

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1127 Insurance Fraud
SPONSOR(S): Insurance & Banking Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Insurance & Banking Subcommittee		Lloyd	Cooper

SUMMARY ANALYSIS

The Department of Financial Services (DFS) is responsible for regulating certain insurance activities under the Insurance Code (such as eligibility and conduct of insurance agents and agencies and policing fraud). The DFS is required to maintain a Division of Insurance Fraud (DIF). The DIF is charged with investigating all manner of fraudulent insurance activities and employs sworn law enforcement investigators with arrest powers. While the many types of health care facilities operating in the state are generally licensed and regulated by the Agency for Health Care Administration (AHCA), the DIF has the authority to police fraudulent insurance claims and activities that may occur in health care facilities.

Health care clinics are regulated under the Health Care Clinic Act. The Act's purpose is to "provide for the licensure, establishment, and enforcement of basic standards for health care clinics and to provide administrative oversight by the Agency for Health Care Administration." A "clinic" under the act is defined as "an entity where health care services are provided to individuals and which tenders charges for reimbursement for such services, including a mobile clinic and a portable equipment provider." However, there is an extensive list of entities that are exempt from the definition and licensure requirements established by the act. There are 1,849 licensed health care clinics and 10,009 clinics that have received a certificate of exemption. Despite the availability of an exemption, "an entity shall be deemed a clinic and must be licensed under this [the Health Care Clinic Act] in order to receive reimbursement under the Florida Motor Vehicle No-Fault Law, ss. 627.730-627.7405, unless exempted under s. 627.736(5)(h)." The list of exempt clinics under the No-Fault Law is much shorter and includes clinics owned, operated by, or affiliated with separately licensed facilities or providers.

The charges and reimbursement claims made by an unlicensed health care clinic, which is operating in violation of statute, are unlawful, noncompensable, and unenforceable. The PCS expands the effect of this provision to included charges and reimbursement claims by clinics that are violating AHCA rules. The PCS expressly identifies such prohibited charging and reimbursement claiming activity as theft, regardless of whether payments are made.

Section 400.993, F.S., and subsection 400.9935(4), F.S., establish offenses related to unlicensed clinic activities that are punishable as a felony. The PCS combines these provisions into a single subsection of statute and establishes an additional felony offense for knowingly failing to update certain required information within 21 days.

The DIF is authorized to establish a direct-support organization to support the prosecution, investigation, and prevention of motor vehicle insurance fraud, to be known as the "Automobile Insurance Fraud Strike Force" (Strike Force). The Strike Force filed its incorporation with the Department of State on April 25, 2012. The Strike Force has engaged in limited organizational activity during its existence. The PCS repeals the statute authorizing the Strike Force. It also removes cross-references regarding Strike Force deposits to and appropriations from the Insurance Regulatory Trust Fund. The DIF's rulemaking authority related to the Strike Force is removed.

The PCS amends the offense severity ranking chart of the Criminal Punishment Code to reflect the changes made by the PCS.

The PCS has no fiscal impact on state or local government. It has an indeterminate positive impact on the private sector.

The PCS is effective July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

The Department of Financial Services (DFS) is responsible for regulating the certain insurance activities under the Insurance Code¹ (such as eligibility and conduct of insurance agents and agencies and policing fraud). The Financial Services Commission and Office of Insurance Regulation also have responsibilities concerning insurance related to licensing insurance companies, ratemaking, and market conduct, among other things. The DFS is required to maintain a Division of Insurance Fraud (DIF).² The DIF is charged with investigating all manner of fraudulent insurance activities and employs armed law enforcement officers with statewide authority and arrest powers.³ Annual reports of the DIF and other public record information, including summaries of fraud referral, investigation, arrests and convictions, are available on the DIF's web site.⁴ While the many types of health care facilities operating in the state are generally licensed and regulated by the Agency for Health Care Administration (AHCA), the DIF has the authority to police fraudulent insurance claims and activities that may occur among health care facilities.

Health Care Clinic Licensing, Charges by Unlicensed Clinics, and Criminal Penalties

Licensing

Health care clinics are regulated under the Health Care Clinic Act.⁵ The purpose of the Act is to “provide for the licensure, establishment, and enforcement of basic standards for health care clinics and to provide administrative oversight by the Agency for Health Care Administration.”⁶ A “clinic” under the act is defined as “an entity where health care services are provided to individuals and which tenders charges for reimbursement for such services, including a mobile clinic and a portable equipment provider.”⁷ However, there is an extensive list of entities that are exempt from the definition and licensure requirements established by the act.⁸ According to the AHCA web site,⁹ there are 1,849 licensed Health Care Clinics and 10,009 clinics that have voluntarily received a certificate of exemption from Health Care Clinic licensure.^{10, 11}

Despite the availability of an exemption to clinic licensure, “an entity shall be deemed a clinic and must be licensed under this part in order to receive reimbursement under the Florida Motor Vehicle No-Fault Law, ss. 627.730-627.7405, unless exempted under s. 627.736(5)(h).”¹² The list of exempt clinics under the No-Fault Law is much shorter and includes clinics owned, operated by, or affiliated with separately licensed facilities or providers. The following entities do not have to be licensed as a health care clinic to make charges or receive reimbursement under the No-Fault Law:

- An entity wholly owned by a physician licensed under chapter 458 or chapter 459, or by the physician and the spouse, parent, child, or sibling of the physician;
- An entity wholly owned by a dentist licensed under chapter 466, or by the dentist and the spouse, parent, child, or sibling of the dentist;

¹ Chapters 624-632, 634, 635, 636, 641, 642, 648, and 651 constitute the Florida Insurance Code. Section 624.01, F.S.

² Section 20.121(2)(e), F.S.

³ Section 626.989, F.S.

⁴ <http://www.myfloridacfo.com/division/fraud/>. (Last viewed March 22, 2015)

⁵ Part X, chapter 400, F.S.

⁶ Section 400.990(2), F.S.

⁷ Section 400.9905(4), F.S.

⁸ Paragraphs 400.9905(4)(a) through (n), F.S.

⁹ <http://www.floridahealthfinder.gov/facilitylocator/FacilitySearch.aspx>.

¹⁰ Data as of March 23, 2015, obtained from <http://www.floridahealthfinder.gov/facilitylocator/FacilitySearch.aspx>, with search limited to Facility/Provider Type - “Health Care Clinic” or “Health Care Clinic Exemption.” (Last viewed March 23, 2015)

¹¹ A Health Care Clinic that is exempt from the licensure requirements of 400.9905, F.S., may choose to obtain a certificate of exemption from the AHCA. Rule 59A-33.006, F.A.C.

¹² Section 400.9905(4), F.S.

- An entity wholly owned by a chiropractic physician licensed under chapter 460, or by the chiropractic physician and the spouse, parent, child, or sibling of the chiropractic physician;
- A hospital or ambulatory surgical center licensed under chapter 395;
- An entity that wholly owns or is wholly owned, directly or indirectly, by a hospital or hospitals licensed under chapter 395; or
- An entity that is a clinical facility affiliated with an accredited medical school at which training is provided for medical students, residents, or fellows.

Charges by Unlicensed Clinics

The charges and reimbursement claims made by a health care clinic that is required to be licensed under ss. 400.990-995, F.S., but is not licensed or is operating in violation of the referenced statutes, are unlawful, noncompensable, and unenforceable. The PCS includes health care clinics that are operating in violation of AHCA rules in this provision. In addition, the PCS applies this standard whether or not the charge or claim is paid. The PCS expressly defines the making of such charges or claims as theft within the meaning of s. 812.014, F.S., and subject to the punishments found therein.¹³ Depending upon the circumstances, theft is punished as a misdemeanor of the first or second degree or a felony of the first, second, or third degree.¹⁴ This does not establish a new criminal offense; rather, it makes it plain that such activities are criminal theft.

Criminal Penalties

Section 400.993, F.S., and subsection 400.9935(4), F.S., establishes offenses related to unlicensed clinic activities that are punishable as a felony. A person who offers or advertises unlicensed health care services, performs unlicensed health care services, or owns, operates, or maintains an unlicensed health care clinic, as specified in s. 408.812, F.S., commits a felony of the third degree.¹⁵ A second or subsequent such offense is a second degree felony. Also, knowingly filing false or misleading information in a license application or renewal application for health clinic licensure, including information related to an applicable rule, is a third degree felony. To help identify unlicensed clinic activity, health care providers, who know of an unlicensed health care clinic, are required to report such clinics to the AHCA.¹⁶ Those providers that fail to do so, when they knew or should have known that the clinic was unlicensed, must be reported to their licensing board.¹⁷

The PCS consolidates these existing criminal offense provisions into a single subsection of statute by repealing s. 400.993, F.S., and revising subsection 400.9935(4), F.S.

The PCS creates a new third degree felony offense applicable to any person who knowingly fails to report a change in information contained in the most recent health care clinic license application or a change regarding the required insurance or bonds.^{18, 19} Such changes must be reported within 21 days of their occurrence.²⁰

Direct-Support Organization to Fight Automobile Insurance Fraud

¹³ Section 812.014(1), F.S., defines theft as follows:

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

¹⁴ Section 812.014, F.S.

¹⁵ Felonies are punished under ss. 775.082, 775.083, or 775.084, F.S.

¹⁶ Section 400.993(3), F.S.

¹⁷ Individual health care providers are regulated by one or more of the boards at the Department of Health.

¹⁸ The required reports go to the AHCA. Section 400.810, F.S.

¹⁹ Section 408.810(3), F.S. There are no express insurance requirements for health care clinic licensure, but an applicant can offer a bond of at least \$500,000, payable to the AHCA, as surety for compliance with the law, as an alternative to showing the financial responsibility required under s. 400.810(8), F.S. The AHCA has implemented the financial responsibility requirements for licensure through rule 59A-35.062, F.A.C.

²⁰ Id.

The DIF is authorized to establish a direct-support organization to support the prosecution, investigation, and prevention of motor vehicle insurance fraud, known as the “Automobile Insurance Fraud Strike Force” (Strike Force).²¹ The Strike Force is a not-for-profit corporation incorporated under ch. 617, F.S. It is authorized to raise funds, conduct programs and activities, hold, invest, and administer assets in its name, and make grants and expenditures to state attorneys’ offices, the statewide prosecutor, the AHCA, and the Department of Health to be used exclusively to prosecute, investigate, or prevent motor vehicle insurance fraud. The Strike Force may make grants and expenditures to the extent that they do not interfere with prosecutorial independence or otherwise create conflicts of interest that threaten the success of prosecutions. The Strike Force is precluded from engaging in lobbying activities or from using grants and expenditures for advertising using the likeness or name of any elected official.

The Strike Force is required to operate under a written contract with the DIF, which must provide for:

- DIF approval of the Strike Force’s articles of incorporation and bylaws, and its annual budget (which begins on July 1 and ends on June 30th of the following year).
- DIF certification of the Strike Force’s compliance with contract terms and that it is acting in a manner consistent with its goals and purposes.
- Allocation of funds to address motor vehicle insurance fraud, and reversion of moneys and property to DIF if the Strike Force ceases to exist, or to the state if DIF ceases to exist.
- Criteria to be used by the Strike Force’s board of directors in evaluating the effectiveness of funding to combat insurance fraud.
- Disclosure of material provisions of the contract, including disclosure on all promotional and fundraising publications of the Strike Force.

The Strike Force’s board of directors consists of 11 members as follows: the Chief Financial Officer (CFO) or a designee of the CFO, who serves as the chair; two state attorneys (one appointed by the CFO and the other by the Attorney General); two representatives of motor vehicle insurers appointed by the CFO; two representatives of local law enforcement agencies (one appointed by the CFO and the other by the Attorney General); two representatives of the types of health care providers who regularly make claims for PIP benefits (one appointed by Speaker of the House of Representatives and one appointed by the President of the Senate); a private attorney that has experience representing PIP claimants (appointed by the President of the Senate); and a private attorney with experience representing PIP insurers (appointed by the Speaker of the House of Representatives).

The DFS is required to adopt rules prescribing the procedures by which the Strike Force is to be governed.²² For regulatory purposes, insurer contributions to the Strike Force are allowed as appropriate business expenses.²³ The Strike Force may place its receipts in a separate depository account in its name, subject to its contract with DIF. Any moneys that DIF receives from the Strike Force are required to be deposited into the Insurance Regulatory Trust Fund.²⁴

The Strike Force filed its incorporation with the Department of State on April 25, 2012. The Strike Force has engaged in limited organizational activity during its existence.²⁵ The DFS reports²⁶ that the Strike Force has not: taken in any donations, paid any grants, established a bank account,²⁷ or made any transfers into the Insurance Regulatory Trust Fund.

²¹ Section 626.9895(2), F.S.

²² Section 626.9895(5)(c), F.S. The authorized rules were adopted as Chapter 69D-3, F.A.C.

²³ Section 626.9895(6), F.S.

²⁴ Section 626.9895(7), F.S.

²⁵ According to its web site, <http://www.myfloridacfo.com/autofraud/meetings.html>. (Last viewed March 23, 2013), the Strike Force held four board meetings; August 7, 2012, January 24, 2013, July 9, 2013, and December 9, 2013.

²⁶ Email from Legislative Affairs, Department of Financial Services, Re: HB 1127 – new proposed strike all, dated March 23, 2015.

²⁷ The minutes of the board of directors of the Strike Force reflect that a depository account was authorized, but do not indicate where or if the account was established. Minutes of the board, July 9, 2013, Automobile Insurance Fraud Strike Force. Strike Force records are available on the Internet at <http://www.myfloridacfo.com/autofraud/index.htm>. (Last viewed March 23, 2013)

The PCS repeals the statute authorizing the Strike Force. It also removes cross-references to the Strike Force's authorizing statute regarding deposits to and appropriations from the Insurance Regulatory Trust Fund for Strike Force purposes. The DIF loses its rulemaking authority related to the Strike Force.

Criminal Punishment Code Offense Severity Ranking Chart

The Criminal Punishment Code²⁸ applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the "offense severity ranking chart"²⁹ from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature.³⁰ A defendant's sentence is calculated based on points assigned for factors (e.g., the offense for which the defendant is being sentenced and injury to the victim). The points are added in order to determine the "lowest permissible sentence" for the offense.

The PCS amends the offense severity ranking chart to reflect the changes made by the PCS. The titles relevant offenses are updated consistent with the PCS and additions are made to the chart consistent with the PCS. Filing a false license application or other required information or failing to report information³¹ is classified as a Level 3 offense.³² A second or subsequent conviction of operating a clinic, or offering services requiring licensure, without a license³³ is classified as a Level 6 offense.³⁴ While such second or subsequent offenses are currently second degree felonies under s. 400.993(2), F.S., this offense does not appear on the offense severity ranking chart and is added to the chart by the PCS.

B. SECTION DIRECTORY:

Section 1: Repeals s. 400.993, F.S., relating to unlicensed clinics; reporting.

Section 2: Amends s. 40.9935, F.S., relating to clinic responsibilities.

Section 3: Amends s. 626.9894, F.S., relating to gifts and grants.

Section 4: Repeals s. 626.9895, F.S., relating to motor vehicle insurance fraud direct-support organization.

Section 5: Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity chart.

Section 6: Provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

²⁸ Section 921.002, F.S.

²⁹ Section 921.0022, F.S.

³⁰ Section 921.0024, F.S.

³¹ Section 400.9935(4)(e), F.S., as revised by the PCS.

³² Level 3 offenses carry 16 sentencing points for the primary offense and 2.4 sentencing points for each additional offense. Section 921.0024(1)(a), F.S.

³³ Section 400.9935(4)(c), F.S., as revised by the PCS.

³⁴ Level 6 offenses carry 36 sentencing points for the primary offense and 18 sentencing points for each additional offense. Section 921.0024(1)(a), F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The PCS has an indeterminate impact on the private sector. The private sector will benefit from increased enforcement activities, including restitution orders, due to the criminal penalty provisions of the PCS. Savings realized by the insurance industry should be passed on to consumers.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This PCS does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Department of Financial Services, Division of Insurance Fraud, loses the rulemaking authority to adopt rules related to the Strike Force.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES