

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 649 Substance Abuse Services

SPONSOR(S): Health & Human Services Committee, Civil Justice Subcommittee, Children, Families & Seniors Subcommittee, Caruso

TIED BILLS: IDEN./SIM. BILLS:

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	15 Y, 0 N, As CS	Siples	Brazzell
2) Civil Justice Subcommittee	13 Y, 0 N, As CS	Frost	Luczynski
3) Health & Human Services Committee	16 Y, 0 N, As CS	Siples	Calamas

SUMMARY ANALYSIS

Substance abuse affect millions in the United States each year. The Department of Children and Families (DCF) regulates substance abuse treatment programs through licensure. Florida law also provides for voluntary registration of recovery residences and recovery residence administrators. Recovery residences offer drug- and alcohol-free living environments for individuals in recovery and licensed treatment providers are limited in the referrals they may make to non-certified recovery residences.

An Individual who is employed, or applying for employment, by a substance abuse treatment provider or an individual applying for certification as recovery residence administrator must undergo a background screening. If an individual has committed any disqualifying offense, he or she is disqualified from employment or certification, unless exempted by DCF.

CS/CS/CS/HB requires, DCF to exempt substance abuse treatment personnel from disqualification based on background screening when these personnel committed certain nonviolent crimes common among substance users and requires a minimum waiting period, during which the individual cannot have been arrested for any offense. The bill also adds disqualifying offenses for recovery residence administrators.

Florida's patient brokering statute makes it unlawful for a person to receive or provide a commission, benefit, bonus, rebate, kickback, or bribe, for the referral of a patient to or from a substance abuse provider or health care facility. The law provides a number of exceptions to the prohibition, including to any discount, waiver of payment or payment arrangement expressly authorized under the federal anti-kickback statute, which prohibits inducements for patient referrals for services payable by a federal health care program. Although the federal anti-kickback statute provides exceptions to its provisions, there may be payment arrangements that are not prohibited under the federal law but also not expressly authorized.

The bill expands the number of payment structures allowed under Florida's patient-brokering statute by exempting discounts, waivers of payment, or payments that are not prohibited by the federal anti-kickback statute. This restores the statute to 2018 status, reversing changes made in 2019.

The Criminal Justice Impact Conference considered the bill on January 27, 2020, and determined it will likely have a negative insignificant impact, meaning it will result in a decrease of 10 or fewer beds. The bill has no fiscal impact on local government.

The bill is effective July 1 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Substance Abuse

Substance abuse refers to the harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs.¹ Substance use disorders occur when the chronic use of alcohol or drugs causes significant impairment, such as health problems, disability, and failure to meet major responsibilities at work, school, or home.² Repeated drug use leads to changes in the brain's structure and function that can make a person more susceptible to developing a substance use disorder.³ Brain imaging studies of persons with substance use disorders show physical changes in areas of the brain that are critical to judgment, decision making, learning and memory, and behavior control.⁴

According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, a diagnosis of substance use disorder is based on evidence of impaired control, social impairment, risky use, and pharmacological criteria.⁵ The most common substance use disorders in the United States are from the use of alcohol, tobacco, cannabis, stimulants, hallucinogens, and opioids.⁶

Substance Abuse Treatment in Florida

In the early 1970s, the federal government furnished grants for states to develop continuums of care for individuals and families affected by substance abuse.⁷ The grants provided separate funding streams and requirements for alcoholism and drug abuse. In response, the Florida Legislature enacted ch. 396, F.S. (alcohol) and ch. 397, F.S. (drug abuse).⁸ In 1993, legislation combined ch. 396 and ch. 397, F.S., into a single law, the Hal S. Marchman Alcohol and Other Drug Services Act ("the Marchman Act").⁹ The Marchman Act supports substance abuse prevention and remediation through a system of prevention, detoxification, and treatment services to assist individuals at risk for or affected by substance abuse.

Additionally, the Department of Children and Families (DCF) administers a statewide system of safety-net services for substance abuse and mental health (SAMH) prevention, treatment, and recovery. SAMH programs include a range of prevention, acute interventions (such as crisis stabilization or detoxification), residential, transitional housing, outpatient treatment, and recovery support services. Services are provided based upon state and federally-established priority populations.¹⁰

¹ World Health Organization, *Substance Abuse*, available at http://www.who.int/topics/substance_abuse/en/ (last visited February 18, 2020).

² Substance Abuse and Mental Health Services Administration, *Mental Health and Substance Use Disorders*, (last rev. April 2019), available at <http://www.samhsa.gov/disorders/substance-use> (last visited February 18, 2020).

³ National Institute on Drug Abuse, *Drugs, Brains, and Behavior: The Science of Addiction*, available at <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drug-abuse-addiction> (last visited February 18, 2020).

⁴ Id.

⁵ *Supra* note 2.

⁶ Id.

⁷ Department of Children and Families, *Baker Act and Marchman Act Project Team Report for Fiscal Year 2016-2017*, p. 4-5. (on file with Health and Human Services Committee staff).

⁸ Id.

⁹ Ch. 93-39, s. 2, Laws of Fla., codified in ch. 397, F.S.

¹⁰ These priority populations include, among others, persons diagnosed with co-occurring substance abuse and mental health disorders, persons who are experiencing an acute mental or emotional crisis, children who have or are at risk of having an emotional disturbance, and children at risk for initiating drug use.

DCF provides treatment for substance abuse through a community-based provider system that offers detoxification, treatment and recovery support for adolescents and adults affected by substance misuse, abuse or dependence.¹¹

- **Detoxification Services:** Detoxification services use medical and clinical procedures to assist individuals and adults as they withdraw from the physiological and psychological effects of substance abuse.¹²
- **Treatment Services:** Treatment services¹³ include a wide array of assessment, counseling, case management, and support that are designed to help individuals who have lost their abilities to control their substance use on their own and require formal, structured intervention and support. Some of these services may also be offered to the family members of the individual in treatment.¹⁴
- **Recovery Support:** Recovery support services, including transitional housing, life skills training, parenting skills, and peer-based individual and group counseling, are offered during and following treatment to further assist individuals in their development of the knowledge and skills necessary to maintain their recovery.¹⁵

DCF regulates substance abuse treatment by licensing individual treatment components under ch. 397, F.S., and rule 65D-30, F.A.C. Licensed service components include a continuum of substance abuse prevention,¹⁶ intervention,¹⁷ and clinical treatment services.¹⁸

Clinical treatment is a professionally directed, deliberate, and planned regimen of services and interventions that are designed to reduce or eliminate the misuse of drugs and alcohol and promote a healthy, drug-free lifestyle.¹⁹ “Clinical treatment services” include, but are not limited to, the following licensable service components:²⁰

- Addictions receiving facility.
- Day or night treatment.
- Day or night treatment with community housing.
- Detoxification.
- Intensive inpatient treatment.
- Intensive outpatient treatment.
- Medication-assisted treatment for opiate addiction.
- Outpatient treatment.
- Residential treatment.

Recovery Residences

¹¹ Department of Children and Families, *Treatment for Substance Abuse*, available at <https://www.myflfamilies.com/service-programs/samh/substance-abuse.shtml>, (last visited February 18, 2020).

¹² Id.

¹³ Id. Research indicates that persons who successfully complete substance abuse treatment have better post-treatment outcomes related to future abstinence, reduced use, less involvement in the criminal justice system, reduced involvement in the child-protective system, employment, increased earnings, and better health.

¹⁴ *Supra* note 11.

¹⁵ Id.

¹⁶ Section 397.311(26)(c), F.S. Prevention is a process involving strategies that are aimed at the individual, family, community, or substance and that preclude, forestall, or impede the development of substance use problems and promote responsible lifestyles. See also, Department of Children and Families, *Substance Abuse: Prevention*, available at <https://www.myflfamilies.com/service-programs/samh/prevention/index.shtml>, (last visited February 18, 2020). Substance abuse prevention is best accomplished through the use of ongoing strategies such as increasing public awareness and education, community-based processes and evidence-based practices. These prevention programs are focused primarily on youth, and, in recent years, have shifted to the local level, giving individual communities the opportunity to identify their own unique prevention needs and develop action plans in response. This community focus allows prevention strategies to have a greater impact on behavioral change by shifting social, cultural and community environments.

¹⁷ Section 397.311(26)(b), F.S. Intervention is structured services directed toward individuals or groups at risk of substance abuse and focused on reducing or impeding those factors associated with the onset or the early stages of substance abuse and related problems.

¹⁸ Section 397.311(25), F.S.

¹⁹ Id.

²⁰ Section 397.311(26)(a), F.S.

Recovery residences (also known as “sober homes” or “sober living homes”) are alcohol- and drug-free living environments for individuals in recovery who are attempting to maintain abstinence from alcohol and drugs.²¹ These residences offer no formal treatment (though they may mandate or strongly encourage attendance at 12-step groups) and are self-funded through resident fees.²²

Florida law defines a recovery residence as a residential dwelling unit, or other form of group housing, offered or advertised through any means, including oral, written, electronic, or printed means, by any person or entity as a residence that provides a peer-supported, alcohol-free, and drug-free living environment.²³

Voluntary Certification of Recovery Residences in Florida

Florida established voluntary certification programs for recovery residences and recovery residence administrators, implemented by private credentialing entities.²⁴ Under the voluntary certification program, DCF approved two credentialing entities to design the certification programs and issue certificates: the Florida Association of Recovery Residences certifies the recovery residences and the Florida Certification Board certifies recovery residence administrators.

While certification is voluntary, Florida law incentivizes certification. Since 2016, Florida has prohibited licensed substance abuse service providers from referring patients to a recovery residence unless the recovery residence holds a valid certificate of compliance and is actively managed by a certified recovery residence administrator.²⁵ There are certain exceptions that allow referrals to or from uncertified recovery residences:²⁶

- A licensed service provider under contract with a behavioral health managing entity.
- Referrals by a recovery residence to a licensed service provider when the recovery residence or its owners, directors, operators, or employees do not benefit, directly or indirectly, from the referral.
- Referrals made before July 1, 2018, by a licensed service provider to that licensed service provider’s wholly owned subsidiary.
- Referrals of patient to or from a recovery residence that has no direct or indirect financial relationship or other referral relationship with the licensed service provider and that is democratically operated by its residents pursuant to a charter from an entity recognized by Congress, and where the residence or any resident of residence does not directly or indirectly receive a benefit.

DCF publishes a list of all certified recovery residences and recovery residence administrators on its website.²⁷ As of February 2020, there are 405 certified recovery residences in Florida.²⁸

²¹ Douglas L. Polcin, Ed.D., MFT, and Diane Henderson, B.A., *A Clean and Sober Place to Live: Philosophy, Structure, and Purported Therapeutic Factors in Sober Living Houses*, 40(2) J PSYCHOACTIVE DRUGS 153–159 (June 2008).

²² Id.

²³ Section 397.311(38), F.S.

²⁴ Sections 397.487–397.4872, F.S.

²⁵ Section 397.4873(1), F.S.

²⁶ Section 397.4873(2), F.S.

²⁷ Section 397.4872, F.S.

²⁸ Florida Association of Recovery Residences, *Certified Residences*, available at <http://farronline.org/certification/certified-residences/> (last visited February 18, 2020).

Background Screening

Substance Use Disorder and Criminal History

Certain individuals receiving substance abuse treatment may have a criminal or violent history. About 54% of state prisoners and 61% of sentenced jail inmates incarcerated for violent offenses meet the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, (DSM-IV) criteria for drug dependence or abuse.²⁹ Additionally, individuals who use illicit drugs are more likely to commit crimes, and it is common for many offenses, including violent crimes, to be committed by individuals who had used drugs or alcohol prior to committing the crime, or who were using at the time of the offense.³⁰ As a result, individuals who have recovered from a substance use disorder or mental illness often have a criminal history.

Some of these individuals with criminal pasts, once in recovery, may contribute to the substance abuse treatment industry as a volunteer, peer, or other employee of a substance abuse treatment program that provides support. Social support services have been shown to facilitate recovery from a substance use disorder or mental illness.³¹ Additionally, these individuals bring many “lived experiences,” including experience navigating the criminal justice system, which give them the ability to assist others in recovery.³² However, the crimes committed during the period while these individuals were abusing substances may disqualify them from employment in the substance abuse treatment industry due to Florida’s background screening process.

Background Screening Process

In 1995, the Legislature created standard procedures for criminal history background screening of prospective employees; ch. 435, F.S., outlines the screening requirements. There are two levels of background screening: level 1 and level 2. Level 1 screening includes, at a minimum, employment history checks and statewide criminal correspondence checks through the Florida Department of Law Enforcement (FDLE) and a check of the Dru Sjodin National Sex Offender Public Website,³³ and may include criminal records checks through local law enforcement agencies. A level 2 background screening includes, but is not limited to, fingerprinting for statewide criminal history records checks through FDLE and national criminal history checks through the Federal Bureau of Investigation (FBI), and may include local criminal records checks through local law enforcement agencies.³⁴

Every person required by law to be screened pursuant to ch. 435, F.S., must submit a complete set of information necessary to conduct a screening to his or her employer.³⁵ Such information for a level 2 screening includes fingerprints, which are taken by a vendor that submits them electronically to FDLE.³⁶

For both level 1 and 2 screenings, the employer must submit the information necessary for screening to FDLE within five working days after receiving it.³⁷ Additionally, for both levels of screening, FDLE must perform a criminal history record check of its records.³⁸ For a level 1 screening, this is the only information searched, and once complete, FDLE responds to the employer or agency, who must then

²⁹ Jennifer Bronson, et al., *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, June 2017, available at <https://www.bjs.gov/content/pub/pdf/dudaspii0709.pdf> (last visited February 18, 2020).

³⁰ National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide*, available at https://d14rmgrwzf5a.cloudfront.net/sites/default/files/txcriminaljustice_0.pdf (last visited February 18, 2020).

³¹ Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Treatment, *What Are Peer Recovery Support Services?*, available at <https://store.samhsa.gov/system/files/sma09-4454.pdf> (last visited February 18, 2020).

³² Department of Children and Families, *Florida Peer Services Handbook*, 2016, available at <https://www.myflfamilies.com/service-programs/samh/publications/docs/peer-services/DCF-Peer-Guidance.pdf> (last visited February 18, 2020).

³³ The Dru Sjodin National Sex Offender Public Website is a U.S. government website that links public state, territorial, and tribal sex offender registries in one national search site. The website is available at <https://www.nsopw.gov/> (last visited February 18, 2020).

³⁴ Section 435.04, F.S.

³⁵ Section 435.05(1)(a), F.S.

³⁶ Sections 435.03(1) and 435.04(1)(a), F.S.

³⁷ Section 435.05(1)(b)-(c), F.S.

³⁸ Id.

inform the employee whether screening has revealed any disqualifying information.³⁹ For level 2 screening, FDLE also requests the FBI to conduct a national criminal history record check of its records for each employee for whom the request is made.⁴⁰ As with a level 1 screening, FDLE responds to the employer or agency, and the employer or agency must inform the employee whether screening has revealed disqualifying information. If the employer or agency finds that an individual has a history containing one of these offenses, it must disqualify that individual from employment.

The person whose background is being checked must supply any missing criminal or other necessary information upon request to the requesting employer or agency within 30 days after receiving the request for the information.⁴¹

Disqualifying Offenses

Regardless of whether the screening is level 1 or level 2, the screening employer or agency must make sure that the applicant has good moral character by ensuring that the employee has not been arrested for and is awaiting final disposition of, been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or been adjudicated delinquent and the record has not been sealed or expunged for, any of the following 52 offenses prohibited under Florida law, or similar law of another jurisdiction:⁴²

- Section 393.135, relating to sexual misconduct with certain developmentally disabled clients and reporting of such sexual misconduct.
- Section 394.4593, relating to sexual misconduct with certain mental health patients and reporting of such sexual misconduct.
- Section 415.111, relating to adult abuse, neglect, or exploitation of aged persons or disabled adults.
- Section 777.04, relating to attempts, solicitation, and conspiracy to commit an offense listed in this subsection.
- Section 782.04, relating to murder.
- Section 782.07, relating to manslaughter, aggravated manslaughter of an elderly person or disabled adult, or aggravated manslaughter of a child.
- Section 782.071, relating to vehicular homicide.
- Section 782.09, relating to killing of an unborn child by injury to the mother.
- Chapter 784, relating to assault, battery, and culpable negligence, if the offense was a felony.
- Section 784.011, relating to assault, if the victim of the offense was a minor.
- Section 784.03, relating to battery, if the victim of the offense was a minor.
- Section 787.01, relating to kidnapping.
- Section 787.02, relating to false imprisonment.
- Section 787.025, relating to luring or enticing a child.
- Section 787.04(2), relating to taking, enticing, or removing a child beyond the state limits with criminal intent pending custody proceedings.
- Section 787.04(3), relating to carrying a child beyond the state lines with criminal intent to avoid producing a child at a custody hearing or delivering the child to the designated person.
- Section 790.115(1), relating to exhibiting firearms or weapons within 1,000 feet of a school.
- Section 790.115(2)(b), relating to possessing an electric weapon or device, destructive device, or other weapon on school property.
- Section 794.011, relating to sexual battery.
- Former s. 794.041, relating to prohibited acts of persons in familial or custodial authority.
- Section 794.05, relating to unlawful sexual activity with certain minors.
- Chapter 796, relating to prostitution.
- Section 798.02, relating to lewd and lascivious behavior.
- Chapter 800, relating to lewdness and indecent exposure.

³⁹ Section 435.05(1)(b), F.S.

⁴⁰ Section 435.05(1)(c), F.S.

⁴¹ Section 435.05(1)(d), F.S.

⁴² Section 435.04(2), F.S.

- Section 806.01, relating to arson.
- Section 810.02, relating to burglary.
- Section 810.14, relating to voyeurism, if the offense is a felony.
- Section 810.145, relating to video voyeurism, if the offense is a felony.
- Chapter 812, relating to theft, robbery, and related crimes, if the offense is a felony.
- Section 817.563, relating to fraudulent sale of controlled substances, only if the offense was a felony.
- Section 825.102, relating to abuse, aggravated abuse, or neglect of an elderly person or disabled adult.
- Section 825.1025, relating to lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled adult.
- Section 825.103, relating to exploitation of an elderly person or disabled adult, if the offense was a felony.
- Section 826.04, relating to incest.
- Section 827.03, relating to child abuse, aggravated child abuse, or neglect of a child.
- Section 827.04, relating to contributing to the delinquency or dependency of a child.
- Former s. 827.05, relating to negligent treatment of children.
- Section 827.071, relating to sexual performance by a child.
- Section 843.01, relating to resisting arrest with violence.
- Section 843.025, relating to depriving a law enforcement, correctional, or correctional probation officer means of protection or communication.
- Section 843.12, relating to aiding in an escape.
- Section 843.13, relating to aiding in the escape of juvenile inmates in correctional institutions.
- Chapter 847, relating to obscene literature.
- Section 874.05, relating to encouraging or recruiting another to join a criminal gang.
- Chapter 893, relating to drug abuse prevention and control, only if the offense was a felony or if any other person involved in the offense was a minor.
- Section 916.1075, relating to sexual misconduct with certain forensic clients and reporting of such sexual misconduct.
- Section 944.35(3), relating to inflicting cruel or inhuman treatment on an inmate resulting in great bodily harm.
- Section 944.40, relating to escape.
- Section 944.46, relating to harboring, concealing, or aiding an escaped prisoner.
- Section 944.47, relating to introduction of contraband into a correctional facility.
- Section 985.701, relating to sexual misconduct in juvenile justice programs.
- Section 985.711, relating to contraband introduced into detention facilities.

Individuals Requiring Background Screening Under Ch. 397, F.S.

Only certain individuals affiliated with substance abuse treatment providers require background screening. Section 397.4073, F.S., requires all owners, directors, chief financial officers, and clinical supervisors of service providers, as well as all service provider personnel who have direct contact with children receiving services or with adults who are developmentally disabled receiving services and peer specialists who have direct contact with individuals receiving services to undergo a level 2 background screening. However, certain personnel are excluded from background screening requirements:⁴³

- Persons who volunteer at a program for less than 40 hours per month and who are under direct and constant supervision by persons who meet all screening requirements;
- Service providers who are exempt from licensing; and
- Persons employed by the Department of Corrections in an inmate substance abuse program unless they have direct contact with unmarried inmates under the age of 18 or with inmates who are developmentally disabled.

⁴³ Section 397.4073(1)(c)-(e), F.S.

Other statutory provisions are tailored to facilitate individuals in recovery who have disqualifying offenses being able to work in substance abuse treatment. For example, DCF may grant exemptions from disqualification that would limit service provider personnel to working with adults in substance abuse treatment facilities.⁴⁴ DCF may also grant exemptions for service providers which treat adolescents 13 years of age and older, whose background checks indicate certain drug crimes⁴⁵ may be granted an exemption without the usual three-year waiting period for felonies.⁴⁶

Similarly, if five years or more, or three years or more in the case of a certified peer specialist or person seeking such certification, have elapsed since the person has completed or been lawfully released from confinement, supervision, or non-monetary condition imposed by a court for the most recent disqualifying offense, an employee may work with adults with substance use disorders until DCF makes a final determination regarding the request for an exemption from disqualification.⁴⁷ These individuals must work under the supervision of a qualified personnel until DCF makes a final determination regarding the request for an exemption from disqualification.

Regarding recovery residences, ss. 397.487 and 397.4871, F.S., require level 2 background screening for all recovery residence owners, directors and chief financial officers and for administrators seeking certification. DCF may exempt an individual from the disqualifying offenses of a level 2 background screening if the individual meets certain criteria and the recovery residence attests that it is in the best interest of the program.⁴⁸

Exemption from Disqualification

If an individual is disqualified due to a pending arrest, conviction, plea of nolo contendere, or adjudication of delinquency to one or more of the disqualifying offenses, s. 435.07, F.S., allows the Secretary of the appropriate agency (in the case of substance abuse treatment, DCF) to exempt applicants from that disqualification under certain circumstances.⁴⁹

- Three years have elapsed since the individual has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by a court for a disqualifying felony; or
- The applicant has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by a court for a misdemeanor or an offense that was a felony at the time of commission but is now a misdemeanor.

Receiving an exemption allows that individual to work despite the disqualifying crime in that person's past. However, an individual who is considered a sexual predator,⁵⁰ career offender,⁵¹ or sexual offender (unless not required to register)⁵² cannot ever be exempted from disqualification.⁵³

Additionally, individuals employed, or applicants for employment, by treatment providers who treat adolescents 13 years of age and older who are disqualified from employment solely because of certain crimes may be exempted from disqualification from employment, without applying the 3-year waiting period. These crimes include certain offenses related to:⁵⁴

- Prostitution;
- Unarmed burglary of a structure;

⁴⁴ Section 397.4073 (4)(c), F.S.

⁴⁵ Specifically, ss. 817.563, 893.13, or 893.147, F.S.

⁴⁶ Section 397.4073 (4)(b), F.S., provides exemptions for crimes under ss. 817.563, 893.13, and 893.147, F.S. These exemptions only apply to providers who treat adolescents age 13 and older, as well as personnel who work exclusively with adults.

⁴⁷ Section 397.4073(1)(g), F.S.

⁴⁸ Section 397.4872, F.S.

⁴⁹ Section 435.07(1), F.S.

⁵⁰ Section 775.261, F.S.

⁵¹ Section 775.261, F.S.

⁵² Section 943.0435, F.S.

⁵³ Section 435.07(4)(b), F.S.

⁵⁴ Section 435.07(2), F.S.

- Third degree felony grand theft;
- Sale of imitation controlled substance;
- Forgery;
- Uttering or publishing a forged instrument;
- Sale, manufacture, delivery, or possession with intent to sell, manufacture, or deliver controlled substances (excluding drug trafficking); and
- Use, possession, manufacture, delivery, transportation, advertisement, or sale of drug paraphernalia.

To seek exemption from disqualification, an employee must submit a request for an exemption from disqualification within 30 days after being notified of a pending disqualification.⁵⁵ However, the individual must first have paid all court-ordered payments (e.g., fees, fines, costs of prosecution or restitution) and three years must have passed since the individual's release from confinement and completion of supervision (e.g., probation) and satisfaction of all other nonmonetary conditions (e.g., community service) before DCF can consider his or her request.⁵⁶

The disqualified employee must submit an exemption packet to provide information for DCF to use in determining whether he or she meets the statutory standards for an exemption from disqualification.⁵⁷ This packet requests the employee to provide.⁵⁸

- A certified copy from the court file of the petition (filing of information), and final disposition for each disqualifying criminal offense.
- A copy of the arrest report for each disqualifying criminal offense. If the report is not available, a statement from the court or law enforcement agency that the record does not exist or has been destroyed is acceptable.
- A copy of arrest reports and dispositions for any additional identified criminal offenses.
- Documentation from the probation department or court documenting release from supervision if probation or parole was given.
- Two or more original, signed letters of recommendation or letters of reference that attest to good moral character.
- Proof of rehabilitation.⁵⁹
- Employment history record.
- Explanation of personal history, e.g., explain what happened with each arrest, current home life, education/training, family members, goals, and community involvement.

To be exempted from disqualification and thus be able to work, the applicant must demonstrate by clear and convincing evidence that he or she should not be disqualified from employment.⁶⁰ Clear and convincing evidence is a heavier burden than the preponderance of the evidence standard but less than beyond a reasonable doubt.⁶¹ This means that the evidence presented is credible and verifiable, and that the memories of witnesses are clear and without confusion.⁶² This evidence must create a firm belief and conviction of the truth of the facts presented and, considered as a whole, must convince DCF representatives without hesitancy that the requester will not pose a threat if allowed to hold a position of

⁵⁵ Section 397.4073(1)(f), F.S.

⁵⁶ Department of Children and Families, *Request for an Exemption*, available at

<https://www.myflfamilies.com/programs/backgroundscreening/docs/Exemption-Packet.pdf> (last visited February 18, 2020).

⁵⁷ Id.

⁵⁸ Department of Children and Families, *Exemption Request Checklist*, available at

<https://www.myflfamilies.com/programs/backgroundscreening/docs/Exemption%20Request%20Checklist.pdf> (last visited February 18, 2020).

⁵⁹ Proof of rehabilitation includes successful completion of court-ordered treatment or counseling, educational or training certificates, proof of participation in community activities, special recognition, or awards received.

⁶⁰ Section 435.07(3)(a), F.S.

⁶¹ Department of Children and Families, CF Operating Procedure 60-18, Personnel: Exemption from Disqualification, Appendix B, (Aug. 1, 2010), available at <https://www.myflfamilies.com/admin/publications/cfops/CFOP%20060-x%20Human%20Resources/CFOP%2060-18,%20Exemption%20from%20Disqualification.pdf> (last visited February 18, 2020).

⁶² Id.

special trust relative to children, vulnerable adults, or to developmentally disabled individuals.⁶³ Evidence that may support an exemption includes, but is not limited to:⁶⁴

- Personal references.
- Letters from employers or other professionals.
- Evidence of rehabilitation, including documentation of successful participation in a rehabilitation program.
- Evidence of further education or training.
- Evidence of community involvement.
- Evidence of special awards or recognition.
- Evidence of military service.
- Parenting or other caregiver experiences.

After DCF receives a complete exemption request package from the applicant, the background screening coordinator searches available data, including, but not limited to, a review of records and pertinent court documents including case disposition and the applicant's plea in order to determine the appropriateness of granting the applicant an exemption.⁶⁵ These materials, in addition to the information provided by the applicant, form the basis for a recommendation as to whether the exemption should be granted.⁶⁶

After all reasonable evidence is gathered, the background screening coordinator consults with his or her supervisor, and after consultation with the supervisor, the coordinator and the supervisor will recommend whether the exemption should be granted.⁶⁷ The regional legal counsel's office reviews the recommendation to grant or deny an exemption to determine legal sufficiency; the criminal justice coordinator in the region in which the background screening coordinator is located also reviews the exemption request file and recommendation and makes an initial determination whether to grant or deny the exemption.⁶⁸

If the regional criminal justice coordinator makes an initial determination that the exemption should be granted, the exemption request file and recommendations are forwarded to the regional director, who has delegated authority from the DCF Secretary to grant or deny the exemption.⁶⁹ After an exemption request decision is final,⁷⁰ the background screener provides a written response to the applicant as to whether the request is granted or denied.⁷¹

If DCF grants the exemption, the applicant and the facility or employer are notified of the decision by regular mail.⁷² However, if the request is denied, notification of the decision is sent by certified mail, return receipt requested, to the applicant, addressed to the last known address and a separate letter of denial is sent by regular mail to the facility or employer.⁷³ If the application is denied, the denial letter must set forth pertinent facts that the background screening coordinator, the background screening coordinator's supervisor, the criminal justice coordinator, and regional director, where appropriate, used in deciding to deny the exemption request.⁷⁴ It must also inform the denied applicant of the availability of an administrative review⁷⁵ pursuant to ch. 120, F.S.⁷⁶

⁶³ Id.

⁶⁴ Id. at 3-4.

⁶⁵ Id. at 5.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ At no point during the evaluation process may an evaluator rely on criminal history reports with an effective date that is more than 60 days old. If the most recent criminal history report is more than 60 days old at the time of review, new criminal history reports must be generated prior to the final decision being made.

⁷¹ *Supra* note 58 at 5.

⁷² Id. at 6.

⁷³ Id.

⁷⁴ Id.

⁷⁵ All notices of denial of an exemption shall advise the applicant of the basis for the denial, that an administrative hearing pursuant to s. 120.57, F.S., may be requested, and that the request must be made within 21 days of receipt of the denial letter or the applicant's right to an appeal will be waived.

Patient Brokering

In Florida, patient brokering is against the law.⁷⁷ Patient brokering is when a person pays to induce, or make a payment in return for, a referral of a patient to or from a health care provider or health care facility. Such payments can take many forms, including commissions, benefits, bonuses, rebates, kickbacks, bribes, split-fee arrangements, in cash or in kind, provided directly or indirectly.⁷⁸ The prohibition on patient brokering applies regardless of payment source.⁷⁹ There are significant penalties for patient brokering and penalties escalate as the number of patients involved increases. A person who violates the patient brokering statute commits a felony of the third degree.⁸⁰ If the violation involves 10 to 19 patients, the person commits a felony of the second degree.⁸¹ If the violation involves 20 or more patients, the person commits a felony of the first degree.⁸²

However, there are a number of exceptions to the prohibition on patient brokering, which means health care providers or other entities can engage in brokering practices without committing a crime. These exceptions include:⁸³

- Any discount, payment, waiver of payment, or payment expressly authorized by the Federal Anti-Kickback Statute or regulations adopted thereunder;
- Any payment, compensation or financial arrangements within a group practice, provided such payment, compensation, or arrangement is not to or from persons who are not members of the group practice;
- Payments to a health care provider or health care facility for professional consultation services;
- Commissions, fees, or other remuneration lawfully paid to insurance agents;
- Payments by a health insurer who reimburses, provides, offers to provide, or administers health, mental health, or substance abuse goods or services under a health benefit plan;
- Payments to or by a health care provider or health care facility that has contracted with a health insurer, health care purchasing group, or the Medicare or Medicaid program to provide health, mental health, or substance abuse goods or services under a health benefit;
- Lawfully authorized insurance advertising gifts;
- Commissions or fees paid to a nurse registry for referring persons providing health care services to clients of the nurse registry;
- Certain payments by health care providers or health care facilities to a health, mental health, or substance abuse information service that provides information upon request and without charge to consumers about provider of health care good or services to enable consumers to select appropriate providers of facilities; and
- Certain payments authorized for assisted living facilities.

Federal Anti-Kickback Statute

⁷⁶ *Supra*, note 58 at 6.

⁷⁷ Section 817.505, F.S.

⁷⁸ Section 817.505(1), F.S.

⁷⁹ See s. 817.5050, F.S., which does not specify which payment sources are subject to its provisions; however, cases have been brought involving both private and public payers. See, e.g., *Prosper Diagnostic Centers, Inc. v. Allstate Insurance Company*, 964 So.2d 763 (Fla. 4d DCA 2007) and *State v. Rubio*, 967 So.2d 768 (Fla. 2007).

⁸⁰ Punishable by a term of imprisonment not to exceed 5 years and a fine of \$50,000.

⁸¹ Punishable by a term of imprisonment not to exceed 15 years and a fine of \$100,000.

⁸² Punishable by a term of imprisonment not to exceed 30 years and a fine of \$500,000.

⁸³ Section 817.505(3), F.S.

Federal law prohibits payment for the referral of an individual to a person for furnishing or arranging to furnish any item or service for which payment may be made under a federal health care program.⁸⁴ A federal health care program is any plan or program that provides health benefits, in whole or in part, by the United States government or any state health care program. State health care programs include Medicaid, maternal and child health services block grants, block grants and programs for social services and elder justice, and state children's health insurance programs.⁸⁵ Violation of the federal anti-kickback statute is a felony that is punishable by a fine of up to \$25,000 or up to 5 years in prison, or both.⁸⁶ However, similar to Florida's patient brokering statute, there are several exceptions to the federal statute, such as:⁸⁷

- Discounts properly disclosed and appropriately reflected in the costs claimed and charges made by the provider or entity;
- Payments between employers and employees for employment in the provision of covered items or services;
- Certain payments to a group purchasing organization;
- Waivers of co-insurance;
- Certain risk-sharing agreements; and
- The waiver of any cost-sharing provisions by a pharmacy.

Federal law allows other payment arrangements that are not specifically listed in law. Payment arrangements that do not squarely meet one of the exceptions are reviewed on a case-by-case basis to determine if the parties have the requisite criminal intent.⁸⁸ The Office of the Inspector General, within the U.S. Department of Health and Human Services, is proposing additional exceptions to the anti-kickback statute, including payment arrangements that are currently used by health care practitioners but are not specifically authorized under the statute.⁸⁹

State Anti-Kickback Exception

As listed above, a current exception to the state patient brokering law is any discount, payment, waiver of payment, or payment practice that is expressly authorized by the federal anti-kickback statute. This language is a result of 2019 statute change.⁹⁰ This legislation changed this exception from payment schemes *not prohibited* under federal law to those *expressly authorized* under federal law.⁹¹ This change created uncertainty for those using payment practices that were not prohibited under federal law but also not expressly authorized.⁹² The federal anti-kickback statute applies only to those services for which payment is made by a federal health care program. Therefore, this exception does not apply to patient brokering involving any other payment sources, such as commercial health insurance policies and the prohibition against patient brokering would apply.

Effect of Proposed Changes

Exemption from Employment Disqualification

⁸⁴ 42 U.S.C. s. 1320a-7b(b).

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ U.S. Department of Health and Human Services, *HHS Office of Inspector General Fact Sheet: Notice of Proposed Rulemaking OIG-0936-AA10-P*, (Oct. 2019), available at https://oig.hhs.gov/authorities/docs/2019/CoordinatedCare_FactSheet_October2019.pdf (last visited Feb. 5, 2020).

⁸⁹ Id.

⁹⁰ Chapter 2019-59, L.O.F.

⁹¹ Id.

⁹² See Florida Bar Health Law Section, *Health Law Section Adopts Legislative Position and Advocates for Revisions to Patient Brokering Act*, available at <http://www.flabarhls.org/news/health-law-section-news/425-health-law-section-in-action> (last visited Feb. 5, 2020); JDSupra, *Significant Changes to Florida's Patient Brokering Act: Uncertainty Lies Ahead – HealthCare Alert*, (Aug. 13, 2019), available at <https://www.jdsupra.com/legalnews/significant-changes-to-florida-s-49130/> (last visited Feb. 5, 2020), and Jana Kolarik Anderson, Lawrence Vernaglia, and Jonathan Simler, *Florida: Changes to the State Patient Brokering Act*, NATIONAL LAW REVIEW, (Aug. 16, 2019), available at <https://www.natlawreview.com/article/florida-changes-to-state-patient-brokering-act> (last visited Feb. 5, 2020).

Currently, DCF has discretion in whether or not to grant an exemption from employment disqualification for service provider personnel who have committed certain crimes related to prostitution, theft, burglary, forgery, and controlled substances without a waiting period. CS/CS/CS/SB 649 requires, rather than authorizes, DCF to grant an exemption from employment disqualification for such an applicant if:

- At least five years, or three years for a peer specialist applicant, has elapsed since the applicant has completed or been lawfully released from any confinement, supervision, or nonmonetary condition imposed by a court for the most recent disqualifying offense;
- The applicant has not been arrested for any offense during the five years, or three years for a peer specialist applicant; and
- Is not subject to the waiting period required under ch. 435, F.S., which is three years for a felony offense.

The bill adds the crimes listed in s. 408.809, F.S., as disqualifying offenses recovery resident administrators, which includes offenses related to:

- Medicaid fraud;
- Domestic violence;
- Fraud, including mail fraud and insurance fraud;
- Fraudulently obtaining goods and services from a health care provider;
- Fraudulently use of a credit card, if a felony;
- Fraudulently obtaining a credit card;
- Fraudulently obtaining medicinal drugs;
- Criminal use of personal identification information;
- Patient brokering;
- Uttering certain forged instruments;
- Sale, manufacture, delivery or possession with the intent to sell, manufacture, or deliver counterfeit controlled substances;
- Racketeering; and
- Money laundering.

The bill also repeals language related to exemptions from employment disqualification for recovery residence administrators that is duplicative of the requirements of ch. 435, F.S.

Patient Brokering

Currently, the patient brokering statute does not apply to any discount, payment, waiver of payment, or payment practice that is expressly authorized by the federal anti-kickback statute, which addresses this activity only in the context of federal health care programs.⁹³ The bill amends this provision so that the patient brokering statute does not apply to any such payment scheme not prohibited by the federal anti-kickback statute. This restores the law to the 2018 content before the 2019 revisions.

⁹³ 42 U.S.C. §1320a-7b(f).

The bill makes other conforming changes.

The bill is effective July 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 397.4073, F.S., relating to background checks of service provider personnel.

Section 2: Amends s. 397.487, F.S., relating to voluntary certification of recovery residences.

Section 3: Amends s. 397.4871, F.S., relating to recovery residence administrator certification.

Section 4: Amends s. 397.4872, F.S., relating to exemption from disqualification; publication.

Section 5: Amends s. 817.505, F.S., relating to patient brokering prohibited; exceptions; penalties.

Section 2: Provides that the bill is effective of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference considered the bill on January 27, 2020, and determined it will likely have a negative insignificant impact, meaning it will result in a decrease of 10 or fewer beds.⁹⁴

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Treatment programs and recovery residences may be able to more quickly fill positions since DCF will no longer have discretion for providing exemptions for employment disqualifications.

The bill may alleviate confusion on which payment schemes are permissible under the state patient brokering law.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

⁹⁴ Criminal Justice Impact Conference, CS/HB 649, available at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/CSHB649.pdf> (last visited February 8, 2020).

None.

B. RULE-MAKING AUTHORITY:

Rulemaking authority is not necessary to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 22, 2020, the Children, Families & Seniors Subcommittee adopted a PCS and reported the bill favorably as a committee substitute. The PCS differed from the bill by:

- Removing the section relating to background checks of service provider personnel.
- Removing the section relating to voluntary certification of recovery residences.
- Removing the section relating to exemptions from disqualification for certain persons associated with applicant recovery residences.
- Amending the title from an act relating to substance abuse services to an act relating to patient brokering.

On February 4, 2020, the Civil Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Defined "federal healthcare program" as provided under federal law on March 1, 2020.
- Changed the effective date of the bill to upon becoming a law.
- Made other minor technical changes.

On February 18, 2020, the Health and Human Services Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed the expansion of payment structures allowed under Florida's patient brokering statute and reverts the provision to the 2018 version of the law.
- Required, rather than authorized, DCF to exempt substance abuse treatment personnel from disqualification based on background screening when these personnel committed certain nonviolent crimes common among substance users and required a minimum waiting period, during which the individual cannot have been arrested for any offense.
- Revised statute on background screening of recovery residence administrators to add disqualifying offenses and to remove obsolete language.

This analysis is drafted to the committee substitute as passed by the Health and Human Services Committee.