HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 687 Free Speech of Health Care Practitioners
SPONSOR(S): Professions & Public Health Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Professions & Public Health Subcommittee		Rahming	McElroy

SUMMARY ANALYSIS

The First Amendment of the United States Constitution protects the right to freedom of expression from government interference. Under current law, government regulation based on the content of speech is presumptively invalid and is upheld only if it is necessary to advance a compelling governmental interest, precisely tailored to serve that interest, and is the least restrictive means available for establishing that interest.

The Division of Medical Quality Assurance, within the Department of Health (DOH), has general regulatory authority over health care practitioners. Current law authorizes a regulatory board or DOH, if there is no board, to discipline a health care practitioner's license for a number of offenses, including failing to adhere to the applicable standard of care and making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession. DOH and the boards do not have the authority to regulate free speech and thus have not taken any adverse actions against a health care practitioner's licensed based solely on free speech.

Under current law, the DOH must "promptly" provide a copy of only legally sufficient complaints that result in the initiation of a disciplinary investigation of a health care practitioner to the practitioner or the practitioner's attorney. "Promptly" is not defined in statute or rule.

The DOH does not license healthcare practitioners by specialty or subspecialty based upon national board certification; however, current law prohibits osteopathic physicians from holding themselves out as board-certified specialists unless they have obtained that specialty from an approved recognizing agency. Rule 64B15-14.001, F.A.C., relating to advertising, authorizes the Board of Osteopathic Medicine to approve recognizing agencies for purposes of certifying Florida-licensed osteopathic physicians as specialists in certain aspects of the practice of osteopathic medicine. This rule establishes requirements for advertising by osteopathic physicians and does not confer upon the state any authority over the recognizing agencies.

PCS for HB 687 prohibits a board within the jurisdiction of the DOH, or the DOH if there is no board, and recognizing agencies from reprimanding, sanctioning, revoking or threatening to revoke a license, certificate, or registration of a health care practitioner for exercising their constitutional right of free speech, including through the use of a social media platform. The bill provides an exception to this prohibition if the DOH, board, or recognizing agency proves beyond a reasonable doubt that a health care practitioner's use of free speech has led to the direct physical harm of a person with whom the health care practitioner had a practitioner-patient relationship within the 3 years immediately preceding the physical harm.

The bill also requires the DOH, board, or recognizing agency to provide the health care practitioner with all complaints, rather than only legally sufficient complaints, that may result in licensure revocation within seven days after receiving such complaint.

The bill will have a significant, negative fiscal impact on the DOH and no fiscal impact on local governments.

The bill provides an effective date of July 1, 2022.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Licensure and Regulation of Physicians

The Division of Medical Quality Assurance (MQA), within the Department of Health (DOH), has general regulatory authority over health care practitioners.[1] The MQA works in conjunction with 22 boards and four councils to license and regulate seven types of health care facilities and more than 40 health care professions.[2] Each profession is regulated by an individual practice act and by ch. 456, F.S., which provides general regulatory and licensure authority for the MQA. MQA is statutorily responsible for the following boards and professions established within the division:[3]

- The Board of Acupuncture, created under ch. 457, F.S.;
- The Board of Medicine, created under ch. 458, F.S.;
- The Board of Osteopathic Medicine, created under ch. 459, F.S.;
- The Board of Chiropractic Medicine, created under ch. 460, F.S.;
- The Board of Podiatric Medicine, created under ch. 461, F.S.;
- Naturopathy, as provided under ch. 462, F.S.;
- The Board of Optometry, created under ch. 463, F.S.;
- The Board of Nursing, created under part I of ch. 464, F.S.;
- Nursing assistants, as provided under part II of ch. 464, F.S.;
- The Board of Pharmacy, created under ch. 465, F.S.;
- The Board of Dentistry, created under ch. 466, F.S.;
- Midwifery, as provided under ch. 467, F.S.;
- The Board of Speech-Language Pathology and Audiology, created under part I of ch. 468, F.S.;
- The Board of Nursing Home Administrators, created under part II of ch. 468, F.S.;
- The Board of Occupational Therapy, created under part III of ch. 468, F.S.;
- Respiratory therapy, as provided under part V of ch. 468, F.S.;
- Dietetics and nutrition practice, as provided under part X of ch. 468, F.S.;
- The Board of Athletic Training, created under part XIII of ch. 468, F.S.;
- The Board of Orthotists and Prosthetists, created under part XIV of ch. 468, F.S.;
- Electrolysis, as provided under ch. 478, F.S.;
- The Board of Massage Therapy, created under ch. 480, F.S.;
- The Board of Clinical Laboratory Personnel, created under part III of ch. 483, F.S.;
- Medical physicists, as provided under part IV of ch. 483, F.S.;
- The Board of Opticianry, created under part I of ch. 484, F.S.;
- The Board of Hearing Aid Specialists, created under part II of ch. 484, F.S.;
- The Board of Physical Therapy Practice, created under ch. 486, F.S.;
- The Board of Psychology, created under ch. 490, F.S.;
- School psychologists, as provided under ch. 490, F.S.;
- The Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling, created under ch. 491, F.S.; and
- Emergency medical technicians and paramedics, as provided under part III of ch. 401, F.S.

Recognizing Agencies

[1] Pursuant to s. 456.001(4), F.S., health care practitioners are defined to include acupuncturists, physicians, physician assistants, chiropractors, podiatrists, naturopaths, dentists, dental hygienists, optometrists, nurses, nursing assistants, pharmacists, midwives, speech language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dieticians, athletic trainers, orthotists, prosthetists, electrologists, massage therapists, clinical laboratory personnel, medical physicists, dispensers of optical devices or hearing aids, physical therapists, psychologists, social workers, counselors, and psychotherapists, among others.
[2] Florida Department of Health (DOH), Division of Medical Quality Assurance, *Annual Report and Long-Range Plan, Fiscal Year 2020-2021*, p. 6, https://mqawebteam.com/annualreports/2021/8/ (last visited Feb. 9, 2022).
[3] S. 456.001(4), F.S; *Id*.

The DOH does not license healthcare practitioners by specialty or subspecialty based upon national board certification; however, ch. 459, F.S., prohibits osteopathic physicians from holding themselves out as board-certified specialists unless they have obtained that specialty from an approved recognizing agency.[4] Rule 64B15-14.001, F.A.C., relating to advertising, authorizes the Board of Osteopathic Medicine to approve recognizing agencies for purposes of certifying Florida-licensed osteopathic physicians as specialists in certain aspects of the practice of osteopathic medicine. The Board has approved the following 501(c) private, national organizations, as recognizing agencies:

- American Board of Medical Specialties
- American Osteopathic Association
- American Association of Physician Specialists, Inc.
- American Board of Interventional Pain Physicians

This rule establishes requirements for advertising by osteopathic physicians and does not confer upon the state any authority over the recognizing agencies.

Discipline of Health Care Practitioners

Section 456.072, F.S., authorizes a regulatory board or DOH, if there is no board, to discipline a health care practitioner's licensure for a number of offenses, including but not limited to:

- Making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession; or
- Failing to identify through writing or orally to a patient the type of license under which the practitioner is practicing.

If the board or DOH finds that a licensee committed a violation, the board or DOH may:[5]

- Refuse to certify, or to certify with restrictions, an application for a license;
- Suspend or permanently revoke a license;
- Place a restriction on the licensee's practice or license;
- Impose an administrative fine not to exceed $10,000 for each count or separate offense; if the violation is for fraud or making a false representation, a fine of $10,000 must be imposed for each count or separate offense;
- Issue a reprimand or letter of concern;
- Place the licensee on probation;
- Require a corrective action plan;
- Refund fees billed and collected from the patient or third party on behalf of the patient; or
- Require the licensee to undergo remedial education.

Investigations

The DOH, on behalf of the professional boards, investigates any complaint that is filed against a health care practitioner if the complaint is in writing, signed by the complainant, and legally sufficient.[6] A complaint is legally sufficient if it contains allegations of ultimate facts that, if true, show that a regulated practitioner has violated ch. 456, F.S., their practice act, or a rule of their board or the DOH.[7]

[4] S. 459.015, F.S. Similar provisions are contained within ch. 458 (allopathic physicians), ch. 464 (nurses) and ch. 466 (dentists).
[5] S. 456.073(1), F.S.
[6] S. 456.073(1), F.S.
[7] *Id*.

The Consumer Services Unit within MQA receives the complaints and refers them to the closest Investigative Services Unit (ISU) office.[8] The ISU investigates complaints against health care practitioners.[9] Complaints that present an immediate threat to public safety are given priority; however, all complaints are investigated as timely as possible. When the complaint is assigned to an investigator, the complainant is contacted and given the opportunity to provide additional information. A thorough investigation is then conducted. The steps taken in the investigation are determined by the specifics of the allegations, but generally include the following:[10]

- Obtaining medical records, documents, and evidence;
- Locating and interviewing the complainant, the patient, the practitioner, and any witnesses; and
- Drafting and serving subpoenas for necessary information.

The ISU includes a staff of professional investigators and senior pharmacists who conduct interviews, collect documents and evidence, prepare investigative reports for the Prosecution Services Unit (PSU), and serve subpoenas and official orders for the DOH.[11]

The PSU is responsible for providing legal services to the DOH in the regulation of all health care boards and councils.[12] The PSU will review the investigative file and report from ISU and recommend a course of action to the State Surgeon General (when an immediate threat to the health, safety, and welfare of the people of Florida exists), the appropriate board's probable cause panel, or the DOH, if there is no board, which may include:[13]

- Having the file reviewed by an expert;
- Issuing a closing order;
- Filing an administrative complaint; or
- Issuing an emergency order (emergency restriction order or emergency suspension order).

If the ISU investigative file received by PSU does not pose an immediate threat to the health, safety, and welfare of the people of Florida, then the PSU attorneys review the file and determine, first, whether expert review is required and, then, whether to recommend to the board's probable cause panel a closing order, an administrative complaint, or a letter of guidance.[14]

Final DOH action, including all of the above, as well as cases where the practitioner has failed to respond to an administrative complaint, are presented before the applicable board, or DOH if there is no board. The practitioner may be required to appear. The complainant is notified of the date and location of the hearing and may attend. If the practitioner is entitled to, and does, appeal the final decision, PSU defends the final order before the appropriate appellate court.[15]

Health Care Practitioner Notification of Complaint

Current law does not require the DOH to provide a health care practitioner with a copy of any complaint it has received that may result in revocation of licensure, certification, or registration, within a specified time period. Rather, current law requires the DOH to "promptly" provide a copy of any complaint or

[8] DOH, *Consumer Services*, http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/consumer-services.html (last visited Feb. 10, 2022).
[9] DOH, *Investigative Services,* http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/isu.html (last visited Feb. 10, 2022).
[10] *Id*.
[11] *Id*.
[12] DOH, *Prosecution Services,* http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/psu.html (last visited Feb. 10, 2022).
[13] *Id*.
[14] S. 456.073(2), F.S. The DOH may recommend a letter of guidance in lieu of finding probable cause if the subject has not previously been issued a letter of guidance for a related offense.
[15] *Supra* note 12.

document that resulted in the initiation[16] of a disciplinary investigation of a health care practitioner to the practitioner or the practitioner's attorney.[17] This means that the DOH is not required to provide copies of legally insufficient complaints.

Additionally, a complaint and all information obtained pursuant to the investigation by the DOH are confidential and exempt from public disclosure until 10 days after the probable cause panel or DOH makes a probable cause determination, or until the regulated professional or subject of the investigation waives confidentiality, whichever occurs first.[18]

Currently, health care practitioners must provide a mailing address and a telephone number when applying for licensure or licensure renewal. Health care practitioners are also required to notify the DOH of address changes for communication purposes. The DOH does not have the authority to require applicants to provide e-mail addresses for the purpose of receiving correspondence from the department. Thus, correspondence is generally provided to licensees through the mail.[19] Based on the most current Service Standards Maps provided by the United States Postal Service, the average time for delivery in Florida is four days.[20]

During FY 2020-2021, the DOH prosecuted 356 health care license revocations. The average number of all DOH complaints received in the last three fiscal years was 41,209.[21]

Due Process Under Chapter 120, F.S.

Chapter 120, F.S., known as the Administrative Procedure Act, (APA), provides uniform procedures for the exercise of specified authority. Section 120.60, F.S., pertains to licensing and provides for due process for persons seeking government-issued licensure or who have been granted such licensure. Under the APA, no revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the governmental agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a hearing under ss. 120.569 and 120.57, F.S.[22]

When personal service cannot be made and the certified mail notice is returned undelivered, the agency must cause a short, plain notice to the licensee to be published once each week for four consecutive weeks in a newspaper published in the county of the licensee's last known address as it appears on the records of the agency, or, if no newspaper is published in that county, the notice may be published in a newspaper of general circulation in that county.[23]

The APA provides a process for cases in which a governmental agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license.[24] In such cases, the agency may take such action by any procedure that is fair under the circumstances if:[25]

- The procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the U.S. Constitution;
- The agency takes only that action necessary to protect the public interest under the emergency procedure; and

[16] The initiation of the investigation occurs upon establishment of legal sufficiency. DOH, Agency Bill Analysis of 2022 HB 687, p. 3. (Feb. 4, 2022).
[17] S. 456.073(1), F.S.
[18] S. 456.073(10), F.S.
[19] First-class mail is the standard for sending letters by the DOH, unless certified return receipt is required. According to the United States Post Office, the cost to mail a letter by first class mail is 58 cents, and takes one to five days to deliver.
[20] USPS, *Service Standard Maps*, https://postalpro.usps.com/ppro-tools/service-standards-maps (last visited Feb. 11, 2022).
[21] DOH, Agency Bill Analysis of 2022 HB 687, p. 4. (Feb. 4, 2022).
[22] S. 120.60(5), F.S.
[23] *Id*.
[24] S. 120.60(6), F.S.
[25] *Id*.

- The agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable. Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding pursuant to ss. 120.569 and 120.57, F.S., must also be promptly instituted and acted upon.

The DOH prosecutes administrative cases based upon the standard of "clear and convincing evidence."[26]

Burden and Standard of Proofs in Litigation Cases

Burden of Proof

The burden of proof is an obligation to prove a material fact in issue.[27] Generally, the party who asserts the material fact in issue has the burden of proof.[28] Thus, in a criminal proceeding, the burden is on the state to prove that the defendant committed the crime with which he or she was charged, while in a civil proceeding, the burden of proof is on the plaintiff to prove the allegations contained in their complaint. A defendant in either a criminal or a civil proceeding has the burden to prove any affirmative defenses[29] he or she may raise in response to the charges or allegations. However, there are certain statutory and common law presumptions[30] that may shift the burden of proof from the party asserting the material fact in issue to the party defending against such fact.[31] These presumptions remain in effect following the introduction of evidence rebutting the presumption, and the factfinder must decide if such evidence is strong enough to overcome the presumption.[32]

Standard of Proof

A standard of proof is the level or degree of proof necessary to meet the burden of proof for a particular issue.[33] In criminal actions, the standard of proof necessary for a conviction[34] is beyond a reasonable doubt, meaning that the fact finder must be virtually certain of the defendant's guilt in order to render a guilty verdict. Beyond a reasonable doubt is the highest standard of proof that may be imposed upon a party at trial and, under current law, is only used in criminal cases.

In most civil actions the standard of proof is by the preponderance of the evidence, meaning the burden of proof is met when the party with the burden convinces the factfinder that there is a greater than 50 percent chance that the claim is true.[35]

However, certain civil actions[36] are practitioner to a heightened standard of proof, requiring the plaintiff to prove the allegations by clear and convincing evidence. This standard requires the evidence to be highly and substantially more likely to be true than untrue.[37] The clear and convincing evidence standard is an intermediate-level standard. It is more rigorous than the "preponderance" standard but less rigorous than the "beyond a reasonable doubt" standard.

---

[26] DOH, Agency Bill Analysis of 2022 HB 687, p. 4. (Feb. 4, 2022).
[27] 5 *Florida Practice Series* s. 16:1.
[28] *Id.*; *see Berg v. Bridle Path Homeowners Ass'n, Inc.*, 809 So. 2d 32 (Fla. 4th DCA 2002).
[29] An affirmative defense is a defense which, if proven, negates criminal or civil liability even if it is proven that the defendant committed the acts alleged. Examples include self-defense, entrapment, insanity, necessity, and *respondeat superior*. Legal Information Institute, *Affirmative Defense*, https://www.law.cornell.edu/wex/affirmative_defense (last visited Feb. 10, 2022).
[30] These presumptions tend to be social policy expressions, such as the presumption that all people are sane or that all children born in wedlock are legitimate. 5 *Florida Practice Series* s. 16:1.
[31] 5 *Florida Practice Series* s. 16:1.
[32] *Id.*
[33] *Id.*
[34] The standard of proof for proving affirmative defenses raised in a criminal trial may vary.
[35] *See*, S. 120.57(1)(j), F.S., and 5 *Florida Practice Series* s. 16:1.
[36] These actions typically include actions to impose a civil penalty, civil actions based on conduct amounting to a criminal law violation, and actions in which the effect of a civil ruling might be deprive a party of a protected interest. 5 *Florida Practice Series* s. 16:1.
[37] 5 *Florida Practice Series* s. 16:1; *see Colorado v. New Mexico*, 467 U.S. 310 (1984).

Freedom of Speech

The First Amendment of the United States Constitution protects the right to freedom of expression from government interference. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[38] "The First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well."[39]

It is well established that a government regulation based on the content of speech is presumptively invalid and is upheld only if it is necessary to advance a compelling governmental interest, precisely tailored to serve that interest, and is the least restrictive means available for establishing that interest.[40] The government bears the burden of demonstrating the constitutionality of any such content-based regulation.[41] "Falsity alone may not suffice to bring the speech outside the First Amendment; the statement must be a knowing and reckless falsehood."[42]

Online Speech

The United States Supreme Court has clarified, "[o]nline speech is equally protected under the First Amendment as there is 'no basis for qualifying the level of First Amendment scrutiny that should be applied' to online speech."[43] This means that speech made on social media platforms is protected under the First Amendment, subject to any constitutional government regulations.

Under Florida law, "social media platform" means any information service, system, Internet search engine, or access software provider that:[44]

- Provides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site;
- Operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity;
- Does business in the state; and
- Satisfies at least one of the following thresholds:
    - Has annual gross revenues in excess of $100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index.
    - Has at least 100 million monthly individual platform participants globally.

Professional Speech

In 2018, the U.S. Supreme Court clarified that professional speech of individuals who perform personalized services that require a professional license from the state is not a separate category of speech exempt from the rule that content-based regulations of speech are practitioner to strict scrutiny.[45] Justice Thomas delivered the opinion of the court, stating "[t]he dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information."[46] Further, "[w]hen the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[47]

---

[38] *See De Jonge v. Oregon*, 299 U.S. 353, 364–65(1937) (incorporating right of assembly); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating right of freedom of speech).
[39] Douglas v. City of Jeannette (Pennsylvania), 319 U.S. 157, 179, (1943) (Jackson, J., concurring in result).
[40] Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 665-66 (2004).
[41] *Id.* at 660.
[42] *See* U.S. v. Alvarez, 617 F. 3d 1198 (2012) and *New York Times v. Sullivan*, 376 U.S. 254 (1964).
[43] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997).
[44] S. 501.2041(1)(g), F.S. The term does not include any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex as defined in s. 509.013.
[45] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2365 (2018).
[46] *Id.* at 2374.
[47] *Id.* at 2366.

Currently, there are no disciplinary penalties established within any board, council, or DOH rule that specifically addresses a health care practitioner's "constitutional right to free speech." As such, there is no mechanism for establishing legal sufficiency to initiate an investigation, nor prosecuting a case for such an allegation.[48]

However, a health care practitioner may be disciplined for conduct that could be considered an exercise of free speech if such conduct is in violation of ch. 456, F.S., their practice act, or a rule of their board or the DOH, including, but not limited to, through the use of a social media platform, or prosecuted for violation of standard of care in a case in which the health care practitioner causes direct physical or psychological harm to a patient.

Free Speech Regulation – Department of Health

Current law authorizes a regulatory board or DOH, if there is no board, to discipline a health care practitioner's license for a number of offenses, including failing to adhere to the applicable standard of care and making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession.[49] DOH and the boards however, do not have the authority to regulate free speech. Per the DOH:[50]

> "There are no existing disciplinary penalties established within any board, council, or department rule that addresses a health care practitioner's "constitutional right to free speech." As such, there is no mechanism for establishing legal sufficiency to initiate an investigation, nor prosecuting a case for this allegation. Only in a case in which direct physical or psychological harm of a patient by a health care practitioner resulted could be prosecuted as a violation of standard of care."

Thus, DOH and the boards have not taken any adverse actions against a health care practitioner's licensed based solely on free speech.

Free Speech Regulation – Recognizing Agencies

Recognizing agencies are independent from the state and develop their own standards by which they certify and discipline health care practitioners. The state, including DOH and its regulatory boards, has no authority over the external credentialing of these private, national accrediting entities or their disciplinary practices.[51]

Effect of the Bill

Free Speech of Health Care Practitioners

PCS for HB 687 prohibits a board within the jurisdiction of the DOH, or the DOH if there is no board, and certain recognizing agencies from reprimanding, sanctioning, revoking or threatening to revoke a license, certificate, or registration of a health care practitioner for exercising their constitutional right of free speech, including, but not limited to, through the use of a social media platform. The bill provides an exception to this prohibition if the DOH, board, or recognizing agency proves beyond a reasonable doubt that a health care practitioner's use of free speech has led to the direct physical harm of a person with whom the health care practitioner had a practitioner-patient relationship within the 3 years immediately preceding the incident of physical harm.

Free Speech Regulation by DOH

[48] DOH, Agency Bill Analysis of 2022 HB 687, p. 4. (Feb. 4, 2022).
[49] S. 456.72, F.S.
[50] DOH, Agency Bill Analysis of 2022 HB 687, p. 4. (Feb. 4, 2022).
[51] DOH, Agency Bill Analysis of 2022 HB 687, p. 4. (Feb. 4, 2022).

The bill may conflict with DOH and the board's authority to discipline health care practitioners. Current law authorizes a regulatory board or DOH, if there is no board, to discipline a health care practitioner's license for a number of offenses, including failing to adhere to the applicable standard of care and making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession. The bill's provisions appear to conflict with this authority. For example, a health care practitioner could allege that any deceptive, fraudulent or misleading statement was free speech and protected under the bill's provisions. This would serve as a bar to any prosecution by DOH unless DOH proved beyond a reasonable doubt, the standard applicable in criminal cases, that a physical harm occurred to a person who had been a patient of the health care practitioner within the 3 preceding years. Additionally, by raising the evidentiary standard from clear and convincing to beyond a reasonable doubt, the bill may increase prosecution costs for DOH or discourage prosecution of certain offenses.

Free Speech Regulation by Recognizing Agencies

The bill applies to recognizing agencies approved by the Board of Osteopathic Medicine in Rule 64B15-14.001 for purposes of certifying Florida-licensed osteopathic physicians as specialists in certain aspects of the practice of osteopathic medicine. The Board has approved the following 501(c) private, national organizations, as recognizing agencies:

- American Board of Medical Specialties
- American Osteopathic Association
- American Association of Physician Specialists, Inc.
- American Board of Interventional Pain Physicians

These 501(c) recognizing agencies are national in scope. They choose to develop their own standards by which they certify health care practitioners as specialists. While the state of Florida may prohibit persons from holding themselves out to be certified specialists in aspects of the practice of osteopathic medicine, the state does not have the ability to prohibit these recognizing agencies from taking adverse actions against the certification of persons who fail to meet the recognizing agency's standards. The state of Florida has no control over the certification and disciplinary processes created by these independent organizations and might not be able to enforce the provisions of the bill.

Health Care Practitioner Notification of Complaint

The bill requires the DOH, board, or recognizing agency to provide the health care practitioner with all complaints, rather than only legally sufficient complaints, that may result in licensure revocation within seven days after receiving such complaint.

Although email delivery would be the most efficient way to timely provide a complaint to a health care practitioner, the DOH does not have the authority to require that health care practitioners provide or maintain an e-mail address with the department for notification purposes.[52] This means that the DOH's only recourse for ensuring delivery would be to send notifications and complaint documentation by first class mail to the address the licensee is required to provide to the DOH and maintain. Complaints received on a Saturday or Sunday would further limit the time for transmission to the health care practitioner within seven calendar days, increasing the likelihood that the DOH will involuntarily fail to satisfy this statutory requirement.

Additionally, the state of Florida has no control over the certification and disciplinary processes created by national, independent recognizing agencies and might not be able to enforce this provision of the bill.

The bill provides an effective date of July 1, 2022.

[52] DOH, Agency Bill Analysis of 2022 HB 687, p. 3. (Feb. 4, 2022).

B. SECTION DIRECTORY:

Section 1: Creates s. 456.61, F.S., relating to use of free speech by a health care practitioner.
Section 2: Provides an effective date of July 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:[53]

Implementation of the bill will have a significant, negative fiscal impact resulting from a recurring increase in workload associated with processing complaints in a manner where all notifications are completed in within seven days from the time of the receipt of the complaint, and increased litigation for the DOH and its boards.

The DOH estimates that 12 full-time equivalent (FTE) positions will be required to implement the provisions of this bill, with salary being computed at a position's base plus 43% for benefits. Based on the LBR standards, the total FTE cost is $805,062 ($654,137/Salary $147,264/Expense $3,661/HR).

The seven-day complaint notification requirement would mandate the DOH to provide the complaint to the practitioner by first class mail. Based on the average complaints received over the most recent three years (41,209), the anticipated recurring cost to notify health care practitioners could be as much as $23,901.22 (41,209 x .58) in postage costs and $7,417.62 (41,209 x .18) in contracted services.

Since bill does not specify what, if any, administrative fines the DOH would face for failure to comply with the seven-day complaint notification requirement, the fiscal impact is indeterminate at this time.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

[53] DOH, Agency Bill Analysis of 2022 HB 687, p. 6. (Feb. 4, 2022).

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Current law provides sufficient rulemaking authority to implement the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES