

SUBJECT: Expanding “whistle blower” protection in nursing homes and ICF-MRs

COMMITTEE: Human Services — committee substitute recommended

VOTE: 5 ayes — Naishtat, J. Davis, Noriega, Raymond, Wohlgemuth

0 nays

4 absent — Chavez, Ehrhardt, Telford, Villarreal

WITNESSES: For — Bruce Bower, Texas Senior Advocacy Coalition; Nancy Chessen; Gavin Gadberry, Texas Health Care Association; Jerry Galow; Leslie Hernandez, National Association of Social Workers, Texas; Greg Hooser, Private Providers Association of Texas; *Registered but did not testify:* Teresa Aguirre, Texas Association of Homes and Services for the Aging; Susan Marshall, The Arc of Texas; Carole Smith, Private Providers Association of Texas; Lee Spiller

Against — None

BACKGROUND: Health and Safety Code, secs. 242.133 and 242.1335 prohibit retaliation against employees, volunteers or residents of a nursing home who report abuse or neglect in a facility or related institutions. Health and Safety Code, secs. 252.132 and 252.133 apply the same laws to intermediate care facilities for the mentally retarded (ICF-MRs)

An employee in a nursing home or similar facility who is fired, suspended or otherwise disciplined because of reporting neglect or abuse may recover \$1,000 or actual damages, including mental anguish, other damages, court costs, and attorney fees. In addition, the employee may be entitled to reinstatement of employment in his or her former position, including seniority and benefits. The employee must bring suit or notify the Texas Workforce Commission within 90 days of the suspension or termination. Though the employee has the burden of proof in such a case, there is a rebuttable presumption of retaliation if the termination or suspension of employment took place within 60 days after reporting abuse or neglect. As a condition of employment, institutions must require employees to sign a statement that

these rights are understood. Employees at ICF-MRs have the same rights and condition of employment.

A volunteer or resident in a nursing home or similar facility who is retaliated or discriminated against is entitled to sue for injunctive relief, \$1,000 or actual damages, including mental anguish, other damages, court costs, and attorney fees. The volunteer or resident must report the retaliation or discrimination within 180 days after it occurred or was discovered. A resident, resident's guardian, and any other person who reports abuse or neglect at an ICF-MR is entitled to sue for injunctive relief, actual damages, other damages, court costs, and attorney fees.

Health and Safety Code, secs. 242.042 and 252.039 require nursing homes and similar facilities, and ICF-MRs to prominently post signs that explain complaint procedures. These signs must be in a conspicuous public area of the institution that is readily available to residents, employees, and visitors. Nursing homes and similar facilities also are required to post a sign stating that the institution is prohibited from retaliation.

DIGEST: CSHB 482 would amend Health and Safety Code, sec. 242.042 (a) to expand the protection from retaliation to relatives or guardians of nursing home residents. It also would amend sec. 252.133 to provide the same protection to volunteers and family members of residents at ICF-MRs. The bill would change the posting rules to reflect the expanded protection.

CSHB 482 would amend Health and Safety Code, sec. 252.132 to include contract laborers in the definition of ICF-MR employees who are protected from retaliation. It also would add initiating or cooperating in a government investigation to the list of activities protected from retaliation.

CSHB 482 would take effect September 1, 2001, and would apply only to a cause of action that accrued after the bill took effect. All other actions would be governed by current law.

SUPPORTERS SAY: CSHB 482 would help protect residents of institutions by encouraging anyone who witnessed evidence of neglect or abuse to report it. The law already provides protection to most employees, volunteers and residents, but

anyone who has contact with a resident should be encouraged to report problems.

CSHB 482 also would conform statutory requirements for the reporting of neglect and abuse at nursing homes and ICF-MRs. Because “whistle blower” provisions for nursing homes are in a different section of code than for ICF-MRs and were implemented through separate legislation, disparities exist in the protections from retaliation, posting requirements, and potential liability in retaliation cases. Nursing homes and ICF-MRs functionally are very similar and should have the same, standard requirements.

OPPONENTS
SAY:

CSHB 482 would increase the potential liability for nursing homes and ICF-MRs. The terms “neglect” and “abuse” could mean different things to different people, and family members might report what they think is neglect or abuse, when in fact it may be only a disagreement between roommates or unreasonably high demands from the patient. By responding to the report, the staff could be accused of discriminating or retaliating against a resident.

CSHB 482 would place greater financial burdens on nursing homes because it would add a new and unnecessary cause of action against the homes. In turn, this would raise costs and decrease the quality of care in nursing homes. Given the financial difficulties that this industry already faces with the rising cost of liability insurance, now is not the time to add a new cause of action.

NOTES:

The committee substitute would update posting requirements, add government investigations to the activities protected from retaliation, and make the amounts that can be recovered in retaliation suits and posting rules the same for nursing homes and ICF-MRs.