

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: Nursing Home Staff/Union Organizing

DATE: February 22, 2002 REVISED: _____

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

I. Summary:

Senate Bill 1378 provides that nursing home employees may not participate in activity related to union organizing during time that is counted toward minimum staffing requirements and that salaries paid to an employee for union organizing may not be an allowable cost for Medicaid cost reporting. Furthermore, the bill 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 its 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 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(2), 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. CS/CS/CS/SB 1202 from the 2001 Session

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 to be calculated as the number of hours of direct care per resident per day.

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 2001-2002 General Appropriations Act appropriated \$1,755,556,099 for nursing home care in the Medicaid program (appropriation line item 283).

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 CS/CS/CS/SB 1202, the 2001 Legislature required the agency 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. 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. The agency is to report average direct and indirect care costs per resident and per category of staff member to the Legislature by July 1 of each year.

Medicare Policy Regarding Reimbursement of Activities Relating to Unionization

The Agency for Health Care Administration indicates that from an allowable cost perspective the bill is consistent with Medicare Reimbursement Manual policies, Sec. 2180. Policy statement Transmittal No. 218 and 261 articulates 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 such costs are therefore related to patient care within the meaning of 42 CFR 405.451. However, costs incurred 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

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

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.

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).

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.

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 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

III. Effect of Proposed Changes:

Section 1. The bill creates an undesignated section of law to provide that nursing home employees may not participate 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. Furthermore, it provides that neither of the following may be an allowable cost for Medicaid cost reporting purposes: (a) salaries paid by any health care provider to an employee for any activity that assists, promotes, deters, or discourages union organizing; and (b)

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).

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.

any expenses incurred for activities directly relating to influencing employees with respect to unionization.

The bill specifies, however, that its prohibitions do not apply to: (a) addressing grievances or negotiating or administering a collective bargaining agreement; (b) performing an activity required by federal or state law or by a collective bargaining agreement; or (c) keeping employees informed of issues and keeping lines of communication open between employees and employers as a part of normal personnel management, provided such activities and expenses are not directly related to influencing employees with respect to unionization.

Section 2. The bill takes effect upon becoming a law.

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:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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