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**SUBSTITUTE SENATE BILL 5258**

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**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)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) ((~~The department shall convene a stakeholder group to make recommendations to the legislature on the establishment of a separate licensure or certification category for a consumer directed employer. The stakeholder group shall make their recommendations by October 1, 2018.~~

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

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

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

If the department contracts with a consumer directed employer:

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

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

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

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

(ii) One representative from the department;

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

(iv) One designee from the exclusive bargaining representative of individual providers or, in the absence of an exclusive bargaining representative, a designee from the consumer directed employer workforce chosen by the employees of the consumer directed employer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

((~~(b)~~)) (c) On the next occasion that the ((~~four~~)) voting members identified in subsection (2)(a) of this section fail to select a ((~~fifth tie-breaking~~)) chair member by a majority vote, the ((~~fifth~~)) chair member will be selected using the method described in ((~~(a)~~)) (b) of this subsection except that the order of ((~~panel~~)) board members striking names from the list, described in ((~~(a)~~)) (b)(ii) of this subsection, shall be reversed.

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

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

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

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

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

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

((~~(8)~~)) (9) The labor rate approved by the legislature shall be an hourly rate paid to the consumer directed employer. The labor rate shall be used exclusively for paying the wages, associated taxes, and benefits of individual providers. The consumer directed employer shall have full discretion to set wages and benefits for individual providers, except as provided in: (a) Subsection ((~~(9)~~)) (10) of this section; (b) any specific legislative appropriation requirement; or (c) a collective bargaining agreement, if applicable.

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

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

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

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

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

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

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

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

(13) For the purpose of this section:

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

(b) "Administrative rate" is defined as that portion of the consumer directed employer's hourly rate that is to be used by the consumer directed employer to perform its administrative duties including losses for bad debt, compensation for business and occupation taxes on the labor and administrative rates, and all other costs associated with operating as the consumer directed employer.

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

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

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

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