

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/CS/HB 387 Physician Certifications for the Medical Use of Marijuana

**SPONSOR(S):** Health & Human Services Committee and Healthcare Regulation Subcommittee, Roach and others

**TIED BILLS:** IDEN./SIM. **BILLS:** CS/SB 344

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**FINAL HOUSE FLOOR ACTION:** 105 Y's 8 N's **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/CS/HB 387 passed the House on May 4, 2023, as amended.

Section 381.986, F.S., authorizes certain patients to obtain medical marijuana from Medical Marijuana Treatment Centers (MMTC). To obtain medical marijuana a qualified patient must have a physician certification from a qualified physician and an identification card from the Department of Health (DOH). To certify a patient, a qualified physician must perform a physical examination and determine that the patient has a qualifying medical condition and that medical marijuana would likely outweigh the health risks to the patient. A qualified physician must be physically present in the same room when conducting the examination and must conduct an examination before the initial certification and any subsequent renewals.

In Florida, telehealth may be used by a Florida-licensed health care practitioner, a practitioner licensed under a multistate health care licensure compact of which Florida is a member, or a registered out-of-state-health care provider. Current law requires health care providers to adhere to the same standard of care for telehealth as is required for in-person treatment.

In response to the COVID-19 pandemic, on March 16, 2020, the State Surgeon General issued Emergency Order 20-002, authorizing qualified physicians to use telehealth to renew physician certifications of existing medical marijuana patients. The Emergency Order expired June 30, 2020, thus restoring the in-person examination requirement.

The bill authorizes a qualified physician who performs an in-person examination of a patient for the initial physician certification to use telehealth to conduct subsequent examinations of that patient for renewals. The bill also authorizes DOH to suspend the registration of a qualified physician for up to 2 years if the qualified physician violates the requirements of s. 381.986, F.S., or provides, advertises, or markets telehealth services before July 1, 2023.

Under current law, DOH must issue a single license to a class member of *Pigford v. Glickman/In Re Black Farmers* using a competitive application process. The bill requires DOH to issue medical marijuana licenses to all applicants for that license that:

- Received a DOH notice of intent to deny or approve, and the application had no deficiencies; or
- Received a DOH final determination in an administrative challenge that the applicant met all requirements for licensure, even if the applicant died during the challenge process; or
- Had deficiencies in its application but cures such deficiencies within 90 days.

The bill has no fiscal impact on state or local government.

The bill was approved by the Governor on June 26, 2023, ch. 2023-292, L.O.F., and will become effective on July 1, 2023.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Marijuana for Medical Use

Section 381.986, F.S., authorizes patients with any of the following debilitating medical conditions to obtain medical marijuana from Medical Marijuana Treatment Centers (MMTC):

- Cancer
- Epilepsy
- Glaucoma
- Positive status for human immunodeficiency virus
- Acquired immune deficiency syndrome
- Post-traumatic stress disorder
- Amyotrophic lateral sclerosis
- Crohn's disease
- Parkinson's disease
- Multiple sclerosis
- Medical conditions of the same kind or class as or comparable to those enumerated above

To obtain marijuana for medical use from a MMTC, and maintain the immunity from criminal prosecution, the patient must obtain a physician certification from a qualified physician<sup>1</sup> and an identification card from DOH.

#### *Physician Certification – Use of Telehealth*

To certify a patient for medical use of marijuana, a qualified physician must conduct a physical examination of the patient and determine that the patient has a qualifying medical condition and that medical marijuana would likely outweigh the health risks to the patient.<sup>2</sup> A qualified physician must be physically present in the same room when conducting the examination on a qualified patient.<sup>3</sup> The physician must evaluate an existing patient at least once every 30 weeks before issuing a renewal physician certification.<sup>4</sup> Under current law, the physician must conduct the in-person<sup>5</sup> physical examination of the patient to issue the initial certification and any subsequent renewal certifications.<sup>6</sup>

In response to the COVID-19 pandemic, on March 16, 2020, the State Surgeon General issued Emergency Order 20-002, authorizing qualified physicians to conduct examinations using telehealth to renew physician certifications of existing qualified patients. The Emergency Order expired on June 30, 2020, thus requiring in-person examinations for renewal of physician certifications.

As of May 19, 2023, there are 2,457 qualified physicians and 818,679 qualified patients.<sup>7</sup>

#### *Medical Marijuana Treatment Center Licensure*

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<sup>1</sup> To certify patients for medical use of marijuana, a physician must hold an active, unrestricted license as an allopathic physician under chapter 458 or as an osteopathic physician under chapter 459 and comply with certain physician education requirements. See ss. 381.986(1)(m), F.S. and 381.986(3)(a), F.S.

<sup>2</sup> S. 381.986, F.S.

<sup>3</sup> S. 381.986(a), F.S.

<sup>4</sup> S. 381.986(4)(g), F.S.

<sup>5</sup> This means that the physician must be physically present and in the same room as the patient. S. 381.986(4)(a)1, F.S.

<sup>6</sup> S. 381.986, F.S.

<sup>7</sup> Department of Health, *Office of Medical Marijuana Use Weekly Updates, May 19, 2023*, available at [https://knowthefactsmmj.com/wp-content/uploads/ommu\\_updates/2023/05/1923-OMMU-Update.pdf](https://knowthefactsmmj.com/wp-content/uploads/ommu_updates/2023/05/1923-OMMU-Update.pdf) (last visited May 22, 2023).

Current law requires the Department of Health (DOH) to grant MMTC licenses to dispensing organizations previously licensed under the Compassionate Medical Cannabis Act (CMCA)<sup>8</sup> by July 3, 2017.<sup>9</sup> Current law also requires DOH to grant ten additional MMTC licenses.<sup>10</sup> Among these, licenses were to be awarded by August 1, 2017, to any dispensing organization<sup>11</sup> applicant denied under the CMCA whose application was scored by DOH and had one or more administrative or legal challenges pending as of January 1, 2017, or had a final ranking within one point of the highest final ranking applicant in its region, and proves to DOH that it has the infrastructure and ability to begin cultivating marijuana within 30 days after registration as a MMTC.<sup>12</sup> The remaining licenses were to be awarded by October 3, 2017, one of which must be awarded to an applicant that is a recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011), using a competitive application process.<sup>13</sup>

Current law also requires DOH to issue 4 additional licenses on a slot-limited, competitive basis within 6 months of the medical marijuana registry reaching 100,000 active qualified patients and for every 100,000 patients added thereafter.<sup>14</sup> There are currently over 800,000 active qualified patients in the registry. Thus, DOH should have issued 26 additional MMTC licenses; however, due to various lawsuits and administrative challenges, DOH has not issued any licenses using the competitive application process.

In October 2021, DOH adopted an application rule establishing the requirements for the competitive application process for the one *Pigford/In Re Black Farmers* litigants medical marijuana license.<sup>15</sup> In December 2021, DOH adopted a rule establishing March 21-25, 2022, as the application window for this license.<sup>16</sup> There were 12 applicants for this license<sup>17</sup> and, in September 2022, DOH issued its notice of intent to award. The 11 unsuccessful applicants, who were denied for reasons varying from simply not have the highest score to submitting incomplete applications, challenged the notice of intent. To date, DOH has not issued the *Pigford/In Re Black Farmers* litigant license as the issue remains in various stages of legal and administrative challenges.

In December 2022, DOH adopted an application rule for the non-*Pigford/In Re Black Farmers* litigants medical marijuana licenses with an application window of April 24-28, 2023.<sup>18</sup> DOH has indicated that it will not issue those additional licenses until the *Pigford/In Re Black Farmers* litigants medical marijuana license litigation has been resolved.

## Telehealth

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<sup>8</sup> The CMCA was enacted in 2014, prior to enactment of Art. X, Sec. 29 of the Florida Constitution which established Florida's current medical marijuana program.

<sup>9</sup> Section 381.986(8)(a)1, F.S.

<sup>10</sup> Section 381.986(8)(a)2, F.S.

<sup>11</sup> Dispensing organizations were the equivalent to MMTCs under the CMCA.

<sup>12</sup> Section 381.986(8)(a)2.a, F.S.

<sup>13</sup> Section 381.986(8)(a)2.b, F.S. These cases were class action discrimination suits between the U.S. Department of Agriculture (USDA) and black farmers. The suits alleged that USDA had discriminated against black farmers on the basis of race and failed to investigate or properly respond to complaints from 1983 to 1997. Settlement was reached in *Pigford v. Glickman* in 1999, for \$1.06 billion and was reached in *In re Black Farmers Discrimination Litigation* in 2010, for \$1.25 billion. *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, available at <https://www.everycrsreport.com/reports/RS20430.html> (last visited May, 17, 2023).

<sup>14</sup> Section 381.986(8)(a)4, F.S.

<sup>15</sup> Rule 64ER21-16, F.A.C.

<sup>16</sup> Rule 64ER21-19, F.A.C.

<sup>17</sup> *2022 Pigford/Black Farmers Litigation MMTC Application Process*, Florida Department of Health, Office of Medical Marijuana Use, available at <https://knowthefactsmmj.com/mmtc/2022-pigford-bfl-mm-tc-application-process/> (last visited May 17, 2023).

<sup>18</sup> F.A.C. Rules 64ER22-9 and 64ER23-1. There are currently 21 MMTC licenses available to be issued by DOH.

Telehealth is a mechanism for delivery of health care services using advanced information and communication technologies to exchange valid information for diagnosis, treatment and prevention of disease and injuries, research and evaluation.<sup>19</sup> Under current law, telehealth is defined as the use of synchronous or asynchronous telecommunications technology by a telehealth provider to provide health care services, including, but not limited to:<sup>20</sup>

- Assessment, diagnosis, consultation, treatment, and monitoring of a patient;
- Transfer of medical data;
- Patient and professional health-related education;
- Public health services; and
- Health administration.

### *Service Providers*

Health care services may be provided via telehealth by a Florida-licensed health care practitioner, a practitioner licensed under a multistate health care licensure compact of which Florida is a member,<sup>21</sup> or a registered out-of-state-health care provider.<sup>22</sup> Out-of-state telehealth providers must register biennially with DOH or the applicable board to provide telehealth services, within the relevant scope of practice established by Florida law and rule, to patients in this state.

### *Standards of Practice*

Current law sets the standard of care for telehealth providers at the same level as the standard of care for health care practitioners or health care providers providing in-person health care services to patients in this state. This ensures that a patient receives the same standard of care irrespective of the modality used by the health care professional to deliver the services. A patient receiving telehealth services may be in any location at the time services are rendered and a telehealth provider may be in any location when providing telehealth services to a patient.<sup>23</sup>

Practitioners may perform a patient evaluation using telehealth. A practitioner using telehealth is not required to research a patient's medical history or conduct a physical examination of the patient before providing telehealth services to the patient if the telehealth provider is capable of conducting a patient evaluation in a manner consistent with the applicable standard of care sufficient to diagnose and treat the patient when using telehealth.

## **Effect of the Bill**

### Medical Marijuana Physician Certification – Use of Telehealth

The bill authorizes a qualified physician who performs an in-person examination of a patient for the initial physician certification to use telehealth to conduct subsequent examinations of that patient for renewal physician certifications. The bill also authorizes DOH to suspend the registration of a qualified physician for up to 2 years if the qualified physician violates the requirements of s. 381.986, F.S., or provides, advertises, or markets telehealth services before July 1, 2023.

### Medical Marijuana Treatment Center Licensure: *Pigford/In Re Black Farmers*

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<sup>19</sup> World Health Organization, *Telemedicine: Opportunities and Developments in Member States, Global Observatory for Ehealth Series- Volume 2*, Section 1.2, page 9 (2010), available at [http://www.who.int/goe/publications/goe\\_telemedicine\\_2010.pdf](http://www.who.int/goe/publications/goe_telemedicine_2010.pdf) (last visited May 17, 2023).

<sup>20</sup> S. 456.47(1), F.S.

<sup>21</sup> Florida is a member of the Nurse Licensure Compact. See s. 464.0095, F.S.

<sup>22</sup> S. 456.47(4), F.S.

<sup>23</sup> S. 456.47(2), F.S.

The bill requires DOH to issue medical marijuana licenses to applicants for the *Pigford/In Re Black Farmers* litigants medical marijuana license for all applicants that:

- Received a notice from DOH of its intent to deny or approve the application and the application had no deficiencies; or
- Received a final determination from DOH in an administrative challenge that applicant met all requirements for licensure, even if the applicant died during the challenge process; or
- Had deficiencies in its application but cures such deficiencies within 90 days.

It is likely that the majority, if not all, of the 11 unsuccessful applicants will be awarded a MMTC license under these provisions. The bill provides that licenses awarded under the bill's provisions do not affect the number of licenses currently available (26) but will reduce the number of licenses available when the active qualified patient population crosses the additional 100,000 patient threshold in the future. For example, there will be an additional 12 licenses available when the patient population reaches 1.1 million. If all 11 unsuccessful applicants are awarded licenses then there would only be 1 additional license available when patient population reaches 1.1 million.

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

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

The state will likely see a decrease in litigation costs associated with the 11 challenges to the *Pigford/In Re Black Farmers* MMTC license as these individuals will likely qualify for a license under the bill's provisions.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

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

Any of the 11 unsuccessful *Pigford v. Glickman/In Re Black Farmers* MMTC license applicants who obtain a license under the bill's provision will realize the economic benefits of obtaining a MMTC license.

### D. FISCAL COMMENTS:

None.