

Legislative Analysis



HOME HELP CAREGIVER COUNCIL

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

Senate Bill 790 (proposed substitute H-2)
Sponsor: Sen. Kevin Hertel

Analysis available at
<http://www.legislature.mi.gov>

Senate Bill 791 (H-1) as reported from committee
Sponsor: Sen. Sylvia A. Santana

House Committee: Appropriations
Senate Committee: Appropriations [Discharged]
Complete to 9-25-24

SUMMARY:

Senate Bills 790 and 791 would provide that, for collective bargaining purposes, caregivers under the Home Help Program are public employees of the director of the Department of Health and Human Services (DHHS) or the director's representative. (Generally speaking, the Home Help Program provides assistance with everyday activities so individuals with functional limitations can live at home.) The bills also would create the Home Help Caregiver Council in DHHS to provide orientation, education, and other supports to caregivers. Caregivers would, as public employees, be subject to provisions of the public employment relations act. They could be represented by a labor organization, and the council would have to maintain and provide a list with caregiver contact information to organizations seeking to represent them. The council's board of directors or its representative would have to collectively bargain with the caregivers' bargaining representative. The bills are described in detail below.

Senate Bill 791 would amend 1947 PA 336, the public employment relations act (PERA), to provide that the term *public employee*, whenever used in the act, includes an individual designated by the legislature as a public employee. The definition of *public employee* also would allow the legislature to designate an individual as a public employee only for the purpose of collective bargaining and provide that this designation does not make the individual an employee of the state or a political subdivision of the state for any purpose other than the limited purpose authorized by the legislature.

In addition, PERA now prohibits a public employer's bargaining unit that consists of individuals who are not public employees from having an election regarding representation or from being recognized by either the public employer or the Michigan Employment Relations Commission (MERC), and it provides that a bargaining unit formed or recognized in violation of those prohibitions is invalid and void. The bill would eliminate these provisions.

PERA now provides that an individual employed by a private organization or entity who receives a direct or indirect government subsidy in the individual's private employment is not an employee of the state or political subdivision providing the subsidy and is not a public employee. The bill would eliminate this provision.

Finally, under PERA, an individual employed by a private organization or entity who provides services under a time-limited contract with the state or a political subdivision of the state is not

an employee of the state or political subdivision and is not a public employee. PERA now adds that this provision supersedes any interlocal agreement, memorandum of understanding or of commitment, or other similar document. The bill would eliminate the language adding that the PERA provision supersedes those other documents.

MCL 423.201 and 423.214

Senate Bill 790 would create a new act called the Home Help Caregiver Council Act. Under the bill, solely for the purposes of collective bargaining and as expressly limited as described below, **individual home help caregivers** would be considered public employees of the director of DHHS or the director's representative.¹ The bill states that it would not require or provide for individual home help caregivers to be treated or classified as public employees for any other purpose, and DHHS's employer role for collective bargaining would not be a basis for establishing an employer-employee relationship. Individual home help caregivers would not be employees of the state or a political subdivision of the state for any other purpose and would not be subject to section 5 of Article XI of the state constitution (which establishes the classified state civil service).² PERA would apply only to the governance of the collective bargaining relationship between DHHS and the **bargaining representative** of a bargaining unit composed of individual home help caregivers as described below.³

Individual home help caregiver would mean a caregiver who, under the Home Help Program, is selected by a **participant** or the **participant's representative** and provides **individual home help services** to a participant. A caregiver who provides services through an **agency provider** or **integrated care organization**, or another similar entity, would not be considered an individual home help caregiver under the bill.

Participant would mean a person who receives individual home help services.

Participant's representative would mean a participant's legal guardian or an individual who has the authority and responsibility to act on a participant's behalf regarding the provision of individual home help services.

Individual home help service would mean services the Home Help Program that provides assistance with one or more **activities of daily living** or **instrumental activities of daily living** through caregivers in a home or community-based setting.⁴

¹ As described above, Senate Bill 791 would amend PERA to provide that, whenever used in that act, the term *public employee* includes "an individual designated by the legislature as a public employee." Senate Bill 790 appears to designate individual home help caregivers as public employees in a way that would, under Senate Bill 791, include them as *public employees* wherever that term is used in PERA. The bills do not provide, in PERA, any limitations on PERA's application to individuals defined there as public employees.

² <https://www.legislature.mi.gov/Laws/MCL?objectName=mcl-Article-XI-5>

³ The bills together appear to define individual home help caregivers as *public employees* within PERA itself, and they do not provide, in PERA, any limitations on PERA's application to individuals defined there as public employees.

⁴ The terms *home or community-based setting* and, used later, *home or community-based services* generally refer to settings outside of institutions such as nursing homes and services provided in those noninstitutional settings. See <https://www.cms.gov/training-education/partner-outreach-resources/american-indian-alaska-native/ltss-ta-center/information/ltss-models/home-and-community-based-services>

Activities of daily living would include eating, toileting, bathing, grooming, dressing, mobility, and transferring (e.g., moving to or from a bed, chair, or standing position).

Instrumental activities of daily living would include at least laundry, light housework, shopping, meal preparation or cleanup, and medication administration.

Agency provider would mean any of the following:

- A home health agency that is currently Medicare-certified.⁵
- An entity, except for the Department of Health and Human Services (DHHS), that has a federal employer identification number and directly employs or contracts with caregivers to provide home or community-based services.
- A community mental health services program (CMHSP) under the Mental Health Code that works with clients who use arrangements that support self-determination.⁶

Integrated care organization would mean a managed care entity under federal rules⁷ that has contracted with DHHS and the Centers for Medicare and Medicaid Services (CMS) to provide Medicare and Medicaid covered services to individuals who are dually eligible for full Medicare and Medicaid.

Bargaining representative would mean (as defined in PERA) a labor organization recognized by an employer or certified by MERC as the sole and exclusive bargaining representative of certain employees of the employer.

The bill states that it would not modify the authority, and must not be construed as modifying or limiting the authority, of DHHS to deny participation in the Medicaid program to individuals who do not or will not comport with state and federal program requirements or to terminate the participation of individual providers.

Immunity from liability

The bill would provide that individual home help caregivers are not government actors, their limited status as public employees under the bill notwithstanding, and that the state (including DHHS, the Home Help Caregiver Council, and the council's board of directors) is not liable for actions undertaken by caregivers in performing their duties.

Further, the state, DHHS, or a state or DHHS contractor could not be held liable, vicariously or jointly, for the action or inaction of an individual home help caregiver, regardless of whether they referred the caregiver to a consumer or included the caregiver on a referral registry. A special relationship with a consumer would not be established or evidenced by the existence of a collective bargaining agreement, the placement of an individual home help caregiver on a referral registry, the development or approval of a consumer's plan of care, or the fact that DHHS provides case management services to the consumer.

⁵ With regard to the term *home health agency*, see <https://www.michigan.gov/lara/bureau-list/bsc/accs-division/hha>

⁶ The term *arrangements that support self-determination* is not defined in the bill or in the Mental Health Code. For information on CMHSPs, see <https://www.michigan.gov/mdhhs/keep-mi-healthy/mentalhealth/mentalhealth/cmhsp>

⁷ Specifically, 42 CFR Part 438: <https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-C/part-438>

Finally, the state, DHHS, or a state or DHHS contractor could not indemnify an individual home help caregiver for claims against them arising from actions taken in the course of their employment.

Rights of participants

Under the bill, except for the limited purposes described above (i.e., collective bargaining), participants or participant's representatives would be the sole employer of individual home help caregivers and retain the rights to select, hire, direct, schedule, supervise, or terminate the services of any individual home help caregiver who provides individual home help services to the participant in accordance with the laws and regulations that govern the program. The bill says that it would not alter those rights, and that a provision of an agreement reached between DHHS and a bargaining representative of individual home help caregivers would not interfere with those rights.

Bargaining representatives

The bill would authorize individual home help caregivers to choose a bargaining representative to bargain collectively and enter into collective bargaining agreements with DHHS under specified sections of PERA. Once a bargaining representative is selected by a majority of individual home help caregivers under PERA or another applicable law, that representative would have to continue to be recognized by the director and any other state entity charged with regulating individual home help caregivers' conditions of employment, unless the representative is decertified by a vote of the majority of individual home help caregivers. If a bargaining representative is certified, the mutual rights and obligations of DHHS and the bargaining representative to bargain collectively over wages, hours, and other terms and conditions of employment would not include the subjects reserved to participants and participant's representatives as described above. If there is not an agreement between DHHS and the bargaining representative, DHHS would have no obligation to engage in effects or impact bargaining with respect to the subjects reserved to participants and participant's representatives as described above.⁸

At the bargaining representative's request, the board of directors of the Home Help Caregiver Council (described below) or the board's representative on behalf of DHHS would have to engage in collective bargaining with the bargaining representative concerning the terms and conditions of employment that are within the state's control. This provision would not limit any bargaining obligations arising out of PERA, except for those identified above as the rights of participants or participant's representatives.⁹ Negotiations between the board or the board's representative on behalf of DHHS and the bargaining representative would have to begin by July 1 of any year before the year an existing collective bargaining agreement expires in.

The bill would state that, notwithstanding section 13 of PERA (which charges MERC with deciding the appropriate bargaining unit for a given group of public employees),¹⁰ a statewide unit of all individual home help caregivers is the only appropriate bargaining unit for those

⁸ Effects bargaining, also known as impact bargaining, involves decisions that an employer has the right to make but that will have effects or an impact on relevant employees.

⁹ The bills together appear to define individual home help caregivers as *public employees* within PERA itself, and they do not provide, in PERA, any limitations on PERA's application to individuals defined there as public employees.

¹⁰ The bills together appear to define individual home help caregivers as *public employees* within PERA itself, and they do not provide, in PERA, any limitations on PERA's application to individuals defined there as public employees.

caregivers. Caregivers who are related to their participant or related to their participant's representative could not be excluded for that reason from the bargaining unit.

Any aspects of a collective bargaining agreement that require federal or state appropriations or revisions of law would have to be made subject to those appropriations or revisions, and either the Home Help Caregiver Council or the bargaining representative could reopen negotiations on all or part of the agreement if the appropriations or revisions are not made.¹¹

Arbitration proceedings

If a bargaining representative dispute (except for one about the interpretation or application of an existing agreement)¹² has not been resolved to the agreement of both parties within 30 days after its submission to mediation (or an additional period the parties agree to), DHHS or the bargaining representative could initiate binding arbitration proceedings by prompt request, in writing, to the other, with a copy to MERC. The arbitration would have to be conducted in the same way as a binding arbitration under 1969 PA 312 (which provides for compulsory arbitration of labor disputes in police and fire departments), except that, under the bill, an arbitration panel's decision would be binding only for economic issues identified by the panel as described in section 8 of 1969 PA 312.¹³ The panel would not have to adopt the last offer of settlement from either party as to each economic issue, but could adopt an award that falls between those last offers on each economic issue, as long as the award is based on applicable factors described in section 9 of 1969 PA 312.¹⁴ DHHS could implement *its* last best offer of settlement on each economic issue 60 days after the panel's decision, but would also (or still) have to meet all of its obligations under section 10 of PERA.¹⁵

Wage deductions

DHHS would have to make deductions from the wages of individual home help caregivers that are authorized by law, including under 1978 PA 390 (which regulates the payment of wages and benefits for Michigan workers), and including deduction of the dues of a bargaining representative if authorized by the caregiver.

As described in section 7 of 1978 PA 390,¹⁶ the bill would expressly allow deductions from the wages of individual home help caregivers in writing or using a valid form of authorization

¹¹ As described above, the responsibility for collective bargaining would be given to the council's board of directors or its representative on behalf of DHHS. In that context, it is unclear why the council, and not the board or its representative, is given specific authority to reopen negotiations.

¹² The bill does not define the term *bargaining representative dispute*.

¹³ Section 8 requires the arbitration panel to make a conclusive determination as to which issues in dispute are economic and direct each party to submit, before the hearing, its last offer of settlement on each economic issue. <https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-423-238>

¹⁴ <https://www.legislature.mi.gov/Laws/MCL?objectName=mcl-423-239>

¹⁵ Generally speaking, section 10 prohibits public employers (e.g., DHHS) and labor organizations from interfering with public employees (e.g., individual home help caretakers) in the exercise of their right to form or join a labor organization and prohibits them from refusing to bargain with each other. The section also prohibits other forms of interference in labor organizing or collective bargaining, such as discriminating in employment on the basis of labor organization membership or activity. <https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-423-210>

¹⁶ Section 7 prohibits deduction from wages of any amount that includes an employee contribution to a separate segregated fund established for political purposes under section 55 of the Michigan Campaign Finance Act (<https://www.legislature.mi.gov/Laws/MCL?objectName=mcl-169-255>) without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to allow the deduction. However, this prohibition does not apply to deductions expressly allowed by law.

under the Uniform Electronic Transactions Act. A deduction for a bargaining representative could be revoked only under the terms of the authorization. Caregiver requests to cancel or change bargaining representative deductions would have to be directed to, and processed by, the labor organization and not DHHS. Unless a dispute arises about the existence or terms of an authorization, a bargaining representative that certifies that it has and will maintain caregivers' authorizations would not have to provide DHHS with a copy of an individual authorization. DHHS would have to rely on information provided by the bargaining representative regarding whether deductions were canceled or changed. The labor organization would have to indemnify the Home Help Caregiver Council for any claims made by the caregiver for deductions made based on that information.¹⁷

Applicability of specific provisions of PERA

The bill would provide that acts prohibited and made unlawful under section 10 of PERA are prohibited and unlawful if performed by DHHS or a labor organization representing or seeking to represent individual home help caregivers.

The bill would provide, as PERA does, that an alleged violation may be filed with MERC as an unfair labor practice and considered and ruled on under sections 10 and 16 of PERA and MERC's rules and regulations.¹⁸

The bill would provide that, as provided in sections 2, 3, and 6 of PERA, an individual home help caregiver is prohibited from striking.

Home Help Caregiver Council

The bill would create the Home Help Caregiver Council in DHHS. The council would have to do all of the following with regard to individual home help caregivers:

- Provide for a mandatory orientation program for newly enrolled caregivers. The program would have to be conducted on paid time, and a caregiver would have to attend an initial orientation no later than 45 days after they begin providing individual home help services. Both of the following would apply to the orientation program:
 - A caregiver bargaining representative could attend, give material to attendees and receive it from them, and make a presentation of up to 30 minutes in length.
 - At least 24 hours before the orientation begins, the council would have to give an attending bargaining representative a list of caregivers registered for it.
- Provide for additional training and educational opportunities for caregivers, including opportunities for certification of training and experience in areas of specialization.
- By September 30, 2025, and twice a year after that, compile and maintain a list of all caregivers who have been paid for providing individual home help services in the previous six months. The list would include caregivers' names, home addresses, home phone numbers, personal cell phone numbers, and personal email addresses, if known. The list could not include the name or private information of a participant or participant's representative or indicate that a caregiver is a relative of, or has the same address as, a participant. In preparing the list, the council would have to protect personally identifiable information as required by law. Upon request, the council would

¹⁷ Under the bill, DHHS would be responsible for making deductions from wages.

¹⁸ Section 16: <https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-423-216>

Rules: https://ars.apps.lara.state.mi.us/AdminCode/DownloadAdminCodeFile?FileName=1833_2018-051LR_AdminCode.pdf&ReturnHTML=True

have to provide the list to the following entities, as long as they agree to protect the information and use it only for purposes of the bill or PERA:

- A labor organization that wants to represent the appropriate unit of individual home help caregivers.
- A bargaining representative of individual home help caregivers.
- Maintain a registry of individuals *qualified to be* caregivers. Those who *are* caregivers could, upon request, opt out of having their information maintained in this registry.
- Collect statewide information related to the home help caregiver workforce (i.e., not just individual home help caregivers), including at least information about individual home help caregiver pay, retention and turnover rates, individual home help caregiver job satisfaction, service gaps caused by individual home help caregiver shortages, and any other relevant information as requested by the interested parties advisory group described below.
- Serve as a communications hub to distribute information relevant to individual home help caregivers.
- Support and work to preserve participant selection and self-direction of caregivers.
- Provide supports to caregivers aimed at encouraging competence, achieving quality services, and improving caregiver retention through improved job satisfaction.

The council could contract with experienced organizations to develop and deliver orientations and trainings. Funds for training and education opportunities could be used for career education, wraparound support services, and job skills training in areas of specialization, as well as for such expenses as instructors, marketing and recruitment, space rental, and services to help caregivers attend.

The council would have to convene and support an interested parties advisory group as often as its members consider necessary to meet the council's obligations under federal Medicaid requirements, or any other requirements, but not less often than once every two years.¹⁹ The advisory group would include Home Help participants, individual home help caregivers, their bargaining representative, and representatives of DHHS. The bill defines the group as these individuals who make recommendations about adequate payments and other workforce supports for personal care attendants providing services under the state Medicaid program.

The council could do all things necessary or convenient to implement the provisions described above. The council could receive local, state, federal, and other funds to accomplish the purposes described above. DHHS could provide funds to support the council's operation. The council could hire and pay employees and enter into contracts and agreements to accomplish the purposes described above. A document or record prepared, owned, used, possessed, or retained by the council for an official function would have to be made available to the public under the Freedom of Information Act (FOIA). All state departments and agencies would have to cooperate with and assist the council in performing its powers and duties described above and implementing any agreements it enters into.

¹⁹ CFR 447.203(b)(6): <https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-C/part-447/subpart-B/section-447.203>. Relevant guidance is here, on page 35: <https://www.medicaid.gov/medicaid/access-care/downloads/ffs-prov-final-rule-guidance.pdf>.

The council could receive local, state, federal, and other funds to pay for individual home help services.²⁰

The council and DHHS would have to immediately begin all necessary steps to do all of the following, and complete those steps by September 30, 2025:

- Ensure that individual home help services are offered in conformity with the bill.
- Seek from the CMS any necessary federal approval for program modifications.
- Gather all information that might be needed to promptly compile lists required under the bill.

Board of directors

The council would be directed and governed by a board of directors consisting of the following seven members:

- The director of DHHS or their designated representative from within DHHS.
- The director of the Department of Labor and Economic Opportunity (LEO) or their designated representative.
- The state treasurer or their designated representative.
- Two members appointed by the DHHS director to represent participants or participant's representatives.
- Two members appointed by the DHHS director who represent nonprofit organizations that advocate on behalf of older adults or people with disabilities.

Members would be appointed to four-year terms ending July 31, but initial appointments would be for one, two, three, and four years to stagger the terms. Terms for members appointed to represent participants would expire in odd-numbered years, and those for members appointed to represent nonprofit organizations would expire in even-numbered years. At the end of a term, the director of DHHS would appoint someone to serve a new term. For a mid-term vacancy, the director would appoint someone to serve the rest of the term. A member's resignation would be effective whenever the director of DHHS gets their written notice. A member could serve until a successor is appointed.

Appointments would have to be filed with the secretary of state, and board members would have to take and file the oath sworn by legislative, executive, and judicial officers under section 1 of Article XI of the state constitution.²¹

The board's first meeting would have to be held within 60 days after a majority of members are appointed, at a date and time determined by the DHHS director. The board would have to select a chairperson from its members and could elect other officers it considers necessary. It would elect the chairperson and any other officers annually. A majority of members serving would be a quorum of the board.

²⁰ It is unclear which of the council's responsibilities (described above) would involve paying for individual home help services.

²¹ <https://www.legislature.mi.gov/Laws/MCL?objectName=mcl-Article-XI-1>

In addition to engaging in collective bargaining (or designating a representative to do so) as described above, the board would have to do all of the following:

- Organize and make its own policies and procedures and adopt bylaws governing its operations.
- Adopt a schedule of regular meetings. A special meeting could be called by the chairperson or as provided in the bylaws.
- Meet at the call of the chairperson and as provided in the bylaws.
- Comply with the Open Meetings Act with regard to its meetings, meeting notices, and bylaws.
- Keep a written or printed record of each meeting, which would be subject to FOIA.

The bill says that nothing in it is intended to curtail or infringe on the legislature's constitutional appropriation authority.

The bill cannot take effect unless Senate Bill 791 is also enacted.

FISCAL IMPACT:

Senate Bills 790 and 791 would have two primary cost drivers. First, the bills would establish new annual costs related to the new Home Help Caregiver Council, which would cost a minimum of \$5.0 million Gross (\$2.5 million GF/GP) and could be up to \$10.0 million Gross (\$5.0 million GF/GP). The specific cost estimate would depend on the amount and types of additional trainings the Home Help Caregiver Council would contract with organizations for. Second, and representative of the majority of the bills' potential costs, these bills could significantly increase state costs related to home help services, but those costs would depend on the outcomes of any negotiations and on the legislature's appropriating funds for the cost increases.

Due to the fact that a majority of costs would be attributed to negotiations that have an unknown outcome, the cost estimate below makes a number of assumptions in order to establish a cost range. The assumptions reviewed include:

- The number of home help workers to be part of the negotiations. The bill is clear that Medicaid fee-for service adult home help workers would be a part of the negotiations, but the bill is not clear about whether home help workers that provide services through the Medicaid MI Choice managed care program, and non-Medicaid home help programming provided through area agencies on aging, would be part of any negotiations.
- The negotiated hourly rate. Similar efforts in other states have had hourly rates negotiated up to between \$15.00 and \$16.15.
- The inclusion of other employment benefits. It is unknown whether other benefits besides the hourly rate would be a part of negotiations, including whether paid leave or health insurance/stipends would be included.

Given the very broad range of possible outcomes of the negotiations, the cost, and subsequent request for a legislative appropriations, could range from an estimated \$39.7 million Gross (\$13.8 million GF/GP) to \$193.2 million Gross (\$65.9 million GF/GP) within the state Medicaid program. The non-GF/GP portion of the cost comes from federal Medicaid reimbursements. For FY 2024-25, the federal Medicaid reimbursement rate is 65.13%.

It is also important to note that, while these bills specifically exempt home help services provided through the CMHSPs and integrated care organizations, as managed care providers they are required to have a sufficient provider network. Therefore, any changes in the reimbursement rates paid to home help workers through a different Medicaid program could affect their ability to maintain a sufficient provider network without the CMHSPs and integrated care organizations also increasing the rates, though not necessarily up to the same amount, that they provide to home help workers.

POSITIONS:

A representative of Caring Across Generations testified in support of the bills. (9-25-24)

The Michigan Elder Justice Initiative indicated support for the bill. (9-25-24)

A representative of the Mackinac Center for Public Policy testified in opposition to the bills. (9-25-24)

The following entities indicated opposition to the bills (9-25-24):

- Michigan Chamber of Commerce
- NFIB

Legislative Analyst: Rick Yuille
Fiscal Analysts: Kevin Koorstra
Kent Dell

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