

# SENATE BILL REPORT

## 2SHB 1725

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As Reported by Senate Committee On:  
Ways & Means, March 3, 2016

**Title:** An act relating to the consumer's right to assign hours to individual providers and the department of social and health services' authority to adopt rules related to payment of individual providers.

**Brief Description:** Concerning the consumer's right to assign hours to individual providers and the department of social and health services' authority to adopt rules related to payment of individual providers.

**Sponsors:** House Committee on Appropriations (originally sponsored by Representatives Cody and Tharinger; by request of Department of Social and Health Services).

**Brief History:** Passed House: 2/15/16, 97-0.

**Committee Activity:** Ways & Means: 3/02/16, 3/03/16 [DPA, w/oRec].

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### SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** Do pass as amended.

Signed by Senators Braun, Vice Chair; Dammeier, Vice Chair; Honeyford, Vice Chair, Capital Budget Chair; Hargrove, Ranking Member; Keiser, Assistant Ranking Member on the Capital Budget; Ranker, Ranking Minority Member, Operating; Bailey, Becker, Billig, Brown, Conway, Darneille, Hewitt, Nelson, O'Ban, Padden, Parlette, Pedersen, Rolfes, Schoesler and Warnick.

**Minority Report:** That it be referred without recommendation.

Signed by Senator Hasegawa.

**Staff:** Julie Murray (786-7711)

**Background:** Individuals with long-term care needs and/or developmental disabilities who meet financial and functional eligibility criteria are eligible to receive in-home personal care and respite services. The Department of Social and Health Services (DSHS) assesses consumers to determine their support needs and the amount of services they are eligible to receive. Consumers may choose to receive services either from an individual provider (IP) or agency provider (AP). Consumers have the right to select, hire, supervise the work of, and terminate any IP providing services to them as long as they do not exceed their monthly

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award identified in their plan of care or individual support plan. The state is the employer only for the purposes of collective bargaining.

Wages, hours, and working conditions of IPs are determined through the collective bargaining process. The statute specifically provides that no state agency or department may establish policies or rules governing the wages or hours of IPs. The consumer has the right to assign hours to one or more IPs selected by the consumer, within the maximum hours determined by the consumer's care plan.

In 2014, the Department of Labor modified the "Domestic Service Rules" to now require third-party employers to pay overtime at a rate of 150 percent of the hourly wage when IPs provide work more than 40 hours a week. those rules were set to go into effect on January 1, 2015.

As a result of legal challenges in U.S. District Court regarding the authority of the Department of Labor (DOL) to implement new rules requiring overtime to be paid for home care workers when they work over 40 hours in a week, implementation of the rule was delayed. In August 2015, the United States Court of Appeals disagreed with the district court ruling and issued a unanimous opinion affirming the validity of the new DOL rule. The new rule went into effect on January 1, 2016 and enforcement action by DOL is expected to begin on April 1, 2016; last October, the United State Supreme Court refused to stay the United States Court of Appeals ruling, allowing the final rule to take effect.

There are approximately 35,000 individual providers who provide almost 45 million hours of support to individuals in their own home each year.

**Summary of Bill (Recommended Amendments):** The number of hours the Department of Social and Health Services is authorized to pay any single individual provider is limited to 40 hours each work week. The Department must adopt rules establishing criteria to authorize additional hours. The criteria must reduce the state's exposure to payment of overtime and address the following needs of consumers:

- Ensuring that consumers are not at increased risk for institutionalization;
- When there is a limited number of providers within the geographic region of the consumer;
- When there is a limited number of providers available to support a consumer with complex medical and behavioral needs; and
- Emergencies that pose a health and safety risk for consumers.

A consumer's authority to assign hours to individual providers must be consistent with the criteria adopted by the Department and with the consumer's plan of care or individual support plan. The Department is required to adopt emergency rules that will remain in effect until permanent rules can be adopted.

**EFFECT OF CHANGES MADE BY WAYS & MEANS COMMITTEE (Recommended Amendments):** The number of hours the Department of Social and Health Services is authorized to pay any single individual provider is limited to 40 hours each work week. The Department must adopt rules establishing criteria to authorize additional hours. The Department is required to adopt emergency rules that will remain in effect until permanent

rules can be adopted. A consumer's authority to assign hours to individual providers must be consistent with the criteria adopted by the Department and with the consumer's plan of care or individual support plan.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:** PRO: We need to have the authority to manage overtime in a way that allows flexibility for clients. Life happens and clients need some flexibility to be able to move hours from week to week as long as it does not create overtime. WA is second in the nation in services and 34th in cost and it is important to note that the majority of that cost is in-home care. This authority would also help the Department to comply with a number of federal regulations governed by the Department of Justice, Department of Labor and Health and Human Services. The only concern I have with this bill is the weekly allowance versus monthly. I live on my own, own my own house and to manage my hours on a week-to-week basis is impractical for me. Hopefully, I will be immune from that because I am a high hour user, but it is easy to mess my life up really quick. I need that flexibility. There is no agency that can take on my care needs and right now we have an acute problem in not having enough care providers. We need more providers and with the issue of overtime, we need even more. If I have an issue on Friday night after 5 pm, there is no one I can call to get help and if I have to issue overtime, I don't want my provider being terminated. Terminating the individual provider when there is already a lack of individual providers is probably not the right idea. Agency providers are already responsible for paying overtime. If you don't pass this bill, the Department is going to have to manage hours weekly and individuals will be locked into those amounts when there are times that individuals need to shift some hours to the next week. Issues like these will create chaos and there are individuals who receive up to 400 hours per month in care.

CON: We disagree with this bill and is an inappropriate response to the removal of the exemption under the Fair Labor Standards Act. There needs to be a lot more work than just this addition of regulation. I have to synchronize and harmonize my responsibilities under the collective bargaining act, my provider contract and the WACs; the present state is a cacophony. This bill is not an improvement.

OTHER: We serve thousands of individuals with severe disabilities in their own homes and the Area Agencies on Aging help manage that care. This bill is needed to avoid disruption of care to these individuals. DSHS needs the authority to control costs and some flexibility in implementing these rules so that the consumer has the ability to adjust their hours to meet their needs and to maintain that special relationship with their caregiver. Funding needs to be available so that consumers are able to stay at home. This is still a more cost effective alternative to others.

**Persons Testifying:** PRO: Bill Moss, DSHS; Nathan Loose, Passport for Change; Scott Merriman, Office of Financial Management; Peter Nazzal, Catholic Community Services

CON: Loren Freeman, Freeman & Associates.

OTHER: Cathy Knight, WA Association of Area Agencies on Aging.

**Persons Signed In To Testify But Not Testifying:** Lani Todd, SEIU 775; Diana Stadden, ARC of Washington, DD Council, & WA State Parent Coalitions; Steve Duncan, Res Care; Donna Patrick, Developmental Disabilities Council; Brittany Stadden; Noah Seidel, Self Advocates in Leadership; Ivanova Smith, People First; Gerald Reilly, Elder Care Alliance; David Lord, Disability Rights Washington; Walt Bowen, WA Senior Lobby; Loren Freeman, Freeman and Associates.