

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1042

SPONSOR: Senator Dawson

SUBJECT: Nursing Home Expenditures of State Funds

DATE: March 19, 2001 REVISED: 03/28/01 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Thomas	Wilson	HC	Fav/1 amendment
2.	_____	_____	GO	_____
3.	_____	_____	JU	_____
4.	_____	_____	AHS	_____
5.	_____	_____	AP	_____
6.	_____	_____	_____	_____

I. Summary:

This bill provides that no funds from the state may be used by any nursing home for activities that assist, promote, deter, or discourage labor union organizing. The Attorney General or any taxpayer may bring a legal or equitable action against a nursing home to enforce the provisions. Any nursing home found liable to the state for funds impermissibly expended would be subject to civil monetary penalties of twice the funds owed, or if a nursing home violates the prohibition against union organizing activities during an employee’s regularly scheduled work time, the facility is liable for that proportion of the cost of the unionization campaign which represents the proportion of the nursing home’s revenues from Medicaid. An individual who knowingly violates the act would be liable to the state for such monies and be subject to a fine of \$1,000 per violation. Attorney’s fees and costs could be awardable to successful litigants. No person subject to these provisions would be permitted to discharge, demote, threaten, or otherwise discriminate against any person providing information to the Agency for Health Care Administration or the Attorney General as to a violation of the provisions. Any person with the belief that they had been retaliated against for supplying such information could bring suit within 3 years of the retaliatory act.

This bill creates an undesignated section of law.

II. Present Situation:

Nursing Home Staffing

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.

It is generally recognized that the quality of nursing home care is directly related to the number of appropriately trained staff in the nursing home. While nursing homes in Florida, on average, exceed the national average in staffing ratios, the percentage of nursing homes in Florida cited for insufficient staffing has been increasing and is substantially above the national average.

Medicaid Funding

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.

National Labor Relations Act

The National Labor Relations Act, 29 United States Code ss. 151 – 169, provides for the regulation of organized labor. Employees have the express right to organize, join or form labor organizations, bargain collectively through representatives of their own choosing, or refrain from any and all such activities under 29 USC s. 157.¹ Congress' intent was to guarantee employees a fundamental right to present grievances to their employers to secure better terms and conditions of employment² and to foster collective agreements between employers and representatives of employees concerning wages, hours and other conditions of employment to better stabilize employment relations.³

¹ *Katz Drug Company v. Kavner*, 249 S.W.2d 166 (Mo. 1952).

² *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345 (3rd Cir. 1969), *cert.denied*, 90 S.Ct. 943, 397 U.S. 935, 25 L.Ed.2d 115.

³ *NLRB v. Montgomery Ward & Company*, 133 F.3d 676 (9th Cir. 1943).

It is expressly prohibited under the act 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 s. 158.⁴

The established procedure for adjudicating disputes regarding the right to collectively bargain, or be free from collective bargaining, lies with the National Labor Relations Board (NLRB) under 29 Code of Federal Regulations s. 102. To initiate NLRB protections, any person may file a complaint with their regional NLRB director's office⁵ under 29 CFR s. 102.10. An allegation of any attempt to unduly promote or discourage unionization is sufficient to provide for a sufficiently pleaded complaint under 29 CFR s. 102.12. Upon review of the complaint the NLRB regional director may issue an administrative complaint against the alleged respondent under 29 CFR 102.15 and a hearing⁶ will be set before a federal administrative law judge (ALJ) under 29 CFR s. 102.16. The respondent may file a legal answer with the ALJ and a hearing will be conducted by the judge under 29 CFR ss. 102.20 and 102.34. Any person may intervene in the action upon motion and all parties may appear, be represented by counsel, call and cross-examine witnesses and introduce oral and documentary evidence under 29 CFR ss. 102.29 and 102.38. After the hearing the parties may file proposed findings and legal briefs under 29 CFR s. 102.42. The ALJ will then issue findings of fact and conclusions to the NLRB, and the parties may in response file exceptions, cross-exceptions, and briefs in support thereof under 29 CFR ss. 102.45 and 102.46. The NLRB then will rule upon all matters and issue findings of fact and conclusions of law under 29 CFR ss. 102.48 through 102.51. The NLRB enforces compliance with its ruling and may award attorney's fees and costs under 29 CFR ss. 102.52 through 102.59 and 102.143 through 102.155. The NLRB may issue advisory opinions or declaratory orders regarding board jurisdiction under 29 CFR ss. 102.98 through 102.110. NLRB determinations may be appealed in federal court.

Federal Preemption

As a general maxim, activity which is protected or prohibited under the National Labor Relations Act is preempted by federal law and may not be regulated by the states except where violence or coercive conduct is involved which presents imminent threats to the public order.⁷ There is a presumption of law that any labor union activity falls within the exclusive competence of the NLRB.⁸ Original jurisdiction preemption by the NLRB is applicable not only to state courts, but as to federal district courts as well.⁹ Only upon an express determination of lack of jurisdiction

⁴ *Richardson Paint Company, Inc. v. NLRB*, 574 F.2d 1195 (Cal. 5th App. 1978); *NLRB v. Advertisers Manufacturing Company*, 823 F.2d 1086 (Cal. 6th App. 1987); *F.W. Woolworth Company v. NLRB*, 655 F.2d 151 (Cal. 8th App. 1981), *cert. denied*, 102 S.Ct. 1613, 455 U.S. 989, 71 L.Ed.2d 849; *NLRB v. A & B Zinman, Inc.*, 372 F.2d 444 (2nd Cir. 1967); *NLRB v. Montgomery Ward & Company*, 192 F.2d 160 (2nd Cir. 1951).

⁵ There are three NLRB offices in Florida, in Miami, Tampa and Jacksonville.

⁶ NLRB hearings for Florida are typically held in Atlanta, Georgia.

⁷ *Hennepin Broadcasting Associates, Inc. v. NLRB*, 408 F.Supp. 932 (D.C. Minn. 1975).

⁸ *People v. Medrano*, 78 Cal.App.3d 198, 144 Cal.Rptr. 217 (Cal. 3d App. 1978); *State v. District Court of Second Judicial Circuit In and For Silver Bow County, Montana*, 374 P.2d 336, 140 Mont. 581 (Mont. 1962); *State v. Percich*, 557 S.W.2d 25 (Mo. App. 1977).

⁹ *Bebensee v. Ross Pierce Electrical Corporation*, 253 N.W.2d 633, 400 Mich. 233 (Mich. 1977).

by the NLRB of a particular complaint may jurisdiction vest in a state court.¹⁰ This general rule of jurisdiction has been the well-established law in Florida for over 30 years.¹¹

If it can be demonstrated that physical intimidation is present to coerce employees to either collectively bargain or not collectively bargain, a compelling state interest may arise to provide for criminal prosecution in state court.¹² Because the federal labor laws do not encompass any state police power to maintain public safety and civil order, a state is always free to enjoin union-related violence.¹³ Demonstration of an overriding state interest, such as preservation of domestic peace, will provide for state court jurisdiction.¹⁴ If litigants can show that the basis for the action is merely peripheral to the provisions of the National Labor Relations Act, NLRB jurisdiction will not lie and a state court may hear the controversy.¹⁵

Taxpayer Standing

In order to be afforded relief in a court of law, a petitioner need have legal standing. It is well established that in Florida, a person does not have standing to sue as a taxpayer without demonstrating either a constitutional question, or a “special injury.”¹⁶ It is not enough to plead that a tax is illegal, or that an otherwise legal tax is being applied in an illegal manner, to achieve standing.¹⁷ A petitioner must plead that the tax or its application is unconstitutional, or that the petitioner is in a unique circumstance and, unlike other taxpayers, is personally and specially harmed by the tax or its application.¹⁸

III. Effect of Proposed Changes:

Section 1. Creates an undesigned section of 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

¹⁰ *Table Talk Pies of Westchester v. Strauss*, 237 F.Supp. 514 (S.D.N.Y. 1964); *Wax v. International Mailers Union*, 161 A.2d 603, 400 Pa. 173 (Pa. 1960).

¹¹ *Teamsters Local Union Number 769 v. Fountainbleau Hotel Corporation*, 239 So.2d 255, 256 (Fla.1970); *Sheetmetal Workers’ International Association, Local Union No. 223 v. Florida Heat and Power, Inc.*, 230 So.2d 154, 155 (Fla.1970); *Carpenters District Council of Jacksonville v. Waybright*, 279 So.2d 300, 302 (Fla.1973).

¹² *People v. Holder*, 456 N.E.2d 628 (Ill. 2nd App. 1983), *cert. denied*, 104 S.Ct. 3511, 467 U.S. 1241, 82 L.Ed.2d 820.

¹³ *15 McKay Place Realty Corporation v. ALF-CIO, 32B-32J, Service Employees International Union*, 576 F.Supp. 1423 (E.D.N.Y. 1983); *Acme Markets, Inc. v. Retail Store Employees Union Local No. 692, AFL-CIO*, 231 F.Supp. 566 (D.C.Md. 1964); *Schena v. Smiley*, 401 A.2d 1194, 265 Pa.Super. 249 (Pa.Super. 1979), *affirmed*, 413 A.2d 662, 488 Pa. 632 (1979); *International Brotherhood of Electrical Workers, Local 903 v. Chain Lighting & Appliance Company*, 309 So.2d 530 (Miss. 1975); *State v. Percich*, *supra*.

¹⁴ *S. & H. Grossinger, Inc. v. Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, Local 343*, 272 F.Supp. 25 (S.D.N.Y. 1967); *Cannon v. Edgar*, 825 F.Supp. 1349, *affirmed*, 33 F.3d 880 (N.D.Ill. 1993).

¹⁵ *Local 926, International Union of Operating Engineers, ALF-CIO v. Jones*, 103 S.Ct. 1453, 460 U.S. 669, 75 L.Ed.2d 368 (1983); *Carter v. Sheet Metal Workers’ International Association*, 724 F.2d 1472, *cert. denied*, 105 S.Ct. 119, 469 U.S. 831, 83 L.Ed.2d 61.

¹⁶ *School Board of Volusia County v. Clayton*, 691 So.2d 1066 (Fla.1997); *North Broward Hospital District v. Fornes*, 476 So.2d 154 (Fla. 1985); *Godheim v. City of Tampa*, 426 So.2d 1084 (Fla. 2nd DCA 1983).

¹⁷ *Id.*

¹⁸ *School Board of Volusia County v. Clayton*, *supra*; *North Broward Hospital District v. Fornes*, *supra*.

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 union campaign 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 incurred by the state including legal and consulting fees, and salaries of employees, incurred for research, preparation, planning, or coordination of 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.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Art. VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Art. III, s. 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that nursing homes with Medicaid residents are participating in collective bargaining matters by utilizing Medicaid funds, or are participating in collective bargaining matters during employee time scheduled for resident care, such monies will be made unavailable.

C. Government Sector Impact:

There may be some increased expenses for the Agency for Health Care Administration and the office of the Attorney General in handling any complaints or lawsuits.

VI. Technical Deficiencies:

None.

VII. Related Issues:

It is likely that the provisions of the bill are preempted by 29 USC ss. 151, et seq. If that is the case, the state courts would lack jurisdiction to hear any cases brought under the provisions of the proposed act. It is also likely that the provisions permitting taxpayer standing are not enforceable, or conflict with current Florida law.

VIII. Amendments:

#1 by Health, Aging and Long-Term Care:

Removes the authorization for the Attorney General and taxpayers to bring an action under this section for injunctive relief, damages, or civil penalties, and attorney's fees for such actions.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
