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## OLR Bill Analysis

### sHB 5312 (as amended by House “A” and “B”)\*

#### ***AN ACT ESTABLISHING A TASK FORCE TO STUDY THE EFFECT OF COLLECTIVE BARGAINING FOR CERTAIN STATE EMPLOYEES.***

#### **SUMMARY:**

This bill allows certain family child care providers and personal care attendants (PCAs) to collectively bargain with the state through an employee organization (i.e., a union) over reimbursement rates, benefits, payment procedures, contract grievance arbitration, training, professional development, and other requirements and opportunities. It explicitly states that the child care providers and PCAs are not state employees; thus they are not covered by the rights, obligations, privileges, and immunities statutorily provided to state employees.

It establishes a collective bargaining and arbitration process for the child care providers and PCAs and grants them many of the same collective bargaining rights and obligations given to state employees. It also specifically prohibits certain subjects from being collectively bargained and sets conditions under which the General Assembly must affirmatively approve any contract or arbitration award.

The bill creates a PCA Workforce Council to study and plan for improving PCA quality, stability, and availability. It also (1) requires the Department of Social Services (DSS) and the council to compile and maintain lists of covered child care providers and PCAs lists, respectively; and (2) provides liability protection for the state under certain circumstances.

\*House Amendment “A” replaces the original bill (File 218), which created a task force to study the potential effect of collective bargaining on the pensions, health care, and working conditions of nonunionized state employees.

\*House Amendment “B” prohibits the unions from charging dues or nonmember service fees to child care providers and PCAs during the first 60 days that they participate in their respective programs.

EFFECTIVE DATE: July 1, 2012

### **§ 1 — FAMILY CHILD CARE PROVIDERS**

The bill applies to child care providers paid by the state’s Care-4-Kids program to provide day care in (1) family day care homes (i.e., private family homes with up to six children) or (2) their own homes to the children of neighbors or relatives. The Care-4-Kids program subsidizes child care costs for low- and moderate-income families while a parent is working or attending a temporary family cash assistance approved education or training program (i.e., a Jobs First participant).

### **§ 4 — PERSONAL CARE ATTENDANTS**

PCAs provide home- and community-based personal care services to the elderly and disabled through Medicaid waivers that allow services to be provided to the people in their own homes (rather than the standard Medicaid assistance that is only available through institutions such as nursing homes).

The bill specifically applies to the following PCA waiver programs:

1. individuals with brain injuries (CGS § 17b-260a),
2. personal care assistance program for adults with disabilities (CGS § 17b-605a),
3. home care program for the elderly (CGS § 17b-342),
4. home care pilot for disabled persons (CGS § 17b-617),
5. individual and family support administered by Department of Developmental Services (DDS),
6. comprehensive waiver program administered by DDS, and

7. any state-funded programs that provide services from a PCA.

Under the bill, a PCA must be someone who is employed by a consumer or surrogate to provide personal care assistance to a consumer.

It defines consumer as a person who receives services from a PCA under a state-funded program, including any of those listed above. A surrogate means a consumer's legal guardian or a person named in an agreement as being responsible for the consumer's care. Personal care assistance means supportive home care, direct support services, personal care, or another nonprofessional services provided to a person with a disability or an elderly person who needs assistance to (1) meet daily living needs, (2) ensure he or she can adequately function at home, or (3) provide him or her with safe access to the community.

## **§§ 2 & 6 — COLLECTIVE BARGAINING**

### ***Union and Employer Determination***

Under the bill, the exclusive bargaining agents (unions) for the family child care providers or PCAs must be certified by the State Board of Labor Relations (SBLR) under either the (1) statutory procedure used to certify state employees' unions or (2) procedure for certifying a family child care providers' union or PCA union established under Governor Malloy's Executive Orders Nine and Ten, respectively. The bill requires the SBLR to certify a union without an additional election if it can prove that it had been certified under one of the executive orders before July 1, 2012. Any elections to resolve representation issues must be conducted by mail ballot.

The bill limits the child care providers to one statewide bargaining unit. It allows the PCAs to be in (1) one statewide bargaining unit, (2) a state-wide unit of PCAs who provide service under a DSS program, or (3) a statewide unit of PCAs who provide services under a DDS program. PCAs who are members of the consumer's or surrogate's family cannot be excluded from a bargaining unit due to their familial relationship.

Under the bill, as under the law for state employees, the SBLR determines PCA bargaining units.

For child care providers, the bill, like current law, specifies that DSS is an executive branch employer represented by the Office of Policy and Management (OPM) in collective bargaining negotiations. The bill places the newly created PCA council within the executive branch but does not say the council is the employer.

### ***Collective Bargaining Subjects***

Although not considered state employees, the bill provides child care providers and PCAs with many of the same bargaining rights, obligations, and protections given to state employees, including the right to organize, an obligation to provide fair representation, protection from being discharged or discriminated against for organizing, and a prohibition against strikes. However, the bill prohibits them from bargaining over (1) state employee pension or health care benefits; (2) a parent, consumer, or surrogate's right to hire, fire, and direct a child care provider or PCA's activities; and (3) grievance arbitration against parents, consumers, or surrogates.

Under the bill, no provision in a contract or arbitration award can reduce child care provider or PCA services. Any provision that would require an additional appropriation to maintain existing service levels must be affirmatively approved by the General Assembly. The bill also prohibits the SBLR from deciding any complaints that a parent (for child care providers), consumer, or surrogate (for PCAs) committed an act prohibited by an employer.

Current collective bargaining laws for state employees require nonmember service fees, instead of union dues, to be deducted from the wages of an employee who does not wish to join the union representing his or her bargaining unit. The bill does not require that these fees be deducted from the PCA's or child care provider's payments but instead allows a contract or arbitration award to require the state or its fiscal intermediary to deduct dues or fees from the state's payments. Nonmember service fees must be the lesser of either

the dues and initiation fees paid by union members or a proportionate share of the union's costs for collective bargaining. Under the bill, the dues and fees can only be deducted from payments from the Care-4-kids program (for child care providers) or the waiver program in which a PCA's consumer is participating. No dues or fees can be deducted from a child care provider or PCA's payments during the first 60 days that they are participating in their respective programs.

The bill excludes unionized child care providers and PCAs from other provisions of the collective bargaining laws for state employees, including:

1. the timetable for negotiations and arbitration (the bill replaces it with a new timetable);
2. the requirement for a party to pay interest on overdue arbitration awards;
3. the General Assembly's approval process (the bill replaces it with a new approval process);
4. the requirement for the legislature to appropriate funds needed for an approved contract or award;
5. allowances for negotiations to continue past the legislature's budget deadline and contracts to be retroactive;
6. a requirement that the provisions in an approved contract supersede any conflicting laws or regulations;
7. the mandate for coalition bargaining for pension and health benefits (i.e., SEBAC); and
8. an exemption from binding arbitration for non-mandated collective bargaining subjects.

***Collective Bargaining and Arbitration Process***

The bill establishes a contract negotiation and arbitration process separate from the process used by state employees' unions. The

process is the same for family child care providers and PCAs. The bill gives the parties 150 days to negotiate a contract (it does not specify when negotiations must begin). If they have not reached an agreement within that time, they must jointly select an arbitrator who (1) has experience as an impartial arbitrator in labor-management disputes and (2) is not employed as an advocate or consultant for labor or management in labor-management disputes. If the parties cannot agree on an arbitrator within 10 days, the bill requires an arbitrator to be selected using the procedure under the American Arbitration Association's voluntary labor arbitration rules.

Once the parties have an arbitrator, the bill requires them to submit their last best offer on each unresolved issue. The arbitrator must then hold a hearing to allow them to provide evidence and arguments. The parties can also submit written briefs. Under the bill, the arbitration record is closed at the end of the hearing or once the arbitrator receives the briefs, whichever is later. The bill does not specify a timeline for the hearing process to occur.

In coming to a decision, the bill requires the arbitrator to select one party's proposal on each unresolved issue (issue-by-issue last best offer decisions). The arbitrator must consider:

1. the nature and needs of the particular program and the needs and welfare of the parents, children, or consumers served by the program, including better recruitment, retention, and quality of family child care providers or PCAs, as the case may be;
2. the history of negotiations between the parties;
3. the existing employment conditions of similar groups of workers;
4. cost of living changes; and
5. the interests and welfare of the covered family child care providers or PCAs.

Unlike state employee collective bargaining, the arbitrator is not

required to consider the ability of the employer to pay.

The bill requires the parties to split the costs and fees incurred in the arbitration process.

***General Assembly Approval***

The bill requires any contract or arbitration award to be submitted to the General Assembly for approval. Any provisions in the contract or award that requires supersedence of any law or regulation must be affirmatively approved by the General Assembly. In addition, any provision that requires additional appropriations to maintain existing levels of service must be approved by the budgetary process applicable to appropriations, including affirmative legislative approval. Presumably, the Office of Labor Relations will determine what provisions of a contract or award require supersedence of a law or regulation or require an appropriation, as it does for the state's other collectively bargained contracts.

Under the bill, contract or award provisions that neither supersede existing laws nor regulations nor involve additional appropriations are automatically approved unless the General Assembly affirmatively rejects them by a majority vote of either chamber within 30 days after they were filed. The General Assembly must be in regular session when the 30 day deadline begins and ends.

Once a contract or award provision has been approved, that provision does not need to be resubmitted to the General Assembly if it is identically repeated in future contracts or awards.

**§ 5 & 6 — PROVISIONS SPECIFIC TO PCAS**

***Collective Bargaining***

The bill prohibits the following subjects specifically from PCA bargaining:

1. any proposal that prevents surrogates from hiring PCAs not on the registry list described in the bill,
2. any proposal that prevents consumers or surrogates from

requiring any additional training, and

3. a procedure for grievance arbitration against any consumer or surrogate.

Furthermore, no agreement or arbitration award can provide for a reduction in (1) Medicaid funds provided to the state or (2) PCA services to consumers.

Any provision in any agreement or award which would require an additional appropriation in order to maintain the levels of services provided by existing appropriations must be submitted to the General Assembly for approval in accordance with the bill's provisions.

Also, programs where consumers' budgets for direct support services are allocated through an individual budget methodology must be increased to accommodate additional expenses when a contract negotiated under the bill or an award includes increases in wages or benefits.

The bill specifically prohibits SLRB from having any authority or jurisdiction to rule on a complaint of a prohibited act filed against a consumer or a surrogate under state employee collective bargaining law.

***Other***

The bill states that it does not alter the obligations of the state or a consumer to pay their respective shares of Social Security, federal and state unemployment contributions, Medicare, or workers' compensation insurance.

**§ 5 — PCA WORKFORCE COUNCIL**

The bill establishes a 13-member PCA Workforce Council made up of state officials and representatives of the populations served by PCAs and lists their duties and responsibilities.

The council consists of the following members:

1. social services and developmental services commissioners,

Healthcare Advocate, OPM secretary, or any of their respective designees;

2. one representative of (a) an organization for consumers with developmental disabilities, (b) an organization for consumers with physical disabilities, and (c) an organization for elderly consumers appointed by the governor;
3. two members of an organization representing consumers with developmental disabilities, one each appointed by the House speaker and Senate majority leader;
4. two members of an organization representing consumers with physical disabilities, one each appointed by the Senate president pro tempore and the House minority leader; and
5. two members of an organization representing elderly consumers, one each appointed by the House majority leader and Senate minority leader.

Initial appointments to the council must be made by August 1, 2012. The governor appoints a chairperson from among the members who must call the first meeting by September 1, 2012.

Council members serve coterminously and at the pleasure of the appointing authority. A majority of the members constitutes a quorum in order to transact any business. Members receive no compensation, but will be reimbursed for necessary expenses. The council is in DSS for administrative purposes only.

### ***Council Duties***

The bill requires the council to (1) study PCA recruitment, retention, and adequacy and (2) develop a plan to improve PCA quality, stability and availability. The plan must do this by:

1. developing a means to identify and recruit PCAs;
2. developing PCA and consumer training and educational opportunities;

3. developing one or more registries to (a) provide routine, emergency, and respite referrals of qualified PCAs to consumers and surrogates who are authorized to receive long-term, in-home PCA personal care services, (b) enable consumers and surrogates to access information about prospective PCAs including their training, educational background, and work experience, and (c) provide appropriate employment opportunities for PCAs; and
4. establishing standards for wages, benefits and conditions of employment for personal care attendants.

On or after July 1, 2013, the DSS and DDS commissioners must review the council's plan and if the commissioners approve the plan, they must include requests for funding to implement the plan or any aspects of it in any budgetary requests they submit to OPM.

#### **§ 7 — STATE FEDERAL WAIVER APPLICATION REQUIRED**

The bill requires the DSS and DDS commissioners to submit any federal Medicaid waiver application necessary to carry out the bill's provisions according to the waiver application process provided in state law. The commissioners, and any other state agency, must take all necessary and reasonable actions to obtain the waiver's approval to ensure continued federal funding.

#### **§ 2 — CHILD CARE PROVIDER LIST**

Starting July 1, 2012, the bill requires the DSS commissioner to compile monthly lists of the child care providers who have participated in the Care-4-Kids program over the previous six months. The lists are a public record subject to the state's Freedom of Information Act (FOIA).

#### **§ 5 — PCA REGISTRY LIST**

By October 1, 2012 and in each following month, the council must compile and maintain a registry list of the names and addresses of all PCAs who have been paid through the state-funded programs identified in the bill within the previous six calendar months.

The bill forbids the list from (1) including the name of any consumer or (2) indicating that a PCA is a relative of, or has the same address as, a consumer.

Any fiscal intermediary that provides administrative services to the state concerning state-funded programs must assist the council in compiling and maintaining the registry list. The council must use the list in carrying out its duties and purposes assisting those seeking to form a PCA union. The list will be accessible to the public under FOIA.

The council must respond within seven days to a request for the list from any employee organization interested in forming a PCA union. The council must provide the employee organization with the most recent list of PCAs it has compiled.

### **§§ 3 & 8 — LIABILITY**

The bill protects the state from liability in any legal action, grievance arbitration, or prohibited practice proceeding brought by a union against a parent (for child care providers), consumer, or surrogate (for PCAs) for a violation of the bill's provisions regarding collective bargaining, the PCA Workforce Council, or federal Medicaid waivers and compliance.

### **BACKGROUND**

#### ***Executive Orders Nine and Ten***

In September 2011, Governor Malloy issued Executive Orders Nine (for Care-4-Kids family child care providers) and Ten (for Medicaid waiver PCAs), which, among other things, establish a process for family child care providers and PCAs to form organizations (referred to as the "majority representatives") to represent them in discussions with the state. Both orders authorize the majority representatives to (1) meet and confer with executive branch representatives on ways to improve the quality and accessibility of family child care and PCA service and (2) collect dues from its members.

Using the procedures set out in the orders, the family day care providers elected CSEA/SEIU Local 2001 to represent them in

December 2011. The PCAs elected New England Health Care Employees Union, District 1199, SEIU, to represent them in March 2012.

Executive Order Ten also creates a Personal Care Attendant Quality Home Care Workforce Council charged with ensuring the quality of long-term personal home care in the state. The council must represent the executive branch in carrying out various responsibilities contained in the order.

Both executive orders also require the monthly compilation of their respective provider lists.

***The Effect of Public Acts on Existing Executive Orders***

The bill contains several provisions that duplicate or make minor changes to the executive orders' provisions, such as creating a PCA Workforce Council and requiring the monthly compilation of provider lists. According to an opinion issued by Attorney General Joseph Lieberman on February 1, 1986, an executive order can be (1) altered by an act of the legislature that either cites an executive order specifically or deals with the same subject matter or (2) amended or revoked by a governor (1986 Conn. Op. Atty. Gen. 13).

**COMMITTEE ACTION**

Labor and Public Employees Committee

Joint Favorable Substitute

Yea 11 Nay 0 (03/20/2012)

Human Services Committee

Joint Favorable

Yea 12 Nay 6 (04/11/2012)