

ACT 109

H.B. NO. 1369

A Bill for an Act Relating to Nursing Facilities.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that the nursing facility sustainability program was established in 2012 and has served a critical role in strengthening the long-term care system in the State. In the eleven years since its inception, the nursing facility sustainability program has helped long-term care facilities treat the most vulnerable patients in the State, especially low-income individuals who require these services. The program has been carried out in a public-private partnership to ensure that patients in the State can access quality, affordable care.

The legislature further finds that, even with this program, nursing facilities in the State face major challenges. These challenges are due in part to the health and financial pressures related to the ongoing coronavirus disease 2019 pandemic. Medicaid is jointly financed by the federal and state governments by statutory formula whereby the federal government pays between fifty per cent and seventy-four per cent, with assistance levels determined by each state's per capita income. States with the lowest per capita income relative to the national average receive higher federal matching rates. Under federal rules, the state share must be public funds that are not federal funds. The legislature finds that public funding to help financially sustain Hawaii's nursing facilities should continue to be assessed through the nursing facility sustainability program's provider fee, which is currently scheduled to repeal in 2024.

The legislature further finds that provider fees exist in forty-nine states and the District of Columbia as a means of drawing down federal funds to sustain their medicaid programs, increase the number of health care providers, and expand medicaid enrollment. Provider fees, which are collected from specific categories of health care providers, may be imposed on different classes of health care services, including inpatient and outpatient hospital and nursing facility services.

The legislature also finds that a provider fee on nursing facilities in the State has resulted in a substantial increase in medicaid payments without putting additional constraints on the State's budget. The additional federal funds obtained via the nursing facility sustainability program have also maintained access to care for medicaid recipients. This has allowed nursing facilities in the State to continue to serve under- or uninsured patients in a timely, effective manner, and helped to ensure the overall sustainability of the health care system in the State.

Therefore, the purpose of this Act is to preserve access to health care for medicaid recipients and strengthen the nursing sustainability program by:

- (1) Repealing the sunset dates of Act 156, Session Laws of Hawaii 2012, and Act 124, Session Laws of Hawaii 2014, thereby making the program permanent and permanently exempting the nursing facility sustainability program special fund from the central service and administrative expenses assessments;

- (2) Making various amendments to the nursing facility sustainability program and nursing facility sustainability program special fund;
- (3) Repealing the nursing facility tax; and
- (4) Appropriating funds out of the nursing facility sustainability program special fund.

SECTION 2. Section 23-78, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) This section shall apply to the following:

- (1) Section 237-24.7(1)--Amounts received by hotel operators and hotel suboperators for employee wages and fringe benefits;
- (2) Section 237-24.7(2)--Amounts received by a county transportation system operator under a contract with the county;
- (3) Section 237-24.7(4)--Amounts received by orchard property operators for employee wages and fringe benefits;
- (4) Section ~~[237-24.7(6)]~~ 237-24.7(5)--Amounts received from insurers for damage or loss of inventory of businesses located in a natural disaster area;
- (5) Section ~~[237-24.7(7)]~~ 237-24.7(6)--Amounts received by community organizations, school booster clubs, and nonprofit organizations for precinct and other election-related activities;
- (6) Section ~~[237-24.7(8)]~~ 237-24.7(7)--Interest received by persons domiciled outside the State from trust companies acting as payment agents or trustees on behalf of issuers or payees of interest-bearing instruments or obligations;
- (7) Section ~~[237-24.7(9)]~~ 237-24.7(8)--Amounts received by management companies from related entities engaged in interstate or foreign common carrier telecommunications services for employee wages and fringe benefits; and
- (8) Section ~~[237-24.7(10)]~~ 237-24.7(9)--Amounts received from technology research and development grants.”

SECTION 3. Section 237-24.7, Hawaii Revised Statutes, is amended to read as follows:

“**§237-24.7 Additional amounts not taxable.** In addition to the amounts not taxable under section 237-24, this chapter shall not apply to:

- (1) Amounts received by the operator of a hotel from the owner of the hotel or from a time share association, and amounts received by the suboperator of a hotel from the owner of the hotel, from a time share association, or from the operator of the hotel, in amounts equal to and ~~[which]~~ that are disbursed by the operator or suboperator for employee wages, salaries, payroll taxes, insurance premiums, and benefits, including retirement, vacation, sick pay, and health benefits. As used in this paragraph:

“Employee” means employees directly engaged in the day-to-day operation of the hotel and employed by the operator or suboperator.

“Hotel” means an operation as defined in section 445-90 or a time share plan as defined in section 514E-1.

“Operator” means any person who, pursuant to a written contract with the owner of a hotel or time share association, operates or manages the hotel for the owner or time share association.

“Owner” means the fee owner or lessee under a recorded lease of a hotel.

“Suboperator” means any person who, pursuant to a written contract with the operator, operates or manages the hotel as a sub-contractor of the operator.

“Time share association” means an “association” as that term is defined in section 514E-1;

- (2) Amounts received by the operator of a county transportation system operated under an operating contract with a political subdivision, where the political subdivision is the owner of the county transportation system. As used in this paragraph:

“County transportation system” means a mass transit system of motorized buses providing regularly scheduled transportation within a county.

“Operating contract” or “contract” means a contract to operate and manage a political subdivision’s county transportation system, which provides that:

- (A) The political subdivision shall exercise substantial control over all aspects of the operator’s operation;
- (B) The political subdivision controls the development of transit policy, service planning, routes, and fares; and
- (C) The operator develops in advance a draft budget in the same format as prescribed for agencies of the political subdivision. The budget must be subject to the same constraints and controls regarding the lawful expenditure of public funds as any public sector agency, and deviations from the budget must be subject to approval by the appropriate political subdivision officials involved in the budgetary process.

“Operator” means any person who, pursuant to an operating contract with a political subdivision, operates or manages a county transportation system.

“Owner” means a political subdivision that owns or is the lessee of all the properties and facilities of the county transportation system (including buses, real estate, parking garages, fuel pumps, maintenance equipment, office supplies, etc.), and that owns all revenues derived therefrom;

- (3) Surcharge taxes on rental motor vehicles imposed by chapter 251 and passed on and collected by persons holding certificates of registration under that chapter;
- (4) Amounts received by the operator of orchard properties from the owner of the orchard property in amounts equal to and ~~which~~ that are disbursed by the operator for employee wages, salaries, payroll taxes, insurance premiums, and benefits, including retirement, vacation, sick pay, and health benefits. As used in this paragraph:

“Employee” means an employee directly engaged in the day-to-day operations of the orchard properties and employed by the operator.

“Operator” means a producer who, pursuant to a written contract with the owner of the orchard property, operates or manages the orchard property for the owner where the property contains an area sufficient to make the undertaking economically feasible.

“Orchard property” means any real property that is used to raise trees with a production life cycle of fifteen years or more producing fruits or nuts having a normal period of development from the initial planting to the first commercially saleable harvest of not less than three years.

“Owner” means a fee owner or lessee under a recorded lease of orchard property;

- ~~[(5) Taxes on nursing facility income imposed by chapter 346E and passed on and collected by operators of nursing facilities;~~
- ~~[(6) (5) Amounts received under property and casualty insurance policies for damage or loss of inventory used in the conduct of a trade or business located within the State or a portion thereof that is declared a natural disaster area by the governor pursuant to section 209-2;~~
- ~~[(7) (6) Amounts received as compensation by community organizations, school booster clubs, and nonprofit organizations under a contract with the chief election officer for the provision and compensation of precinct officials and other election-related personnel, services, and activities, pursuant to section 11-5;~~
- ~~[(8) (7) Interest received by a person domiciled outside the State from a trust company (as defined in section 412:8-101) acting as payment agent or trustee on behalf of the issuer or payees of an interest bearing instrument or obligation, if the interest would not have been subject to tax under this chapter if paid directly to the person domiciled outside the State without the use of a paying agent or trustee; provided that if the interest would otherwise be taxable under this chapter if paid directly to the person domiciled outside the State, it shall not be exempt solely because of the use of a Hawaii trust company as a paying agent or trustee;~~
- ~~[(9) (8) Amounts received by a management company from related entities engaged in the business of selling interstate or foreign common carrier telecommunications services in amounts equal to and ~~[which] that~~ are disbursed by the management company for employee wages, salaries, payroll taxes, insurance premiums, and benefits, including retirement, vacation, sick pay, and health benefits. As used in this paragraph:~~
- ~~“Employee” means employees directly engaged in the day-to-day operation of related entities engaged in the business of selling interstate or foreign common carrier telecommunications services and employed by the management company.~~
- ~~“Management company” means any person who, pursuant to a written contract with a related entity engaged in the business of selling interstate or foreign common carrier telecommunications services, provides managerial or operational services to that entity.~~
- ~~“Related entities” means:~~
- ~~(A) An affiliated group of corporations within the meaning of section 1504 (with respect to affiliated group defined) of the federal Internal Revenue Code of 1986, as amended;~~
 - ~~(B) A controlled group of corporations within the meaning of section 1563 (with respect to definitions and special rules) of the federal Internal Revenue Code of 1986, as amended;~~
 - ~~(C) Those entities connected through ownership of at least eighty per cent of the total value and at least eighty per cent of the total voting power of each ~~[such]~~ entity (or combination thereof), including partnerships, associations, trusts, S corporations, nonprofit corporations, limited liability partnerships, or limited liability companies; and~~
 - ~~(D) Any group or combination of the entities described in paragraph (C) constituting a unitary business for income tax purposes;~~

whether or not the entity is located within or without the State or licensed under this chapter; and
[(10)] (9) Amounts received as grants under section 206M-15.”

SECTION 4. Section 346D-4.5, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) There may be established a monthly needs allowance for individuals living in:

- (1) Adult residential care home type I and type II facilities;
- (2) Licensed developmental disabilities domiciliary homes as defined in section 321-15.9;
- (3) Community care foster family homes as defined in section 321-481;
- (4) Certified adult foster homes as defined in section 321-11.2;
- (5) Domiciliary care as defined in section 346-1;
- (6) A nursing facility [~~as defined in section 346E-1~~]; or
- (7) A community-based residence as part of the residential alternatives community care program.”

SECTION 5. Section 346F-2, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§346F-2]]~~ **Findings and declaration of necessity.** It is the intent of the legislature to establish a special fund within the state treasury to receive revenue from the imposition of a nursing facility sustainability fee to be administered by the department, which shall use the revenue from the fee and associated federal medicaid matching funds exclusively to make payments to nursing facilities and for other purposes as set forth in this chapter.”

SECTION 6. Section 346F-4, Hawaii Revised Statutes, is amended by amending subsections (b) through (d) to read as follows:

“(b) Moneys in the special fund shall consist of:

- (1) All revenues collected or received by the department from the nursing facility sustainability fee as required by this chapter;
- [(2)] ~~All federal medicaid funds received by the department as a result of matching expenditures made with the nursing facility sustainability fees;~~
- [(3)] (2) Any interest or penalties levied in conjunction with the administration of this chapter; and
- [(4)] (3) Any designated appropriations, federal funds, donations, gifts, or moneys from any other sources.

(c) Revenue from the nursing facility sustainability fee shall be used exclusively as follows:

- (1) No less than eighty-eight per cent of the revenue from the nursing facility sustainability fee shall be used for one or more of the following:
 - (A) To match federal medicaid funds, with the combined total to be used to enhance capitated rates to medicaid managed care health plans for the purpose of increasing medicaid payments to private nursing facilities to support the availability of services and ensure access to care for the medicaid managed care health plan enrollees; or
 - (B) To match federal medicaid funds, with the combined total to enhance capitated rates for the purpose of paying quality incentives; and

- (2) Twelve per cent of the revenue from the nursing facility sustainability fee may be used by the department for other departmental purposes~~[-and~~
- (3) ~~All moneys remaining in the special fund on June 30, 2024, shall be distributed to nursing facilities within thirty days in the same proportions as received from the nursing facilities].~~
- (d) The department shall utilize federal funds derived from state long-term care facility certified expenditures to make ~~supplemental~~ payments to state long-term care facilities to the extent permitted by federal law. The department may receive intergovernmental transfers from the state long-term care facilities to support ~~direct supplemental~~ payments and increased capitation rates to health plans for the benefit of the state long-term care facilities. During any period in which the nursing facility sustainability fee is in effect, certified expenditures of state long-term care facilities shall not be used to make or support ~~direct~~ payments to private nursing facilities.”

SECTION 7. Section 346F-5, Hawaii Revised Statutes, is amended by amending subsections (b) through (d) to read as follows:

“(b) The nursing ~~[f]acility~~ sustainability fee shall be based on the ~~net patient service revenue~~ total resident days of all nursing facilities that are subject to the sustainability fee, as determined by the department.

(c) The nursing facility sustainability fee shall not exceed ~~[5-5]~~ six per cent of overall net patient service revenue and shall be calculated and paid on a per resident day basis, unless the facility qualifies for an exemption identified in subsection (d)(1). The facilities described in subsection (d)(2) shall pay a reduced daily fee compared to other facilities participating in the program.

(d) In accordance with the redistribution method set forth in title 42 Code of Federal Regulations section 433.68(e)(1) and (2), the department shall seek a waiver of the broad-based and uniformity provider fee requirements under federal law from which to exclude certain nursing facilities and to permit certain high volume medicaid nursing facilities or facilities with a high number of total annual patient days to pay the sustainability fee at a lesser amount per resident day, as follows:

- (1) The department shall exempt the following nursing facility providers from the nursing facility sustainability fee subject to federal approval under title 42 Code of Federal Regulations section 433.68(e)(2):
 - (A) Nursing facilities with twenty-eight or fewer licensed beds;
 - (B) Nursing facilities owned, operated by, or affiliated with the Hawaii health systems corporation; and
 - (C) Continuing care retirement communities~~[-];~~
- (2) The department shall reduce the fee for ~~[high volume medicaid nursing facilities or facilities with high patient volumes]~~ facilities with high medicaid resident days in order to meet the redistributive tests of title 42 Code of Federal Regulations section 433.68(e)(2)~~[-];~~ and
- (3) The department, ~~[with agreement by]~~ upon good faith consultation and negotiation with the nursing facility trade ~~[associations]~~ association located in ~~[Hawaii-]~~ the State, may modify, add to, or ~~[reduce the categories of]~~ exclude facilities ~~[exempt]~~ from the assessment if necessary to obtain and maintain approval of the waiver by the Centers for Medicare and Medicaid Services, if the modification, addition, or exclusion is consistent with the purposes of this chapter.”

SECTION 8. Section 346F-6, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) ~~The department shall [collect and each nursing facility shall pay in twelve equal installments] impose the nursing facility sustainability fee [in section 346F-5 on a monthly basis, subject to the terms of this section. The fee shall be due within sixty days after the end of each month, with the initial payment due on the later of July 31, 2012, or forty five days after the required federal approvals for the assessment and any increase in health plan capitation payments have been secured from the Centers for Medicare and Medicaid Services.] on a monthly basis, which a nursing facility shall pay no later than the sixtieth day after the end of the calendar month that the department imposed the fee; provided that if required federal approvals have not been secured by the end of a calendar month, the fees for that month shall be paid within ten days after the notification to the nursing facilities that the required approvals have been received.”~~

SECTION 9. Section 346F-9, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) If a nursing facility fails to pay the full amount of the nursing facility sustainability fee when due, there shall be added to the fee, unless waived by the department for reasonable cause, a penalty equal to two per cent of the fee that was not paid when due. Any subsequent payments shall be credited first to unpaid fee amounts ~~[rather than to penalty or interest amounts,]~~ beginning with the most delinquent installment~~[,], rather than to penalty or interest amounts.”~~

SECTION 10. Section 346F-10, Hawaii Revised Statutes, is amended to read as follows:

“**§346F-10 Enhanced rates to medicaid managed care health plans.** (a) In accordance with title 42 Code of Federal Regulations part 438, the department shall use revenues from the nursing facility sustainability fee and federal matching funds to enhance the capitated rates paid to medicaid managed care health plans ~~[for the period of July 1 through December 31, 2021, and calendar years 2022 and 2023,]~~ consistent with the following objectives:

- (1) ~~The [rate enhancement shall be used exclusively for increasing reimbursements to private nursing facilities to support the availability of services and to ensure access to care to the medicaid managed care health plan enrollees;]~~ department shall use moneys from the nursing facility sustainability program solely to fulfill the requirements of section 346F-4(c);
- (2) The rate enhancement shall be ~~[made part of the monthly capitated rates]~~ paid by the department to medicaid managed care health plans, which shall provide documentation to the department and the nursing facility trade association located in ~~[Hawaii]~~ the State certifying that the revenues received under paragraph ~~[(4)]~~ (3) are used in accordance with this section;
- (3) The rate enhancement shall be used exclusively to increase reimbursements to private nursing facilities to support the availability of services and ensure access to care for medicaid managed care health plan enrollees;
- ~~[(3)]~~ (4) The rate enhancement shall be actuarially sound and approved by the federal government for federal fund participation;
- ~~[(4)]~~ (5) The department shall modify the fee-for-service reimbursement rates of the nursing facilities to recognize the medicaid portion of the nursing facility sustainability fee as an additional cost

- of serving medicaid patients, and to provide a uniform percentage increase in preexisting facility-specific rates; ~~and~~
- (5) (6) Payments made by the medicaid managed care health plans shall be made within thirty calendar days upon receipt of ~~[monthly capitation rates]~~ payment from the department~~[-]; and~~
- (7) Each medicaid managed care health plan shall expend one hundred per cent of any increased payments it receives under this section to carry out the goals of the nursing facility sustainability program.

(b) If federal approval pursuant to section 346F-7 is not received until after the end of any month for which the nursing facility sustainability fee is applicable, the department shall make the initial monthly payments within five days after receipt of the nursing facility sustainability fee for the respective month.

(c) To the extent the nursing facility sustainability program is not effective for the entire year, the nursing facility sustainability fee, the state medicaid expenses and administrative fee, and the corresponding payments to fulfill the requirements of section 346F-4(c) shall be based on the proportion of the fiscal year the program is in effect.”

SECTION 11. Section 346F-13, Hawaii Revised Statutes, is amended to read as follows:

“§346F-13 Termination. (a) Collection of the nursing facility sustainability fee under section 346F-5 shall be discontinued if:

- (1) The waiver in section 346F-7 or the enhanced capitation rates in section 346F-10 have not been approved by the Centers for Medicare and Medicaid Services;
- (2) The department reduces ~~[funding for nursing facility services below the state appropriation in effect on June 30, 2021;]~~ reimbursement rates for private nursing facility services to medicaid patients with the intention of using the sustainability funds to supplant the planned or permanent reduction in rates;
- (3) The department or any other state agency uses the money in the special fund for any use other than the uses permitted pursuant to this chapter; or
- (4) Federal financial participation to match the nursing facility sustainability fee becomes unavailable under federal law~~[- in such], in which~~ case, the department shall terminate the collection of the fee beginning on the effective date of the federal statutory, regulatory, or interpretive change.

(b) If ~~[collection of]~~ the nursing facility sustainability fee is discontinued ~~[as provided in this section], any [remaining] money remaining~~ in the nursing facility sustainability program special fund shall be ~~[returned]~~ distributed to the nursing facilities ~~[from which the fee was collected]~~ within [thirty days] six months of the date of discontinuation in the same proportions as received from the nursing facilities.”

SECTION 12. Chapter 346E, Hawaii Revised Statutes, is repealed.

SECTION 13. Act 156, Session Laws of Hawaii 2012, as amended by section 3 of Act 142, Session Laws of Hawaii 2013, as amended by section 2 of Act 124, Session Laws of Hawaii 2014, as amended by section 2 of Act 69, Session Laws of Hawaii 2015, as amended by section 2 of Act 59, Session Laws of Hawaii 2016, as amended by section 5 of Act 60, Session Laws of Hawaii 2017, as amended by section 6 of Act 163, Session Laws of Hawaii 2019, as

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amended by section 7 of Act 24, Session Laws of Hawaii 2021, is amended by amending section 5 to read as follows:

~~“SECTION 5. This Act shall take effect on July 1, 2012; and shall be repealed on December 31, 2023; provided that section 4, Hawaii Revised Statutes, established by section 2 of this Act, and the amendment made to section 36-30(a), Hawaii Revised Statutes, in section 3 of this Act, shall be repealed on June 30, 2024.”~~

SECTION 14. Act 124, Session Laws of Hawaii 2014, as amended by section 3 of Act 69, Session Laws of Hawaii 2015, as amended by section 3 of Act 59, Session Laws of Hawaii 2016, as amended by section 6 of Act 60, Session Laws of Hawaii 2017, as amended by section 7 of Act 163, Session Laws of Hawaii 2019, as amended by section 8 of Act 24, Session Laws of Hawaii 2021, is amended by amending section 7 to read as follows:

~~“SECTION 7. This Act shall take effect on June 29, 2014; provided that:~~
~~(1) Section 5 shall take effect on July 1, 2014; and~~
~~(2) The amendments made to sections 36-27(a) and 36-30(a), Hawaii Revised Statutes, in sections 3 and 4 of this Act shall be repealed on June 30, 2024.”~~

SECTION 15. There is appropriated out of the nursing facility sustainability program special fund the sum of \$27,000,000 or so much thereof as may be necessary for fiscal year 2023-2024 and the same sum or so much thereof as may be necessary for fiscal year 2024-2025 for purposes consistent with section 346F-4, Hawaii Revised Statutes.

The sums appropriated shall be expended by the department of human services for the purposes of this Act.

SECTION 16. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 17. This Act shall take effect upon its approval; provided that sections 14 and 15 shall take effect on July 1, 2023.

(Approved June 22, 2023.)