

# SENATE BILL REPORT

## SB 5709

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As of February 18, 2015

**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 a consumer's right to assign hours to individual providers and the department of social and health services' authority to establish criteria regarding the payment of individual providers.

**Sponsors:** Senator Keiser; by request of Department of Social and Health Services.

**Brief History:**

**Committee Activity:** Health Care: 2/17/15.

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### SENATE COMMITTEE ON HEALTH CARE

**Staff:** Mich'l Needham (786-7442)

**Background:** In-home care services are available to Medicaid-eligible persons who are aging and people with developmental disabilities. Eligible persons (consumers) are assessed by the Department of Social and Health Services (DSHS) to determine the level of their in-home care needs. The consumers may choose to receive services either from an individual provider or agency providers. Consumers have the right to select, hire, supervise the work of, and terminate any individual provider. The state is the employer only for the purposes of collective bargaining.

The wages, hours, and working conditions of individual providers 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 individual providers. The consumer has the right to assign hours to one or more individual providers, within the maximum hours determined by the consumer's care plan.

The Fair Labor Standards Act (FLSA) specifically exempts from federal overtime laws domestic service workers who provide companionship services to the elderly and people with illnesses, injuries, or disabilities. In 2014 the United States Department of Labor (U.S. DOL) adopted rules to amend the definition of companionship services so that direct care workers, such as individual providers, would be provided overtime pay. Those rules were set to go

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into effect January 1, 2015; however, a federal court held that U.S. DOL's rules were inconsistent with the language in the FLSA and the court vacated the rules. The case has been appealed.

The most recent collective bargaining agreement governing individual providers in Washington provides for overtime pay, but only if the statute authorizing the consumer to assign hours to is amended to allow the state to control overtime utilization.

**Summary of Bill:** The statute is amended to give DSHS authority to adopt rules establishing criteria regarding the number of hours per week DSHS may pay any single provider. In addition, the consumer's right to assign hours to individual providers of the consumer's choice must be consistent with the rules and criteria adopted by DSHS.

**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: This is a department request. Currently the department has no ability to manage the hours and overtime for individual providers and the bill provides the ability to manage overtime within budget. The Department of Labor rules for overtime have been vacated and are on appeal. We anticipate a decision this summer and if they enforce overtime calculation we need the ability to manage it. No overtime pay is allowed for individual providers today.

CON: This bill places the entire system of care at risk especially for live-in care providers when you apply overtime rules. Live-in care providers should not be included in the bargaining agreement. The Fair Labor Standards Act has exempted home care aids from overtime since 1974 and that has been upheld a number of times. The Department of Labor rule change is an overreach and it has been halted.

OTHER: As a consumer that uses individual providers, I have some concerns about managing the hours of each individual provider. When one needs a shift in hours another provider needs to pick that up and the overtime limits may not allow that. We have concerns and suggest the department be required to establish criteria for granting overtime in certain circumstances like the one just described that will help a person to maintain their independent living.

**Persons Testifying:** PRO: Bill Moss, DSHS.

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

OTHER: David Lord, Disability Rights WA; Nathan Loose, citizen.