

JAN 22 2016

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# A BILL FOR AN ACT

RELATING TO HEALTH.

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

1           SECTION 1. The Fair Labor Standards Act (FLSA) generally  
2 requires employers to pay employees a minimum wage and overtime  
3 compensation under certain conditions. While FLSA did not  
4 initially protect workers employed directly by households in  
5 domestic service, in 1974, FLSA coverage was extended to  
6 domestic service workers, thus applying coverage to employees  
7 performing household services in private homes, but exempting  
8 certain domestic service workers from FLSA's minimum wage and  
9 overtime provisions. Under this exemption, casual babysitters  
10 and domestic service workers employed to provide companionship  
11 services to elderly persons or persons with illnesses, injuries,  
12 or disabilities, were not required to be paid the minimum wage  
13 or overtime pay, and live-in domestic service workers were  
14 exempted from the overtime pay requirement.

15           Given the changes to the home care industry and workforce  
16 since the 1975 federal regulations, the United States Department  
17 of Labor adopted a final regulation in 2013 whereby third-party



1 employers of companionship services and live-in employees would  
2 no longer be subject to FLSA minimum wage and overtime pay  
3 exemptions. Under this regulation, direct care workers, such as  
4 home health aides, personal care aides, and certified nursing  
5 assistants, who are employed by third-party employers, such as  
6 home care agencies, qualify for minimum wage and overtime  
7 protection. The regulation provides that third-party employers  
8 are no longer able to rely on the FLSA companionship exemption  
9 and overtime exemption for live-in domestics.

10 Trade associations representing third-party home care  
11 providers challenged this regulation in *Home Care Association of*  
12 *America v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015). In this case,  
13 the United States Court of Appeals for the District of Columbia  
14 upheld the regulation that extended FLSA's minimum wage and  
15 overtime provisions to employees of third-party agencies who are  
16 domestic service workers providing companionship services and  
17 live-in care for the elderly, ill, or disabled.

18 Under the regulation, direct care workers who perform  
19 medically-related services for which training is typically a  
20 prerequisite are not companionship workers and, therefore, are  
21 entitled to minimum wage and overtime. The regulation may have



1 a profound impact on current services and costs, especially for  
2 healthcare providers providing services to persons with  
3 developmental disabilities and persons with intellectual  
4 disabilities.

5 In light of the United States Department of Labor's  
6 statement that it could not "address all shared living  
7 arrangements raised in the comments because the circumstances  
8 are different under countless factual scenarios" (78 Fed. Reg.  
9 60,476) as it relates to application of FLSA to domestic  
10 services (Final Rule, 78 Fed. Reg. 60,454), the legislature  
11 finds it is in states' best interests to consider how best to  
12 provide healthcare services to persons with developmental  
13 disabilities and persons with intellectual disabilities in the  
14 State.

15 The purpose of this Act is to establish a health care task  
16 force to examine the impact of the federal regulation extending  
17 minimum wage and overtime pay protections under FLSA to direct  
18 care workers who provide essential home care services to persons  
19 with disabilities and older adults in the State.

20 SECTION 2. (a) There is established a health care task  
21 force to be placed in the department of health for



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1 administrative purposes to examine the impact of the federal  
2 regulation extending minimum wage and overtime pay protections  
3 under FLSA to workers who provide essential home care services  
4 to persons with disabilities and older adults.

5 (b) The health care task force shall:

6 (1) Examine whether FLSA applies to various shared living  
7 arrangements in the State, including adult foster care  
8 and community care homes, and the State's current  
9 community-based caregivers and home care businesses  
10 providing caregiver services in the State;

11 (2) Examine whether there is an employment relationship  
12 between a covered employer and a nonexempt employee,  
13 and whether a worker is an employee or an independent  
14 contractor;

15 (3) Provide guidance on the application of FLSA to  
16 innovative shared living programs and the  
17 administration of medicaid-funded and other home care  
18 programs;

19 (4) Review the work of direct service workers and develop  
20 a test or system to classify whether direct service



- 1 workers remain independent contractors or become  
2 employees;
- 3 (5) Review the FLSA economic realities test for  
4 independent contractors and determine whether it  
5 changes the status of a caregiver being an independent  
6 contractor or an employee; and
- 7 (6) With respect to essential services provided by  
8 developmental disabilities (DD)/mental retardation  
9 (MR) services provided to the State's elderly and  
10 disabled adult participants who live in community  
11 homes, examine the effect of the federal regulation on  
12 home caregivers in the State who provide DD/MR  
13 (intellectual disabilities) medicaid waiver services  
14 under section 1915(c) of the Social Security Act  
15 (DD/MR Waiver Services).
- 16 (c) The health care task force shall consist of the  
17 following members:
- 18 (1) The director of health or the director's designee, who  
19 shall serve as the chair of the task force;
- 20 (2) The director of human services or the director's  
21 designee;



- 1           (3) The director of commerce and consumer affairs or the  
2           director's designee;
- 3           (4) Representatives from health insurance plans within the  
4           State to be invited by the director of health;
- 5           (5) A representative from the Healthcare Association of  
6           Hawaii; and
- 7           (6) Representatives from recognized community care home  
8           organizations doing business in Hawaii and providing  
9           healthcare services to residents in the State, to be  
10          invited to serve on the task force by the department  
11          of health.
- 12          (c) The task force, by majority vote, may select an  
13          additional member to assist the task force.
- 14          (d) No member of the task force shall be made subject to  
15          chapter 84, Hawaii Revised Statutes, solely because of that  
16          member's participation as a member of the task force.
- 17          (e) The task force shall submit a report to the  
18          legislature of its findings and recommendations, including  
19          guidelines in meeting the requirements of the task force  
20          specified in this Act, no later than twenty days prior to the  
21          convening of the regular session of 2017.



1 (f) The health care task force shall terminate on

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3 SECTION 3. It is the intent of this Act not to jeopardize  
4 the receipt of any federal aid. If this Act is found to be in  
5 conflict with federal requirements that are a prescribed  
6 condition for the allocation of federal funds to the State, this  
7 Act shall be deemed void.

8 SECTION 4. This Act shall take effect upon its approval.

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INTRODUCED BY: Will Engro  
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# S.B. NO. 2634

**Report Title:**

Health Care Task Force; Fair Labor Standards Act; Direct Services Workers

**Description:**

Establishes a Health Care Task Force to examine the impact of federal rules extending minimum wage and overtime pay protections under the Fair Labor Standards Act to direct care workers who provide essential home care services to persons with disabilities and older adults.

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

