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**SUBSTITUTE HOUSE BILL 1942**

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**State of Washington 68th Legislature 2024 Regular Session**

**By** House Labor & Workplace Standards (originally sponsored by Representatives Fosse, Schmidt, Reed, Simmons, Ormsby, Rule, Macri, and Ortiz-Self; by request of Department of Social and Health Services)

AN ACT Relating to clarifying employment standards for long-term care individual providers; amending RCW 49.46.800, 74.39A.009, and 74.39A.500; and creating a new section.

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

**Sec.**  RCW 49.46.800 and 2017 c 2 s 6 are each amended to read as follows:

(1) ((~~Beginning January 1, 2017, all~~)) All existing rights and remedies available under state or local law for enforcement of the minimum wage shall be applicable to enforce all of the rights established under chapter 2, Laws of 2017.

(2) ((~~The~~)) (a) If the department of social and health services contracts with an individual provider for personal care services or respite care services, the state shall pay individual providers, as defined in RCW 74.39A.240, in accordance with the minimum wage, overtime, and paid sick leave requirements of this chapter, except as provided in subsection (4) of this section.

(b) A consumer directed employer contracting with the state is an employer of individual providers for the purposes of this chapter. Individual providers are employees of the consumer directed employer.

(c) Neither the department of social and health services nor the consumer directed employer may avail itself of any state law minimum wage or overtime exemption, except as provided in subsection (4) of this section.

(3) The definitions in this subsection apply to this section:

(a) "Authorized hours" means the number of paid hours of care included in the client's plan of care as determined by the department of social and health services.

(b) "Client" has the same meaning as in RCW 74.39A.009.

(c) "Consumer directed employer" has the same meaning as in RCW 74.39A.009.

(d) "Family member" includes, but is not limited to, a parent, child, sibling, aunt, uncle, niece, nephew, cousin, grandparent, grandchild, grandniece, grandnephew, or such relatives when related by marriage, adoption, or domestic partnership.

(e) "Household member" means an individual provider who lives with the client and did so before the employment relationship between the client and individual provider began.

(f) "Individual provider" has the same meaning as in RCW 74.39A.240.

(g) "Personal care services" has the same meaning as in RCW 74.39A.009.

(4)(a) Hours worked by an individual provider in excess of the number of authorized hours in the client's plan of care are not compensable if:

(i) The individual provider is a family member or household member of the client, as defined by this section; and

(ii) The client's plan of care is reasonable.

(b) This subsection (4) does not apply to hours worked to address temporary emergencies or an unexpected health or safety event of the client that cannot be postponed.

(c) A client's plan of care is reasonable under (a)(ii) of this subsection if all of the following are true:

(i) The plan of care includes the same number of paid hours it would have if the individual provider were not a family member or household member of the client;

(ii) The plan of care does not reflect unequal treatment of an individual provider or their client because of their familial or household relationship. Unequal treatment includes the plan of care including fewer paid hours than it would have if the client's individual provider were not a family or household member of the client; the plan of care including fewer paid hours because the client's individual provider shares in the benefit of a personal care service or task provided to the client; the plan of care including fewer paid hours because the client lives in a multiclient household and two or more clients benefit from the same personal care service or task being performed; or the plan of care including fewer paid hours because of paid or unpaid assistance provided to a client by that client's paid provider; and

(iii) The department of social and health services does not otherwise require an increase in the hours of unpaid services performed by the family or household member individual provider in order to reduce the number of hours of paid services.

(d) A determination that a plan of care is reasonable for purposes of this section does not mean that the amount or type of services or paid hours to be provided are or are not appropriate for the client under chapter 74.39A RCW.

(5) The department of social and health services retains its core responsibility to manage long-term in-home care services under chapters 74.39A and 74.41 RCW and its authority to set a client's benefit level as required by RCW 74.09.520(3). However, to limit an individual provider's compensable hours as described in subsection (4)(a) of this section, a plan of care must satisfy the requirements of subsection (4)(a) and (c) of this section.

(6) The director of labor and industries may adopt rules to implement this section.

NEW SECTION. **Sec.**  (1) This act is curative and remedial. It applies retroactively and prospectively to all actions filed under RCW 49.46.800, regardless of when they were filed, except for the actions referenced in subsection (2) of this section.

(2) Subsection (1) of this section does not apply to the following actions: *Liang v. State of Washington*, No. 20-2-02506-34 (Thurston Cnty. Superior Court); *SEIU 775 v. Washington State Dep't of Soc. And Health Servs.*, No. 97216-8 (Washington Supreme Court); or *SEIU 775 v. Washington State Dep't of Soc. And Health Servs.*, No. 99659-8 (Washington Supreme Court).

**Sec.**  RCW 74.39A.009 and 2022 c 255 s 5 are each amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adult family home" means a home licensed under chapter 70.128 RCW.

(2) "Adult residential care" means services provided by an assisted living facility that is licensed under chapter 18.20 RCW and that has a contract with the department under RCW 74.39A.020 to provide personal care services.

(3) "Assisted living facility" means a facility licensed under chapter 18.20 RCW.

(4) "Assisted living services" means services provided by an assisted living facility that has a contract with the department under RCW 74.39A.010 to provide personal care services, intermittent nursing services, and medication administration services; and the facility provides these services to residents who are living in private apartment-like units.

(5) "Community residential service business" means a business that:

(a) Is certified by the department of social and health services to provide to individuals who have a developmental disability as defined in RCW 71A.10.020((~~(5)~~)) (6):

(i) Group home services;

(ii) Group training home services;

(iii) Supported living services; or

(iv) Voluntary placement services provided in a licensed staff residential facility for children;

(b) Has a contract with the developmental disabilities administration to provide the services identified in (a) of this subsection; and

(c) All of the business's long-term care workers are subject to statutory or regulatory training requirements that are required to provide the services identified in (a) of this subsection.

(6) "Consumer" or "client" means a person who is receiving or has applied for services under this chapter, including a person who is receiving services from an individual provider.

(7) "Consumer directed employer" is a private entity that contracts with the department to be the legal employer of individual providers ((~~for purposes of performing administrative functions~~)). The consumer directed employer is patterned after the agency with choice model, recognized by the federal centers for medicare and medicaid services for financial management in consumer directed programs. The entity's responsibilities are described in RCW 74.39A.515 and throughout this chapter and include: (a) Coordination with the consumer, who is the individual provider's managing employer; (b) withholding, filing, and paying income and employment taxes, including workers' compensation premiums and unemployment taxes, for individual providers; (c) verifying an individual provider's qualifications; and (d) providing other administrative and employment-related supports. The consumer directed employer is a social service agency and its employees are mandated reporters as defined in RCW 74.34.020.

(8) "Core competencies" means basic training topics, including but not limited to, communication skills, worker self‑care, problem solving, maintaining dignity, consumer directed care, cultural sensitivity, body mechanics, fall prevention, skin and body care, long-term care worker roles and boundaries, supporting activities of daily living, and food preparation and handling.

(9) "Cost-effective care" means care provided in a setting of an individual's choice that is necessary to promote the most appropriate level of physical, mental, and psychosocial well-being consistent with client choice, in an environment that is appropriate to the care and safety needs of the individual, and such care cannot be provided at a lower cost in any other setting. But this in no way precludes an individual from choosing a different residential setting to achieve his or her desired quality of life.

(10) "Department" means the department of social and health services.

(11) "Developmental disability" has the same meaning as defined in RCW 71A.10.020.

(12) "Direct care worker" means a paid caregiver who provides direct, hands‑on personal care services to persons with disabilities or the elderly requiring long‑term care.

(13) "Enhanced adult residential care" means services provided by an assisted living facility that is licensed under chapter 18.20 RCW and that has a contract with the department under RCW 74.39A.010 to provide personal care services, intermittent nursing services, and medication administration services.

(14) "Facility" means an adult family home, an assisted living facility, a nursing home, an enhanced services facility licensed under chapter 70.97 RCW, or a facility certified to provide medicare or medicaid services in nursing facilities or intermediate care facilities for individuals with intellectual disabilities under 42 C.F.R. Part 483.

(15) "Home and community-based services" means services provided in adult family homes, in-home services, and other services administered or provided by contract by the department directly or through contract with area agencies on aging or federally recognized Indian tribes, or similar services provided by facilities and agencies licensed or certified by the department.

(16) "Home care aide" means a long-term care worker who is certified as a home care aide by the department of health under chapter 18.88B RCW.

(17) "Individual provider" is defined according to RCW 74.39A.240.

(18) "Legal employer" means the consumer directed employer, which along with the consumer, coemploys individual providers. The legal employer is responsible for setting wages and benefits for individual providers and must comply with applicable laws including, but not limited to, state minimum wage laws, workers compensation, and unemployment insurance laws.

(19) "Long-term care" means care and supports delivered indefinitely, intermittently, or over a sustained time to persons of any age who are functionally disabled due to chronic mental or physical illness, disease, chemical dependency, or a medical condition that is permanent, not curable, or is long-lasting and severely limits their mental or physical capacity for self-care. The use of this definition is not intended to expand the scope of services, care, or assistance provided by any individuals, groups, residential care settings, or professions unless otherwise required by law.

(20)(a) "Long-term care workers" include all persons who provide paid, hands-on personal care services for the elderly or persons with disabilities, including but not limited to individual providers of home care services, direct care workers employed by home care agencies or a consumer directed employer, providers of home care services to persons with developmental disabilities under Title 71A RCW, all direct care workers in state‑licensed assisted living facilities, enhanced services facilities, and adult family homes, respite care providers, direct care workers employed by community residential service businesses, and any other direct care worker providing home or community-based services to the elderly or persons with functional disabilities or developmental disabilities.

(b) "Long-term care workers" do not include: (i) Persons employed by the following facilities or agencies: Nursing homes licensed under chapter 18.51 RCW, hospitals or other acute care settings, residential habilitation centers under chapter 71A.20 RCW, facilities certified under 42 C.F.R., Part 483, hospice agencies subject to chapter 70.127 RCW, adult day care centers, and adult day health care centers; or (ii) persons who are not paid by the state or by a private agency or facility licensed or certified by the state to provide personal care services.

(21) "Managing employer" means a consumer who coemploys one or more individual providers and whose responsibilities include (a) choosing potential individual providers and referring them to the consumer directed employer; (b) overseeing the day-to-day management and scheduling of the individual provider's tasks consistent with the plan of care; and (c) dismissing the individual provider when desired.

(22) "Nursing home" or "nursing facility" means a facility licensed under chapter 18.51 RCW or certified as a medicaid nursing facility under 42 C.F.R. Part 483, or both.

(23) "Person who is functionally disabled" means a person who because of a recognized chronic physical or mental condition or disease, including chemical dependency or developmental disability, is dependent upon others for direct care, support, supervision, or monitoring to perform activities of daily living. "Activities of daily living," in this context, means self-care abilities related to personal care such as bathing, eating, using the toilet, dressing, and transfer. Instrumental activities of daily living such as cooking, shopping, house cleaning, doing laundry, working, and managing personal finances may also be considered when assessing a person's functional ability to perform activities in the home and the community.

(24) "Personal care services" means physical or verbal assistance with activities of daily living and instrumental activities of daily living provided because of a person's functional disability.

(25) "Population specific competencies" means basic training topics unique to the care needs of the population the long-term care worker is serving, including but not limited to, mental health, dementia, developmental disabilities, young adults with physical disabilities, and older adults.

(26) "Qualified instructor" means a registered nurse or other person with specific knowledge, training, and work experience in the provision of direct, hands‑on personal care and other assistance services to the elderly or persons with disabilities requiring long‑term care.

(27) "Secretary" means the secretary of social and health services.

(28) "Training partnership" means a joint partnership or trust that includes the office of the governor and the exclusive bargaining representative of individual providers under RCW 74.39A.270 with the capacity to provide training, peer mentoring, and workforce development, or other services to individual providers.

(29) "Tribally licensed assisted living facility" means an assisted living facility licensed by a federally recognized Indian tribe in which a facility provides services similar to services provided by assisted living facilities licensed under chapter 18.20 RCW.

**Sec.**  RCW 74.39A.500 and 2021 c 186 s 1 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 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.

(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.

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