

**STORAGE NAME:** h2259a.lt

**DATE:** April 25, 2000

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
Elder Affairs & Long Term Care  
ANALYSIS**

**BILL #:** HB 2259 (formerly PCB LT 00-01a)

**RELATING TO:** Protection of Vulnerable Adults

**SPONSOR(S):** Committee on Elder Affairs & Long Term Care, Representative Argenziano & others

**TIED BILL(S):** SB 1856

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) Elder Affairs & Long Term Care YEAS 10 NAYS 0
- (2) Judiciary (W/D)
- (3) Governmental Rules & Regulations (W/D)
- (4) Health & Human Services Appropriations
- (5)

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**I. SUMMARY:**

The bill revises the system for conducting pre-employment background screening of paid caregivers. It provides for a structured previous employer reference check, continues criminal background checks, and removes the requirement for screening applicants through the Abuse Registry.

Certain health care employers are required to conduct reference checks on applicants for positions involving direct access to patients or clients. Applicants are required to sign a release authorizing the prospective employer to obtain specific information from previous health care employers. Former health care employers for the past five years are required to disclose, subject to administrative fines for failure to comply, any disciplinary action related to the applicant's maltreatment of patients or clients. Any applicant who falsifies an employment history to hide a history of maltreatment of persons in their care may be immediately terminated and commits a misdemeanor of the second degree.

Disciplinary action taken against a licensed health care professional by the Department of Health and its professional boards will be available *on-line* in the background screening database operated by the Agency for Health Care Administration ( AHCA).

The Central Abuse Registry and Tracking System is redesignated as the "*Abuse Hotline*." The requirements that the Department of Children and Family Services (DCFS) classify reports it investigates, notify persons named in investigative reports, and maintain records are removed. The Department's interactions with and responsibility for perpetrators of abuse, neglect, and exploitation are significantly reduced. The terms "elderly person" and "disabled person" are redefined as "vulnerable adult" for purposes of chapter 415.

There are extensive conforming references. No significant fiscal impact on state agencies is anticipated. Cost savings through elimination of certain duties and responsibilities within the DCFS are anticipated. Marginal cost increases to AHCA for enforcement activities are projected but should be offset by collection of administrative fines. Savings to private industry in abuse registry screening fees should exceed \$1,000,000, including about \$280,000 for hospitals.

The bill will take effect on September 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- |                                   |   |                             |   |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u>         | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. <u>Lower Taxes</u>             | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u>      | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/>            |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u>      | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Currently, Florida has more than two and a half million residents age 65 and older, representing about twenty percent <sup>1</sup> of the total state population. This is the highest percentage of elderly in any state. The fastest growing segment of Florida's population is the age 85 and older cohort. With advancing age comes the likelihood of a number of physical and mental infirmities. The need for safe, reliable, trained, competent health care personnel to assist and care for frail elderly and other adults with disabilities is profound and growing.

***Employment Screening & Disqualification***

The use of criminal history information for conducting background screening of individuals working in sensitive positions or positions of "special trust" began in the late 1970s. The 1974 legislature created the Department of Criminal Law Enforcement (now FDLE) and included a Division of Criminal Justice Information Systems. Since its creation, the division has conducted hundreds of thousands of screenings, providing a variety of entities with information needed in making personnel and other decisions. Many of these have involved caregivers of elderly and disabled persons.

In 1995 the legislature created Chapter 435, F.S., which sets forth the requirements for screenings according to level 1 and level 2. In creating Chapter 435 the legislature consolidated screening requirements and disqualifying offenses that were distributed throughout numerous other chapters. One intent was to provide a more uniform set of standards and procedures related to employment disqualification.

The 1985 Legislature also eliminated the requirement for screening against the child abuse registry.

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<sup>1</sup> February 11, 2000: Population Estimates Program, Population Division, U.S. Census Bureau, Washington, D.C. Florida has 2,734,145 persons over age 65. 310,079 persons are over age 85 or 2.1% of the state's population. Internet citation: <http://www.census.gov/population/estimates/state/st98elderly.txt>

## **Recent Background Screening Legislation**

In recent years, the Legislature expanded background screening requirements for persons employed in long term care and other health care settings and created an on-line electronic background screening database within the Agency for Health Care Administration (AHCA). Those background screening mandates built upon the framework in chapter 435, F.S., which provided the requirements, time lines, and a statement of protection from liability for employers who shared personnel information in good faith. Currently, there are more than 200,000 records in the AHCA background screening database. Employers can easily, by way of the Internet, determine that an applicant has been screened and determine if she or he is disqualified from employment, thus saving time, effort, and expense.

## **Health, Safety & Welfare**

The responsibility for protecting the health safety and welfare of all citizens who receive care from a paid caregiver is shared among the Department of Health (DOH), the Agency for Health Care Administration (AHCA), and the Department of Children & Family Services (DCFS). Each has a particular role and function that is summarized as follows.

### *Regulation of Health Care Professionals: DOH and AHCA*

The state, under its obligation to protect the health, safety and welfare of its residents, licenses some caregivers, such as nurses, doctors, and therapists of various skills. Some caregivers, such as certified nursing assistants (CNAs), are certified by the state as having met a basic level of competency. The regulation of these professionals is the responsibility of the Department of Health (DOH).

Exemptions from employment disqualification because of a criminal offense or because of a "confirmed" report on the abuse registry and classification system can be requested of AHCA for employees who are not licensed health care professionals. DOH processes requests for exemptions from employment disqualification for licensed health care professionals.

Currently, AHCA is responsible for regular inspection of facilities it licenses. Further, AHCA is responsible for investigating complaints in the facilities it licenses.

The Long term Care Ombudsman, the Human Rights Advocacy Committee, and the Medicaid Fraud Unit within the Office of the Attorney General are also charged with oversight and investigative responsibilities in the health care entities covered by this bill.

### *Classification of Perpetrators: DCFS*

Currently, adult protective services (APS) investigators investigate reports of adult abuse, neglect, or exploitation. The investigators must "classify" the report at the close of the investigation based on their success at identifying the perpetrator. In addition to determining that abuse, neglect, or exploitation has occurred, the protective investigator must attempt to identify the perpetrator and establish a sufficiently compelling case to withstand an appeal from the perpetrator. Persons who are "confirmed" as the perpetrator are listed in the registry. Being named on the registry is a disqualification for work in a long term care facility.

### **When the State Affects a Person's Livelihood**

Florida, like other states, provides its citizens of the state an avenue to protest or appeal adverse actions imposed by any state entity against them. Chapter 120, F.S., sets forth the rights and procedures for securing those rights. Over the past 11 years since the current screening system has been operating, DOAH administrative law judges (ALJs) have heard hundreds of appeals of citizens challenging their classification by APS as confirmed perpetrators. Data supplied by the DCFS show that during FY 1996/97 and FY 1997/98 there were 231 appeals under the provisions of Chapter 120, F.S. Of these, 94 went to a hearing before an ALJ. In 49 of these hearings the recommended order by the ALJ was in favor of the alleged perpetrator, and in 45 the recommended order upheld the department's classification. A small number of these have appealed further to the District Court of Appeals. Individuals who have requested an exemption from employment disqualification because of a criminal conviction or confirmed abuse finding and have been denied exemption by either DOH or AHCA may also request an administrative hearing.

Currently, employers subject to background screening requirements must conduct employee reference checks pursuant to sections 435.03 and 435.04. Further, section 435.10 requires such employers to share personnel information, if requested, regarding a former employee and provides immunity from liability for the employer sharing such information. Based on reports from industry representatives, few employers are willing to provide such personnel information for fear of being sued. Generally, employers report only the hiring and termination dates of such former employees. Without protected sharing of disciplinary action by the former employer against persons who mistreat vulnerable adults in their care, such employees are free to continue hurting frail elders and disabled persons in other health care environments.

### **C. EFFECT OF PROPOSED CHANGES:**

The bill has three major effects related to employment screening for *paid caregivers*:

- Caregivers in specified organizations will be required to disclose their full employment history, and grant permission for the hiring facility to obtain employment history information from previous health care employers.
- Specified organizations are required, subject to a financial penalty for failure to do so, to complete the employment history check form (called a "service letter") and disclose any disciplinary action taken against an employee for mistreatment of a patient or client. The former employers must complete the service letter within prescribed time frames. Organizations are protected from liability associated with disclosing the required covered personnel information.
- Screening of the abuse registry and classification system is no longer required. Criminal background screening is maintained.

*Other changes:*

- The terms "elderly person" and "disabled person" in Chapter 415 are revised to "vulnerable adult."
- DCFS must enter into cooperative working agreements with the local law enforcement agencies that are responsible for the criminal investigation of shared cases.

- The requirements associated with the abuse registry, classification of records, and due process procedures are removed. Provisions related to adult protective services teams are streamlined, certain Legislative committee staff are permitted access to investigative records.
- Increases from 30 days to 60 days the time frame within which the department must complete its protective investigation.
- The regulation of Health care services pools is transferred from the Department of Health to the Agency for Health Care Administration. This regulation is transferred from s. 402.48, F.S., to s. 400.980, F.S. Such pools must comply with background screening requirements and mandatory reference checks as set forth in Parts I and II of Chapter 435.
- As a condition of licensure hospice personnel are subject to the background screening requirements of Parts I and II of Chapter 435.

**D. SECTION-BY-SECTION ANALYSIS:**

This section need be completed only in the discretion of the Committee.

Section 1. Amends s. 400.6065. Establishes background screening requirements for hospice personnel as is required for other programs regulated under Chapter 400.

Section 2. Creates Part XII of Chapter 400 for the regulation of Health Care Services Pools.

Section 3. Renumbers s. 402.48 as s. 400.980. Amends s. 400.980 to establish background screening requirements for individuals referred for temporary employment in health care facilities.

Section 4. Transfers by a Type 2 transfer, the regulation of Health Care Services Pools from the Department of Health to the Agency for Health Care Administration.

Section 5. Amends s. 415.102. Revises definition of *abuse*; adds definitions for: *vulnerable adult*, *vulnerable adult in need of services*, *protective investigation*, and *protective investigator*. Removes definitions related to the classification and management of reports, and the definitions for: *elderly person*, *elderly person in need of services*, *disabled adult* and *disabled adult in need of services*.

Section 6. Amends s.415.103. Technical & conforming changes: renames "Registry" as "Hotline"

Section 7. Amends s. 415.1034. Technical & conforming changes.

Section 8. Amends s. 415.1035. Provides that AHCA and the department work cooperatively with DOEA to ensure that every facility that serves "vulnerable adults" advises residents of their rights to report abuse or other mistreatment. Facilities must establish policies and procedures.

Section 9. Amends s. 415.1036. Technical and conforming changes.

Section 10. Amends s. 415.104. Provides that the department and local law enforcement agencies shall cooperate to allow the criminal investigation to proceed, without hindrance, concurrently with the department's protective investigation. Transferred from section 415.045 to section 415.104 are: delineation of the information to be provided to persons involved in a protective investigation; that persons interviewed may be represented by an attorney; and, the requirement that the protective investigator determine if the alleged victim meets the statutory definition of a "vulnerable adult." The investigator must determine if the alleged victim is a "vulnerable adult in need of services" as defined in section 415.102. At the close of the investigation, the protective investigator must advise the victim and any caregiver of any recommendations of services to be provided to ameliorate the causes or effects of abuse, neglect, or exploitation.

Section 11. Amends s. 415.1045. Provisions related to the conduct of the protective investigation which are moved to section 415.104 are deleted from s. 415.1045. Conforms changes related to registry & classification system. Provides that the department enter into working agreements with local law enforcement agencies. The Florida Department of Law Enforcement is directed to provide electronic access to criminal justice information for purposes of investigations and emergency placement.

Section 12. Amends s. 415.105. Provisions related to interference with the provision of protective services are amended and moved from section 415.1052(2) to section 415.105(3). Makes technical and conforming changes.

Section 13. Amends s. 415.1051. Provisions related to interference with the provision of protective services when capacity is lacking are transferred from section 415.1052(4) to section 415.1051(5). Technical and conforming changes are made.

Section 14. Amends s. 415.1052. Technical and conforming changes are made. Subsection (2) related to access to records is deleted from section 415.1052 and transferred to section 415.105.

Section 15. Amends s. 415.1055. Technical and conforming changes are made. Provides that when the department has reason to believe that a person living in a facility licensed by AHCA has been the victim of abuse, neglect, or exploitation, the department shall send a copy of its report to AHCA. If the investigation determines that a health professional licensed or certified by the Department of Health was involved in the abuse, neglect, or exploitation of a vulnerable adult, a copy of the investigative report will also be sent to the Department of Health. Removes provisions related to notification of alleged victims and perpetrators and to notification by law enforcement to the department and to the State Attorney.

Section 16. Amends s. 415.106. Makes technical and conforming changes.

Section 17. Amends s. 415.107. Adds certain Legislative committee staff to those persons who may have access to protective services reports. DOH, and AHCA, and the Department of Business and Professional Regulation may have access to reports when considering disciplinary action against a licensed or certified person pursuant to allegations of abuse, neglect or exploitation. Clarifies that the victim, the victim's caregiver, guardian, or legal counsel and any person who the department determined might be abusing, neglecting, or exploiting the victim may receive a copy of the department's report. Provides that information in the central abuse hotline cannot be used for employment screening.

Section 18. Amends s. 415.1102. Certain specifications about the operation of Adult Protection Teams are removed.

Section 19. Amends s. 415.111. Technical and conforming changes are made.

Section 20. Amends s. 415.1111. Civil penalties are removed. Makes technical and conforming changes.

Section 21. Amends s. 415.1113. Technical and conforming changes are made.

Section 22. Amends s. 415.113. Technical and conforming changes are made.

Section 23. Creates Part I of chapter 435.

Section 24. Amends s. 435.03. Requires employees and employers licensed pursuant to Chapter 400 and employees and employers of developmental institutions, intermediate care facilities for the developmentally disabled, and mental health treatment facilities to meet the requirements of chapter 435, Part II.

Section 25. Amends s. 435.05. Technical and conforming changes related to level 1 screening.

Section 26. Amends s. 435.07. Technical and conforming changes are made to Part I of chapter 435.

Section 27. Amends s. 435.08. Technical and conforming changes are made.

Section 28. Amends s. 435.09. Technical and conforming changes are made.

Section 29. Creates Part II of chapter 435.

Section 30. Creates s. 435.401. Creates definitions related to Part II of chapter 435 related to employment practices in specified organizations.

Section 31. Creates s. 435.402. Creates the "Service Letter" requirements and penalties.

Section 32. Creates s. 435.403. Creates a new section that provides that AHCA monitor employers and employees licensed by the agency. Provides enforcement and penalty authority. Funds collected through the payment of administrative penalties shall be deposited in the Health Care Trust Fund.

Section 33. Creates s. 435.405. Directs the agency to adopt rules to implement the provisions of Part II of Chapter 435.

Section 34. Amends s. 20.43. Technical corrections are made.

Sections 35-101. Technical and conforming changes and cross reference corrections are made to numerous sections of the statute.

Section 102. Repeal of sections 415.1065, 415.1075, 415.1085, 415.109.

Section 103. Appropriates from the Health Care Trust Fund to the Agency for Health Care Administration one FTE position and \$60,000 for regulation of health care services pools.

Section 104. Provides an effective date of September 1, 2000.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

No new revenues are projected. However, savings are projected for DCFS, DOH, AHCA, and for the Division of Administrative Hearings because of the removal of the requirements associated with the classification system and registry including due process protections.

2. Expenditures:

No significant new expenditures are required in the bill. Cost to AHCA for enforcement of reference check requirements should be offset by collections of administrative fines.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

No measurable impact is projected. Health care employers who currently conduct and respond to reference checks as required by law should incur insignificant cost increases. Further, the \$6.00 per applicant abuse registry screen no longer required should eliminate well over \$1,000,000 in fees currently paid by private industry.

D. FISCAL COMMENTS:

No significant fiscal impact is projected because chapter 435 currently requires checks of past employers for all persons subject to either level 1 or level 2 background screening.

Savings are anticipated from the removal of responsibilities from DCFS and other agencies associated with classifying persons identified during protective investigations, from the records management associated with maintaining a registry of perpetrators, and the extensive requirements associated with providing aggrieved parties with access to their rights to appeal the department's classification and addition of their name to the registry and in administrative hearing under the authority of chapter 120, F.S.

From the 1998 Committee on Elder Affairs & Long Term Care Interim Report:

- Salary costs to state agencies are estimated to be about \$2,547,700.



- Applicants and facilities bore a financial burden for abuse background checks of certified nursing assistants, which amounted to about \$750,000 annually. Since thousands of other personnel screenings besides CNAs are required, this number significantly understates total screening costs.
- Not estimated are costs associated with: general office operations, numerous sheriffs offices and other process servers who must deliver personally to an alleged perpetrator the notice that the department has classified their case as proposed confirmed, or the substantial private sector costs, including attorney fees to defend against an allegation or to obtain an exemption.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

**STORAGE NAME:** h2259a.lt

**DATE:** April 25, 2000

**PAGE 10**

VII. SIGNATURES:

COMMITTEE ON Elder Affairs & Long Term Care:

Prepared by:

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Melanie Meyer

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Tom Batchelor, Ph.D.