

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 384

Finance

(Senator Kelley)

Health and Government Operations

Health Facilities - Residential Service Agencies - Guidance and Reporting

This bill requires the Office of the Attorney General, in consultation with the Maryland Department of Health (MDH) and the Maryland Department of Labor (MDL), to produce a guidance document concerning the application of employee protection laws to the use of “personal care aides” by residential service agencies (RSAs). The guidance document must be completed by December 30, 2021, and revised and updated each year. The Secretary of Health must annually provide the most current version of the guidance document to each licensed RSA. The bill also establishes related reporting requirements for MDL and MDH.

The bill takes effect July 1, 2021.

Fiscal Summary

State Effect: The bill’s requirements can be handled with existing budgeted resources. Revenues are not affected.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: “Personal care aide” means an individual who provides “personal care,” as defined in statute.

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 an initial license to operate and every three years thereafter, an RSA must certify to MDH, on a form developed by the department, that an individual with authority over the RSA's pay or employment practices (1) has read and understood the guidance document and (2) will comply with the relevant requirements of the Labor and Employment Article.

MDH must develop a form that includes a checkbox for each RSA receiving Medicaid reimbursement for the provision of home care or similar services by a personal care aide to indicate whether the RSA uses personal care aides designated as independent contractors.

By November 1, 2021, MDL must report to specified committees of the General Assembly on the strategies undertaken to educate RSAs and workers on the laws governing the classification of independent contractors and employees. By November 1, 2021, MDH must report to specified committees of the General Assembly on the steps taken to align the rates for personal care aides with the cost of delivering services and on turnover of personal care aides under Medicaid.

Current Law:

Personal Care

“Personal care” is defined in statute 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.

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. Chapter 661 of 2018 repealed the requirement for renewal of such licenses; thus, once issued, these licenses do not expire.

Personal Care Aide Rates

Chapter 798 of 2018 required MDH to compare the rate of reimbursement with the actual cost to providers for (1) providing care to individuals approved for direct care services; (2) coordinating care services; and (3) providing any other services. It also required MDH to determine, to the extent information was publicly available, the costs associated with providing service and care under other home- and community-based programs. The final report submitted by MDH can be found [here](#).

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.

Additional Information

Prior Introductions: HB 1415 of 2020, a bill containing similar provisions, received a hearing in the House Economic Matters Committee, but no further action was taken.

Designated Cross File: HB 652 (Delegate Qi) - Health and Government Operations.

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

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