

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 721 Prohibited Acts by Health Care Practitioners

**SPONSOR(S):** Massullo

**TIED BILLS:** IDEN./SIM. BILLS: SB 1142

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Professions & Public Health Subcommittee	12 Y, 3 N	Morris	McElroy
2) Health & Human Services Committee			

### SUMMARY ANALYSIS

The Division of Medical Quality Assurance (MQA), within the Department of Health (DOH), has general regulatory authority over health care practitioners. The M QA works in conjunction with 22 boards and four councils to license and regulate seven types of health care facilities and more than 40 health care professions, including allopathic physicians, osteopathic physicians, and dentists.

An unlicensed individual may be subject to administrative action or criminal penalties if the individual states or otherwise implies that he or she is a licensed medical professional. This may include the use of certain terms or titles that the public generally associates with a specific medical profession. DOH does not license a physician's specialty or sub-specialty based upon board certification, but does limit who can hold themselves out as board-certified specialists.

HB 721 prohibits health care practitioners from making misleading, deceptive, or fraudulent representations regarding a health care practitioner's specialty designation. The bill prohibits a health care practitioner from using the title "anesthesiologist" unless the health care practitioner is licensed as an allopathic physician under chapter 458, F.S., an osteopathic physician under chapter 459, F.S., or a dentist under chapter 466, F.S. The bill also prohibits a health care practitioner from using the title "dermatologist" unless the health care practitioner is licensed as an allopathic physician under chapter 458, F.S., or an osteopathic physician under chapter 459, F.S.

The bill requires DOH, rather than the boards, to enforce the bill's provisions. The bill requires DOH to issue an emergency order to cease and desist to a health care practitioner who violates the bill's provisions. DOH must issue an order imposing a citation and daily fine, reprimand or letter of concern, or suspension of license, if the health care practitioner does not immediately correct the violation upon receipt of the emergency cease and desist order.

The bill has an indeterminate, negative fiscal impact on DOH, which current resources are adequate to absorb.

The bill has no fiscal impact on local governments.

The bill takes effect upon becoming law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

###### **Licensure and Regulation of Physicians**

The Division of Medical Quality Assurance (MQA), within the Department of Health (DOH), has general regulatory authority over health care practitioners.<sup>1</sup> The MQA works in conjunction with 22 boards and four councils to license and regulate seven types of health care facilities and more than 40 health care professions, including Medical Doctors (allopathic physicians) and Doctors of Osteopathic Medicine (osteopathic physicians).<sup>2</sup> Each profession is regulated by an individual practice act and by ch. 456, F.S., which provides general regulatory and licensure authority for the MQA. MQA is statutorily responsible for the following boards and professions established within the division:<sup>3</sup>

- The Board of Acupuncture, created under ch. 457, F.S.;
- The Board of Medicine, created under ch. 458, F.S.;
- The Board of Osteopathic Medicine, created under ch. 459, F.S.;
- The Board of Chiropractic Medicine, created under ch. 460, F.S.;
- The Board of Podiatric Medicine, created under ch. 461, F.S.;
- Naturopathy, as provided under ch. 462, F.S.;
- The Board of Optometry, created under ch. 463, F.S.;
- The Board of Nursing, created under part I of ch. 464, F.S.;
- Nursing assistants, as provided under part II of ch. 464, F.S.;
- The Board of Pharmacy, created under ch. 465, F.S.;
- The Board of Dentistry, created under ch. 466, F.S.;
- Midwifery, as provided under ch. 467, F.S.;
- The Board of Speech-Language Pathology and Audiology, created under part I of ch. 468, F.S.;
- The Board of Nursing Home Administrators, created under part II of ch. 468, F.S.;
- The Board of Occupational Therapy, created under part III of ch. 468, F.S.;
- Respiratory therapy, as provided under part V of ch. 468, F.S.;
- Dietetics and nutrition practice, as provided under part X of ch. 468, F.S.;
- The Board of Athletic Training, created under part XIII of ch. 468, F.S.;
- The Board of Orthotists and Prosthetists, created under part XIV of ch. 468, F.S.;
- Electrolysis, as provided under ch. 478, F.S.;
- The Board of Massage Therapy, created under ch. 480, F.S.;
- The Board of Clinical Laboratory Personnel, created under part III of ch. 483, F.S.;
- Medical physicists, as provided under part IV of ch. 483, F.S.;
- The Board of Opticianry, created under part I of ch. 484, F.S.;
- The Board of Hearing Aid Specialists, created under part II of ch. 484, F.S.;
- The Board of Physical Therapy Practice, created under ch. 486, F.S.;
- The Board of Psychology, created under ch. 490, F.S.;
- School psychologists, as provided under ch. 490, F.S.;
- The Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling, created under ch. 491, F.S.; and

<sup>1</sup> Pursuant to s. 456.001(4), F.S., health care practitioners are defined to include acupuncturists, physicians, physician assistants, chiropractors, podiatrists, naturopaths, dentists, dental hygienists, optometrists, nurses, nursing assistants, pharmacists, midwives, speech language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dieticians, athletic trainers, orthotists, prosthetists, electrologists, massage therapists, clinical laboratory personnel, medical physicists, dispensers of optical devices or hearing aids, physical therapists, psychologists, social workers, counselors, and psychotherapists, among others.

<sup>2</sup> Florida Department of Health, Division of Medical Quality Assurance, *Annual Report and Long-Range Plan, Fiscal Year 2019-2020*, p. 5, [http://www.floridahealth.gov/licensing-and-regulation/reports-and-publications/\\_documents/2019-2020-annual-report.pdf](http://www.floridahealth.gov/licensing-and-regulation/reports-and-publications/_documents/2019-2020-annual-report.pdf) (last visited March 15, 2021).

<sup>3</sup> S. 456.001(4), F.S.; Id.

- Emergency medical technicians and paramedics, as provided under part III of ch. 401, F.S.

### Allopathic Physician Licensure

Chapter 458, F.S., provides for the licensure and regulation of the practice of medicine by the Florida Board of Medicine (allopathic board) in conjunction with DOH. The chapter imposes requirements for licensure examination and licensure by endorsement.

#### *Allopathic Licensure Requirements*

An individual seeking to be licensed by examination as an allopathic physician must, among other things:

- Complete 2 years of post-secondary education which includes, at a minimum, courses in fields such as anatomy, biology, and chemistry prior to entering medical school;
- Meet one of the following medical education and postgraduate training requirements:
  - Graduate from an allopathic medical school recognized and approved by an accrediting agency recognized by the U.S. Office of Education or recognized by an appropriate governmental body of a U.S. territorial jurisdiction, and have completed at least one year of approved residency training;
  - Graduate from an allopathic foreign medical school registered with the World Health Organization and certified pursuant to statute as meeting the standards required to accredit U.S. medical schools, and have completed at least one year of approved residency training; or
  - Graduate from an allopathic foreign medical school that has not been certified pursuant to statute; have an active, valid certificate issued by the Educational Commission for Foreign Medical Graduates (ECFMG),<sup>4</sup> have passed that commission's examination; and have completed an approved residency or fellowship of at least 2 years in one specialty area; and
- Obtain a passing score on:
  - The United States Medical Licensing Examination (USMLE);
  - A combination of the USMLE, the examination of the Federation of State Medical Boards of the United States, Inc. (FLEX), or the examination of the National Board of Medical Examiners up to the year 2000; or
  - The Special Purpose Examination of the Federation of State Medical Boards of the United States (SPEX), if the applicant was licensed on the basis of a state board examination, is currently licensed in at least one other jurisdiction of the United States or Canada, and has practiced for a period of at least 10 years.<sup>5</sup>

An individual who holds an active license to practice medicine in another jurisdiction may seek licensure by endorsement to practice medicine in Florida.<sup>6</sup> The applicant must meet the same requirements for licensure by examination. To qualify for licensure by endorsement, the applicant must also submit evidence of the licensed active practice of medicine in another jurisdiction for at least 2 of the preceding 4 years, or evidence of successful completion of either a board-approved postgraduate training program within 2 years preceding filing of an application or a board-approved clinical competency examination within the year preceding the filing of an application for licensure.

### Osteopathic Physician Licensure

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<sup>4</sup> A graduate of a foreign medical school does not need to present an ECFMG certification or pass its exam if the graduate received his or bachelor's degree from an accredited U.S. college or university, studied at a medical school recognized by the World Health Organization, and has completed all but the internship or social service requirements, has passed parts I and II of the National Board Medical Examiners licensing examination or the ECFMG equivalent examination. Section 458.311, F.S.

<sup>5</sup> Section 458.311(1), F.S.

<sup>6</sup> Section 458.313, F.S.

Chapter 459, F.S., provides for the licensure and regulation of the practice of medicine by the Florida Board of Osteopathic Medicine (osteopathic board) in conjunction with DOH. The chapter imposes requirements for licensure by examination and licensure by endorsement.

#### *Osteopathic Licensure Requirements*

An individual seeking to be licensed as an osteopathic physician must, among other things:<sup>7</sup>

- Graduate from a medical college recognized and approved by the American Osteopathic Association;
- Successfully complete a resident internship of at least 12 months in a hospital approved by the Board of Trustees of the American Osteopathic Association or any other internship approved by the osteopathic board; and
- Obtain a passing score, as established by rule of the osteopathic board, on the examination conducted by the National Board of Osteopathic Medical Examiners or other examination approved by the osteopathic board, no more than five years prior to applying for licensure.<sup>8</sup>

If an applicant for a license to practice osteopathic medicine is licensed in another state, the applicant must have actively practiced osteopathic medicine within the two years prior to applying for licensure in this state.

#### Dentist Licensure

The Board of Dentistry, in conjunction with DOH, regulates dental practice in Florida, including dentists, dental hygienists, and dental assistants under the Dental Practice Act.<sup>9</sup> A dentist is licensed to examine, diagnose, treat, and care for conditions within the human oral cavity and its adjacent tissues and structures.<sup>10</sup>

#### *Dental Licensure Requirements*

Any person wishing to practice dentistry in this state must apply to DOH and meet specified requirements. To qualify to take the Florida dental licensure examination, an applicant must be 18 years of age or older, be a graduate of a dental school accredited by the American Dental Association or be a student in the final year of a program at an accredited institution, and have successfully completed the NBDE dental examination.

Section 466.006, F.S., requires dentistry licensure applicants to sit for and pass the following licensure examinations:

- The National Board of Dental Examiners dental examiner (NBDE);
- A written examination on Florida laws and rules regulating the practice of dentistry; and
- A practical examination, which is the American Dental Licensing Examination developed by the American Board of Dental Examiners, Inc., and graded by a Florida-licensed dentist employed by DOH for such purpose.<sup>11</sup>

#### Board Certification and Florida Licensure

DOH does not license physicians by specialty or subspecialty; however, current law limits which physicians may hold themselves out as board-certified specialists. An allopathic physician may not hold himself or herself out as a board-certified specialist unless he or she has received formal recognition as a specialist from a specialty board of the American Board of Medical Specialties (ABMS) or other

<sup>7</sup> Section 459.0055(1), F.S.

<sup>8</sup> However, if an applicant has been actively licensed in another state, the initial licensure in the other state must have occurred no more than five years after the applicant obtained the passing score on the licensure examination.

<sup>9</sup> Section 466.004, F.S.

<sup>10</sup> Section 466.003(3), F.S.

<sup>11</sup> A passing score is valid for 365 days after the date the official examination results are published. A passing score on an examination obtained in another jurisdiction must be completed on or after October 1, 2011.

recognizing agency<sup>12</sup> approved by the allopathic board.<sup>13</sup> Additionally, an allopathic physician may not hold himself or herself out as a board-certified specialist in dermatology unless the recognizing agency, whether authorized in statute or by rule, is triennially reviewed and reauthorized by the allopathic board.<sup>14</sup> Similarly, an osteopathic physician may not hold himself or herself out as a board-certified specialist unless he or she has successfully completed the requirements for certification by the American Osteopathic Association (AOA) or the Accreditation Council on Graduate Medical Education (ACGME) and is certified as a specialist by a certifying agency<sup>15</sup> approved by the board.<sup>16</sup>

A dentist may not hold himself or herself out as a specialist, or advertise membership in or specialty recognition by an accrediting organization, unless the dentist has completed a specialty education program approved by the American Dental Association and the Commission on Dental Accreditation and the dentist is:<sup>17</sup>

- Eligible for examination by a national specialty board recognized by the American Dental Association; or
- Is a diplomate of a national specialty board recognized by the American Dental Association.

If a dentist announces or advertises a specialty practice for which there is not an approved accrediting organization, the dentist must clearly state that the specialty is not recognized or that the accrediting organization has not been approved by the American Dental Association or the Florida Board of Dentistry in capital letters.<sup>18</sup>

### Cease and Desist

Florida law prohibits an individual from practicing a regulated health care profession without a license. An individual must meet minimum education and training requirements to become licensed and practice a health care profession.<sup>19</sup> An unlicensed individual providing healthcare services is subject to administrative and criminal penalties. Among other actions, DOH may issue a cease and desist letter to such a person and impose, by citation, an administrative penalty of up to \$5,000 per offense.<sup>20</sup>

DOH is not authorized to issue a cease and desist letter to licensed health care practitioners for:

- Making misleading, deceptive, or fraudulent representations related to his or her licensed profession or specialty designation;
- Using the title “anesthesiologist” if not licensed as an allopathic physician under chapter 458, F.S., osteopathic physician under chapter 459, F.S., or dentist under chapter 466, F.S.; and
- Using the title “dermatologist” if not licensed as an allopathic physician under chapter 458, F.S., or an osteopathic physician under chapter 459, F.S.

DOH may also seek a civil penalty of up to \$5,000 for each offense through the circuit court, in addition to or in lieu of the administrative penalty.<sup>21</sup> An individual practicing, attempting to practice or offering to practice, a health care profession without an active, valid Florida license is subject to criminal penalties, in addition to any administrative and civil penalties incurred by the unlicensed individual.<sup>22</sup>

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<sup>12</sup> The allopathic board has approved the specialty boards of the ABMS as recognizing agencies. Rule 64B8-11.001(1)(f), F.A.C.

<sup>13</sup> Section 458.3312, F.S.

<sup>14</sup> Id.

<sup>15</sup> The osteopathic board has approved the specialty boards of the ABMS and AOA as recognizing agencies. Rule 64B15-14.001(h), F.A.C.

<sup>16</sup> Section 459.0152, F.S.

<sup>17</sup> Section 466.0282, F.S. A dentist may also hold himself or herself out as a specialist if the dentist has continuously held himself or herself out as a specialist since December 31, 1964, in a specialty recognized by the American Dental Association.

<sup>18</sup> Section 466.0282(3), F.S.

<sup>19</sup> Section 456.065(1), F.S.

<sup>20</sup> Section 456.065, F.S. Each day that the unlicensed practice continues after issuance of a notice to cease and desist constitutes a separate offense.

<sup>21</sup> Section 456.065(2)(c), F.S.

<sup>22</sup> Section 456.065(2)(d), F.S.

**STORAGE NAME:** h0721a.PPH

**DATE:** 4/1/2021

## Discipline of Health Care Practitioners

Section 456.072, F.S., authorizes a regulatory board or DOH, if there is no board, to discipline a health care practitioner's licensure for a number of offenses, including but not limited to:

- Making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession; or
- Failing to identify through writing or orally to a patient the type of license under which the practitioner is practicing.

Making misleading, deceptive, or fraudulent representations related to a licensee's specialty designation or failing to identify such specialty designation to a patient is not ground for discipline under current law.

If the board or DOH finds that a licensee committed a violation, the board or DOH may:<sup>23</sup>

- Refuse to certify, or to certify with restrictions, an application for a license;
- Suspend or permanently revoke a license;
- Place a restriction on the licensee's practice or license;
- Impose an administrative fine not to exceed \$10,000 for each count or separate offense; if the violation is for fraud or making a false representation, a fine of \$10,000 must be imposed for each count or separate offense;
- Issue a reprimand or letter of concern;
- Place the licensee on probation;
- Require a corrective action plan;
- Refund fees billed and collected from the patient or third party on behalf of the patient; or
- Require the licensee to undergo remedial education.

### *Investigations*

DOH, on behalf of the professional boards, investigates any complaint that is filed against a health care practitioner if the complaint is in writing, signed by the complainant, and legally sufficient.<sup>24</sup> A complaint is legally sufficient if it contains allegations of ultimate facts that, if true, show that a regulated practitioner has violated ch. 456, F.S., his or her practice act, or a rule of his or her board or the DOH.<sup>25</sup>

The Consumer Services Unit within MQA receives the complaints and refers them to the closest Investigative Services Unit (ISU) office.<sup>26</sup> The ISU investigates complaints against health care practitioners.<sup>27</sup> Complaints that present an immediate threat to public safety are given priority; however, all complaints are investigated as timely as possible. When the complaint is assigned to an investigator, the complainant will be contacted and given the opportunity to provide additional information. A thorough investigation will be conducted. The steps taken in the investigation are determined by the specifics of the allegations, but generally include the following:<sup>28</sup>

- Obtaining medical records, documents, and evidence;
- Locating and interviewing the complainant, the patient, the subject, and any witnesses; and
- Drafting and serving subpoenas for necessary information.

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<sup>23</sup> Section 456.073(1), F.S.

<sup>24</sup> Section 456.073(1), F.S.

<sup>25</sup> Id.

<sup>26</sup> Department of Health, *Consumer Services*, <http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/consumer-services.html> (last visited March 26, 2021).

<sup>27</sup> Department of Health, *Investigative Services*, <http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/isu.html> (last visited March 26, 2021).

<sup>28</sup> Id.

The ISU includes a staff of professional investigators and senior pharmacists who conduct interviews, collect documents and evidence, prepare investigative reports for the Prosecution Services Unit (PSU), and serve subpoenas and official orders for the DOH.<sup>29</sup>

The PSU is responsible for providing legal services to the DOH in the regulation of all health care boards and councils.<sup>30</sup> The PSU will review the investigative file and report from ISU and recommend a course of action to the State Surgeon General (when an immediate threat to the health, safety, and welfare of the people of Florida exists), the appropriate board's probable cause panel, or the DOH, if there is no board, which may include:<sup>31</sup>

- Having the file reviewed by an expert;
- Issuing a closing order;
- Filing an administrative complaint; or
- Issuing an emergency order (emergency restriction order or emergency suspension order).

If the ISU investigative file received by PSU does not pose an immediate threat to the health, safety, and welfare of the people of Florida, then the PSU attorneys review the file and determine, first, whether expert review is required and, then, whether to recommend to the board's probable cause panel a closing order, an administrative complaint, or a letter of guidance.<sup>32</sup>

Final DOH action, including all of the above, as well as cases where the subject has failed to respond to an AC, are presented before the applicable board, or DOH if there is no board. The subject may be required to appear. The complainant is notified of the date and location of the hearing and may attend. If the subject is entitled to, and does, appeal the final decision, PSU defends the final order before the appropriate appellate court.<sup>33</sup>

If the ISU investigative file received by the PSU presents evidence of an immediate threat to the health, safety, and welfare of the people of Florida, then PSU will present the file to the State Surgeon General and recommend one of two types of emergency orders – emergency suspension order (ESO) or emergency restriction order (ERO) – which are exclusively issued by the State Surgeon General against licensees who pose such a threat to the people of Florida.<sup>34</sup>

Whether the State Surgeon General issues an ERO or an ESO depends on the level of danger the licensee presents because the DOH is permitted to use only the “least restrictive means” to stop the danger.<sup>35</sup> The distinction between the two orders is:<sup>36</sup>

- ESOs – Licensees are deemed to be a threat to the public at large; or
- EROs – Licensees are considered a threat to a segment of the population.

The emergency order process is carried out without a hearing, restricting someone's right to work, and when the order is served on the licensee, it must contain a notice to the licensee of his or her right to an immediate appeal of the emergency order.<sup>37</sup> An ESO or ERO is not considered final agency action, and the DOH must file an AC on the underlying facts supporting the ESO or ERO within 20 days of its

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<sup>29</sup> Id.

<sup>30</sup> Department of Health, *Prosecution Services*, <http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/psu.html> (last visited March 26, 2021).

<sup>31</sup> Id.

<sup>32</sup> Section 456.073(2), F.S. The DOH may recommend a letter of guidance in lieu of finding probable cause if the subject has not previously been issued a letter of guidance for a related offense.

<sup>33</sup> *Supra* note 27.

<sup>34</sup> Section 456.073(8) and 120.60(6), F.S.

<sup>35</sup> Section 120.60(6)(b), F.S.

<sup>36</sup> Department of Health, Licensing and Regulation, Enforcement, Administrative Complaint Process, Prosecution Services, *A Quick Guide to the MQA Disciplinary Process Discretionary Emergency Orders – 3 Things to Know*, [http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/\\_documents/a-quick-guide-to-the-mqa-disciplinary-process-discretionary-emergency-orders.pdf](http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/_documents/a-quick-guide-to-the-mqa-disciplinary-process-discretionary-emergency-orders.pdf) (last visited Mar. 26, 2021).

<sup>37</sup> See Rule 28-106.501(3), F.A.C., and ss. 120.569(2)(n) or 120.60(6), F.S.

issuance.<sup>38</sup> The appeal of the emergency order and the normal disciplinary process under the AC, and regular prosecution can run simultaneously.<sup>39</sup>

### Mandatory EROs and ESOs

Section 456.074, F.S., directs that in certain cases, the DOH must issue an ESO or ERO to certain licensed practitioners under certain circumstances. The State Surgeon General must issue an ESO to certain practitioners if they have plead guilty to, been convicted of, found guilty of, or have entered a plea of *nolo contendere* to, regardless of adjudication, Medicare fraud, Medicaid fraud, health care fraud, or reproductive battery.<sup>40</sup> Such practitioners include:<sup>41</sup>

- Allopathic physician, physician assistants, anesthesiologist assistants, medical assistants;
- Osteopathic physician, physician assistants, and anesthesiologist assistants;
- Chiropractic physician and physician assistants;
- Podiatric physicians;
- Naturopathic physicians;
- Optometrists - licensed and certified;
- Autonomous advanced practice registered nurses, advanced practice registered nurses, registered nurses, licensed practical nurses and certified nursing assistants;
- Pharmacists and pharmacy technicians;
- Dentists, dental hygienist and dental laboratories; and
- Opticians.

DOH may issue an ESO or ERO if the Board of Medicine (BOM) or Board of Osteopathic Medicine (BOOM) has previously found one of its physicians has committed medical malpractice,<sup>42</sup> gross medical malpractice, or repeated medical malpractice,<sup>43</sup> and the probable cause panel again finds probable of cause for another malpractice violation. In such cases, the State Surgeon General must review the matter to determine if an ESO or ERO is warranted.<sup>44</sup>

DOH may issue an ESO or ERO if any practitioner governed by ch. 456, F.S., tests positive for any drug on any government or private sector pre-employment or employer-ordered confirmed drug test<sup>45</sup> when the practitioner does not have a lawful prescription and legitimate medical reason for using such drug.<sup>46</sup>

The DOH must issue an ESO if it receives information that a massage therapist, a person with an ownership interest in the establishment, or a massage corporate establishment corporation whose owners, officers, or individual are directly involved in the management of the establishment, has been convicted of, found guilty of, or has entered a guilty or *nolo contendere* plea to, regardless of adjudication, a felony under any of the following crimes anywhere:<sup>47</sup>

- Prostitution;<sup>48</sup>

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<sup>38</sup> Rule 28-106.501(3), F.A.C.

<sup>39</sup> Section 120.60(6)(c), F.S.

<sup>40</sup> Section 456.073(1), F.S.

<sup>41</sup> Id.

<sup>42</sup> Section 456.50(1)(g), F.S., "Medical malpractice" means the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in law related to health care licensure.

<sup>43</sup> Id. "Repeated medical malpractice" is medical malpractice, and any similar wrongful act, neglect, or default committed in another state or country which, if committed in this state, would have been considered medical malpractice, and will be considered medical malpractice, if the standard of care and burden of proof applied in the other state or country equaled or exceeded that used in this state.

<sup>44</sup> Section 456.074(2), F.S.

<sup>45</sup> See s. 112.0445, F.S.

<sup>46</sup> Section 456.074(3), F.S. The practitioner must be given 48 hours from the time of notification of the confirmed test results to produce a lawful prescription for the drug before an emergency order is issued.

<sup>47</sup> 456.074(4), F.S.

<sup>48</sup> Section 796.07(1)(a), F.S., "Prostitution" means the giving or receiving of the body for sexual activity for hire, but excludes sexual activity between spouses. Prostitution that took place at massage establishment is reclassified to the next higher degree. See s. 796.07(2)(a), F.S., which is reclassified under s. 796.07(7), F.S.

- Kidnapping;<sup>49</sup>
- False imprisonment;<sup>50</sup>
- Luring or enticing a child;<sup>51</sup>
- Human trafficking;<sup>52</sup>
- Human smuggling;<sup>53</sup>
- Sexual battery;<sup>54</sup>
- Female genital mutilation;<sup>55</sup>
- Procuring a person under 18 for prostitution;<sup>56</sup>
- Selling or buying of minors into prostitution;<sup>57</sup>
- Forcing, compelling, or coercing another to become a prostitute;<sup>58</sup>
- Deriving support from the proceeds of prostitution;<sup>59</sup>
- Prohibiting prostitution and related acts;<sup>60</sup>
- Lewd or lascivious offenses committed upon or in the presence of persons under 16;<sup>61</sup>
- Lewd or lascivious offenses committed upon or in the presence of an elderly or disabled person;<sup>62</sup>
- Sexual performance by a child;<sup>63</sup>
- Protection of minors;<sup>64</sup>
- Computer pornography;<sup>65</sup>
- Transmission of material harmful to minors, to a minor by electronic device or equipment;<sup>66</sup> and
- Selling or buying of minors.<sup>67</sup>

DOH must issue an ESO if a BOM or BOOM probable cause panel determines that the following constitutes a violation of the practice act and there exists an immediate danger to the public.<sup>68</sup>

- The registered surgery office where office surgery liposuction, or Level II or Level III office surgeries are being performed, or the physician practicing in the office, are not in compliance with the standards of practice for office surgery set by statute and board rule;<sup>69</sup> or
- The physician is practicing beyond the scope of his or her education, training, and experience and is performing procedures the licensee knows, or has reason to know, that he or she is not competent to perform.<sup>70</sup>

#### Due Process Under Chapter 120, F.S.

Chapter 120, F.S., known as the Administrative Procedure Act, (APA), provides uniform procedures for the exercise of specified authority. Section 120.60, F.S., pertains to licensing and provides for due process for persons seeking government-issued licensure or who have been granted such licensure. Under the APA, no revocation, suspension, annulment, or withdrawal of any license is lawful unless,

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<sup>49</sup> Section 787.01, F.S.

<sup>50</sup> Section 787.02, F.S.

<sup>51</sup> Section 787.025, F.S.

<sup>52</sup> Section 787.06, F.S.

<sup>53</sup> Section 787.07, F.S.

<sup>54</sup> Section 794.011, F.S.

<sup>55</sup> Section 794.08, F.S.

<sup>56</sup> Former s. 796.03, F.S.

<sup>57</sup> Former s. 796.035, F.S.

<sup>58</sup> Section 796.04, F.S.

<sup>59</sup> Section 796.05, F.S.

<sup>60</sup> Section 796.07(4)(a)3., F.S., relating to a felony of the third degree for a third or subsequent violation of s. 796.07, F.S.

<sup>61</sup> Section 800.04, F.S.

<sup>62</sup> Section 825.1025(2)(b), F.S.

<sup>63</sup> Section 827.071, F.S.

<sup>64</sup> Section 847.0133, F.S.

<sup>65</sup> Section 847.0135, F.S.

<sup>66</sup> Section 847.0138, F.S.

<sup>67</sup> Section 847.0145, F.S.

<sup>68</sup> Section 456.074(5), F.S.

<sup>69</sup> Rules 64B-9.009 and 64B15-14.007, F.A.C.

<sup>70</sup> Sections 458.331(1)(v) and 459.015(1)(z), F.S.

prior to the entry of a final order, the governmental agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a hearing under ss. 120.569 and 120.57, F.S.<sup>71</sup>

When personal service cannot be made and the certified mail notice is returned undelivered, the agency must cause a short, plain notice to the licensee to be published once each week for four consecutive weeks in a newspaper published in the county of the licensee's last known address as it appears on the records of the agency, or, if no newspaper is published in that county, the notice may be published in a newspaper of general circulation in that county.<sup>72</sup>

The APA provides a process for cases in which a governmental agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license.<sup>73</sup> In such cases, the agency may take such action by any procedure that is fair under the circumstances if:<sup>74</sup>

- The procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the U.S. Constitution;
- The agency takes only that action necessary to protect the public interest under the emergency procedure; and
- The agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable. Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding pursuant to ss. 120.569 and 120.57, F.S., must also be promptly instituted and acted upon.

### **Effect of the Bill**

HB 721 prohibits health care practitioners from making misleading, deceptive, or fraudulent representations regarding a health care practitioner's specialty designation. The bill prohibits a health care practitioner from using the title "anesthesiologist" unless the health care practitioner is licensed as an allopathic physician under chapter 458, F.S., an osteopathic physician under chapter 459, F.S., or a dentist under chapter 466, F.S. The bill also prohibits a health care practitioner from using the title "dermatologist" unless the health care practitioner is licensed as an allopathic physician under chapter 458, F.S., an osteopathic physician under chapter 459, F.S.

The bill requires DOH, rather than the boards, to enforce the bill's provisions. The bill requires DOH to issue an emergency order to cease and desist to a health care practitioner who violates the bill's provisions. DOH must send the emergency order to the health care practitioner's email address and by certified mail to the practitioner's physical address, and to any other address at which the practitioner may be reached. DOH must issue an order imposing a citation and daily fine, reprimand or letter of concern, or suspension of license, if the health care practitioner does not immediately correct the violation upon receipt of the emergency cease and desist order.

The bill takes effect upon becoming law.

### **B. SECTION DIRECTORY:**

**Section 1**      Amends s. 456.072, F.S., relating to grounds for discipline; penalties; enforcement.  
**Section 2**      Provides an effective date of upon becoming law.

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<sup>71</sup> Section 120.60(5), F.S.

<sup>72</sup> Id.

<sup>73</sup> Section 120.60(6), F.S.

<sup>74</sup> Id.

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

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

#### **1. Revenues:**

None.

#### **2. Expenditures:**

DOH may experience a recurring increase in workload associated with additional complaints, investigations, and prosecutions resulting from the bill. The extent to which such complaints, investigations, and prosecutions may materialize is unknown; therefore, the fiscal impact is indeterminate.<sup>75</sup>

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

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

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

Health care practitioners in violation of the restrictions in this bill may be subject to disciplinary actions and fines.

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

#### **1. Applicability of Municipality/County Mandates Provision:**

No applicable. The bill does not appear to affect county or municipal governments.

#### **2. Other:**

The bill's requirement for DOH to enter an order imposing penalties if a person does not immediately comply with an emergency cease and desist order, in a manner that differs from procedures that provide due process under current law, may subject those provisions of the bill to challenge as a violation of the licensee's due process rights under the Florida Constitution and the United States Constitution.

### **B. RULE-MAKING AUTHORITY:**

Current law provides sufficient rulemaking authority to implement the bill.

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

DOH advises that while the bill focuses on a practitioner's misuse of a specialty designation as grounds for discipline, the term "specialty designation" is not defined in the bill or in existing statute and is not a term used in the ordinary course of health care practitioner regulation. Absent a definition or guidelines about what constitutes a misrepresentation, the bill's new grounds for discipline are so vague as to be

<sup>75</sup> Department of Health, Agency Analysis of 2021 House Bill 721 (March 20, 2021).

unenforceable, according to DOH. While some physicians hold board certifications in their specialty areas from the American Board of Medical Specialties or the American Osteopathic Association, not all specialists hold or maintain such credentials. Health care providers who participate in Medicare typically have a specialty designation under which they bill for payment. It is unclear to DOH what credentials a practitioner must hold to use a “specialty designation” under the bill and when the use of such designation would be considered misleading or fraudulent.<sup>76</sup>

DOH also advises that, because the bill requires the department, not the applicable regulatory board, to impose discipline for violations of ss. 456.072(1)(a) and (t), F.S., the bill will require the creation of a new disciplinary process. DOH will need to create a unique procedure and tracking system for these specific charges. For all other disciplinary grounds, it is the board that issued the license that takes disciplinary action against that license. The bill would authorize DOH to suspend a practitioner’s license without the involvement or input of the board that issued the license, which could be interpreted to conflict with current law regarding practitioner discipline.<sup>77</sup>

DOH further advises that, under the bill’s requirement for DOH to issue an emergency order to cease and desist, the procedures for issuing such an order are unclear. Currently, when DOH issues an emergency order, it must show that allowing the practitioner to continue to practice would constitute an immediate serious danger to the health, safety, or welfare of the citizens of Florida and that nothing short of the emergency action would protect citizens from that danger, as required under s. 120.60(6), F.S. It is unclear to DOH how these requirements would be met under the circumstances specified in the bill.<sup>78</sup>

DOH further advises that the bill’s requirement for the department to enter an order imposing penalties if a person does not immediately comply with an emergency cease and desist order may conflict with s. 456.073(5), F.S., which provides that a formal hearing must be held before an administrative law judge in disciplinary matters if there are material issues of disputed fact. This portion of the bill may also conflict with s. 120.60(5), F.S., which provides that no revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of the order, the governmental agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57, F.S.<sup>79</sup>

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

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<sup>76</sup> Id.

<sup>77</sup> Id. Sections 456.073(1) and (2), F.S., provide that the DOH investigates complaints and violations of the grounds for discipline and provides the completed investigative report to the probable cause panel of the appropriate regulatory board. The statute provides for the report to be sent to the department only when there is no board for the profession in question. Section 456.073(4), F.S., provides that the determination of the existence of probable cause is made by the probable cause panel and that the DOH determines probable cause only if there is no board. And, s. 456.073(6), F.S., provides that the appropriate board issues the final order in each health care professional disciplinary case, unless there is no board, in which case the DOH would issue the final order.

<sup>78</sup> *Supra*, note 75.

<sup>79</sup> Id.