

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1179 Home Health Care

SPONSOR(S): Health & Human Services Committee; Health Innovation Subcommittee; Stone

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 976

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Innovation Subcommittee	12 Y, 0 N, As CS	Poche	Shaw
2) Health & Human Services Committee	16 Y, 1 N, As CS	Poche	Calamas

SUMMARY ANALYSIS

In Florida, a nurse registry is an agency licensed to secure temporary employment for nurses, home health aides (HHAs), certified nursing assistants (CNAs), homemakers, and companions in a patient's home or with health care facilities or other entities. A person referred for contract by a nurse registry is compensated by fees as an independent contractor, including, but not limited to, contracts for the provision of services to patients and contracts to provide private duty or staffing services to licensed health care facilities or other entities. The person who is referred for contract then pays a fee to the nurse registry after the contract is signed with the patient, health care facility, or other entity.

Since a nurse registry operates as a referral service for health care workers working as independent contractors for a patient, health care facility, or other entity, a nurse registry is not required to meet the minimum wage and overtime requirements for employers established by the federal Fair Labor Standards Act (FLSA).

Currently, even if a nurse registry were found to be an employer of a person referred for contract, the registry remains exempt from the requirements of the FLSA relating to minimum wage and overtime payment under the exception for companionship services. However, a pending change to federal regulations, scheduled to take effect on January 1, 2015, will narrow the definition of "companionship services" to specifically exclude "the performance of medically related services." If a nurse registry is found to be an employer after the effective date of the new federal regulation, the registry must comply with the requirements of the FLSA relating to minimum wage and overtime payment, or violate federal law.

The bill proposes several changes to statutes governing nurse registries to clarify the relationship between a nurse registry and the persons referred for contract by the registry. By confirming that each person referred for contract by a nurse registry is an independent contractor and that a nurse registry has no obligation to perform any tasks or oversight of a referred person's work so as to be misconstrued as an employee, a nurse registry may avoid liability for minimum wage and overtime payments as result of the change in federal rules governing companionship activities.

The bill requires a nurse registry to notify the patient, the patient's family, or other person acting on behalf of the patient that the person referred for contract is an independent contractor and the nurse registry is not responsible to monitor, supervise, manage, or train the person referred for contract. However, the bill also requires a nurse registry that has knowledge of a violation of law by a person referred to contract to advise the patient to terminate the contract and provide reasons for the suggested termination. The nurse registry must additionally cease referring the person for contract and notify the licensing board of any practice violations. The bill confirms that a nurse registry must comply with all other obligations under part II of chapter 408, F.S., including licensure application procedures, the process for effecting a change of ownership, and other licensure requirements. Lastly, the bill exempts certain home health agencies, which provide unskilled care services and are not certified by Medicare or Medicaid, from the accreditation requirement in s. 400.474, F.S.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2014.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1179b.HHSC

DATE: 4/14/2014

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Nurse Registries

In Florida, a nurse registry is an agency licensed to secure temporary employment for nurses, home health aides (HHAs), certified nursing assistants (CNAs), homemakers, and companions in a patient's home or with health care facilities or other entities.¹ A person referred for contract by a nurse registry is compensated by fees as an independent contractor, including, but not limited to, contracts for the provision of services to patients and contracts to provide private duty or staffing services to licensed health care facilities or other entities.² The person who is referred for contract then pays a fee to the nurse registry after the contract is signed with the patient, health care facility, or other entity. Nurse registries are governed by part II of chapter 408, F.S.,³ associated rules in Chapter 59A-35, F.A.C., and the nurse registry rules in Chapter 59A-18, F.A.C.

A nurse registry must be licensed by the Agency for Health Care Administration (AHCA) in order to offer contracts in Florida.⁴ In order to become licensed, a nurse registry must submit an application and a \$2,000 licensure fee to the AHCA.⁵ A nurse registry license automatically expires 2 years from the date it was issued and may be renewed biennially.⁶

A nurse registry has several responsibilities established by statute and rule, including, but not limited to:

- Confirming and annually reconfirming the licensure or certification of independent contractors;⁷
- Establishing a system for recording and following-up on complaints involving independent contractors referred for contract;⁸
- Preparing and maintaining a written comprehensive emergency management plan;⁹ and
- Complying with the background screening requirements in s. 400.512, F.S., which require a level II background check for all employees and contractors.¹⁰

There are 519 licensed nurse registry locations in Florida.¹¹

Nurse Registries and the Federal Fair Labor Standards Act (FLSA)

A nurse registry operates as a referral service for health care workers working as independent contractors for a patient, health care facility, or other entity. Because the patient, health care facility, or other entity has sole responsibility for hiring, firing, and paying the person referred for contract, a nurse registry is not required to meet the minimum wage and overtime requirements for employers established by the federal FLSA. However, a nurse registry may be considered an employer for the purposes of the FLSA under certain circumstances.¹² Currently, if a nurse registry is found to be an

¹ S. 400.462(6)(a), F.S.

² S. 400.462(21), F.S.

³ S. 400.506(2), F.S. A nurse registry is also governed by the provisions in s. 400.506, F.S.

⁴ S. 400.506(1), F.S.

⁵ Rule 59A-18.004(1), F.A.C.

⁶ Rule 59A-18.004(5), F.A.C.

⁷ Rule 59A-18.005(3) and (4), F.A.C.

⁸ Rule 59A-18.017(4), F.A.C.

⁹ Rule 59A-18.018(1), F.A.C.

¹⁰ S. 400.506(9), F.S.

¹¹ Agency for Health Care Administration, Florida HealthFinder, *Facility/Provider Locator-Nurse Registry*, available at www.floridahealthfinder.gov/facilitylocator/ListFacilities.aspx (last viewed on March 23, 2014).

¹² 78 Fed. Reg. 60453, 60483 (Oct. 1, 2013); "Determinations about the existence of an employment or joint employment relationship are made by examining all the facts in a particular case and assessing the 'economic realities' of the work relationship. See, e.g., *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961). Factors to consider may include whether an employer has the

employer of a person referred for contract, the registry remains exempt from the requirements of the FLSA relating to minimum wage and overtime payment under the exception companionship services.¹³ The term “companionship services” means those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work”¹⁴

A pending change to federal regulations, scheduled to take effect on January 1, 2015, will narrow the definition of “companionship services” to specifically exclude “the performance of medically related services.”¹⁵ If a nurse registry is found to be an employer after January 1, 2015, the registry must comply with the requirements of the FLSA relating to minimum wage and overtime payment, or violate federal law.

Home Health Agencies and Regulation

A home health agency is an organization that provides home health services and staffing services.¹⁶ Home health services provided by a home health agency include health and medical services and medical equipment provided to an individual in his or her home, such as nursing care, physical and occupational therapy, and home health aide services.¹⁷ Home health agencies are regulated by the Agency for Health Care Administration (AHCA) pursuant to part III of chapter 400, F.S.

AHCA is authorized to deny, revoke, or suspend the license of a home health agency.¹⁸ AHCA is required to impose a fine against a home health agency that commits certain acts.¹⁹ One of these acts is the failure of the home health agency to submit a report to AHCA, within 15 days after the end of each calendar quarter, which includes the following information:

- The number of insulin dependent diabetic patients receiving insulin-injection services from the home health agency;
- The number of patients receiving both home health services from the home health agency and hospice services;
- The number of patients receiving home health services from that home health agency; and
- The names and license numbers of nurses whose primary job responsibility is to provide home health services to patients and who received remuneration from the home health agency in excess of \$25,000 during the calendar quarter.²⁰

These data items help identify possible fraud, such as billing for a high number of injection visits for insulin-dependent patients who could self-inject insulin, fraudulent billing for patients who did not receive the visits, possible duplicate payment for patients receiving both hospice and home health services, and nurses earning well above the average salary that could indicate false billing. The results of each quarter’s reporting are shared with the U.S. Department of Health and Human Services Centers for Medicare and Medicaid Services’ Medicare Program Integrity Miami Satellite Division, the AHCA’s

power to direct, control, or supervise the worker(s) or the work performed; whether an employer has the power to hire or fire, modify the employment conditions or determine the pay rates or the methods of wage payment for the worker(s); the degree of permanency and duration of the relationship; where the work is performed and whether the tasks performed require special skills; whether the work performed is an integral part of the overall business operation; whether an employer undertakes responsibilities in relation to the worker(s) which are commonly performed by employers; whose equipment is used; and who performs payroll and similar functions. An economic realities test does not depend on ‘isolated factors but rather upon the circumstances of the whole activity.’ See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).”

¹³ 29 CFR §552.109(a)

¹⁴ 29 CFR §552.6

¹⁵ 78 Fed. Reg. at 60557.

¹⁶ S. 400.462(12), F.S.

¹⁷ S. 400.462(14)(a)-(c), F.S.

¹⁸ S. 400.474(1), F.S.

¹⁹ S. 400.474(3)-(6), F.S.

²⁰ S. 400.474(6)(f), F.S.

Effect of Proposed Changes

The bill proposes several changes to statutes related to nurse registries to clarify the relationship between a nurse registry and the persons referred for contract by the registry. By confirming that each person referred for contract by a nurse registry is an independent contractor and that a nurse registry has no obligation to perform any tasks or oversight of a referred person's work so as to be misconstrued as an employee, a nurse registry may avoid liability for minimum wage and overtime payments as result of the change in federal rules governing companionship activities.

Current law requires that a nurse registry ensure that a CNA or HHA is adequately trained to perform the tasks of a home health aide when either is referred for contract in a home setting. Instead, the bill only requires a nurse registry to ensure that a CNA or HHA has presented credentials which demonstrate adequate training to perform HHA tasks in a home setting.

The bill requires a nurse registry, when a person is referred for contract to a patient's home, to advise the patient, the patient's family, and any person acting on behalf of the patient at the time the contract for services is made that the person who has been referred is an independent contractor and that the nurse registry has no obligation to monitor, supervise, manage, or train any person referred for contract. The bill confirms that a nurse registry must comply with all other obligations required of it under part II of chapter 408, F.S., which includes general health care licensing provisions, such as license application procedures, procedures for effecting a change in ownership, and other license requirements.

The bill adds a provision to s. 400.506, F.S., which states that a nurse registry is under no obligation to monitor, supervise, manager, or train any person referred for contract. However, if a nurse registry has knowledge of a violation of law by a person referred for contract by the registry, the bill requires the registry to:

- Advise the patient to terminate the referred person's contract;
- Provide the reason for advising for termination of the contract;
- Cease referring the person for contract to any other patient, health care facility, or other entity; and
- Notify the appropriate licensing board of any practice violations.

The bill also clarifies that records which are required by chapter 400, F.S., to be filed with a nurse registry as a repository of records must be filed according to the rules adopt by AHCA. Further, the bill states that a nurse registry has no other obligation to review and act upon records filed with it pursuant to rule except as required in the instance where the registry has knowledge of a violation of law by a person it has referred for contract, described above.

Finally, the bill also adds a provision to s. 400.474, F.S., which exempts from the accreditation requirement in that section certain home health agencies which only provide unskilled caregivers and are not certified by Medicare or Medicaid.

The bill provides an effective date of July 1, 2014.

B. SECTION DIRECTORY:

Section 1: Amends s. 400.474, F.S., relating to application for license; fee.

Section 2: Amends s. 400.506, F.S., relating to licensure of nurse registries; requirements; penalties.

Section 3: Provides an effective date of July 1, 2014.

²¹ Agency for Health Care Administration, *2013 Bill Analysis & Economic Impact Statement-HB 4031*, page 1 (on file with Health Innovation Subcommittee staff).

²² *Id.*

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill clarifies that each person referred for contract by a nurse registry is an independent contractor and that a nurse registry is not responsible for certain actions or activities that may be associated with an employer-employee relationship, such as training and management of a referred person. As a result, a nurse registry may be able to avoid complying with minimum wage requirements and overtime payments required under the new federal DOL rule that removes the exemption from these requirements under the FLSA for companionship services.

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:

None.

B. RULE-MAKING AUTHORITY:

The bill does not require rule-making authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 25, 2014, the Health Innovation Subcommittee adopted one amendment to House Bill 1179. The amendment confirmed that a nurse registry must comply with all obligations required of it under part II of chapter 408, F.S., which contains general health care licensing provisions applicable to most entities regulated by AHCA.

On April 10, 2014, the Health and Human Services Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment conformed the bill to the Senate version, which is identical with regard to policy and purpose but included different phrasing. The amendment exempted from the accreditation requirement those home health agencies which provide only unskilled caregivers and are not certified by Medicare or Medicaid.

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