F I S C A L I M P A C T R E P O R T

SPONSOR: Papen DATE TYPED: 03/04/03 HB

SHORT TITLE: Personal Care Attendant Vicarious Liability SB 823

ANALYST: Geisler

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	**FY04**	**FY03**	**FY04**		
		NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

Responses Received From

Department of Health (DOH)
State Agency on Aging (SAOA)
Human Services Department (HSD)
Governor's Committee on Concerns of the Handicapped (GCCH)
Attorney General (AG)

SUMMARY

Synopsis of Bill

Senate Bill 823 would enact a new section of the Public Assistance Act to exempt health care providers who function as fiscal intermediaries from vicarious liability as an employer or principal for a wrongful act committed by a personal care attendant if the attendant: 1) is not a current or former employee of the fiscal intermediary; 2) has not received training or instruction from the fiscal intermediary regarding the provision of personal care services to a person with a disability (not including administrative work); 3) has been hired by and received training from the consumer or his authorized representative; and 4) provides basic assistance with activities of daily living that do not require the education, training, or a certification of a licensed health care practitioner.

SB 823 would require that a fiscal intermediary identify a personal care attendant as a covered employee with the fiscal intermediary's workers' compensation carrier solely to provide work-

ers' compensation coverage in the event of a work-related injury. SB 823 would not create an employer-employee relationship between the fiscal intermediary and the personal care attendant. SB 823 would not hold the fiscal intermediary immune from a claim for a wrongful act committed by the fiscal intermediary or its employees. SB 823 has the support of DOH, HSD, SAOA, and GCCH. The AG has concerns about the workers compensation provision of this bill. See discussion below under the conflict section.

Significant Issues

Following the ruling of the U.S. Supreme Court in Olmstead v. L.C. ex rel. Zimring, 119 S.Ct. 2176 (1999), New Mexico and almost all other states have developed plans to increase the availability of community-based services to persons with disabilities (hereafter "Consumers"). In 2002, the New Mexico legislature passed Senate Joint Memorial 54 directing the Governor's Committee on the Concerns of the Handicapped, in conjunction with several agencies, to develop a plan for addressing the issues raised in the Olmstead decision. The resulting report, entitled "Initial State Olmstead Plan" (October 16, 2002) recommended expanding the availability of a consumer-directed option in personal care plans.

Under consumer-directed personal care plans, persons with disabilities (or their authorized representative) hire, train, and supervise persons to assist with simple activities of daily living such as bathing, dressing, eating, and shopping. The fiscal intermediary performs administrative tasks for the consumer such as processing payment for service to the personal care attendant.

This bill proposes to further the policy of expanding the availability of consumer directed personal care in two ways. First, it seeks to encourage home care providers and others to serve as fiscal intermediaries by removing the threat of vicarious liability for the actions of attendants that are hired, trained, and supervised by consumers. Second, the bill seeks to make workers' compensation coverage for attendants more available by permitting fiscal intermediaries to describe attendants as covered employees under their workers' compensations policy without creating an employer-employee relationship.

FISCAL IMPLICATIONS

The GCCH provided that the Medicaid Personal Care Option program (PCO) should be able to significantly serve more people due to the lower per-individual average cost of service delivery. Currently, the PCO serves over 6,000 with in-home services. It would also allow people living in nursing homes or institutions, who are Medicaid eligible for PCO, to choose to live in the community, with a potential reduction in long-term services cost. Nursing homes, on average, cost about $40,000 per person as opposed to the $27,000 per person average cost of the PCO, which again would allow the State to serve more people with the same amount of dollars.

CONFLICT

The AG provides that the provisions of subsection 1B (page 2, lines 12-18) of the bill conflict with the Workers' Compensation Act. Employers who employ less than three employees, or employ only domestic servants are exempted from the requirements of the Workers' Compensation Act. Section 56-1-6A NMSA 1978 (Repl. Pamp. 1991). Accordingly, under current law consumers who employ personal care attendants as part of consumer-directed personal care programs are not required to provide workers' compensation coverage for a personal care attendant

they employ. The consumer may elect to provide coverage under Section 56-1-6B of the Act, but as a practical matter, workers' compensation policies for a single employee under such circumstances are difficult to find and very expensive.

As noted above, subsection 1B of this bill provides that a fiscal intermediary may list personal care attendants employed by a consumer as a "covered employee" under the fiscal intermediary's workers' compensation policy without creating an employment relationship. This language creates a contradiction, however, because a person cannot be a"covered employee" under an employer's worker's compensation policy unless there is an employment relationship between the two. Workers' compensation coverage is predicated on the existence of an employer/employee relationship. Perea v. Torrance County Commissioners, 77 N.M. 543, 545 (1967).

The Act creates a set of rules that govern claims by the employee against his or her employee that arise out of an injury sustained in the course and scope of the employment. See sections 52-1-2, -6C, -9 NMSA 1978. By its own terms, subsection 1B of the bill appears to refer to circumstances in which the employer/employee relationship does not exist, but one party seeks workers' compensation insurance coverage for the other. Neither the act nor cases interpreting the Act recognize the "quasi-employer" / "quasi-employee" relationship contemplated by this subsection of the bill. Even if the Act were expressly amended to authorize this type of coverage, the absence of an actual employer/employee relationship in fact raises questions as to whether there is a legitimate insurable risk that can be covered by a New Mexico workers' compensation insurance policy.

AMENDMENTS

Per the AG, in light of the apparent conflicts with the Worker's Compensation Act, it may be simplest to amend the bill to delete the workers' compensations coverage issue in subsection 1B. Another option could be to amend the Workers' Compensation Act to authorize the coverage included in this bill.

GG/njw