

2001 DRAFTING REQUEST

Assembly Amendment (AA-ASA1-SB55)

Received: 06/21/2001

Received By: mdsida

Wanted: As time permits

Identical to LRB:

For: Spencer Black (608) 266-7521

By/Representing: Susan McMurray

This file may be shown to any legislator: NO

Drafter: mdsida

May Contact:

Add. Drafters:

Subject: Courts - civil procedure
Employ Priv - miscellaneous
Health - long-term care
Justice - civil
Public Assistance - med. assist.

Extra Copies: rac
gmm
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dak

Submit via email: YES

Requester's email: Rep.Black@legis.state.wi.us

Pre Topic:

No specific pre topic given

Topic:

Use of MA funds by nursing homes and union activity - ADC30

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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			06/26/2001 _____		06/26/2001	06/26/2001	

FE Sent For:

<END>

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/? mdsida 1 cjs 6/25
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6/22

FE Sent For:

<END>

Assembly Democrat Budget Amendment Requests

Request Number: 30
(not LRB number)

Agency: *health*

Description: Health Care Only for Nursing Homes- no ~~anti~~ union activity

Attachments: JFC motion 1522

Cost (if known): NA

Contact person: Susan McMurray, 266-7521, Representative Black's Office

MGD

HEALTH AND FAMILY SERVICES -- MEDICAL ASSISTANCE

Prohibit Use of State Funds For Support of Union or Anti-Union Activities

Motion:

Move to prohibit the use of state funds, including medical assistance (MA) payments provided to nursing home providers, from being used to assist, promote, deter or discourage union organizing. Specify that a nursing home provider that receives MA funds, may not engage in activities to assist, promote, deter or discourage an employee, who provides services directly or indirectly to MA beneficiaries, from union organizing during a time when the employee is regularly scheduled to provide services. Direct the Department of Health and Family Services to accept any complaints from an individual who believes that a provider is expending funds in violation of this provision, and require the Department to notify the provider within one week after receiving the complaint that it must provide records sufficient to show that no state funds were used in violation of the statute within 10 days.

Authorize the Attorney General or any taxpayer to bring a civil action for a violation of this provision for injunctive relief, damages, civil penalties and other appropriate equitable relief. Require that all damages and civil penalties collected be paid to the State Treasury. Require that a taxpayer who wishes to file a civil suit, to first provide written notice to the Attorney General of the alleged violation and his/her intent to bring suit. Specify that such notice cannot be given until 20 days after a complaint is filed with the Department and the notice must include a copy of the complaint filed with the Department and its disposition, if any. Prohibit a taxpayer from bringing a civil action if the Attorney General commences a civil action for the same alleged violation within 60 days of receiving the notice. Allow a taxpayer to intervene as a plaintiff in any civil action. Specify that a prevailing plaintiff would be entitled to recover reasonable attorney's fees and costs. Specify that a prevailing taxpayer intervenor who makes a substantial contribution to an action would be entitled to recover reasonable attorney's fees and costs.

Specify that a provider who uses state funds for union or anti-union activities is liable to the state for the amount of such funds used, plus a civil penalty equal to twice the amount of those funds. Specify that for a nursing home that receives both MA funds and other revenue violates these provisions, the nursing home would be liable for the proportion of the cost of the campaign which represents the proportion of the nursing home's revenues from MA in the fiscal year of the campaign and the civil penalty would not apply. Specify that any individual who knowingly authorizes the use of state funds in violation of the provision would be liable to the state for the amount of those funds. Specify that any individual who knowingly violates the prohibition would be personally liable to the state in the amount of \$1,000 per violation.

Specify that any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning or coordination of, or carrying out, an activity to assist, promote, or deter union organizing shall be treated as paid or incurred for that activity. The prohibition in this motion would not apply to an activity performed, or to an expense incurred, in connection with any of the following: (1) addressing a grievance or negotiating or administering a collective bargaining agreement; or (2) performing an activity required by federal or state law or by a collective bargaining agreement.

Exempt expenditures made prior to January 1, 2002, or a grant or contract awarded prior to January 1, 2002, unless the grant or contract is modified, extended or renewed after January 1, 2002. Specify that these requirements would not require employers to maintain records in any particular form.

Prohibit any person subject to the provisions from discharging, demoting, threatening or otherwise discriminating against any person or employee with respect to compensation, terms, conditions, or privileges of employment as a reprisal because the person or employer (or any person acting pursuant to the request of the employee) provided or attempted to provide information to the Department or to the Attorney General or his or her designee regarding possible violations. Permit any person or former employee who believes that he or she has been discharged or discriminated against to file a civil action within three years of the date of such discharge or discrimination. Specify that if a court finds by a preponderance of the evidence that a violation of this protection has occurred, the court may grant such relief as it may deem appropriate, including: (a) reinstatement to the employee's former position; (b) compensatory damages, costs and reasonable attorneys fees; and (c) other relief to remedy past discrimination. Exclude from these protections any employee or person who: (a) deliberately causes or participates in the alleged violation or regulation; or (b) knowingly or recklessly provides substantially false information to the division.

Specify that the provisions of this motion are severable. If any one provision is held invalid, in whole or in part, that invalidity shall not affect any other provision that can be given effect.

ADC

D-Note

SDC:.....Keckhaver – CN1505, Nursing home MA funds used in connection with union activities

FOR 2001-03 BUDGET — NOT READY FOR INTRODUCTION

CAUCUS SENATE AMENDMENT

TO SENATE SUBSTITUTE AMENDMENT 1,

TO 2001 SENATE BILL 55

1 At the locations indicated, amend the substitute amendment as follows:

2 1. Page 622, line 21: after that line insert:

3 "SECTION 1770q. 49.45 (6n) of the statutes is created to read:

4 49.45 (6n) USE OF FUNDS BY NURSING FACILITIES IN CONNECTION WITH UNION
5 ORGANIZING. (a) In this subsection:

6 1. "Labor organization" means any employee organization in which employees
7 participate and that exists primarily for the purpose of engaging in collective
8 bargaining with any employer concerning grievances, labor disputes, wages, hours
9 or conditions of employment, or the promotion and advancement of the professional
10 or occupational standards and the welfare of its members and families and any

1 organization established for the same purposes composed of individuals or affiliates
2 of any such employee organization.

3 2. “Nursing facility” means a nursing home, as defined in s. 50.01 (3), or a
4 community-based residential facility that is licensed under s. 50.03 and that is
5 certified by the department of health and family services to provide medical
6 assistance services equivalent to those provided by a nursing home.

7 (b) No nursing facility that has received money that is appropriated under s.
8 20.435 (4) (b), (o), or (w) may use any of that money to influence the decision of any
9 individual to support or oppose a labor organization that represents or seeks to
10 represent the individual or to become a member of a labor organization. This
11 paragraph does not prohibit a person, if otherwise permitted by law, to negotiate or
12 administer a collective bargaining agreement or to perform any action that is
13 required by law or the terms of a collective bargaining agreement. This paragraph
14 does not apply to any money received before January 1, 2002.

15 (c) 1. The department shall accept complaints from any individual who alleges
16 that a nursing facility is violating par. (b). The department shall notify the nursing
17 facility that is the subject of the complaint within 7 days after receiving it and shall
18 direct the nursing facility to provide the department, within 10 days after the
19 department notifies it of the complaint, records showing that it did not violate par.
20 (b).

21 2. Notwithstanding subd. 1., the department may not require a nursing facility
22 to maintain records relating to this subsection in any particular form.

23 (d) The attorney general may bring an action to enforce par. (b). If the court
24 determines that a nursing facility has violated par. (b), the court shall order the
25 nursing facility to repay to the state an amount equal to the amount that the nursing

1 facility received under s. 20.435 (4) (b), (o), or (w) and spent in connection with the
2 nursing facility's violation. The nursing facility shall also forfeit an amount equal
3 to twice the total amount that the nursing facility spent in connection with the
4 nursing facility's violation. The court may also order injunctive relief and any other
5 equitable relief that is appropriate.

6 (e) 1. Any person other than the attorney general may bring an action to enforce
7 par. (b), but only if all of the following apply:

8 a. The person filed with the department a written complaint under par. (c)
9 alleging a violation of par. (b).

10 b. No earlier than 20 days after filing the complaint under par. (c) the person
11 filed with the attorney general a copy of that complaint, a written description of the
12 disposition of the complaint, and a written notice that the person intended to bring
13 an enforcement action under this paragraph.

14 c. At least 60 days have elapsed since the person complied with subd. 1. b.

15 d. The attorney general did not bring an action to enforce par. (b) against the
16 subject of the complaint filed under subd. 1. a. before the expiration of the time period
17 specified in subd. 1. c.

18 e. The complaint that the person files in his or her action is substantially based
19 on the complaint that the person filed under subd. 1. a.

20 2. If, in an action brought under this paragraph, the court determines that a
21 nursing facility violated par. (b), the court shall impose any penalty that would have
22 been required and may order any relief that would have been permitted if the action
23 had been brought under par. (d). Any forfeiture ordered under this subdivision shall
24 be paid to the state.

1 (f) Notwithstanding s. 803.09 (1), any person may intervene in an action
2 brought under par. (d) or (e).

3 (g) If the court determines that a nursing facility violated par. (b) in a case
4 brought under par. (d) or (e), the court shall order the nursing facility to pay the
5 plaintiff's reasonable litigation costs, including a reasonable attorney fee,
6 notwithstanding s. 814.04 (1). If a person has intervened in a case under par. (f), the
7 court shall order the nursing facility or to pay the intervenor's reasonable litigation
8 costs, including a reasonable attorney fee, notwithstanding s. 814.04 (1), if the court
9 determines that the intervenor made a substantial contribution to the plaintiffs in
10 prosecuting the action.

11 (h) 1. If an operator or owner of a nursing facility discharges, demotes,
12 threatens, or otherwise discriminates against an individual regarding compensation
13 or terms, conditions, or privileges of employment because the individual or anyone
14 acting at the request of the individual provided or attempted to provide information
15 to the department or the attorney general regarding possible violations of par. (b),
16 the individual may bring a civil action for any damages resulting from that
17 discharge, demotion, threat, or discrimination. The action shall be commenced
18 within 3 years after the discharge, demotion, threat, or discrimination or be barred.
19 If the plaintiff proves by a preponderance of the evidence that the discharge,
20 demotion, threat, or discrimination occurred, the court may grant any appropriate
21 relief, including the following:

- 22 a. Reinstatement of the individual to his or her former position.
- 23 b. Compensatory damages.
- 24 c. Costs, and notwithstanding s. 814.04 (1), reasonable attorney fees.
- 25 d. Other relief to remedy past discrimination.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBb1374/1dn
MGD&RPN&RAC/f.....

js

1. Please note that the behavior prohibited in this draft relating to union organizing is based on California law. ✓
2. In enacting the national Labor Relations Act, congress intended to preempt the states from regulating the use by labor and management in the private sector of peaceful means of putting economic pressure on each other. See *Lodge 76, IAM v. WERC*, 427 U.S. 132, 96 S. Ct. 2548 (1976). The second point contained in each of the first and third paragraphs of the motion are particularly problematic from that standpoint. Moreover, those points each appear to conflict with the narrower approach counseled by the first instruction in each of those paragraphs — namely, to draft the amendment to limit its application to how the medical assistance (MA) payments themselves are used. This amendment follows the narrower instructions, but even under that approach, a court might hold that part or all of this amendment is preempted by the national Labor Relations Act.
3. The JCF motion states that the attorney general or a private party may obtain damages and civil penalties in enforcement actions, but it does not specify what those damages are in cases brought on behalf of the state or how they are to be calculated. Therefore, this amendment does not include any provision for damages in actions brought on behalf of the state. It does, however, require the violator to return to the state money expended in violation of the prohibition in s. 49.45 (6n) (b) and provides a forfeiture based on the total amount unlawfully expended on union-related activity. It also permits a private person who is harmed as a result of a violation to obtain damages and specifies what those damages are. ✓
4. It is unclear whether a district attorney may enforce the prohibition contained in this amendment.
5. Wisconsin courts do not appear to have addressed the question of when an intervenor may be awarded attorney fees. Under a recent court of appeals case, an intervening plaintiff has the same status as any other plaintiff in the case. *Kohler Co. v. Sogen International Fund, Inc.*, 2000 WI App. 60, 233 Wis. 2d 592, 608 N.W.2d 746, ¶ 11. That case, however, does not address attorney fees. Therefore, this amendment uses language from the JCF motion to specify the circumstances under which a prevailing intervenor is entitled to attorney fees.

6. The fungibility of money may make it difficult to prove a violation if a nursing facility receives both MA funds and other revenue. The facility may argue that it spent only other revenue on its union-related activities.

Rick A. Champagne
Senior Legislative Attorney
Phone: (608) 266-9930
E-mail: rick.champagne@legis.state.wi.us

Michael Dsida
Legislative Attorney
Phone: (608) 266-9867

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
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LRBb1374/1dn
MGD&RPN&RAC:cjs:cmh

June 26, 2001

1. Please note that the behavior prohibited in this draft relating to union organizing is based on California law.
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