
ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1725

State of Washington

64th Legislature

2016 Regular Session

By House Appropriations (originally sponsored by Representatives Cody and Tharinger; by request of Department of Social and Health Services)

READ FIRST TIME 01/28/16.

1 AN ACT Relating to the consumer's right to assign hours to
2 individual providers and the department of social and health
3 services' authority to adopt rules related to payment of individual
4 providers; amending RCW 74.39A.270; adding a new section to chapter
5 74.39A RCW; creating a new section; and declaring an emergency.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **Sec. 1.** RCW 74.39A.270 and 2011 1st sp.s. c 21 s 10 are each
8 amended to read as follows:

9 (1) Solely for the purposes of collective bargaining and as
10 expressly limited under subsections (2) and (3) of this section, the
11 governor is the public employer, as defined in chapter 41.56 RCW, of
12 individual providers, who, solely for the purposes of collective
13 bargaining, are public employees as defined in chapter 41.56 RCW. To
14 accommodate the role of the state as payor for the community-based
15 services provided under this chapter and to ensure coordination with
16 state employee collective bargaining under chapter 41.80 RCW and the
17 coordination necessary to implement RCW 74.39A.300, the public
18 employer shall be represented for bargaining purposes by the governor
19 or the governor's designee appointed under chapter 41.80 RCW. The
20 governor or governor's designee shall periodically consult with the
21 authority during the collective bargaining process to allow the

1 authority to communicate issues relating to the long-term in-home
2 care services received by consumers. The department shall solicit
3 input from the developmental disabilities council, the governor's
4 committee on disability issues and employment, the state council on
5 aging, and other consumer advocacy organizations to obtain informed
6 input from consumers on their interests, including impacts on
7 consumer choice, for all issues proposed for collective bargaining
8 under subsections (5) and (6) of this section.

9 (2) Chapter 41.56 RCW governs the collective bargaining
10 relationship between the governor and individual providers, except as
11 otherwise expressly provided in this chapter and except as follows:

12 (a) The only unit appropriate for the purpose of collective
13 bargaining under RCW 41.56.060 is a statewide unit of all individual
14 providers;

15 (b) The showing of interest required to request an election under
16 RCW 41.56.060 is ten percent of the unit, and any intervener seeking
17 to appear on the ballot must make the same showing of interest;

18 (c) The mediation and interest arbitration provisions of RCW
19 41.56.430 through 41.56.470 and 41.56.480 apply, except that:

20 (i) With respect to commencement of negotiations between the
21 governor and the bargaining representative of individual providers,
22 negotiations shall be commenced by May 1st of any year prior to the
23 year in which an existing collective bargaining agreement expires;
24 and

25 (ii) The decision of the arbitration panel is not binding on the
26 legislature and, if the legislature does not approve the request for
27 funds necessary to implement the compensation and fringe benefit
28 provisions of the arbitrated collective bargaining agreement, is not
29 binding on the authority or the state;

30 (d) Individual providers do not have the right to strike; and

31 (e) Individual providers who are related to, or family members
32 of, consumers or prospective consumers are not, for that reason,
33 exempt from this chapter or chapter 41.56 RCW.

34 (3) Individual providers who are public employees solely for the
35 purposes of collective bargaining under subsection (1) of this
36 section are not, for that reason, employees of the state, its
37 political subdivisions, or an area agency on aging for any purpose.
38 Chapter 41.56 RCW applies only to the governance of the collective
39 bargaining relationship between the employer and individual providers
40 as provided in subsections (1) and (2) of this section.

1 (4) Consumers and prospective consumers retain the right to
2 select, hire, supervise the work of, and terminate any individual
3 provider providing services to them. Consumers may elect to receive
4 long-term in-home care services from individual providers who are not
5 referred to them by the authority.

6 (5) Except as expressly limited in this section and RCW
7 74.39A.300, the wages, hours, and working conditions of individual
8 providers are determined solely through collective bargaining as
9 provided in this chapter. Except as described in subsection (9) of
10 this section, no agency or department of the state may establish
11 policies or rules governing the wages or hours of individual
12 providers. ((However,)) This subsection does not modify:

13 (a) The department's authority to establish a plan of care for
14 each consumer or its core responsibility to manage long-term in-home
15 care services under this chapter, including determination of the
16 level of care that each consumer is eligible to receive. However, at
17 the request of the exclusive bargaining representative, the governor
18 or the governor's designee appointed under chapter 41.80 RCW shall
19 engage in collective bargaining, as defined in RCW 41.56.030(4), with
20 the exclusive bargaining representative over how the department's
21 core responsibility affects hours of work for individual providers.
22 This subsection shall not be interpreted to require collective
23 bargaining over an individual consumer's plan of care;

24 (b)(i) The requirement that the number of hours the department
25 may pay any single individual provider is limited to:

26 (A) Sixty hours each workweek if the individual provider was
27 working an average number of hours in excess of forty hours for the
28 workweeks during January 2016, except for fiscal years 2016 and 2017,
29 the limit is sixty-five hours each workweek; or

30 (B) Forty hours each workweek if the individual provider was not
31 working an average number of hours in excess of forty hours for the
32 workweeks during January 2016, or had no reported hours for the month
33 of January 2016.

34 (ii) Additional hours may be authorized under criteria
35 established by rules adopted by the department under subsection (9)
36 of this section.

37 (iii) Additional hours may be authorized for required training
38 under RCW 74.39A.074, 74.39A.076, and 74.39A.341.

39 (iv) An individual provider may appeal to the department for
40 qualification for the hour limitation in (b)(i)(A) of this subsection

1 if the average weekly hours the provider was working in January 2016
2 materially underrepresent the average weekly hours worked by the
3 individual provider during the first three months of 2016.

4 (v) No individual provider is subject to the hour limitations in
5 (b)(i)(A) of this subsection until the department has conducted a
6 review of the plan of care for the consumers served by the provider.
7 The department shall review plans of care expeditiously, starting
8 with consumers connected with the most individual provider overtime;

9 (c) The requirement that the total number of additional hours in
10 excess of forty hours authorized under (b) of this subsection and
11 subsection (9) of this section are limited by the total hours as
12 provided in subsection (10) of this section;

13 (d) The department's authority to terminate its contracts with
14 individual providers who are not adequately meeting the needs of a
15 particular consumer, or to deny a contract under RCW 74.39A.095(8);

16 ~~((e))~~ (e) The consumer's right to assign hours to one or more
17 individual providers (~~selected by the consumer within the maximum~~
18 hours determined by)) consistent with the rules adopted under this
19 chapter and his or her plan of care;

20 ~~((d))~~ (f) The consumer's right to select, hire, terminate,
21 supervise the work of, and determine the conditions of employment for
22 each individual provider providing services to the consumer under
23 this chapter;

24 ~~((e))~~ (g) The department's obligation to comply with the
25 federal medicaid statute and regulations and the terms of any
26 community-based waiver granted by the federal department of health
27 and human services and to ensure federal financial participation in
28 the provision of the services; and

29 ~~((f))~~ (h) The legislature's right to make programmatic
30 modifications to the delivery of state services under this title,
31 including standards of eligibility of consumers and individual
32 providers participating in the programs under this title, and the
33 nature of services provided. The governor shall not enter into,
34 extend, or renew any agreement under this chapter that does not
35 expressly reserve the legislative rights described in this subsection
36 (5)((f)) (h).

37 (6) At the request of the exclusive bargaining representative,
38 the governor or the governor's designee appointed under chapter 41.80
39 RCW shall engage in collective bargaining, as defined in RCW
40 41.56.030(4), with the exclusive bargaining representative over

1 employer contributions to the training partnership for the costs of:
2 (a) Meeting all training and peer mentoring required under this
3 chapter; and (b) other training intended to promote the career
4 development of individual providers.

5 (7) The state, the department, the area agencies on aging, or
6 their contractors under this chapter may not be held vicariously or
7 jointly liable for the action or inaction of any individual provider
8 or prospective individual provider, whether or not that individual
9 provider or prospective individual provider was included on the
10 referral registry or referred to a consumer or prospective consumer.
11 The existence of a collective bargaining agreement, the placement of
12 an individual provider on the referral registry, or the development
13 or approval of a plan of care for a consumer who chooses to use the
14 services of an individual provider and the provision of case
15 management services to that consumer, by the department or an area
16 agency on aging, does not constitute a special relationship with the
17 consumer.

18 (8) Nothing in this section affects the state's responsibility
19 with respect to unemployment insurance for individual providers.
20 However, individual providers are not to be considered, as a result
21 of the state assuming this responsibility, employees of the state.

22 (9) The department may not pay any single individual provider
23 more than the hours listed in subsection (5)(b) of this section
24 unless the department authorizes additional hours under criteria
25 established by rule. The criteria must be limited in scope to reduce
26 the state's exposure to payment of overtime, address travel time from
27 worksite to worksite, and address the following needs of consumers:

28 (a) Ensuring that consumers are not at increased risk for
29 institutionalization;

30 (b) When there is a limited number of providers within the
31 geographic region of the consumer;

32 (c) When there is a limited number of providers available to
33 support a consumer with complex medical and behavioral needs or
34 specific language needs;

35 (d) Emergencies that could pose a health and safety risk for
36 consumers; and

37 (e) Instances where the cost of the allowed hour is less than
38 other alternatives to provide care to a consumer, distinct from any
39 increased risk of institutionalization.

1 (10)(a) Each fiscal year, the department shall establish a
2 spending plan and a system to monitor the authorization and cost of
3 hours in excess of forty hours each workweek from subsections (5)(b)
4 and (9) of this section beginning July 1, 2016, and each fiscal year
5 thereafter. Expenditures for hours in excess of forty hours each
6 workweek under subsections (5)(b) and (9) of this section shall not
7 exceed 8.75 percent of the total average authorized personal care
8 hours for the fiscal year as projected by the caseload forecast
9 council. The caseload forecast council may adopt a temporary
10 adjustment to the 8.75 percent of the total average hours projection
11 for that fiscal year, up to a maximum of 10.0 percent, if it finds a
12 higher percentage of overtime hours is necessitated by a shortage of
13 individual providers to provide adequate client care, taking into
14 consideration factors including the criteria in subsection (9) of
15 this section. If the council elects to temporarily increase the
16 limit, it may do so only upon a majority vote of the council.

17 (b) The department also shall provide expenditure reports
18 beginning September 1, 2016, and on a quarterly basis thereafter. If
19 the department determines, based upon quarterly expenditure reports,
20 that the annual expenditures will exceed the limitation established
21 in (a) of this subsection, the department shall take those actions
22 necessary to ensure compliance with the limitation.

23 (c) The spending plan and expenditure reports must be submitted
24 to the legislative fiscal committees and the joint legislative-
25 executive overtime oversight task force. The joint legislative-
26 executive overtime oversight task force members are as follows:

27 (i) Two members from each of the two largest caucuses of the
28 senate, appointed by the respective caucus leaders.

29 (ii) The speaker of the house of representatives shall appoint
30 two members from each of the two largest caucuses of the house of
31 representatives.

32 (iii) The governor shall appoint members representing the
33 department of social and health services and the office of financial
34 management.

35 (iv) The governor shall appoint two members representing
36 individual providers and two members representing consumers receiving
37 personal care or respite care services from an individual provider.

38 (d) The task force shall meet at least annually, but may meet
39 more frequently as desired by the task force. The task force shall

1 choose cochair, one from among the legislative members and one from
2 among the executive branch members.

3 (e) The department is authorized to adopt rules, including
4 emergency rules under RCW 34.05.350, to implement this subsection.

5 NEW SECTION. Sec. 2. The department of social and health
6 services shall immediately adopt emergency rules under RCW 34.05.350
7 to limit the number of hours per workweek that the department may pay
8 any single provider to forty hours and to establish criteria to
9 authorize additional hours in accordance with section 1 of this act.
10 The emergency rules shall remain in effect until permanent rules can
11 be adopted.

12 NEW SECTION. Sec. 3. A new section is added to chapter 74.39A
13 RCW to read as follows:

14 In order to monitor quality of care and safety of consumers,
15 employment conditions of individual providers, and compliance with
16 the provisions of payment of hours in excess of forty hours each
17 workweek for any single provider, the department must provide
18 quarterly expenditure reports to the legislative fiscal committees
19 and joint legislative-executive overtime oversight task force created
20 in RCW 74.39A.270(10). The report must contain the following
21 information:

22 (1) The number of providers receiving payment for more than forty
23 hours in a workweek, specifying how many of those providers were
24 eligible for those hours due to meeting the conditions of RCW
25 74.39A.270 (5)(b)(i)(A), (b)(ii), (b)(iii), and (9).

26 (2) The number of hours paid and the amount paid for hours in
27 excess of forty hours in a workweek, specifying how many of those
28 hours and payments were for providers eligible for those hours and
29 payments due to meeting the conditions of RCW 74.39A.270
30 (5)(b)(i)(A), (b)(ii), (b)(iii), and (9).

31 (3) In reporting the information required in subsections (1) and
32 (2) of this section, the department must provide total amounts,
33 averages, and a display of the distribution of the amounts.

34 (4) The information required must be provided by department
35 region and county of client, department program, and must be
36 specified for providers by the number of clients they serve.

37 (5) Any personally identifiable information of consumers and
38 individual providers used to develop this report is confidential and

1 exempt from public disclosure, inspection, or copying under chapter
2 42.56 RCW. However, information may be released in aggregate form,
3 with any personally identifiable information redacted, for the
4 purpose of statistical analysis and oversight of agency performance
5 and actions.

6 NEW SECTION. **Sec. 4.** This act is necessary for the immediate
7 preservation of the public peace, health, or safety, or support of
8 the state government and its existing public institutions, and takes
9 effect immediately.

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