SENATE BILL REPORT
ESSB 6199

As of Third Reading

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

Brief Description: Concerning the consumer directed employer program.

Sponsors: Senate Committee on Health & Long Term Care (originally sponsored by Senators Cleveland, Conway, Miloscia, Keiser and Fortunato; by request of Department of Social and Health Services).

Brief History:
Committee Activity: Health & Long Term Care: 1/25/18, 1/29/18 [DPS-WM, DNP]. Ways & Means: 2/05/18, 2/06/18 [DPS(HLTC), DNP, w/oRec].

Brief Summary of First Substitute Bill

- Authorizes the Department of Social and Health Services (DSHS) to implement a Consumer Directed Employer (CDE) program to act as the legal employer of individual providers (IPs).
- Establishes a rate-setting board to determine IP labor rates and CDE administrative rates.
- Modifies the IP overtime expenditure requirements.

SENATE COMMITTEE ON HEALTH & LONG TERM CARE

Majority Report: That Substitute Senate Bill No. 6199 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Cleveland, Chair; Kuderer, Vice Chair; Conway, Keiser, Mullet and Van De Wege.

Minority Report: Do not pass.

Signed by Senators Rivers, Ranking Member; Bailey and Becker.

Staff: LeighBeth Merrick (786-7445)

SENATE COMMITTEE ON WAYS & MEANS

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.

Majority Report: That Substitute Senate Bill No. 6199 as recommended by Committee on Health & Long Term Care be substituted therefor, and the substitute bill do pass.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair; Billig, Carlyle, Conway, Darneille, Hasegawa, Hunt, Keiser, Mullet, Palumbo, Pedersen, Ranker and Van De Wege.

Minority Report: Do not pass.

Signed by Senators Braun, Ranking Member; Honeyford, Assistant Ranking Member; Bailey, Becker, Brown, Fain, Schoesler, Wagoner and Warnick.

Minority Report: That it be referred without recommendation.

Signed by Senator Rivers.

Staff: James Kettel (786-7459)

Background: In-home care services are available to Medicaid eligible older adults and people with developmental disabilities. Eligible persons (consumers) are assessed by DSHS to determine the level of the consumer's in-home care needs. Consumers may choose to receive services from either an IP or agency providers.

DSHS contracts with the IP to provide in-home care for consumers and with the Area Agencies on Aging (AAA) to provide case management services. Case management services include: establishing the consumer's plan of care, verifying the IP has met the training requirements, conducting or verifying an IP's criminal background check, monitoring the consumer's needs and the IP's performance, and reassessing and reauthorizing services. Consumers have the right to select, hire, supervise, and terminate any IP providing services to them. DSHS and the AAA may suspend or terminate IPs if they find or suspect that the IP's performance is jeopardizing the health, safety, or well-being of a consumer.

The state is the IP 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 select their IPs and to assign hours to one or more IPs, within the maximum hours determined by the consumer's care plan.

In 2014, the U.S. Supreme Court ruled that Medicaid home care workers in Illinois are not required to pay union dues. The court declared that IPs are not full-fledged public employees because they are hired and fired by the consumer. Washington IPs are represented and can elect to not pay union dues.

In 2016, the Legislature passed a law that established overtime pay requirements for IPs. Unless approved, IPs must not work more than 40 hours per work week, not including paid travel time and paid training time. Expenditures for hours worked beyond 40 hours per week must not exceed 8.75 percent of the total average authorized personal care hours as projected by the Caseload Forecast Council. DSHS submits quarterly overtime expenditure reports to the Legislative fiscal committees and the Joint Legislative-Executive Overtime Oversight Task Force.

Summary of Bill: CDE Program. DSHS is authorized to establish a CDE program to provide personal care, respite care, and similar services to individuals with functional impairments under the medicaid program.

The CDE is the IP's legal employer for administrative purposes which includes:

- verifying IPs have met the training requirements;
- conducting or verifying background checks;
- implementing an electronic visit verification system or monitoring a statistically valid sample of individual provider's claims to the receipt of services by the consumer;
- monitoring individual provider compliance with employment requirements;
- as authorized, providing a copy of the consumer's care plan to the IP;
- verifying the IP is able and willing to carry out the plan of care;
- taking into account information provided by the consumer or the consumer's case manager;
- discontinuing the IP's assignment to a consumer when the CDE has reason to believe, or DSHS or AAA has reported, that the health, safety or well-being of a consumer is in imminent jeopardy due to the performance of the IP;
- rejecting a consumer's request if the CDE has reason to believe that the individual will be unable to meet the care needs of the consumer;
- establishing a dispute resolution process for consumers who wish to dispute the CDE's IP assignment decisions;
- operating the IP referral registry; and
- withholding, filing and paying income and employment taxes for IPs.

The consumer is the managing employer and has the primary right to select, dismiss, assign hours and supervise the work of one or more IPs. Consumers must authorize the distribution of their plan of care.

Nothing in the act deems IPs as becoming state employees or vesting in the state's PERS pension system.

The AAA develop a plan of care; monitor the consumer's plan of care and verify it meets the client's needs; reassess and reauthorize services; and notify the CDE if they have concerns about the IP's ability to meet the plan of care.

By October 1, 2018, a stakeholder work group must make recommendations to the Legislature about establishing a separate license or certification for CDEs. DSHS is permitted to contract with a maximum of two CDEs. CDE selection will be based on a strong commitment to consumer choice; commitment to recruiting and retaining a high quality and diverse workforce; ability to deliver high quality training; and ability to build and adapt technology tools to enhance efficiency of services. By July 1, 2021, DSHS must contract and initiate the transition of IPs to the CDE. DSHS will conduct a readiness review to determine when they will terminate their contracts with IPs and fully transition to the CDE.

Once DSHS determines that the transition to the CDE is complete, biennial funding in the next ensuing biennium for case management and social work must be reduced by no more than:

- $2,908,000 for AAA;
- $1,361,000 for Home and Community Services; and
- $1,289,000 for Developmental Disabilities

DSHS will continue to establish the plan of care for each consumer and determine the number of service hours per consumer; manage-long term in home care services and determine the level of care for each consumer; and maintain the obligation to comply with federal requirements.

Rates. The rates paid to the CDE must include a labor rate and an administrative rate. The labor rate is the portion of the payment that is used to compensate the IPs, which includes wages, benefits, and any associated taxes. The administrative rate is the portion of the payment that is used to compensate the CDE for their administrative duties. Until labor rates are established, the initial labor rate will be based on the most recent collective bargaining agreement between the Governor and the Service Employees International Union 775, plus hourly roll-up costs of any additional legally required benefits and labor costs.

A 14-person rate-setting board is established to evaluate and propose changes to the rates paid to the CDE. The rate setting board is comprised of four voting members: one representative from the Governor's Office; one representative from DSHS; one representative from the CDE; and one designee from the exclusive bargaining representative of IPs. At the first board meeting, the voting members must select a fifth voting member to act as the board chair and cast any tie-breaking votes. The remaining nine non-voting members are: four legislators, one member from each caucus of the House of Representatives and the Senate; one representative from the State Council on Aging; one representative of an organization representing people with intellectual or developmental disabilities; one representative of an organization representing people with physical disabilities; one representative from licensed home care agency; and one home care worker.

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.

By October 1 of every year, the rate-setting board must submit their rate request to the Office of Financial Management (OFM). If the OFM director considers the request as financially feasible, the Governor will include the request in the Governor's budget. The Legislature then has the option to approve or reject the request as a whole. If the Legislature rejects the request, the rate stays at the current level.

Overtime. DSHS must adopt rules describing the criteria under which a consumer is permitted to use a single IP for more than 40 hours per week. Expenditures for hour worked beyond 40 hours per week may not exceed 8.25 percent of the total average authorized personal care hours as projected by the Caseload Forecast Council.

Beginning September 1, 2018, and every year after, DSHS must submit overtime expenditure reports to the Legislative fiscal committees and the Joint Legislative-Executive Overtime

Oversight Task Force. The task force is required to meet when they are projected or anticipate they will exceed their expenditure limits.

EFFECT OF CHANGES MADE BY HEALTH & LONG TERM CARE COMMITTEE (First Substitute): The name of the employment entity is changed from "Individual Provider Employment Administrator" to "Consumer Directed Employer" and the transition date is changed from January 1, 2021, to July 1, 2021.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: Yes.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill (Health & Long Term Care): *The committee recommended a different version of the bill than what was heard.* PRO: The vast majority of the state's LTSS consumers are in-home. Many have aged in place and the complexity of managing the IP workforce has increased. It is time the state moves to a private entity that specializes in managing this type of workforce. A case manager's time should be devoted to monitoring the consumer's need and not spent administering employer functions like ensuring the IP has met their training requirements.

CON: The system is already difficult for IPs to navigate. Less mandates and regulation for IPs is needed. This would complicate the system more. Funding should be spent on simplifying the existing system rather than contracting with an administrator.

OTHER: This would establish a state-contracted home care agency. Washington already has many private home care agencies and the state should not be in competition with the private industry.

Persons Testifying (Health & Long Term Care): PRO: Senator Annette Cleveland, Prime Sponsor; Bill Moss, Aging and Long Term Support Administration, DSHS; Dan Murphy, Northwest Regional Council.

CON: Loren Freeman, Freeman & Associates; Maxford Nelsen, Freedom Foundation.

OTHER: Leslie Emerick, Washington Home Care Association.

Persons Signed In To Testify But Not Testifying (Health & Long Term Care): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): PRO: The current system for administration and payroll is broken. The original system was created when there were less than 2000 workers with no benefits or pay scales. There are now more then 35,000 workers with retirement, paid-time-off, pay scales, and overtime. There are also other administratively complex requirements. These benefits have helped make the long-term care system in Washington one of the best in the nation. However, these benefits have

also exceeded the capacity in the Department of Social and Health Services. With the roll out of the IP payment technology, and also the implementation of overtime regulations, workers have experienced that such complexity has led to incorrect payments, delayed payments, or even a lack of payment entirely. It makes sense to transfer these functions to an entity that has expertise in payroll management, as well as other administrative functions. The cost of this bill is driven from the essential need of providing care. It is important that family members be able to access overtime when necessary. It is also critical to have an adequately funded case management system. Certain principles should be considered for a functioning system of in-home care. The rates paid to workers should be sufficient to lift families out of poverty. Consumers should have a role in directing their own care. Workers should continue to have a pathway forward for a career in homecare. The bill in its current form meets these requirements. Brick-and-mortar institutions cannot take care of the needs of many clients these days. Taking care of clients in their own homes also saves the state money. Case managers help ensure the safety of in-home clients. It is difficult for case managers, however, because they are dealing more with administrative tasks. Caregivers want to do their job, they enjoy working with people, and they take their jobs very seriously. Caregivers can lose their health coverage due to administrative mistakes. Case managers cannot notice individual mistakes because they are busy with other tasks. It can cost hundreds of dollars to correct the mistake. Currently, individual providers are under Washington public sector labor law. Under this bill, individual providers would switch to a private employer and would be subject to private federal labor law. At that point, there is the normal negotiation between the employer and the union to figure out the scope of the contract. There are also the basic minimums that exist under all federal labor law. Having time available for case managers is crucial to maintaining client choice within the system of long term services and supports, and also monitoring to make sure that client safety is maintained. To some extent, the administrative requirements in the system have been an unfunded mandate. The genesis for this proposal goes back to the genesis of the IPOne payroll system. At that time, the state was not ready to go forward with a consumer directed employer system. Transferring the system to a private entity means that public disclosure laws would not apply, but it is up to the Legislature to construct a potential fix. Long-term, it is important for the state to maintain an arms-length relationship with individual providers.

CON: There is a potential fiscal bomb in section 19 of this bill. In essence, this section eliminates the prohibition against strikes. Caregivers were very concerned about being included in the bargaining unit for this very reason. There were assurances given that the role of the Governor as the employer for the purpose of bargaining would take away the possibility of a strike. Transitioning homecare workers to a private entity changes everything, because the private entity will be under federal rules. Strikes now, for the very first time, become possible. When school bus drivers go on strike, kids cannot get to school. When individual providers go on strike, people die. There could be hundreds of casualties, and thousands of visits to hospitals. The state has just now come to the point where it has finished the transition to the new IPOne payroll system that came at a cost of millions of dollars. This proposal would potentially upend that entire system again, and perhaps even go further. The transition will create additional hardships for caregivers and their families. There will still be administrative headaches for many years to come. This proposal paves the way to take away constitutional protections that these caregivers currently have to make their own choices about union membership and dues payment as a result of the 2014 *Harris vs. Quinn* case. It is quite conceivable that all individual providers will once again be forced to

pay 3.2 percent of earning toward union dues. Caregivers should be able to pay dues if they wish, but it is not right to snatch back constitutional rights based on a technicality into a system that they may oppose.

Persons Testifying (Ways & Means): PRO: Lani Todd, SEIU775; Ed Solseng, HomeCare Individual Provider; Rhonda Parker, HomeCare Individual Provider.

CON: Loren Freeman, Freeman & Associates; Maxford Nelsen, Freedom Foundation.

Persons Signed In To Testify But Not Testifying (Ways & Means): PRO: Dan Murphy, Executive Director, Northwest Regional Council; Bill Moss, Aging and Long-Term Support Administration, DSHS.