, kickbacks, bribes, split-fee arrangements, in cash or in kind, provided directly or indirectly.³¹ A person who violates the patient brokering statute commits a felony of the third degree.³² If the violation involves 10 to 19 patients, the person commits a felony of the second degree.³³ If the violation involves more than 20 patients, the person commits a felony of the first degree.³⁴

However, there are a number of exceptions to the prohibition on patient brokering, which means health care providers or other entities can engage in practices that involve some types of payment without committing a crime. These exceptions include:³⁵

- Any discount, payment, waiver of payment, or payment expressly authorized by the federal anti-kickback statute or regulations;
- Any payment, compensation or financial arrangements within a group practice, provided such payment, compensation, or arrangement is not to or from persons who are not members of the group practice;
- Payments to a health care provider or health care facility for professional consultation services;
- Commissions, fees, or other remuneration lawfully paid to insurance agents;
- Payments by a health insurer who reimburses, provides, offers to provide, or administers health, mental health, or substance abuse goods or services under a health benefit plan;
- Payments to or by a health care provider or health care facility that has contracted with a health insurer, health care purchasing group, or the Medicare or Medicaid program to provide health, mental health, or substance abuse goods or services under a health benefit;
- Lawfully authorized insurance advertising gifts;
- Commissions or fees paid to a nurse registry for referring persons providing health care services to clients of the nurse registry;
- Certain payments by health care providers or health care facilities to a health, mental health, or substance abuse information service that provides information upon request and without charge to consumers about provider of health care good or services to enable consumers to select appropriate providers of facilities; and
- Certain payments authorized for assisted living facilities.

³⁰ Section 817.505, F.S.

³¹ Section 817.505(1), F.S.

³² Punishable by a term of imprisonment not to exceed 5 years and a fine of \$50,000.

³³ Punishable by a term of imprisonment not to exceed 15 years and a fine of \$100,000.

³⁴ Punishable by a term of imprisonment not to exceed 30 years and a fine of \$500,000.

³⁵ Section 817.505(3), F.S.

Until 2019, the patient brokering statute did not apply to any discount, payment, waiver of payment, or payment practice that was not prohibited by the federal anti-kickback statute. In 2019, the Legislature enacted legislation that applied this exception to only those payment practices expressly authorized under federal law.³⁶ This change created uncertainty for those using payment arrangements that were not prohibited under federal law but also not expressly authorized.

Federal Anti-Kickback Statute

Federal law prohibits payment for the referral of an individual to a person for furnishing or arranging to furnish any item or service for which payment may be made under a federal health care program.³⁷ Violation of the federal anti-kickback statute is a felony that is punishable by a fine of up to \$25,000 or up to five years in prison, or both.³⁸ However, there are several exceptions to the federal statute, including, but not limited to:³⁹

- 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 payments to a group purchasing organization;
- Waivers of co-insurance;
- Certain risk-sharing agreements; and
- The waiver of any cost-sharing provisions by a pharmacy.

Payment arrangements that do not specifically meet one of the exceptions are reviewed on a case-by-case basis to determine if the parties have the requisite criminal intent.⁴⁰ The Office of the Inspector General within the U.S. Department of Health and Human Services, is proposing additional exceptions to the anti-kickback statute, including payment arrangements that are currently used by health care practitioners but are not specifically authorized under the statute.⁴¹

III. Effect of Proposed Changes:

Section 1 amends s. 397.4073, F.S., requiring that certified recovery residence owners, directors, chief financial officers, and certified recovery residence administrators are subject to level 2 background screening as provided under s. 408.809, F.S., and ch. 435, F.S. These positions already require a level 2 background screening under current law; the bill streamlines the background screening language in ch. 397, F.S., to one section of statute rather than two sections.

The bill also requires the DCF to grant applications for exemption from employment disqualification for service providers that treat adolescents aged 13 or older whose background

³⁶ Chapter 2019-59, L.O.F.

³⁷ 42 U.S.C., s. 1320a-7b(b).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ U.S. Department of Health and Human Services, *HHS Office of Inspector General Fact Sheet: Notice of Proposed Rulemaking OIG-0936-AA10-P*, (Oct. 2019), available at https://oig.hhs.gov/authorities/docs/2019/CoordinatedCare_FactSheet_October2019.pdf (last visited February 11, 2020).

⁴¹ *Id.*

checks indicate crimes referenced in s. 397.4073(4)(b), F.S., provided that at least five years (or three years if certified as a Peer Specialist) have elapsed since the applicant for an exemption from disqualification has completed, or has been lawfully released from confinement, supervision, or a nonmonetary condition imposed by a court for the applicant's most recent disqualifying offense under s. 397.417, F.S., and the applicant has not been arrested for any criminal offense within the past three years. Currently, the DCF has discretion in whether or not to grant such applications.

Section 2 amends s. 397.487, F.S., by removing language related to level 2 background screenings for certified recovery residence owners, directors, chief financial officers, and certified recovery residence administrators made obsolete by moving the background screening requirement to s. 397.4073, F.S.

Section 3 amends s. 397.4872, F.S., by removing language related to exemptions from disqualification made obsolete by the bill.

Section 4 amends s. 397.4873, F.S., providing that anyone who willfully and knowingly facilitates patient brokering is guilty of a first-degree misdemeanor.

Section 5 amends s. 817.505, F.S., revising the patient brokering statute such that it does not apply to any discount, payment, waiver of payment, payment practice, or payment scheme that is expressly authorized by the federal anti-kickback statute or regulations.

The bill also makes such exception applicable to any payment scheme, regardless of whether it involves services paid in whole or in part by a federal health care program designated in the federal anti-kickback statute or regulations.

Section 6 amends s. 397.4871, F.S., by adding offenses listed under s. 408.809, F.S., to those currently referenced in s. 435.04(2), F.S., for recovery residence administrator certification. The offenses added by incorporating s. 408.809, F.S., include financial crimes such as Medicaid fraud, forgery, and patient brokering. The bill also amends statutory references for determining whether the DCF can grant a background screening exemption for recovery residence administrators from s. 397.4872, F.S., to s. 397.4073, F.S. or s. 435.07, F.S.

Section 7 amends s. 435.07, F.S., by requiring the DCF to exempt individuals disqualified during background screening for committing specific offenses. The crimes specified in the bill are:

- Section. 777.04, F.S., (Attempt to commit a criminal offense, solicitation of another person to commit a criminal offense, or conspiracy to commit a criminal offense);
- Section 796.07(2)(e), F.S., (Person 18 years of age or older to offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation);
- Section 810.02(4), F.S., (Burglary);
- Section 812.014(2)(c), F.S., (Grand theft);
- Section 817.563, F.S., (Sale of controlled substances);
- Section 831.01, F.S. (Forgery);
- Section 831.02, F.S., (Uttering forged instruments);

- Section 893.13, F.S., (Sale, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, controlled substances); and
- Section 893.147, F.S., (Use, possession, manufacture, delivery, transportation, advertisement, or retail sale of drug paraphernalia, specified machines, and materials).

Section 8 provides an effective date of July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

According to the DCF, substance use treatment providers and recovery residences may realize savings by being able to fill positions faster with the changes identified in the bill.⁴² Additionally, PCS/CS/SB 1120 alleviates confusion on which payment arrangements are permissible under the state patient brokering law. This may result in increased revenues for the private sector resulting from more allowable payment agreement options between health care providers.⁴³

⁴² *Id.*

⁴³ Department of Children and Families Agency Analysis of HB 649. On file with the Senate Committee on Children, Families, and Elder Affairs.

C. **Government Sector Impact:**

The bill is expected to have an insignificant fiscal impact on the DCF.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 397.4073, 397.487, 397.4871, 397.4872, 397.4873, 435.07, and 817.505.

IX. **Additional Information:**

A. **Committee Substitute – Statement of Changes:**

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

Recommended CS/CS by Appropriations Subcommittee on Health and Human Services on February 18, 2020:

The committee substitute:

- Requires DCF to grant applicants exemptions from disqualifying offenses under s. 435.07, F.S., provided that at least three years has elapsed for a certified peer specialist, or five years has passed for a non-certified substance abuse treatment or recovery residence service provider, since completion or release from confinement, supervision, or nonmonetary conditions imposed by the court, and has not been arrested for any criminal offense within the past three years.

CS by Children, Families, and Elder Affairs on January 28, 2020:

- Provides that anyone who willfully and knowingly facilitates patient brokering is guilty of a first-degree misdemeanor.

B. **Amendments:**

None.