No. 48. An act relating to independent direct support providers.

(S.59)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 21 V.S.A. chapter 20 is added to read:

CHAPTER 20. INDEPENDENT DIRECT SUPPORT PROVIDERS

§ 1631. DEFINITIONS

As used in this chapter:

(1) "Board" means the State Labor Relations Board established by 3 V.S.A. § 921.

(2) "Collective bargaining" or "bargaining collectively" means the process by which the State and the exclusive representative of the independent direct support providers negotiate mandatory subjects of bargaining identified in subsection 1634(b) of this chapter, or any other mutually agreed subjects of bargaining not in conflict with state or federal law, with the intent to arrive at an agreement which, when reached, shall be legally binding on all parties.

(3) "Collective bargaining service fee" means a fee deducted by the State from the compensation of an independent direct support provider who is not a member of the exclusive representative of independent direct support providers, which is paid to the exclusive representative. The collective bargaining service fee shall not exceed 85 percent of the amount payable as dues by members of the exclusive representative, and shall be deducted in the same manner as dues are deducted from the compensation of members of the exclusive representative, and shall be used to defray the costs incurred by the

labor organization in fulfilling its duty to represent independent direct support providers in their relations with the State.

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

(5) "Grievance" means the exclusive representative's formal written complaint regarding the improper application of one or more terms of the collective bargaining agreement, the failure to abide by any agreement reached, or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with the State.

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

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

(8) "Service recipient" means a person who receives home- and community-based services under the Choices for Care Medicaid waiver, the Attendant Services Program (ASP), the Children's Personal Care Service Program, the Developmental Disabilities Services Program, or any successor program or similar program subsequently established.

(9) "Shared living provider" means a person who operates under a contract with an authorized agency and provides individualized home support for one or two people who live in his or her home. An authorized agency includes a designated agency for developmental services.

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

§ 1632. RIGHTS OF INDEPENDENT DIRECT SUPPORT PROVIDERS

Independent direct support providers shall have the right to:

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

(2) bargain collectively through their chosen representatives;

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

(4) pursue grievances through the exclusive representative as provided in this chapter; and

(5) refrain from any or all such activities, subject to the requirements of subdivision 1634(b)(3) of this chapter.

§ 1633. RIGHTS OF THE STATE

Subject to the rights guaranteed by this chapter and subject to all other applicable laws, rules, and regulations, nothing in this chapter shall be construed to interfere with the right of the State to:

(1) carry out the statutory mandate and goals of the Agency of Human Services and to utilize personnel, methods, and means in the most appropriate manner possible;

(2) with the approval of the Governor, take whatever action may be necessary to carry out the mission of the Agency of Human Services in an emergency situation;

(3) comply with federal and state laws and regulations;

(4) enforce regulations and regulatory processes;

(5) develop regulations and regulatory processes that do not impair existing contracts, subject to the duty to bargain over mandatory subjects of bargaining and to the rulemaking authority of the General Assembly and the Human Services Board; and

(6) solicit and accept for use any grant of money, services, or property from the federal government, the State, or any political subdivision or agency of the State, including federal matching funds, and to cooperate with the federal government or any political subdivision or agency of the State in making an application for any grant.

§ 1634. ESTABLISHMENT OF LIMITED COLLECTIVE BARGAINING; SCOPE OF BARGAINING

(a) Independent direct support providers, through their exclusive representative, shall have the right to bargain collectively with the State, through the Governor's designee, under this chapter.

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

(1) compensation rates, workforce benefits, and payment methods and procedures, except that independent direct support providers shall not be eligible to participate in the State's retirement system or the Vermont state employee health plan solely by virtue of bargaining under this chapter;

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

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

(A) an audited financial statement that identifies the major categories of expenses, and divides them into chargeable and nonchargeable expenses; and

(B) an opportunity to object to the amount of the agency fee sought, any amount reasonably in dispute to be placed in escrow, subject to prompt review and determination by the board to resolve any objection over the amount of the collective bargaining fee, as provided for in subsection (d) of this section.

(4) procedures for resolving grievances against the State, provided that the final step of any negotiated grievance procedure, if required, shall be a

hearing and final determination by the board in accordance with board rules and regulations; and

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

(c) For the purpose of this chapter, the obligation to bargain collectively is the performance of the mutual obligation of the State and the exclusive representative of the independent direct support providers to meet at reasonable times and confer in good faith with respect to all matters bargainable under the provisions of this chapter; but the failure or refusal of either party to agree to a proposal, or to change or withdraw a lawful proposal, or to make a concession shall not constitute, or be evidence of direct or indirect, a breach of this obligation. Nothing in this chapter shall be construed to require either party during collective bargaining to accede to any proposal or proposals of the other party.

(d) Any dispute raised by a nonmember concerning the amount of a collective bargaining service fee, as provided for under subdivision (b)(3) of this section, may be grieved to the State Labor Relations Board which shall review and determine such matter promptly, in accordance with the Board's rules.

§ 1635. ELECTION; BARGAINING UNIT

(a) Petitions and elections shall be conducted pursuant to the procedures provided in 3 V.S.A. §§ 941 and 942, except that only one bargaining unit shall exist for independent direct support providers, and the exclusive representative shall be the exclusive representative for the purpose of grievances.

(b) A representation election for independent direct support providers conducted by the Board shall be by mail ballot.

(c) The bargaining unit for purposes of collective bargaining pursuant to this chapter shall be one statewide unit of independent direct support providers. Eligible independent direct support providers shall have the right to participate in a representation election but shall not have the right to vote on or otherwise determine the collective bargaining unit. Eligible independent direct support providers shall all be independent direct support providers who have been paid for providing home- and community-based services within the previous 180 days.

(d) At least quarterly the State shall compile and maintain a list of names and addresses of all independent direct support providers who have been paid for providing home- and community-based services to service recipients within the previous 180 days. The list shall not include the names of any recipient, or indicate that an independent direct support provider is a relative of a recipient or has the same address as a recipient. The State shall, upon request, provide

within seven days the most recent list of independent direct support providers in its possession to any organization which has as one of its primary purposes the collective bargaining representation of independent direct support providers in their relations with state or other public entities. This obligation shall include providing the most recent list, upon request, to any labor organization certified as the exclusive representative under this chapter.

§ 1636. MEDIATION; FACT-FINDING; LAST BEST OFFER

(a) If, after a reasonable period of negotiation, the representative of the collective bargaining unit and the State reach an impasse, the Board, upon petition of either party, may authorize the parties to submit their differences to mediation. Within five days after receipt of the petition, the Board shall appoint a mediator who shall communicate with the parties and attempt to mediate an amicable settlement. A mediator shall be of high standing and not actively connected with labor or management.

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

(c) The Board shall appoint a fact finder who has been mutually agreed upon by the parties. If the parties fail to agree on a fact finder within five days, the Board shall appoint a neutral third party to act as a fact finder pursuant to rules adopted by the Board. A member of the Board or any individual who has actively participated in mediation proceedings for which fact-finding has been

called shall not be eligible to serve as a fact finder under this section, unless agreed upon by the parties.

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

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

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

(1) the needs and welfare of consumers, including their interest in greater access to quality services;

(2) the nature and needs of the personal care assistance program;

(3) the interest and welfare of independent direct support providers;

(4) the history of negotiation between the parties, including those leading to the proceedings;

(5) changes in the cost of living; and

(6) generally accepted labor-management relations practices in Vermont.

(g) Upon completion of the hearings provided in subsection (d) of this section, the fact finder shall file written findings and recommendations with both parties.

(h) The costs of witnesses and other expenses incurred by either party in fact-finding proceedings shall be paid directly by the parties incurring them, and the costs and expenses of the fact finder shall be divided equally by the parties. The fact finder shall be paid a rate mutually agreed upon by the parties for each day or any part of a day while performing fact-finding duties and shall be reimbursed for all reasonable and necessary expenses incurred in the performance of his or her duties. A statement of fact-finding per diem and expenses shall be certified by the fact finder and submitted to the Board for approval. The Board shall provide a copy of approved fact-finding costs to each party with its order apportioning half of the total to each party for payment. Each party shall pay its half of the total within 15 days after receipt of the order. Approval by the Board of fact-finding and the fact finder's costs and expenses and its order for payment shall be final as to the parties.

(i) If the dispute remains unresolved 20 days after transmittal of findings and recommendations, each party shall submit to the Board its last best offer on all disputed issues as a single package. Each party's last best offer shall be certified to the Board by the fact finder. The board may hold hearings and consider the recommendations of the fact finder. Within 30 days of the certifications, the Board shall select between the last best offers of the parties, considered in their entirety without amendment, and shall determine its cost. The Board shall not issue an order under this subsection that: (1) is in conflict with any statute; (2) is in conflict with any rule unless the rule relates to a

mandatory subject of bargaining; or (3) determines an issue that is not a mandatory subject of bargaining. The Board shall determine the cost of the agreement selected and recommend to the General Assembly its choice with a request for appropriation. If the General Assembly appropriates sufficient funds, the agreement shall become effective and legally binding at the beginning of the next fiscal year. If the General Assembly appropriates a different amount of funds, the terms of the agreement affected by that appropriation shall be renegotiated based on the amount of funds actually appropriated by the General Assembly, and the agreement with the negotiated changes shall become effective and binding at the beginning of the next fiscal year. No portion of any agreement shall become effective separately without the mutual consent of the parties.

§ 1637. GENERAL DUTIES AND PROHIBITED CONDUCT

(a) The State and the independent direct support providers and their representatives shall make every reasonable effort to make and maintain agreements concerning matters allowed under this chapter and to settle all disputes, whether arising out of the application of those agreements or disputes concerning the agreements. All disputes shall, upon request of either party, be considered within 15 days of the request or at such times as may be mutually agreed to and if possible settled with all expedition in conference between representatives designated and authorized to confer by the State or the

independent direct support providers. This obligation does not compel either party to make any agreements or concessions.

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

(1) Interfere with, restrain, or coerce independent direct support providers in the exercise of their rights under this chapter or by any law, rule, or regulation.

(2) Dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

(3) Discriminate in regard to referral practices or eligibility for work opportunities within covered programs for an independent direct support provider, or to encourage or discourage membership in any labor organization.

(4) Take negative action against an independent direct support provider because the provider has taken actions demonstrating his or her support for a labor organization, including signing a petition, grievance, or affidavit or giving testimony under this chapter.

(5) Refuse to bargain collectively in good faith with the exclusive representative.

(6) Discriminate against an independent direct support provider based on race, color, creed, religion, age, gender, sexual orientation, gender identity, or national origin, or because the provider is a qualified individual with a disability.

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

(1) Restrain or coerce independent direct support providers in the exercise of the rights guaranteed them by law, rule, or regulation. However, a labor organization may prescribe its own rules with respect to the acquisition or retention of membership, provided such rules are not discriminatory.

(2) Refuse to bargain collectively in good faith with the State.

(3) Cause, or attempt to cause, the State to discriminate against an independent direct support provider in violation of subsection (b) of this section.

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

(d) An independent direct support provider shall not strike or curtail his or her services in recognition of a picket line of any employee or labor organization.

§ 1638. PREVENTION OF UNFAIR PRACTICES

(a) The Board may prevent the State or a labor organization from engaging in any unfair labor practice listed in section 1637 of this title. Whenever a charge is made that the State or a labor organization has engaged in or is engaging in any unfair labor practice, the Board may issue and cause to be served upon that party a complaint stating the charges in that respect and containing a notice of hearing before the Board at a place and time therein fixed at least seven days after the complaint is served. The Board may amend the complaint at any time before it issues an order based thereon. No

complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the party against whom such charge is made, unless the person aggrieved thereby was prevented from filing the charge by reason of service in the U.S. Armed Forces, in which event the six-month period shall be computed from the day of his or her discharge.

(b) The party complained of shall have the right to file an answer to the original or amended complaint and appear in person or otherwise and present evidence in connection therewith at the time and place fixed in the complaint. In the discretion of the Board, any other person may be permitted to intervene and present evidence in the matter. Any proceeding under this section shall, so far as practicable, be conducted in accordance with rules of evidence used in the courts. The Board shall provide for the making of a transcript of the testimony presented at the hearing.

(c) The Board shall have power to administer oaths and take testimony under oath relative to the matter of inquiry. At any hearing ordered by the Board, the Board shall have the power to subpoena witnesses and to demand the production of books, papers, records, and documents for its examination. Officers who serve subpoenas issued by the Board and witnesses attending hearings conducted by the Board shall receive fees and compensation at the same rates as officers and witnesses in causes before a Criminal Division of the Superior Court, to be paid on vouchers of the Board.

(d) If upon the preponderance of the evidence, the Board finds that any party named in the complaint has engaged in or is engaging in any such unfair labor practice, it shall state its finding of fact in writing and shall issue and cause to be served on that party an order requiring him or her to cease and desist from the unfair labor practice, and to take such affirmative action as will carry out the policies of this chapter. If upon the preponderance of the evidence, the Board does not find that the party named in the complaint has engaged in or is engaging in any unfair labor practice, it shall state its findings of fact in writing and dismiss the complaint.

(e) In determining whether a complaint shall issue alleging a violation of subdivision 1637(1) or (2) of this title, and in deciding those cases, the same regulations and rules of decision shall apply irrespective of whether or not a labor organization affected is affiliated with a labor organization national or international in scope.

§ 1639. NEGOTIATED AGREEMENT; FUNDING

(a) If the State and the exclusive representative reach an agreement, the Governor shall request from the General Assembly an appropriation sufficient to fund the agreement in the next operating budget. If the General Assembly appropriates sufficient funds, the negotiated agreement shall become effective and binding at the beginning of the next fiscal year. If the General Assembly appropriates a different amount of funds, the terms of the agreement affected by that appropriation shall be renegotiated based on the amount of funds

actually appropriated by the General Assembly and shall become effective and legally binding in the next fiscal year.

(b) Collective bargaining agreements shall be for a maximum term of two years and shall not be subject to cancellation or renegotiation during the term except with the mutual consent in writing of both parties, which consent shall be filed with the Board. Upon the filing of such consent, an agreement may be supplemented, cancelled, or renegotiated.

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

(d) In the event the State of Vermont and the collective bargaining unit are unable to arrive at an agreement and there is not an existing agreement in effect, the existing contract shall remain in force until a new contract is ratified by the parties. However, nothing in this subsection shall prohibit the parties from agreeing to a modification of certain provisions of the existing contract which, as amended, shall remain in effect until a new contract is finalized and funded by the General Assembly.

(e) The Board is authorized to enforce compliance with all provisions of a collective bargaining agreement upon complaint of either party. In the event a complaint is made by either party to an agreement, the Board shall proceed in

the manner prescribed in section 1638 of this title relating to the prevention of unfair labor practices.

§ 1640. RIGHTS UNALTERED

(a) A collective bargaining agreement shall not infringe upon any rights of service recipients or their surrogates to hire, direct, supervise, or discontinue the employment of any particular independent direct support provider.

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

(c) Independent direct support providers shall not be considered state employees for purposes other than collective bargaining, including for purposes of joint or vicarious liability in tort or the limitation on liability in subsection (e) of this section. Independent direct support providers shall not be eligible for participation in the State Employee Retirement System or health care plan solely by virtue of bargaining under this chapter. Nothing in this chapter shall require the State to alter its current practice with respect to independent direct support providers of making payments regarding Social Security and Medicare taxes, federal or state unemployment contributions, or workers' compensation insurance.

(d) Nothing in this chapter shall infringe upon the right of the Judiciary and the General Assembly to make programmatic modifications to the delivery of state services through subsidy or other programs.

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

§ 1641. RULES AND REGULATIONS

The Board shall make and may amend and rescind and adopt such rules and regulations consistent with this chapter as may be necessary to carry out the provisions of this chapter.

§ 1642. APPEAL

(a) Any person aggrieved by an order or decision of the Board issued under the authority of this chapter may appeal on questions of law to the Supreme Court.

(b) An order of the Board shall not automatically be stayed pending appeal. A stay must first be requested from the Board. The Board may stay the order or any part of it. If the Board denies a stay, then a stay may be requested from the Supreme Court. The Supreme Court or a single justice may stay the order or any part of it and may order additional interim relief.

§ 1643. ENFORCEMENT

(a) Orders of the Board issued under this chapter may be enforced by any party or by the Board by filing a petition with the Civil Division of the Superior Court of Washington County or in the Civil Division of the Superior Court in the county in which the action before the Board originated. The

petition shall be served on the adverse party as provided for service of process under the Vermont Rules of Civil Procedure. If, after hearing, the court determines that the Board had jurisdiction over the matter and that a timely appeal was not filed or that an appeal was timely filed and a stay of the Board order or any part of it was not granted or that a Board order was affirmed on appeal in pertinent part by the Supreme Court, the court shall incorporate the order of the Board as a judgment of the court. There is no appeal from that judgment except that a judgment reversing a Board decision on jurisdiction may be appealed to the Supreme Court.

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

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

§ 1644. ANTITRUST EXEMPTION

The activities of independent direct support providers and their exclusive representative that are necessary for the exercise of their rights under this chapter shall be afforded state action immunity under applicable federal and state antitrust laws. The State intends that the "state action" exemption to

federal antitrust laws be available only to the State, to independent direct support providers, and to their exclusive representative in connection with these necessary activities. Exempt activities shall be actively supervised by the State.

Sec. 2. SELF-DETERMINATION ALLIANCE

(a) There is established a Self-Determination Alliance to advise the State on issues related to stabilizing the independent direct provider workforce and improving the quality of services provided to people with disabilities and elders who manage their services. The alliance shall consist of:

(1) The Commissioner of Disabilities, Aging, and Independent Living or designee;

(2) The Commissioner of Health or designee;

(3) Two service recipients who manage their services under Developmental Disabilities Services, two service recipients who manage their services under Choices for Care Medicaid Waiver, and two recipients who manage their services under Attendant Services Program (ASP), and one service recipient who manages his or her services under the Traumatic Brain Injury Program.

(4) One family member of a service recipient under Children's Personal Care Program and one family member of a service recipient under Developmental Disabilities Services.

(b) All initial appointments to the Alliance shall be made on or before August 1, 2013. The chair shall convene the first meeting on or before September 1, 2013. The chair shall be appointed by the Governor from among its members. Members shall serve coterminously and at the pleasure of their appointing authority. A majority of members of the Self-Determination Alliance shall constitute a quorum for the transaction of any business. The Alliance shall be within the Agency of Human Services for administrative purposes only.

(c) The Self-Determination Alliance shall advise the State regarding issues relating to attracting and retaining a high-quality independent direct support provider workforce to be available to all service recipients, including making recommendations to improve the quality, stability, and availability of the independent direct support provider workforce.

(d) The Secretary of Human Services shall review the recommendations of the Self-Determination Alliance within 30 days of submission, and shall include the recommendations with his or her input to the Governor's collective bargaining designee.

Sec. 3. SUNSET

Sec. 2 of this act shall be repealed on June 30, 2018. Prior to this date, the members of the Self-Determination Alliance shall review the purpose and membership of the Alliance and report its recommendations on the future role of the Alliance to the House Committee on General, Housing and Military

Affairs and the Senate Committee on Economic Development, Housing and General Affairs.

Sec. 4. EFFECTIVE DATE

This act shall take effect on passage.

Date the Governor signed the bill: May 24, 2013