

2005 ASSEMBLY BILL 792

October 31, 2005 – Introduced by Representatives VAN ROY, MUSSER, OWENS, KRAWCZYK, HAHN, BIES, HINES, STRACHOTA, OTT and MONTGOMERY, cosponsored by Senators ROESSLER, GROTHMAN, BRESKE, DARLING and ERPENBACH. Referred to Committee on Aging and Long-Term Care.

1 **AN ACT** *to amend* 105.15; and *to create* 105.115 and 893.99 of the statutes;
2 **relating to:** requiring a home care placement agency that places a home care
3 worker in the residence of a home care consumer to provide notice to the
4 consumer concerning the rights, duties, responsibilities, and liabilities of the
5 consumer with respect to the worker and notice to the worker concerning the
6 worker’s employment status and granting rule-making authority.

Analysis by the Legislative Reference Bureau

Under current law, the Department of Workforce Development (DWD) regulates employment agents. Currently, “employment agent” is defined as a person who furnishes to persons seeking employment or to employers seeking help information enabling those persons to secure employment or those employers to secure help.

This bill requires a home care placement agency that places a home care worker in the temporary or permanent residence of a home care consumer to provide the home care consumer with a notice of his or her rights, duties, responsibilities, and liabilities with respect to the worker. The bill requires the notice to include, at a minimum, all of the following information:

1. A statement specifying the duties, responsibilities, and liabilities of the home care placement agency with respect to the home care consumer and the home care worker and the duties, responsibilities, and liabilities of the home care consumer

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with respect to the home care worker, including the consumer's responsibilities, if any, for the day-to-day supervision of the home care worker; assigning duties to the home care worker; hiring, firing, and discipline of the home care worker; providing equipment or materials for use by the home care worker; performing a background investigation of the home care worker; and ensuring that the home care worker has any credential, license, registration, certification, permit, or approval that is required for the home care worker to provide adequate home care services for the home care consumer.

2. A statement of the employment status of the home care worker, specifically, whether the home care worker is an employee of the home care placement agency or of the home care consumer or is an independent contractor and a statement identifying which party is responsible for paying the wages or salary of the home care worker, paying federal social security taxes and state and federal unemployment contributions or taxes with respect to the home care worker, and procuring worker's compensation or liability insurance covering injury to the home care worker.

3. A statement that, notwithstanding the employment status of the home care worker specified in the notice, the home care consumer may be determined to be the employer of the home care worker for purposes of certain state and federal labor laws and that, if that is the case, the home care consumer may be held responsible for paying the wages or salary of the home care worker, paying federal social security taxes and state and federal unemployment contributions or taxes with respect to the home care worker, procuring worker's compensation or liability insurance covering injury to the home care worker, and complying with various other state and federal labor laws.

4. A list of the forms that the home care consumer may be required to complete and file if the home care consumer is determined to be the employer of the home care worker.

5. A statement of the penalties that may be assessed against the home care consumer if he or she is determined to be the employer of the home care worker and does not fulfill his or her duties and responsibilities as the employer of the home care worker.

6. A telephone number and address at which the home care consumer may contact DWD if he or she has any questions about the contents of the notice.

7. A statement acknowledging that the home care consumer has received and understands the notice and a line for the home care consumer's signature located immediately below that statement.

This bill also requires a home care placement agency that places a home care worker in the temporary or permanent residence of a home care consumer to provide the home care worker with a notice stating the employment status of the home care worker, specifically, whether the home care worker is an employee of the home care placement agency or of the home care consumer or is an independent contractor. The bill requires the notice to include, at a minimum, all of the following information:

1. A statement that, notwithstanding the employment status of the home care worker specified in the notice, the home care worker may be determined to be an independent contractor for purposes of certain state and federal labor laws and, if

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that is the case, a description of the duties, responsibilities, and liabilities of the home care placement agency and the home care consumer with respect to the home care worker and the duties, responsibilities, and liabilities of the home care worker as a result of that independent contractor status. That description must include the identity of the party who is responsible for paying the wages or salary of the home care worker, paying federal social security taxes and state and federal unemployment contributions or taxes with respect to the home care worker, and procuring worker's compensation or liability insurance covering injury to the home care worker. The description must also include: the identity of the party who is responsible for the day-to-day supervision of the home care worker; assigning duties to the home care worker; hiring, firing, and discipline of the home care worker; and providing equipment or materials for use by the home care worker.

2. A telephone number and address at which the home care consumer may contact DWD if he or she has any questions about the contents of the notice.

3. A statement acknowledging that the home care worker has received and understands the notice and a line for the home care worker's signature located immediately below that statement.

Finally, the bill permits a home care consumer or home care worker who is not provided with the notice required under the bill to file a complaint with DWD or commence an action in circuit court to recover from the home care placement agency certain liabilities and damages incurred by the home care consumer or home care worker. Specifically, a home care consumer may recover: 1) the amount of any federal social security taxes or state or federal unemployment contributions or taxes paid with respect to the home care worker; 2) the cost of providing worker's compensation or liability insurance covering injury to the home care worker; 3) the amount of any fine or penalty imposed on the home care consumer for noncompliance with any state or federal labor law with respect to the home care worker; and 4) the amount of any liability incurred for any injury to the home care worker. Similarly, a home care worker who is found to be an independent contractor may recover: 1) the amount of any federal self-employment social security taxes paid by the home care worker; and 2) the amount of any damages sustained as a result of any injury suffered while performing home care services. If a home care placement agency does not pay an amount determined by DWD within 30 days after demand by DWD, DWD may commence an action to recover that amount, and the circuit court may order the home care placement agency to pay to the home care consumer or home care worker that amount, plus an additional amount equal to 50 percent of that amount, together with costs and attorney fees.

For purposes of the bill:

1. "Home care services" is defined as skilled or unskilled care, including companionship services, homemaker services, nursing services, and personal care services, provided to a person in his or her temporary or permanent residence for the purpose of enabling the person to remain safely and comfortably in that residence.

2. "Home care placement agency" is defined as a person that is engaged in placing home care workers in the temporary or permanent residences of home care

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consumers for the purpose of providing home care services to those home care consumers, including an employment agent.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 105.115 of the statutes is created to read:

2 **105.115 Notice to home care consumers and workers. (1) DEFINITIONS.**

3 In this section:

4 (a) “Companionship services” means services that provide fellowship and
5 protection for a person who, because of advanced age or physical or mental infirmity,
6 cannot care for his or her own needs.

7 (b) “Home care consumer” means a person who receives home care services in
8 his or her temporary or permanent residence from a home care worker.

9 (c) “Home care placement agency” means a person that is engaged in placing
10 home care workers in the temporary or permanent residences of home care
11 consumers for the purpose of providing home care services to those home care
12 consumers, including an employment agent engaged in the business specified in s.
13 105.01 (1) (intro.) or a person specified in s. 105.01 (1) (f) whose fees or charges are
14 paid entirely by a home care consumer.

15 (d) “Home care services” means skilled or unskilled care provided to a person
16 in his or her temporary or permanent residence for the purpose of enabling the
17 person to remain safely and comfortably in that residence. “Home care services”
18 include companionship services, homemaker services, nursing services, and
19 personal care services.

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1 (e) “Home care worker” means a person who provides home care services to a
2 home care consumer in the temporary or permanent residence of the home care
3 consumer.

4 (f) “Homemaker services” means household work, including preparing meals,
5 laundering clothes, making beds, cleaning, performing errands and shopping,
6 completing other miscellaneous chores, and performing any other activities that
7 support the smooth and safe functioning of a home care consumer’s residence.

8 (g) “Nursing services” means nursing procedures, other than personal care
9 services, that are permitted to be performed by a registered nurse under s. 441.001
10 (2) or by a licensed practical nurse under s. 441.001 (3).

11 (h) “Personal care services” means assistance with the activities of daily living,
12 such as eating, dressing, bathing, personal hygiene, and ambulation, but does not
13 include nursing services.

14 **(2) NOTICE TO HOME CARE CONSUMERS.** Whenever a home care placement agency
15 places a home care worker in the temporary or permanent residence of a home care
16 consumer, the home care placement agency shall provide the home care consumer
17 with a notice of the rights, duties, responsibilities, and liabilities of the home care
18 consumer with respect to the home care worker, except that a home care placement
19 agency is not required to provide that notice when placing a home care worker who
20 is temporarily substituting for the regular home care worker of a home care
21 consumer. The notice shall be on a form prescribed by the department and shall
22 include, at a minimum, all of the following:

23 (a) A statement specifying the duties, responsibilities, and liabilities of the
24 home care placement agency with respect to the home care consumer and the home
25 care worker and the duties, responsibilities, and liabilities of the home care

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1 consumer with respect to the home care worker. The statement shall clearly specify
2 the home care consumer's responsibility, if any, for all of the following:

3 1. Day-to-day supervision of the home care worker.

4 2. Assigning duties to the home care worker.

5 3. Hiring, firing, and discipline of the home care worker.

6 4. Providing equipment or materials for use by the home care worker.

7 5. Performing a background investigation of the home care worker.

8 6. Ensuring that the home care worker has any credential, as defined in s.
9 440.01 (2) (a), or any other license, registration, certification, permit, or approval
10 that is required for the home care worker to provide adequate home care services for
11 the home care consumer.

12 (b) A statement of the employment status of the home care worker, specifically,
13 whether the home care worker is an employee of the home care placement agency or
14 of the home care consumer or is an independent contractor and a statement
15 identifying which party is responsible for paying the wages or salary of the home care
16 worker, paying federal social security taxes and state and federal unemployment
17 contributions or taxes with respect to the home care worker, and procuring worker's
18 compensation or liability insurance covering injury to the home care worker.

19 (c) A statement that, notwithstanding the employment status of the home care
20 worker specified in the notice, the home care consumer may be determined to be the
21 employer of the home care worker for purposes of certain state and federal labor laws
22 and that, if that is the case, the home care consumer may be held responsible for
23 paying the wages or salary of the home care worker, paying federal social security
24 taxes and state and federal unemployment contributions or taxes with respect to the
25 home care worker, procuring worker's compensation or liability insurance covering

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1 injury to the home care worker, and complying with various other state and federal
2 labor laws.

3 (d) A list of the forms that the home care consumer may be required to complete
4 and file if the home care consumer is determined to be the employer of the home care
5 worker.

6 (e) A statement of the penalties that may be assessed against the home care
7 consumer if he or she is determined to be the employer of the home care worker and
8 does not fulfill his or her duties and responsibilities as the employer of the home care
9 worker.

10 (f) A telephone number and address at which the home care consumer may
11 contact the department if he or she has any questions about the contents of the notice.

12 (g) A statement acknowledging that the home care consumer has received and
13 understands the notice provided under this subsection and a line for the home care
14 consumer's signature located immediately below that statement. The home care
15 placement agency shall give the home care consumer one copy of the notice signed
16 by the home care consumer and shall retain one copy in its files.

17 **(3) NOTICE TO HOME CARE WORKERS.** Whenever a home care placement agency
18 places a home care worker in the temporary or permanent residence of a home care
19 consumer, the home care placement agency shall provide the home care worker with
20 a notice stating the employment status of the home care worker, specifically, whether
21 the home care worker is an employee of the home care placement agency or of the
22 home care consumer or is an independent contractor. The notice shall be on a form
23 prescribed by the department and shall include, at a minimum, all of the following:

24 (a) A statement that, notwithstanding the employment status of the home care
25 worker specified in the notice, the home care worker may be determined to be an

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1 independent contractor for purposes of certain state and federal labor laws and, if
2 that is the case, a description of the duties, responsibilities, and liabilities of the
3 home care placement agency and the home care consumer with respect to the home
4 care worker and the duties, responsibilities, and liabilities of the home care worker
5 as a result of that independent contractor status. That description shall include, at
6 a minimum, all of the following information:

7 1. A statement identifying which party is responsible for paying the wages or
8 salary of the home care worker, paying federal social security taxes and state and
9 federal unemployment contributions or taxes with respect to the home care worker,
10 and procuring worker's compensation or liability insurance covering injury to the
11 home care worker.

12 2. A statement identifying which party is responsible for the day-to-day
13 supervision of the home care worker, assigning duties to the home care worker,
14 hiring, firing, and discipline of the home care worker, and providing equipment or
15 materials for use by the home care worker.

16 (b) A telephone number and address at which the home care worker may
17 contact the department if he or she has any questions about the contents of the notice.

18 (c) A statement acknowledging that the home care worker has received and
19 understands the notice provided under this subsection and a line for the home care
20 worker's signature located immediately below that statement. The home care
21 placement agency shall give the home care worker one copy of the notice signed by
22 the home care worker and shall retain one copy in its files.

23 **(4) INVESTIGATIONS, REMEDIES, AND PENALTIES.** (a) A home care consumer who
24 is not provided with the notice required under sub. (2) or a home care worker who is
25 not provided with the notice required under sub. (3) may either file a complaint with

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1 the department or commence an action in circuit court to recover from the home care
2 placement agency the payment under par. (b) or (c) no later than 3 years after the
3 date on which the home care placement agency was required to provide the notice.
4 If the department receives a complaint that is timely filed, the department shall
5 investigate the complaint and attempt, on behalf of the home care consumer or home
6 care worker, to recover the payment under par. (b) or (c). In investigating a complaint
7 filed under this paragraph, the department shall have the right of entry and audit
8 under ss. 105.08 and 105.09 as to the home care placement agency.

9 (b) 1. If the department finds that a home care placement agency has failed to
10 provide a home care consumer with the notice required under sub. (2) and that the
11 home care consumer is liable for the payment of federal social security taxes or state
12 or federal unemployment contributions or taxes with respect to the home care
13 worker, for the provision of worker's compensation or liability insurance covering
14 injury to the home care worker, for the payment of any fine or penalty imposed on
15 the home care consumer for noncompliance with any state or federal labor law with
16 respect to the home care worker, or for any injury to the home care worker, the
17 department may recover from the home care placement agency, on behalf of the home
18 care consumer, an amount equal to the total cost of those liabilities.

19 2. If the home care placement agency does not pay the amount specified in subd.
20 1. within 30 days after demand by the department, the department may commence
21 a civil action on behalf of the home care consumer to collect that amount, and the
22 circuit court may order the home care placement agency to pay to the home care
23 consumer that amount, plus an additional amount equal to 50 percent of that
24 amount, together with costs under ch. 814 and, notwithstanding s. 814.04 (1),
25 reasonable attorney fees.

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1 3. In the case of a home care consumer who commences an action in circuit court
2 under par. (a), if the circuit court finds that the home care placement agency has
3 failed to provide the home care consumer with the notice required under sub. (2) and
4 that the home care consumer is liable for the payment of federal social security taxes
5 or state or federal unemployment contributions or taxes with respect to the home
6 care worker, for the provision of worker's compensation or liability insurance
7 covering injury to the home care worker, for the payment of any fine or penalty
8 imposed on the home care consumer for noncompliance with any state or federal
9 labor law with respect to the home care worker, or for any injury to the home care
10 worker, the court may order the home care placement agency to pay to the home care
11 consumer an amount equal to the total cost of those liabilities, together with costs
12 under ch. 814 and, notwithstanding s. 814.04 (1), reasonable attorney fees.

13 (c) 1. If the department finds that a home care placement agency has failed to
14 provide a home care worker with the notice required under sub. (3), that the home
15 care worker is an independent contractor, and that the home care worker is liable for
16 the payment of federal self-employment social security taxes or has sustained an
17 injury as a result of performing home care services, the department may recover from
18 the home care placement agency, on behalf of the home care worker, an amount equal
19 to the total cost of that liability or the total amount of damages sustained as a result
20 of that injury.

21 2. If the home care placement agency does not pay the amount specified in subd.
22 1. within 30 days after demand by the department, the department may commence
23 a civil action on behalf of the home care worker to collect that amount, and the circuit
24 court may order the home care placement agency to pay to the home care worker that

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1 amount, plus an additional amount equal to 50 percent of that amount, together with
2 costs under ch. 814 and, notwithstanding s. 814.04 (1), reasonable attorney fees.

3 3. In the case of a home care worker who commences an action in circuit court
4 under par. (a), if the circuit court finds that the home care placement agency has
5 failed to provide the home care worker with the notice required under sub. (3), that
6 the home care worker is an independent contractor, and that the home care worker
7 is liable for the payment of federal self-employment social security taxes or has
8 sustained an injury as a result of performing home care services, the court may order
9 the home care placement agency to pay to the home care worker an amount equal to
10 the total cost of that liability or the total amount of damages sustained as a result
11 of that injury, together with costs under ch. 814 and, notwithstanding s. 814.04 (1),
12 reasonable attorney fees.

13 **(5) RULES.** The department shall promulgate rules to implement this section.

14 **SECTION 2.** 105.15 of the statutes is amended to read:

15 **105.15 General powers of department applicable; penalties.** Such
16 investigations, classifications, and orders shall be made as provided in s. 103.005 and
17 the penalties specified in s. 103.005 (12) shall apply to and be imposed for any
18 violation of ss. 105.01 to 105.11 105.115 or 105.13 to 105.15. The department may
19 also order a person who operates an employment agency in violation of s. 105.05 (1)
20 to make refunds as provided under s. 105.16 (2). Orders issued under this section
21 are subject to review in the manner provided in ch. 227.

22 **SECTION 3.** 893.99 of the statutes is created to read:

23 **893.99 Home care consumer notification.** An action arising under s.
24 105.115 (4) (a) is subject to the limitations under s. 105.115 (4) (a).

25 **SECTION 4. Nonstatutory provisions.**

