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 1378

SPONSOR: Senator Meek

SUBJECT: Health Care Union Organizing Activities

DATE: March 4, 2002 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Wilson	HC	Favorable
2.	Gillespie	Maclure	CM	Favorable
3.				
4.				
5.				
6.				

I. Summary:

Senate Bill 1378 prohibits nursing home employees from participating in an activity related to union organizing during any time that is counted toward minimum staffing requirements and directs that salaries paid to an employee for union organizing may not be an allowable cost for Medicaid cost reporting. The bill further provides that any expenses incurred for activities directly relating to influencing employees with respect to unionization are not an allowable cost for Medicaid cost-reporting purposes. The bill specifies, however, that these prohibitions do not apply to protected labor activities, such as addressing grievances or negotiating collective bargaining agreements; performing activities required by federal or state law or by a collective bargaining agreement; or normal personnel management communication between employees and employers.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Nursing Home Staffing

Nursing homes are licensed and regulated by the Agency for Health Care Administration under part II of ch. 400, F.S. Under current law, the agency is required to adopt rules providing reasonable and fair criteria in relation to the number and qualifications of all personnel in a nursing home, 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 (s. 400.23(2), F.S.). The agency is further required to adopt rules providing for minimum staffing requirements for nursing homes (s. 400.23(3)(a), F.S.).

It is generally recognized that the quality of care in a nursing home is directly related to the number of appropriately trained staff in the nursing home. During the 2001 Regular Session, the Legislature enacted ch. 2001-45, L.O.F., which amended s. 400.23(3), F.S., to phase in higher minimum certified nursing assistant staffing levels over a three-year period and to increase the minimum licensed nursing staffing level. Staffing levels are calculated as the number of hours of direct care per resident per day.

Medicaid Funding

Federal and state government programs are the primary purchasers of nursing home care. The federal Medicare program, which provides for health care services for the elderly and disabled, primarily pays for short-term transitional care in nursing homes. Medicaid is a medical assistance program that provides for health care services for the poor and disabled. Medicaid is funded jointly by the federal government, the state, and county government and pays for longer-term care in nursing homes. The Medicaid program pays for approximately two-thirds of the resident days in nursing homes in Florida. In the General Appropriations Act for fiscal year 2001-2002, the Legislature provided almost $1.76 billion for nursing home care in the Medicaid program (Specific Appropriation 283, ch. 2001-253, L.O.F.). The Agency for Health Care Administration is the single state agency responsible for Florida's Medicaid program (s. 409.902, F.S.).

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.

In 2001, the Legislature required the Agency for Health Care Administration to amend the long-term care reimbursement plan to create direct care and indirect care subcomponents of the patient care component of the nursing home per diem rate (s. 49, ch. 2001-45, L.O.F.). The direct care subcomponent is to include salaries and benefits of direct care staff, including nurses and certified nursing assistants who deliver care to residents. The agency was directed to adjust the patient care component effective January 1, 2002, using funds previously allocated for a case mix add-on. On July 1 of each year, the agency is directed to report to the Legislature on the average direct and indirect care costs per resident and per category of staff member.

Medicare Policy Regarding Reimbursement of Activities Relating to Unionization

Under s. 2180.1 of the Medicare Provider Reimbursement Manual,[1] reasonable costs incurred by health care providers in activities consistent with the National Labor Relations Act may represent an allowable cost of operation if these costs are not directly related to influencing employees with respect to unionization. The manual further provides that costs incurred for activities

[1] Health Care Financing Administration, U.S. Department of Health and Human Services, *Medicare Provider Reimbursement Manual, Part I*, Publication No. 15-1.

directly related to influencing employees respecting unionization or related to attempts to coerce employees or otherwise interfere with or restrain the exercise of employee rights under the National Labor Relations Act are not allowable costs under Medicare. In s. 2180.2, the manual provides that reasonable expenses incurred for collective bargaining and related activities are allowable costs, if the activities are permitted by the National Labor Relations Act. According to the Agency for Health Care Administration, Senate Bill 1378 is consistent with s. 2180 of the Medicare Provider Reimbursement Manual.

Federal regulations adopted by the Health Care Financing Administration require that all payments to health care providers must be based on the reasonable cost of services covered under Medicare and related to patient care (42 C.F.R. s. 413.9). The Agency for Health Care Administration reports that the federal Health Care Financing Administration's policy statements in Transmittal Nos. 218 and 261 articulate the view that reasonable costs incurred by a provider for collective bargaining and related activities are necessary to maintain the continued operation of the provider, and accordingly these costs are related to patient care within the meaning of the federal regulations. The costs incurred, however, for activities directly related to influencing employees respecting proposed unionization (e.g., through furnishing literature to employees opposing union membership or training management to oppose unionization) are not sufficiently related to patient care and, therefore, may not be reimbursed.

National Labor Relations Act

In 1935, the United States Congress enacted the National Labor Relations Act (29 U.S.C. ss. 151-169), which provides for the regulation of organized labor. Section 7 of the federal act establishes the rights of employees to engage in, or refrain from, union organizing activities:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . (29 U.S.C. s. 157).

Under Section 7 of the federal act, 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.[2] The courts have interpreted the federal act as designed to guarantee to employees the fundamental right to present grievances to their employer to secure better terms and conditions of employment[3] and to foster collective agreements between employers and representatives of employees concerning wages, hours and other conditions of employment to better stabilize employment relations.[4]

[2] *Katz Drug Co. v. Kavner*, 249 S.W.2d 166 (Mo. 1952).
[3] *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3rd Cir. 1969), *cert. denied*, 397 U.S. 935 (1970).
[4] *NLRB v. Montgomery Ward & Co*., 133 F.2d 676 (9th Cir. 1943).

The federal act expressly prohibits an employer from discriminating against, retaliating against, coercing, restraining, dominating, or interfering with an employee's exercise of those rights guaranteed to the employee under Section 7 of the federal act (29 U.S.C. s. 158).[5]

The federal act is administered and enforced principally by the National Labor Relations Board. The board's staff investigates and prosecutes unfair labor practice cases.[6] Hearings of complaints alleging unfair labor practices are conducted by federal administrative law judges (29 C.F.R. s. 102.34), but the board has authority to issue final orders in these cases (29 C.F.R. s. 102.48). If an employer or labor organization fails to comply with an order of the board, the federal act authorizes the board to petition the federal courts to intervene (29 U.S.C. s. 160).

Federal Preemption

Union organizing activities that are protected or prohibited under the National Labor Relations Act are generally 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 National Labor Relations Board.[8] Original jurisdiction preemption by the National Labor Relations Board 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 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

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[5] *Richardson Paint Company, Inc. v. NLRB*, 574 F.2d 1195 (5th Cir. 1978); *NLRB v. Advertisers Manufacturing Company*, 823 F.2d 1086 (7th Cir. 1987); *F.W. Woolworth Co. v. NLRB*, 655 F.2d 151 (8th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *NLRB v. A & B Zinman, Inc.*, 372 F.2d 444 (2nd Cir. 1967); *NLRB v. Montgomery Ward & Co*., 192 F.2d 160 (2nd Cir. 1951).

[6] National Labor Relations Board, *A Guide to Basic Law and Procedures Under the National Labor Standards Act*, 11 (1997), available at http://www.nlrb.gov/publications/basicguide.pdf (last modified Mar. 11, 2000).

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

[8] *People v. Medrano*, 144 Cal. Rptr. 217 (Cal. 3d App. 1978); *State ex rel. Butte Teamsters Local No. 2 v. District Court of Second Judicial Circuit In and For Silver Bow County*, 374 P.2d 336 (Mont. 1962); *State ex rel. Girard v. Percich*, 557 S.W.2d 25 (Mo. App. 1977).

[9] *Bebensee v. Ross Pierce Electrical Corp*., 253 N.W.2d 633, (Mich. 1977).

[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, (Pa. 1960).

[11] *Teamsters Local Union No. 769 v. Fountainbleau Hotel Corp*., 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*, 467 U.S. 1241 (1984).

[13] *15 McKay Place Realty Corp. 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. Md. 1964); *Schena v. Smiley*, 401 A.2d 1194 (Pa. Super. Ct. 1979), *affirmed*, 413 A.2d 662 (Pa. 1980); *International Brotherhood of Electrical Workers, Local 903 v. Chain Lighting & Appliance Co*., 309 So. 2d 530 (Miss. 1975); *State ex rel. Girard v. Percich, supra*.

peace, will provide for state court jurisdiction.[14] If certain union organizing activities are only peripheral to the protections and prohibitions of the federal act, a state's regulation of these activities is not preempted and the National Labor Relations Board's jurisdiction will not prevent a state court from hearing the controversy.[15]

III. Effect of Proposed Changes:

The bill prohibits nursing home employees from participating in any activity that assists, promotes, deters, or discourages union organizing during any time the employee is counted in staffing calculations for minimum staffing standards. The bill also provides that the following are not an allowable cost for Medicaid cost-reporting purposes:

- Salaries paid by any health care provider to an employee for any activity that assists, promotes, deters, or discourages union organizing; or
- Any expenses incurred for activities directly related to influencing employees with respect to unionization (e.g., legal and consulting fees and salaries of supervisors and employees).

However, if the following activities and expenses are not directly related to influencing employees with respect to unionization, the bill specifies that its prohibitions do not apply to:

- Addressing grievances or negotiating or administering a collective bargaining agreement;
- Performing an activity required by federal or state law or by a collective bargaining agreement; or
- Keeping employees informed of issues and keeping lines of communication open between employees and employers as a part of normal personnel management.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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[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 (N.D. Ill. 1993), *affirmed*, 33 F.3d 880 (7th Cir. 1994).

[15] *Local 926, International Union of Operating Engineers, ALF-CIO v. Jones*, 460 U.S. 669 (1983); *Carter v. Sheet Metal Workers' International Association*, 724 F.2d 1472 (11th Cir. 1984), *cert. denied*, 469 U.S. 831 (1984).

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 funding the union organizing activities of their employees with Medicaid funds, or are permitting their employees to participate in union organizing activities during time accounted for as providing resident care, Medicaid funds would cease to be available to pay for these activities.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.