

The Connecticut Association of
Home Care Registries
Supports Raised Bill No. 1107

Good day Madam Chair, Chairman and members of the committee. My Name is Kevin Donohue. I am the owner of the Danbury Nurses Registry, a family owned business in operation since 1930. I also am a member of the CT Association of Home-care Registries and a member of the Private Care Association both advocate groups for Nurse Registries. I have devoted my life to helping our aging population to be afforded the opportunity to remain at home as long as they possibly can.

I am here today in support of Raised Bill 1107 with the anticipation that our organization can assist in providing factual information and clarification to the "Commission" on the history and value of preserving the independent contractor status for homecare workers referred by nurse registries. My hope is that by presenting our perspective and other precedents the commission can come to an informed educated and objective recommendation in this matter.

I strongly suggest that the commission review similar if not identical issues raised in other states. PA, MD, CA and particularly FL all embrace the nurse registry model as an integral part of caring for our aging population. I give an exceptional mention to FL because as you know they have by far the highest population of elder consumers in need of care. In 1999 a Bill was raised in FL to repeal nurse registry laws thereby eliminating independent contractors from the workforce and limiting consumer choice. A study was commissioned much as you have proposed. The findings concluded there would be no benefit to the state in revenue. No benefit to the consumer and no benefit to the independent contractor if nurse registries in other words independent contractors were eliminated. I have submitted the study in my written testimony for your convenience.

Nurse registries have been in operation in CT for at least 80 years. We have a long track record of providing well-qualified pre-screened independent contractor caregivers to the community. The outcomes have been excellent and with cost savings of 20%-50% to the consumer over employee based agencies. Overwhelmingly the recipients of these services are aging seniors on fixed incomes. Danbury Nurses registry regularly gets referrals from VNA, hospitals, nursing homes, assisted living facilities, and many other community based institutions. This would not be the case if the caregivers provided less than adequate services.

Depending on the situation, you may classify a caregiver as an independent contractor or an employee, but to make a blanket statement to eliminate the independent contractor status of the caregiver would be a disservice to the consumer and would interfere with the caregiver's and the consumer's right to choose this arrangement.

The traditional 20-factor common law test and/or ABC test can, and has been, interpreted subjectively and inconsistently. From the IRS website:

....." A worker does not have to meet all 20 criteria to qualify as an employee or independent contractor, and no single factor is decisive in determining a worker's status. The individual circumstances of each case determine the weight IRS assigns different factors...."

To determine that caregivers are independent contractors would eliminate the confusion caused by the intricacies of a case-by-

case application of the 20 factor and ABC test. This would benefit the consumer by removing the ambiguity that now exists.

We would like to work with the commission to help identify specific items that should be in place to preserve the care givers' independent contractor status such as carrying their own liability insurance, business cards, etc.

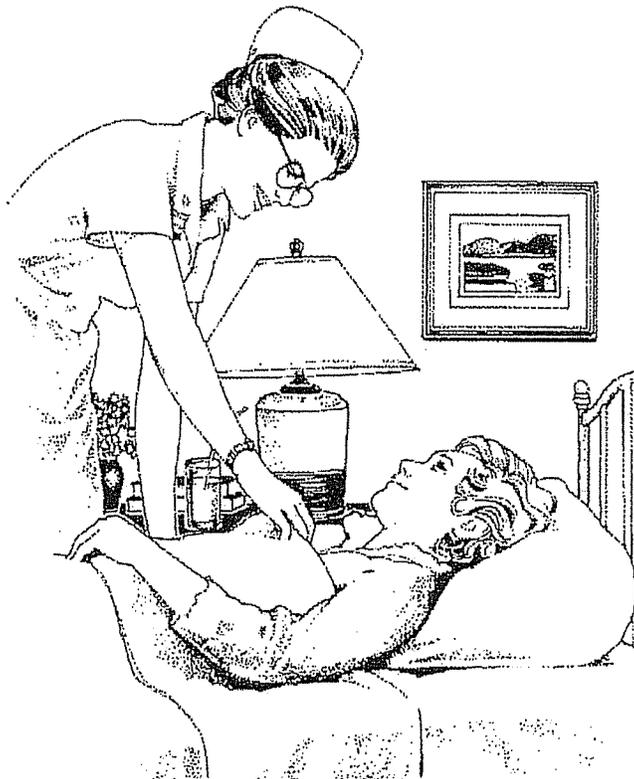
To clarify any issues that may arise during the investigation I would officially like to extend the resources of our attorney Russ Hollrah to the commission. He is an expert on the independent contractor status and employment law, both at the federal and state levels.

The former ct association of nurse registries previously asked for clarification of the status of the independent contractor caregivers, so we welcome the commission to make a ruling.

Thank you for the opportunity to speak here today.

Repeal of Nurse Registry Regulation?

Section 400.506, Florida Statutes



**The Florida House of Representatives
Committee on Health Care Licensing & Regulation
The Honorable Mike Fasano, Chair
The Honorable Everett Kelly, Vice Chair**

**Lucretia Shaw Collins, Staff Director
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INTRODUCTION

During the 1999 session the Legislature adopted CS/SB 2360 (ch. 99-332, Laws of Florida) to clarify the definition of a home health agency and to strengthen the licensure requirements. The intent was to prevent any organization that involves more than one health care professional discipline or a combination of a health care professional and a home health aide or certified nursing assistant from providing in-home care services without being licensed as a "home health agency."

A category of in-home care providers not subject to this restriction is nurse registries. A nurse registry procures, offers, promises, or attempts to secure health-care-related contracts for various persons who are compensated by fees as independent contractors.

Immediately following the 1999 session, Associated Home Health Industries, Inc., suggested that the Committee on Health Care Licensing and Regulation conduct a review to determine whether the Legislature should repeal the nurse registry regulation. This request was forwarded to the Speaker of the House for consideration as an interim project. On June 4, 1999, the Speaker released the approved list of projects for Summer 1999, and the committee was authorized to proceed with this review.

The following report is a compilation of information gathered from individuals within the industry, jurisdictional agency personnel, and other public and private sources with expertise in specific areas. It is intended to provide options that the Legislature might consider in determining whether to repeal licensure of nurse registries.

EXECUTIVE SUMMARY

Chapter 400, part IV, F.S., provides for the development, establishment, and enforcement of basic standards that will ensure the safe and adequate care of persons receiving health services in their own homes. This part provides separate and specific licensure requirements for home health agencies and nurse registries. This report looks specifically at s. 400.506, F.S., to determine if this section should be repealed.

This part of ch. 400, F.S., recognizes home health agencies and nurse registries as two entities that may be licensed in Florida to provide home health care. A home health agency by definition, is an organization that provides home health services. A nurse registry is defined as any person that procures, offers, promises, or attempts to secure health-care-related contracts for health care providers who are compensated by fees as independent contractors. Home health agencies must provide at least one service using an individual who is an employee of the agency. Nurse registries may work exclusively with independent contractors. There are 1,174 licensed home health agencies and 49 licensed nurse registries in Florida.

Staff conducted in-depth research of this topic and related issues. During the investigative process, staff developed a survey that was sent to operators of home health agencies and nurse registries. Staff attended meetings with representatives of both industries. Input was solicited from state and federal agencies such as the Agency for Health Care Administration, the Department of Labor and Employment Security, the Department of Revenue, and the Internal Revenue Service.

Proponents of repealing this section raise several issues. They are concerned that the current regulatory situation is unfair to:

- the state;
- health care providers that function as independent contractors;
- patients receiving care in their homes; and
- home health agencies.

They contend that if this section is not repealed all private funded home health agencies will eventually seek licensure as nurse registries.

Opponents maintain that nurse registries are a cost-effective alternative for consumers. They purport that registries are beneficial to those caregivers that choose to operate as independent contractors and desire assistance in obtaining contracts. They maintain that a change in the current regulatory situation would not be beneficial to the state, consumers or home health care providers; it would simply raise the cost of care.

Staff received 35% (89/259) of the surveys mailed out. Based on the survey results and on conversations with member of both industries, staff identified the following concerns as central to this project:

- Taxes
- Liability
- Cost of care

Research revealed that allowing individuals to operate as independent contractors who seek contracts through nurse registries, does not subject the state to any undue tax liability. Regarding personal liability, home health agencies do afford a greater assurance to a patient that in the event of an injury, damages may be recovered. Research also indicated that nurse registries offer care at a lower cost (up to 20-30% less) than do home health agencies.

Staff identified two options that the Legislature might pursue:

1. Repeal s. 400.506, F.S. - would effectively eliminate nurse registries. Eliminating nurse registries would leave consumers with two alternatives:
 - A. Seek home health care from home health agencies - would cost consumers more money to obtain care from a state licensed entity; or
 - B. Hire an individual not affiliated with any organization - would expose consumers to independent contractors that will not have been subject to any manner of background screening.
2. Make no change to the current regulatory process - would allow home health agencies and nurse registries to continue coexisting. Consumers would have greater choice when seeking in-home care. This would help to keep home health care costs down and would enable the state to maintain oversight of independent contractors wishing to use nurse registries to market their services.

Based on the findings and conclusions in this report it would not be beneficial to the state, independent contractors providing home health care, or consumers seeking home health care to repeal this section. It is therefore recommended that the Legislature not repeal s. 400.506, F.S.

RESEARCH QUESTION & METHODOLOGY

The Research Question

Should s. 400.506, F.S., authorizing the licensure of nurse registries be repealed?

Methodology

In May 1999, Associated Home Health Industries, Inc., suggested that the Committee on Health Care Licensing and Regulation conduct a review to determine whether the Legislature should repeal the nurse registry regulation. This request was forwarded to the Speaker of the House for consideration as an interim project. On June 4, 1999, the Speaker released the approved list of projects for Summer 1999, and the committee was authorized to proceed with this review.

In order to gain a better understanding of the impact of this repeal, the chair facilitated meetings in June and July, of all involved parties, allowing representatives of both industries to share their views and concerns relating to this issue. In an effort to develop a more complete understanding of the home health care industry, staff attended meetings of the Task Force on Home Health Services Licensure Provisions established pursuant to CS/SB 2360. This task force is charged with reviewing the provisions of part IV of chapter 400, F.S. A portion of this task force's study includes a review of the section in question (s. 400.506, F.S.).

Committee staff distributed a questionnaire to home health agency operators and to nurse registry operators around the state. The survey was sent to 210 of the 1,174 home health agencies and to all 49 nurse registries currently licensed in Florida. Nearly 35% (89/259) of the surveys were returned. Staff also conducted personal telephone interviews with owners of both types of businesses.

During the investigative process staff consulted various state and federal agencies. These contacts included the Agency for Health Care Administration, the Internal Revenue Service, the Department of Labor and Employment Security, and the Department of Revenue.

BACKGROUND INFORMATION

Legislative History

- *Nurse Registries*

Nurse registries were first defined and regulated by the state in 1947, under the Private Employment Agency regulatory law, ch. 24080, Laws of Florida. This law was administered by the Florida Industrial Commission. In 1957, ch. 24080, Laws of Florida, was renumbered as ch. 449, F.S., and in 1961, administration of this chapter was transferred to the Secretary of State. In 1969, the Department of State was created and the Division of Corporations, established by law, took control of the regulation of Private Employment Agencies. In 1974, a new division, the Division of Licensing, was created and given control of this regulatory function. The Regulatory Reform Act of 1976 provided for repeal of ch. 449, F.S., on July 1, 1980, unless reenacted or revised. Pursuant to this act all regulation of nurse registries was repealed.

Nurse registries were not explicitly defined again by law until 1990. However, in 1985, the Department of Health and Rehabilitative Services (HRS) developed, pursuant to its rulemaking authority, a definition of home health services that encompassed nurse registries that operated on a for-profit basis. Under that rule, nurse registries were regulated in the same manner as home health agencies. In 1990, the Legislature enacted ch. 90-101, Laws of Florida, which provided for the definition and licensing of nurse registries as entities separate from home health agencies. Section 2, ch. 90-101, Laws of Florida, exempted nurse registries from the licensing requirements of home health agencies and created separate licensure requirements for registries. In 1993, ch. 93-214, Laws of Florida, amended ch. 400, F.S., granting regulatory authority for home health agencies and nurse registries to the Agency for Health Care Administration (AHCA). This law also allowed nurse registries to refer certified nursing assistants and required that a registered nurse make monthly visits to a patient's home to assess the quality of care being given by the certified nursing assistant.

- *Home Health Agencies*

Home health agency regulations in Florida were first enacted in 1975 through ch. 75-233, Laws of Florida. Since 1975, the statutes have been amended several times. The first significant change to the statutes occurred in 1983 through the implementation of ch. 83-181, Laws of Florida. This revision divided ch. 400, F.S., into separate parts. Home health agencies were placed in part III, of chapter 400, F.S. The next significant changes to the statutes came about in 1990 as ch. 90-319, Laws of Florida. Sections 400.461 and 400.462, F.S., were amended to redefine "home health agency" to include non-Medicare service providers, expand the applicability of licensure requirements, and redefine "home health services." These changes brought all home health care agencies under the

auspices of government regulation, not just those agencies that were “certified or seek[ing] certification as a Medicare home health service provider.”

In 1993, the Legislature enacted ch. 93-214, Laws of Florida. This act reassigned oversight of home health agencies to AHCA. It also further revised the definition of a home health agency to include organizations providing “staffing services for health care facilities.”

The most recent changes to the statutes were enacted through the adoption of CS/SB 2360 which became ch. 99-332, Laws of Florida. This law creates a definition of an “organization” which includes any “corporation, government or governmental subdivision or agency, partnership or association, or any other legal or commercial entity” that involves more than one health care professional discipline or a combination of a health care professional and a home health aide or certified nursing assistant in the act of providing in-home care. This change is intended to clarify the definition of a home health agency and to strengthen the licensure requirements. The law also provides grounds for disciplinary action to be taken against home health agencies operating without a license, requires a patient assessment to be done and a plan of care to be created for any patient not under a doctor’s care, and establishes a Task Force on Home Health Services Licensure Provisions. These provisions all took effect October 1, 1999.

Current Law

As established by law (ch. 400, part IV, F.S.) and by administrative rule (59A-18.001-.017 and 59A-8.001-.0245, F.A.C.), home health agencies and nurse registries are two distinct types of home health care providers and must comply with separate regulatory requirements. Listed below are some of the major differences in the regulations:

- Nurse registries may only procure contracts for registered nurses (RN), licensed practical nurses (LPN), home health aides, certified nursing assistants (CNA), and homemaker/companions. Home health agencies may supply all of these services as well as provide various types of therapists and social workers. They may also supply nutritional guidance and medical supplies to patients. Both industries may provide staffing services to health care facilities.
- By rule, home health agencies are assessed a licensing fee of \$830. By rule, nurse registries are assessed a licensing fee of \$689.
- Home health agencies must have a registered nurse or physician available during operating hours. Any patient receiving skilled care must be visited by a RN every two weeks. Nurse registries are not required to provide any RN care except to patients receiving CNA or home health aide services.
- Home health agencies are required to obtain a physician's order prior to the start of all services while nurse registries only need a medical plan of treatment if medication or medical treatment is administered.
- Home health agencies must submit evidence signed by a certified public accountant that they have the financial ability to operate for two years. Nurse registries must present a first year operating budget. Home health agencies are required, by law, to carry liability insurance. Nurse registries are required, by rule, to carry liability insurance.
- Homemakers or companions employed by home health care agencies must be evaluated by a RN every six months. Homemakers or companions referred by a nurse registry require no supervision.
- Home health agencies are required to develop a plan of care for all patients and nurse registries are not.
- When a home health agency discontinues care to a patient the agency must inform the patient of the reason and develop a plan of care and make a referral to another home health agency. Nurse registries must inform the patient of the reason for the termination of services.

COMPARISON BETWEEN CERTIFIED AND NON-CERTIFIED HOME HEALTH AGENCIES & NURSE REGISTRIES

	Minimum Standards all HHAs must meet State licensure	Federal Certification Medicare & Medicaid	Nurse Registries State licensure
Services	1. Home health services, including: <ul style="list-style-type: none"> • Nursing • Physical, speech, occupational, respiratory therapy • Home health aide • Social work • Nutritional guidance • Homemaker, sitter, companion • Medical supplies 2. Staffing services for health care facilities	<ul style="list-style-type: none"> • Nursing • Physical, speech, occupational, therapy • Home health aide • Medical social services 	Procures contracts for registered nurses, L.P.N.s, certified nursing assistants, home health aides, homemakers, sitters, companions for private duty patients or staffing services to health care facilities
Fees for licensure	\$830 for state license	Must be state licensed - no additional fee	\$689 for state license
Nursing supervision	Director of Nursing or similarly qualified alternate [Same as federal] R.N. may assign selected portions of patient care to L.P.N.s & home health aides, but always retains full responsibility for care & making supervisory visits	Registered nurse (public health, 1 year experience) or physician available at all times during operating hours; personnel development & assignment; participates in all activities RN or therapist must visit patient receiving skilled care every 2 weeks Aides are supervised on-site at least every 62 days	None required except patients receiving C.N.A. and home health aide services in the home must get monthly visit from registered nurse to assess quality of care

	Minimum Standards all HHAs must meet State licensure	Federal Certification Medicare & Medicaid	Nurse Registries State licensure
Physician's order	Required prior to the start of all services except home health aide and homemaker, sitter, companion Same as federal	Required prior to the start of all services Plan of treatment reviewed at least every 62 days or more often if patient's condition changes	When medical treatment and medication is administered, physician's orders in writing are included in the clinical record
Geographic area	Any AHCA geographic area from single office Each office in a different county must be licensed	An AHCA geographic area For Medicaid, each location must be enrolled as a provider	Area not limited from single office Each office in a different county must be licensed
Distance between parent and branch offices	Distance not limited	Branch office must be sufficient close to share administration; Branch cannot be more than 1 1/2 hours from parent office	Not specified
Financial stability	Require proof of financial ability to operate by a 2 year income and expenditure projection signed by a CPA Liability insurance	Requires information on all offices and board members owning 5% or more Fiscal Intermediary must approve initial federal application Surety Bond required for Medicaid & will be required for Medicare 3 months capitalization required for Medicare Annual operating budget required Liability insurance	First year operating budget including income and projected expenditures Liability insurance

	Minimum Standards all HHAs must meet State licensure	Federal Certification Medicare & Medicaid	Nurse Registries State licensure
Certificate of need	Not required	Required for Medicare but not Medicaid	Not required
Personnel qualifications	Specified in state rules for all health care professionals and patient care staff	Specified in federal regulations; more stringent than state except for administrator	Specified in state rules
Administrator	Same as federal	Administrator must be a physician, registered nurse, or has training & experience in health service administration & 1 year supervisory or administrative experience in HH care or related health programs	Same except experience can be in a health care field
Home Health Aide	Minimum 40 hours of training; & 12 hours in- service annually No competency evaluation	Minimum 75 hours of training; & same in-service Requirements for trainer specified Competency evaluation	Home health aides just added in CS/SB 2360. Rules are being revised
Homemaker, companion, sitter	16 hours of training R.N. must evaluate appropriateness every 6 months	None	16 hours of training No evaluation required
Coordination of services	Nursing director must coordinate all services	All personnel must coordinate services. Case conferences required. Reports to physician required at least every 62 days	Designate a nurse to coordinate if more than one nurse sees a patient
Patient assessment	Required for all patients prior to start of care	Required, using OASIS, at start of care and specified time periods	Only required for patients receiving care from certified nursing assistant

	Minimum Standards all HHAs must meet State licensure	Federal Certification Medicare & Medicaid	Nurse Registries State licensure
Plan of care	Required for all patients; content specified in rule. Includes plan of medical treatment Service provision plan for home health aides & homemakers services	Required; additional content specified in regulation. Includes plan of medical treatment	None required; only a medical plan of treatment if patient is under physician's care and receives medical treatment and medications from nurse
Patient rights	<ul style="list-style-type: none"> Must be informed of right to report abuse, neglect, exploitation to DCF Central Abuse Registry Confidentiality of patient records When agency terminates a patient still needing care, a plan must be developed & a referral made to an appropriate HHA prior to termination. Patient must be notified in writing of date, reason for termination, plan & referral. Must provide information on advanced directives 	<p>Patient rights specified</p> <ul style="list-style-type: none"> Must be notified of rights prior to start of services; Must be notified of costs prior to service; Right to be informed & participate in planning care & treatment Confidentiality of medical records Home health hotline (part of the AHCA 1-888-#, linked to Consumer Assistance Unit) Must provide information on advanced directives 	<ul style="list-style-type: none"> Must be informed of right to report abuse, neglect, exploitation to DCF Central Abuse Registry Must be informed of date & reason for termination of services
Evaluation by group of professionals	Not required	Required	Not required
Services under contract	Fewer requirements than federal Personnel history & reference checks	Eight requirements in regulation Personnel history & reference checks	No requirements other than reference checks
Background Screening	Level 2 for administrators & chief financial officers; Level 1 for employees	No additional requirements	Same as HHA

FINDINGS

Industry Positions

The points presented in the ensuing two sections are the positions of the home health agency industry and the nurse registry industry, respectively. The positions reported are those that were furnished to staff as research was conducted relating to this project.

• *Proponents' Position*

The proposal being researched calls for the repeal of s. 400.506, F.S. Proponents of the proposal submitted the following five assertions for repeal:

- The current regulatory situation is unfair to the citizens of the state of Florida.
- The current regulatory situation is unfair to individuals referred by nurse registries.
- The current regulatory situation is unfair to patients who receive care from individuals referred by nurse registries.
- The current regulatory situation is unfair to home health agencies.
- If s. 400.506, F.S., is not repealed, all private-funded home health agencies in the state will seek licensure as nurse registries. This would be a negative development for both Florida's in-home care providers and consumers.

It is asserted that this section is unfair to citizens of Florida in at least two ways. The first is that taxes paid to the state and federal government are less assured of collection. Second, since nurse registry field staff operate as independent contractors, they are not protected by Worker's Compensation, medical or malpractice insurance, or any retirement funding mechanism. This means that many of these independent contractors will look to the state for assistance through programs such as Medicaid.

Furthermore, proponents contend that this situation is not fair to independent contractors referred by nurse registries. They do not enjoy any of the protections afforded employees under federal and state statutes. These contractors are not covered by Worker's Compensation, the Equal Opportunity Employment Act, the Fair Labor Standards Act or any other similar acts.

The third assertion is that the current regulations are unfair to patients who receive care through a nurse registry. Most patients do not realize that by using an independent contractor they are increasing their personal liability exposure. These contractors operate independently from nurse registries and are

therefore not covered under the registry's liability policy. If a patient is injured the only claim that they have is against the individual contractor.

The proponents also maintain that the current situation is unfair to home health agencies. They claim that both home health agencies and nurse registries provide the patients with nursing and home health aide staff and therefore should be regulated in the same manner.

Finally, those supporting the repeal of s. 400.506, F.S., contend that if the section in question is not repealed, virtually all private funded home health agencies will eventually become licensed as nurse registries, and that this would have a negative impact on Florida's in-home care providers and consumers.

- *Opponents' Position*

Opponents to the proposal to repeal s. 400.506, F.S., submitted the following claims for consideration:

- Home health agencies are seeking this change because of a reduction in available funds due to Medicare cutbacks.
- Nurse registries are a cost effective alternative in the arena of in-home care, which should not be eliminated.
- Eliminating nurse registries would be unfair to independent contractors.
- There is no reason to change the current situation.

Opponents to the proposal maintain that federal cutbacks in the Medicare program have led home health agencies to seek new markets. These agencies want government assistance to regulate competition out of existence.

They also maintain that nurse registries provide a cost effective mechanism for in-home care. On average, nurse registries are able to provide equivalent care at a 20-30% lower cost. These savings are passed on to the consumer. If registries are eliminated, many consumers would not be able to afford adequate care. They would then be forced to rely on the state to subsidize the cost of additional care or be forced to seek it from a cheaper source. This would mean hiring unregulated individuals from "off the street," effectively eliminating any government oversight and exposing consumers to greater risk.

Another claim is that eliminating nurse registries would be unfair to independent contractors. Nurse registries serve as a marketing mechanism for independent contractors. If nurse registries were to be eradicated it would become much more difficult for individuals to market their services.

The final assertion made by opponents of this proposal is that there simply is no reason to enact a change to the statute. No complaints have been made by consumers or by caregivers who contract through nurse registries. The only complaint has been raised by those who stand to profit from a change in current regulation.

Survey Findings

The In-home Health-Care-Related Questionnaire, submitted to all 49 nurse registries and a selected number of home health agencies, is included at the end of this section.

- *Nurse Registries*

The following is a summary of responses to selected questions on the survey sent to nurse registries:

What are the advantages to a patient of using a nurse registry? What are the disadvantages?

The advantages most frequently identified were reduced costs to patients, more involvement by the patient and family in planning the care that is to be delivered and more freedom of choice in selecting the caregiver. The only reported disadvantage was the inability of nurse registries to accept Medicare or Medicaid.

How are self-employed caregivers (independent contractors) of nurse registries accountable regarding the payment of taxes? Are they required to be covered by unemployment insurance?

In nearly all cases the nurse registries responded that they submit a 1099 Misc. form to the IRS for informational purposes and they provide a copy to the independent contractor. Independent contractors are not required to carry unemployment insurance.

If a patient is injured or harmed by a person on contract with a nurse registry, who is liable? Are these independent contractors required to carry malpractice insurance?

The nurse registry is liable for making an inappropriate referral and for not following the required background screening guidelines. To this end, nurse registries are required by administrative rule to carry liability insurance. The independent contractor would be liable for any injury that occurs in the home. Independent contractors are not required to carry malpractice insurance.

How do you screen applicants for employment?

All nurse registries are required to perform an abuse registry check, an employment history check, and obtain a criminal background check through the Florida Department of Law Enforcement. Administrators must submit to all of these screenings plus they are required to have an additional criminal screening through the Federal Bureau of Investigation.

How would the following be affected by the repeal of s. 400.506, F.S.:

(A) Patient

The nurse registries indicated that patients would suffer. They would have less choice, less flexibility and less control in planning their care. The cost of obtaining in-home care would rise substantially, causing consumers to be unable to afford adequate care.

(B) Self-employed caregiver

They would suffer in the ability to market their services. This would lead to a reduction in income and make it more difficult to obtain clients.

(C) Home health agency

These agencies would benefit from the elimination of their competition. Nurse registries claim that the elimination of s. 400.506, F.S., would give home health agencies a monopoly in the home health care industry.

(D) Nurse registry

Nurse registries believe that they would be forced out of business by the proposed change in regulation.

• *Home health agencies*

Below is a summary of responses to selected questions from the survey sent to home health agencies:

What are the advantages to a patient of using a home health agency? What are the disadvantages?

Home health agency owners responded that the advantages to a client are an ability to provide care to Medicare and Medicaid beneficiaries and continuity of care especially to those clients needing specialized care. The agency assumes all responsibility for reporting taxes and for providing liability coverage for its employees. Home health agencies also offer twenty-four hour RN supervision. The only reported disadvantage was a higher price due to overhead that is not present in running a nurse registry.

If a patient is injured or harmed by a home health agency employee, is the home health agency liable or is the employee liable?

In all instances, home health agencies indicated that they would be liable for the actions of their employees. Home health agencies are required to carry liability insurance of not less than \$250,000 per incident.

How do you screen applicants for employment?

All home health agencies are required to perform an abuse registry check, an employment history check, and obtain a criminal background check through the Florida Department of Law Enforcement. Administrators must submit to all of these screenings plus they are required to have an additional criminal screening through the Federal Bureau of Investigation.

How would the following be affected by the repeal of s. 400.506, F.S.:

At least half of the respondents indicated that they were not clear what effect the repeal of this section would have. Many of the home health agencies were not familiar with this section. The responses from the remaining respondents are listed below.

(A) Patient

Home health agencies responded that the price of care would go up but patients would receive a higher level of care due to required RN supervision. Also, the client would benefit from a reduced level of risk exposure.

(B) Self-employed caregiver

They would still be able to work independently if they desired. The other alternative would be to become an employee of a home health agency.

(C) Home health agency

Home health agencies indicated that the repeal of this section would allow them to compete again on a "level playing field." All organizations providing in-home care would have the same regulations.

(D) Nurse registry

With the repeal of this section they would cease to exist. They would have to become licensed as a home health agency or close down.

In-home Health-Care-Related Questionnaire

1. Your entity is licensed as a _____
 - (a) What services do you provide?
 - (b) How do you interact with a physician?
 - (c) Do your services require a doctor's ordered plan of care?
 - (d) Do you provide a supervisory visit by a registered nurse (RN) of the work of non-RN persons?

2. What are the advantages to a patient of using a nurse registry? What are the disadvantages?

3. What are the advantages to a patient of using a home health agency? What are the disadvantages?

4. What impact does a managed care organization have in determining whether a patient utilizes the services of a nurse registry or a home health agency? Do you have contracts with managed care organizations? Do you receive referrals and payments from managed care organizations?

5. Studies indicate that home health agencies were created to meet the needs of Medicare and Medicaid beneficiaries and remain as the sole source of home care that is eligible to participate in the Medicare program. How have cutbacks in Medicaid and Medicare programs affected the level of care/services provided by home health agencies?

6. Are there deficiencies in the existing regulation of home health agencies? Of nurse registries?
 - (a) Have you had an Adult Protection Services investigation of any person referred by your nurse registry?
 - (b) Have you had an Adult Protection Services investigation of any person referred by your home health agency?
 - (c) How many complaints have been made to the Agency for Health Care Administration about your home health agency? Your nurse registry?

7. How are self-employed caregivers (independent contractors) of nurse registries accountable regarding the payment of taxes? Are they required to be covered by unemployment insurance?

8. If a patient is injured or harmed by a person on contract with a nurse registry, who is liable? Are these independent contractors required to carry medical malpractice insurance?
9. If a patient is injured or harmed by an home health agency employee, is the home health agency liable or is the employee?
10. Both home health agencies and nurse registries have a screening process to provide patients and families protection against the risk of engaging a caregiver who has a criminal background or who misrepresents his or her background or experience. How can this procedure be strengthened to provide additional safeguards?
11. How do you screen applicants for employment? (check all that apply)
Abuse Registry _____ FDLE _____ FBI (fingerprint) _____
Local screening _____
12. Should the state license and regulate all In-Home health-care-related services?
 - (a) Should *only* home health agencies provide in-home health-care-related services?
 - (b) If nurse registry statutes were repealed (s. 400.506, F.S.), would current law require you to be licensed as a home health agency to deliver in-home care?
13. How would the following be affected by repeal of s. 400.506, F.S.:
 - (a) patient
 - (b) self-employed caregiver\health care provider (i.e., certified nurse assistant, registered nurse, licensed practical nurse, homemaker, companion, home health aide, etc.)
 - (c) home health agency
 - (d) nurse registry
14. Additional comments if needed.

Research Findings

- *Quality of Care*

Quality of care has not been an issue in this project. The agency with primary oversight jurisdiction of this industry has not questioned the quality of care being provided to consumers in Florida. During the June meeting with the chair, both industries also agreed that this is not an issue.

- *Taxes*

Survey responses indicate that nearly all nurse registries in Florida use 1099 Misc. forms to report monies earned by independent contractors to the IRS for informational purposes. Registries also provide a copy to each individual that they refer. The IRS, in a report submitted to Congress, indicated that when 1099 Misc. forms are filed for informational purposes, independent contractors report 97% of the amounts as income.

Department of Labor and Employment Security statistics reveal that as of 1996 there were 1,048 licensed home health agencies in Florida that employed over 44,000 individuals. Total Unemployment Compensation contributions to the state by employers on behalf of those employees totaled \$3.5 million. The total Unemployment Compensation trust fund had a balance of \$1.9 billion. If all of these employees were to become independent contractors they would no longer be eligible to receive Unemployment Compensation. Accordingly, they would no longer be subject to state Unemployment Compensation taxes. The revenue lost by the state in this scenario would amount to less than .002% of the annual balance of the state's Unemployment Compensation trust fund.

Staff determined that based on this information, there is no undue tax liability inherent in allowing an individual to operate as an independent contractor.

- *Liability*

Section 400.471, F.S., requires that home health agencies maintain liability insurance in an amount not less than \$250,000 per claim. Administrative rule requires that nurse registries also carry liability insurance, but no dollar amount is specified.

In the case of a nurse registry, their liability is limited to ensuring that they refer appropriately screened and qualified individuals. The independent contractor is liable for any injury to a patient that results directly from his or her actions or through negligence on his or her behalf. There is no statutory requirement that independent contractors carry liability insurance. The insurance carried by the home health agency covers all employees of the agency.

Home health agencies do afford a greater assurance to a patient that in the event of an injury, damages may be recovered. It is entirely plausible that a patient would not be able to recover any damages from an uninsured independent contractor.

- *Cost*

Nurse registries offer in-home care at a lower cost than do home health agencies. Research conducted among the long-term care insurance community indicates that the existence of nurse registries in Florida has reduced the cost of services delivered by 20-30%. These savings are passed on to consumers. Eliminating nurse registries would raise in-home care costs and eliminate a home health care alternative for consumers.

CONCLUSIONS & RECOMMENDATIONS

Nurse registries and home health agencies are intended to be two separate and distinct entities that operate under separate guidelines. The Legislature expressly provided that nurse registries could operate with independent contractors and would act as a broker of home health care services. The statutes are clear that nurse registries should be regulated separately since they perform functions distinct from home health agencies. The state allows independent contractors to operate in many industries. Allowing them to function as home care providers does not expose the state to any excessive tax liability.

Individuals that contract through nurse registries do so by choice. They waive the protections and benefits offered to employees such as Worker's Compensation, Unemployment Compensation, or the Equal Opportunity Employment Act by opting to be self-employed.

Patients that choose to contract with an independent contractor may be subject to a higher level of risk. Since there is no requirement that independent contractors carry liability insurance, if a patient is injured by a contractor, there is a higher likelihood that they will not be able to receive any monetary compensation.

Home health agencies provide a service that is different from that provided by nurse registries and they are regulated more heavily. If this is an undue burden, they are free to become nurse registries and be regulated accordingly.

Nurse registries and home health agencies are two separate and effective methods through which consumers can find in-home health care. Eliminating nurse registries would limit consumer alternatives in obtaining in-home care. This course of action would also effectively raise the cost of care by 20-30%.

There are two options that the Legislature might pursue:

1. Repeal s. 400.506, F.S. - would effectively eliminate nurse registries. Eliminating nurse registries would leave consumers with two alternatives:
 - A. Seek home health care from home health agencies - would cost consumers more money to obtain care from a state licensed entity; or
 - B. Hire an individual not affiliated with any organization - would expose consumers to independent contractors that will not have been subject to any manner of background screening.

2. Make no change to the current regulatory process - would allow home health agencies and nurse registries to continue coexisting. Consumers would have greater choice when seeking in-home care. This would help to keep home health care costs down and would enable the state to maintain oversight of independent contractors wishing to use nurse registries to market their services.

Based on the findings and conclusions in this report it would not be beneficial to the state, independent contractors providing home health care, or consumers seeking home health care to repeal this section. It is therefore recommended that the Legislature not repeal s. 400.506, F.S.