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.)

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

BILL:	SB 1580
INTRODUCER:	Senator Trumbull
SUBJECT:	Protections of Medical Conscience
DATE:	April 2, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Brown	HP	**Favorable**
2.			RC	

I. Summary:

SB 1580 establishes rights of conscience for health care providers and payors. The bill provides that a provider or payor has the right to opt-out of participation in or payment for a health care service on the basis of a conscience-based objection (CBO). The bill establishes notification requirements for opting-out and prohibits a payor from opting-out of paying for a service it is contractually obligated to cover during a plan year. The bill also specifies that CBOs are limited to specific health care services and that the bill may not be construed to waive or modify any duty a provider or payor may have for other health care services that do not violate a provider's or payor's conscience.

The bill prohibits any person, governmental entity, business entity, or educational institution from discriminating against a provider or payor for declining to participate in a health care service based on a CBO. The bill also provides whistle-blower protections for providers or payors in specific situations and specifies that the bill may not be construed to override any requirement to provide emergency medical treatment in accordance with federal or state law.

Additionally, the bill prohibits a board,[1] or the Department of Health (DOH) if there is no board, from taking disciplinary action against a health care practitioner solely because he or she has spoken or written publicly about a health care service, including on a social media platform, as long as the speech or written communication does not provide advice or treatment to a specific patient or patients and does not separately violate any other applicable law or rule.

The bill provides that its provisions are severable and provides an effective date of July 1, 2023.

[1] Under s. 456.001(1), F.S., a "board" is any board or commission, or other statutorily created entity, to the extent such entity is authorized to exercise regulatory or rulemaking functions within the Department of Health or the department's Division of Medical Quality Assurance. Most of Florida's licensed health care professions have a board.

II. Present Situation:

Medical Conscience

The Church Amendments

The conscience provisions contained in 42 U.S.C. 300a-7 (collectively known as the "Church Amendments") were enacted at various times during the 1970s in response to debates over whether receipt of federal funds required the recipients of such funds to perform abortions or sterilizations. The first conscience provision in the Church Amendments, 42 U.S.C. 300a-7(b), provides that "[t]he receipt of any grant, contract, loan, or loan guarantee under [certain statutes implemented by the Department of Health and Human Services] by any individual or entity, does not authorize any court or any public official or other public authority to require:"

- The individual to perform or assist in a sterilization procedure or an abortion, if it would be contrary to his or her religious beliefs or moral convictions;
- The entity to make its facilities available for sterilization procedures or abortions, if the performance of sterilization procedures or abortions in the facilities is prohibited by the entity on the basis of religious beliefs or moral convictions; or
- The entity to provide personnel for the performance or assistance in the performance of sterilization procedures or abortions, if it would be contrary to the religious beliefs or moral convictions of such personnel.

The second conscience provision in the Church Amendments, 42 U.S.C. 300a-7(c)(1), prohibits any entity that receives a grant, contract, loan, or loan guarantee under certain statutes from discriminating against any physician or other health care personnel in employment, promotion, termination of employment, or the extension of staff or other privileges because the individual "performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions."

The third conscience provision, contained in 42 U.S.C. 300a-7(c)(2), prohibits any entity that receives a grant or contract for biomedical or behavioral research under any program administered by the U.S. Department of Health and Human Services (HHS) from discriminating against any physician or other health care personnel in employment, promotion, termination of employment, or extension of staff or other privileges "because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity."

The fourth conscience provision, 42 U.S.C. 300a-7(d), provides that "[n]o individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by [the HHS] if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions."

The final conscience provision contained in the Church Amendments, 42 U.S.C. 300a-7(e), prohibits any entity that receives a grant, contract, loan, loan guarantee, or interest subsidy under certain Departmentally-implemented statutes from denying admission to, or otherwise discriminating against, "any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions."[2]

Public Health Service Act Section 245

Enacted in 1996, section 245 of the Public Health Service Act (PHS Act) prohibits the federal government and any state or local government receiving federal financial assistance from discriminating against any health care entity on the basis that the entity:

- "Refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions;"
- Refuses to make arrangements for such activities; or
- "Attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide, or refer for training in the performance of induced abortions, or make arrangements for the provision of such training."

For the purposes of this protection, the statute defines "financial assistance" as including, "with respect to a government program," "governmental payments provided as reimbursement for carrying out health-related activities." In addition, PHS Act Sec. 245 requires that, in determining whether to grant legal status to a health care entity (including a state's determination of whether to issue a license or certificate), the federal government and any state or local government receiving federal financial assistance must deem accredited any post-graduate physician training program that would be accredited, but for the reliance on an accrediting standard that, regardless of whether such standard provides exceptions or exemptions, requires an entity:

- To perform induced abortions; or
- To require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training.[3]

Medicare and Medicaid

Federal Medicare and Medicaid law includes certain conscience provisions as well. In particular, the Balanced Budget Act of 1997, Public Law 105-33, 111 Stat. 251 (1997), prohibits Medicaid managed care organizations and Medicare Advantage plans from prohibiting or restricting a physician from informing a patient about his or her health and full range of treatment options. However, it also provides that Medicaid managed care organizations and Medicare Advantage

[2] Safeguarding the Rights of Conscience as Protected by Federal Statutes: A Proposed Rule by the HHS, 1/5/23, available at https://www.federalregister.gov/documents/2023/01/05/2022-28505/safeguarding-the-rights-of-conscience-as-protected-by-federal-statutes, (last visited April 1, 23).
[3] *Id.*

plans are not required to provide, reimburse for, or cover a counseling or referral service if the organization or plan objects to the service on moral or religious grounds. Such organization or plan must, however, provide sufficient notice of its moral or religious objections to prospective enrollees.[4]

Weldon Amendment

The Weldon Amendment, originally adopted as section 508(d) of the Labor-HHS Division (Division F) of the 2005 Consolidated Appropriations Act,[5] has been readopted (or incorporated by reference) in each subsequent legislative measure appropriating funds to HHS.

The Weldon Amendment provides that "[n]one of the funds made available in this Act [making appropriations for the Departments of Labor, Health and Human Services, and Education] may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." It also defines "health care entity" to include "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan."[6]

The Patient Protection and Affordable Care Act (ACA)

Section 1553 of the federal ACA provides that the federal government, any state or local government, and any health care provider that receives federal funding under the ACA, or any health plan created under the ACA, may not subject an individual or health care entity to discrimination on the grounds that the individual or entity does not provide services for the purpose of causing or assisting in the death of any individual, including through assisted suicide, euthanasia, and mercy killing.

Section 1303 provides that a state may choose to prohibit abortion coverage in its qualified health plans and that such a plan is not required to provide abortion coverage as part of its "essential health benefits." However, a qualified health plan that declines to provide abortion coverage must provide notice of this exclusion to potential enrollees, and no qualified health plan may discriminate against any health care provider or facility because it refuses to provide, pay for, cover, or refer for abortions. Section 1303 also states that nothing in the ACA shall be construed to preempt state laws on abortion or federal laws on conscience protection, willingness or refusal to provide abortion, and discrimination based on that willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion, or to relieve health care providers of their obligations to provide emergency services under federal or state laws, including the Emergency Medical Treatment and Labor Act.[7]

[4] *Supra* note 2.
[5] Public Law 108-447, 118 Stat. 2809, 3163 (Dec. 8, 2004)
[6] *Supra* note 2.
[7] *Supra* note 2.

State Medical Conscience Laws

According to the Guttmacher Institute:

- Forty-six states allow some health care providers to refuse to provide abortion services.
  - All of these states permit individual health care providers to refuse to provide abortion services.
  - Forty-four states allow health care institutions to refuse to provide abortion services;
  - Thirteen limit the exemption to private health care institutions; and
  - One state allows only religious health care entities to refuse to provide such services.
- Twelve states allow some health care providers to refuse to provide services related to contraception.
  - Nine states allow individual health care providers to refuse to provide services related to contraception.
  - Six states explicitly permit pharmacists to refuse to dispense contraceptives. (Six additional states have broad refusal clauses that do not specifically include pharmacists, but may apply to them.)
  - Eight states allow health care institutions to refuse to provide services related to contraception; and
  - Five states limit the exemption to private entities.
- Eighteen states allow some health care providers to refuse to provide sterilization services.
  - Seventeen states allow individual health care providers to refuse to provide sterilization services.
  - Sixteen states allow health care institutions to refuse to provide sterilization services;
  - Four limit the exemption to private entities.[8]

Freedom of Speech

"Congress shall make no law … abridging the freedom of speech."[9]

The First Amendment of the U.S. Constitution protects the right to freedom of expression from government interference. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[10] "[T]he First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well."[11]

It is well established that a government regulation based on the content of speech is presumptively invalid and will be upheld only if it is necessary to advance a compelling governmental interest, precisely tailored to serve that interest, and is the least restrictive means

[8] For details, please see: Refusing to Provide Health Services, Guttmacher Institute, Updated March 1, 2023, available at https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services, (last visited April 1, 2023).
[9] U.S. CONST. amend. I.
[10] *See De Jonge v. Oregon*, 299 U.S. 353, 364–65(1937) (incorporating right of assembly); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating right of freedom of speech).
[11] *Douglas v. City of Jeannette (Pennsylvania)*, 319 U.S. 157, 179, (1943) (Jackson, J., concurring in result).

available for establishing that interest.[12] The government bears the burden of demonstrating the constitutionality of any such content-based regulation.[13] The U.S. Supreme Court has noted that

> Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.[14]

With regard to speech made on Internet platforms, the Supreme Court has stated, "We agree with [the District Court's] conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[15]

Professional Speech

In 2018, the U.S. Supreme Court issued an opinion underscoring the concept that professional speech is not a separate category of speech that falls outside the protection of First Amendment freedom of speech. The Court stated that the professional speech of individuals who perform personalized services that require a professional license from the state is not exempt from the rule that content-based regulations of speech are subject to strict scrutiny.[16] Justice Clarence Thomas delivered the opinion of the court, writing

> The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information. … When the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.[17]

III. Effect of Proposed Changes:

Medical Conscience Provisions

SB 1580 creates s. 381.00321, F.S., to provide rights of conscience for health care providers and health care payors.

Definitions

The bill defines the following terms:

- "Adverse action" to mean the discharge, transfer, demotion, discipline, suspension, exclusion, revocation of privileges, withholding of bonuses, or reduction in salary or benefits; any action that may negatively impact the advancement or graduation of a student,

[12] *Ashcroft v. Am. Civil Liberties Union,* 542 U.S. 656, 665-66 (2004).
[13] *Id.* at 660.
[14] See *U.S. v. Alvarez*, 567 U.S. 709, 719 and *New York Times v. Sullivan*, 376 U.S. 254 (1964).
[15] *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).
[16] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2365 (2018).
[17] *Id.* at 234.

including, but not limited to, the withholding of scholarship funds; or any other negative action taken against a health care provider.

- "Agency" to mean the Agency for Health Care Administration (AHCA).
- "Business entity" has the same meaning as provided in s. 606.03, F.S. The term also includes a charitable organization as defined in s. 496.404, F.S., and a corporation not for profit as defined in s. 617.01401, F.S.
- "Conscience-based objection" to mean an objection based on a sincerely held religious, moral, or ethical belief. Conscience with respect to entities is determined by reference to the entities' governing documents; any published ethical, moral, or religious guidelines or directives; mission statements; constitutions; articles of incorporation; bylaws; policies; or regulations.
- "Department" to mean the Department of Health (DOH).
- "Educational institution" to mean a public or private school, college, or university.
- "Governmental entity" to mean the state or any political subdivision thereof, including the executive, legislative, and judicial branches of government; the independent establishments of the state, counties, municipalities, districts, authorities, boards, or commissions; and any agencies that are subject to chapter 286, F.S., including, but not limited to, the department and any boards under the jurisdiction of the department.
- "Health care payor" to mean a health insurer, an employer, a health care sharing organization, a health plan, a health maintenance organization, a management services organization, or any other entity that pays for, or arranges for the payment of, any health care service, whether such payment is in whole or in part.
- "Health care provider" means:
  - Any person or entity licensed under chs. 394, 400, 401, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 478, 480, 483, 484, 486, 490, or 491, F.S.
  - Parts I, II, III, IV, V, X, XIII, or XIV of chapter 468;
  - Any provider as defined in s. 408.803;
  - A continuing care facility licensed under chapter 651;
  - A pharmacy permitted under chapter 465; or
  - Any student enrolled in an educational institution who is seeking to become a health care provider.
- "Health care service" to mean medical research or medical procedures, medical care, or medical services provided to any patient at any time over the entire course of treatment, including, but not limited to, testing; diagnosis; referral; dispensing or administering any drug, medication, or device; psychological therapy or counseling; research; prognosis; therapy; record-making procedures; notes related to treatment; set up or performance of a surgery or procedure; or any other care or services performed or provided by any health care provider.
- "Participate" or "participation" to mean to pay for or take part in any way in providing or facilitating any health care service or any part of such service.

Right to Opt-out

The bill provides that a health care provider or health care payor has the right to opt-out of participation in or payment for any health care service on the basis of a conscience-based objection (CBO). A health care provider must, at the time of the CBO or as soon as practicable thereafter, provide written notice of his or her CBO to the health care provider's supervisor or

employer, if applicable, or document his or her CBO to a particular health care service in the patient's medical file. A health care provider who is a student must provide written notice of his or her CBO to the educational institution at the time the CBO is made or as soon as practicable thereafter.

The bill limits the exercise of the right of medical conscience to CBOs to a specific health care service and prohibits a health care payor from declining to pay for a health care service it is contractually obligated to cover during a plan year. The bill specifies that these provisions may not be construed to waive or modify any duty a health care provider or health care payor may have to provide or pay for other health care services that do not violate the rights of conscience or any duty to provide any informed consent required by law.

Prohibition on Discrimination

The bill prohibits a person, a governmental entity, a business entity, or an educational institution from discriminating against any health care provider or health care payor because the health care provider or health care payor declined to participate in or pay for a health care service on the basis of a CBO.

Whistleblower Protections

The bill also prohibits a health care provider or health care payor from being discriminated against with respect to:

- Providing or causing to be provided, or intending to provide or cause to be provided, information relating to any violation of or any act or omission the health care provider or health care payor reasonably believes to be a violation of any provision of the bill to his or her employer, the Attorney General, the DOH, any other state agency charged with protecting health care rights of conscience, the HHS, the Office of Civil Rights, or any other federal agency charged with protecting health care rights of conscience;
- Testifying or intending to testify in a proceeding concerning such violation; or
- Assisting or participating in or intending to assist or participate in such a proceeding.

Under the bill, unless the disclosure is specifically prohibited by law, a health care provider or health care payor may not be discriminated against in any manner for disclosing information that the health care provider or health care payor reasonably believes constitutes:

- A violation of any law, rule, or regulation;
- A violation of any ethical guidelines for the provision of any medical procedure or service; or
- A practice or method of treatment that may put patient health at risk or present a substantial and specific danger to public health or safety.

Emergency Treatment

The bill specifies that nothing in these provisions may be construed to override any requirement to provide emergency medical treatment in accordance with federal or state law.

Free Speech Provisions

SB 1580 creates s. 456.61, F.S., to prohibit a board, or the DOH if there is no board, from taking disciplinary action against a health care practitioner's license, or denying a license to an individual, solely because the individual has spoken or written publicly about a health care service, including, but not limited to, speech through the use of a social media platform as defined in s. 501.2041, F.S., provided that the individual is not using such speech or written communication to provide medical advice or treatment to a specific patient or patients, and provided that such speech or written communication does not separately violate any other applicable law or rule.

Severability

The bill provides that if any provision of the bill, once enacted, or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications which can be given effect without the invalid provision or application, and to this end the provisions of the bill are severable.

Effective Date

The bill provides an effective date of July 1, 2023.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 381.00321 and 456.61.

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.