Legislative Analysis

Mitchell Bean, Director
Phone: (517) 373-8080
http://www.house.mi.gov/hfa

AD RULES: PROVIDERS NOT TO BE JUDGED BASED ON WHETHER LABOR AGREEMENTS EXIST OR NOT

House Bill 5744 (Substitute H-1)
Sponsor: Rep. Bruce Caswell

House Bill 5745 (Substitute H-1)
Sponsor: Rep. Rick Shaffer

Senate Bill 1026 as passed by the Senate
Sponsor: Sen. Bill Hardiman

Senate Bill 1027 as passed by the Senate
Sponsor: Sen. Alan L. Cropsey

Senate Bill 1028 as passed by the Senate
Sponsor: Sen. Alan Sanborn

House Committee: Government Operation
Senate Committee: Families and Human Services

First Analysis (3-1-06)

BRIEF SUMMARY: The bills would amend various healthcare-related statutes to prohibit provisions in administrative rules that provide discriminate in favor or against a provider based on the existence of a collective bargaining agreement.

FISCAL IMPACT: The proposed bills would have no fiscal impact on the State or on local units of government. However, it is possible that rules promulgated under the cited statutes would have fiscal implications, and these bills could affect and limit the fiscal implications of future rules in these areas. Since final proposed rules are not before the Joint Committee on Administrative Rules, the potential impact of the bills in this regard is unknown.

THE APPARENT PROBLEM:

There are approximately 50,000 adults in the state who live in assisted living facilities. These facilities, which include adult foster care and homes for the aged, typically provide residents with physical, psychological, or developmental disabilities with assistance in several activities of daily living, such as bathing, dressing, eating, toileting, and the administration of medication. Residents typically are unable to independently live along, but do not require nursing home level of care.

Last year, the Department of Human Services and the Department of Community Health began to review and revise the administrative rules regulating the adult foster care

facilities and homes for the aged. While no rules have officially been proposed to the State Office of Administrative Hearings and Rules (SOAHR), draft proposals have circulated among the industry representatives. In August, an ad hoc rule revision advisory workgroup consisting of industry and regulatory representatives was formed to provide the administration with recommendations concerning the draft proposals. According to committee testimony, the workgroup was scheduled to meet regularly before it would issue its recommendations to the administration in April 2006. However, the workgroup was disbanded by the administration in October 2005, to the consternation of many of the workgroup members who felt that they did not have sufficient time to adequately review all of the proposed changes and relevant statutes.

Since the fall, there has been increasing concern among workgroup members and other industry representatives over the draft proposals. Many of the provisions, critics contend, would give preferential status to facilities with collective bargaining agreements, and other provisions would mandate extensive reporting requirements on facilities. Industry representatives have estimated that compliance with these new requirements would cost about $35 million industry-wide. In the light of the industry's concerns over the draft rules, it has been suggested that rules favoring or discriminating against a provider based on the existence of a collective bargaining agreement be prohibited.

THE CONTENT OF THE BILL:

The bills would amend various statutes to prohibit the promulgation of administrative rules or exceptions to rules that discriminate in favor or against a provider, facility, or employer based on the existence of a collective bargaining agreement with employees. The bills further provide that collective bargaining status, level of wages, or fringe benefits would not be used to demonstrate or excuse compliance with licensing or regulatory requirements.

House Bill 5744 would amend the Mental Health Code (MCL 330.1114 and 330.1114a).

House Bill 5745 would amend the Public Health Code (MCL 333.2233).

Senate Bill 1026 would amend the Administrative Procedures Act (MCL 24.232).

Senate Bill 1027 would amend the Adult Foster Care Facility Licensing Act (MCL 400.710).

Senate Bill 1028 would amend the Social Welfare Act (MCL 400.1 and 400.6).

BACKGROUND INFORMATION:

Under various draft proposals, the provision in proposed administrative rules directly-related to, and affected by, this package of legislation states:

A home shall provides its direct care employees with compensation and benefits necessary to attract and retain a sufficient number of qualified direct care employees to provide for the protection, health, safety, and welfare of residents of the home. A collective bargaining agreement between the home or its representative and the direct care employees of the home or a collective bargaining agreement with direct care employees of the home resulting from participation of the home in multi-employer collective bargaining activities involving more than 1 home shall be deemed by the department as sufficient evidence that the home is in compliance with this subrule.

ARGUMENTS:

For:

Generally, the bills ensure that state administrative rules are neutral toward unions, neither punishing nor favoring a licensee based on whether its employees are unionized. The disparate treatment of unions has the effect of encouraging or discouraging unionization, something that the state should seek to avoid. The decision of employees to organize is theirs and theirs alone, and should not be subject to certain inducements based on administrative rules.

Among other things, the draft rules require providers to pay direct care employees with compensation and benefits necessary to attract and retain a sufficient number of qualified direct care employees to provide for the protection, health, safety, and welfare of residents of the home, and states that one way to demonstrate compliance with this requirement is by entering into a collective bargaining agreement with employees. This provision essentially makes the claim that quality of care is directly related to employee compensation, when that may not be true in all (or most) instances. Providing care in an assisted living setting requires a deep sense of care and compassion, which often cannot be addressed through better compensation, as financially beneficial as that may be to some workers. These rules, industry representatives have stated, will increases the costs of providing care, often to the detriment of those receiving care. At the very least, this provision is meddlesome, and injects the state into an area where it does not belong. The issues of compensation levels and unionization should be determined by employees and their employer, within market constraints, not by overreaching governmental action. Further, industry representatives have noted that these draft rules likely exceed the rulemaking authority of DHS and DCH and, therefore, are unlawful.

Response:

Some contend that the draft rules are an appropriate means of improving the quality of care provided in assisted living facilities. One of the most pressing issues facing the healthcare community as a whole is the issue of staffing, as there is an ever increasing need for healthcare workers in the state. However, certain parts of the industry, particularly assisted living facilities, are beset by numerous problems, including high turnover rates, that affect the quality of care provided. These problems can, in part, be remedied by providing healthcare workers with a decent wage, which can reduce the turnover rate and improve the quality of services and level of care provided to patients. Moreover, some people allege that providers engage in unfair labor practices by failing to

recognize unions, punishing workers who engage in union activities, and violating other worker rights.

Rebuttal:

The administrative rules are not the proper place to address allegations of unfair labor practices. Other legal recourses are available.

Against:

At this point, the legislation is premature. The bills are predicated on a series of draft rule proposals, which have not been formally submitted to the State Office of Administrative Hearings and Rules for publication as proposed rules. Once the rules are officially proposed, they will be subject to public comment and legislative scrutiny. Moreover, the drafts that have circulated among the industry are, in essence, the starting point in the discussion about possible rule changes, but are far from what may eventually be officially promulgated.

Further, in committee testimony, the Office of Child and Adult Licensing, testified that is has a history of working well with regulated entities and would likely not move forward in the rule promulgation process without reaching a consensus with the regulated industry. To the extent that occurs, it is not likely that the disputed provisions in the current drafts would be included in the formal proposed rules, let alone the final promulgated rules.

Response:

The bills would take a preventive approach. It makes no sense, given the information already available on this issue, to wait until the rules are formally proposed. The legislation will remove this issue from discussion at an earlier stage.

Against:

The bills are unnecessary. Under the Administrative Procedures Act, the legislature already has the opportunity to reject pending rules or rescind existing rules, as provided in the following sections:

- Section 45a of the APA provides the Joint Committee on Administrative Rules (JCAR) with 15 session days to review a proposed rule, and allows the committee to object to a rule by filing a notice of objection under the following conditions:
    - The agency lacks statutory authority.
    - The agency exceeds is rule-making authority as provided by statute.
    - There is an emergency relating to the public health, safety, and welfare that warrants disapproval of the rule.
    - A substantial change in circumstances has occurred since the law upon which the rules are based was enacted.
    - The rule conflicts with state law.
    - The rule is arbitrary and capricious
    - The rule is unduly burdensome to the public or to a licensee licensed by the rule.

The filing of a notice of objection stays the effective date of the proposed rule for 15 session days, unless JCAR rescinds the notice of objection prior to the expiration of the 15-session-day period. Following JCAR's notice of objection, bills are simultaneously introduced in the House and Senate. The bills would have to repeal the rule upon its effective date, repeal the statutory authority upon which the rule is based, or stay the effective date of the rule for up to one year. If the bills are enacted by the legislature and governor within the 15-session-day period, the rules do not take effect.

- Section 50 of the APA provides that if the JCAR, an appropriate legislative standing committee, or an individual member of the legislature believes that a promulgated rule is unauthorized, is not within legislative intent, or is inexpedient, the JCAR or member may introduce a bill that amends or rescinds the rule.

While the legislature's oversight of the rule promulgation process has been diminished following recent litigation and amendments to the act, a process remains in place and should be followed.

Response:

The current rule-making process, because of constitutional constraints, does not provide the Joint Committee on Administrative Rules and the legislature with authority to directly approve or disapprove proposed rules. Rather, JCAR may "object" to the proposed rules and introduce bills in both houses of the legislature that effectively disapproves of the rule. However, as with other legislation, the governor must sign the bills before they become law. The governor has final authority over rules, and it would seem that if the administration has proposed the rules and has not withdrawn the rules from further consideration, the governor would continue to support the promulgation of the rules, the opposition from the legislature and other interested parties notwithstanding.

If the administration continues to push for the promulgation of the rules as drafted, there is little the legislature can do to stop it. These bills, however, at least express the legislature's opposition to the draft rules, and any other rules proposed in the future that would provide for differential treatment based on unionization.

POSITIONS:

The Michigan Assisted Living Association supports the bills. (2-28-06)

The Michigan Association of Community Mental Health Boards supports the bills. (2-28-06)

The Michigan Center for Assisted Living supports the bills. (2-28-06)

The Michigan Association of Homes for Services for the Aging supports the bills. (2-28-06)

Michigan County Medical Care Facilities supports the bills. (2-28-06)

The Health Care Association of Michigan supports the bills. (2-28-06).

Several health care providers also testified or indicated that they support the bills, including: Oak Crest Manor of Kentwood, St. Clair County Community Mental Health, University Living (Ann Arbor), JARC (Farmington Hills), Brookdale Senior Living (Portage), Blue Water Developmental Housing (Marysville), Judson Center (Royal Oak), Community Living Options (Kalamazoo), Ingham Regional Assisted Living (Lansing), and Alterra Healthcare (Brighton).

The Department of Human Services, Office of Children and Adult Licensing, opposes the bills. (2-28-06).

The International Union – UAW opposes the bills. (2-28-06)

The American Federation of State, County, and Municipal Employees (AFSCME), Michigan Council, opposes the bills. (2-28-06)

The Michigan State AFL-CIO opposes the bills. (2-28-06)

Legislative Analyst: Mark Wolf
Fiscal Analyst: Margaret Alston

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.