

4/20/2009

The Honorable Patricia Vance, Chair
Senate Aging and Youth Committee
Senate Box 203013
351 Main Capitol Bldg.
Harrisburg, PA 17120

Dear Senator Vance:

I write on behalf of the County Commissioners Association of Pennsylvania regarding the joint informational hearing with the Senate Labor and Industry Committee concerning consumer workforce councils. CCAP has no formal position on consumer workforce councils, although our members have expressed concerns with the use of intergovernmental agreements to establish them.

Recently, the CCAP Board of Directors discussed at great length the efforts in several counties to establish consumer workforce councils for the purpose of creating a structured workforce for home health care workers, and establishing a mechanism for those workers to negotiate salary and benefits. While CCAP strongly supports allowing counties the greatest possible flexibility to make decisions locally, board members were concerned that such agreements could bind a non-participating county to paying for or providing services and benefits that are not currently required through county revenues and resources. More importantly, the board responded with concern to reports that a trigger would be reached if three counties would sign such agreements, launching the program statewide.

There are a number of concerns with establishing this structure without legislative oversight, and the board expressed concern that other counties could be forced to adopt a similar model. The board felt that having a council in several counties and not others could create an environment for litigation relying on a promise of the same public benefits being provided consistently across the state.

After much debate, the CCAP Board adopted a motion stating that if such agreements are to be considered for local consumer workforce councils, they should be adopted legislatively and not by local ordinance. The CCAP Human Services Committee met later that same day, and a similar discussion led to an identical motion by that committee.

I hope this letter will clarify the concerns of Commissioners with regard to consumer workforce councils. I would be happy to discuss this with you at your convenience. Please feel free to contact me at any time.

Sincerely,


Brinda Carroll Penyak
Deputy Director

4/20/2009

The Honorable John Gordner, Chair
Senate Labor and Industry Committee
Senate Box 203027
351 Main Capitol Bldg.
Harrisburg, PA 17120

Dear Senator Gordner:

I write on behalf of the County Commissioners Association of Pennsylvania regarding the joint informational hearing with the Senate Aging and Youth Committee concerning consumer workforce councils. CCAP has no formal position on consumer workforce councils, although our members have expressed concerns with the use of intergovernmental agreements to establish them.

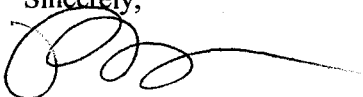
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Sincerely,



Brinda Carroll Penyak
Deputy Director



COMMONWEALTH OF PENNSYLVANIA

April 21, 2009

Thomas H. Earle, CEO
Liberty Resources, Inc.
714 Market Street, Suite 100
Philadelphia, PA 19106

Dear Mr. Earle:

We have concluded our legal analysis of the draft Consumer Workforce Council (CWC) proposal to determine compliance and conformity to existing and applicable labor laws, regulations and policies as they pertain to programs serving Pennsylvania's disability and aging communities. I have enclosed a copy of the legal memo for your review.

While the analysis has identified several issues and concerns that will require further revision, we believe the general concept offers a positive framework for continuing this discussion. We understand that it is not a finished product, but a work-in-progress and the Administration is interested in moving such discussions forward.

As Pennsylvania's population ages, the demands increase on those in whom we entrust the care of our older loved ones. One way to address this need is to expanding the availability and quality of consumer directed home care services. Creation of an entity like the CWC could provide a mechanism for deliberating the steps necessary to ensure the future success of consumer directed model of care in Pennsylvania's home care delivery system.

The Administration recognizes the benefit of this approach and we look forward to entering into discussions with all interested parties to refine the concept and advance the interests of our direct care workforce. We believe that establishing such a Council could assist in achieving the following goals: rebalancing Pennsylvania's long-term care system; increasing independence and choice for those in need of services; expanding the availability of consumer directed home care services; assuring quality in long term care; controlling costs; and, recruiting, training and retaining direct care workers.

However, it will be important to ensure that an open process is observed and the perspectives of the entire spectrum of stakeholders are solicited and fairly considered. Moreover, the General Assembly has recently expressed interest in pursuing a legislative remedy and we should thoroughly explore that possibility.

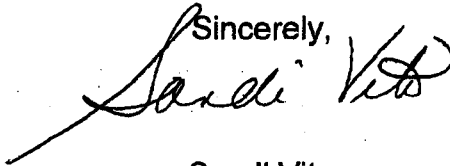
Recognizing that there will be policy and operational issues to be addressed in the further development and implementation of any such initiative, we must continue to work closely with consumers, consumer advocacy groups, workers, workers' representatives and the General Assembly to ensure any proposal is properly vetted with the affected groups.

Throughout this process, it has always been our intention to ensure that the stakeholders and concerned communities would have the opportunity to deliberate the concept and specific language of any proposed model in public meetings and forums. The upcoming joint public hearing of the Senate Labor and Industry Committee and Senate Aging and Youth Committee will provide the appropriate opportunity to begin that process.

One of the great strengths of the Commonwealth's home care system is the flexibility that we afford consumers, permitting them to choose to receive their care either from our well-established network of professional home care provider agencies or by directly hiring their own caregivers. To this end, the Commonwealth supports the creation of a venue that would allow consumers and direct care workers to address the labor shortage, worker training and qualification challenges faced by our direct care workforce.

I thank you and the members of the Steering Committee who have laid the foundation for the creation of a strategy to address labor force shortages, wages and benefits and other issues affecting both consumers and workers. I look forward to working with you and all the stakeholders as we strive to improve the quality of jobs and quality of care.

Sincerely,

A handwritten signature in black ink that reads "Sandi Vito". The signature is written in a cursive style with a long, sweeping underline that extends to the left.


Sandi Vito
Acting Secretary

cc: Secretary Estelle B. Richman
Secretary John Michael Hall



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

TO: Sandi Vito
Acting Secretary
Department of Labor and Industry

FROM: Jane C. Pomerantz 
Chief Counsel

DATE: April 20, 2009

SUBJECT: **Labor and Industry Analysis of Intergovernmental Cooperative Agreement
Creating the Consumer Workforce Council**

You have asked me to outline any key legal issues raised by the Intergovernmental Cooperative Agreement (IGA) prepared by the Consumer Attendant Workforce Steering and Legal Committees establishing a Pennsylvania Consumer Workforce Council (Council). This analysis is based upon the perspective of the Department of Labor and Industry and if the Council version complies with the requirements of the Intergovernmental Cooperative Act. Any issues regarding compliance with Medicare or other federal or state assistance programs for home care workers will have to be addressed by the Departments of Aging and Public Welfare.

Compliance with Intergovernmental Cooperation Act

The Pennsylvania Constitution was amended in 1968 to include an explicit provision authorizing intergovernmental cooperation between governmental units. Pennsylvania Constitution Article IX, Section 5. To implement this Constitutional Amendment, the Legislature enacted the Intergovernmental Cooperation Act of July 12, 1972, P.L. 762, which is now codified at 53 Pa.C.S. §§2301 to 2315. That Act authorizes two or more "local governments" to "jointly cooperate... in the exercise or in the performance of their respective governmental functions, powers or responsibilities." 53 Pa.C.S. §2303(a). In order to do so, the local governments are required to enter into "any joint agreements as may be deemed appropriate for such purposes." 53 Pa.C.S. § 2303(b). In other words, if a County has the power to take an action or deliver a service under the provisions of law, its code or charter, then the County has the power to cooperate with other local governments in doing so. It may then delegate or transfer those functions, powers or responsibilities to another local government or "similar entity." Furthermore, the Intergovernmental Cooperation Act permits local governments to enter

into intergovernmental cooperation with the Commonwealth. 53 Pa.C.S. §2307(1). An agreement between a local government and the Commonwealth must be submitted to the Local Government Commission for review and recommendation. 53 Pa.C.S. §2314.

It appears that the CWC proposal meets all the requirements of the Intergovernmental Cooperation Act.

Designation of Employer

A major legal issue is designation of the Consumer as employer and the Council as a joint but limited employer of those workers. The Council determines or negotiates wages, leave entitlement and benefits for the workers; bargains with any labor organization if selected by the workers; acts as a unified voice for Consumers at the bargaining table; addresses grievances of workers with regard to matters under the Council's control without interfering with the principle Consumer control. While the Council will facilitate orientation and training, it will provide training only at the direction of Consumers. It will not determine qualifications of workers. Nor will the Council perform fiscal inter-mediary/management services. The Council will ensure that the FMS agencies make arrangements and payments on behalf of Consumers for worker's compensation coverage and if practical, for tort liability insurance to protect Consumers and workers.

It is unclear as written who will be determined to be the employer for purposes of unemployment and workers compensation, especially in light of the fact that UC and WC case law have never embraced the concept of joint employers. For purposes of UC and WC, the entity that has direction and control over the workers are determined to be the employer and liable for the payment UC taxes and WC premiums. This determination involves a difficult balancing test based on the facts of an individual case. However, under both laws, the courts have determined only one entity to be the employer. Some might not view this as an issue as long as one entity, whether the Council or the consumer, pays the UC taxes and WC premiums to ensure that the workers are covered.

Collective Bargaining Issues

While it appears that the Pennsylvania Labor Relations Board may have jurisdiction under the Pennsylvania Employment Relations Act (PERA) (43 P.S. § 1101.101 *et seq.*), the state public sector labor law, the language of the IGA cannot determine the application of PERA by simply designating the Council as a collective bargaining agent. For there to be an authorized collective bargaining agent under Pennsylvania labor laws, the state Labor Board must certify a union to represent employees of a "public employer" for collective bargaining. That is true even when the "public employer" agrees to recognize a union for collective bargaining purposes. 43 P.S. §1101. 602(a). Thus, the entity created must qualify as a "public employer" under existing law. In the absence of a designated "employer", a certified labor organization, and bona fide collective bargaining, the collective setting of wages may not qualify for the labor anti-trust exemption.