

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 Appropriations

BILL: CS/SB 1786

INTRODUCER: Health Policy Committee and Senator Burgess and others

SUBJECT: Payments for Birth-related Neurological Injuries

DATE: April 16, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	Favorable
2.	<u>Smith</u>	<u>Brown</u>	<u>HP</u>	Fav/CS
3.	<u>Davis</u>	<u>Sadberry</u>	<u>AP</u>	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1786 increases the cap on the periodic or lump-sum payment amount¹ from \$100,000 to \$250,000 that the Florida Birth-Related Neurological Injury Compensation Association (NICA) may pay parents or legal guardians of an infant found to have suffered a compensable birth-related neurological injury, as determined by an administrative law judge (ALJ). Further, the bill establishes a three percent annual increase of this cap to counteract increasing costs. The bill also increases the death benefit from \$10,000 to \$50,000. The provisions of the bill apply retroactively to claims filed on or after January 1, 2021.

The Florida Birth-Related Neurological Injury Compensation Plan (Plan) pays for compensation and medically necessary medical care and other services to persons with birth-related neurological injuries when a physician participating in the plan delivers obstetrical services in connection with the birth, and an ALJ determines the claim is compensable.

NICA engaged an actuary to determine the viability and likely impact of increasing the parental award from \$100,000 to \$250,000. It was determined that the bill will have a negative fiscal impact on the Plan; however the actuary's report recommended increasing the parental award. Since the 2020 actuarial study did not appear to consider the impact of an increase in the death benefit for an infant from \$10,000 to \$50,000, as provided in the bill, the fiscal impact is indeterminate, but most likely insignificant. *See* Part V, Fiscal Impact Statement.

¹ Also known as the parental award.

The bill provides an effective date of July 1, 2021.

II. Present Situation:

Florida Birth-Related Neurological Injury Compensation Association

In 1988, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation Plan² (Plan) to provide compensation, long-term medical care, and other services to persons with birth-related neurological injuries.³ If an infant suffers such an injury, and the physician participates in NICA and delivers obstetrical services in connection with the birth, then an administrative award for a compensable injury is the infant's sole and exclusive remedy for the injury, with exceptions.⁴ Although the benefits paid under the Plan are limited, the Plan does not require the claimant to prove malpractice and provides a streamlined administrative hearing process to resolve the claim.⁵

A "birth-related neurological injury" is an injury to the brain or spinal cord of a live infant who weighs at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant who weighs at least 2,000 grams at birth caused by oxygen deprivation or by mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.⁶ Such an injury addressed by this statute renders the infant permanently and substantially mentally and physically impaired.⁷

NICA is an independent association. Although it is not a state agency, NICA is subject to regulation and oversight by the Office of Insurance Regulation (OIR) and the Joint Legislative Auditing Committee. Directors on NICA's board are appointed by the Chief Financial Officer.⁸ The five-member board of directors of the Florida Birth-Related NICA administers the Plan.⁹ Duties of the NICA include:

- Administering the plan;
- Administering the funds collected;
- Reviewing and paying claims;
- Directing the investment and reinvestment of any surplus funds over losses and expenses;
- Reinsuring the risks of the plan in whole or in part;
- Suing and being sued, appearing and defending, in all actions and proceedings in its name; and
- Taking such legal action as may be necessary to avoid payment of improper claims.¹⁰

² Section 766.303(1), F.S.

³ Chapter 88-1, ss. 60-75, Laws of Fla., was enacted by the Legislature to stabilize and reduce malpractice insurance premiums for physicians practicing obstetrics. The intent of the Legislature is to provide compensation, on a no-fault basis, for a limited class of high costs catastrophic injuries, specifically birth-related neurological injuries, that result in unusually high costs for custodial care and rehabilitation. Section 766.301 F.S.

⁴ Section 766.31(1), F.S.

⁵ See *Florida Birth-Related Neurological Injury Compensation Ass'n v. McKaughan*, 668 So.2d 974, 977 (Fla. 1996).

⁶ Section 766.302(2), F.S.

⁷ *Id.*

⁸ Section 766.315, F.S. and section 74 of ch. 88-1 Laws of Fla.

⁹ Section 766.315(1) and (2), F.S.

¹⁰ Section 766.315(4), F.S.

NICA Funding

The funding for the Plan is derived from an initial appropriation of \$20 million by the Legislature at the time the Plan was created¹¹ and annual assessments paid by physicians and hospitals.¹² In 2019, NICA collected \$26,989,960 in hospital and physician assessments; in 2020, NICA collected \$27,000,000.¹³

Section 766.314, F.S., requires the OIR to maintain a \$20 million reserve in the Insurance Regulatory Trust Fund. If the assessments collected and the appropriation of funds provided by s. 41, ch. 88-277, L.O.F., to the Plan from the trust fund are insufficient to maintain the Plan on an actuarially sound basis, OIR is authorized to transfer an additional amount up to \$20 million to NICA from the Insurance Regulatory Trust Fund reserve.¹⁴

The Plan pays, on behalf of a qualifying infant, the following benefits:

- Medically necessary and reasonable care, services, drugs, equipment, facilities, and travel;¹⁵
- Periodic or lump-sum award, not to exceed \$100,000, to the infant's parents or guardians;¹⁶
- Death benefit of \$10,000 for the infant; and
- Reasonable expenses for filing the claim under the plan, including attorney's fees.¹⁷

The ALJ must require the Plan to immediately pay expenses previously incurred and require that future expenses be paid as incurred.¹⁸

The \$100,000 cash award limit was established when the NICA statutory provisions were enacted in 1988. If the initial award of \$100,000 established for the first birth year of 1989 was adjusted for inflation and assuming an annual increase of three percent, this would result in an indicated award of approximately \$250,000.¹⁹

Filing a Claim for Benefits

A claim for compensation under the Plan must be filed within five years of the birth of the infant alleged to be injured.²⁰ First, the parents or guardians of the infant must file a petition with the Division of Administrative Hearings (DOAH).²¹ Then, the DOAH serves a copy of the petition

¹¹ Section 766.314(5)(b), F.S.

¹² Section 766.314, F.S., requires non-participating physicians to pay \$250 per year, participating physicians to pay \$5,000 per year, and hospitals to pay \$50 per infant delivered during the prior year.

¹³ Turner Consulting, Inc., *Proposed Increase in Parental Award – Section 766.31 (1) (b) (1)*, *Florida Statutes* (Jan. 14, 2020).

¹⁴ S. 766.314(5)(b), F.S.

¹⁵ The Plan excludes coverage for expenses that are compensable by state or federal governments, or by private insurers. Section 766.31(1)(a), F.S.

¹⁶ Often the award is paid out over time to assist the parents or guardians in making necessary modifications to living quarters to accommodate a disabled child.

¹⁷ Section 766.31, F.S.

¹⁸ Section 766.31(2), F.S.

¹⁹ Turner Consulting, Inc., Consultants and Actuaries, *Proposed Increase in Parental Award-Section 766.31(b)(1)*, *Florida Statutes*, (Jan. 14, 2020) (on file with the Senate Committee on Health Policy).

²⁰ Section 766.313, F.S.

²¹ Section 766.305, F.S.

upon NICA, the physician(s) and hospital named in the petition, the Division of Medical Quality Assurance, and the Agency for Health Care Administration.²² Within 10 days of filing the petition, the parents or guardian must provide to NICA all medical records, assessments, evaluations and prognoses, documentation of expenses, and documentation of any private or governmental source of services or reimbursement relative to the impairments.²³

Within 45 days from the date of service of a complete claim, NICA must file a response to the petition and submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury.²⁴ An ALJ from the DOAH will set a hearing on the claim to be conducted 60-120 days from the petition filing date.²⁵

The issue of whether the claim for compensation is covered by the Plan is determined exclusively in an administrative proceeding.²⁶ The ALJ presiding over the hearing makes the following determinations:

- Whether the injury claimed is a birth-related neurological injury;
- Whether obstetrical services were delivered by a participating physician;
- How much compensation, if any, is awardable under s. 766.31, F.S.; and
- Whether, if raised by the claimant or other party, the factual determination regarding the notice requirement in s. 766.316, F.S.²⁷

If the ALJ determines that an injury meets the definition of a birth-related neurological injury, compensation from the plan is the exclusive legal remedy.²⁸ If the ALJ determines that, the injury alleged is not a birth-related neurological injury or that a participating physician did not deliver the obstetrical services, the ALJ will enter an order to that effect.²⁹ The ALJ may also bifurcate the proceeding and address compensability and notice first, and address an award, if any, in a separate proceeding.³⁰ If any party chooses to appeal the ALJ's order under s. 766.309, F.S., the appeal must be filed in the District Court of Appeal.³¹

Notice Requirement

Section 766.316, F.S., requires any hospital with a participating physician on its staff and each participating physician under the Plan, to provide notice to an obstetrical patient as to the limited no-fault alternative for birth-related neurological injuries. The notice must:

- Be provided on forms furnished by the association; and
- Include a clear and concise explanation of a patient's rights and limitations under the plan.

²² Section 766.305(2), F.S.

²³ Section 766.305(3), F.S.

²⁴ Section 766.305(4), F.S.

²⁵ Section 766.307(1), F.S.

²⁶ Section 766.301(1)(d), F.S.

²⁷ Section 766.309(1), F.S.

²⁸ Section 766.303(2), F.S., only allows a civil action in place of a claim under the Plan where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property.

²⁹ Section 766.309(2), F.S.

³⁰ Section 766.309(4), F.S.

³¹ Section 766.311(1), F.S.

This section of statute also provides that the notice does not need to be provided to a patient when the patient has an emergency medical condition or when notice is not practicable.

III. Effect of Proposed Changes:

Section 1 amends s. 766.31, F.S., to increase the limit for periodic payments or a lump-sum payment of an award from \$100,000 to \$250,000, beginning January 1, 2021. Each January 1 thereafter, the award limit is increased by three percent. Section 1 also increases the death benefit from \$10,000 to \$50,000.

Section 2 provides that the amendments made to s. 766.31, F.S., by this act apply to claims filed under s. 766.305, F.S., on or after January 1, 2021.

Section 3 provides that the bill is effective July 1, 2021.

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:

Once a bill becomes law, it is presumed to apply only prospectively. The presumption against retroactive application may be rebutted by clear evidence of legislative intent.³² To determine if the terms of a statute and the purpose of the enactment indicate retroactive application, a court may consider the language, structure, purpose, and legislative history of the enactment.³³

If the legislation clearly expresses an intent that the law should apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.³⁴ Even when the Legislature has clearly expressed its intention that the statute be given a

³² *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187 (Fla. 2011).

³³ *Id.*

³⁴ *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).

retroactive application, courts must refuse to do so if it impairs vested rights, creates new obligations, imposes new penalties,³⁵ or impairs an obligation of contract.³⁶ For example, ex post facto legislation, i.e., a law that expands criminal liability retroactively by either creating a new crime for past conduct or by increasing the penalty for past conduct, is forbidden by both the State Constitution and the United States Constitution. Statutes that do not alter vested rights, but relate only to remedies or procedure may be applied retroactively.³⁷

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Increasing the cash payment limit from \$100,000 to \$250,000 would assist parents and legal guardians in meeting significant medical expenses and other necessary services and care of children with birth-related neurological injuries.

C. Government Sector Impact:

NICA Report³⁸

NICA engaged actuaries to evaluate the viability and likely impact of the proposed increase in parental award, which is authorized pursuant to s. 766.31(1)(b), F.S. The actuaries concluded that, if the payment were increased from \$100,000 to \$250,000, this would result in additional expected costs to NICA of approximately \$2.70 million for the 2020 birth year. However, the actuaries noted:

[G]iven the current net assets of approximately \$393.2 million³⁹ plus the recent better than expected inflation levels, it is not likely this increase will significantly impact the overall financial position in the short-term. Given the erosion resulting from the impact of inflation on the parental award coupled with the current NICA financial position, we would recommend the proposed change from \$100,000 to \$250,000.

The actuaries also noted that NICA's financial position and the potential need for assessment level increases in the longer run would depend on actual investment results and inflation levels experienced over shorter term three to five year periods. The shortfall in assessments (i.e., without the additional investment income realized on the net assets

³⁵ *Id.*

³⁶ *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010).

³⁷ *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d 494 (Fla. 1999).

³⁸ *Supra* note 15.

³⁹ Net assets were approximately \$426.5 million on June 30, 2020. Florida Birth-Related Neurological Injury Compensation Association, Financial Statements for years ended June 30, 2020 and 2019, pg. 5, available at <https://www.nica.com/downloads/2020%20NICA%20Audited%20Financial%20Statements.pdf> (last viewed Mar. 25, 2021).

and/or the better than expected inflation) and the indicated funding levels have in the past been offset by the better than expected realized NICA investment returns and inflation rates. To the extent this favorable relationship continues, the actuaries contend that it is likely additional increases in assessment levels will not be required. Alternatively, the actuaries note that volatility in the prospective results or increases in benefit inflation levels may require assessment level increases at some point in the longer term.

Although the bill increases the cap or maximum amount of the one-time parental award from \$100,000 to \$250,000, NICA's investment activities will likely absorb the increased costs estimated at \$2.7 million per year and should not result in any significant impact for NICA or increased assessments for hospitals or physicians.

Since the 2020 actuarial study did not appear to consider the impact of an increase in the death benefit for an infant from \$10,000 to \$50,000, as provided in the bill, the fiscal impact is indeterminate, but most likely insignificant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 766.31 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Policy on March 24, 2021:

The CS increases the death benefit for an infant from \$10,000 to \$50,000. An ALJ must award this death benefit if he or she determines that the infant died due to a birth-related neurological injury and obstetrical services were delivered by a physician participating in the plan at the time of birth. Like the changes made in the underlying bill, the increased death benefit under the CS would apply to claims filed on or after January 1, 2021.

- B. **Amendments:**

None.