

HOUSE BILL REPORT

E2SHB 1725

As Passed Legislature

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:

Committee Activity:

Appropriations: 1/20/16, 1/25/16 [DP2S].

Floor Activity:

Passed House: 6/29/15, 97-0.

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

Passed House: 3/29/16, 95-0.

Passed Senate: 3/29/16, 42-1.

Passed Legislature.

Brief Summary of Engrossed Second Substitute Bill

- Authorizes the Department of Social and Health Services (DSHS) to adopt rules establishing criteria for the number of hours per week it may pay an individual provider (IP). Provides DSHS with emergency rulemaking authority until permanent rules can be adopted.
- Provides that the consumer's right to assign hours to IPs must be consistent with DSHS rules.
- Establishes total weekly hours limits per IP for IPs in two categories:
 - 65 hours total per week in fiscal year (FY) 2016 and FY 2017 and 60 hours total per week in subsequent FYs for IPs who worked above 40 hours per week on average in January 2016; and
 - 40 hours total per week for IPs who worked zero to 40 hours per week on average in January 2016.

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- Allows the DSHS to authorize additional IP hours above the two categories of weekly limits for specified circumstances such as required training, before an IP consumer's plan of care has been reviewed, and to meet consumer needs such as avoiding increased risk of institutionalization.
- Limits the percentage of IP hours worked above 40 hours per week to 8.75 percent of the total IP hours projected by the Caseload Forecast Council (CFC) each FY.
- Authorizes the CFC to, upon a majority vote, temporarily lift the 8.75 percent cap to a maximum of 10 percent if it finds that a higher percentage is necessitated by a shortage of IPs to provide adequate client care.
- Establishes the Joint Legislative-Executive Overtime Oversight Task Force and specifies membership.
- Requires the DSHS to regularly report detailed information regarding IPs working overtime, overtime hours, and payment for overtime.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass. Signed by 31 members: Representatives Ormsby, Chair; Chandler, Ranking Minority Member; Parker, Assistant Ranking Minority Member; Wilcox, Assistant Ranking Minority Member; Buys, Cody, Condotta, Dent, Fitzgibbon, Haler, Hansen, Hudgins, S. Hunt, Jinkins, Kagi, Lytton, Magendanz, Pettigrew, Robinson, Sawyer, Schmick, Senn, Springer, Stokesbary, Sullivan, Taylor, Tharinger, Van Werven, Walkinshaw, Dunshee and G. Hunt.

Staff: Mary Mulholland (786-7391).

Background:

Aging persons on Medicaid and people with developmental disabilities are eligible to receive in-home care services. The Department of Social and Health Services (DSHS) assesses these eligible persons (consumers) to determine the level of their in-home care needs. The consumers may choose to receive services either from an individual provider (IP) or agency provider. Consumers have the right to select, hire, supervise the work of, and terminate any IP providing services to them. 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 fiscal year (FY) 2015, IPs provided a total of approximately 50 million hours of personal care to DSHS consumers. Of that amount, approximately 4 million hours or 8.75 percent were hours worked by an IP above 40 in one week.

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 (DOL) modified a "domestic service rule" that requires third-party employers, such as the state, to pay overtime (150 percent of the hourly wage) when home care workers such as IPs provide over 40 hours per week of authorized care. Those rules were set to go into effect January 1, 2015; however, a federal court held that the DOL's rules were inconsistent with the language in the FLSA and Congress' intent. The court vacated the rules, and the case was appealed. In August 2015, the United States Federal Court of Appeals upheld the DOL rules. The modified DOL rules went into effect January 1, 2016. The case is on appeal to the Supreme Court of the United States.

The Caseload Forecast Council (CFC) is the state agency charged with forecasting caseloads for entitlement programs and other programs specified in statute. The CFC consists of two individuals appointed by the Governor, and four individuals that consist of one appointee each from the two largest caucuses in the House of Representatives and in the Senate. The CFC oversees the preparation and approval of the state caseload forecasts used in the operating budget.

Summary of Engrossed Second Substitute Bill:

The DSHS is authorized to establish rules that limit the number of hours it may pay any single IP, and is provided emergency rulemaking authority until permanent rules can be adopted. The consumer's right to assign hours to IPs of the consumer's choice must be consistent with rules adopted by the DSHS.

An 8.75 percent cap is placed on total IP overtime hours as a share of total projected personal care hours for each FY.

Limitations on the total weekly hours that may be worked by an IP are established for IPs in two categories:

- IPs who worked in excess of 40 hours total per week on average in January 2016 are limited to 65 total hours per week in FY 2016 and FY 2017 and 60 total hours per week in subsequent FYs; and
- IPs who worked zero to 40 hours total per week on average in January 2016 are limited to 40 total hours per week.

Hours worked above these weekly limits may be authorized by the DSHS for:

- statutorily-required IP training;
- IPs who successfully appeal to the DSHS that their average weekly hours in January 2016 materially underrepresent their average weekly hours in the first three months of 2016; and
- IPs working for consumers for whom the DSHS has not yet reviewed a plan of care.

In addition, the DSHS may adopt criteria in rule to authorize hours above the weekly hour limits. The criteria must be designed to reduce the state's exposure to payment of overtime and to address the following:

- ensure that consumers are not at increased risk of institutionalization;
- address situations in which there is a limited number of IPs in a consumer's geographic area;
- address situations in which there is a limited number of IPs available to support a consumer with complex medical and behavioral needs or specific language needs;
- avoid emergencies that could pose a health and safety risk to the consumer; and
- address situations in which the cost of the authorized hour is less than other care alternatives for the consumer, distinct from increased risk of institutionalization.

The CFC may, upon a majority vote, adopt a temporary adjustment to the 8.75 percent cap, up to a maximum 10 percent cap, if it finds that a higher percentage of personal care hours is necessary to provide adequate consumer care.

A Joint Legislative-Executive Overtime Oversight Task Force (Task Force) is created with the following members:

- two members from each of the two largest caucuses of the Senate, appointed by the respective caucus leaders;
- two members from each of the two largest caucuses of the House of Representatives, appointed by the Speaker of the House of Representatives;
- members representing the DSHS and the Office of Financial Management, appointed by the Governor; and
- two members representing IPs and two members representing consumers of care from IPs, appointed by the Governor.

For each FY, the DSHS shall establish a spending plan and system to monitor the authorization and cost of IP overtime hours. In addition, the DSHS shall provide quarterly reports to the legislative fiscal committees and task force that includes specific information on the number of IPs receiving payment for overtime, the number of overtime hours paid, and the amount of the overtime payments.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) The DSHS Aging and Long-Term Support Administration (ALTSA) recommends an amendment to provide emergency rulemaking authority and an emergency clause. Rulemaking will provide an opportunity for the DSHS to manage overtime utilization, not to remove overtime. The cost avoidance will be significant. The DSHS intends to pay for up to 45 hours per week to any IP. For weekly hours above 45, the DSHS intends to conduct assessments for the approximately 4,000 IPs who work hours above this mark. Exceptions to allow weekly hours above 45 will be made if there is a health and safety

risk or risk of institutionalization for the consumer. The DSHS assumes that exceptions will be made 50 percent of the time, and it will pay overtime for weekly hours above 45 in those situations. The DSHS has moved from a monthly care plan to a weekly care plan, which will better align with managing overtime for the 40-hour work week.

The big problem is that consumers need flexibility to be able to offer overtime to their IPs, and rules regarding overtime could mean a big life change for consumers. An individual who currently has three providers may be forced into using four or five providers based on overtime rules. Another issue is that the consumer may be held accountable for putting an IP into overtime. There are not enough IPs for the DSHS to terminate IPs who violate overtime rules. The state needs to find an easier way for consumers to find IPs.

The cheapest way for the state to provide care is through IPs. If the state loses IPs due to regulation of overtime pay, IPs may be replaced by agency-employed providers. It would be more costly for the state to replace IPs with agency providers than for the state to pay overtime to IPs.

(Opposed) Family providers make about \$4.30 because two-thirds of the care that they provide to keep their family members out of institution is off the clock. There is a reason why the current statute prevents the DSHS from regulating IP hours. If the state hits certain conditions set by the DOL, IPs will become state employees and that has budget impacts that are not documented in the fiscal note. The DSHS-request legislation is an overreaction that does not adequately assess the downsides of managing IP work hours. This is why the Senate stalled the bill in 2015. The DSHS has already proposed rules for hearing on February 9, which could precede passage of legislation authorizing the rulemaking. Management of IP overtime may prevent IPs and consumers from handling emergency situations. The DSHS and the Legislature are urged to work with caregivers on a different solution.

There is a major workforce issue among IPs in Washington that could be exacerbated with regulation of IP overtime. The hours that are allocated to consumers often do not meet the needs of consumers.

(Other) Individual providers, like all workers, should be paid overtime. The state should have some ability to control overtime and its costs. There are concerns over the possibility of forcing some consumers to hire a second caregiver. It can be particularly challenging for consumers to find more than one IP in rural areas or if the consumer is a non-English speaker. For the IPs, whom are already low-income, loss of overtime may mean a reduction in pay. The Service Employees International Union 775 is working with the DSHS to develop rules that cause the least amount of disruption for clients and IPs, and is hopeful that the final rules will be implementable by the state and will mitigate undue harm to clients and caregivers.

There are serious concerns about there being enough resources to implement IP overtime. The worry is that DSHS will implement administrative controls that reduce the flexibility that consumers have to the point where they are unable to hire the caregivers that they need. There is already a shortage of caregivers, particularly in rural areas. It can be very difficult, especially for consumers with high-needs, to find IPs to cover all of the hours of care that

they need. These concerns will be dealt with as the DSHS moves ahead with rulemaking and implementation. If there are enough resources and the rules are carefully implemented, then people will be able to manage. If not, then the Legislature could see severe impositions on people and possibly safety issues. Rules must be implemented in a way that enables consumers to receive the hours of care that they need, and that allows consumers to live in their own homes if they choose.

Consumers have the right to assign the hours in the plan of care determined by the state. There is concern over the DSHS establishing hours by the week rather than by the month. Individuals with disabilities may require more hours of care in certain weeks. It could be harmful if IPs are prevented from stepping up when individuals need more than 40 hours of care in a given week. Another issue is that many family members who care for individuals with disabilities are aging. The Committee and the Governor are urged to take a close look at the consequences of the rules for people who require in-home services.

Persons Testifying: (In support) Bill Moss, Department of Social and Health Services; Nathan Loose, Passport for Change; and Jesse Sims.

(Opposed) Loren Freeman, Freeman and Associates.

(Other) Lani Todd, Service Employees International Union 775; David Lord, Disability Rights Washington; Shawn Latham; Darla Helt; Vickie Foster; and Robert Wardell.

Persons Signed In To Testify But Not Testifying: None.