

HOUSE BILL REPORT

HB 2681

As Reported by House Committee On:
Labor & Workplace Standards
Appropriations

Title: An act relating to preventing harassment, abuse, and discrimination experienced by long-term care workers.

Brief Description: Preventing harassment, abuse, and discrimination experienced by long-term care workers.

Sponsors: Representatives Stonier, Eslick, Harris, Macri, Thai, Riccelli, Sells, Robinson, Cody, Kilduff, Davis, Gregerson, Chapman, Tharinger, Ormsby, Walen, Tarleton, Ortiz-Self, Valdez, Shewmake, Lovick, Goodman, Frame, Orwall and Pollet.

Brief History:

Committee Activity:

Labor & Workplace Standards: 1/28/20, 2/6/20 [DPS];
Appropriations: 2/10/20, 2/11/20 [DP2S(w/o sub LAWS)].

Brief Summary of Second Substitute Bill

- Requires employers of long-term care workers to: (1) adopt and maintain written policies and strategic plans to address workplace abuse, discrimination, and challenging behavior; (2) disclose to its employees documented instances of discrimination, abusive conduct, and challenging behavior; (3) keep records of reported incidents; and (4) comply with other requirements.
- Requires the Department of Social and Health Services to convene a stakeholder work group to, among other things, recommend best practices for training.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 4 members: Representatives Sells, Chair; Chapman, Vice Chair; Gregerson and Ormsby.

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: Do not pass. Signed by 3 members: Representatives Mosbrucker, Ranking Minority Member; Chandler, Assistant Ranking Minority Member; Hoff.

Staff: Trudes Tango (786-7384).

Background:

"Home care services" means nonmedical services provided to individuals needing assistance with various tasks, such as dressing, feeding, bathing, housekeeping, and meal preparing, in order for the person to remain living at home.

Recipients of services may receive home care services from an "Individual Provider" (IP) or from an employee of a home care agency. Individual Providers provide Medicaid-funded home care services to eligible adults and people with developmental disabilities. The state is the IP employer only for purposes of collective bargaining. In 2018 legislation was enacted directing the Department of Social and Health Services (DSHS) to contract with a Consumer Directed Employer (CDE) to act as the legal employer for IPs by July 1, 2021. Under the CDE, the client is the managing employer and has the primary right to select, dismiss, assign hours, and supervise the work of their IP.

The Washington Law Against Discrimination (WLAD) prohibits discrimination in employment based on race, creed, color, national origin, sex, marital status, age, disability, retaliation, sexual orientation, gender identity, honorably discharged veteran or military status, or use of a trained guide dog or service animal by a person with a disability. The WLAD is administered by the Washington State Human Rights Commission (HRC), which investigates complaints of unfair practices.

Summary of Substitute Bill:

Employer Policy.

Consumer directed employers and home care agencies, referred to as "covered employers" under the bill, must adopt and maintain written policies on how they will address instances of discrimination, abusive conduct, and challenging behavior. "Challenging behavior" is defined as behavior by a service recipient that is specifically caused by, or related to, a disability that might be experienced by a long-term care worker as offensive or presenting a safety risk.

A covered employer must:

- adopt a policy by July 1, 2021, in English and in three languages spoken most by its employees;
- review and update its policy annually;
- disseminate its policy to each employee at the beginning of employment, annually, and each time the policy is updated;
- post its policy in prominent locations at its place of business and on its website, if applicable; and
- ensure all its employees are properly trained on its policy.

The policy must, at a minimum, contain:

- a definition of discrimination, harassment, abusive conduct, and challenging behavior;
- a description of the types of discrimination and abusive conduct covered by the policy;
- identification of persons to whom an employee may report discrimination, abusive conduct, and challenging behavior;
- stated permission and a process for employees to leave situations when their safety is at immediate risk;
- a stated prohibition against retaliation for actions related to disclosing, reporting, assisting in an investigation, or challenging discrimination, abusive conduct, or challenging behavior, and a statement on how the employer will protect employees against retaliation;
- a list of resources for employees, such as contact information of the HRC; and
- any additional components recommended by the stakeholder work group.

Prevention Plan and Workplace Safety Committees.

Beginning July 1, 2021, covered employers must implement a plan to prevent and protect employees from abusive conduct, to assist employees working in environments with challenging behavior, and work to resolve issues impacting the provision of care. The plan must be developed and monitored by a workplace safety committee that is made up of individuals who are employee-elected and employer-selected, and includes at least one representative of service recipients. The plan must be reviewed and updated at least once every three years.

At a minimum, plans must include:

- processes for intervening and providing assistance to employees directly affected by challenging behavior;
- processes that covered employers may follow to engage appropriate members of the care team when allegations of discrimination, abusive conduct, or challenging behaviors occur;
- the development of processes for reporting, intervening, and providing assistance to an employee directly affected by abusive conduct; and
- processes covered employers may follow to engage the service recipient in problem resolution.

Covered employers and workplace safety committees must annually review the frequency of incidents of discrimination and abusive conduct, including identification of the causes for, and consequences of, abusive conduct and any emerging issues contributing to abusive conduct.

Disclosure Requirements.

Covered employers must inform an employee of discrimination and abusive conduct prior to assigning the employee to the service recipient, and throughout the duration of the service, if those instances are documented by the covered employer, or documented by the DSHS, and communicated to the covered employer. Covered employers must inform the employee of challenging behavior if the challenging behavior is documented in the service recipient's care

plan, or by the covered employer, or by the DSHS and communicated to the covered employer.

A covered employer may not terminate an employee, reduce the employee's pay, or not offer future assignments to an employee for requesting reassignment due to alleged discrimination, abusive conduct, or challenging behavior. A covered employer is not prevented from disciplining or terminating an employee if an allegation or request for reassignment was reasonably determined to be false or not made in good faith.

The disclosure requirements do not impose a requirement on a recipient of care to provide information of discrimination, abusive conduct, or challenging behavior to an employee.

Recordkeeping.

Covered employers must keep records of reported incidents of discrimination or abusive conduct experienced by an employee, and must make the records available for inspection by the Department of Labor and Industries (L&I). If the covered employer makes its records available to the exclusive bargaining representative of the employer's employees, the exclusive bargaining representative may assess whether the employer is meeting the data collection requirements.

The L&I must consider the exclusive bargaining representative's assessment when determining whether an employer is in compliance.

Records must be kept for five years and must include, among other things:

- the covered employer's name and address;
- the date, time, and location of the incident;
- the reporting method;
- the name of the person who experienced the act;
- a description of the person committing the act as: a service recipient, another resident in the home, visitor, another employee, manager, supervisor, or other;
- a description of the type of act;
- a description of the actions the employee and employer took in response; and
- a description of how the incident was resolved.

A covered employer must make corrections if an instance of abusive conduct, discrimination, or challenging behavior has been miscategorized, and workplace safety committees must annually review the number of miscategorizations. Covered employers must also make anonymized aggregate data on reported incidents available to the stakeholder work group.

Stakeholder Work Group.

The DSHS must convene a stakeholder work group to recommend policy changes and best practices for training covered employers, employees, and service recipients. To the extent practicable, the following groups should be represented in the work group:

- the DSHS;
- the L&I;
- the HRC;
- two representatives of covered employers;
- two representatives from labor organizations representing employees;

- two long-term care workers;
- organizations with at least five years of experience providing training to at least 10,000 long-term care workers;
- two representatives of disability advocacy organizations, at least one of whom represents individuals with developmental disabilities;
- three service recipients, at least one of whom lives with a developmental disability and one of whom is over age 65;
- a family member, or guardian, of a service recipient;
- Area Agencies on Aging; and
- no more than three subject matter experts determined to be necessary by the work group.

In developing recommendations, the work group must consider, among other things:

- the extent to which current training content could be modified to cover content within existing hours of required training;
- requiring training about discrimination and abusive conduct for all employees;
- factors that are predictive of discrimination and abusive conduct;
- de-escalation techniques to minimize abusive conduct or challenging behavior; and
- other practices, strategies, and resources specifically listed.

By December 1, 2021, the work group must submit to the Legislature a report with recommendations for training long-term care workers, agency supervisors, and service recipients in order to prevent discrimination and abusive conduct in the workplace.

The L&I may investigate covered employers to ensure compliance with the policy, prevention plan, disclosure, recordkeeping, and reporting requirements. A covered employer that fails to comply with the requirements is subject to citations under the Washington Industrial Safety and Health Act.

Definitions.

Various terms are defined. "Abusive conduct" is defined as conduct in a work setting that qualifies as workplace aggression, workplace violence, aggravated workplace violence, physical sexual aggression, rape, attempted rape, sexual contact, sexual harassment, workplace verbal aggression, or inappropriate sexual behavior.

Substitute Bill Compared to Original Bill:

The substitute bill:

- creates new definitions, including a definition for challenging behavior;
- makes changes to required employer policies and plans in order to incorporate how the employer will address challenging behavior;
- changes the dates when an employer must develop its policy and plan;
- makes various changes to what must be contained in the plans;
- requires disclosure of documented discrimination, abusive conduct, and challenging behavior;
- requires employers to correct miscategorizations of conduct;
- removes civil penalties and removes language stating that an employer's failure to comply is a breach of the duty of care;

- requires the DSHS, rather than the L&I, to convene the work group and makes changes to the membership of the work group; and
 - makes other changes to clarify language.
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Appropriation: None.

Fiscal Note: Requested on February 6, 2020.

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) Long-term care workers go into unique environments and they deserve to be protected. The bill will make the worker's environment, and the client's care, safer by requiring reporting and standards. The bill will distinguish between abuse and other types of conduct that are challenging. There is no process in place directing workers on how to report or respond when they feel in danger at work. Complaints filed with the HRC take a long time and there is dispute as to whether those laws even apply. Case managers are there to look out for the client and they do not focus on the long-term care worker's needs. Long-term care workers need a policy they can rely on and need to know how to address these issues.

(Opposed) The work group is a good idea, but more people with disabilities need to be included in the work group. Creating a law is premature. The state should not make any substantive changes until a work group has met. The bill is out of balance. There are power dynamics that can happen when an IP wants to be in control and the IP does not always understand the client.

(Other) Under federal and state laws, employers are already required to provide a workplace free of discrimination. The bill is redundant. People with disabilities should also be free from abuse and discrimination from their IP. This is a complex issue and the bill needs to be carefully reworked to avoid unintended consequences. Labeling folks as violent will stigmatize them and make it harder for them to find the care they need. The bill needs to strike a balance between protecting workers and recognizing the unique situations and abilities of the clients.

Persons Testifying: (In support) Representative Stonier, prime sponsor; Madeleine Foutch; Shaine Truscott, Service Employees International Union 775; Darryl Johnson; Ana Maria Moreno de Riojas; and Peter Nazzal, Catholic Community Services.

(Opposed) Emily Rogers, Self Advocates in Leadership; David Lord, Disability Rights Washington; Robert Wardell; and Krista Milhofer, People First of Washington.

(Other) Brad Banks, Washington Home Care Coalition; Jeff Wiberg, Washington Home Care Association, Family Resource Home Care; Betty Schwieterman, Developmental Disabilities

Ombuds; Bea Rector, Department of Social and Health Services; and Adrienne Stuart, Developmental Disabilities Council.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Labor & Workplace Standards. Signed by 22 members: Representatives Ormsby, Chair; Robinson, 1st Vice Chair; Bergquist, 2nd Vice Chair; Rude, Assistant Ranking Minority Member; Caldier, Chopp, Cody, Dolan, Fitzgibbon, Hansen, Hudgins, Kilduff, Macri, Pettigrew, Pollet, Ryu, Senn, Springer, Sullivan, Sutherland, Tarleton and Tharinger.

Minority Report: Do not pass. Signed by 8 members: Representatives Chandler, Corry, Dye, Hoff, Mosbrucker, Schmick, Steele and Ybarra.

Minority Report: Without recommendation. Signed by 1 member: Representative Stokesbary, Ranking Minority Member.

Staff: Mary Mulholland (786-7391).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Labor & Workplace Standards:

Upon request from the care recipient, a covered employer must provide the care recipient with a copy of the information on discrimination, abusive conduct, and challenging behaviors that is shared with the long-term care employee.

It is mandatory, rather than discretionary, for the work group to consider the various topics listed in the bill when developing its report and recommendations. Additional topics that the work group must consider are:

- policy changes that will reduce discrimination and abusive conduct in the workplace and best practices to prepare employees to work in environments where challenging behavior occurs; and
- other best practices from trainings developed in other states or for other industries to prevent discrimination and abusive conduct in-home care settings or the workplace.

The work group must also address the continuation of collecting and reviewing data, the future role of the work group, and how the work group measures the efficacy of its recommendations.

Appropriation: None.

Fiscal Note: Requested on February 6, 2020.

Effective Date of Second 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) Caregiving is typically done by women, and often by immigrants and people of color. The majority of in-home care workers are not covered by workplace protections. The purpose of the proposal is to give information to workers so that they can do their work safely. Basic safeguards will allow workers to know what to expect and what to do if an incident occurs.

The proposal incorporates stakeholder input. In the past, some have said that it is not the right time for this proposal, or that it is time to slow down. The legislators leading on this issue are appreciated.

One in-home care worker was employed by a home care agency for 14 years. An incident occurred when he was assigned to work with an elderly woman. The worker was scared that no one would believe him about the incident, or that he would be fired by the agency. Ultimately this led to the worker quitting the agency. Another in-home care worker was put into a dangerous situation when she expressed concerns about her client's mother and guardian. Caregivers need more training in de-escalation techniques, and more resources to turn to when an incident occurs.

(Opposed) Stakeholders are still working with each other on potential language changes. The proposal is relatively new this session. A work group is an excellent idea and is strongly supported. A fiscal note has not yet been released, but there will be a cost to implement the proposal. It is important to distinguish between challenging behavior and abusive behavior in a way that is respectful and effective.

Persons Testifying: (In support) Sterling Harders, Darryl Johnson, and Danielle Green, Service Employees International Union 775.

(Opposed) David Lord, Disability Rights Washington.

Persons Signed In To Testify But Not Testifying: None.