

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 1596

INTRODUCER: Senator Garcia

SUBJECT: Provider Accountability

DATE: March 24, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Brown	HP	Pre-meeting
2.			CF	
3.			RC	

I. Summary:

SB 1596 amends ss. 408.809¹ and 435.04², F.S., to add additional crimes to the list of offenses that will disqualify a person from employment after undergoing a background screening. The bill also amends nursing home residents' rights to specify that a nursing home resident has the right to be free from sexual abuse, neglect, and exploitation. Lastly, the bill amends s. 408.812, F.S., to create a new cause of action to pursue an injunction against unlicensed activity by persons or entities who are providing services for which a license is required under ch. 408, F.S.

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

II. Present Situation:

Unlicensed Activity

Section 408.812, F.S., prohibits any person or entity from offering or advertising services that require a license under Part II of ch. 408, F.S., authorizing statutes, or applicable rules to the public without obtaining a valid license from the Agency for Health Care Administration (AHCA). The section allows the AHCA, or any state attorney, to bring action for an injunction to halt the unlicensed activity or enjoin further operation or maintenance of the unlicensed provider until compliance with laws and rules has been demonstrated to the satisfaction of the AHCA. If a person or entity fails to cease operation after receiving notice from the AHCA, the person or entity is subject to penalties including a fine of up to \$1,000 per each day of noncompliance, the revocation of other licenses if the unlicensed entity has an interest in other licensed providers, and the imposition of the same licensure violations that a regularly licensed provider would incur if a condition exists that poses a threat to the health, safety, or welfare of a client.

¹ Background screening specific to health care providers regulated by the Agency for Health Care Administration under ch. 408, F.S.

² General provisions for level 2 background screening.

Limitations of the Current Statutory Scheme

Under the current regulatory scheme, where the unlicensed operation of a health care provider regulated by the AHCA is asserted, the AHCA may inspect the identified location to determine if the operators are providing services therein that meet the definition of a facility requiring licensure. Should the operator not provide consent for the inspection, the circuit court is empowered to issue an inspection warrant.

If the AHCA determines, during an inspection of an unlicensed provider, that the operator is in fact engaging in unlicensed activity, the AHCA's sole immediate action is to issue a notice directed to the operator indicating that the operator is engaging in unlicensed activity. Thereafter, the AHCA may conduct a subsequent inspection to determine if the unlicensed activity has ceased or continues. Should the operator be found to have continued the unlicensed activity on this second inspection, the AHCA may proceed to impose administrative fines of \$1,000 per day.

Though the statutory scheme authorizes the AHCA to seek injunctive relief, the principal of exhaustion of administrative remedies prior to seeking judicial relief essentially renders this provision ineffective. The imposition of administrative fines invokes the Administrative Procedure Act in ch. 120, F.S., and its inherent time delays, which does not result in an order, administrative or otherwise, directing the operator to cease the unlicensed activity.

Thus, under the current legislative scheme, the AHCA has no statutory path to assure that unlicensed activity by an operator ceases in a timely manner to protect citizens from the health and safety risks presented by such unlicensed activity.³

Examples of Unlicensed Activity

In addition to other instances of unlicensed activity identified by the AHCA, individuals currently may travel to the state to receive cheaper surgical and recovery options. Lower-cost cosmetic surgeries have created a market for similarly priced post-operative care. "Recovery homes" charge persons to stay and receive care post-surgery. Most recovery homes offer transportation services following surgery, provide beds, and some have nurses on site that can check vital signs.

The AHCA oversees assisted living facilities (ALF), defined as any home or building where housing, meals, and nonmedical services are provided for more than 24 hours to one or more people who are not related to the homeowner or facility manager. The AHCA is typically only made aware of the existence of recovery homes if a complaint is submitted. Since January 2017, the AHCA has cited unlicensed activity a total of 289 times, including 17 times in the first six months of 2022. The AHCA does not currently have the authority to specifically regulate or license post-operative recovery homes.

Since 2017, the number of recovery care home complaints has increased yearly. The recovery home complaints slowly began to escalate in 2018, and into 2019. Various law enforcement

³ AHCA bill analysis for SB 1596, March 21, 2023, on file with Senate Health Policy Committee staff.

agencies, fire department, and code enforcement personnel also began to alert the AHCA of potential unlicensed ALF/recovery home activity.

In 2019 and early 2020, prior to the COVID-19 pandemic, recovery home complaints were approximately three or fewer per month. In 2020, there were 14 unlicensed recovery home investigations with 12 being substantiated as unlicensed ALF's during the pandemic. In 2021, there were 30 unlicensed recovery home investigations with 20 being substantiated as unlicensed ALF's, and in 2022, there were 22 unlicensed recovery home investigations with 17 being substantiated.

As of March 3, 2023, four unlicensed recovery care home investigations have been conducted with three substantiated as unlicensed ALFs. Currently the AHCA has 10 ongoing and/or pending investigations.⁴

Level 2 Background Screening

Section 435.04, F.S., establishes the standards for level 2 background screenings. The section specifies that a background screening under its provisions must include fingerprinting for statewide criminal history records checks through the FDLE and a national criminal history records checks through the FBI, and may include local criminal records checks through local law enforcement agencies. Fingerprints submitted must be submitted electronically to the FDLE, and agencies may contract with one or more vendors to perform all or part of the electronic fingerprinting.

In order to pass a level 2 background screening, an individual being screened may not have been arrested for and awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent and the record has not been sealed or expunged, for any of the offenses listed in the section or similar provisions in other jurisdictions. The section provides additional disqualifying offenses applicable to participation in the Medicaid program.

Section 408.809, F.S., requires that the following persons who are associated with a licensee under Part II of ch. 408, F.S., must pass a level 2 background screening and be rescreened every five years:

- The licensee, if an individual;
- The administrator or a similarly titled person who is responsible for the day-to-day operation of the provider;
- The financial officer or similarly titled individual who is responsible for the financial operation of the licensee or provider;
- Any person who has a controlling interest;
- Any person, as required by authorizing statutes, seeking employment with a licensee or provider who is expected to, or whose responsibilities may require him or her to, provide personal care or services directly to clients or have access to client funds, personal property, or living areas; and

⁴ *Supra* n. 3

- Any person, as required by authorizing statutes, contracting with a licensee or provider whose responsibilities require him or her to provide personal care or personal services directly to clients, or contracting with a licensee or provider, to work 20 hours a week or more who will have access to client funds, personal property, or living areas.

The section also provides a list of disqualifying offenses which will prevent a person from passing the background screening and which is in addition to the disqualifying offenses listed in s. 435.04, F.S.

Exemptions

Section 435.07, F.S., allows heads of agencies to grant an exemption from disqualification for an employee who would be disqualified under s. 435.04, F.S., or other background screening provisions. These exemptions may be granted for:

- Felonies for which at least three years have elapsed since the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court for the disqualifying felony;
- Misdemeanors prohibited under any of the statutes cited in this chapter or under similar statutes of other jurisdictions for which the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court;
- Offenses that were felonies when committed but that are now misdemeanors and for which the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court; or
- Findings of delinquency. For offenses that would be felonies if committed by an adult and the record has not been sealed or expunged, the exemption may not be granted until at least three years have elapsed since the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court for the disqualifying offense.

In order to be granted an exemption, the employee seeking the exemption must provide clear and convincing evidence that he or she should not be disqualified from employment. The employing, or potentially employing, agency may consider crimes committed or that he or she has been arrested for after the disqualifying offense, even if the crime is not itself a disqualifying offense. The decision regarding whether to grant an exemption is subject to the due process provisions in ch. 120, F.S. Additionally, the section specifies that disqualification cannot be removed if the employee is seeking a child care position, if the employee is a sex offender, or if the disqualifying offense is one of a list of specified offenses.

Nursing Home Residents' Rights

Section 400.022, F.S., enumerates a number of rights for residents in a nursing home. The section requires each nursing home to adopt and make public a statement of the rights and responsibilities of residents in the facility. The facility is required to inform a resident of his or her rights and provide a copy of the statement to the resident and each staff member of the facility. The section specifies that a violation of residents' rights is grounds for AHCA licensure

action and that a licensure inspection of the facility must include private informal conversations with a sample of residents to discuss their experiences with respect to residents' rights.

The section specifies that the statement of rights adopted by each facility must include the right for all residents to:

- Civil and religious liberties.
- Private and uncensored communication.
- Present grievances on behalf of themselves or others to the staff or administrator of the facility, to governmental officials, or to any other person; to recommend changes in policies and services to facility personnel; and to join with other residents or individuals within or outside the facility to work for improvements in resident care, free from restraint, interference, coercion, discrimination, or reprisal.
- Organize and participate in resident groups in the facility and the right to have their families meet in the facility with the families of other residents.
- Participate in social, religious, and community activities that do not interfere with the rights of other residents.
- Examine, upon reasonable request, the results of the most recent inspection of the facility conducted by a federal or state agency and any plan of correction in effect with respect to the facility.
- Manage their own financial affairs or to delegate such responsibility to the licensee, but only to the extent of the funds held in trust by the licensee for a resident.
- Be fully informed, in writing and orally, prior to or at the time of admission and during their stay, of services available in the facility and of related charges for such services.
- Be adequately informed of their medical condition and proposed treatment, unless they are determined to be unable to provide informed consent under Florida law, or the right to be fully informed in advance of any nonemergency changes in care or treatment that may affect their well-being.
- Participate in the planning of all medical treatment, including the right to refuse medication and treatment, unless otherwise indicated by their physician, and to know the consequences of such actions.
- Refuse medication or treatment and to be informed of the consequences of such decisions, unless determined unable to provide informed consent under state law.
- Receive adequate and appropriate health care and protective and support services, including social services; mental health services, if available; planned recreational activities; and therapeutic and rehabilitative services consistent with their resident care plan, with established and recognized practice standards within the community, and with rules as adopted by the AHCA.
- Have privacy in treatment and in caring for personal needs; to close room doors and to have facility personnel knock before entering the room, except in the case of an emergency or unless medically contraindicated; and to security in storing and using personal possessions.
- Be treated courteously, fairly, and with the fullest measure of dignity and to receive a written statement and an oral explanation of the services provided by the licensee, including those required to be offered on an as-needed basis.
- Be free from mental and physical abuse, corporal punishment, extended involuntary seclusion, and from physical and chemical restraints, except those restraints authorized in

writing by a physician for a specified and limited period of time or as are necessitated by an emergency.

- Be transferred only for specified reasons and to have no less than 30 days' notice of a transfer.
- Freedom of choice in selecting a personal physician and other related health care choices.
- Retain and use personal clothing and possessions as space permits, unless to do so would infringe upon the rights of other residents or unless medically contraindicated as documented by a physician in their medical records.
- Have copies of the rules and regulations of the facility and an explanation of the responsibility of all residents to obey all reasonable rules and regulations of the facility and to respect the personal rights and private property of the other residents.
- Receive notice before their room in the facility is changed.
- Be informed of the bed reservation policy for a hospitalization.
- Challenge a decision by the facility to discharge or transfer, for Medicaid or Medicare certified facilities.

III. Effect of Proposed Changes:

Background Screening

SB 1596 amends ss. 408.809 and 435.04, F.S., to add to the lists of disqualifying offenses in those sections. The following offenses are added to s. 408.809, F.S., for violations of:

- Section 414.39, F.S., relating to fraud, if the offense was a felony.
- Section 815.04, F.S., relating to offenses against intellectual property.
- Section 815.06, F.S., relating to offenses against users of computers, computer systems, computer networks, and electronic devices.
- Section 831.29, F.S., relating to making or having instruments and material for counterfeiting driver licenses or identification cards.
- Section 831.311, F.S., relating to unlawful sale, manufacture, alteration, delivery, uttering, or possession of counterfeit-resistant prescription blanks for controlled substances.
- Section 836.05, F.S., relating to threats and extortion.
- Section 836.10, F.S., relating to written or electronic threats to kill or do bodily injury or conduct a mass shooting or an act of terrorism.
- Section 873.01, F.S., relating to the prohibited purchase or sale of human organs and tissue.

The following offenses are added to s. 435.04, F.S., for violations of:

- Section 39.205, F.S., relating to failure to report child abuse, abandonment, or neglect.
- Section 316.193(3)(c)3., F.S., relating to DUI manslaughter.
- Section 787.06, F.S., relating to human trafficking.
- Section 787.07, F.S., relating to human smuggling.
- Section 790.166, F.S., relating to the manufacture, possession, sale, delivery, display, use, or attempted or threatened use of weapons of mass destruction or hoax weapons of mass destruction.
- Section 838.015, F.S., relating to bribery.
- Section 859.01, F.S., relating to poisoning food or water.

- Section 873.01, F.S., relating to the prohibited purchase or sale of human organs and tissue.
- Section 876.32, F.S., relating to treason.
- Section 951.22, F.S., relating to county detention facilities and contraband articles.

Unlicensed Activity

The bill amends s. 408.812, F.S., to add a new cause of action for an ex parte injunction against continued unlicensed activity. The bill specifies that the AHCA may petition the circuit court for an ex parte injunction against continued unlicensed activity when AHCA personnel have verified, through an onsite inspection, that a person or entity is advertising, offering, or providing services for which licensure is required under this part and applicable statutes and such person or entity has previously received notification from the AHCA to discontinue such activity.

A sworn petition seeking the issuance of an ex parte injunction against continued unlicensed activity must include:

- The location of the unlicensed activity;
- The ownership and operators of the unlicensed provider;
- Identification of the service provider type for which licensure is required under the applicable statutes;
- Specific facts supporting the conclusion that the respondent engaged in unlicensed activity, specifying the date, time, and location at which the unlicensed provider was notified to discontinue such activity;
- Whether the respondent prohibited the agency from conducting a subsequent investigation to determine compliance;
- Any previous injunctive relief granted against the respondent; and
- Any previous AHCA determinations that the respondent was previously identified as engaging in unlicensed activity.

The bill prohibits a bond from being required by the court for the issuance of the injunction and also prohibits, except as provided in s. 90.204,⁵ F.S., evidence being used at the hearing other than verified pleadings or affidavits by AHCA personnel or others with first-hand knowledge of the alleged unlicensed activity, unless the respondent appears at the hearing. Any denial of a petition must be by written order noting the legal grounds for denial. The bill specifies that nothing in the subsection affects the AHCA's right to promptly amend any petition or otherwise be heard in person consistent with the Florida Rules of Civil Procedure.

Should the court find that the respondent is engaged in unlicensed activity, the bill allows the court to grant an ex parte temporary injunction, pending a full hearing, and other relief the court deems appropriate such as an injunction restraining the respondent from advertising, offering, or providing services for which licensure is required under this part and applicable statutes, and requiring the respondent to provide agency personnel full access to facility personnel, records, and clients for a future inspection of the premises. An ex parte injunction must be effective for a fixed period not to exceed 30 days and must be served by the sheriff of the county in which the respondent's activities are conducted.

⁵ Relating to the determination of propriety of judicial notice and nature of matter noticed.

The AHCA is required to inspect the premises within 20 days after the injunction is issued to verify the respondent's compliance with the injunction. If the respondent is found to have complied with the temporary injunction, the AHCA must voluntarily dismiss its injunction action. If the AHCA finds that unlicensed activity has continued in apparent violation of the temporary injunction, the AHCA may file a petition for permanent injunction within 10 days after such discovery, at which time a full hearing must be set as soon as practicable. Contemporaneous with the filing of a petition for permanent injunction, the AHCA may move for an extension of the ex parte injunction until disposition of the permanent injunction proceedings.

The bill specifies that:

- Remedies provided in the bill are not exclusive but a supplement to any other administrative or criminal remedies for unlicensed activity;
- The AHCA is not required to exhaust its administrative remedies before seeking the injunctive relief provided by this subsection; and
- The AHCA may provide any records of its inspections to local law enforcement agencies or state attorney offices upon request and without redaction.

Residents' Rights in Nursing Homes

The bill amends s. 400.022, F.S., to add that a resident in a nursing home has the right to be free from sexual abuse, neglect, and exploitation.

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:

SB 1596 may have a negative fiscal impact on a person who is employed, or is seeking employment, with a provider and who would fail a background screening based on one of the added disqualifying offenses if the person would not have failed such background screening otherwise.

C. Government Sector Impact:

The AHCA's analysis of SB 1596 does not indicate that the bill will have a fiscal impact on the AHCA.⁶

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 400.022, 408.809, 408.812, and 435.04.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁶ *Supra* n. 3