

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Health Policy Committee

BILL: SB 370

INTRODUCER: Senator Wilson

SUBJECT: Inmate Testing for HIV Infection

DATE: March 19, 2007

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|------------|----------------|-----------|------------------|
| 1. | Clodfelter | Cannon | CJ | Favorable |
| 2. | Munroe | Wilson | HP | Favorable |
| 3. | | | JU | |
| 4. | | | HA | |
| 5. | | | | |
| 6. | | | | |

I. Summary:

This bill requires the Department of Health (DOH) to designate two large counties and five smaller counties to participate in an HIV testing program for county jail prisoners. Participation in the program must be approved by the county's governing body. The bill also requires participating detention facilities to notify the DOH and the county health department when an HIV positive prisoner is released and to provide certain transitional assistance to that prisoner. Conforming language adds HIV testing of county jail prisoners under these circumstances to the list of HIV tests for which informed consent is not required.

The bill provides sovereign immunity for death or injury arising from actions carried out in compliance with the provisions of the bill.

This bill substantially amends sections 951.27 and 381.004, Florida Statutes.

II. Present Situation:

HIV/AIDS in Florida

Since testing and reporting began in 1981, through 2004, a cumulative total of 96,849 AIDS cases have been reported in Florida. This places Florida third in the nation for reported AIDS cases. In 2004 alone, 5,816 AIDS cases were reported here. Of the cumulative total, males account for 76 percent of the cases and females account for 24 percent.¹ The number of newly infected HIV cases dropped by 3 percent in 2004. During 2004, AIDS cases rose higher in

¹ Florida Department of Health, Bureau of HIV/AIDS, data as of December 31, 2004.

Broward County (1,010) and Miami-Dade County (1,349) relative to the other areas in the state. Officials at the DOH note that the increase in AIDS cases may be attributed in part to the large volume of publicly funded HIV testing that has occurred over the past three years.

Since HIV testing and reporting began in 1997 through 2004, a cumulative total of 33,489 HIV cases have been reported in Florida. In 2004 alone, 6,341 HIV cases were reported. Males accounted for 64 percent of the cumulative total while females accounted for 36 percent.²

A racial breakdown of these figures indicates that, while blacks account for 14 percent of the state population, blacks represent 48 percent of the total AIDS cases and 54 percent of the HIV cases.³ While whites make up approximately 69 percent of the state population, they represent 36 percent of the AIDS cases and 28 percent of the HIV cases.⁴ Hispanics account for 17 percent of the adult population and comprise the remaining 16 percent of the AIDS cases and 17 percent of the HIV cases.⁵ The Haitian population is recorded as part of the black population for statistical purposes. The Haitian population accounted for 6,984 AIDS cases in the cumulative total and 2,170 cases in the 2004 total.⁶

HIV Testing in Florida Prisons

The rate of HIV/AIDS is more prevalent in prisons and detention facilities than in the general population. The Department of Corrections (DOC) reports that, of the total inmate population of 86,474 inmates, 3,396 or 3.5 percent have tested positive for the HIV virus. Of the inmates who have tested positive for HIV, 645 have been diagnosed with AIDS. This is often attributed to the fact that the inmates engage in high risk activities more frequently than the general population. Researchers say high incarceration rates increase risk behaviors associated with HIV by skewing the ratio of women to men, worsening economic conditions, and increasing the social capital of men who are not imprisoned.⁷

Beginning in July 2002, the DOC has been required to test all inmates for HIV at least 60 days prior to their release. If the inmate is found to be HIV positive, the department is required to:

- Notify the DOH and the health department in the county where the inmate intends to live;
- Provide counseling and transition assistance related to HIV; and
- Provide a 30-day supply of HIV/AIDS related medicine.⁸

Section 951.27, F.S., requires county and municipal detention facilities to have a written procedure concerning the testing for infectious diseases, including HIV. The procedure must be consistent with guidelines established by the Centers for Disease Control and Prevention (CDC) and recommendations of the Correctional Medical Authority.

² *Id.*

³ Florida Department of Health, Bureau of HIV/AIDS – HIV/AIDS and Blacks, 2004.

⁴ Florida Department of Health, Bureau of HIV/AIDS, data as of December 31, 2004.

⁵ Florida Department of Health, Bureau of HIV/AIDS, HIV/AIDS Among Hispanics, Florida, 2004.

⁶ Florida Department of Health, Bureau of HIV/AIDS – HIV/AIDS in Florida's Haitian Population – 2004.

⁷ "Links Between Prison and AIDS Affecting Blacks Inside and Out," Lynette Clemetson, The New York Times, August 6, 2004.

⁸ Section 945.355, F.S.

According to the DOH, 14 county health departments receive funding through the department's Bureau of HIV/AIDS to implement HIV counseling, testing, and referral services to the local county detention facilities. The programs focus on testing inmates early in their jail terms and then linking them with appropriate services upon their release. Other detention facilities provide voluntary testing programs through their county health department or community-based organizations, but do not receive funding from the bureau. Disease reporting laws require reporting of positive test results, but there is no requirement for county health departments to be notified when an HIV-positive inmate is released from jail.

HIV Testing and Informed Consent

Section 381.004(3), F.S., requires any person who orders an HIV test to obtain the informed consent of the person upon whom the test is being performed, with some exceptions. Section 381.004(3)(h), F.S., provides a number of exceptions to the informed consent requirement, including HIV testing of inmates prior to their release from prison. However, informed consent is required before testing an inmate who is being released from jail.

Informed consent for HIV testing must be preceded by an explanation of the right to confidential treatment of information identifying the subject of the test and the results of the test as provided by law. Information must also be provided on the fact that a positive HIV test result will be reported to the county health department with sufficient information to identify the test subject and on the availability and location of sites at which anonymous testing is performed. Consent need not be in writing if there is documentation in the medical record that the test has been explained and the consent has been obtained.

The person ordering the test or that person's designee must ensure that all reasonable efforts are made to notify the test subject of his or her test result. Notification of a person with a positive test result must include information on the availability of appropriate medical and support services, on the importance of notifying partners who may have been exposed, and on preventing transmission of HIV. Notification of a person with a negative test result must include, as appropriate, information on preventing the transmission of HIV. When testing occurs in a hospital emergency department, detention facility, or other facility and the test subject has been released before being notified of positive test results, informing the county health department for that department to notify the test subject fulfills this responsibility.

According to the CDC, an estimated one-fourth of one million Americans believed to be living with HIV remain unaware of their infection. The CDC emphasizes that new approaches are urgently needed to reach these individuals with information on their HIV infection, and are essential to the success of HIV prevention and care efforts in the United States. Early diagnosis is critical in order for people with HIV to receive life-extending therapy. About 40 percent of individuals diagnosed with HIV are diagnosed within one year of developing AIDS, when it may be too late for them to fully benefit from treatment. Additionally, studies show that most people who learn they are infected take steps to protect their partners, while people who are unaware of

their infection are estimated to account for between 50 and 70 percent of new sexually transmitted HIV infections.⁹

The CDC has recently recommended that HIV testing become a part of routine care for all persons between the ages of 13 and 64.¹⁰ It emphasizes that the testing must be voluntary and undertaken only with the patient's knowledge, but recommends that pre-test counseling and separate, written consent for HIV testing should no longer be required.¹¹

The Williams Institute at the University of California, Los Angeles, recently published the results of three studies, which measured HIV-discrimination in health care in Los Angeles County.¹² The studies conducted from 2003 to 2005 found that HIV-discrimination remains common in the health care sector despite legal prohibitions.¹³ The studies found that 46 percent of skilled nursing facilities, 26 percent of plastic and cosmetic surgeons, and 55 percent of obstetricians in Los Angeles County would not take any patients who were HIV-positive for any type of service, even when the patients were asymptomatic.¹⁴

III. Effect of Proposed Changes:

The bill amends s. 951.27, F.S., to require the DOH to select two counties with a population over 1.2 million and five counties with a lower population in which to institute a program to test county jail prisoners for HIV. Participation must be authorized by a majority vote of the county's governing body. Each prisoner would be tested at least 30 days before release unless the facility knows that the inmate is HIV positive or if the inmate has been tested within 120 days of the release date and does not request retesting. A test is not required if an inmate is released due to an emergency or a court order and the facility receives less than 30 days' notice of the release, or if the inmate is transferred to the DOC for incarceration.

The bill imposes several requirements on participating detention facilities before an HIV positive prisoner is released. The facility must notify both the county health department where the inmate plans to reside and the DOH of the inmate's release date and HIV status. The facility must also provide transitional assistance to the inmate in the form of education on preventing HIV transmission and on the importance of receiving medical care and treatment. The assistance must include providing the released inmate with an individualized written discharge plan. The plan must include records of laboratory and diagnostic test results, medication and treatment information, and referrals to and contact information for the health department and local primary

⁹ United States Centers for Disease Control and Prevention "Fact Sheet: CDC's Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health Care Settings" September 2006, as republished in *The Body*©, a service of Body Health Resources Corporation at <http://www.thebody.com/cdc/recommendations06_facts.html> (Last visited on March 19, 2007).

¹⁰ Id.

¹¹ Id.

¹² "HIV Discrimination in Health Care Services in Los Angeles County: The Results of Three Testing Studies" December 2006. Brad Sears and Deborah Ho, The Williams Institute, University of California at Los Angeles. See the Williams Institute's website at:

<<http://www.law.ucla.edu/williamsinstitute/publications/Discrimination%20in%20Health%20Care%20LA%20County.pdf>> (Last visited on March 19, 2007).

¹³ Id.

¹⁴ Id.

medical care services for HIV infection treatment that are available where the inmate intends to reside.

New subsection (5) of s. 951.27(5), F.S., provides that the state, its agencies, its subdivisions, or employees are not liable for negligently-caused death or bodily injury that arises out of compliance with the testing and notification procedures.¹⁵

The provisions of this proposal closely parallel s. 945.355, F.S., which requires the DOC to test inmates prior to their release. A significant difference is that the DOC is required to provide the HIV positive inmate with a 30-day supply of HIV/AIDS-related medications that is being taken at the time of release.

The bill amends s. 381.004, F.S., to add HIV testing pursuant to this bill to the list of tests for which informed consent is not required.

The bill has an effective date of July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

¹⁵ Article X, s. 13, of the State Constitution, authorized the Florida Legislature in 1868 to waive sovereign immunity by stating that, "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." The doctrine of sovereign immunity prohibits lawsuits in state court against a state government, and its agencies and subdivisions without the government's consent. Section 768.28, F.S., provides that sovereign immunity for tort liability is waived for the state, and its agencies and subdivisions, but imposes a \$100,000 limit on the government's liability to a single person and for claims arising out of a single incident, the limit is \$200,000.

B. Private Sector Impact:

There could be an indeterminate impact on costs incurred by private insurance carriers due to increased identification of the HIV status of released inmates. However, the costs of early treatment can be expected to be mitigated by a reduction in treatment costs for opportunistic infections that may be prevented.

C. Government Sector Impact:

Participating county detention facilities will be affected by this bill. For those that do not currently test prisoners for HIV before their release, the fiscal impact of testing depends on the number of inmates that are released from the jail who require testing under the bill. Jails normally use a \$12 rapid test kit that takes from 20-40 minutes to get results. According to the DOH, 98 percent of tests are negative and no further testing is required. For positive results, a confirming test is required at an additional cost of \$1 for a blood test or \$4 for a swab test.

The impact of meeting the transitional assistance requirements is unknown but could be significant. The DOH estimates that the bill would result in increased annual treatment costs of approximately \$3 million for the state. It does not anticipate that federal funds will be available to absorb the costs. The department's estimate is based upon the assumption that two large, four medium, and one small county will agree to participate in the program, resulting in approximately 48,000 tests. Assuming that approximately 2 percent of those inmates will test positive for HIV, approximately 960 inmates per year would be identified. Of these, one-quarter (240 persons) are expected to need services through public health because they are indigent and do not have other coverage. Of these 240 persons, the department projects that half (120 persons) will continue treatment, with the other half either moving from Florida or not continuing treatment. The average cost of treating a person with HIV is approximately \$25,200 a year, yielding a total cost of \$3,024,000 to treat 120 persons.

Early identification and treatment may reduce costs that would otherwise be incurred for treating opportunistic infections. It may also reduce transmission of the virus to other persons who would themselves need treatment. The fiscal impact of this potential benefit has not been estimated.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
