

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 367 Restraint of Incarcerated Pregnant Women

SPONSOR(S): Criminal Justice Subcommittee; Reed and others

TIED BILLS: None **IDEN./SIM. BILLS:** SB 524

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Krol	Cunningham
2) Rulemaking & Regulation Subcommittee	15 Y, 0 N	Rubottom	Rubottom
3) Justice Appropriations Subcommittee	14 Y, 0 N	Toms	Jones Darity
4) Judiciary Committee			

SUMMARY ANALYSIS

The bill prohibits the use of restraints on a prisoner who is known to be pregnant during labor, delivery, and postpartum recovery unless the corrections official makes an individualized determination that the prisoner presents an extraordinary circumstance.

The bill specifies that even if there are extraordinary circumstances:

- (1) The corrections officer, correctional institution employee, or other officer accompanying the pregnant prisoner must remove all restraints if removal is requested by the treating doctor, nurse, or other health care professional; and
- (2) The use of leg, ankle, and waist restraints is completely prohibited during labor and delivery.

The bill requires a corrections official to make written findings within 10 days after the use of restraints as to extraordinary circumstances that dictated the use of restraints. The correctional institution must maintain this documentation on file and make it available for public inspection for at least 5 years.

The bill also establishes additional requirements regarding restraint of pregnant prisoners during the last trimester of pregnancy. These additional requirements can also apply at any time during pregnancy if requested by the treating doctor, nurse, or other health care professional.

The bill allows a prisoner who is restrained in violation of this section to file a grievance with the correctional institution within one year after the incident.

The bill authorizes the Department of Corrections (DOC) and the Department of Juvenile Justice (DJJ) to adopt rules to administer the new law.

There is an unknown fiscal associated with an unquantified workload increase. See "FISCAL SECTION".

The bill is effective July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

On October 10, 2010, the National Commission on Correctional Health Care Board of Directors adopted the following Position Statement on Restraint of Pregnant Inmates:

Restraint is potentially harmful to the expectant mother and fetus, especially in the third trimester as well as during labor and delivery. Restraint of pregnant inmates during labor and delivery should not be used. The application of restraints during all other pre-and postpartum periods should be restricted as much as possible and, when used, done so with consultation from medical staff. For the most successful outcome of a pregnancy, cooperation among custody staff, medical staff, and the patient is required.¹

Federal Policies

In October 2008, the Federal Bureau of Prisons revised its policy regarding the shackling of pregnant women in their custody.² The policy states:

Restraints should not be used when compelling medical reasons dictate, including when a pregnant prisoner is in labor, is delivering her baby, or is in immediate post-delivery recuperation... If a pregnant prisoner is restrained, the restraints used must be the least restrictive necessary to ensure safety and security. Any restraints used must not physically constrict the direct area of the pregnancy.³

In addition to this policy, Section 232 of the Second Chance Act requires the Attorney General to report to Congress on the use of physical restraints on pregnant prisoners by agencies within the Department of Justice (DOJ).⁴ As an agency within DOJ, the Bureau of Prisons is required to report data regarding the use of restraints to the Attorney General.

Immigration and Customs Enforcement (ICE) allows restraints to be used on pregnant detainees. Specifically, ICE standards require medical staff to determine precautions required to protect the fetus, including:

- Safest method of restraint,
- Presence of a medical professional, and
- Medical necessity of restraining the detainee.⁵

The Second Chance Act also requires ICE to report on its use of restraints to the Department of Justice.⁶

¹ Position Paper on Restraint of Pregnant Inmates, adopted by the National Commission on Correctional Health Care Board of Directors (October 10, 2010), http://www.ncchc.org/resources/statements/restraint_pregnant_inmates.html (last visited January 11, 2012).

² "Escorted Trips, Program Statement." Fed. Bureau of Prisons, No. 5538.05, 2008. http://www.bop.gov/policy/progstat/5538_005.pdf (last visited January 11, 2012).

³ *Id.*

⁴ The Second Chance Act, Pub. L. No. 110-199, 122 Stat. 657, 2008. (requiring agencies to report on the use of restraints during "pregnancy, labor, delivery of a child, or post-delivery recuperation" and "the reasons for the use of the physical restraints, the length of time that the physical restraints were used, and the security concerns that justified the use of the physical restraints").

⁵ "ICE/DRO Detention Standard, Use of Force and Restraints." § 5.F1, http://www.ice.gov/doclib/dro/detention-standards/pdf/use_of_force_and_restraints.pdf (last visited January 11, 2012).

⁶ *Supra*, the Second Chance Act.

Other States' Laws

According to a 2010 study, 10 states⁷ have laws prohibiting the use of restraints on pregnant prisoners.⁸

The Department of Juvenile Justice

The Department of Juvenile Justice, through administrative rule, currently limits the use of mechanical restraints on pregnant youth: "If handcuffs are used on pregnant youth, they shall be cuffed in front. Leg restraints, waist chains, and the restraint belt shall not be used on pregnant youth."⁹

While this rule does not address the removal of restraints during labor and delivery, current practice is to remove the restraints during labor and delivery and any time a health care professional treating the youth requests the removal.¹⁰

County and Municipal Jails

The Florida Model Jail Standards contain the following provision related to the shackling of inmates:

Shackles or other personal restraints may be used within the secured areas of the facility. This standard should apply to inmates in transit or to inmates whose behavior presents an immediate danger to themselves, other inmates, or staff. Such inmates may be temporarily restrained by such devices only upon orders of the Officer-in-Charge or designee. Restraints shall never be used as punishment.¹¹

These standards currently have no provisions related to the shackling of pregnant inmates, however, the standards direct local jails' written policies and defined procedures to require that pregnant inmates receive advice on appropriate levels of safety precautions.¹²

The Department of Corrections

The Department of Corrections is responsible for the health care of inmates in its custody¹³ and treats approximately 80 pregnant inmates per year.¹⁴ Each pregnant inmate is referred to an OB/GYN physician to provide prenatal care and to follow her throughout her pregnancy. Inmates receive an extra nutritional meal each day, prenatal counseling, vitamins, and exams.¹⁵

DOC has an established procedure that limits the use of restraints on pregnant inmates.¹⁶ Key components include:

- After it is learned that an inmate is pregnant (and during her postpartum period), her hands are not restrained behind her back and leg irons are not used. The use of waist chains or black boxes is also prohibited when there is any danger that they will cause harm to the inmate or fetus. The inmate's hands can be handcuffed in front of her body during transport and at the medical facility if required by security conditions due to her custody level and behavior. The shift supervisor's approval is required to remove handcuffs for medical reasons, except that approval is not required in an emergency situation.
- Unarmed escort officers are required to maintain close supervision of a pregnant inmate and to provide a "custodial touch" when necessary to prevent falls.

⁷ California, Colorado, Illinois, New Mexico, New York, Pennsylvania, Texas, Vermont, Washington, and West Virginia.

⁸ "Mothers Behind Bars: A state-by-state report card and analysis of federal policies on conditions of confinement for pregnant and parenting women and the effect on their children." National Women's Law Center. October 2010.

⁹ 63H-1.005(10), F.A.C.

¹⁰ Department of Juvenile Justice 2012 Analysis of HB 367.

¹¹ "Chapter 11 Security and Control." 11.11. Florida Model Jail Standards. Effective 8/30/11.

<http://www.flsheriffs.org/uploads/FMJS%2008-30-11rev.doc> (last visited January 11, 2012).

¹² *Ibid.* "Chapter 7 Medical." 7.25 - Prenatal Care.

¹³ Section 945.6034, F.S.

¹⁴ Department of Corrections 2012 Analysis of HB 367.

¹⁵ *Id.*

¹⁶ Department of Corrections Procedure 602.024 (The Utilization of Restraints on Inmates During Prenatal and Postpartum Periods.)

- An inmate in labor is not restrained, but after delivery she may be restrained to the bed with normal procedures (tethered to the bed by one ankle) for the remainder of her hospital stay. A correctional officer is stationed in the room with the inmate to be sure that she has access to the bathroom or can perform other needs that require movement.¹⁷

From 2001 to the present, there have been no formal inmate medical grievances submitted regarding the application of restraints during pregnancy.¹⁸

Effect of the Bill

The bill contains the following whereas clauses:

- Whereas, restraining a pregnant prisoner can pose undue health risks and increase the potential for physical harm to the woman and her pregnancy;
- Whereas, the vast majority of female prisoners in this state are nonviolent offenders;
- Whereas, the impact of such harm to a pregnant woman can negatively affect her pregnancy;
- Whereas, freedom from physical restraints is especially critical during labor, delivery, and postpartum recovery after delivery as women often need to move around during labor and recovery, including moving their legs as part of the birthing process;
- Whereas, restraints on a pregnant woman can interfere with the medical staff's ability to appropriately assist in childbirth or to conduct sudden emergency procedures; and
- Whereas, the Federal Bureau of Prisons, the United States Marshals Service, the American Correctional Association, the American College of Obstetricians and Gynecologists, and the American Public Health Association all oppose restraining women during labor, delivery, and postpartum recovery because it is unnecessary and dangerous to a woman's health and well-being.

The bill creates the following definitions:

- "Corrections official" as "the official who is responsible for oversight of a correctional institution, or his or her designee."
- "Correctional institution" as "any facility under the authority of DOC or DJJ, a county and municipal detention facility, or a detention facility operated by a private entity."
- "Department" as "the Department of Corrections."
- "Labor" as "the period of time before a birth during which contractions are of sufficient frequency, intensity, and duration to bring about effacement and progressive dilation of the cervix."
- "Postpartum recovery" as "the period immediately following delivery, including recovery period when a woman is in the hospital or infirmary following birth." The duration of postpartum recovery is determined by the physician.
- "Prisoner" as "any person incarcerated or detained in any correctional institution who is accused of, convicted of, sentenced for, or adjudicated delinquent for a violation of criminal law or the terms and conditions of parole, probation, community control, pretrial release, or a diversionary program. For the purposes of this section, the term includes any woman detained under the immigration laws of the United States at any correctional institution."
- "Restraints" as "any physical restraint or mechanical device used to control the movement of a prisoner's body or limbs, including, but not limited to, flex cuffs, soft restraints, hard metal handcuffs, a black box, chubb cuffs, leg irons, belly chains, a security or tether chain, or a convex shield."

The bill prohibits the use of restraints on a prisoner who is known to be pregnant during labor, delivery, and postpartum recovery unless the corrections official makes an individualized determination that the prisoner presents an extraordinary circumstance. The bill defines "extraordinary circumstance" as an instance when:

- (1) The prisoner presents a substantial flight risk; or

¹⁷ *Id.* Department of Corrections 2012 Analysis of HB 367.

¹⁸ Department of Corrections 2012 Analysis of HB 367.

- (2) There is an extraordinary medical or security circumstance that dictates the use of restraints for the safety and security of the prisoner, correctional institution or medical facility staff, other prisoners, or the public.

The bill specifies that even if there are extraordinary circumstances:

- (1) The corrections officer, correctional institution employee, or other officer accompanying the pregnant prisoner must remove all restraints if removal is requested by the treating doctor, nurse, or other health care professional; and
- (2) The use of leg, ankle, and waist restraints is completely prohibited during labor and delivery.

If restraints are used on a pregnant prisoner during labor, delivery, and postpartum recovery, the bill requires that:

- The type of restraint applied and the application of the restraint be done in the least restrictive manner necessary.
- The corrections official make written findings within 10 days after the use of restraints as to extraordinary circumstances that dictated the use of restraints.
- The correctional institution maintain this documentation on file and make it available for public inspection for at least 5 years.

The bill establishes additional requirements regarding restraint of pregnant prisoners during the last trimester of pregnancy. These additional requirements also apply at any time during pregnancy if requested by the treating doctor, nurse, or other health care professional. These requirements are:

- Waist restraints that directly constrict the area of pregnancy cannot be used.
- Any wrist restraints must be applied so that the pregnant prisoner can protect herself in the event of a forward fall (handcuff must be in front).
- Leg and ankle restraints that restrain the legs close together cannot be used when the prisoner is required to walk or stand.

The bill also requires that any restraint of a prisoner known to be pregnant (at any stage of pregnancy) must be done in the least restrictive manner necessary in order to mitigate the possibility of adverse clinical consequences.

In addition to maintaining findings as to the extraordinary circumstances that required use of restraint during labor and delivery, the bill requires the secretaries of DOC and DJJ and the official responsible for any local correctional facility to, where an exception was made to allow restraint or where the restraint requirements have been violated during the previous year, submit an annual written report to the Governor with an account of every such instance. The bill provides that these reports will be made available to the public.

The bill authorizes DOC and DJJ to adopt rules to administer the new law.

The bill requires each correctional institution to inform female prisoners of the rules when they are admitted to the institution, include the policies and practices in the prisoner handbook, and post the policies and practices in appropriate places within the institution, including common housing areas and medical care facilities.

The bill allows a prisoner who is restrained in violation of this section to file a grievance with the correctional institution within one year after the incident and does not prevent her from filing a complaint under any other relevant provision of federal or state law.

B. SECTION DIRECTORY:

Section 1. Creates a new section of statute relating to shackling of incarcerated pregnant women.

Section 2. Provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

See "fiscal comments" section.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

See "fiscal comments" section.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill will create additional staff workload for private prison facilities and private DJJ residential facility providers to update procedures and training materials; document the use of restraints; maintain documentation for five years and make it available for public inspection; and prepare any needed annual reports.

D. FISCAL COMMENTS:

The Department of Corrections reports that the bill would create an additional workload for staff to track the details of each delivery for reporting.¹⁹ However DOC was unable to quantify any fiscal impact.²⁰

There will be an insignificant workload impact to DJJ residential facilities and to county juvenile detention centers. The Department of Juvenile Justice reports no fiscal impact.²¹

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

¹⁹ Department of Corrections, Legislative Affairs, HB 367 Analysis

²⁰ E-mail from Tommy Maggitas, Department of Corrections, Legislative Affairs, February 7, 2012., on file with Justice Appropriations staff.

²¹ Department of Juvenile Justice 2012 Analysis of HB 367.

The bill authorizes the Department of Corrections and the Department of Juvenile Justice to adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., to administer the bill's provisions.

C. DRAFTING ISSUES OR OTHER COMMENTS:

- The bill requires an officer to remove all restraints from a pregnant prisoner if the removal is requested by the treating doctor, nurse, or other health care professional, even if the officer believes that an extraordinary circumstance exists as cause to restrain the prisoner. The Department of Corrections reports that the removal of the restraints should be done *in consultation with* the healthcare professional and the officer to ensure that security risks are appropriately evaluated.²²
- The bill requires a correctional official to make written findings within 10 days after using restraints in an extraordinary circumstance that dictated the use of restraints on a pregnant prisoner. These findings must be kept on file at the institution for at least 5 years. This is contrary to current file maintenance practices at the Department of Corrections which provides for files to follow a prisoner as he or she is transferred among institutions.²³ This provision of the bill is also contrary to current filing practices for prisoners who are released from DOC custody.²⁴
- The written findings and annual report to the Governor are required by the bill to be available for public inspection. The Department of Corrections has concerns that broad public access to the reports could pose a potential conflict with the Health Insurance Portability and Accountability Act (HIPPA) and s. 945.10(1)(a), F.S., as the findings and report would necessarily contain some amount of protected health information.²⁵ While DOC reports that these files would not be kept as health records, they would contain information related to pregnancy, labor, delivery, and other health-related topics.²⁶ These reports may have to be heavily redacted in order to maintain the requirements of HIPPA and s. 945.10(1)(a), F.S.²⁷

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 17, 2012, the Criminal Justice Subcommittee approved one amendment and reported the bill favorably as a committee substitute. The amendment:

- Allows a prisoner who is restrained in violation of this section to file a grievance with the appropriate correctional institution within one year after the incident.
- Removes redundant language.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

²² Department of Corrections 2012 Analysis of HB 367.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Department of Corrections General Counsel. Phone Conversation. January 11, 2012.

²⁷ *Id.*