

Department of Legislative Services
 Maryland General Assembly
 2020 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 1415 (Delegate Hill, *et al.*)
 Economic Matters

Health Facilities - Residential Service Agencies - Compliance with State Labor Laws

This bill requires the Maryland Department of Health (MDH), in consultation with the Maryland Department of Labor (MDL) and the Office of the Attorney General (OAG), to produce a guidance document concerning the application of employee protection laws to the employment of “personal care aides” by residential service agencies (RSAs). The guidance document must be completed by December 30, 2020, and revised and updated each year. The Secretary of Health must provide the most current version of the guidance document to each licensed RSA. MDH must also coordinate with MDL to ensure that RSAs are not misclassifying personal care aides or similar employees as independent contractors.

Fiscal Summary

State Effect: MDH general fund expenditures increase by *at least* \$209,000 in FY 2021, as discussed below. Future years reflect annualization and elimination of one-time costs. Revenues are not affected.

(in dollars)	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	209,000	249,100	255,000	263,800	272,800
Net Effect	(\$209,000)	(\$249,100)	(\$255,000)	(\$263,800)	(\$272,800)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: “Personal care aide” means an individual who provides “personal care” as defined elsewhere in statute. Section 19-301 of the Health-General Article defines “personal care” as a service that an individual normally would perform personally but for which the individual needs help from another because of advanced age, infirmity, or physical or mental limitation. “Personal care” includes help in walking, getting in and out of bed, bathing, dressing, and feeding, as well as general supervision and help in daily living.

The guidance document must describe, with specific reference to the residential service care industry (1) relevant definitions of “employ,” “employee,” “employer,” and “independent contractor”; (2) the concept of independent contractor misclassification and the potential for legal liability, including monetary damages for employees; and (3) steps an RSA may take to ensure compliance with the Labor and Employment Article.

As a condition of obtaining a license to operate, an RSA must certify to MDH that an individual with authority over the RSA’s pay practices (1) has read and understood the guidance document and (2) will comply with the relevant requirements of the Labor and Employment Article. To maintain licensure, an RSA must annually recertify through the signature of an individual with authority over the RSA’s pay practices that (1) the individual has read and understood the most current version of the guidance document and (2) to the best of that individual’s knowledge, the RSA’s pay practices comply with the provisions of the Labor and Employment Article. MDH may not issue or renew a license to an RSA that MDL determines is misclassifying personal care aides or similar employees as independent contractors if, following notice from MDH or MDL, the RSA has not remedied the issue after a reasonable time to do so.

Each RSA receiving Medicaid reimbursement for the provision of home care or similar services must report to MDH (1) whether the RSA has classified each worker as an employee or as an independent contractor; (2) the average regular hourly pay rate of each employee calculated on a weekly basis; and (3) whether the RSA paid each employee an overtime rate of 1.5 times the employee’s regular hourly pay rate per hour for each hour the employee worked more than 40 hours in any given week.

Current Law/Background:

Residential Service Agencies

A “residential service agency” is any person that is engaged in a nongovernmental business of employing or contracting with individuals to provide home health care for compensation to an unrelated sick or disabled individual in the residence of that individual. “RSA”

includes any agency that employs or contracts with individuals directly for hire as home health care providers.

MDH must adopt regulations that set standards for the care, treatment, health, safety, welfare, and comfort of individuals who receive home health care services through an RSA. The regulations must provide for the licensing of RSAs. The regulations must include provisions that (1) provide for the establishment of RSAs; (2) establish qualifications for licensure; (3) set minimum standards for individuals who provide home health care services through an RSA; and (4) require an RSA to screen and verify the character references of all home health care providers employed by the RSA.

RSAs are licensed by the Office of Health Care Quality in MDH. As of February 2020, 1,351 RSAs were licensed in the State. Chapter 661 of 2018 repealed the requirement for renewal of such licenses; thus, once issued, these licenses do not expire.

Employee Misclassification

When a company hires an employee, it is responsible for paying half of that employee's Social Security and Medicare taxes, as well as premiums for workers' compensation and unemployment insurance (UI) coverage. Employers also typically withhold federal, state, and local income taxes. An employee is responsible for half of his or her Social Security and Medicare taxes, as well as any state and federal income tax in excess of the amounts withheld by the employer.

By contrast, an independent contractor pays all of his or her Social Security and Medicare taxes and has no income taxes withheld but is still responsible for paying them in full. Independent contractors are not covered by workers' compensation or UI, nor do they receive overtime compensation or benefits such as health insurance. They are treated by the law as temporary, freelance workers and are comparable to self-employed individuals.

An employer may not fail to properly classify an individual as an employee. MDL uses the "ABC test" in determining whether an individual is an employee for the purpose of determining whether the employer should pay UI for the individual. The ABC test has three components, all of which must be met to establish that an individual is an independent contractor and not an employee:

- A. the individual is free from control and direction over his or her performance both in fact and under the contract (Alone);
- B. the individual customarily is engaged in an independent business or occupation (Business); and
- C. the work performed is outside the usual course of business, or outside the place of business, of the person for whom work is performed (Control).

The Secretary of Labor must adopt regulations to provide general guidance on how the ABC test applies with regards to UI for certain industries, including the construction industry, the landscaping industry, and the home care services industry.

Misclassification subjects an employer to a civil penalty of up to \$5,000 per employee. In addition, any and all contribution or reimbursement payments for UI that are due and unpaid accrue interest, as specified.

State Expenditures: General fund expenditures increase by at least \$208,980 in fiscal 2021, which accounts for the bill’s October 1, 2020 effective date. This estimate reflects the cost of hiring at least two health facility nurse surveyors and one assistant Attorney General to consult with MDL and OAG to create the required guidance document by December 30, 2020; print and distribute the document to RSAs; receive documentation that each RSA has received, understands, and is in compliance with provisions of the Labor and Employment Article; provide technical assistance to RSAs; regularly consult with MDL and survey RSAs to ensure they remain in compliance; prepare documents for license revocation for those RSAs that are noncompliant; and revoke licenses when necessary. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	3
Salaries and Fringe Benefits	\$191,181
Annual Printing and Distribution of Guidance Document	1,700
Operating Expenses	<u>16,099</u>
Total FY 2021 MDH Expenditures	\$208,980

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses.

This estimate reflects annual recertification requirements for RSAs to maintain licensure; as noted above, RSA licenses are no longer renewed under current law. It assumes most RSAs comply with the bill’s requirements; otherwise, additional staff resources are necessary to enforce the bill’s provisions.

The estimate does not account for costs associated with a data sharing agreement to provide secure access to wage data that will have to be negotiated between MDL and MDH (for which MDH will have to reimburse MDL). Those costs depend on the type and breadth of information MDH requests and the frequency and number of requests.

MDL anticipates providing notice to MDH when, in the normal course of business, MDL audits an RSA and it is found to be misclassifying its personal care aides or similar employees. MDL can do so with minimal impact on its regular operations.

MDL and OAG can *produce* the guidance document annually with existing resources; as noted above, MDH is responsible for its distribution.

Small Business Effect: Small business RSAs must comply with the bill's requirements or face denial of licensure or license revocation.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Office of the Attorney General; Maryland Department of Health; Maryland Department of Labor; Department of Legislative Services

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