

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 649 Patient Brokering

**SPONSOR(S):** Civil Justice Subcommittee, Children, Families & Seniors Subcommittee, Caruso

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	15 Y, 0 N, As CS	Siples	Brazzell
2) Civil Justice Subcommittee	13 Y, 0 N, As CS	Frost	Luczynski
3) Health & Human Services Committee			

### SUMMARY ANALYSIS

Florida's patient brokering statute makes it unlawful for a person to receive or provide a commission, benefit, bonus, rebate, kickback, or bribe, for the referral of a patient to or from a substance abuse provider or health care facility. The law provides a number of exceptions to the prohibition, including to any discount, waiver of payment or payment arrangement expressly authorized under the federal anti-kickback statute, which prohibits inducements for patient referrals for services payable by a federal health care program. Although the federal anti-kickback statute provides exceptions to its provisions, there may be payment arrangements that are not prohibited under the federal law but also not expressly authorized.

CS/CS/HB 649 expands the number of payment structures allowed under Florida's patient-brokering statute by exempting discounts, waivers of payment, or payments that are not prohibited by the federal anti-kickback statute, regardless of whether the discount, waiver, or payment involves items or services paid, in whole or in part, by a federal health care program.

The bill may have a negative insignificant impact on prison beds by expanding the number of payment structures which are exempt from the crime of patient-brokering.

The bill is effective upon becoming a law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### Patient Brokering

In Florida, patient brokering is against the law.<sup>1</sup> Patient brokering is when a person pays 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 can take many forms, including commissions, benefits, bonuses, rebates, kickbacks, bribes, split-fee arrangements, in cash or in kind, provided directly or indirectly.<sup>2</sup> There are significant penalties for patient brokering and penalties escalate as the number of patients involved increases. A person who violates the patient brokering statute commits a felony of the third degree.<sup>3</sup> If the violation involves 10 to 19 patients, the person commits a felony of the second degree.<sup>4</sup> If the violation involves more than 20 patients, the person commits a felony of the first degree.<sup>5</sup>

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:<sup>6</sup>

- Any discount, payment, waiver of payment, or payment expressly authorized by the Federal Anti-Kickback Statute or regulations adopted thereunder;
- 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.

##### 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>7</sup> Violation of the federal anti-kickback statute is a felony that is punishable by a fine of up to \$25,000 or

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<sup>1</sup> Section 817.505, F.S.

<sup>2</sup> Section 817.505(1), F.S.

<sup>3</sup> Punishable by a term of imprisonment not to exceed 5 years and a fine of \$50,000.

<sup>4</sup> Punishable by a term of imprisonment not to exceed 15 years and a fine of \$100,000.

<sup>5</sup> Punishable by a term of imprisonment not to exceed 30 years and a fine of \$500,000.

<sup>6</sup> Section 817.505(3), F.S.

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

up to 5 years in prison, or both.<sup>8</sup> However, similar to Florida's patient brokering statute, there are several exceptions to the federal statute, such as:<sup>9</sup>

- 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.

Federal law allows other payment arrangements that are not specifically listed in law. 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>10</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>11</sup>

### Anti-Kickback Exception

As listed above, a current exception to the state patient brokering law is any discount, payment, waiver of payment, or payment practice that is expressly authorized by the federal anti-kickback statute. This language is a result of 2019 statute change.<sup>12</sup> As an element of CS/CS/HB 369, a bill addressing the substance abuse treatment industry, the Legislature enacted legislation that changed this exception from *not prohibited* to only those payment schemes that are *expressly authorized* under federal law.<sup>13</sup> This change created uncertainty for those using payment practices that were not prohibited under federal law but also not expressly authorized.<sup>14</sup>

### Effect of Proposed Changes

Currently, the patient brokering statute does not apply to any discount, payment, waiver of payment, or payment practice that is expressly authorized by the federal anti-kickback statute, which addresses this activity only in the context of federal health care programs.<sup>15</sup> CS/CS/HB 649 amends this provision so that the patient brokering statute does not apply to any such payment scheme not prohibited by the federal anti-kickback statute. This restores the law to the 2018 content before the 2019 revisions. The bill also adds new language to this provision, stating that this exemption applies regardless of whether it involves items or services for which payment is made in whole or in part by a federal health care program designated in the federal anti-kickback law on March 1, 2020, such as Medicare and Medicaid.

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<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</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 Feb. 5, 2020).

<sup>11</sup> Id.

<sup>12</sup> Chapter 2019-59, L.O.F.

<sup>13</sup> Id.

<sup>14</sup> See Florida Bar Health Law Section, *Health Law Section Adopts Legislative Position and Advocates for Revisions to Patient Brokering Act*, available at <http://www.flabarhls.org/news/health-law-section-news/425-health-law-section-in-action> (last visited Feb. 5, 2020); JDSupra, *Significant Changes to Florida's Patient Brokering Act: Uncertainty Lies Ahead – HealthCare Alert*, (Aug. 13, 2019), available at <https://www.jdsupra.com/legalnews/significant-changes-to-florida-s-49130/> (last visited Feb. 5, 2020), and Jana Kolarik Anderson, Lawrence Vernaglia, and Jonathan Simler, *Florida: Changes to the State Patient Brokering Act*, NATIONAL LAW REVIEW, (Aug. 16, 2019), available at <https://www.natlawreview.com/article/florida-changes-to-state-patient-brokering-act> (last visited Feb. 5, 2020).

<sup>15</sup> 42 U.S.C. §1320a-7b(f) defines "federal health care program" as any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States government or any state health care program. State health care programs include Medicaid, maternal and child health services block grants, block grants and programs for social services and elder justice, and state children's health insurance programs.

The bill may have a negative insignificant impact on prison beds by expanding the number of payment structures which are exempt from the crime of patient-brokering.

The bill is effective upon becoming a law.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 817.505, F.S., relating to patient brokering prohibited; exceptions; penalties.

**Section2:** Provides that the bill is effective upon becoming a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill may alleviate confusion on which payment schemes are permissible under the state patient brokering law.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 22, 2020, the Children, Families & Seniors Subcommittee adopted a PCS and reported the bill favorably as a committee substitute. The PCS differed from the bill by:

- Removing the section relating to background checks of service provider personnel.
- Removing the section relating to voluntary certification of recovery residences.
- Removing the section relating to exemptions from disqualification for certain persons associated with applicant recovery residences.
- Amending the title from an act relating to substance abuse services to an act relating to patient brokering.

The analysis is drafted to the committee substitute as passed by the Children, Families & Seniors Subcommittee.

On February 4, 2020, the Civil Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Defined "federal healthcare program" as provided under federal law on March 1, 2020.
- Changed the effective date of the bill to upon becoming a law.
- Made other minor technical changes.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.