

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 Health Policy

BILL: CS/SB 178

INTRODUCER: Health Policy Committee and Senators Bean and Gaetz

SUBJECT: Quality Health Care Services

DATE: December 1, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Lloyd	Stovall	HP	Fav/CS
2.			BI	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 178 addresses medical tourism and volunteer health care services.

Enterprise Florida, Inc., (EFI) and the Florida Tourism Industry Marketing Corporation (VISIT Florida) are directed to promote medical tourism and market the state as a healthcare destination. VISIT Florida is required to include the promotion of medical tourism in the 4-year marketing plan and showcase Florida providers.

The bill also revises the description of volunteer, uncompensated services under the Access to Health Care Act (the act) to allow a free clinic to receive and use appropriations or grants from a governmental entity or nonprofit corporation to support the delivery of the contracted services by volunteer health care providers without jeopardizing the sovereign immunity protections afforded under the act. The bill clarifies that employees and agents of a health care provider fall within the sovereign immunity protections of the contracted health care provider when providing health care services pursuant to the contract.

II. Present Situation:

Enterprise Florida, Inc.

Enterprise Florida, Inc. (EFI) is a public-private organization created as a non-profit corporation in Florida law under ss. 288.901 through 288.923, F.S.¹ The EFI serves as the state's economic development agency and is overseen by a board of directors, chaired by the Governor. The state's Tourism Marketing division is located within EFI.

Section 288.001, F.S., requires the Office of Economic and Demographic Research (EDR) and the Office of Program Policy and Government Accountability (OPPAGA) to provide a detailed analysis of state economic development programs according to a recurring schedule established in law. The OPPAGA must evaluate each program over the 3 previous years for effectiveness and value to the state's taxpayers and include recommendations for consideration by the Legislature. The EDR must evaluate and determine the economic benefits, as defined in s. 288.005(1), F.S., of each program over the previous 3 years.

VISIT Florida, Inc.

VISIT Florida, Inc., is Florida's official tourism marketing corporation and is a direct-support organization² of Enterprise Florida, Inc. VISIT Florida is a non-profit, public private partnership created in 1996 by the Florida Legislature³ as the Florida Tourism Industry Marketing Corporation under s. 288.1226, F.S. VISIT Florida's mission is to promote travel and drive visitation to and within Florida.⁴

For every \$1 spent on tourism marketing, VISIT Florida reports that more than \$300 in tourism spending and \$18 in new sales tax collections are generated from visitors, not residents.⁵ VISIT Florida also raised more than \$120 million in private sector matching funds in the last fiscal year through investments in advertising campaigns, promotional campaigns, and other marketing opportunities.⁶

VISIT Florida, Inc., is overseen by a 31-member Board of Directors comprised of Florida tourism experts. The board has 11 committees that focus on these areas:

- Advertising and internet;
- Audit;
- Communications;

¹ Enterprise Florida, Inc., *About EFI*, <http://www.enterpriseflorida.com/about-efi/> (last visited Sept. 22, 2015).

² A direct support organization generally means a not-for-profit corporation incorporated under chapter 617 and organized and operated to conduct program and activities; initiate developmental projects; raise funds; request and receive grants, gifts, and bequests of moneys; acquire, receive, hold, invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and make expenditures to or for the direct or indirect benefit of the state for the specific purposes of the non-profit corporation.

³ VISIT Florida.com, *About VISIT FLORIDA*, <http://www.visitflorida.com/en-us/about-visit-florida.html> (last visited Sept. 17, 2015).

⁴ VISIT Florida.com, *Mission & Vision*, <http://www.visitfloridamediablog.com/home/corporate-info/mission-vision/> (last visited Sept. 17, 2015).

⁵ *Supra* note 10.

⁶ *Id.*

- Cultural, heritage, rural, and nature;
- Finance;
- Industry relations;
- International;
- Marketing Council Steering;
- Promotions;
- Meetings and travel trade; and
- Visitor services.⁷

The 2014-2015 General Appropriations Act earmarked \$5 million for a marketing plan and grants related to medical tourism. The Medical Tourism Task Force, created under VISIT Florida, adopted a \$5 million budget that included a strategic plan, branding, and a website specific to medical tourism, medical meetings and trainings, health and wellness projects, partnerships with the Department of Health and the Department of Agriculture and Consumer Services, public service announcements with the Florida Academic Cancer Center Alliance, and matching grants. The task force developed the theme and logo for the website, *Discover Florida Health*.⁸

VISIT Florida awarded 25 medical tourism grants totaling \$3.1 million in January 2015. Grants were awarded in two categories: nine were awarded for medical tourism destination promotion and 16 for medical meetings and training promotion. The grants aimed to help grow awareness of existing medical tourism products and services in the state, as well as strengthen Florida as a preferred destination to host medical conferences, meetings, and training programs.

Each grant awarded under the medical tourism promotion program was matched by private dollars. The applicants had to be either a destination marketing organization, health care provider, medical facility, physician, or, in the case of the meetings and training program grant, a collaboration that includes one or more of these entities.⁹

The OPPAGA and the EDR offices are required to provide a detailed analysis of state economic development programs based on recurring schedules set in law for specific programs. The medical tourism grant program was included in the review of programs due by January 1, 2015. The report noted that the state's tourism marketing activities appeared to be expanding with increasing emphasis on a number of areas, including medical tourism, but identified that enhanced coordination by VISIT Florida could help agencies leverage state funds and avoid duplicative marketing activities.¹⁰

The Florida Chamber Foundation (Foundation) also funded a report to review the state's *Discover Florida Health* promotion. The report was presented to the Foundation on April 20, 2015 and included an overview of the definition of a medical tourist, keys to success, best

⁷ VISIT Florida.com, *Committees*, <http://www.visitflorida.org/about-us/who-we-are/committees/> (last visited Sept. 17, 2015).

⁸ *Id.*

⁹ See *Discover Florida Health*, Sunshine Matters, The Official Corporate Blog for Visit Florida (January 29, 2015) at: <http://www.visitfloridablog.org/?p=11862>, (last visited Sept. 17, 2015).

¹⁰ Office of Program Policy Analysis and Government Accountability, *Florida Economic Development Program Evaluations - Year 2 (Report No. 15-01, January 1, 2015)*, p. 28, <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1501rpt.pdf> (last visited Sept. 17, 2015).

practices for international patient programs, case studies from other states, and the potential economic impact of medical tourism in Florida.¹¹ The report also provides a strengths, weaknesses, opportunities and threats or SWOT analysis for the state with a roadmap for process improvement. The Foundation plans to release a new report on medical tourism later in December entitled, *A Strategic Look at Florida's Medical Tourism Opportunities*.¹²

Access to Health Care Act

Section 766.1115, F.S., is entitled “The Access to Health Care Act.” It was enacted in 1992 to encourage health care providers to provide care to low-income persons.¹³ The act is administered by the Department of Health (department) through the Volunteer Health Services Program.¹⁴

This section of law extends sovereign immunity to health care providers who execute a contract with a governmental contractor and who, as agents of the state, provide volunteer, uncompensated health care services to low-income individuals. These health care providers are considered agents of the state under s. 768.28(9), F.S., for purposes of extending sovereign immunity while acting within the scope of duties required under the act.

A contract under the act must pertain to volunteer, uncompensated services. For services to qualify as volunteer, uncompensated services, the health care provider must receive no compensation from the governmental contractor for any services provided under the contract and must not bill or accept compensation from the recipient or any public or private third-party payor for the specific services provided to the low-income recipients covered by the contract.¹⁵

Health care providers under the act include:¹⁶

- A birth center licensed under ch. 383, F.S.¹⁷
- An ambulatory surgical center licensed under ch. 395, F.S.¹⁸
- A hospital licensed under ch. 395, F.S.¹⁹
- A physician or physician assistant licensed under ch. 458, F.S.²⁰

¹¹ Florida Chamber Foundation, *Discover Florida Health Feasibility Study* (April 20, 2015) <http://www.flchamber.com/wp-content/uploads/GHR-FLORIDA-STUDY.pdf> (last visited Dec. 1, 2015).

¹² Florida Chamber of Commerce, *A Strategic Look at Florida's Medical Tourism Opportunities*, <http://www.flchamber.com/a-strategic-look-at-floridas-medical-tourism-opportunities/> (last visited Dec. 1, 2015).

¹³ Low-income persons are defined in the act as a person who is Medicaid-eligible, a person who is without health insurance and whose family income does not exceed 200 percent of the federal poverty level, or any eligible client of the Department of Health who voluntarily chooses to participate in a program offered or approved by the department. Section 766.1115(3)(e), F.S. A single individual whose annual income does not exceed \$23,540 is at 200 percent of the federal poverty level using Medicaid data. See *2015 Poverty Guidelines, Annual Guidelines* at: <http://aspe.hhs.gov/poverty/15poverty.cfm> (last visited Sept. 17, 2015).

¹⁴ See Florida Department of Health, *Volunteerism Volunteer Opportunities*, (last visited Sept. 17, 2015) <http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteerism-volunteer-opportunities/index.html>; Rule Chapter 64I-2, F.A.C.

¹⁵ Section 766.1115(3)(a), F.S.

¹⁶ Section 766.1115(3)(d), F.S.

¹⁷ Section 766.1115(3)(d)1., F.S.

¹⁸ Section 766.1115(3)(d)2., F.S.

¹⁹ Section 766.1115(3)(d)3., F.S.

²⁰ Section 766.1115(3)(d)4., F.S.

- An osteopathic physician or osteopathic physician assistant licensed under ch. 459, F.S.²¹
- A chiropractic physician licensed under ch. 460, F.S.²²
- A podiatric physician licensed under ch. 461, F.S.²³
- A registered nurse, nurse midwife, licensed practical nurse, or advanced registered nurse practitioner licensed or registered under part I of ch. 464, F.S., or any facility that employs nurses licensed or registered under part I of ch. 464, F.S., to supply all or part of the care delivered under the act.²⁴
- A dentist or dental hygienist licensed under ch. 466, F.S.²⁵
- A midwife licensed under ch. 467, F.S.²⁶
- A health maintenance organization certificated under part I of ch. 641, F.S.²⁷
- A health care professional association and its employees or a corporate medical group and its employees.²⁸
- Any other medical facility the primary purpose of which is to deliver human medical diagnostic services or which delivers nonsurgical human medical treatment, and which includes an office maintained by a provider.²⁹
- A free clinic that delivers only medical diagnostic services or nonsurgical medical treatment free of charge to all low-income recipients.³⁰
- Any other health care professional, practitioner, provider, or facility under contract with a governmental contractor, including a student enrolled in an accredited program that prepares the student for licensure as a physician, physician assistant, nurse, or midwife.³¹
- Any nonprofit corporation qualified as exempt from federal income taxation under s. 501(a) of the Internal Revenue Code, and described in s. 501(c) of the Internal Revenue Code, that delivers health care services provided by the listed licensed professionals, any federally funded community health center, and any volunteer corporation or volunteer health care provider that delivers health care services.

A governmental contractor is defined in the act as the department, a county health department, a special taxing district having health care responsibilities, or a hospital owned and operated by a governmental entity.³²

The act further specifies additional contract requirements. The contract must provide that:

- The governmental contractor retains the right of dismissal or termination of any health care provider delivering services under the contract.
- The governmental contractor has access to the patient records of any health care provider delivering services under the contract.

²¹ Section 766.1115(3)(d)5., F.S.

²² Section 766.1115(3)(d)6., F.S.

²³ Section 766.1115(3)(d)7., F.S.

²⁴ Section 766.1115(3)(d)8., F.S.

²⁵ Section 766.1115(3)(d)13., F.S.

²⁶ Section 766.1115(3)(d)9., F.S.

²⁷ Section 766.1115(3)(d)10., F.S.

²⁸ Section 766.1115(3)(d)11., F.S.

²⁹ Section 766.1115(3)(d)12., F.S.

³⁰ Section 766.1115(3)(d)14., F.S.

³¹ Section 766.1115(3)(d)15., F.S.

³² Section 766.1115(3)(c), F.S.

- The health care provider must report adverse incidents and information on treatment outcomes.
- The governmental contractor or the health care provider must make patient selection and initial referrals.
- The health care provider is subject to supervision and regular inspection by the governmental contractor.³³
- The health care provider must accept all referred patients; however, the contract may specify limits on the number of patients to be referred.³⁴

The governmental contractor must provide written notice to each patient, or the patient's legal representative, receipt of which must be acknowledged in writing, that the provider is covered under s. 768.28, F.S., for purposes of legal actions alleging medical negligence.³⁵

According to the department, from July 1, 2012, through June 30, 2013, 13,543 licensed health care volunteers (plus an additional 26,002 clinic staff volunteers) provided 427,731 health care patient visits with a total value of donated goods and services of \$294,427,678, under the act.³⁶ The Florida Department of Financial Services, Division of Risk Management, reported on February 14, 2014, that 10 claims had been filed against the Volunteer Health Care Provider Program under s. 766.1115, F.S., since February 15, 2000.³⁷

Legislative Appropriation to Free and Charitable Clinics

The 2015-2016 General Appropriations Act appropriated \$9 million to the Florida Association of Free and Charitable Clinics (Association) through the department. This appropriation, however was vetoed by the Governor because the funds cannot be used for services under the contract.³⁸ In previous years when the Legislature appropriated funds through the department to the Association, the department restricted the use of these funds by free and charitable clinics that were health care providers under the act to clinic capacity building purposes in the contract which distributed this appropriation. The clinic capacity building was limited to products or processes that increase skills, infrastructure and resources of clinics. The department did not authorize these funds to be used to build capacity through the employment of clinical personnel. The department cautiously interpreted the provision in the act relating to volunteer, uncompensated services, which states that a health care provider must receive no compensation from the governmental contractor for any services provided under the contract. Accordingly, the department's interpretation precluded the use of the appropriation for this purpose.

³³ Section 766.1115(4), F.S.

³⁴ Rule 64I-2.003(2), F.A.C.

³⁵ Section 766.1115(5), F.S.

³⁶ Department of Health, *Volunteer Health Services 2012-2013 Annual Report*, available at: <http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteerism-volunteer-opportunities/vhs1213annualreport2.pdf>, (last visited Sept. 17, 2015). The 2012-2013 Annual Report is the most current report available.

³⁷ Correspondence from Lewis R. Williams, Chief of State Liability and Property Claims, to Duane A. Ashe, Department of Health (Feb. 14, 2014) (on file with the Senate Committee on Health Policy).

³⁸ Chapter 2015-232, Laws of Fla., line item 441 and *see* Governor's Veto Message for 2015-2016 General Appropriations Act, p. 35, <http://www.flgov.com/wp-content/uploads/2015/06/Transmittal%20Letter%206.23.15%20-%20SB%202500-A.pdf> (last visited Sept. 22, 2015).

Sovereign Immunity

The term “sovereign immunity” originally referred to the English common law concept that the government may not be sued because “the King can do no wrong.” Sovereign immunity bars lawsuits against the state or its political subdivisions for the torts of officers, employees, or agents of such governments unless the immunity is expressly waived.

Article X, section 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the power to waive immunity in part or in full by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state. Under this statute, officers, employees, and agents of the state will not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. However, personal liability may result from actions committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Instead, the state steps in as the party litigant and defends against the claim. The recovery by any one person is limited to \$200,000 for one incident and the total for all recoveries related to one incident is limited to \$300,000.³⁹ The sovereign immunity recovery caps do not prevent a plaintiff from obtaining a judgment in excess of the caps, but the plaintiff cannot recover the excess damages without action by the Legislature.⁴⁰

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.⁴¹ In *Stoll v. Noel*, the Florida Supreme Court explained that independent contractor physicians may be agents of the state for purposes of sovereign immunity:

One who contracts on behalf of another and subject to the other’s control except with respect to his physical conduct is an agent and also independent contractor.⁴²

The court examined the employment contract between the physicians and the state to determine whether the state’s right to control was sufficient to create an agency relationship and held that it did.⁴³ The court explained:

Whether CMS [Children’s Medical Services] physician consultants are agents of the state turns on the degree of control retained or exercised by CMS. This Court has held that the right to control depends upon the terms of the employment contract. . . . CMS requires each consultant, as a condition of participating in the CMS program, to agree to abide by the terms published in its HRS⁴⁴ Manual and CMS Consultant’s Guide which

³⁹ Section 768.28(5), F.S.

⁴⁰ *Id.*

⁴¹ *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997).

⁴² *Id.* at 703, quoting from the *Restatement (Second) of Agency* s. 14N (1957).

⁴³ *Id.* at 703.

⁴⁴ Florida Department of Health and Rehabilitative Services.

contain CMS policies and rules governing its relationship with the consultants. The Consultant's Guide states that all services provided to CMS patients must be authorized in advance by the clinic medical director. The language of the HRS Manual ascribes to CMS responsibility to supervise and direct the medical care of all CMS patients and supervisory authority over all personnel. The manual also grants to the CMS medical director absolute authority over payment for treatments proposed by consultants. The HRS Manual and the Consultant's Guide demonstrate that CMS has final authority over all care and treatment provided to CMS patients, and it can refuse to allow a physician consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons.

Our conclusion is buttressed by HRS's acknowledgement that the manual creates an agency relationship between CMS and its physician consultants, and despite its potential liability in this case, HRS has acknowledged full financial responsibility for the physicians' actions. HRS's interpretation of its manual is entitled to judicial deference and great weight.⁴⁵

III. Effect of Proposed Changes:

Economic Development Programs Evaluation (Section 1)

Section 1 amends s. 288.0001, F.S., relating to the evaluation of economic development programs by the EDR and OPPAGA. The newly created provision of law relating to medical tourism is added to a list of VISIT Florida programs to receive a detailed economic development review by EDR and OPPAGA every 3 years.

Enterprise Florida, Inc. (Sections 2 and 3)

Enterprise Florida's purpose is amended to include marketing Florida as a health care destination using medical tourism initiatives under s. 288.924, F.S., and promoting the state's quality health care services.

Within Enterprise Florida, Inc., its Division of Tourism's responsibilities are modified to include the promotion of medical tourism for quality health care services, as provided under the newly created s. 288.924, F.S.

Medical Tourism (Section 4)

Section 4 creates s. 288.924, F.S., to require the Division of Tourism Marketing within Enterprise Florida, Inc., to include specific initiatives to establish Florida as a destination for quality, medical services within its statutorily mandated 4-year marketing plan. The plan must, at a minimum promote the state nationally and internationally on:

- The qualifications and specializations of health care providers and the scope of services available throughout the state;

⁴⁵ *Stoll*, 694 So. 2d at 703 (Fla. 1997) (internal citations omitted).

- Opportunities for medical-related conferences, businesses, and training from the medical field; and
- Initiatives that showcase the selected and qualified providers that bundle packages of health and support services.

In order for a provider to be included in initiatives related to bundled health care packages, the bill requires a selection process through a solicitation of proposals that describes the available services, provider qualifications, and special arrangements for food, lodging, transportation, or other support services that may be provided to visiting patients and their families. A proposal may come from a single provider or through a network of providers. Assessment of proposals are through the VISIT Florida. To be qualified for selection, a health care provider must:

- Have a full, active, and unencumbered Florida license and ensure that all health care providers participating in the proposal have a full, active, and unencumbered license;
- Have a current accreditation that is not conditional or provisional from a nationally recognized accrediting body;
- Be a recipient of the Cancer Center of Excellence Award, as described in s. 381,925, F.S., within the recognized 3-year period of the award, or have a current national or international recognition given through a specific qualifying process in another specialty area; and
- Meet other criteria as determined by the VISIT Florida in collaboration with the Agency for Health Care Administration and the Department of Health.

Access to Health Care Act (Section 5)

The bill authorizes a free clinic to receive and use appropriations or grants from a governmental entity or nonprofit corporation to support the delivery of contracted services by volunteer health care providers under the Access to Health Care Act (the act) without those funds being deemed compensation which might jeopardize the sovereign immunity protections afforded in the act. The bill authorizes these appropriations or grants to be used for the employment of health care providers to supplement, coordinate, or support the delivery of services by volunteer health care providers. The bill states that the receipt and use of the appropriation or grant does not constitute the acceptance of compensation for the specific services provided to the low-income recipients covered by the contract.

The bill inserts the phrase “employees or agents” in several provisions in the act to clarify that employees and agents of a health care provider, which typically are paid by a health care provider, fall within the sovereign immunity protections of the contracted health care provider when acting pursuant to the contract. Subsection (5) of the act currently recognizes employees and agents of a health care provider. This subsection requires the governmental contractor to provide written notice to each patient, or the patient’s legal representative, that the provider is an agent of the governmental contractor and that the exclusive remedy for injury or damage suffered as the result of any act or omission of the provider *or any employee or agent thereof* acting within the scope of duties pursuant to the contract is by commencement of an action pursuant to the provisions of s. 768.28, F.S.

The bill provides for efficiencies in health care delivery under the contract by requiring the patient, or the patient’s legal representative, to acknowledge in writing receipt of the notice of agency relationship between the government contractor and the health care provider at the initial

visit only. Thereafter, the notice requirement is met by posting the notice in a place conspicuous to all persons.

Sovereign Immunity (Section 6)

Section 768.28, F.S., is amended to specifically include a health care provider's employees or agents so as to avoid any potential ambiguity between the provisions in that section of law and the act.

Additional Provisions and Effective Date

The bill removes obsolete language and makes technical and grammatical changes.

The effective date of the bill is July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

CS/SB 178 may impact participation by the medical community in medical tourism which may further increase revenues for the medical community. Additionally, the medical community and the public benefit financially when medical conferences and meetings convene in Florida.

Contracted free clinics may receive or continue to receive governmental funding in the form of an appropriation or grant without the concern of restrictions on such funding for certain uses that might be imposed by the act. The receipt of any such funding is speculative at this point and therefor the amount is indeterminate.

C. **Government Sector Impact:**

For every \$1 spent on tourism marketing, VISIT Florida reports that more than \$300 in tourism spending and \$18 in new sales tax collections are generated from visitors, not residents.⁴⁶ VISIT Florida also raised more than \$120 million in private sector matching funds in the last fiscal year through investments in advertising campaigns, promotional campaigns, and other marketing opportunities.⁴⁷

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 288.0001, 288.901, 288.923, 766.1115, and 768.28.

This bill creates s. 288.924 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 December 1, 2015:

The CS removed the creation of s. 624.27, F.S., and all provisions relating to direct primary care agreements.

B. **Amendments:**

None.

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

⁴⁶ *Supra* note 10.

⁴⁷ *Id.*