HOUSE BILL REPORT
HB 2963

As Reported by House Committee On:
Health Care & Wellness
Appropriations

Title: An act relating to the consumer directed employer program.

Brief Description: Concerning the consumer directed employer program.

Sponsors: Representatives Cody and Macri.

Brief History:
Committee Activity:
Health Care & Wellness: 1/31/18 [DPS];
Appropriations: 2/3/18, 2/6/18 [DPS(HCW)].

Brief Summary of Substitute Bill

- Authorizes the Department of Social and Health Services to contract with a consumer directed employer (CDE) to be the legal employer of individual providers and perform administrative functions related to providing personal care, respite care, and other services to individuals with functional disabilities.
- Retains the role of the person receiving the services of an individual provider as the managing employer with the authority to select, hire, schedule, supervise, and dismiss an individual provider.
- Establishes a rate-setting board and a process to set labor rates for payments to individual providers and an administrative rate to be paid to the CDE.

HOUSE COMMITTEE ON HEALTH CARE & WELLNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Cody, Chair; Macri, Vice Chair; Clibborn, Jinkins, Riccelli, Robinson, Slatter, Stonier and Tharinger.

Minority Report: Do not pass. Signed by 5 members: Representatives Schmick, Ranking Minority Member; Graves, Assistant Ranking Minority Member; Caldier, MacEwen and Maycumber.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Minority Report: Without recommendation. Signed by 1 member: Representative Harris.

Staff: Chris Blake (786-7392).

Background:

Personal Care Services.

The Department of Social and Health Services (Department) provides publicly funded personal care services to eligible clients who live in their own home and are elderly or have developmental disabilities. The Department assesses these clients (consumers) to determine the level of their in-home care needs. Personal care services include assistance with various tasks such as toileting, bathing, dressing, ambulating, meal preparation, and household chores. There are two ways in which personal care services may be provided in the client's home: (1) by an individual provider; or (2) by an employee of a home care agency.

Individual Providers.

An individual provider is a person who has contracted with the Department to provide personal care or respite care to functionally disabled persons under a state program. There are currently over 38,000 individual providers in Washington serving almost 38,000 Department clients. Consumers have the right to select, hire, supervise the work of, and terminate any individual provider providing services to them. Individual providers are paid through a direct contract with the Department. Individual providers are considered public employees solely for the purpose of collective bargaining which determines their wages, hours, and working conditions. Individual providers, however, are not otherwise considered employees of the state or area agencies on aging.

In 2014 the United State Supreme Court (Court) invalidated provisions of a state law very similar to Washington's permitting individual provider collective bargaining agreements. The Court held that the "state employees for only purposes of coverage under Illinois state labor law" did not work to extend a legal exception permitting the state to deduct mandatory "fair share" representation fees from "full-fledged" public employees to the individual providers without individual consent. As individual providers mainly private employees of the recipients of home care services, not the state, the Court determined that the state could not compel individual providers funding of union representational activities under the First Amendment. Neither the ruling on collecting representation fees from Illinois individual providers, nor the related prior ruling on public employees, impact the ability of private sector labor agreements to contain representation fee or other union security provisions.

Area Agencies on Aging.

The Department contracts with area agencies on aging to provide case management services to consumers receiving home and community services in their own home. Case management responsibilities are set in statute and include the following: verification that individual providers have met training requirements, are performing their duties, and have passed background checks; monitoring a plan of care to verify that it meets the needs of the consumer; and verifying worker time sheets.

Summary of Substitute Bill:

The Department of Social and Health Services (Department) is authorized to establish a consumer directed employer (CDE) program. A CDE is a private entity that contracts with the Department to be the legal employer of individual providers for the purpose of administrative functions related to providing personal care, respite care, and similar services to individuals with functional impairments under Medicaid programs. A CDE is patterned after the "agency with choice" model recognized by the federal Centers for Medicare and Medicaid Services for financial management in consumer directed programs. The consumer receiving services is considered to be the managing employer of the individual provider. The Department is directed to begin the transition of individual providers to the CDE no later than July 1, 2021.

Authority and Responsibilities of a Consumer Directed Employer.

A CDE's responsibilities generally include coordination with the consumer, establishment of wages and benefits on behalf of individual providers, tax activities on behalf of individual providers, verification of individual provider qualifications, and other administrative and employment-related supports. As the legal employer of individual providers, a CDE must specifically:

- verify that individual providers meet necessary training requirements;
- conduct background checks on individual providers or verify that previously-conducted background checks are still valid;
- implement an electronic visit verification system or monitor a statistically valid sample of individual provider claims to the receipt of services by the consumer;
- monitor individual provider compliance with employment requirements;
- provide a copy of the consumer's plan of care to the individual provider;
- verify that the individual provider is able and willing to carry out his or her responsibilities under the plan of care;
- consider information provided by the consumer, or the consumer's case manager, about the consumer's specific needs;
- discontinue the individual provider's assignment to a consumer if the CDE has reason to believe, or the Department or area agency on aging has reported, that the health, safety, or well-being of a consumer is in imminent jeopardy due to the performance of the individual provider;
- reject requests by consumers to assign a particular individual provider if the CDE has reason to believe that the individual provider will not be able to meet the care needs of the consumer; and
- establish a dispute resolution process for consumers who would like to dispute a CDE decision not to allow a particular individual provider to be assigned to the consumer.

A CDE that holds a contract with the Department to provide Medicaid services through the employment of individual providers is deemed to be a Medicaid provider.

The CDE assumes the responsibility from the Department for maintaining a referral registry to assist consumers in finding individual providers.

Authority and Responsibilities of the Department.

The Department is authorized to establish a CDE program by selecting a single CDE to be a Medicaid provider and to coemploy individual providers. The Department is to attempt to select a single CDE, but may select up to two CDEs, if necessary.

The Department must seek to contract with a vendor that demonstrates: (1) a strong commitment to consumer choice, self-direction, and maximizing consumer autonomy and control over daily decisions; and (2) a commitment to recruiting and retaining a high quality and diverse workforce and working with a broad coalition of stakeholders. The Department may also consider the vendor's:

- ability to provide maximum support to consumers to direct their own services;
- commitment to engage and work closely with consumers in designing and implementing operations through an advisory board;
- focus on workforce retention and developing qualified and trained providers;
- ability to prevent or mitigate disruptions to consumer services;
- ability to deliver high-quality training, health care, and retirement;
- ability to comply with the terms and conditions of the employment of individual providers at the time of transition;
- commitment to involving its home care workforce in decision making;
- vision for including home care workers as valued members of the consumer's care team; and
- ability to build and adapt technology tools that can enhance efficiency and provide better quality of services.

The Department may take enforcement action against the contract of a CDE that knowingly employs a long-term care worker who is not certified as a home care aide or, if exempt from certification, who has not met training requirements.

The Department shall continue to contract with individual providers until the transition to a CDE is complete, at which time the Department may not contract with individual providers except in situations in which there is no CDE available. The Department must perform background checks for these individual providers. The individual providers who contract with the Department continue to be considered public employees solely for the purpose of collective bargaining.

It is expressly stated that the bill does not modify the Department's authority to establish a plan of care for each consumer, including establishing the number of hours per week that a consumer may assign to a single independent provider. In addition, the Department retains the core responsibility to manage long-term in-home care services, including determining the level of care that each consumer is eligible to receive.

Authority of Area Agencies on Aging.

The general case management responsibilities of area agencies on aging are maintained. The area agencies on aging, however, must conduct the following activities only apply to individual providers who are contracted with the Department, rather than those who are employed by the CDE:

- verification of individual provider training requirements;
- attachment of the consumer's plan of care to the contract with the individual provider;
- performance of criminal background checks;
- termination of the contract if the individual provider's inadequate performance or inability to deliver quality care is jeopardizing the consumer;
- summary suspensions of individual providers who place a consumer in imminent jeopardy;
- monitor that the individual provider is providing services;
- verify that the individual provider is willing to carry out the responsibilities under the plan of care; and
- reject requests by consumers to assign a particular individual provider if there is reason to believe that the individual provider will not be able to meet the care needs of the consumer.

Regardless of whether the individual provider is employed by the CDE or contracted with the Department, the area agencies on aging maintain their general responsibilities related to developing plans of care for consumers, monitoring the implementation of plans of care, reassessing and reauthorizing services, and explaining to consumers that they have the right to waive case management services.

The Department and the area agencies on aging are given the general responsibility to notify the CDE if there is reason to believe an individual provider is not delivering or will not be able to deliver services identified in the consumer's plan of care, or the individual provider's performance is jeopardizing the health, safety, or well-being of a consumer.

The list of specific requirements that must be in a consumer's plan of care is eliminated.

Individual Providers.

Qualified and willing individual providers may apply to become employees of the CDE and may work as individual providers when selected by consumers. Whether an individual provider is employed by a CDE or contracted with the Department, the consumer has the right to select, schedule, supervise the work of, and dismiss any individual provider. The CDE and the Department, however, may refuse to employ an individual provider who may not be able to meet a consumer's needs, assign individual providers to different consumers, provide information to a consumer about an individual provider's work history, or terminate the employment of an individual provider who is not meeting the consumer's needs.

The Department must adopt rules describing criteria to be applied in determining whether a single Department-contracted individual provider may work more than 40 hours per week. The criteria relate to: (1) limiting the state's exposure to exceeding expenditure limits; (2) requiring consumers to use good faith efforts to locate other individual providers; (3) addressing travel time between worksites; (4) addressing the emergency needs of consumers; and (5) addressing conditions that could increase a consumer's risk of institutionalization.

Background check screening is not required for a CDE employee if the employee has an individual provider contract with the Department, the last background check is still valid, CDE employment is the only reason a new background check would be required, and the Department's background check results have been shared with the CDE.

Payment Rates and Overtime for Individual Providers.

Initial labor rates for individual providers employed through a CDE are established as the rates paid under the most recent collective bargaining agreement between the Governor and the Service Employees International Union 775 as well as any other legally required benefits or labor costs.

After the initial labor rates are set, subsequent labor rates, including an amount for health benefits, are to be established by a rate-setting board. The rate-setting board must consider current factors used in public employee collective bargaining related to individual providers, such as a comparison of wages; the financial ability of the state to pay for the compensation and fringe benefits; the state's interest in a stable long-term care workforce; the state's interest in assuring access to affordable, quality health care; and the state's fiscal interest in reducing reliance upon public benefit programs. The rate-setting board must also determine the administrative rate for the CDE.

The rate-setting board is comprised of 14 members. The four voting members are: (1) a representative of the Governor's office; (2) a representative of the Department of Social and Health Services; (3) a representative of the CDE; and (4) a representative of the exclusive bargaining representative of individual providers, or if none exists, a designee from the CDE's workforce. Nine of the nonvoting members include four legislators, a representative of the State Council on Aging, a representative of an organization representing people with intellectual disabilities, a representative of an organization representing persons with physical disabilities, a representative of the licensed home care agency industry, and a home care worker. The fourteenth member must be selected by the four voting members and will chair the rate-setting board and be the fifth voting member in the event of a tie. A process is established for selecting the fourteenth member in the event that the four voting members cannot agree.

Once the rates have been determined, the rate-setting board shall submit them to the Office of Financial Management for certification as financially feasible. If they are found to be financially feasible, the Governor must include them in his or her budget request. The Legislature may approve or reject the request in whole. If the rates are rejected, then the matter returns to the rate-setting board and the existing labor rates remain in effect.

The labor rates are an hourly rate to be paid to the CDE for paying wages, taxes, and benefits to individual providers. The CDE, however, has discretion to establish benefits and wages for individual providers, except as needed to pay for health benefits, as specific legislation requires, and according to a collective bargaining agreement. Funding for the training of individual providers must be included in the labor rate component.

In addition, overtime and travel time compensation considerations are factored into the reimbursement to the CDE. The CDE must permit an individual provider to work more than 40 hours per week if allowed under the Department's rules for Department-contracted individual providers. The CDE may permit an individual provider to work additional hours if required for training or if the individual provider had been working between 40 and 65 hours per week in January 2016. Otherwise, the CDE may allow the individual provider to work more than 40 hours per week, but overtime costs for such hours shall not be included in the CDE's labor rate.

Expenditures for hours worked beyond 40 hours per week may not exceed 8.25 percent of the total actual authorized personal care hours as projected by the Caseload Forecast Council. The Department must prepare expenditure reports related to its monitoring of authorizations and costs over 40 hours each workweek. The report must be submitted to the legislative fiscal committees and the Joint Legislative-Executive Overtime Oversight Task Force.

Funding Reductions.

Once the Department enters into a contract with a CDE and the transition to the CDE is complete, biennial funding for the subsequent biennium must be reduced by no more than:

- $2,908,000 for area agencies on aging;
- $1,361,000 for home and community services; and
- $1,289,000 for developmental disabilities.

Findings.

Legislative findings are made regarding in-home care services allowing people to choose to stay in their homes and being less costly than institutional care. Additional findings state that a CDE program will support consumers in directing their care, allow the state to focus on case management services, enhance the efficiency in the delivery of services, eliminate the possible classification of the state as a joint employer of individual providers, prevent the use of hospitals and institutions, and support the enhancement of home care worker skills.

Substitute Bill Compared to Original Bill:

The substitute bill renames the "individual provider employment administrator" (IPEA) to the "consumer directed employer" (CDE). A CDE has the same definition as an IPEA and also is a private entity and is to be patterned after the "agency with choice" model recognized by the federal Centers for Medicare and Medicaid Services for financial management in consumer directed programs.

The substitute bill clarifies that the "legal employer" is responsible for setting wages and benefits for individual providers and complying with applicable laws, including workers compensation and unemployment insurance. It is specified that a person who is functionally disabled includes persons with chemical dependency.

The substitute bill restores a provision stating that in the event of a conflict between agency rules and a collective bargaining agreement related to establishing payment rates, the collective bargaining agreement prevails.

The substitute bill changes the limit on expenditures for hours worked over 40 hours by individual providers from no more than 8.25 percent of the total average authorized personal care hours to no more than 8.25 percent of the total actual authorized personal care hours.

The substitute bill extends the date by which the Department of Social and Health Services must transition to the consumer directed employer from January 1, 2021, to July 1, 2021.

Appropriation: None.

Fiscal Note: Requested on February 1, 2018.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support—from testimony on HB 2426, which is identical to HB 2963 except for the title, on January 24, 2018) Washington has become the number one state in the country for long-term care by being able to care for very acute and very complex people at home, including people with extremely limited mobility, multiple complex diagnoses, dementia, and mental health conditions. Washington's system is based on providing choice in the community and this bill does not change that. Consumers will still have flexibility in selecting a provider and scheduling their hours.

Most people are served in home and the acuity level of these clients has increased which reinforces the need to protect case management time in the system, particularly for in-home care. The complexity of managing the workforce has increased over the last 20 years due to training requirements, certification requirements, federal labor regulations, collective bargaining agreements, and minimum wage requirements. The amount of work that it takes to manage this workforce is significant and has eroded the time that case managers can spend on client contacts, assessments, service planning, provider coordination, and care monitoring. The secondary job of case managers, which has come with insufficient funding, relates to verifying background checks, conducting continuing education, managing overtime, and executing and enforcing contracts. These additional responsibilities mean that there are trade-offs for how case managers spend their time and case managers work less and less with clients. This bill will take the administrative roles from the social workers in the system and leave area agencies on aging free to spend time on case management.

(Opposed—from testimony on HB 2426, which is identical to HB 2963 except for the title, on January 24, 2018) The prospect of family caregivers, who already provide 24/7 care, having to report to another manager will make their work a 25 hour per day job. The system has become very complicated. Families want to be respected partners in the care of their charges and they are beginning to feel like they are the ones being regulated. This bill is overly complex and just tries to cope with the current overload without providing any relief to individual providers. This bill is not ready for prime time.

There is concern that this is the nationalization of home care. Washington already has a successful, employment-based model provided by the free market by private employers which gives caregivers a choice in employer and a better experience and better care through healthy competition. The state should not be in competition with private employers providing home care in Washington.

Persons Testifying: (In support—from testimony on HB 2426, which is identical to HB 2963 except for the title, on January 24, 2018) Bill Moss, Aging and Long-Term Support Administration; and Dan Murphy, Washington Association on Areas of Aging.

(Opposed—from testimony on HB 2426, which is identical to HB 2963 except for the title, on January 24, 2018) Loren Freeman; and Leslie Emerick, Washington Home Care Association.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Health Care & Wellness be substituted therefor and the substitute bill do pass. Signed by 17 members: Representatives Ormsby, Chair; Robinson, Vice Chair; Bergquist, Cody, Fitzgibbon, Hansen, Hudgins, Jinkins, Kagi, Lytton, Pettigrew, Pollet, Sawyer, Senn, Stanford, Sullivan and Tharinger.

Minority Report: Do not pass. Signed by 14 members: Representatives Chandler, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Stokesbary, Assistant Ranking Minority Member; Buys, Caldier, Condotta, Graves, Haler, Manweller, Schmick, Taylor, Vick, Volz and Wilcox.

Minority Report: Without recommendation. Signed by 1 member: Representative Harris.

Staff: Mary Mulholland (786-7391).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Health Care & Wellness:

No new changes were recommended.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Washington is a leader in the delivery of long-term services and supports. A big reason is due to support from the Legislature and Governor. The state supports choice for individuals who want to live and receive services in their own homes. From 1999 to 2016, the state has avoided costs of about $4.5 billion. When the Department of Social and Health Services (Department) began contracting with Individual Providers (IPs) 20 years ago, there was a one-page form and no workers' compensation, employment security, or other benefits or regulations. These are good things for IPs, but make the management of the IP workforce more complex. Case managers should spend their time on case work with the clients they are serving, especially given the medical complexity of many clients. It is appropriate for an entity that has experience in payroll and management issues to take over that work.

The personnel administrative piece for IPs is similar to an unfunded mandate for case managers at the Area Agencies on Aging (AAAs).

The proposal addresses union requirements of creating a rate-setting structure that will support and value IPs, maintain consumer direction over IP employment, and continue to make career pathways available for IPs.

(Opposed) The contracting-out measure does not add value and is expensive and overly complicated. It will make an already complicated situation for parent providers worse. The parent IPs want a respectful partnership and to simplify the system. The Department's response has been to regulate. The state is still working out the kinks with Individual ProviderOne, the payment system for IPs, and this should serve as a cautionary tale in making further changes to the system. Providers feel trapped in a bureaucratic system, and creating a consumer-directed employer will add another layer of bureaucracy.

There is concern that the proposal would result in IPs being required to pay union dues as a condition of employment. In 2014 the United States Supreme Court ruled in the *Harris v. Quinn* decision that partial public employees, which includes IPs in Washington, cannot be forced to support a labor union against their will. Since that decision, many IPs have objected to having 3 percent or more of their paycheck deducted for union dues. Under the proposal, the employment status of IPs would change so that the protections of *Harris v. Quinn* are removed.

The reporting requirements are burdensome for family member IPs, and the proposal does not simplify the process. The Legislature might consider a separate classification for family member IPs.

Persons Testifying: (In support) Dan Murphy, Northwest Regional Council; Bill Moss, Washington State Department of Human Services; Melissa Ringer; Ed Solseng; and Lani Todd, Service Employees International Union 775.

(Opposed) Loren Freeman, Freeman and Associates; Maxford Nelsen, Freedom Foundation; and Richard Thorp.

Persons Signed In To Testify But Not Testifying: None.