



areas of the brain that are critical to judgment, decision making, learning and memory, and behavior control.<sup>4</sup>

### **Substance Abuse Treatment in Florida**

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.

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

The 2017 Legislature passed and the Governor approved HB 807, which made several changes to DCF's licensure program for substance abuse treatment providers in chapter 397, F.S.<sup>6</sup> HB 807 revised the licensure application requirements and process and required 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 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.

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."<sup>7</sup>

### **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.

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<sup>4</sup> *Id.*

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

<sup>6</sup> Ch. 2017-173, L.O.F.

<sup>7</sup> *Id.*

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.<sup>8</sup> 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.<sup>9</sup>

### **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 employer<sup>10</sup> may not hire, select, or otherwise allow an employee to have contact with a vulnerable person<sup>11</sup> 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 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 agency<sup>12</sup> as provided under s. 435.07, F.S.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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

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<sup>8</sup> S. 397.4873(1), F.S.

<sup>9</sup> S. 397.4873(2), F.S.

<sup>10</sup> "Employer" means any person or entity required by law to conduct screening of employees pursuant to ch. 435, F.S. Section 435.02(3), F.S.

<sup>11</sup> Vulnerable persons are defined as minors in s. 1.01, F.S., or as vulnerable adults in s. 415.102, F.S.

<sup>12</sup> "Agency" means 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 DCF. Section 435.02(1), F.S.

<sup>13</sup> Section 435.06(2)(a), F.S.

<sup>14</sup> Section 435.06(2)(b), F.S.

<sup>15</sup> Section 435.06(2)(c), F.S.

completed and the employee demonstrates that he or she exhibits no behaviors that warrant the denial or termination of employment.<sup>16</sup>

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,<sup>17</sup> and may include criminal records checks through local law enforcement agencies.<sup>18</sup>
- 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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup>

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.,<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup>

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<sup>16</sup> Section 435.06(2)(d), F.S.

<sup>17</sup> 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 on January 22, 2020).

<sup>18</sup> Section 435.03(1), F.S.

<sup>19</sup> Section 435.04(1)(a), F.S.

<sup>20</sup> Section 435.04(2), F.S.

<sup>21</sup> Section 435.04(3), F.S.

<sup>22</sup> Section 435.05(1)(a), F.S.

<sup>23</sup> Section 435.05(1)(d), F.S.

<sup>24</sup> Section 435.05(2), F.S.

<sup>25</sup> Section 435.05(1)(b), F.S.

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.<sup>26</sup>

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.<sup>27</sup>

### **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.

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 pursuant to ch. 435, F.S., without application of the 3-year waiting period for felony offenses in s. 435.07(1)(a)1., F.S. The crimes specified under the statute are:<sup>28</sup>
- s. 817.563, F.S. (sale of imitation controlled substance),
- s. 893.13, F.S. (controlled substances offenses, excluding drug trafficking),

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<sup>26</sup> Section 435.05(1)(c), F.S.

<sup>27</sup> Section 435.05(3), F.S.

<sup>28</sup> Section 435.07(2), F.S.

- s. 893.147, F.S. (drug paraphernalia offenses)
- s. 796.07(2)(e), F.S., (prostitution-related offenses)
- s. 810.02(4), F.S. (unarmed burglary of a structure)
- s. 812.014(2), F.S. (third degree grand theft)
- s. 831.01, F.S. (forgery)
- s. 832.02, F.S. (offenses involving uttering or publishing a forged instrument); and
- Any attempt, solicitation, or conspiracy to commit any of these offenses or any offense currently listed in the section.

Section 397.4073(4), F.S., authorizes DCF to grant any service provider personnel an exemption from disqualification as provided in s. 435.07, F.S. DCF may grant exemptions from disqualification to service provider personnel whose backgrounds checks indicate crimes under s. 817.563, F.S., s. 893.13, F.S. (controlled substances offenses, excluding drug trafficking), or s. 893.147, F.S., or grant exemptions from disqualification which would limit service provider personnel to working with adults in substance abuse treatment facilities. DCF must render a decision on the application for exemption from disqualification within 60 days after DCF receives the complete application. Additionally, individuals are permitted to work under supervision for up to 90 days solely in mental health treatment programs or facilities or in programs or facilities that treat co-occurring substance use and mental health disorders while 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 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, DCF may exempt a person from ss. 397.487(6), and 397.4871(5), F.S., if it has been at least 3 years since the person has 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.<sup>29</sup> 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.<sup>30</sup> A person who violates the patient brokering statute commits a felony of the third degree.<sup>31</sup> If the violation involves 10 to 19

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<sup>29</sup> Section 817.505, F.S.

<sup>30</sup> Section 817.505(1), F.S.

<sup>31</sup> Punishable by a term of imprisonment not to exceed 5 years and a fine of \$50,000.

patients, the person commits a felony of the second degree.<sup>32</sup> If the violation involves more than 20 patients, the person commits a felony of the first degree.<sup>33</sup>

There are a number of exceptions to the prohibition on patient brokering, including:<sup>34</sup>

- 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

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 schemes expressly authorized under federal law.<sup>35</sup> This change created uncertainty for those using payment practices 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.<sup>36</sup> Violation of the federal anti-kickback statute is a felony that is punishable by a fine of up to \$25,000 or up to 5 years in prison, or both.<sup>37</sup> However, there are several exceptions to the federal statute, including, but not limited to:<sup>38</sup>

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<sup>32</sup> Punishable by a term of imprisonment not to exceed 15 years and a fine of \$100,000.

<sup>33</sup> Punishable by a term of imprisonment not to exceed 30 years and a fine of \$500,000.

<sup>34</sup> Section 817.505(3), F.S.

<sup>35</sup> Chapter 2019-59, L.O.F.

<sup>36</sup> 42 U.S.C. s. 1320a-7b(b).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

- 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 squarely meet one of the exceptions are reviewed on a case-by-case basis to determine if the parties have the requisite criminal intent.<sup>39</sup> 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.<sup>40</sup>

### 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 Chapter 435, F.S. These positions already require a level 2 background screening under current law; the bill streamlines the background screening language in Chapter 397, F.S., to one section of statute rather than two for these positions.

The bill also requires DCF and AHCA to grant applications for exemption from employment disqualification for service providers that treat adolescents aged 13 or older whose background checks indicate crimes referenced in s. 397.4073(4)(b), F.S. Currently, DCF and AHCA have 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. 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.

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<sup>39</sup> 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](https://oig.hhs.gov/authorities/docs/2019/CoordinatedCare_FactSheet_October2019.pdf) (last visited January 22, 2020).

<sup>40</sup> *Id.*



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.

**Section 5** 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 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 6** amends s. 435.07, F.S., by requiring DCF to exempt individuals disqualified during background screening for committing specific offenses. The crimes specified in the bill are:

- s. 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)
- s. 810.02(4), F.S. (Burglary)
- s. 812.014(2)(c), F.S. (Grand theft)
- s. 817.563, F.S. (Sale of controlled substances)
- s. 831.01, F.S. (Forgery)
- s. 831.02, F.S. (Uttering forged instruments)
- s. 893.13, F.S. (Sale, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, controlled substances)
- s. 893.147, F.S. (Use, possession, manufacture, delivery, transportation, advertisement, or retail sale of drug paraphernalia, specified machines, and materials)
- s. 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)

#### **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:

DCF does not anticipate an impact to private sector revenues as a result of this bill regarding the changes to background screening requirement consolidation. The private sector may realize benefits from a potential increase in revenues resulting from more allowable payment agreement options between health care providers.<sup>41</sup>

C. Government Sector Impact:

DCF anticipates that substance use treatment programs and recovery residences could realize some savings by being able to fill positions faster with the changes identified in the bill.<sup>42</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

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

**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.

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<sup>41</sup> Department of Children and Families Agency Analysis of HB 649. On file with the Senate Committee on Children, Families, and Elder Affairs.

<sup>42</sup> *Id.*

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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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