

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 1487

Licensure of Home Health Agencies, Home Medical

Equipment Providers, and Health Care Clinics

SPONSOR(S): Health & Family Services Policy Council, Health Care Regulation Policy Committee, Rivera

TIED BILLS:

IDEN./SIM. BILLS: SB 2658

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Health Care Regulation Policy Committee	7 Y, 0 N, As CS	Calamas	Calamas
2)	Health & Family Services Policy Council	19 Y, 0 N, As CS	Lowell	Gormley
3)	Full Appropriations Council on General Government & Health Care	(ref. removed)		
4)	Policy Council	22 Y, 0 N, As CS	Phillips	Hogge
5)				

SUMMARY ANALYSIS

The CS/CS House Bill 1487 provides legislative intent stating that increased fraud and abuse in the health care delivery system necessitates increased licensure standards of home health agencies, home medical equipment providers and health care clinics. The legislative intent identifies specific geographic areas of the state and provides rationale and recommendations to initiate timely initiatives.

The bill designates Miami-Dade County as a "health care fraud area of special concern" related to fraudulent activity by home health agencies, home medical equipment providers and health care clinics. It provides additional standards for applicants for licensure as a home health agency, home medical equipment provider, or health care clinic:

- For an initial, renewal, or change of ownership license a nonimmigrant alien who has a controlling interest must file a surety bond of at least \$500,000 payable to the agency as assurance of conformity with all legal requirements for operation;
- For initial or change of ownership licenses, proof of financial ability to operate and a financial statement meeting certain criteria; and,
- For initial or change of ownership licenses, proof of financial ability to fund startup costs through the break-even operational point.

The bill prohibits the Agency for Health Care Administration (AHCA) from issuing new licenses for one year in counties with a ratio of one (1) license per 1,199 or fewer people age 65 or older. The bill allows new licenses in those counties for applications received before July 1, 2009, by applicants who have applied for accreditation before May 1, 2009, by an accrediting organization approved by AHCA.

The bill creates new criminal penalties, by making the following offenses third degree felonies:

- Offering skilled services requiring licensure as a home health agency, home medical equipment provider, or health care clinic;
- Knowingly filing a false or misleading license or renewal application or submitting false or misleading information related to an application or AHCA rule; and,
- Conspiracy to violate the provisions of the enhanced licensure requirements in s. 408.8065, F.S.

The bill has an insignificant, indeterminate effect on state government (see II. D. Fiscal Comments).

The bill provides an effective date of July 1, 2009.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1487f.PC.doc

DATE: 4/22/2009

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Home Health Agency Licensure and Regulation

Home health agencies are organizations that provide home health services and staffing services. Home health services are health and medical services and medical supplies furnished to an individual in the individual's home or place of residence. The services include: Nursing care; physical, occupational, respiratory, or speech therapy; home health aide services (assistance with daily living such as bathing, dressing, eating, personal hygiene, and ambulation); dietetics and nutrition practice and nutrition counseling; and medical supplies, restricted to drugs and biologicals prescribed by a physician.¹

Home health agency personnel are employed by or under contract with a home health agency. Staffing services are provided to health care facilities or other business entities on a temporary basis by licensed health care personnel and by certified nursing assistants and home health aides who are employed by, or work under the auspices of, a licensed home health agency.²

Home health agencies are organizations licensed and regulated by the Agency for Health Care Administration (AHCA). The licensure requirements for home health agencies are found in the general provisions of Part II of Chapter 408, F.S., the specific home health agency provisions of Part III of ch. 400, F.S., and ch. 59A-8, Florida Administration Code (F.A.C.)

In 2008, the Legislature significantly strengthened the home health agency licensure requirements to address fraud and abuse in the Medicaid and Medicare programs.³ To obtain a home health agency license, an applicant must:

- Submit an application under oath which includes the name, address, social security number and federal employer identification number or taxpayer identification number of the applicant and each controlling interest,⁴ and the name of the person who will manage the provider;⁵

¹ Section 400.462(13), F.S.

² Section 400.462(25), F.S.

³ House Bill 7083 (2008); ch. 2008-246 Laws Of Florida.

⁴ "Controlling interests" are the applicants, members of the board of directors, and persons controlling five percent or greater ownership interest in the applicant entity or in the applicant's contracted management entity. Section 408.802, F.S.

⁵ Sections 408.866(1) and 408.803(7), F.S.

- Submit to a Level 2 criminal background screening of the administrator, the financial officer, and (if AHCA has reason to believe they have been convicted of a prohibited offense), controlling interests;⁶
- Disclose all ownership interests in other health care entities held by controlling interests;⁷
- Provide a list of services to be provided, and the number and discipline of professional staff ;⁸
- Provide a business plan identifying methods for obtaining patients and recruiting and maintaining staff;⁹
- Provide proof of financial ability to operate;¹⁰
- Submit proof of professional and commercial liability insurance of not less than \$250,000 per claim;¹¹
- Provide proof of accreditation by an accrediting organization approved by AHCA;¹² and,
- Remit a licensure fee.

In order to provide proof of financial ability to operate, the applicant must submit estimates of anticipated revenues and expenditures, the basis for financing cash flow, and evidence of contingency funding.¹³ An applicant must also submit a balance sheet, income and expense statement, and statement of cash flows for the first 2 years of operation showing sufficient assets, credit, and projected revenues to cover liabilities and expenses.¹⁴ A controlling interest that withholds any evidence of financial instability commits a second degree misdemeanor.¹⁵ Specifically:

The applicant has demonstrated financial ability to operate if the applicant's assets, credit, and projected revenues meet or exceed projected liabilities and expenses. An applicant may not project an operating margin of 15 percent or greater for any month in the first year of operation.¹⁶

Unlicensed home health agency activity is prohibited. AHCA may enjoin unlicensed activity and may fine unlicensed providers \$1,000 for each day of noncompliance.¹⁷ State attorneys may enjoin unlicensed providers.¹⁸ In addition, if persons involved in unlicensed home health agency activity do not cease operations within 10 days after receiving notice from AHCA, they commit a second degree misdemeanor each day they continue the activity.¹⁹

Florida law does not address the legal residency of home health agency applicants. Florida law does not impose caps on the number of home health agency licenses, or define a ratio for the number of licensees per population number. However, the 2008 changes prohibit licensure of an applicant that shares common controlling interest with a home health agency in the same county and within 10 miles of the applicant.²⁰

A home health agency license is valid for 2 years, unless suspended or revoked.²¹ AHCA conducts unannounced licensure surveys every 36 months, unless a home health agency has requested an exemption from state licensure surveys based on accreditation by an approved accrediting organization.²² The Home Health Agency State Regulation Set used in conducting surveys contains

⁶ Section 408.809, F.S.

⁷ Section 408.810(9), F.S.

⁸ Section 400.471, F.S.

⁹ Section 400.471, F.S.

¹⁰ Section 408.810, F.S.

¹¹ Section 400.471, F.S.

¹² Section 400.471, F.S.

¹³ Section 408.810(8), F.S.

¹⁴ Section 400.471(2)(f), F.S.

¹⁵ Section 408.810, F.S.

¹⁶ Section 400.471(2)(f), F.S.

¹⁷ Section 408.812, F.S.

¹⁸ Section 400.464, F.S.

¹⁹ Section 400.464, F.S.

²⁰ Section 400.471, F.S.

²¹ Section 408.808, F.S.

²² Section 400.471(2)(h), F.S., and ch. 59A-8.003(3)(b), F.A.C.

nearly 200 standards and surveyor guidelines, which are based on ch. 59A-8, F.A.C.²³ AHCA also conducts inspections related to complaints. AHCA conducts surveys of Florida licensed home health agencies that are enrolled in Medicaid and Medicare for compliance with federal conditions of participation based on the federal set of survey standards.

Legislative changes in 2008 significantly increased the fine amounts, and made them mandatory, rather than discretionary, for AHCA. Section 400.484, F.S., sets the fine amounts for various classes of deficiencies as follows:

- Class I – \$15,000 (any act, omission, or practice that results in a patient’s death, disablement, or permanent injury, or places a patient at imminent risk of death, disablement, or permanent injury). (Increased from \$5,000 prior to 2008.);
- Class II – \$5,000 (any act, omission, or practice that has a direct adverse effect on the health, safety, or security of a patient). (Increased from \$1,000 prior to 2008.);
- Class III – \$1000 (any act, omission, or practice that has an indirect adverse effect on the health, safety, or security of a patient. The fine may be imposed only for an uncorrected or repeated Class III deficiency). (Increased from \$500 prior to 2008.); and,
- Class IV – \$500 (any act, omission, or practice related to required reports, forms, or documents which does not have the potential of negatively affecting patients. There must be a finding of an uncorrected or repeated class IV deficiency). (Increased from \$200 prior to 2008.).

The 2008 changes also significantly strengthened AHCA’s ability to discipline licensees. AHCA *may* deny, revoke and suspend a license, and may impose administrative fines for any violation of the licensure laws, certain acts harmful to patients, failing to provide at least one service over a 60-day period, knowingly providing home health services in specified facilities unless certain conditions are met, or preparing or maintaining fraudulent patient records. However, as set forth in s. 400.474, F.S., AHCA must impose administrative fines for:

- Falsifying certain documents;
- Fraudulent billing;
- Failing to provide services;
- Providing remuneration for referrals from certain entities or to discharge planners, facility-based staff members, case managers, or third party vendors involved in the discharge process;
- Failing to obtain fair market value for services to residents in assisted living facilities or for staffing services provided to assisted living facilities;
- Failing to provide AHCA, upon request, copies of specified contracts;
- Failing to provide AHCA certain written reports within 15-days after the end of each calendar quarter;
- Providing cash, or its equivalent, to a Medicare or Medicaid beneficiary;
- Having more than one medical director contract or more than one medical director contract and one contract with a mandated physician-specialist;
- Providing remuneration to a physician without a medical director contract; and,
- Providing remuneration specified physicians.

Prior to 2008, AHCA saw significant growth in the number of applications and new licenses of home health care agencies.²⁴ AHCA received 431 new licensure applications for home health agencies during 2007. Two hundred fifty-two (58.5 percent) of those were for new home health agency licenses in Miami-Dade County.²⁵ In Miami-Dade County, the number of licensed home health agencies increased from 216 in August 1999 to 895 as of March 6, 2009, which is a 414 percent increase in licensees in that county.²⁶ According to AHCA, Miami-Dade (population 2.5 million) has about the same number of home health agencies as the entire state of California (population 38 million).²⁷

²³ Agency for Health Care Administration, Home Health Agency State Regulation Set (2009). Available at: http://ahca.myflorida.com/mchq/health_facility_regulation/Home_Care/definitions.shtml#a (last viewed March 15, 2009).

²⁴ See, Florida Senate Interim Project Report 2008-135, November 2007.

²⁵ *Id.*

²⁶ Agency for Health Care Administration: Draft 2009 Bill Analysis & Economic Impact Statement of HB 1487, on file with the Health Care Regulation Policy Committee.

²⁷ Agency for Health Care Administration, “Status Report on the Implementation of HB 7083”, presentation to the Senate Committee on

The number of applications has slowed. In the first six months of 2008, the average number of applications submitted to AHCA was 55 applications per month.²⁸ After the implementation of the 2008 restrictions on licensure, the average fell to 11 applications per month.²⁹ According to AHCA, the accreditation requirement imposed in 2008 has slowed the growth in new licensees: 21 applications were denied in 2008 due to lack of accreditation or failure to prove financial feasibility.³⁰

Home Health Agency Fraud and Abuse

AHCA is the single state agency that administers the state Medicaid plan under federal law.³¹ Under federal law, ACHA is required to pay eligible providers for the provision of certain mandatory services to eligible recipients; however, other services are optional. Home health care services are mandatory services: Florida law requires Medicaid to pay for certain medically-necessary home health care services provided to an eligible Medicaid recipient.³²

Information provided to the House Committee on Health Innovation in 2007 by AHCA and the Office of the Attorney General indicated an increase in AHCA investigations, as well as the number of referrals to the Attorney General's Medicaid Fraud Control Unit (MFCU), related to Medicaid-enrolled home health agencies over the last several years. MFCU opened an average of 7 home health agency cases per year between 2002 and 2004, but opened 17 each year between 2005 and 2007, 70 percent of which were in Miami-Dade County. According to MFCU, fraudulent home health activity includes kickbacks, patient recruiting, and false billing. AHCA's Bureau of Medicaid Program Integrity (MPI) reports that investigations of home health agency providers rose from 47 in FY 2005-2006 to 144 in FY 2006-2007. Identified overpayments are on an upward trend, from about \$10,000 in FY 2004-2005 to about \$1.3 million in FY 2006-2007.

An MPI review of home health Medicaid reimbursement from 2005 to 2007 showed a strong increase in Miami-Dade County. While Miami-Dade has about 20 percent of Florida's Medicaid population and about 33 percent of Florida's residents over the age of 60, 91 percent of the state reimbursement for certain home health services were going to Miami-Dade.³³ MPI and federal partners initiated a focused project on these billing patterns, and found several questionable practices, including:

- Aides allegedly working 20 to 25 hour days;
- Patient brokering by aides;
- Alteration of records;
- Agencies that bill home health services when only housekeeping has been provided;
- Agencies that bill for registered nurse services when a licensed practical nurse is attending;
- Agencies using staffing pools of non-Medicaid approved providers;
- Payment of physicians for referrals;
- Payments to patients (in the form of gifts, services or funds);
- Patients receiving services that are not medically necessary; and,
- Physicians with financial interests in the agencies referring to those entities.³⁴

MPI placed several agencies on prepayment review, recommended contract termination for several home health agencies, made referrals to MFCU for criminal investigation, and made referrals to the Department of Health for health professional licensure action. MPI has seen a 20 percent drop in the

Health and Human Services Appropriations, 2009.

²⁸ *Id.* This number is skewed by a spike in applications submitted in June, 2008, probably by applicants recognizing approval after July 1, 2009, was unlikely. Discounting the month of June, the average number of submissions for the first five months of 2008 was 44. Change of ownership applications were similarly affected: the monthly average dropped from 21 to 6.

²⁹ *Id.*

³⁰ *Id.*

³¹ Sections 409.901(2) and (14), F.S. The Medicaid DME and medical supplies program is authorized by Title XIX of the Social Security Act and 42 C.F.R. Part 440.70. The program was implemented through ch. 409, F.S., and Chapter 59G, F.A.C.

³² Section 400.905, F.S.

³³ Agency for Health Care Administration and Medicaid Fraud Control Unit, Annual Report on The State's Efforts to Control Medicaid Fraud and Abuse FY 2007-2008, 37 (December 2008).

³⁴ *Id.*

type of billing addressed by the project in Miami-Dade County and estimates the project saved the Medicaid program \$5.4 million in FY 2007-2008.³⁵

Licensure of Health Care Clinics

The Agency for Health Care Administration licenses and regulates health care clinics under Part X of ch. 400, F.S., the Health Care Clinic Act (Act). The Act was passed in 2003 to reduce fraud and abuse occurring in the personal injury protection (PIP) insurance system. Section 400.991, F.S., provides licensure requirements to ensure that clinics meet basic standards, and provides administrative oversight. An entity that meets the definition of a “clinic” must be licensed as such and must maintain a valid license with AHCA. Each clinic location must be licensed separately.

To obtain a health care clinic license, an applicant must:³⁶

- Submit an application under oath which includes the name, address, social security number and federal employer identification number or taxpayer identification number of the applicant and each controlling interest,³⁷ and the name of the person who will manage the provider;³⁸
- Provide information on the identity of the owners, the number and profession of medical providers employed, the medical director and the number and discipline of staff employed;³⁹
- Submit to a Level 2 criminal background screening of the medical director or administrator, the financial officer, all licensed health care practitioners working in the clinic, and controlling interests which control 10 percent or more of the interests in the clinic;⁴⁰
- Disclose all ownership interests in other health care entities held by controlling interests;⁴¹
- Provide a list of services to be provided by the clinic, directly or through contracted providers;⁴²
- Provide proof of financial ability to operate a clinic or a \$500,000 surety bond;⁴³
- Have a medical director or clinic director who agrees in writing to accept legal responsibility pursuant to s. 400.9935, F.S., for various activities on behalf of the clinic, including ensuring billing is not fraudulent, taking corrective action if unlawful charges are discovered, and ensuring AHCA has full access to the clinic and its billing records;⁴⁴ and,
- Remit a licensure fee.

In order to provide proof of financial ability to operate, the applicant must submit estimates of anticipated revenues and expenditures, the basis for financing cash flow, and evidence of contingency funding.⁴⁵

The agency may deny, revoke, or suspend a health care clinic license and impose administrative fines of up to \$5,000 per violation pursuant to s. 400.995, F.S.

Entities that do not meet the definition of a “clinic” are exempt from licensure as provided in s. 400.9905(4)(a-l), F.S. These entities may voluntarily apply to AHCA for a certificate of exemption under the act, but are not required to do so. Such providers find it useful to obtain a certificate of exemption to present to an insurance company, particularly a PIP insurer, to prove that the provider is not required to be licensed as a health care clinic. The licensure exemptions do not exempt clinics that do not bill PIP insurers.

³⁵ *Id.*

³⁶ Section 409.991, F.S.

³⁷ “Controlling interests” are the applicants, members of the board of directors, and persons controlling five percent or greater ownership interest in the applicant entity or in the applicant’s contracted management entity. Section 408.802, F.S.

³⁸ Sections 408.866(1), 408.803(7), F.S.

³⁹ Sections 400.991, F.S.

⁴⁰ Section 400.991, F.S. Read with the requirements of section 408.809, F.S., AHCA also has the authority to required background screening of controlling interests which control between 5 and 10 percent of the interests in the clinic if AHCA has reason to believe they have been convicted of a prohibited offense.

⁴¹ Section 408.810(9), F.S.

⁴² Section 400.991, F.S.

⁴³ Section 409.991, F.S.

⁴⁴ Section 409.991, F.S.

⁴⁵ Section 408.810(8), F.S.

Unlicensed health care clinic activity is prohibited. AHCA may enjoin unlicensed activity and may fine unlicensed providers \$1,000 for each day of noncompliance.⁴⁶ Violations of this prohibition also constitute third degree felonies, and second violations constitute second degree felonies.⁴⁷

Florida law does not address the legal residency of health care clinic licensure applicants.

Licensure of Home Medical Equipment Providers

Home Medical Equipment Providers are licensed and regulated by AHCA as home medical equipment providers under Part VII of ch. 400, F.S., and Part II of ch. 408, F.S. Home medical equipment includes any products defined as home medical equipment by the Federal Food and Drug Administration, reimbursed under Medicare Part B Durable Medical Equipment benefits, or reimbursed under the Florida Medicaid durable medical equipment program.⁴⁸

Home medical equipment includes oxygen and related respiratory equipment; manual, motorized, or customized wheelchairs and related seating and positioning, not including prosthetics or orthotics or any splints, braces, or aids custom fabricated by a licensed health care practitioner; motorized scooters; personal transfer systems; and specialty beds, for use by a person with a medical need.⁴⁹

General licensure provisions for various AHCA licensees, including Home Medical Equipment Providers, are found in Part II of ch. 408, F.S. Provisions specific to Home Medical Equipment Providers are found in part VII of ch. 400, F.S. To obtain a Home Medical Equipment Provider license, an applicant must:⁵⁰

- Submit an application under oath which includes the name, address, social security number and federal employer identification number or taxpayer identification number of the applicant and each controlling interest,⁵¹ and the name of the person who will manage the provider;⁵²
- Submit to a Level 2 criminal background screening of the administrator, the financial officer, all personnel who will enter a client's home, and (if AHCA has reason to believe they have been convicted of a prohibited offense) controlling interests;⁵³
- Disclose all ownership interests in other health care entities held by controlling interests;⁵⁴
- Provide information on the equipment and services to be provided;⁵⁵
- Provide a list of contracts with providers and clients;⁵⁶
- Submit proof of financial ability to operate, or a \$50,000 surety bond,⁵⁷ and,
- Remit a licensure fee.

In order to provide proof of financial ability to operate, the applicant must submit estimates of anticipated revenues and expenditures, the basis for financing cash flow, and evidence of contingency funding.⁵⁸ AHCA has rulemaking authority to determine the standards and documentation requirements for proving financial ability to operate. AHCA's rules provide: "If AHCA has reason to believe a provider is financially unstable, the applicant must demonstrate financial ability to operate by

⁴⁶ Section 408.812, F.S.

⁴⁷ Section 400.993, F.S.

⁴⁸ Section 400.925(6), F.S.

⁴⁹ *Id.*

⁵⁰ Sections 408.806, 400.931, 400.953, 408.810, F.S., respectively.

⁵¹ "Controlling interest" are the applicants, members of the board of directors, and persons controlling five percent or greater ownership interest in the applicant entity or in the applicant's contracted management entity. Section 408.802, F.S.

⁵² Sections 408.806(1), 408.803(7), F.S.

⁵³ Sections 408.809, 400.931, F.S.

⁵⁴ Section 408.810(9), F.S.

⁵⁵ Section 400.931, F.S.

⁵⁶ Section 400.931, F.S.

⁵⁷ Section 400.931, F.S.

⁵⁸ Section 408.810(8), F.S.

submitting proof of a current \$50,000 surety bond [. . .] or by submitting AHCA Form 3110-1021⁵⁹ [. . . .]” (emphasis added).⁶⁰

Unlicensed home medical equipment provider activity is prohibited. AHCA may enjoin unlicensed activity and may fine unlicensed providers \$1,000 for each day of noncompliance.⁶¹

AHCA may deny, revoke and suspend a license, and may impose administrative fines (not to exceed \$5,000 per violation) for any violation of the licensure laws and for certain acts harmful to patients.⁶² Florida law prohibits unlicensed activity, authorizes AHCA to fine unlicensed providers \$1,000 for each day of noncompliance, and authorizes state attorneys and AHCA to enjoin unlicensed providers.⁶³ In addition, a controlling interest that withholds any evidence of financial instability commits a second degree misdemeanor.⁶⁴

Florida law does not address legal residency of Home Medical Equipment Provider applicants.

Medicaid Contracting for Medical Equipment and Medical Supply Providers

AHCA is the single state agency that administers the state Medicaid plan under federal law.⁶⁵ Under federal law, ACHA is required to pay eligible providers for the provision of certain mandatory services to eligible recipients; however, other services are optional. Durable medical equipment and supplies (DME) is an optional service which Florida has opted to provide: Florida law authorizes AHCA to pay for certain medically-necessary durable medical equipment and supplies provided to an eligible Medicaid recipient.⁶⁶

Florida law and AHCA rules provide that a DME provider must meet certain criteria to enroll and obtain a contract to be a Medicaid DME provider.⁶⁷ In 2008, the Legislature added to these requirements.⁶⁸ The provider must:

- Be licensed by the local government agency as a business or merchant or provide documentation from the city or county authority that no licensure is required;
- Be licensed by the Department of Health, Board of Orthotists and Prosthetists, if providing orthotics and prosthetic devices;
- Hold a Home Medical Equipment Provider license under Part III of ch. 400, F.S.;
- Comply with all applicable laws relating to qualifications or licensure;
- Have an in-state business location or be located not more than fifty miles from the Florida state line;
- Meet all the general Medicaid provider requirements and qualifications;
- Be fully operational;
- Submit a \$50,000 surety bond for each provider location up to a maximum of five bonds statewide or an aggregate bond of \$250,000 (unless the provider is owned and operated by a governmental entity);
- Pass a site visit (unless the applicant is associated with a pharmacy or rural health clinic, or provides only orthotic or prosthetic devices and is licensed by the Board of Orthotists and Prosthetists);

⁵⁹ AHCA Form 3110-1021 is a projected summary of revenues and expenses.

⁶⁰ Rule 59A-25.002, F.A.C.

⁶¹ Section 408.812, F.S.

⁶² Section 400.932, F.S.

⁶³ Section 400.812, F.S.

⁶⁴ Section 408.810, F.S.

⁶⁵ Sections 409.901(2) and (14), F.S. The Medicaid DME and medical supplies program is authorized by Title XIX of the Social Security Act and 42 C.F.R. Part 440.70. The program was implemented through ch. 409, F.S., and Chapter 59G, F.A.C.

⁶⁶ Section 409.906(10), F.S.

⁶⁷ Section 409.912(48), F.S.; 59G-4.070, F.A.C., incorporating by reference *Florida Medicaid, Durable Medical Equipment/Medical Supply Services Coverage and Limitations Handbook*, Agency for Health Care Administration. Available at:

http://portal.flmmis.com/FLPublic/Provider_ProviderSupport/Provider_ProviderSupport_ProviderHandbooks/tabId/42/Default.aspx (Last visited on March 15, 2009).

⁶⁸ House Bill 7083 (2008); ch. 2008-246, L.O.F.

- Be accredited and maintain accreditation by a Centers for Medicare and Medicaid Services (CMS) Deemed Accreditation Organization for suppliers of durable medical equipment, prosthetics, orthotics and supplies;
- Provide services or supplies directly to the Medicaid recipient or caregiver, or provide the services or supplies by mail, and not subcontract or consign the function to a third party (with certain exceptions);
- Have a physical business location that meets signage, public accessibility, telephone access, location, and co-location criteria, with certain exceptions;
- Maintain a stock of equipment and supplies readily available to meet the needs of customers; and,
- Obtain a level 2 background screening for staff in direct contact with or providing direct services to recipients.

Information provided to the House Committee on Health Innovation in 2007 by AHCA and the Office of the Attorney General indicated an increase in AHCA investigations, as well as an increase in referrals to the Attorney General's Medicaid Fraud Control Unit (MFCU), related to Medicaid DME providers over the last several years. MFCU worked 117 DME cases between 2002 and 2007, 64 of which were in Miami-Dade County, resulting in 78 arrests. According to MFCU, fraudulent DME activity includes changes of ownership with strawman purchasers and kickback schemes. AHCA's Bureau of Medicaid Program Integrity (MPI) reported that investigations of DME providers rose from 148 in FY 2005-2006 to 354 in FY 2006-2007. However, identified overpayments were on a downward trend, from about \$449,000 in FY 2004-2005 to about \$349,000 in FY 2006-2007. Concerns about the potential for fraud led the Legislature to strengthen the requirements for Medicaid contracts in 2008, noted above.

Effect of Proposed Changes

CS/CS House Bill 1487 provides legislative intent stating that increased fraud and abuse in the health care delivery system necessitate increased licensure standards of home health agencies, home medical equipment providers and health care clinics. The bill designates Miami-Dade County as a "health care fraud area of special concern" related to fraudulent activity by those providers.

The bill creates a new section of law providing additional standards for applicants for licensure as a home health agency, home medical equipment provider, or health care clinic:

- For an initial, renewal, or change of ownership license a nonimmigrant alien who has a controlling interest must file a surety bond of at least \$500,000 payable to the agency as assurance of conformity with all legal requirements for operation;
- An applicant for an initial or change of ownership license must provide proof of financial ability to operate, provable by demonstrating that assets, credit and projected revenues meet or exceed projected liabilities and expenses [this is the current requirement for home health agencies in s. 400.471(2), F.S.];
- An applicant for an initial or change of ownership license must submit a financial statement, including a balance sheet and an income and expense statement, and a statement of cash flow for the first two years of operation, meeting certain criteria; and,
- An applicant for an initial or change of ownership license must demonstrate financial ability to fund startup costs through the break-even operational point.

The bill establishes a limit on the number of home health agency initial and change of ownership licenses until July 1, 2010, by prohibiting AHCA from issuing new licenses in counties with a ratio of one (1) license per 1,200 or fewer people age 65 or older. According to population and licensure data provided by AHCA, new licensees would not be issued in Miami-Dade and Broward Counties. The bill allows new licenses in those counties for applications received before July 1, 2009, by applicants who have applied for accreditation before May 1, 2009, by an accrediting organization approved by AHCA.

The bill also creates new criminal penalties, and makes the following offenses third degree felonies:

- Offering skilled services requiring licensure as a home health agency, home medical equipment provider, or health care clinic;
- Knowingly filing a false or misleading license or renewal application or submitting false or misleading information related to an application or AHCA rule; and,
- Conspiracy to violate the enhanced licensure requirements in s. 408.8065, F.S.

B. SECTION DIRECTORY:

Section 1: Designates Miami-Dade County as a health care fraud area of special concern.

Section 2: Creates s. 408.8065, F.S., relating to licensure of home health agencies, home medical equipment providers, and health care clinics.

Section 3: Provides an effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The requirement that licensure applicants provide financial projections may cause applicants to incur additional expenses. Applicants subject to the \$500,000 surety bond requirement will also be subject to increased costs. New entrants to the home health agency, home medical equipment and health care clinic business market will not be permitted to operate those businesses in Miami-Dade and Broward Counties until July 1, 2010.

D. FISCAL COMMENTS:

The bill creates several third degree felonies. On March 23, 2009, the Criminal Justice Impact Conference met and determined the bill would have an indeterminate but insignificant effect on state government.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax sharing with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Agency has sufficient rule-making authority to implement the bill in the existing s. 408.819, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 1 of the bill designates Miami-Dade County as a health care fraud area of special concern. This section is in an unassigned section of law. It is unclear what impact this designation will have on efforts to curb fraud and abuse.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 18, 2009, the Health Regulation Policy Committee adopted a strike-all amendment and reported the bill favorably as amended.

The amendment provides legislative intent and designates Miami-Dade County as a "health care fraud area of special concern" related to fraudulent activity by home health agencies, home medical equipment providers and health care clinics. It provides additional standards for applicants for licensure as a home health agency, home medical equipment provider, or health care clinic:

- Proof of legal U.S. residency for at least 5 years, or of a surety bond of at least \$500,000, payable to the agency;
- Proof of financial ability to operate and a financial statement meeting certain criteria; and,
- Proof of financial ability to fund startup costs through the break-even operational point.

The amendment prohibits AHCA from issuing new licenses in counties with a ratio of than one (1) license per 1,199 or fewer people age 65 or older, and limits new license to applications received before July 1, 2009, by applicants accredited before May 1, 2009, by an accrediting organization approved by AHCA.

Finally, the amendment creates new criminal penalties, by making the following offenses third degree felonies:

- Offering services requiring licensure as a home health agency, home medical equipment provider, or health care clinic;
- Knowingly filing a false or misleading license or renewal application or submitting false or misleading information related to an application or AHCA rule; and,
- Conspiracy to violate the enhanced licensure requirements in s. 408.8065, F.S.

On April 1, 2009, the Health and Families Policy Council adopted a strike-all amendment and reported the bill favorably as a council substitute. The amendment clarified the applicability of various provisions of the bill to initial, renewal and change of ownership licenses, resolved drafting concerns, and resolved conflicts with other sections of law. The amendment:

- Provides legislative intent;
- Designates Miami-Dade County as a “health care fraud area of special concern” related to fraudulent activity by home health agencies, home medical equipment providers and health care clinics; and,
- Provides additional standards for applicants for licensure as a home health agency, home medical equipment provider, or health care clinic:
 - Proof of legal U.S. residency for at least 5 years, or of a surety bond of at least \$500,000, payable to the agency;
 - Proof of financial ability to operate and a financial statement meeting certain criteria; and,
 - Proof of financial ability to fund startup costs through the break-even operational point.
- Prohibits AHCA from issuing new licenses in counties with a ratio of one (1) license per 1,199 or fewer people age 65 or older;
- Allows new licenses in those counties for applications received before July 1, 2009, from applicants accredited before May 1, 2009, by an accrediting organization approved by AHCA; and,
- Creates new criminal penalties, by making the following offenses third degree felonies:
 - Offering services requiring licensure as a home health agency, home medical equipment provider, or health care clinic;
 - Knowingly filing a false or misleading license or renewal application or submitting false or misleading information related to an application or AHCA rule; and,
 - Conspiracy to violate the enhanced licensure requirements in s. 408.8065, F.S.

On April 21, 2009, the Policy Council adopted three amendments and reported the bill favorably as a Council Substitute. The amendments:

- Further clarified the applicability of provision of the bill to initial, renewal and change of ownership license by requiring nonimmigrant aliens to post a \$500,000 surety bond instead of residents who have lived in the United States for less than 5 years;
- Further clarified that the third degree felony applies only to “skilled services”; and,
- Further clarified that AHCA may allow new licenses in those counties for applications received before July 1, 2009, by applicants who have applied for accreditation before May 1, 2009, thereby extending the timeframe for the applicants applying for accreditation. The prior deadline required that the applicant be accredited prior to May 1, 2009.