

HOUSE BILL REPORT

ESHB 2933

As Passed Legislature

Title: An act relating to clarifying collective bargaining processes for individual providers.

Brief Description: Clarifying collective bargaining processes for individual providers.

Sponsors: By House Committee on Commerce & Labor (originally sponsored by Representatives Conway, Cody, Benson, Ormsby, O'Brien, Sullivan, Wood and Morrell).

Brief History:

Committee Activity:

Commerce & Labor: 2/2/04, 2/5/04 [DPS].

Floor Activity:

Passed House: 2/14/04, 95-0.

Senate Amended.

Passed Senate: 2/25/04, 48-0.

House Concurred.

Passed House: 3/4/04, 95-0.

Passed Legislature.

Brief Summary of Engrossed Substitute Bill (As Amended by the Senate)

- Clarifies the various responsibilities for individual home care worker collective bargaining, and requires the Governor or Governor's Labor Relations Office to conduct the bargaining.
- Expressly states that individual home care workers are not state employees and that collective bargaining law governs the collective bargaining relationship, not the employment relationship.
- Adds that only collective bargaining may determine wages, hours, and working conditions for individual home care workers, but this does not modify, among other things, the authority of the Department of Social and Health Services (DSHS) to establish plans of care and terminate contracts with providers, and the Legislature's authority to make program changes.
- Adds requirements for individual home care worker collective bargaining including: review of funding requests by the Office of Financial Management, consultation with the Joint Committee on Employment Relations, submission of the funding request in the Governor's proposed budget, requirement for the parties

to renegotiate if there is a significant revenue shortfall, requirement for an arbitration panel to consider the state's ability to pay, and requirement for an arbitration award to be funded before it becomes binding.

- Adds that the state and the DSHS are not vicariously or jointly liable for action or inaction by individual home care workers and that certain listed circumstances do not create a special relationship with the consumer.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Conway, Chair; Wood, Vice Chair; McMorris, Ranking Minority Member; Crouse, Hudgins, Kenney and McCoy.

Minority Report: Do not pass. Signed by 2 members: Representatives Condotta, Assistant Ranking Minority Member; and Holmquist.

Staff: Chris Cordes (786-7103).

Background:

Long-term Care Services

The state contracts with agency and individual home care workers to provide long-term care services for elderly and disabled clients who are eligible for publicly funded services through the Department of Social and Health Services' (DSHS) Aging and Adult Services and Developmental Disabilities programs. These services are provided through the Medicaid Personal Care program, state-funded programs such as Chore, or under a home and community-based waiver granted by the federal Department of Health and Human Services, which allows the program to continue receiving federal Medicaid funds. Home care workers provide DSHS clients with personal care assistance with various tasks such as toileting, bathing, dressing, ambulating, meal preparation, and household chores. These individual home care workers are hired and fired by the client, but are paid by the DSHS.

Initiative 775 - Collective Bargaining for Individual Home Care Workers

In November 2001 the voters enacted Initiative Measure No. 775 (I-775). Under the initiative, consumers of services retain the right to select, hire, supervise the work of, and terminate any individual home care worker providing them with services, while the DSHS pays the unemployment insurance contributions to cover these workers. I-775 also provides individual home care workers with collective bargaining rights under the Public Employees' Collective Bargaining Act (PECBA). The Home Care Quality Authority (HCQA) was created as an agency of state government to provide oversight of home care services and, for purposes of collective bargaining, to function as the "public employer" of approximately 26,000 individual home care workers. I-775 states that the individual home care workers are not, because of these provisions, employees of the state for any purpose.

Individual home care workers do not have the right to strike and are covered by the binding interest arbitration provisions of the PECBA.

Under I-775, the Governor must submit a request to the Legislature for the funds and any legislative changes necessary to implement a collective bargaining agreement covering individual home care workers within 10 days of the agreement's ratification. The Legislature may only approve or reject the submission of the request for funds as a whole. If the Legislature rejects or fails to act on the submission, the collective bargaining agreement will be reopened solely for the purpose of renegotiating the funds necessary to implement the agreement.

In August 2002 the individual home care workers voted to unionize. An initial contract submitted to the Legislature in January 2003 was returned to the parties for renegotiation after the Legislature adjourned without approving the funds for the contract.

Initiative 775 - Agency Liability for Conduct of Individual Home Care Workers

I-775 provides that the HCQA, the Areas Agencies on Aging, or their contractors, may not be held vicariously liable for the action or inaction of an individual home care worker.

In a tort case, the defendant is generally not responsible for the negligent acts of third persons. However, the defendant may be held vicariously liable for actions of others. For example, the defendant might be held liable for the action or inaction of his or her agent who is acting within the scope of the agency relationship.

Generally, a defendant in a tort case is responsible only for his or her own percentage of fault in causing the plaintiff's harm. In some instances, however, multiple defendants may be "jointly and severally" liable for the whole of the plaintiff's damages. This joint and several liability means that any one defendant may be required to pay all of the damages.

Although, at common law, states have sovereign immunity from tort liability, the Legislature has adopted a broad waiver of state immunity. The courts, however, have limited government liability in some circumstances. These limits are referred to as the "public duty doctrine." There are a number of exceptions to the public duty doctrine, including that a governmental entity is not protected from liability if the governmental entity had a special relationship with the injured person. A special relationship arises where: (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public; (2) there are express assurances given by the public official; and (3) the plaintiff justifiably relies on the assurances.

Summary of Engrossed Substitute Bill:

Collective Bargaining Responsibilities

The responsibilities for collective bargaining with individual home care workers are modified. For purposes of the bargaining law, the Governor is the "public employer." To

accommodate the state's role as payor of the community-based services provided to consumers and to ensure coordination with state employee collective bargaining and the coordination necessary for bringing funding requests to the Legislature, the public employer is represented for bargaining purposes by the Governor or the Governor's Labor Relations Office (Office). The Governor or Office must periodically consult with the HCQA during collective bargaining to communicate on issues relating to services received by consumers.

It is expressly stated that the collective bargaining law governs the collective bargaining relationship, not the employment relationship, between the parties. The individual home care workers who are "public employees" only for collective bargaining purposes are not, for that reason, employees of the state, its political subdivisions, or an Area Agency on Aging for any purpose. Individual home care workers are not to be considered state employees as a result of the state assuming responsibility for individual home care worker's unemployment insurance. Individual home care workers are expressly excluded from the statutory provisions that apply to state employees, such as civil service, pension programs, and other employee benefit programs.

Individual home care worker wages, hours, and working conditions are determined solely through collective bargaining. Except for the HCQA, no state agency may establish policies or rules governing wages or hours of individual home care workers. However, these provisions do not modify:

- the DSHS's authority to establish a consumer's plan of care and determine the hours of care for which a consumer is eligible;
- the DSHS's authority to terminate individual home care worker contracts for not adequately meeting the needs of a particular consumer or to deny contracts with individual home care workers;
- the consumer's right to assign hours to one or more individual home care workers within the maximum hours in the plan of care;
- the consumer's right to select, hire, terminate, supervise, and determine the conditions of employment for each individual home care worker providing services to the consumer; the DSHS's obligation to comply with conditions of the federal Medicaid waiver and to ensure federal financial participation; and
- the Legislature's right to make program modifications, including standards of eligibility of consumers and providers and the nature of services provided. This right must be reserved in any collective bargaining agreement.

If any part of a collective bargaining agreement is found to be in conflict with federal requirements that are a condition to the allocation of federal funds to the state, the conflicting part of the agreement is inoperative.

Collective Bargaining Process

Collective bargaining for home care worker agreements must begin by May 1 of the year before the year in which an existing collective bargaining agreement expires.

The Governor's submission of a request for funding to implement a collective bargaining agreement covering individual home care workers must be submitted as part of the Governor's budget proposal to the Legislature. Before the request may be submitted, the request must: (1) be submitted to the Office of Financial Management (OFM) by October 1 prior to the legislative session at which the request will be considered, and (2) be certified by the Director of the OFM as being feasible financially for the state or reflect the binding decision of an arbitration panel.

The Governor must periodically consult with the Joint Employment Relations Committee regarding appropriations necessary to implement the compensation and fringe benefit provisions of a collective bargaining agreement and, on completing negotiations, advise the Committee of the elements of the agreement and any legislation necessary to implement the agreement.

When an arbitration panel determines a dispute arising from a bargaining impasse involving individual home care workers, the panel must consider, in addition to other factors, the financial ability of the state to pay for compensation and fringe benefit provisions. The decision of an arbitration panel is not binding on the Legislature and, if the Legislature does not fund the compensation and fringe benefit provisions of the arbitrated agreement, the decision is not binding on the HCQA or the state.

If a significant revenue shortfall occurs after the Legislature approves an agreement's compensation and fringe benefit provisions, the parties must negotiate a mutually agreed to modification of the agreement.

Liability

The state and the DSHS, as well as the HCQA and Area Agencies on Aging, and their contractors, are not vicariously or jointly liable for the action or inaction of an individual home care worker. The fact that the following circumstances exist does not constitute a special relationship with the consumer: (1) a collective bargaining agreement; (2) placement of a home care worker on the referral registry; or (3) the development or approval of a plan of care for a consumer who chooses to use an individual home care worker or the provision of case management services to that consumer.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Testimony For: The bill is a response to concerns raised during the 2003 session. It attempts to resolve questions about the employment status of the individual home care workers. Even though these workers are not employees of the state, the bill adds clarity. It also allows for earlier legislative input into the bargaining process and for bringing the request for funding to the Legislature in a balanced budget. The concern raised by the HCQA about whether an

arbitrator's award would be binding on the HCQA if funding was not approved should be addressed in an amendment. Another amendment should be adopted to make it clear that individual home care worker hours cannot be changed by unilateral agency action.

Testimony Against: None.

Persons Testifying: (In support) David Rolf, Service Employees International Union.

(In support, with concerns) Mindy Schaffner, Home Care Quality Authority.

Persons Signed In To Testify But Not Testifying: None.