

**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.)

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Prepared By: The Professional Staff of the Committee on Health Policy

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BILL: SB 626

INTRODUCER: Senator Pizzo

SUBJECT: HIV Prevention

DATE: February 17, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Williams	Brown	HP	<b>Pre-meeting</b>
2.			ACJ	
3.			AP	

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**I. Summary:**

SB 626 revises provisions of law regarding the behavior of persons who are human immunodeficiency virus (HIV) positive and other persons concerning disease status. The bill:

- Provides definitions of the terms “sexual conduct” and “substantial risk of transmission”;
- Permits the donation of blood, plasma, organs, skin, or other human tissue by a person with HIV, without the donor committing a third-degree felony that would apply under current law, if the donation is made specifically for a recipient who knows the donor is infected with HIV;
- Reduces the initial offense of engaging in sex while having knowledge of being HIV-positive without the informed consent of the sexual partner from a third-degree felony to a first-degree misdemeanor and provides for a penalty of a felony of the third degree for a second or subsequent violation that occurs after July 1, 2020;
- Requires the state to prove additional elements to convict for the crime of transmitting a sexually transmitted disease (STD), including:
  - Intent,
  - Conduct imposing a substantial risk of transmission of a specified STD, and
  - Actual transmission of a specified STD; and
- Provides that a good-faith effort to comply with a treatment regimen or behavioral recommendations is an affirmative defense to the charge of intending to transmit an STD and provides that a lack of compliance with a treatment regime or behavioral recommendations, alone, is insufficient to establish intent.

The bill provides an effective date of July 1, 2020.

## II. Present Situation:

### The Human Immunodeficiency Virus (HIV)

HIV is a virus that can lead to acquired immunodeficiency syndrome (AIDS) if not treated. Unlike some other viruses, the human body cannot rid itself of HIV completely, even with treatment.<sup>1</sup>

HIV is spread through specific activities that result in contact with an infected person's blood, other bodily fluids, mucous membranes, or damaged tissue.<sup>2</sup> In the United States, HIV is mainly transmitted through unprotected anal or vaginal sex and the sharing of used needles and syringes, rinse water, or other equipment used to prepare drugs for injection.<sup>3</sup> Less common methods of HIV transmission are through:

- The passage of HIV from mother to child during pregnancy, childbirth, and breastfeeding; and
- Being pierced with an HIV-contaminated needle or other sharp object.<sup>4</sup>

Rare methods of HIV transmission include the following activities with an untreated HIV positive person:

- Oral sex;
- Transfusion of blood and blood products;
- Organ or tissue transplants contaminated with HIV;
- Eating food that has been pre-chewed by a person with HIV;
- Human bites that break the skin by an HIV-positive person;
- Contact with open wounds or mucus membranes of an HIV-positive person; and
- Deep, open-mouth kissing if both persons have mouth sores or bleeding gums.<sup>5</sup>

HIV does not survive long outside the human body, such as on surfaces, and it cannot reproduce outside a human host. HIV is not spread by:

- Mosquitoes, ticks, or other insects;
- Saliva, tears, or sweat that is not mixed with the blood of an HIV-positive person;
- Hugging, shaking hands, sharing toilets, sharing dishes, or closed-mouth kissing with someone who is HIV-positive; or
- Other sexual activities that do not involve the exchange of body fluids.<sup>6</sup>

Once transmitted, HIV attacks the infected person's immune system, specifically, the lymphocytes known as CD4 cells or T Cells, which normally participate in an immune response.<sup>7</sup>

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<sup>1</sup> Centers for Disease Control and Prevention, *About HIV/AIDS* (updated December 2, 2019), available at <https://www.cdc.gov/hiv/basics/whatishiv.html> (last visited Feb. 12, 2020).

<sup>2</sup> Centers for Disease Control and Prevention, *HIV Transmission* (updated August 6, 2019), available at <https://www.cdc.gov/hiv/basics/transmission.html> (last visited Feb. 12, 2020).

<sup>3</sup> *Id.*

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

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Supra* note 1.

Untreated, HIV reduces a body's ability to fight off infections and disease and can lead to AIDS, the most severe form of HIV infection.<sup>8</sup> There is no effective cure for HIV, but antiretroviral therapy (ART) can slow or prevent the disease's progression and dramatically prolong the lifespan of an infected person.<sup>9</sup> When treated, an infected person can expect to live nearly as long as a person without HIV.<sup>10</sup> ART can also reduce the amount of HIV in a person's blood, known as the viral load.<sup>11</sup> Persons who attain an undetectable viral load have effectively no risk of transmitting HIV through sexual conduct.<sup>12</sup>

In the United States, about 53 percent of an estimated 1.1 million people with HIV had achieved an undetectable viral load by the end of 2015.<sup>13</sup> In Florida, 64 percent of the 119,661 people living with HIV had achieved an undetectable viral load.<sup>14</sup>

### **HIV Harm Reduction in Florida**

The Florida Department of Health currently has a four-part plan to eliminate HIV transmission and reduce HIV-related deaths. The components of this plan are:<sup>15</sup>

- Implementing routine HIV and sexually transmitted infections (STIs) screening in health care settings and priority testing in non-health care settings;
- Providing rapid access to treatment and ensure retention in care (test and treat);
- Improving and promoting access to antiretroviral pre-exposure prophylaxis (PrEP) and non-occupational post-exposure prophylaxis (nPEP); and
- Increasing HIV awareness and community response through outreach, engagement, and messaging.

PrEP involves the daily use of antiretroviral medications to reduce the risk of HIV transmission to HIV-negative individuals. In July 2012, the U.S. Food and Drug Administration approved the use of Truvada (TDF/FTC) for use as PrEP for HIV prevention in sexually active HIV-negative individuals. PrEP is used in conjunction with other prevention methods to reduce HIV transmissions.<sup>16</sup>

Post Exposure Prophylaxis (PEP) involves taking antiretroviral medications as soon as possible after a potential exposure to HIV to reduce the likelihood of HIV transmissions. To be effective,

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Centers for Disease Control and Prevention, *HIV Care Saves Lives infographic* (last updated November 25, 2014), available at <https://www.cdc.gov/vitalsigns/hiv-aids-medical-care/infographic.html> (last visited Feb. 12, 2020).

<sup>11</sup> *Supra* note 1.

<sup>12</sup> *Id.*

<sup>13</sup> The annual number of new HIV diagnoses in the United States decreased by 11 percent overall, but trends varies for different groups of people, with 2018 resulting in approximately 37,832 new HIV diagnoses. Centers for Disease Control and Prevention, *HIV in the United States and Dependent Areas* (December 2019), available at <https://www.cdc.gov/hiv/pdf/statistics/overview/cdc-hiv-us-ataglance.pdf> (last visited Feb. 12, 2020).

<sup>14</sup> Florida reported an estimated 4,906 new HIV diagnoses in 2018. Florida Department of Health, *HIV Data Center* (last modified September 17, 2019), available at <http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/index.html> (last visited Feb. 12, 2020).

<sup>15</sup> Florida Department of Health, HIV AIDS, “*Florida’s Plan to Eliminate HIV Transmission and Reduce HIV-related Deaths*” (last modified February 3, 2020), available at <http://www.floridahealth.gov/diseases-and-conditions/aids/index.html> (last visited Feb. 12, 2020).

<sup>16</sup> *Id.*

PEP must begin prior to 72 hours after exposure and consists of 2 or 3 antiretroviral medications that must be taken for 28 days. A physician must determine what treatment is appropriate based on the nature of the exposure. Starting PEP after a potential exposure does not guarantee that someone exposed to HIV will not be diagnosed with HIV. nPEP refers to a PEP directed toward non-occupational exposure, such as when someone is exposed to HIV through sexual intercourse or injection drug use, as opposed to occupational exposure, or exposure that occurs in a workplace setting, such as a needle stick in a doctor's office or health care facility.<sup>17</sup>

### **National Criminal HIV Exposure Laws**

Nearly two-thirds of all states criminalize certain conduct related to HIV exposure.<sup>18</sup> Such laws attempt to deter HIV transmission by:

- Criminalizing behaviors that result in HIV exposure for other persons;
- Criminalizing behaviors that result in STD or other communicable or infectious disease exposure, which may include HIV exposure;
- Increasing sentence lengths for certain crimes committed by a person infected with HIV; and
- Increasing sentence lengths for certain crimes committed by a person infected with an STD, which may include HIV.<sup>19</sup>

Additionally, all 50 states have criminal laws, such as assault, battery, reckless endangerment, and attempted murder, under which the state can prosecute a person with HIV for engaging in certain behaviors.<sup>20</sup>

In light of scientific advancements in HIV treatment and prevention, the U.S. Department of Justice (DOJ) recommends that states reform HIV criminal exposure laws to eliminate HIV-specific penalties, except when a person knows he or she is HIV positive and:

- Commits a sex crime with the risk of transmission (e.g., rape or other sexual assault);
- Evidence clearly demonstrates that the person intended to transmit HIV; and
- The person's behavior posed a significant risk of transmission.<sup>21</sup>

### **Florida Law**

#### ***STDs and Non-Disclosure***

Under Florida law, a person commits a third-degree felony<sup>22</sup> if the person knows he or she has HIV, has been informed of the risk of transmission through sexual intercourse, and has sexual intercourse with another person, unless that person consented with knowledge of the diagnosis.<sup>23</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> J. Stan Lehman, et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, AIDS and Behavior (March 15, 2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4019819/> (last visited Feb. 12, 2020).

<sup>19</sup> Centers for Disease Control and Prevention, *HIV and STD Criminal Laws* (July 1, 2019), available at <https://www.cdc.gov/hiv/policies/law/states/exposure.html> (last visited Feb. 12, 2020).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> A third degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine. See ss. 775.082(3)(e) and 775.083(1)(c), F.S.

<sup>23</sup> See ss. 384.24(2) and 384.34(5), F.S.

A person commits a first-degree felony<sup>24</sup> for a second or subsequent non-disclosure offense.<sup>25</sup> Conviction for a non-disclosure offense does not require the intent to transmit or the actual transmission of HIV.

Florida law does not currently define “sexual intercourse.” However, the Florida Supreme Court has defined sexual intercourse to include penile-vaginal penetration and acts of oral and anal intercourse.<sup>26</sup>

### ***Criminal Transmission of HIV***

A person convicted of committing or attempting to commit a specified offense involving the transmission of bodily fluids from one person to another must undergo HIV testing.<sup>27</sup> Specified offenses include:<sup>28</sup>

- Sexual battery;<sup>29</sup>
- Incest;<sup>30</sup> lewd or lascivious offenses on a person under 16;<sup>31</sup>
- Assault<sup>32</sup> or aggravated assault;<sup>33</sup>
- Battery<sup>34</sup> or aggravated battery;<sup>35</sup>
- Child abuse<sup>36</sup> or aggravated child abuse;<sup>37</sup>
- Abuse of an elderly person or disabled adult<sup>38</sup> or aggravated abuse of an elderly person or disabled adult;<sup>39</sup>
- Sexual performance by a minor (person under 18 years of age);<sup>40</sup>
- Prostitution;<sup>41</sup>
- Human trafficking;<sup>42</sup> and
- Donation of blood, plasma, organs, skin, or other human tissue under certain conditions.<sup>43</sup>

A person who tests positive for HIV following a conviction for a specified offense, who is informed of the result, and who later commits another specified offense, commits criminal

<sup>24</sup> A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. *See* ss. 775.082(3)(b)1. and 775.083(1)(b), F.S.

<sup>25</sup> *Supra* note 23.

<sup>26</sup> *Debaun v. State*, 213 So. 3d 747 (Fla. 2017), Supreme Ct. Case # SC13-2336, available at <http://onlinedocketssc.flcourts.org/> (last visited Feb. 12, 2020).

<sup>27</sup> Section 775.0877(1), F.S.

<sup>28</sup> *Id.*

<sup>29</sup> Section 794.011, F.S.

<sup>30</sup> Section 826.04, F.S.

<sup>31</sup> Section 800.04, F.S.

<sup>32</sup> Sections 784.011, 784.07(2)(a), and 784.08(2)(d), F.S.

<sup>33</sup> Sections 784.021, 784.07(2)(c), and 784.08(2)(b), F.S.

<sup>34</sup> Sections 784.03, 784.07(2)(b), 784.08(2)(c), F.S.

<sup>35</sup> Sections 784.045, 784.07(2)(d), and 784.08(2)(a), F.S.

<sup>36</sup> Section 827.03(2)(c), F.S.

<sup>37</sup> Section 827.03(2)(a), F.S.

<sup>38</sup> Section 825.102(1), F.S.

<sup>39</sup> Section 825.102(2), F.S.

<sup>40</sup> Section 827.071, F.S.

<sup>41</sup> Sections 796.07 and 796.08, F.S.

<sup>42</sup> Sections 787.06(3)(b), (d), (f), and (g), F.S.

<sup>43</sup> Section 381.0041(11)(b), F.S.

transmission of HIV.<sup>44</sup> An offender may be convicted of, and sentenced separately for, criminal transmission of HIV and for the underlying offense.<sup>45</sup> A conviction for criminal transmission of HIV does not require the intent to transmit or the actual transmission of HIV.<sup>46</sup>

### ***Court-Ordered Hepatitis and HIV Testing***

At the request of a victim,<sup>47</sup> a court must order an offender charged with the commission of a specified offense to undergo Hepatitis and HIV testing if the offense:

- Involves the transmission of bodily fluids from one person to another;<sup>48</sup> or
- Is a sexual offense and the victim was a minor, a disabled adult, or an elderly person.<sup>49</sup>

The specified offenses include all the offenses that form the basis for a conviction of criminal transmission of HIV, except human trafficking.<sup>50</sup>

### ***Organ, Blood, Plasma, Skin, and Tissue Donation***

Due to increased life expectancy, the number of HIV-positive persons in need of organ transplants has increased.<sup>51</sup> However, the number of people on the organ transplant waiting list far outweighs the number of available organs.<sup>52</sup> This shortage disproportionately affects persons with HIV, who have a higher mortality rate than persons without HIV on the organ transplant waiting list.<sup>53</sup>

For decades, federal law prohibited persons with HIV from donating organs for transplantation, including to HIV-positive recipients.<sup>54</sup> However, in 2013, the HIV Organ Policy Equity (HOPE) Act legalized HIV-positive organ donations for transplantation into HIV-positive candidates under approved research protocols designed to evaluate the feasibility, effectiveness, and safety of such organ transplants.<sup>55</sup>

Although authorized by federal law, it is a third-degree felony in Florida for an HIV-positive person to donate blood, plasma, organs, skin, or other human tissue when he or she knew of the HIV infection and was informed that transmission could occur through such donation.<sup>56</sup>

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<sup>44</sup> Section 775.0877(3), F.S.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> A request may also come from a victim's legal guardian or the parents of a minor victim pursuant to s. 960.003, F.S. See s. 775.0877(2), F.S.

<sup>48</sup> Section 960.003(2)(a), F.S.

<sup>49</sup> Section 960.003(2)(b), F.S.

<sup>50</sup> *Id.*

<sup>51</sup> Christine Durand, M.D., *The Transformation of Transplantation*, HIV Specialist (July 2018), available at [https://aahivm.org/wp-content/uploads/2018/07/FINALHIVspecialist\\_July2018FINAL-1.pdf](https://aahivm.org/wp-content/uploads/2018/07/FINALHIVspecialist_July2018FINAL-1.pdf) (last visited Feb. 12, 2020).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> UNOS, *At Two Years, HOPE Act Still Offering Hope* (December 1, 2017), available at <https://unos.org/at-two-years-hope-act-still-offering-hope/> (last visited Feb. 12, 2020).

<sup>55</sup> *Id.*

<sup>56</sup> Section. 381.0041(11)(b), F.S.

### ***Release of Information***

A person who maliciously disseminates any false information or report about the existence of any STD, including HIV, commits a third degree felony.<sup>57</sup> A person who obtains information identifying a person with an STD, including HIV, who knew or should have known the nature of the information and who maliciously, or for monetary gain, spreads such information to anyone other than a physician or a nurse employed by the DOH or to a law enforcement agency, commits a third degree felony.<sup>58</sup>

### ***STD Rules of the DOH***

The DOH promulgates rules regulating STD testing, confidentiality of information, disease reporting, quarantine orders, and notification requirements.<sup>59</sup> A person who violates DOH rules related to STDs<sup>60</sup> is subject to a \$500 fine for each violation.<sup>61</sup> The DOH can impose the fine in addition to other penalties provided by ch. 384, F.S.<sup>62</sup>

## **III. Effect of Proposed Changes:**

### ***Short Title***

**Section 1** provides that the bill may be cited as the “HIV Prevention Justice Act.”

### ***Organ, Blood, Plasma, Skin and Tissue Donation***

**Section 2** amends s. 381.0041, F.S., to permit the donation of blood, plasma, organs, skin, or other human tissue by a person with HIV, without an otherwise applicable penalty of a felony of the third degree, if the donation is made specifically for a recipient who knows the donor is infected with HIV.

### ***Sexually Transmitted Disease Definitions***

**Section 3** defines two terms previously undefined in ch. 384, F.S., relating to sexually transmitted diseases. The bill’s definition for “sexual conduct” is similar to that set forth by the Florida Supreme Court in DeBaun. The bill defines the term as conduct between persons, regardless of gender, which is capable of transmitting a sexually transmissible disease, including, but not limited to, contact between a:

- Penis and a vulva or an anus; or
- Mouth and a penis, a vulva, or an anus.

The bill defines “substantial risk of transmission” as a reasonable probability of disease transmission as proven by competent medical or epidemiological evidence.

<sup>57</sup> Section 384.34(3), F.S.

<sup>58</sup> Section 384.34(6), F.S.

<sup>59</sup> Fla. Admin. Code R. 64D-3.

<sup>60</sup> For example: Fla. Admin. Code R. 64D-3.029, requires practitioners, hospitals, and laboratories to report to DOH diseases or conditions identified by DOH as being of public health significance, including HIV, within specified timeframes.

<sup>61</sup> Section 384.34(4), F.S.

<sup>62</sup> *Id.* Other penalties include criminal misdemeanor penalties for violations of s. 384.29, F.S., relating to the confidentiality of information and records held by the DOH, and for violations of s. 384.26, F.S., relating to the confidentiality of information gathered by the DOH during an investigation into the source and spread of an STD.

***STDs and Non-Disclosure; Unlawful Acts and Penalties***

**Sections 4 and 5** amend ss. 384.24 and 384.34, F.S., relating to unlawful acts and penalties, respectively, to replace the undefined phrase “sexual intercourse” with the defined phrase “sexual conduct” and to reduce the offense of engaging in sex while knowingly HIV-positive without the informed consent of the other party from a third-degree felony to a first-degree misdemeanor. This change makes non-disclosure of HIV the same offense level as non-disclosure of other enumerated STDs. However, the bill makes a second or subsequent non-disclosure offense relating to HIV under s. 384.24(2), F.S., occurring after July 1, 2020, a third-degree felony.

The bill requires the state to prove additional elements for a conviction under s. 384.24, F.S., including that the offender:

- Acted with intent to transmit a specified STD or HIV;
- Engaged in conduct that imposed a substantial risk of transmission of a specified STD or HIV when the other person was unaware of the specified STD diagnosis or HIV; and
- Actually transmitted a specified STD or HIV.

The bill specifies that a person does not act with the intent to transmit a specified STD or HIV if he or she:

- In good faith complies with a prescribed treatment regimen or with the behavioral recommendations of a health care provider or public health officials to limit the risk of transmission; or
- Offers to comply with such behavioral recommendations but the sexual partner rejects the offer.

In this context, the bill defines “behavioral recommendations” as including, but not limited to, the use of a prophylactic device, such as a condom, and specifies that evidence of person’s failure to comply with a treatment regimen or behavioral recommendations does not, in and of itself, constitute sufficient evidence of intent to transmit the disease.

Section 384.34(4), F.S., relating to a charge of \$500 for violating rules of the DOH specific to STDs, and authority for this penalty to be enforced in addition to other penalties, is deleted under the bill.

**Section 6** 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.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Authorizing persons with HIV to donate organs and tissue may make more organs and tissue available to other persons with HIV and increase participation in clinical research trials authorized by the federal HOPE Act.<sup>63</sup>

C. Government Sector Impact:

The Department of Health has not provided an analysis for this bill.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 381.0041, 384.23, 384.24, and 384.34.

This bill creates one non-statutory section of Florida law.

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<sup>63</sup> *Supra* note 54.

**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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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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