

**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 1786

INTRODUCER: Senator Burgess

SUBJECT: Payments for Birth-related Neurological Injuries

DATE: March 23, 2021

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	<b>Favorable</b>
2.	Smith	Brown	HP	<b>Pre-meeting</b>
3.			AP	

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## **I. Summary:**

SB 1786 increases the cap on the periodic or lump-sum payment amount<sup>1</sup> from \$100,000 to \$250,000 that the Florida Birth-Related Neurological Injury Compensation Association (NICA) may pay parents or legal guardians of an infant found to have suffered a compensable birth-related neurological injury, as determined by an administrative law judge (ALJ). Further, the bill establishes a three percent annual increase of this cap to counteract increasing costs. The provisions of the bill apply retroactively to claims filed on or after January 1, 2021.

The Florida Birth-Related Neurological Injury Compensation Plan (Plan) pays for compensation and medically necessary medical care and other services to persons with birth-related neurological injuries when a physician participating in the Plan delivers obstetrical services in connection with the birth, and an (ALJ) determines the claim is compensable.

NICA engaged an actuary to determine the viability and likely impact of increasing the parental award from \$100,000 to \$250,000. It was determined that the bill will have a negative fiscal impact on the Plan, but the actuary's report recommended increasing the parental award. *See* section V of this analysis.

The bill provides an effective date of July 1, 2021.

## **II. Present Situation:**

### **Florida Birth-Related Neurological Injury Compensation Association**

In 1988, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation Plan<sup>2</sup> (Plan) to provide compensation, long-term medical care, and other services to persons with

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<sup>1</sup> Also known as the parental award.

<sup>2</sup> Section 766.303(1), F.S.

birth-related neurological injuries.<sup>3</sup> If an infant suffers such an injury, and the physician participates in NICA and delivers obstetrical services in connection with the birth, then an administrative award for a compensable injury is the infant's sole and exclusive remedy for the injury, with exceptions.<sup>4</sup> Although the benefits paid under the Plan are limited, the Plan does not require the claimant to prove malpractice and provides a streamlined administrative hearing process to resolve the claim.<sup>5</sup>

A "birth-related neurological injury" is an injury to the brain or spinal cord of a live infant who weighs at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant who weighs at least 2,000 grams at birth caused by oxygen deprivation or by mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.<sup>6</sup> Such an injury addressed by this statute renders the infant permanently and substantially mentally and physically impaired.<sup>7</sup>

The five-member board of directors of the Florida Birth-Related Neurological Injury Compensation Association (NICA) administers the Plan.<sup>8</sup> Duties of NICA include:

- Administering the Plan;
- Administering the funds collected;
- Reviewing and paying claims;
- Directing the investment and reinvestment of any surplus funds over losses and expenses;
- Reinsuring the risks of the Plan in whole or in part;
- Suing and being sued, appearing and defending, in all actions and proceedings in its name; and
- Taking such legal action as may be necessary to avoid payment of improper claims.<sup>9</sup>

### **NICA Funding**

The funding for the Plan is derived from an initial appropriation of \$20 million by the Legislature at the time the Plan was created<sup>10</sup> and annual assessments paid by physicians and hospitals.<sup>11</sup> The Plan pays, on behalf of a qualifying infant, the following benefits:

- Medically necessary and reasonable care, services, drugs, equipment, facilities, and travel;<sup>12</sup>

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<sup>3</sup> Chapter 88-1, ss. 60-75, Laws of Fla., was enacted by the Legislature to stabilize and reduce malpractice insurance premiums for physicians practicing obstetrics. The intent of the Legislature is to provide compensation, on a no-fault basis, for a limited class of high costs catastrophic injuries, specifically birth-related neurological injuries, that result in unusually high costs for custodial care and rehabilitation. Section 766.301 F.S.

<sup>4</sup> Section 766.31(1), F.S.

<sup>5</sup> See *Florida Birth-Related Neurological Injury Compensation Ass'n v. McKaughan*, 668 So.2d 974, 977 (Fla. 1996).

<sup>6</sup> Section 766.302(2), F.S.

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

<sup>8</sup> Section 766.315(1) and (2), F.S. The Chief Financial Officer appoints the members of the NICA board.

<sup>9</sup> Section 766.315(4), F.S.

<sup>10</sup> Section 766.314(5)(b), F.S.

<sup>11</sup> Section 766.314, F.S., requires non-participating physicians to pay \$250 per year, participating physicians to pay \$5,000 per year, and hospitals to pay \$50 per infant delivered during the prior year.

<sup>12</sup> The Plan excludes coverage for expenses that are compensable by state or federal governments, or by private insurers. Section 766.31(1)(a), F.S.

- Periodic or lump-sum award, not to exceed \$100,000, to the infant's parents or guardians;<sup>13</sup>
- Death benefit of \$10,000 for the infant; and
- Reasonable expenses for filing the claim under the Plan, including attorney's fees.<sup>14</sup>

The \$100,000 cash award limit was established when the NICA statutory provisions were enacted in 1988. If the initial award of \$100,000 established for the first birth year of 1989 was adjusted for inflation and assuming an annual increase of three percent, this would result in an indicated award of approximately \$250,000.<sup>15</sup>

### **Filing a Claim for Benefits**

A claim for compensation under the Plan must be filed within five years of the birth of the infant alleged to be injured.<sup>16</sup> First, the parents or guardians of the infant must file a petition with the Division of Administrative Hearings (DOAH).<sup>17</sup> Then, the DOAH serves a copy of the petition upon NICA, the physician(s) and hospital named in the petition, the Division of Medical Quality Assurance, and the Agency for Health Care Administration.<sup>18</sup> Within 10 days of filing the petition, the parents or guardian must provide to NICA all medical records, assessments, evaluations and prognoses, documentation of expenses, and documentation of any private or governmental source of services or reimbursement relative to the impairments.<sup>19</sup>

Within 45 days from the date of service of a complete claim, NICA must file a response to the petition and submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury.<sup>20</sup> An ALJ from the DOAH will set a hearing on the claim to be conducted 60-120 days from the petition filing date.<sup>21</sup>

The issue of whether the claim for compensation is covered by the Plan is determined exclusively in an administrative proceeding.<sup>22</sup> The ALJ presiding over the hearing makes the following determinations:

- Whether the injury claimed is a birth-related neurological injury;
- Whether obstetrical services were delivered by a participating physician;

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<sup>13</sup> Often the award is paid out over time to assist the parents or guardians in making necessary modifications to living quarters to accommodate a disabled child.

<sup>14</sup> Section 766.31, F.S.

<sup>15</sup> Turner Consulting, Inc., Consultants and Actuaries, *Proposed Increase in Parental Award-Section 766.31(b)(1)*, *Florida Statutes*, (Jan. 14, 2020) (on file with the Senate Committee on Health Policy).

<sup>16</sup> Section 766.313, F.S.

<sup>17</sup> Section 766.305, F.S.

<sup>18</sup> Section 766.305(2), F.S.

<sup>19</sup> Section 766.305(3), F.S.

<sup>20</sup> Section 766.305(4), F.S.

<sup>21</sup> Section 766.307(1), F.S.

<sup>22</sup> Section 766.301(1)(d), F.S.

- How much compensation, if any, is awardable under s. 766.31, F.S.; and
- Whether, if raised by the claimant or other party, the factual determination regarding the notice requirement in s. 766.316, F.S.<sup>23</sup>

If the ALJ determines that an injury meets the definition of a birth-related neurological injury, compensation from the Plan is the exclusive legal remedy.<sup>24</sup> If the ALJ determines that, the injury alleged is not a birth-related neurological injury or that a participating physician did not deliver the obstetrical services, the ALJ will enter an order to that effect.<sup>25</sup> The ALJ may also bifurcate the proceeding and address compensability and notice first, and address an award, if any, in a separate proceeding.<sup>26</sup> If any party chooses to appeal the ALJ's order under s. 766.309, F.S., the appeal must be filed in the District Court of Appeal.<sup>27</sup>

### **Notice Requirement**

Section 766.316, F.S., requires any hospital with a participating physician on its staff and each participating physician under the Plan, to provide notice to an obstetrical patient as to the limited no-fault alternative for birth-related neurological injuries. The notice must:

- Be provided on forms furnished by the association; and
- Include a clear and concise explanation of a patient's rights and limitations under the Plan.

This section of statute also provides that the notice does not need to be provided to a patient when the patient has an emergency medical condition or when notice is not practicable.

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

**Section 1** amends s. 766.31, F.S., to increase the limit for periodic payments or a lump-sum payment of an award from \$100,000 to \$250,000, beginning January 1, 2021. Each January 1 thereafter, the award limit is increased by three percent.

**Section 2** provides that the amendments made to s. 766.31, F.S., by this act apply to claims filed under s. 766.305, F.S., on or after January 1, 2021.

**Section 3** provides that the bill is effective July 1, 2021.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

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<sup>23</sup> Section 766.309(1), F.S.

<sup>24</sup> Section 766.303(2), F.S., only allows a civil action in place of a claim under the Plan where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property.

<sup>25</sup> Section 766.309(2), F.S.

<sup>26</sup> Section 766.309(4), F.S.

<sup>27</sup> Section 766.311(1), F.S.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

Once a bill becomes law, it is presumed to apply only prospectively. The presumption against retroactive application may be rebutted by clear evidence of legislative intent.<sup>28</sup> To determine if the terms of a statute and the purpose of the enactment indicate retroactive application, a court may consider the language, structure, purpose, and legislative history of the enactment.<sup>29</sup>

If the legislation clearly expresses an intent that the law should apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.<sup>30</sup> Even when the Legislature has clearly expressed its intention that the statute be given a retroactive application, courts must refuse to do so if it impairs vested rights, creates new obligations, imposes new penalties,<sup>31</sup> or impairs an obligation of contract.<sup>32</sup> For example, ex post facto legislation, i.e., a law that expands criminal liability retroactively by either creating a new crime for past conduct or by increasing the penalty for past conduct, is forbidden by both the State Constitution and the United States Constitution. Statutes that do not alter vested rights, but relate only to remedies or procedure may be applied retroactively.<sup>33</sup>

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Increasing the cash payment limit from \$100,000 to \$250,000 would assist parents and legal guardians in meeting significant medical expenses and other necessary services and care of children with birth-related neurological injuries.

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<sup>28</sup> *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187 (Fla. 2011).

<sup>29</sup> *Id.*

<sup>30</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).

<sup>31</sup> *Id.*

<sup>32</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010).

<sup>33</sup> *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d 494 (Fla. 1999).

**C. Government Sector Impact:****NICA Report<sup>34</sup>**

NICA engaged actuaries to evaluate the viability and likely impact of the proposed increase in parental award, which is authorized pursuant to s. 766.31(1)(b), F.S. The actuaries concluded that, if the payment were increased from \$100,000 to \$250,000, this would result in additional expected costs to NICA of approximately \$2.70 million for the 2020 birth year. However, the actuaries noted:

[G]iven the current net assets of approximately \$393.2 million plus the recent better than expected inflation levels, it is not likely this increase will significantly impact the overall financial position in the short-term. Given the erosion resulting from the impact of inflation on the parental award coupled with the current NICA financial position, we would recommend the proposed change from \$100,000 to \$250,000.

The actuaries also noted that NICA's financial position and the potential need for assessment level increases in the longer run would depend on actual investment results and inflation levels experienced over shorter term three to five year periods. The shortfall in assessments (i.e., without the additional investment income realized on the net assets and/or the better than expected inflation) and the indicated funding levels have in the past been offset by the better than expected realized NICA investment returns and inflation rates. To the extent this favorable relationship continues, the actuaries contend that it is likely additional increases in assessment levels will not be required. Alternatively, the actuaries note that volatility in the prospective results or increases in benefit inflation levels may require assessment level increases at some point in the longer term.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 766.31 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.

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<sup>34</sup> *Supra* note 15.

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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