

STORAGE NAME: h957.elt.doc
DATE: March 13, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
ELDER AND LONG TERM CARE
ANALYSIS**

BILL #: HB 957
RELATING TO: Nursing Home Expenditures of State Funds
SPONSOR(S): Representative(s) Bendross-Mindingall

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMITTEE ON ELDER AND LONG TERM CARE
- (2) COMMITTEE ON STATE ADMINISTRATION
- (3) FISCAL POLICY AND RESOURCES
- (4)
- (5)

I. SUMMARY:

HB 957 establishes as the intent of the Legislature that the state not interfere with an employee's choice of whether or not to join a labor union. Based on that intent, the bill prohibits the use of state funds by any nursing home provider for activities that assist, promote, deter, or discourage union activities. This prohibition applies to activities related to unionization that occur during the regularly scheduled times employees provide services, directly or indirectly, to Medicaid beneficiaries.

Any person may file a complaint regarding an alleged violation with the Agency for Health Care Administration (AHCA). The agency must notify the provider within one week, and the provider has 10 days thereafter to provide all pertinent records. A civil action against the employer may be brought by the Attorney General or a taxpayer, and all awarded damages are paid into the state treasury. Before filing an action, the taxpayer must give notice to the Attorney General, no sooner than 20 days after a complaint is filed, of the intent to bring suit. The notice must include a copy of the complaint and AHCA's disposition toward the claim. If the Attorney General commences a civil action within 60 days for the same alleged violation, then the taxpayer is barred from bringing a separate suit. The taxpayer is still allowed to intervene as a plaintiff in actions brought by the Attorney General. A prevailing plaintiff or taxpayer intervenor who makes a substantial contribution to an action is entitled to recover reasonable attorney's fees and costs.

Providers would be liable for the amount of funds expended in violation of the bill as well as civil penalties equal to twice the amount of such funds. Nursing homes would be liable for the proportion of the cost of the campaign that represents the proportion of the nursing home's revenue from Medicaid in the fiscal year of the campaign and the civil penalty does not apply. Individuals who knowingly authorize the use of state funds in violation of the bill would be liable to the state for the amount of the funds. Individuals who knowingly violate the prohibition on the use of state funds would be personally liable to the state for the amount of \$1,000 per violation. Any expense incurred for research, preparation, planning, coordination of, or carrying out an activity in violation of this bill is treated as paid or incurred for that activity.

No person may be discharged, threatened, or otherwise discriminated against as a reprisal because the person provided or attempted to provide information to AHCA or the Attorney General or their designee regarding alleged violations of the bill. The provisions of the bill are declared severable so that if any

provision of the bill is held to be invalid, the invalidity does not affect the validity of other sections of the bill.

The bill is scheduled to take effect January 1, 2002.

SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Nursing homes are regulated by the Agency for Health Care Administration under part II of chapter 400, F.S. Section 400.23, F.S., requires the agency to adopt by rule reasonable and fair criteria in relation to the number and qualifications of all personnel, including management, medical, nursing, and other professional personnel, and nursing assistants, orderlies, and support personnel, having responsibility for any part of the care given to residents. The agency is further required in s. 400.23(3)(a), F.S., to adopt rules providing for minimum staffing requirements for nursing homes.

Federal and state government programs are the primary payers for nursing home care. The federal Medicare program, which pays for health care services for the elderly and disabled, primarily pays for short-term transitional care in nursing homes. Medicaid, the state/federal program that pays for health care services for the poor and disabled, pays for longer-term care. The Medicaid program pays for approximately two-thirds of the resident days in nursing homes in Florida. The FY 2000-2001 General Appropriations Act appropriated \$1,586,520,836 for nursing home care in the Medicaid program (appropriation line item 244).

The Florida Medicaid program pays nursing homes a facility-specific per diem rate based on the facility's reported costs. The per diem rate is the aggregate of costs in four specific domains: operating expenses, patient care, property costs and return on equity. The operating component includes administration, laundry, plant operations and housekeeping. The patient care component includes nursing, dietary, social services, and ancillary expenses. The property component includes interest, depreciation, insurance, property taxes, and equipment rental. Each of these components is calculated separately and the components are combined to determine the per diem rate.

The Agency for Health Care Administration states that Medicare reimbursement policies¹ currently in place already prohibit reimbursement for activities meant to influence unionization of employees. While Medicare reimbursement policies at the state and federal level recognize the costs associated with

¹ Medicare Reimbursement Manual, § 2180.3, Policy Statement Transmittal Nos. 218, 261.

collective bargaining as necessary for the continued care of patients, costs stemming from an employer's activities respecting proposed unionization are not reimbursable.

C. EFFECT OF PROPOSED CHANGES:

Section 1. Creates a law to provide that the Legislature finds that it is the policy of the state to not interfere with an employee's choice about whether to join or be represented by a labor union. The stated intent is that the state not subsidize efforts by an employer to assist, promote, deter, or discourage union organizing. Because it is the largest single purchaser of nursing home services in Florida through the Medicaid program, it is expressly found that all state health care funds must be utilized to deliver the highest possible quality care to nursing home residents. Further, because short staffing results in compromised quality of care and because unionization activities often transpire while employees are scheduled to be providing resident care, state funds should not be used to subsidize such unionization efforts.

The use of funds from the state for any unionization activities during a time when an employee is scheduled to provide resident care services is expressly prohibited. Any person who believes a violation of this provision is occurring may file a complaint with the Agency for Health Care Administration. Upon filing, the agency shall within 7 days notify the provider that it must provide records within 10 days to demonstrate no violation took place. A civil action may be brought by the Attorney General or any taxpayer for injunctive relief, damages, civil penalties, and other appropriate equitable relief. All damages and civil penalties collected must be paid into the State Treasury. Any taxpayer filing suit must first give written notice and a copy of the complaint filed with the agency and any disposition to the Attorney General. Such notice may not be given until 20 days after a complaint is filed with the agency. Any taxpayer may intervene in a suit brought by the Attorney General. A prevailing party is entitled to reasonable attorney's fees and costs.

Any provider found liable for impermissible expenditures of Medicaid funds on union organizing is also liable for a civil penalty equal to twice the amount of such funds. Any provider found liable for promoting or discouraging union organizing during time when employees are scheduled to be providing Medicaid resident care is liable for that proportion of the cost of the campaign against union activities which represents the proportion of the nursing home's revenues from Medicaid in the fiscal year of the campaign and the civil monetary penalty shall not apply.

Any individual who knowingly authorizes the use of state funds for union organizing is liable to the state for such funds and is personally liable to the state in the amount of \$1,000 per violation.

Any expense, including legal and consulting fees, and salaries of employees, incurred for research, preparation, planning, or coordination of efforts to promote or deter union activities is prohibited. The provisions do not prohibit the expenditure of monies for handling a grievance, or negotiating or administering a collective bargaining agreement, or performing an activity required by federal or state law.

The provisions do not apply to expenditures made prior to January 1, 2002, unless modified, extended, or renewed after January 1, 2002. Employers are not required to maintain records in any particular manner in order to comply with the requirements of the bill.

No person may discharge, demote, threaten, or otherwise discriminate against any person or employee with respect to compensation, terms, conditions, or privileges of employment as a reprisal for acting pursuant to these provisions. Any person believing she or he has been impermissibly discriminated against may file a civil action within 3 years. If a court of competent jurisdiction finds by a preponderance of the evidence that a violation of the provisions of the bill has occurred, the court may: reinstate the

employee to her or his former position; provide compensatory damages, costs, and reasonable attorney's fees; and provide other appropriate remedies.

The protections do not apply to any person who deliberately causes or participates in the alleged violation of the provisions, or knowingly or recklessly provides substantially false information to the Agency for Health Care Administration.

If any provision of the act or application thereof is invalidated, that portion shall be severable and the invalidity shall not affect other provisions or applications of the act that can be given independent force and effect.

Section 2. Provides that the bill, if it becomes a law, will become effective January 1, 2002.

D. SECTION-BY-SECTION ANALYSIS:

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

All damages and civil penalties that are awarded shall be paid into the state treasury.

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Nursing homes or providers who violate the act will be subject to lawsuits, penalties, and court awarded damages.

D. FISCAL COMMENTS:

N/A

III. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

Taxpayer Standing

The concept of standing limits those who can bring suit in court. Standing exists when "...a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy ..."² This limitation helps to ensure only parties that are truly affected by an action or controversy are able to bring suit. According to the Florida Supreme Court, a typical taxpayer suit, where no legislative grant of authority is in place, has two justifications: special injury or constitutional challenge.³ Additionally, while a complaining party may have a substantive right to sue, if their rights have not been affected by the acts of the defendant, then they may have no standing.⁴ HB 957 grants any taxpayer the right to bring suit for violations of the bill's provisions. This provision brings on the question of how the courts will interpret the statutory grant of authority to sue to all taxpayers. If the Legislature grants standing to all taxpayers, will the courts be satisfied with the legislative action or will they look to the traditional rules that limit who has the ability to bring suit?

Federal Preemption

Preemption occurs when federal law takes precedence over state law. The National Labor Relations Act (NLRA)⁵ generally governs relations between labor and management and preempts most actions by state courts.⁶ It is expressly prohibited under the NLRA for an employer to discriminate against, retaliate against, coerce, restrain, dominate, or interfere with any employee on the basis of any union matter under 29 USC §§157-8. According to sources familiar with the practice of labor law, the area of labor / management relations in nursing homes has been governed by federal law since 1974. Complaints

² Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

³ School Bd. of Volusia County v. Clayton, 691 So. 2d 1066, 1067 (Fla. 1997). The Florida Supreme Court stated "there were two means to achieve standing in a taxpayer case, holding 'absent a constitutional challenge, a taxpayer must allege a special injury distinct from other taxpayers in the taxing district to bring suit.' *Fornes*, 476 So. 2d at 154."

⁴ Philip J. Padovano, Florida Civil Practice, §4.3, (2000).

⁵ 29 USCS §§ 151 - 169

⁶ Sheetmetal Workers' Intern. Ass'n, Local Union No. 223 v. Florida Heat & Power, Inc., 230 So.2d 154, 155 (Fla. 1970). "It is settled law that jurisdiction over labor activities is pre-empted in favor of the National Labor Relations Board, if the activities arguably are covered by the National Labor Relations Act. In such cases state courts may not exercise jurisdiction because the jurisdiction of the Board is paramount and exclusive."

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about unfair labor practices and an employer's efforts to influence union activities may fall under the NLRA and preempt the state court action envisioned by HB 957.

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VI. SIGNATURES:

COMMITTEE ON COMMITTEE ON ELDER AND LONG TERM CARE:

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