

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 5258

Chapter 186, Laws of 2021

67th Legislature
2021 Regular Session

CONSUMER DIRECTED EMPLOYERS—VARIOUS PROVISIONS

EFFECTIVE DATE: July 25, 2021

Passed by the Senate February 26,
2021

Yeas 30 Nays 18

DENNY HECK

President of the Senate

Passed by the House April 7, 2021

Yeas 58 Nays 39

Laurie Jinkins

**Speaker of the House of
Representatives**

Approved May 3, 2021 2:40 PM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5258** as passed by the Senate and the House of Representatives on the dates hereon set forth.

BRAD HENDRICKSON

Secretary

FILED

May 3, 2021

**Secretary of State
State of Washington**

SUBSTITUTE SENATE BILL 5258

Passed Legislature - 2021 Regular Session

State of Washington

67th Legislature

2021 Regular Session

By Senate Ways & Means (originally sponsored by Senators Cleveland, Robinson, Das, Nguyen, Saldaña, and Wilson, C.; by request of Department of Social and Health Services)

READ FIRST TIME 02/22/21.

1 AN ACT Relating to consumer directed employers; amending RCW
2 74.39A.500 and 74.39A.530; and amending 2018 c 278 s 30 (uncodified).

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

4 **Sec. 1.** RCW 74.39A.500 and 2018 c 278 s 3 are each amended to
5 read as follows:

6 (1) The department may establish and implement a consumer
7 directed employer program to provide personal care, respite care, and
8 similar services to individuals with functional impairments under
9 programs authorized through the medicaid state plan or medicaid
10 waiver authorities and similar state-funded in-home care programs.

11 (a) The consumer directed employer program is a consumer directed
12 program and must be operated in a manner consistent with federal
13 medicaid requirements. The consumer directed employer is the legal
14 employer of individual providers for administrative purposes.

15 (b) Under the consumer directed employer program, the consumer is
16 the managing employer of individual providers and retains the primary
17 right to select, dismiss, assign hours, and supervise the work of one
18 or more individual providers, as long as the consumer's actions are
19 consistent with the consumer's plan of care, this chapter, and state
20 and federal law.

1 (2) The department shall endeavor to select and contract with one
2 consumer directed employer to be a medicaid provider that will
3 coemploy individual providers. The department shall make every effort
4 to select a single qualified vendor. In the event it is not possible
5 to contract with a single vendor, the department is authorized to
6 contract with up to two vendors. The department's activities to
7 identify, select, and contract with a consumer directed employer are
8 exempt from the requirements of chapter 39.26 RCW.

9 (a) When contracting with a consumer directed employer, the
10 department should seek to contract with a vendor that demonstrates:

11 (i) A strong commitment to consumer choice, self-direction, and
12 maximizing consumer autonomy and control over daily decisions; and

13 (ii) A commitment to recruiting and retaining a high quality and
14 diverse workforce and working with a broad coalition of stakeholders
15 in an effort to understand the changing needs of the workforce and
16 consumer needs and preferences.

17 (b) Additional factors the department should consider in
18 selecting a vendor include, but are not limited to, the vendor's:

19 (i) Ability to provide maximum support to consumers to focus on
20 directing their own services through a model that recognizes that the
21 provision of employer responsibility and human resource
22 administration support is integral to successful self-directed home
23 care programs;

24 (ii) Commitment to engage and work closely with consumers in
25 design, implementation, and ongoing operations through an advisory
26 board, focus group, or other methods as approved by the department;

27 (iii) Focus on workforce retention and creating incentives for
28 qualified and trained providers to meet the growing needs of state
29 long-term care consumers;

30 (iv) Ability to meet the state's interest in preventing or
31 mitigating disruptions to consumer services;

32 (v) Ability to deliver high quality training, health care, and
33 retirement, which may include participation in existing trusts that
34 deliver those benefits;

35 (vi) Ability to comply with the terms and conditions of
36 employment of individual providers at the time of the transition;

37 (vii) Commitment to involving its home care workforce in decision
38 making;

1 (viii) Vision for including and enhancing home care workers as a
2 valued member of the consumer's care team, as desired and authorized
3 by the consumer and reflected in the consumer's plan of care; and

4 (ix) Ability to build and adapt technology tools that can enhance
5 efficiency and provide better quality of services.

6 (c) In order to be qualified as a consumer directed employer, an
7 entity must meet the requirements in: (i) Its contract with the
8 department; (ii) the medicaid state plan; (iii) rules adopted under
9 this chapter, if any; and (iv) this section.

10 (d) Any qualified and willing individual may apply to become an
11 employee of a consumer directed employer and may work as an
12 individual provider when selected by a consumer.

13 (e) A consumer directed employer that holds a contract with the
14 department to provide medicaid services through the employment of
15 individual providers is deemed to be a certified medicaid provider.

16 (f) A consumer directed employer is not a home care agency under
17 chapter 70.127 RCW.

18 (g) A consumer directed employer does not need a separate
19 licensure or certification category.

20 (h) A consumer directed employer that also provides home care
21 services under chapter 70.127 RCW must demonstrate to the
22 department's satisfaction that it operates the programs under
23 separate business units, and that its business structures, policies,
24 and procedures will prevent any conflicts of interest.

25 (3) If the department selects and contracts with a consumer
26 directed employer, the department shall determine when to terminate
27 the department's contracts with individual providers.

28 (a) Until the department determines the transition to the
29 consumer directed employer program is complete, the state shall
30 continue to administer the individual provider program for the
31 remaining contracted individual providers and to act as the public
32 employer solely for the purpose of collective bargaining under RCW
33 74.39A.270 for those directly contracted individual providers.

34 (b) Once the department determines that the transition to the
35 consumer directed employer is complete, the department may no longer
36 contract with individual providers, unless there are not any
37 contracted consumer directed employers available.

38 ~~(4) ((The department shall convene a stakeholder group to make~~
39 ~~recommendations to the legislature on the establishment of a separate~~
40 ~~licensure or certification category for a consumer directed employer.~~

1 ~~The stakeholder group shall make their recommendations by October 1,~~
2 ~~2018.~~

3 ~~(5))~~) The department of labor and industries shall initially
4 place individual providers employed by a consumer directed employer
5 in the classification for the home care services and home care
6 referral registry. After the department determines that the
7 transition to the consumer directed employer program is complete, the
8 department of labor and industries may, if necessary, adjust the
9 classification and rate in accordance with chapter 51.16 RCW.

10 ~~((+6))~~) (5) After the date on which the department enters into a
11 contract with the consumer directed employer and determines the
12 transition to the consumer directed employer program is complete,
13 biennial funding in the next ensuing biennium for case management and
14 social work shall be reduced by no more than: Two million nine
15 hundred eight thousand dollars for area agencies on aging; one
16 million three hundred sixty-one thousand dollars for home and
17 community services; and one million two hundred eighty-nine thousand
18 dollars for developmental disabilities.

19 **Sec. 2.** RCW 74.39A.530 and 2018 c 278 s 27 are each amended to
20 read as follows:

21 If the department contracts with a consumer directed employer:

22 (1) In addition to overtime and compensable travel time set forth
23 in RCW 74.39A.525, the initial labor rates shall be paid as described
24 in the most recent collective bargaining agreement between the
25 governor and the service employees international union 775, plus the
26 hourly roll-up costs of any additional legally required benefits or
27 labor costs, until subsequent rates can be established in accordance
28 with this section.

29 (2) A ~~((fourteen person))~~ rate-setting board is established which
30 is comprised of the voting members and nonvoting members to evaluate
31 and propose changes in the rates paid to the consumer directed
32 employer.

33 (a) The following ~~((four))~~ members shall be voting members:

34 (i) One representative from the governor's office;

35 (ii) One representative from the department;

36 (iii) One representative from ~~((the))~~ each consumer directed
37 employer; and

38 (iv) One designee from the exclusive bargaining representative of
39 individual providers or, in the absence of an exclusive bargaining

1 representative, a designee from the consumer directed employer
2 workforce chosen by the employees of the consumer directed employer.

3 (b) The following nine members of the board shall be nonvoting
4 advisory members:

5 (i) Four legislators, one member from each caucus of the house of
6 representatives and the senate;

7 (ii) One representative from the state council on aging,
8 appointed by the governor;

9 (iii) One representative of an organization representing people
10 with intellectual or developmental disabilities appointed by the
11 governor;

12 (iv) One representative of an organization representing people
13 with physical disabilities appointed by the governor;

14 (v) One representative from the licensed home care agency
15 industry chosen by the state's largest association of home care
16 agencies that primarily serves state-funded clients; and

17 (vi) One home care worker chosen by the state's largest
18 organization of home care workers.

19 (c) The governor's appointments shall be made by April 1st in
20 even-numbered years.

21 (3) When the board membership has four voting members listed in
22 subsection (2)(a) of this section, each voting member shall have one
23 vote. When there are five voting members due to two consumer directed
24 employer representatives, each voting member listed in subsection
25 (2)(a) of this section shall have two votes with the exception of the
26 consumer directed employer representatives who shall have one vote.
27 Voting members cannot split their votes. A majority of the voting
28 members of the board constitutes a quorum for the transaction of
29 business and is necessary for any action taken by the board.

30 (4) Beginning in the year following the establishment of the
31 initial rate under subsection (1) of this section, and in every even-
32 numbered year thereafter, the rate-setting board shall attempt to
33 determine a proposed labor rate, including a specific amount for
34 health benefits by considering the factors listed in RCW 41.56.465
35 (1) and (5). In addition, the rate-setting board shall attempt to
36 determine an administrative rate for the consumer directed employer.

37 ~~((4))~~ In addition, the rate-setting board may take testimony
38 and make a recommendation regarding the administrative vendor rate
39 for home care agencies that serve medicaid clients.

1 (5) The department shall provide administrative support for the
2 board.

3 (a) At the commencement of the board's rate-setting activities,
4 the ~~((four))~~ voting members must first attempt to select ~~((a-fifth))~~
5 an additional voting member, who will chair the rate-setting
6 ~~((panel))~~ board and will cast a tie-breaking vote if the ~~((four))~~
7 voting members identified in subsection (2) of this section are
8 unable to ~~((reach an agreement))~~ pass by majority vote on the labor
9 rate.

10 ~~((a))~~ (b) On the first occasion that the ~~((four))~~ voting
11 members identified in subsection (2)(a) of this section fail to
12 select a tie-breaking member by a majority vote, the ~~((fifth))~~ chair
13 member will be selected as follows:

14 (i) The ~~((panel))~~ voting member representing the governor's
15 office shall request a list of five qualified arbitrators, or six if
16 there are two consumer directed employers, from the federal mediation
17 and conciliation service.

18 (ii) If a majority of the voting members of the ~~((panel))~~ board
19 cannot agree on the selection of a neutral arbitrator from the list,
20 the representative from the consumer directed employer who first
21 contacted the department will strike a name from the list first. The
22 representative from the governor's office shall then strike a name
23 from the list, the designee from the exclusive bargaining
24 representative or, in the absence of an exclusive bargaining
25 representative, the designee from the consumer directed employer
26 workforce shall strike a name from the list, if there are two
27 consumer directed employers, the second representative will strike a
28 name from the list, and finally the representative from the
29 department shall strike a name from the list.

30 (iii) The name of the arbitrator remaining after the final strike
31 shall be the ~~((fifth))~~ chair member of the ~~((panel))~~ board.

32 (iv) If that person is not willing or available to be the ~~((fifth~~
33 ~~panel))~~ chair member, the second to last person remaining on the list
34 shall be asked to be the ~~((fifth-panel))~~ chair member. If the second
35 to last person is not willing or available, the third to last person
36 shall be asked to be the ~~((fifth))~~ chair member. This process of
37 selecting an arbitrator shall be continued until a ~~((fifth))~~ chair
38 member of the ~~((panel))~~ board is appointed.

39 ~~((b))~~ (c) On the next occasion that the ~~((four))~~ voting members
40 identified in subsection (2)(a) of this section fail to select a

1 (~~(fifth tie-breaking)~~) chair member by a majority vote, the (~~(fifth)~~)
2 chair member will be selected using the method described in (~~((a))~~)
3 (b) of this subsection except that the order of (~~(panel)~~) board
4 members striking names from the list, described in (~~((a))~~) (b)(ii) of
5 this subsection, shall be reversed.

6 (~~((e))~~) (d) On each successive occasion that the (~~(four)~~) voting
7 members identified in subsection (2)(a) of this section fail to
8 select a (~~(fifth tie-breaking)~~) chair member by a majority vote, the
9 order of (~~(panel)~~) voting members striking names from the list will
10 continue to alternate between the order described in (~~((a))~~) (b)(ii)
11 and (~~((b))~~) (c) of this subsection.

12 (~~((5))~~) (6) If an agreement on a proposed labor rate, an
13 administrative rate, or both, is not reached by a majority of the
14 voting members of the rate-setting board prior to July 1st, then:

15 (a) The labor rate shall be determined by the vote of the
16 (~~(fifth)~~) chair member, who was selected in accordance with
17 subsections (2) and (~~((4))~~) (5)(a) of this section; and

18 (b) The administrative rate shall be determined by the
19 department.

20 (~~((6))~~) (7) After the rates have been determined in accordance
21 with subsections (3) through (~~((5))~~) (6) of this section, they shall
22 be submitted to the director of the office of financial management by
23 October 1st prior to the legislative session during which the
24 requests are to be considered for review. If the director of the
25 office of financial management certifies them as being feasible
26 financially for the state, the governor shall include a request for
27 funds necessary to implement the proposed rates as part of the
28 governor's budget document submitted under RCW 43.88.030 and
29 43.88.060. The legislature shall approve or reject the request for
30 funds as a whole.

31 (~~((7))~~) (8) If the legislature rejects the request under
32 subsection (~~((5))~~) (6) of this section, the matter shall return to
33 the rate-setting board established under this section for further
34 consideration. Until the legislature approves a request for funds
35 under this section, the current labor rate shall stay in effect.

36 (~~((8))~~) (9) The labor rate approved by the legislature shall be
37 an hourly rate paid to the consumer directed employer. The labor rate
38 shall be used exclusively for paying the wages, associated taxes, and
39 benefits of individual providers. The consumer directed employer
40 shall have full discretion to set wages and benefits for individual

1 providers, except as provided in: (a) Subsection (~~((9))~~) (10) of this
2 section; (b) any specific legislative appropriation requirement; or
3 (c) a collective bargaining agreement, if applicable.

4 (~~((9))~~) (10) The labor rate shall include a specific hourly
5 amount that the consumer directed employer may use only for health
6 benefits for individual providers.

7 (~~((10))~~) (11) The department shall make a one-time transfer of
8 funds totaling the full amount of previously unclaimed paid time off
9 to the consumer directed employer, and shall transfer all associated
10 liabilities for payment of unclaimed paid time off to the consumer
11 directed employer. This amount shall be accounted for as a labor rate
12 payment.

13 (12) The department shall have the authority to modify the labor
14 rate and the administrative rate between the rate-setting board's
15 rate-setting activities without convening the rate-setting board or
16 following the preceding rate-setting process, subject to the
17 following conditions:

18 (a) The department finds the changes to the rates necessary to:

19 (i) Recognize changes to the department's required expenditures
20 or the consumer directed employer's required costs associated with
21 changes to tax rates, required employer contributions, mileage rate
22 allowances, and utilization of overtime to comply with RCW
23 74.39A.525; or

24 (ii) Comply with a significant change in state or federal rule or
25 law that would impact the consumer directed employer's ability to
26 operate;

27 (b) Changes to the rates shall not exceed two percent of the
28 combined labor and administrative rates; and

29 (c) Any increase to the rates is contingent on appropriation of
30 adequate funds by the legislature.

31 (13) For the purpose of this section:

32 (a) "Labor rate" is defined as that portion of the consumer
33 directed employer's hourly rate that is to be used by the consumer
34 directed employer to compensate its workers, including wages,
35 benefits, and any associated taxes.

36 (b) "Administrative rate" is defined as that portion of the
37 consumer directed employer's hourly rate that is to be used by the
38 consumer directed employer to perform its administrative duties
39 including losses for bad debt, compensation for business and

1 occupation taxes on the labor and administrative rates, and all other
2 costs associated with operating as the consumer directed employer.

3 **Sec. 3.** 2018 c 278 s 30 (uncodified) is amended to read as
4 follows:

5 Upon the governor's signature of this act into law, the
6 department of social and health services may begin the procurement
7 process to select a consumer directed employer. The department shall
8 initiate the transition of individual providers to the consumer
9 directed employer no later than (~~July 1~~) December 31, 2021, when it
10 determines it is ready to do so based upon a readiness review
11 conducted by the department.

12 Nothing in this act shall be deemed to result in individual
13 providers becoming state employees or vesting in the state's public
14 employment retirement system.

Passed by the Senate February 26, 2021.
Passed by the House April 7, 2021.
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