

FINAL BILL REPORT

E2SHB 1725

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Synopsis as Enacted

Brief Description: Concerning the consumer's right to assign hours to individual providers and the department of social and health services' authority to adopt rules related to payment of individual providers.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Cody and Tharinger; by request of Department of Social and Health Services).

House Committee on Labor & Workplace Standards

House Committee on Appropriations

Senate Committee on Health Care

Senate Committee on Ways & Means

Background:

Aging persons on Medicaid and people with developmental disabilities are eligible to receive in-home care services. The Department of Social and Health Services (DSHS) assesses these eligible persons (consumers) to determine the level of their in-home care needs. The consumers may choose to receive services either from an individual provider (IP) or agency provider. Consumers have the right to select, hire, supervise the work of, and terminate any IP providing services to them. The state is the employer only for the purposes of collective bargaining.

Wages, hours, and working conditions of IPs are determined through the collective bargaining process. No state agency or department may establish policies or rules governing the wages or hours of IPs. The consumer has the right to assign hours to one or more IPs selected by the consumer, within the maximum hours determined by the consumer's care plan.

In fiscal year (FY) 2015, IPs provided a total of approximately 46 million hours of paid care to DSHS consumers. Of that amount, approximately 4 million hours or 8.75 percent were hours worked by an IP above 40 in one week.

The Fair Labor Standards Act (FLSA) specifically exempts from federal overtime laws domestic service workers who provide "companionship services" to the elderly and people with illnesses, injuries, or disabilities. In 2014 the United States Department of Labor (DOL)

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modified a "domestic service rule" that requires third-party employers, such as the state, to pay overtime (150 percent of the hourly wage) when home care workers such as IPs provide over 40 hours per week of authorized care. Those rules were set to go into effect January 1, 2015; however, a federal court held that the DOL's rules were inconsistent with the language in the FLSA and Congress' intent. The court vacated the rules, and the case was appealed. In August 2015, the United States Federal Court of Appeals upheld the DOL rules. The modified DOL rules went into effect January 1, 2016. The case is on appeal to the Supreme Court of the United States.

The Caseload Forecast Council (CFC) is the state agency charged with forecasting caseloads for entitlement programs and other specified programs. The CFC consists of two individuals appointed by the Governor and one appointee each from the two largest caucuses in the House of Representatives and in the Senate. The CFC oversees the preparation and approval of the state caseload forecasts used in the operating budget.

Summary:

The DSHS is authorized to establish rules that limit the number of hours it may pay any single IP, and is provided emergency rulemaking authority until permanent rules can be adopted. The consumer's right to assign hours to IPs of the consumer's choice must be consistent with rules adopted by the DSHS.

An 8.75 percent cap is placed on total IP overtime hours as a share of total IP hours projected by the CFC for each FY.

Limitations on the total weekly hours that may be worked by an IP are established for IPs in two categories:

- IPs who worked in excess of 40 hours total per week on average in January 2016 are limited to 65 total hours per week in FY 2016 and FY 2017 and 60 total hours per week in subsequent FYs; and
- IPs who worked zero to 40 hours total per week on average in January 2016 are limited to 40 total hours per week.

Hours worked above these weekly limits may be authorized by the DSHS for:

- statutorily-required IP training;
- IPs who successfully appeal to the DSHS that their average weekly hours in January 2016 materially underrepresent their average weekly hours in the first three months of 2016; and
- IPs working for consumers for whom the DSHS has not yet reviewed a plan of care.

In addition, the DSHS may adopt criteria in rule to authorize hours above the weekly hour limits. The criteria must be designed to reduce the state's exposure to payment of overtime and to:

- ensure that consumers are not at increased risk of institutionalization;
- address situations in which there is a limited number of IPs in a consumer's geographic area;
- address situations in which there is a limited number of IPs available to support a consumer with complex medical and behavioral needs or specific language needs;

- avoid emergencies that could pose a health and safety risk to the consumer; and
- address situations in which the cost of the authorized hour is less than other care alternatives for the consumer, distinct from increased risk of institutionalization.

The CFC may, upon a majority vote, adopt a temporary adjustment to the 8.75 percent cap, up to a maximum 10 percent cap, if it finds that a higher percentage of IP overtime hours is necessary to provide adequate consumer care.

A Joint Legislative-Executive Overtime Oversight Task Force (Task Force) is created with the following members:

- two members from each of the two largest caucuses of the Senate, appointed by the respective caucus leaders;
- two members from each of the two largest caucuses of the House of Representatives, appointed by the Speaker of the House of Representatives;
- members representing the DSHS and the Office of Financial Management, appointed by the Governor; and
- two members representing IPs and two members representing consumers of care from IPs, appointed by the Governor.

For each FY, the DSHS shall establish a spending plan and system to monitor the authorization and cost of IP overtime hours. In addition, the DSHS shall provide quarterly reports to the legislative fiscal committees and task force that includes specific information on the number of IPs receiving payment for overtime, the number of overtime hours paid, and the amount of the overtime payments.

Votes on Final Passage:

2015 Third Special Session

House 97 0

2016 Regular Session

House 97 0

2016 First Special Session

House 95 0

Senate 42 1

Effective: April 18, 2016