

JAN 23 2014

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# A BILL FOR AN ACT

RELATING TO COLLECTIVE BARGAINING RIGHTS OF INDEPENDENT DIRECT  
SUPPORT PROVIDERS.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The Hawaii Revised Statutes is amended by  
2 adding a new chapter to be appropriately designated and to read  
3 as follows:

4   **"CHAPTER**

5   **INDEPENDENT DIRECT SUPPORT PROVIDERS**

6           § -1 **Definitions.** As used in this chapter:

7           "Board" means the Hawaii labor relations board established  
8 under section 89-5.

9           "Collective bargaining" or "bargaining collectively" means  
10 the process by which the State and the exclusive representative  
11 of the independent direct support providers negotiate mandatory  
12 subjects of bargaining identified in section -4(b), or any  
13 other mutually agreed subjects of bargaining not in conflict  
14 with state or federal law, with the intent to arrive at an  
15 agreement that, when reached, shall be legally binding on all  
16 parties.



1 "Collective bargaining service fee" means a fee deducted by  
2 the State from the compensation of an independent direct support  
3 provider who is not a member of the exclusive representative of  
4 independent direct support providers, which is paid to the  
5 exclusive representative. The collective bargaining service fee  
6 shall not exceed eighty-five per cent of the amount payable as  
7 dues by members of the exclusive representative, and shall be  
8 deducted in the same manner as dues deducted from the  
9 compensation of independent direct support providers who are  
10 members of the exclusive representative, and shall be used to  
11 defray the costs incurred by the labor organization in  
12 fulfilling its duty to represent independent direct support  
13 providers in their relations with the State.

14 "Exclusive representative" means the labor organization  
15 that has been certified under this chapter and has the right to  
16 represent independent direct support providers for the purpose  
17 of collective bargaining.

18 "Grievance" means the exclusive representative's formal  
19 written complaint regarding the improper application of one or  
20 more terms of the collective bargaining agreement, the failure  
21 to abide by any agreement reached, or the discriminatory



1 application of a rule that has not been resolved to a  
2 satisfactory result through informal discussion with the State.

3 "Independent direct support provider" means any individual  
4 who provides home- and community-based services to a service  
5 recipient and is employed by the service recipient, shared  
6 living provider, or surrogate.

7 "Labor organization" means an organization of any kind in  
8 which independent direct support providers participate and that  
9 exists, in whole or in part, for the purpose of representing  
10 independent direct support providers.

11 "Service recipient" means a person who receives home- and  
12 community-based services administered by the department of human  
13 services.

14 "Shared living provider" means a person who operates under  
15 a contract with an authorized agency and provides individualized  
16 home support for one or two people who live in the person's  
17 home. An authorized agency includes a designated agency for  
18 developmental services.

19 "Surrogate" means a service recipient's authorized family  
20 member, legal guardian, or a person identified in a written  
21 agreement as having responsibility for the care of a service  
22 recipient.



1           §   -2   **Rights of independent direct support providers.**

2   Independent direct support providers shall have the right to:

3           (1)   Organize, form, join, or assist a labor organization  
4                for the purposes of collective bargaining without  
5                interference, restraint, or coercion;

6           (2)   Bargain collectively through their chosen  
7                representatives;

8           (3)   Engage in concerted activities for the purpose of  
9                supporting or engaging in collective bargaining or  
10               other mutual aid or protection;

11          (4)   Pursue grievances through the exclusive representative  
12                as provided in this chapter; and

13          (5)   Refrain from any or all activities, subject to the  
14                requirements of section    -4(b)(3).

15          §   -3   **Rights of the State.**   Subject to the rights  
16   guaranteed by this chapter and subject to all other applicable  
17   laws and rules, nothing in this chapter shall be construed to  
18   interfere with the right of the State to:

19          (1)   Carry out the mandate and goals of the department of  
20                human services and to use personnel, methods, and  
21                means in the most appropriate manner possible;

- 1           (2) With the approval of the governor, take whatever
- 2           action as may be necessary to carry out the mission of
- 3           the department of human services in an emergency
- 4           situation;
- 5           (3) Comply with federal and state laws;
- 6           (4) Enforce rules and regulatory processes;
- 7           (5) Develop rules and regulatory processes that do not
- 8           impair existing contracts, subject to the duty to
- 9           bargain over mandatory subjects of bargaining and to
- 10          the legislative power of the legislature; and
- 11          (6) Solicit and accept for use any grant of money,
- 12          services, or property from the federal government, the
- 13          State, or any political subdivision or agency of the
- 14          State, including federal matching funds, and to
- 15          cooperate with the federal government or any political
- 16          subdivision or agency of the State in making an
- 17          application for any grant.

18          §   -4   **Establishment of limited collective bargaining;**

19   **scope of bargaining.** (a) Independent direct support providers,

20 through their exclusive representative, shall have the right to

21 bargain collectively with the State, through the governor's

22 designee, under this chapter.



1 (b) Mandatory subjects of bargaining under this section  
2 shall be limited to:

3 (1) Compensation rates, workforce benefits, and payment  
4 methods and procedures, except that independent direct  
5 support providers shall not be eligible to participate  
6 in the employees' retirement system or the employer-  
7 union health benefits trust fund solely by virtue of  
8 bargaining under this chapter;

9 (2) Professional development and training, except that the  
10 issue of whether the State may choose directly to  
11 create and administer a professional development or  
12 training program shall be a permissive subject of  
13 bargaining;

14 (3) The collection and disbursement of dues or fees to the  
15 exclusive representative, provided that a collective  
16 bargaining service fee may not be required of  
17 nonmembers unless the exclusive representative has  
18 established and maintained a procedure to provide  
19 nonmembers with:

20 (A) An audited financial statement that identifies  
21 the major categories of expenses, and divides



1                   them into chargeable and nonchargeable expenses;  
2                   and

3                   (B) An opportunity to object to the amount of the  
4                   agency fee sought, any amount reasonably in  
5                   dispute to be placed in escrow, subject to prompt  
6                   review and determination by the board to resolve  
7                   any objection over the amount of the collective  
8                   bargaining fee, as provided for in subsection  
9                   (d);

10                  (4) Procedures for resolving grievances against the State,  
11                  provided that the final step of any negotiated  
12                  grievance procedure, if required, shall be a hearing  
13                  and final determination by the board in accordance  
14                  with board rules; and

15                  (5) Access to job referral opportunities within covered  
16                  programs, except that the issue of whether the State  
17                  may choose directly to create and administer a  
18                  referral registry shall be a permissive subject of  
19                  bargaining.

20                  (c) For the purpose of this chapter, the obligation to  
21                  bargain collectively is the performance of the mutual obligation  
22                  of the State and the exclusive representative of the independent



1 direct support providers to meet at reasonable times and confer  
2 in good faith with respect to all matters bargainable under this  
3 chapter; provided that the failure or refusal of either party to  
4 agree to a proposal, or to change or withdraw a lawful proposal,  
5 or to make a concession shall not constitute, or be evidence of,  
6 direct or indirect, a breach of this obligation. Nothing in  
7 this chapter shall be construed to require either party during  
8 collective bargaining to accede to any proposal or proposals of  
9 the other party.

10 (d) Any dispute raised by a nonmember concerning the  
11 amount of a collective bargaining service fee, as provided under  
12 subsection (b)(3), may be resolved by the board, which shall  
13 review and determine the matter promptly, in accordance with the  
14 board's rules.

15 § -5 **Election; bargaining unit.** (a) Petitions and  
16 elections shall be conducted in like manner pursuant to the  
17 procedures provided in section 89-7 for employee organizations,  
18 and the exclusive representative shall be the exclusive  
19 representative for the purpose of collective bargaining.

20 (b) A representation election for independent direct  
21 support providers conducted by the board shall be by mail  
22 ballot.





1           (c) The bargaining unit for purposes of collective  
2 bargaining pursuant to this chapter shall be one statewide unit  
3 of independent direct support providers. Eligible independent  
4 direct support providers shall have the right to participate in  
5 a representation election but shall not have the right to vote  
6 on or otherwise determine the collective bargaining unit.  
7 Eligible independent direct support providers shall all be  
8 independent direct support providers who have been paid for  
9 providing home- and community-based services within the previous  
10 one hundred eighty days.

11           (d) At least quarterly, the State shall compile and  
12 maintain a list of names and addresses of all independent direct  
13 support providers who have been paid for providing home- and  
14 community-based services to service recipients within the  
15 previous one hundred eighty days. The list shall not include  
16 the names of any recipient, or indicate that an independent  
17 direct support provider is a relative of a recipient or has the  
18 same address as a recipient. Upon request, the State shall  
19 provide within seven days the most recent list of independent  
20 direct support providers in its possession to any organization  
21 which has as one of its primary purposes the collective  
22 bargaining representation of independent direct support



1 providers in their relations with state or other public  
2 entities, including the labor organization certified as the  
3 exclusive representative under this chapter.

4       §   -6 **Mediation; fact-finding; last best offer.** (a) If,  
5 after a reasonable period of negotiation, the representative of  
6 the collective bargaining unit and the State reach an impasse,  
7 the board, upon petition of either party, may authorize the  
8 parties to submit their differences to mediation. Within five  
9 days after receipt of the petition, the board shall appoint a  
10 mediator who shall communicate with the parties and attempt to  
11 mediate an amicable settlement; provided that no person may be  
12 appointed as a mediator unless the person shall be of high  
13 standing and not actively connected with labor or management.

14       (b) If, after a reasonable period of time, no fewer than  
15 fifteen days after the appointment of a mediator, the impasse is  
16 not resolved, the mediator shall certify to the board that the  
17 impasse continues.

18       (c) The board shall appoint a fact finder who has been  
19 mutually agreed upon by the parties. If the parties fail to  
20 agree on a fact finder within five days, the board shall appoint  
21 a neutral third party to act as a fact finder pursuant to rules  
22 adopted by the board. A member of the board or any individual



1 who has actively participated in mediation proceedings for which  
2 fact-finding has been called shall not be eligible to serve as a  
3 fact finder under this section, unless agreed upon by the  
4 parties.

5 (d) The fact finder shall conduct hearings pursuant to  
6 rules of the board. Upon request of either party or of the fact  
7 finder, the board may issue subpoenas of persons and documents  
8 for the hearings and the fact finder may require that testimony  
9 be given under oath and may administer oaths.

10 (e) Nothing in this section shall prohibit the fact finder  
11 from endeavoring to mediate the dispute at any time prior to  
12 issuing recommendations.

13 (f) The fact finder shall consider the following factors  
14 in making a recommendation:

- 15 (1) The needs and welfare of consumers, including their  
16 interest in greater access to quality services;
- 17 (2) The nature and needs of the personal care assistance  
18 program;
- 19 (3) The interest and welfare of independent direct support  
20 providers;
- 21 (4) The history of negotiation between the parties,  
22 including those leading to the proceedings;



1 (5) Changes in the cost of living; and

2 (6) Generally accepted labor-management relations  
3 practices in the State.

4 (g) Upon completion of the hearings provided in subsection  
5 (d), the fact finder shall transmit its written findings and  
6 recommendations to both parties.

7 (h) The costs of witnesses and other expenses incurred by  
8 either party in fact-finding proceedings shall be paid directly  
9 by the parties incurring them, and the costs and expenses of the  
10 fact finder shall be divided equally by the parties. The fact  
11 finder shall be paid a rate mutually agreed upon by the parties  
12 for each day or any part of a day while performing fact-finding  
13 duties and shall be reimbursed for all reasonable and necessary  
14 expenses incurred in the performance of the fact finder's  
15 duties. A statement of fact-finding per diem and expenses shall  
16 be certified by the fact finder and submitted to the board for  
17 approval. The board shall provide a copy of approved fact-  
18 finding costs to each party with its order apportioning half of  
19 the total to each party for payment. Each party shall pay its  
20 half of the total within fifteen days after receipt of the  
21 order. Approval by the board of fact-finding and the fact



1 finder's costs and expenses and its order for payment shall be  
2 final as to the parties.

3 (i) If the dispute remains unresolved twenty days after  
4 transmittal of findings and recommendations, each party shall  
5 submit to the board its last best offer on all disputed issues  
6 as a single package. Each party's last best offer shall be  
7 certified to the board by the fact finder. The board may hold  
8 hearings and consider the recommendations of the fact finder.  
9 Within thirty days of the certifications, the board shall select  
10 between the last best offers of the parties, considered in their  
11 entirety without amendment, and shall determine its cost. The  
12 board shall not issue an order under this subsection that:

- 13 (1) Is in conflict with any statute;  
14 (2) Is in conflict with any rule, unless the rule relates  
15 to a mandatory subject of bargaining; or  
16 (3) Determines an issue that is not a mandatory subject of  
17 bargaining.

18 The board shall determine the cost of the agreement  
19 selected and recommend to the legislature its choice with a  
20 request for an appropriation. If the legislature appropriates  
21 the requested amount of funds, the agreement shall become  
22 effective and legally binding at the beginning of the next



1 fiscal year. If the legislature appropriates a different amount  
2 of funds, the terms of the agreement affected by that  
3 appropriation shall be renegotiated based on the amount of funds  
4 actually appropriated by the legislature, and the agreement with  
5 the negotiated changes shall become effective and binding at the  
6 beginning of the next fiscal year. No portion of any agreement  
7 shall become effective separately without the mutual consent of  
8 the parties.

9       § -7 **General duties and prohibited conduct; unfair labor**  
10 **practices.** (a) The State, the independent direct support  
11 providers, and their representatives shall make every reasonable  
12 effort to make and maintain agreements concerning matters  
13 allowed under this chapter and to settle all disputes, whether  
14 arising out of the application of, or concerning, those  
15 agreements. Upon request of either party, all disputes shall be  
16 considered within fifteen days of the request or at such times  
17 as may be mutually agreed to and, if possible, settled with all  
18 expedition in conference between representatives designated and  
19 authorized to confer by the State or the independent direct  
20 support providers; provided that neither party shall be  
21 compelled to make any agreements or concessions.

22       (b) It shall be an unfair labor practice for the State to:



- 1           (1) Interfere with, restrain, or coerce independent direct  
2           support providers in the exercise of their rights  
3           under this chapter or by any law or rule;
- 4           (2) Dominate or interfere with the formation or  
5           administration of any labor organization or contribute  
6           financial or other support to it;
- 7           (3) Discriminate in regard to referral practices or  
8           eligibility for work opportunities within covered  
9           programs for an independent direct support provider,  
10          or to encourage or discourage membership in any labor  
11          organization;
- 12          (4) Take negative action against an independent direct  
13          support provider because the provider has taken  
14          actions demonstrating the provider's support for a  
15          labor organization, including signing a petition,  
16          grievance, or affidavit or giving testimony under this  
17          chapter;
- 18          (5) Refuse to bargain collectively in good faith with the  
19          exclusive representative; or
- 20          (6) Discriminate against an independent direct support  
21          provider based on race, color, creed, religion, age,  
22          gender, sexual orientation, gender identity, or



1 national origin, or because the provider is a  
2 qualified individual with a disability.

3 (c) It shall be an unfair labor practice for a labor  
4 organization to:

5 (1) Restrain or coerce independent direct support  
6 providers in the exercise of the rights guaranteed  
7 them by law or rule; provided that a labor  
8 organization may prescribe its own rules with respect  
9 to the acquisition or retention of membership;  
10 provided further that the rules are not  
11 discriminatory;

12 (2) Refuse to bargain collectively in good faith with the  
13 State;

14 (3) Cause, or attempt to cause, the State to discriminate  
15 against an independent direct support provider in  
16 violation of subsection (b); or

17 (4) Threaten to or cause a provider to strike or curtail  
18 the provider's services in recognition of a picket  
19 line of any employee or labor organization.

20 (d) An independent direct support provider shall not  
21 strike or curtail the provider's services in recognition of a  
22 picket line of any employee or labor organization.





1           §   -8   Prevention of unfair labor practices.   (a)   The  
2 board may prevent the State or a labor organization from  
3 engaging in any unfair labor practice listed in section   -7.  
4 Whenever a charge is made that the State or a labor organization  
5 has engaged in or is engaging in any unfair labor practice, the  
6 board may issue and cause to be served upon that party a  
7 complaint stating the charges in that respect and containing a  
8 notice of hearing before the board at a place and time therein  
9 fixed at least seven days after the complaint is served. The  
10 board may amend the complaint at any time before it issues an  
11 order. No complaint shall be filed based upon any unfair labor  
12 practice that occurred more than six months prior to the filing  
13 of the complaint with the board and the service of a copy  
14 thereof upon the party against whom such complaint is made,  
15 unless the person aggrieved thereby was prevented from filing  
16 the complaint by reason of service in the United States armed  
17 forces, in which event the six-month period shall be computed  
18 from the day of the person's discharge.

19           (b)   The party complained of shall have the right to file  
20 an answer to the original or amended complaint and appear in  
21 person or otherwise and present evidence in connection therewith  
22 at the time and place fixed in the complaint. In the discretion



1 of the board, any other person may be permitted to intervene and  
2 present evidence in the matter. Any proceeding under this  
3 section shall, so far as practicable, be conducted in accordance  
4 with the Hawaii rules of evidence adopted under chapter 626.  
5 The board shall provide for the making of a transcript of the  
6 testimony presented at the hearing.

7 (c) The board shall have power to administer oaths and  
8 take testimony under oath relative to the matter of inquiry. At  
9 any hearing ordered by the board, the board shall have the power  
10 to subpoena witnesses and to demand the production of books,  
11 papers, records, and documents for its examination. Officers  
12 who serve subpoenas issued by the board and witnesses attending  
13 hearings conducted by the board shall receive fees and  
14 compensation at the same rates as officers and witnesses in  
15 cases brought in the circuit court, to be paid by the board.

16 (d) If upon the preponderance of the evidence, the board  
17 finds that any party named in the complaint has engaged in or is  
18 engaging in any unfair labor practice, it shall state its  
19 finding of fact in writing and shall issue and cause to be  
20 served on that party an order requiring that party to cease and  
21 desist from the unfair labor practice, and to take any  
22 affirmative action as will carry out the policies of this



1 chapter. If upon the preponderance of the evidence, the board  
2 does not find that the party named in the complaint has engaged  
3 in or is engaging in any unfair labor practice, it shall state  
4 its findings of fact in writing and dismiss the complaint.

5 (e) In determining whether a complaint shall issue  
6 alleging a violation of section -7, and in deciding those  
7 cases, the same rules of decision shall apply irrespective of  
8 whether or not a labor organization affected is affiliated with  
9 a labor organization national or international in scope.

10 § -9 **Negotiated agreement; funding termination; renewal;**  
11 **enforcement.** (a) If the State and the exclusive representative  
12 reach an agreement, the governor shall request from the  
13 legislature an appropriation sufficient to fund the agreement in  
14 the next operating budget. If the legislature appropriates  
15 sufficient funds, the negotiated agreement shall become  
16 effective and binding at the beginning of the next fiscal year.  
17 If the legislature appropriates a different amount of funds, the  
18 terms of the agreement affected by that appropriation shall be  
19 renegotiated based on the amount of funds actually appropriated  
20 by the legislature and shall become effective and legally  
21 binding in the next fiscal year.



1           (b) Collective bargaining agreements shall remain in  
2 effect for a maximum term of two years and shall not be subject  
3 to cancellation or renegotiation during the term without the  
4 mutual consent in writing of both parties; provided that the  
5 consent shall be filed with the board. Upon the filing of the  
6 consent, an agreement may be supplemented, cancelled, or  
7 renegotiated.

8           (c) The agreement shall terminate upon the expiration of  
9 its specified term. Negotiations for a new agreement to take  
10 effect upon the expiration of the preceding agreement shall be  
11 commenced at any time within one year next preceding the  
12 expiration date upon the request of either party and may be  
13 commenced at any time previous thereto with the consent of both  
14 parties.

15           (d) If the State and the collective bargaining unit are  
16 unable to arrive at an agreement and no existing agreement is in  
17 effect, the existing contract shall remain in force until a new  
18 contract is ratified by the parties; provided that nothing in  
19 this subsection shall prohibit the parties from agreeing to a  
20 modification of certain provisions of the existing contract  
21 that, as amended, shall remain in effect until a new contract is  
22 finalized and funded by the legislature.



1           (e) The board may enforce compliance with all provisions  
2 of a collective bargaining agreement upon the complaint of  
3 either party. If a complaint is made by either party to an  
4 agreement, the board shall proceed in the manner prescribed in  
5 section -8 relating to the prevention of unfair labor  
6 practices.

7           § -10 **Rights unaltered.** (a) A collective bargaining  
8 agreement shall not infringe upon any rights of service  
9 recipients or their surrogates to hire, direct, supervise, or  
10 discontinue the employment of any particular independent direct  
11 support provider.

12           (b) Nothing in this section shall alter the rights and  
13 obligations of private sector employers and employees under the  
14 National Labor Relations Act, 29 U.S.C. section 151 et seq.

15           (c) Independent direct support providers shall not be  
16 considered public employees for purposes other than collective  
17 bargaining, including joint or vicarious liability in tort or  
18 the limitation on liability in subsection (e). Independent  
19 direct support providers shall not be eligible for participation  
20 in the employees' retirement system or the Hawaii employer-union  
21 health benefits trust fund solely by virtue of bargaining under  
22 this chapter. Nothing in this chapter shall require the State



1 to alter its current practice with respect to independent direct  
2 support providers of making payments regarding social security  
3 and medicare taxes, federal or state unemployment contributions,  
4 or workers' compensation insurance.

5 (d) Nothing in this chapter shall infringe upon the right  
6 of the judiciary and the legislature to make programmatic  
7 modifications to the delivery of state services through subsidy  
8 or other programs.

9 (e) The State and its employees shall not be vicariously  
10 liable for any act or omission by an independent direct support  
11 provider or any claim arising out of the employment relationship  
12 between a service recipient and an independent direct service  
13 provider, nor shall the State be liable as a joint employer.

14 § -11 **Rules.** The board shall adopt rules in accordance  
15 with chapter 91 as necessary to implement this chapter.

16 § -12 **Appeal.** (a) Any person aggrieved by an order or  
17 decision of the board issued pursuant to this chapter may appeal  
18 the order or decision to the intermediate court of appeals.

19 (b) An order of the board shall not automatically be  
20 stayed pending an appeal. A stay shall first be requested from  
21 the board. The board may stay the order or any part of it. If  
22 the board denies a stay, then a stay may be requested from the



1 intermediate court of appeals. The intermediate court of  
2 appeals may stay the order or any part of it and may order  
3 additional interim relief.

4       § -13 **Enforcement.** (a) Orders of the board issued  
5 under this chapter may be enforced by any party or by the board  
6 by filing a petition with a circuit court located in the county  
7 in which the action before the board originated. The petition  
8 shall be served on the adverse party as provided for service of  
9 process under the Hawaii rules of civil procedure. If, after  
10 hearing, the court determines that the board had jurisdiction  
11 over the matter and that a timely appeal was not filed or that  
12 an appeal was timely filed and a stay of the board order or any  
13 part of it was not granted or that a board order was affirmed on  
14 appeal in pertinent part by the intermediate court of appeals or  
15 on review by the supreme court following acceptance of an  
16 application for writ of certiorari, the court shall incorporate  
17 the order of the board as a judgment of the court. There shall  
18 be no appeal from that judgment; provided that a judgment  
19 reversing a board decision on jurisdiction may be appealed to  
20 the intermediate court of appeals.



1 (b) Upon filing of a petition by a party or the board, the  
2 court may grant temporary relief, including a restraining order,  
3 as it deems proper pending a formal hearing.

4 (c) Orders and decisions of the board shall apply only to  
5 the particular case under appeal, but any number of appeals  
6 presenting similar issues may be consolidated for hearing with  
7 the consent of the board. The board shall not modify, add to,  
8 or detract from a collective bargaining agreement by any order  
9 or decision.

10 § -14 Antitrust exemption. The activities of  
11 independent direct support providers and their exclusive  
12 representative that are necessary for the exercise of their  
13 rights under this chapter shall be afforded state action  
14 immunity under applicable federal and state antitrust laws. The  
15 State intends that the "state action" exemption to federal  
16 antitrust laws be available only to the State, to independent  
17 direct support providers, and to their exclusive representative  
18 in connection with these necessary activities. Exempt  
19 activities shall be actively supervised by the State."

20 SECTION 2. This Act shall take effect upon its approval.

21

INTRODUCED BY: *George J. Bell*  
*George J. Bell*



# S.B. NO. 3076

**Report Title:**

Collective Bargaining; Independent Direct Support Providers

**Description:**

Enables independent direct support providers to engage in collective bargaining with the State.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

