

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 181

(The President)(By Request - Administration)

Finance

Appropriations

Collective Bargaining - Independent Home Care Providers

This Administration bill codifies collective bargaining rights for “independent home care providers,” as defined in the bill, who participate in and are reimbursed under one of four State programs (or a successor program of one of these programs): the Medicaid Waiver for Older Adults Program, the Medicaid Personal Care Program, the Living at Home Waiver Program, and the In-Home Aide Service Program.

The bill specifies that a future collective bargaining agreement may allow an exclusive representative to receive service fees from independent home care providers who are not members of the “provider organization” but are nonetheless represented by the organization. However, the State must conclude that the agreement as a whole will not adversely affect nonmember providers. A service fee provision is only allowable if nonmembers pay fees on a sliding scale in approximate proportion to the amount that each nonmember independent home care provider receives as reimbursement.

The bill takes effect July 1, 2011.

Fiscal Summary

State Effect: None. The bill generally codifies the provisions of an executive order and a resulting memorandum of understanding. Any additional responsibilities resulting from the bill are expected to be minimal and can be handled with existing resources.

Local Effect: None.

Small Business Effect: The Administration has determined that this bill has minimal or no impact on small business (attached). Legislative Services disagrees with this assessment as discussed below. (The attached assessment does not reflect amendments to the bill.)

Analysis

Bill Summary: Independent home care providers are reimbursed directly by the State or a fiscal intermediary and not by an agency or business that refers independent contractors. They are reimbursed for their work with the elderly or disabled under one of the four programs referenced above; these individuals are not State employees. The bill's definition of "independent home care provider" does not include an individual who provides home care services to a family member. Independent home care providers may choose a provider organization to act as the exclusive representative of all independent home care providers in the State, thereby creating a bargaining unit. All independent home care providers are members of the bargaining unit regardless of whether or not they are members of the provider organization acting as the exclusive representative. Employees of a private agency that offers home care services are not members of the bargaining unit created by the bill.

The election and certification of the exclusive representative must be conducted by the State Labor Relations Board (SLRB) and is governed by statutory provisions. The provider organization certified as the unit's exclusive representative in the election held pursuant to a particular executive order prior to the bill's effective date may continue as the exclusive representative without the requirement of an additional election and certification. SLRB may not conduct an election for an exclusive representative if an election or certification has taken place within the preceding two years. A provider organization designated as the exclusive representative must represent all providers in the State fairly and without discrimination, whether or not the providers are members of the organization.

The certification of an exclusive representative of independent home care providers does not prevent the provider organization or any other organization or individual from communicating with any State official on matters of interest, including appearing before or making proposals to the State agencies at a public meeting, hearing, or other forum.

The departments of Health and Mental Hygiene (DHMH), Human Resources (DHR), and Aging (MDoA) must designate representatives to participate in collective bargaining with the certified provider organization. Unless otherwise specified, the parties must adhere to the bargaining process set forth in statute. DHMH, DHR, and MDoA must negotiate in consultation with the Department of Budget and Management (DBM) regarding all matters that require appropriation of State funds. The parties must reduce their agreement to a memorandum of understanding that complies with applicable provisions of State law.

Collective bargaining must include all matters related to the terms and conditions of participation by independent home care providers in the four specified State programs, including:

- reimbursement rates;

- benefits;
- payment procedures;
- contract grievance procedures;
- training;
- member dues deductions; and
- other terms and conditions of participation by independent home care providers in the specified State programs.

The representatives of the State may not be required to negotiate any matter that is inconsistent with applicable law. The parties may negotiate such matters only if it is understood that the agreement cannot become effective unless the applicable law is amended by the General Assembly to eliminate the inconsistency.

As mentioned above, negotiations may include the right of the provider organization to receive service fees from individuals who are not members of the provider organization but are members of the bargaining unit. Independent home care providers who oppose, on religious grounds, joining or financially supporting a collective bargaining organization are not required to pay a service fee. However, they are required to pay an amount of money – as determined in collective bargaining negotiations and not more than a service fee – to a tax-exempt charitable organization.

The bill specifies that independent home care providers must be notified by the exclusive representative if service fee provisions are included in a collective bargaining agreement, as reflected in a memorandum of understanding. The notice must be given before the vote to ratify the memorandum of understanding is held.

The provider organization is prohibited from calling or directing a strike, and the bill may not be construed to imply that independent home care providers have any right to engage in any collective cessation of professional services.

The provisions within the bill may not be construed to make independent home care providers employees of the State, nor do they deny program recipients of independent home care services the right to select, direct, and terminate the services of home care providers.

By December 31 of each year between 2011 and 2014, DHMH must report to specified committees of the General Assembly regarding (1) the number of independent home care providers participating in the specified programs and the number of consumers served by the programs; (2) the number of independent home care providers who have joined the collective bargaining unit and the number of consumers served by each of the providers; and (3) an analysis of any positive or negative trends resulting from the bill.

The bill expresses legislative intent that the State action exemption from liability for engaging in federal and State antitrust violations be fully available to the extent that the

activities of the independent home care providers and their representatives are allowed by the bill. The bill also includes a severability clause so that, if any provision of the bill is found to be invalid, the invalidity of that provision does not affect other provisions or the general applicability of the bill.

Current Law: In 2007, Governor Martin O’Malley issued an executive order specifying that the State must recognize a provider organization designated by a majority of independent home care providers who participate in the four programs included in the bill. The executive order authorized independent home care providers to engage with the State in collective bargaining negotiations and outlined the procedure a provider organization must follow when seeking certification as the exclusive representative for the bargaining unit.

Background: In 2008, in accordance with the process established by the executive order, the American Federation of State, County, and Municipal Employees (AFSCME) was certified as the exclusive representative of the individual home care providers bargaining unit. AFSCME reports that it represents about 4,600 independent home care providers in collective bargaining. In July 2010, AFSCME and State representatives entered into a three-year collective bargaining agreement that included a 4% increase in reimbursement rates for independent home care providers in the Medicaid Personal Care Program. Independent home care providers in the other three programs did not receive an increase in their reimbursement rates under the terms of the agreement. **Exhibit 1** displays the amount of reimbursement payments and estimated number of providers under each program in fiscal 2010.

Exhibit 1
Number of Providers and Payments in Specified State Programs
Fiscal 2010

<u>Program</u>	<u>Number of Providers¹</u>	<u>Amount of Payments</u>
Medicaid Older Adults Waiver	530	\$101,072,000 ²
Medicaid Personal Care	3,800	26,530,000
Living at Home Waiver	720	32,014,400
In-Home Aide Service	120	84,250 ³

¹Some independent home care providers may participate in multiple programs, thus the total number of providers in Maryland may be less than the sum of providers in all programs. The bargaining unit is aware of approximately 4,600 independent home care providers.

²Expenditures made under the Older Adults Waiver Program are made (1) to independent home care providers at an hourly reimbursement rate; and (2) for assisted living services on a per diem basis.

³DHR advises data regarding total expenditures under the In-Home Aide Service Program are not readily available because the payments are made by local social services departments. The amount of payments reflected is an estimate based on the average number of hours the program operates per month.

Source: Department of Health and Mental Hygiene, Department of Human Resources, Department of Legislative Services

The Medicaid Older Adults Waiver Program offers community services to adults older than age 49 as an alternative to institutionalization in a nursing home. Individuals currently living in the community who may need a nursing home level of care are also eligible to receive waiver services. Services under the program include personal care, respite care, home-delivered meals, assisted-living services, dietician services, assistive devices, and environmental modifications and assessments. Independent home care providers may be reimbursed at rates between \$10.17 and \$13.27 per hour under the program. Reimbursement rates for care delivered at an assisted living or nursing facility range between \$43 and \$136 per day.

The Medicaid Personal Care Program offers personal care assistance with activities of daily living to Medicaid recipients who have a chronic illness, medical condition, or disability. Services may be performed by a friend of the recipient and are monitored by a registered nurse. The objectives of the program are to prevent patient deterioration, delay institutionalization, and prevent inappropriate institutionalization. Personal care services are provided in accordance with the needs of each patient and include basic assistance with dressing, grooming, toileting, self-administered medications, and diet; escort to medical services; and performance of incidental household services essential to the patient's health. Independent home care providers are reimbursed on a per diem basis under the Medical Assistance Personal Care Program. Reimbursement rates for providers range between \$13.25 and \$57.42 based on the level of care required by the recipient. Legislative Services advises that the recent reimbursement rate increase has a projected fiscal impact of \$1.1 million (combined general and federal funds) in fiscal 2011.

The Living at Home Waiver Program is designed for people between the ages of 18 and 64 with physical disabilities who need assistance with activities of daily living. The program is designed to serve people who are currently in a nursing home with an interest in returning to the community and individuals who may need nursing home services but would like to remain in the community. The waiver program offers personal assistance, skilled nursing supervision, assistive technology, and personal emergency response systems. Eligible individuals must require a nursing facility level of care based on an assessment from their local health department. Independent home care providers may be reimbursed at rates between \$13.25 and \$26.69 per hour under the program.

Independent home care providers who participate in the In-Home Aide Service Program serve adults with functional disabilities by offering help with personal care (*e.g.*, dressing, bathing, grooming, eating); chores (*e.g.*, cooking, laundry, cleaning, shopping); and other activities to facilitate daily living. DHR advises that the program uses individual providers as a last resort and only when a local social services department does not have either a State-employed aide or vendor aide service available. Currently, 11 counties and Baltimore City utilize independent home care providers under this program. According to DHR, independent home care providers are reimbursed at rates ranging between \$8 and \$13 per hour.

Expenses attributed to the Medicaid Personal Care, Older Adults Waiver, and Living at Home Waiver programs are Medicaid costs, which are generally split evenly between State and federal funds. DHR advises that the In-Home Aide Service Program is funded solely with general funds. DHMH and DHR advise that independent home care providers are compensated as independent contractors.

The state action exemption or Parker immunity doctrine exempts a state from liability for engaging in antitrust violations. The exemption applies to a state when it exercises legislative authority in creating a regulation with anticompetitive effects. The U.S. Supreme Court held that antitrust laws do not bar anticompetitive restraints that sovereign states impose “as an act of government.” *Parker v. Brown*, 317 U.S. 341, 352, 87 L.Ed. 315, 63 S. Ct. 307 (1943).

Small Business Effect: Although the majority of the bill’s provisions simply codify the provisions within the executive order, the bill establishes a service fee as a permissible topic of negotiations. *If* a service fee applying to nonunion members is negotiated and ratified, the nonunion members must pay the service fee or, if they raise a religious objection, make an equivalent payment to a nonprofit organization of their choice. Of the 4,600 independent home care providers in the State who qualify as members of the bargaining unit, 1,500 providers are AFSCME members. The roughly 3,100 remaining members of the bargaining unit are not AFSCME members and may be subject to a service fee requirement if one is successfully negotiated. The current collective bargaining agreement is in effect for at least two more years; it is unknown to what extent, if any, service fees may be included in future collective bargaining negotiations.

Legislative Services observes that the bill requires representatives of the State to conclude that a collective bargaining agreement “as a whole will not adversely impact nonmember providers” if the agreement includes a service fee requirement. Thus, the State does have the authority to block a proposed collective bargaining agreement based on the equity of the service fee provisions. However, the standard appears to allow the State to approve a collective bargaining agreement if *most* providers benefit. Thus, it is possible that a collective bargaining agreement may be permissible even if a minority of providers do not benefit from the agreement; under this scenario, both nonmember independent home care providers who benefit from the agreement and those who do not may still be assessed a service fee (on a sliding-scale basis). For example, the July 2010 collective bargaining agreement increased reimbursement levels for the majority of the bargaining unit’s member providers by 4%. A service fee requirement for the entire bargaining unit could have been allowable under those circumstances (if it were a permissible topic of negotiation) even though many providers did not receive an increase in their reimbursement rates.

The impact on providers depends largely on two conditions: (1) the success of the exclusive representative at increasing *all* reimbursement rates through future collective bargaining negotiations for providers in each program; and (2) the equity of the service fee

provisions. Ultimately, the equity of the services fee provisions, even if such fees are set on a sliding scale, depends on whether service fee provisions fairly consider the breadth of provider pay scales and whether providers in a given program receive increased benefits under the collective bargaining agreement.

Additional Information

Prior Introductions: None.

Cross File: HB 171 (The Speaker, *et al.*) (By Request - Administration) - Appropriations.

Information Source(s): American Federation of State, County, and Municipal Employees; Governor's Office; Maryland Department of Aging; Department of Budget and Management; Department of Disabilities; Department of Health and Mental Hygiene; Department of Human Resources; Department of Labor, Licensing, and Regulation
Department of Legislative Services

Fiscal Note History: First Reader - February 8, 2011
mc/mcr Revised - Senate Third Reader - April 9, 2011

Analysis by: Michael T. Vorgetts

Direct Inquiries to:
(410) 946-5510
(301) 970-5510

ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Collective Bargaining – Independent Home Care Providers

BILL NUMBER: SB 181/HB 171

PREPARED BY: Governor's Legislative Office

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS

The proposed legislation will have no impact on small business in Maryland.