FREEDOM FOUNDATION

STOP THE SPREAD:

HOW THE **BUILD BACK BETTER ACT** SEEKS TO REPLICATE WASHINGTON STATE'S UNION-DOMINATED HOME AND COMMUNITY BASED SERVICES MODEL NATIONWIDE

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Executive Summary

One of the most expensive elements of President Joe Biden's "Build Back Better" agenda, which congressional Democrats are seeking to pass unilaterally via the budget reconciliation process, is a vast expansion of Medicaid funding for home and community-based services (HCBS) that provide in-home care to, and prevent the institutionalization of, adults with functional disabilities. Such services are provided via state-designed-and-operated programs operating within federal parameters.

While the precise increase in funding in the Build Back Better Act (BBBA), H.R. 5376, has yet to be determined amid fast-moving negotiations in Congress, the proposals released so far all offer states hundreds of billions of dollars in additional federal funds to expand their HCBS programs.

The White House has claimed the additional spending is necessary to "permanently improve Medicaid coverage for home care services for seniors and people with disabilities... The framework will improve the quality of caregiving jobs, which will, in turn, help to improve the quality of care provided to beneficiaries."[1]

While additional funding for HCBS may or may not be justified, the federal funds come with conditions designed to steer potentially billions of dollars in Medicaid funds to unions representing home care aides, like the Service Employees International Union (SEIU) and American Federation of State, County and Municipal Employees (AFSCME).

As a condition of receiving the additional funding, states must implement changes to their HCBS programs designed to encourage the unionization of home care aides and are incentivized to use a historically disfavored model that would allow unions to force caregivers to pay dues as a condition of employment in states lacking right-to-work protections. Further, federal grant funds are made available to go directly to union-operated training programs for home care aides.

Certain congressional supporters of the BBBA have made it clear that boosting home care unions is a goal of the bill. In a recent op-ed, Rep. Robin Kelly (D-IL), brazenly argued that the BBBA would allow "organizations like SEIU" to "advocate" for home care workers."[2] SEIU endorsed Kelly in 2020[3] and contributed thousands of dollars to her campaign.[4]

The structure of the legislation suggests that the architects of the BBBA look to replicate SEIU's dominance of the home care system in Washington state nationwide, and union-sympathetic coverage of the BBBA's HCBS provisions by prominent newspapers has repeatedly held up Washington state as an example to be emulated.[5]

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[1] The White House. "President Biden Announces the Build Back Better Framework." October 28, 2021. https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better-framework/

[2] Rep. Robin Kelly. "Congresswoman Robin Kelly: Investing in home care is investing in Black women." *The Grio*. October 1, 2021. https://thegrio.com/2021/10/01/rep-robin-kelly-investing-in-home-care-black-women/

[3] SEIU Healthcare Illinois-Indiana. "2020 Election Center." https://seiuhcilin.org/resources/election-information/#endorse

[4] *See* Schedule B of the Forms 3X filed with the Federal Elections Commission by the SEIU Committee on Political Education in 2020. Available online at:
https://docquery.fec.gov/cgi-bin/fecimg/?202004209224113436
https://docquery.fec.gov/cgi-bin/fecimg/?202010209312995189

[5] Brigid Schulte and Cassandra Robertson. "Mother and Daughter Do the Same Job. Why Does One Make $9 More an Hour?" *New York Times*. May 10, 2021. https://www.nytimes.com/2021/05/10/opinion/home-health-wages.html
Eric D. Lawrence. "Unionization could help home health care workers with wages, experts say." *Detroit Free Press*. October 19, 2021. https://www.freep.com/story/news/local/michigan/2021/10/19/biden-caregivers-unions/5868553001/

In Washington, home care aides for Medicaid clients are unionized, with dues deducted from their Medicaid payments by the state. Additionally, the state requires robust training, of questionable utility, for caregivers and pays SEIU to provide it. Finally, the state uses Medicaid funds to pay trust funds affiliated with SEIU to provide health insurance, retirement and other benefits to caregivers. These entities face little meaningful accountability and typically operate with relatively high operating costs, often paying the union for administration. Overall, nearly three percent of the payroll expenses the state incurs on behalf of HCBS caregivers wind up in union coffers.

Expanding similar arrangements nationwide could potentially increase union revenue by billions of dollars, much of which, if history is any guide, will be spent by SEIU and AFSCME on furthering their wide-ranging political and electoral goals.

Given the degree to which they stand to benefit, it comes as no surprise that unions like SEIU are spending millions of dollars on advertisements and lobbying urging passage of the BBBA.[6]

If Congress believes additional HCBS funding is warranted, it should simply provide the funds to states with the flexibility to expand and improve such programs as they see fit. Structuring the program in such a way as to divert potentially billions of dollars in Medicaid funds to a politically influential special interest group with a track record of exploitative practices simply cannot be justified.

Analysis of the Build Back Better Act's Home Care Provisions

The BBBA, H.R. 5376, contains a number of provisions aimed at increasing funding for Medicaid HCBS funding, encouraging state expansion of HCBS, and shaping the way in which states provide such services. Many of these provisions are specifically designed to promote the unionization of home care workers and steer Medicaid funds into union coffers.

However, the haste with which the legislation is being written and rewritten has made tracking the precise details difficult. An ostensibly $3.5 trillion draft of the BBBA was introduced on Sept. 27 and clocked in at 2,468 pages.[7] However, on Oct. 28, the House Rules Committee released a smaller, purportedly less expensive version of the bill running 1,684 pages.[8] This draft of the BBBA contains two generally similar, but not identical, versions of the same text pertaining to HCBS funding, one prepared by the Committee on Energy and Commerce[9] and one prepared by the Committee on Ways and Means.[10] The two committees' language differs both from each other and from the original text of the BBBA, but no mechanism is provided to determine which is the "real" version. The following analysis attempts to capture what appear to be the primary aspects of both versions.

Training grants

Sec. 22302 of the BBBA appropriates $1 billion in grant funds to be allocated over 10 years to "eligible entities," which include labor unions and affiliated funds, as well as state and local governments and Indian tribes. Grant funds must be used to develop and implement a strategy to recruit direct support workers, to retain direct support workers, and/or to develop or implement a paid training program for direct support workers focused on, among other things, workers' rights under federal, state or local

[6] Tian Weinberg. "New Poll: 81% of U.S. Voters Support Transformative 'Build Back Better' Home Care Investment." SEIU. September 21, 2021. https://www.seiu.org/2021/09/new-poll-81-of-u-s-voters-support-transformative-build-back-better-home-care-investment

[7] The text of H.R. 5376 is available online at: https://www.congress.gov/bill/117th-congress/house-bill/5376

[8] Available online at: https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5376RH-RCP117-17.pdf

[9] *See* Title III, Subtitle F.

[10] *See* Title XIII, Subtitle E.

employment laws, including "forming, joining, or assisting a labor organization." The training must also seek to help increase the "skills and competencies" of participating direct support workers with the goal of helping them attain "any associated recognized postsecondary credentials."

In developing the grant proposal, applicants must "assure" HHS that they will "consult" with "direct support workers, *their representatives* [labor unions], and recipients of direct care services and their families." (Emphasis added).

Grantees must also,

> "...provide competitive wages, benefits, and other supportive services, including transportation, child care, dependent care, workplace accommodations, and workplace health and safety protections, to the direct support workers served by the grant that are necessary to enable such workers to participate in the activities supported by the grant."

Finally, Sec. 22302(b)(1)(B)(iv) of the BBBA requires that grant applicants agree to "remain neutral in any organizing effort involving direct support workers served by the grant who seek to form, join, or assist a labor organization."

In short, grant funds can go directly to unions, and even non-union recipients must promote or at least remain neutral regarding the unionization of direct support workers, which would likely prohibit grantees from educating workers of their rights to *refrain* from union representation and membership if they so choose.

HCBS Improvement Planning Grants

Sec. 30711 of the BBBA appropriates $130 million, "to remain available until expended," for "HCBS improvement planning grants" to states for the purpose of developing plans to "expand access to home and community-based services and strengthen the direct care workforce that provides such services."

States' HCBS improvement plans must document the "existing Medicaid HCBS landscape" and include a description of how the state will increase the use of HCBS and boost compensation for direct support workers to a level "sufficient" to support "recruitment and retention" and ensure "the availability of home and community-based services."

In developing such plans, states must allow for,

> "...a public notice and comment process that includes consultation with Medicaid eligible individuals who are recipients of home and community-based services, family caregivers of such recipients, providers, health plans, direct care workers, *chosen representatives of direct care workers* [labor unions], and aging, disability, and workforce advocates."

(Emphasis added).

States must implement their HCBS improvement plan if it is approved by the Department of Health and Human Services (HHS).

Additional Federal Funding for HCBS Improvement States

If a state's HCBS improvement plan is approved by HHS and the state remains in compliance with various requirements, Sec. 30712 provides that the state becomes eligible for a six-point increase in its federal

medical assistance percentage (FMAP), or the share of the state's Medicaid expenditures covered by federal funds.[11]

To receive the added federal funds, states must "update qualification standards" and provide "training opportunities" for HCBS caregivers.

States must also "...update and, as appropriate, increase payment rates" for HCBS services to "support recruitment and retention of the direct care workforce" by completing a "transparent process involving meaningful input" from stakeholders "at least every 3 years." The process is designed to increase wages to direct support workers in a manner bearing a striking — and likely not coincidental — resemblance to collective bargaining.

PROMOTION OF THE AGENCY WITH CHOICE MODEL

Sec. 30712 further provides that HCBS improvement states may receive an additional, one-and-a-half-year, two-point increase in their FMAP (for a cumulative eight-point increase) if they establish, on their own or via contracting with one or more "entities," an "agency with choice or a similar service delivery model" to perform the functions of, among other things:

- "Registering qualified direct care workers and assisting beneficiaries in finding direct care workers";
- "Undertaking activities to recruit and train independent providers to enable beneficiaries to direct their own care, including by providing or coordinating training for beneficiaries on self-directed care";
- "Ensuring the safety of, and supporting the quality of, care provided to beneficiaries";
- "Supporting beneficiary hiring, if selected by the beneficiary, of independent providers of home and community-based services, including by processing applicable tax information, collecting and processing timesheets, submitting claims and processing payments to such providers"; and,
- Ensuring such programs do not "promote or prevent the ability of workers to form a labor organization or discriminate against workers who may join or decline to join such an organization."

The agency with choice model is one method by which states have historically been permitted to structure HCBS delivery. It is also the model unions representing home care workers have come to prefer as it provides the legal structure needed to require caregivers to pay union dues as a condition of employment.

Medicaid does not generally pay beneficiaries directly, but rather reimburses providers for services rendered to beneficiaries. At the same time, a consensus has developed in recent decades regarding the importance and benefits of maximizing beneficiaries' ability to self-direct their care. To accommodate these two realities,

> "Medicaid provides for financial management services (FMS) entities (sometimes also referred to as fiscal intermediaries) to pay self-directing program participants' workers... States may arrange for FMS through a 'fiscal/employer agent' (F/EA) in which the FMS is strictly a payroll agent and self-directing program participants are their workers' sole legal employers under tax law.

[11] Medicaid and CHIP Payment and Access Commission. "Matching Rates." Accessed October 28, 2021. https://www.macpac.gov/subtopic/matching-rates/
U.S. Department of Health and Human Services, Office of the Assistant Secretary for Health and Evaluation. "Federal Medical Assistance Percentages or Federal Financial Participation in State Assistance Expenditures (FMAP)." Accessed October 28, 2021. https://aspe.hhs.gov/federal-medical-assistance-percentages-or-federal-financial-participation-state-assistance

> Alternatively, states may arrange for FMS via an 'Agency with Choice' (AwC). Although, for tax purposes, the AwC is the sole legal employer of self-directing program participants' workers; AwCs do not assume all of the other employer responsibilities of a typical home care agency."[12]

While both methods are permissible, HHS during both the Obama and Trump administrations promoted the fiscal/employer agent model over agency with choice, as the former best permits clients to take charge of and direct their own care.

In 2010, HHS explained that, "Fiscal/Employer Agents are most effective for implementing participant direction programs" because:

> "First, using an F/EA provides participants a high degree of choice and control over their workers as their common law employers, while reducing their employer-related burden by managing the payroll and bill payment tasks. Second, using an F/EA provides safeguards for participants by ensuring that all required taxes are paid and all Department of Labor and workers compensation insurance requirements are met. Third, using an F/EA can provide fiscal accountability for states."[13]

In 2016, the Center for Medicaid Services (CMS) within HHS released an informational bulletin to states in which it explained;

> "There are generally two models of PCS [personal care] service delivery that states can choose to make available: agency-directed or self-directed. Agency-directed is the traditional delivery model for PCS. Under this approach, a qualified PCS agency hires, fires, pays and trains PCAs to provide services to eligible individuals. A variation of the agency model is the agency with choice', in which an agency is co-employer with the beneficiary of PCS attendants. Self-directed PCS is an alternative to the traditional delivery model. Under self-directed models, beneficiaries or their representatives have decision-making authority over PCS and take direct responsibility to manage their services with the assistance of a system of available supports... Beneficiary decision-making and autonomy are hallmarks of self-directed models of service provision, and CMS strongly encourages use of self-directed models with necessary supports using a person-centered planning process."[14]

(Emphasis added).

And in 2019, a CMS guidance document stated that, "The Fiscal/Employer Agent model provides Medicaid program participants with the greatest level of flexibility and empowerment" and observed that, "Many states... use this model to allow Medicaid program participants and their families to self-direct."[15]

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[12] Pamela J. Doty, Marie R. Squillace, and Edward Kako. "Analysis of State Efforts to Comply with Fair Labor Standards Act Protections to Home Care Workers." U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. January 7, 2020. https://aspe.hhs.gov/reports/analysis-state-efforts-comply-fair-labor-standards-act-protections-home-care-workers-0

[13] Janet O'Keeffe, Paul Saucier, Beth Jackson, Robin Cooper, Ernest McKenney, Suzanne Crisp and Charles Moseley. "Understanding Medicaid Home and Community Services: A Primer, 2010 Edition." U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. October 28, 2010. https://aspe.hhs.gov/reports/understanding-medicaid-home-community-services-primer-2010-edition-0

[14] Vikki Wachino and Shantanu Agrawal. "Strengthening Program Integrity in Medicaid Personal Care Services." Centers for Medicare & Medicaid Services. December 13, 2016. https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/cib121316_1.pdf

[15] Centers for Medicare & Medicaid Services. "Application for a §1915(c) Home and Community-Based Waiver, Instructions, Technical Guide and Review Criteria, Resource Attachments." Version 3.6, January 2019. https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/resourceattachmentsjan2019.pdf

Circumventing the Supreme Court

Most likely, the BBBA incentivizes states to adopt an agency with choice model not because it is best for clients, but because unions believe this structure provides them with the legal authority necessary to compel home care aides to pay union dues as a condition of employment.

In June 2014, the U.S. Supreme Court ruled in *Harris v. Quinn* that the First Amendment does not permit states and unions to compel "quasi-public employees," like the Illinois personal assistants for Medicaid clients who brought the lawsuit, to pay union dues or fees as a condition of employment.[16]

Ever since unions began organizing home care workers in California in the early 1990s, the challenge has been to establish a common employer against which to bargain. In self-directed HCBS programs, individual workers contract with the state or a fiscal/employer agent to serve individual clients, who are the employers of record, making traditional unionization under the National Labor Relations Act effectively impossible.

Rather than attempt to get Congress to amend the NLRA, however, unions turned to the states, which have the authority to permit or regulate the unionization of public employees via state collective bargaining laws. To solve the problem of no common employer, unions lobbied state officials to declare home care workers public employees solely for the purpose of placing them under the state's collective bargaining laws for government workers and to designate a single government agency or official as their putative "employer." As these state laws generally allowed unions to force public employees, such as teachers, to pay union dues/fees as a condition of employment, caregivers found themselves in the same position. This was the approach adopted in Illinois and, to varying degrees and for various times, at least 14 other states.[17]

In *Harris*, however, the Supreme Court recognized that these unions typically provided minimal representational benefits to caregivers while spending the collected dues on political advocacy. Consequently, the Supreme Court struck down the forced payment "scheme" as compelled speech in violation of the First Amendment.

As a result of the ruling, unions could no longer collect dues from the tens of thousands of unionized home care aides who never signed up for or resigned their union membership.

Upset with the loss in revenue, SEIU 775 — which represents the 45,000 individual provider home care aides (IPs) serving Medicaid clients in Washington state — concocted a scheme to reimpose mandatory dues.

As far back as June 2014, SEIU 775 had asked Gov. Jay Inslee to help the union respond to the anticipated loss in *Harris* by "contract[ing] with an outside entity to run the home care system, making IPs private-sector employees."[18] However, this change required legislative action and the union lacked the political support in Olympia to implement it until after Democrats recaptured the state Senate majority via a 2017

[16] *Harris v. Quinn,* 573 US 616 (2014). https://www.supremecourt.gov/opinions/13pdf/11-681_j426.PDF

[17] Maxford Nelsen. "Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity." The Freedom Foundation. July 2018. https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf

[18] Diane Lutz and Roslyn Marcus. "Governor briefing: Update on Harris v. Quinn Union Requests." Washington State Office of Financial Management. June 3, 2014. https://www.freedomfoundation.com/wp-content/uploads/2018/05/OFM-Gov-Briefing-6-3-14.pdf

special election.[19]

In 2018, at the urging of SEIU 775, the Washington State Legislature passed and Gov. Inslee signed SB 6199, directing the state to hire a private company to manage the workforce of home care aides serving Medicaid clients.[20]

The vendor's role would be that of an agency with choice that:

> "...operates under a co-employment arrangement whereby employer status is shared by the participant and an agency. For IRS purposes and other considerations, the agency is the primary or legal employer and officially hires the worker(s), processes human resource forms, and manages the payroll tasks. They also monitor the participant's health and welfare, ensure that intended services are provided, and may provide guidance on recruiting, training, managing, and discharging workers. The participant or his/her representative is the secondary or managing employer. In this role, the participant or representative recruits, interviews, and selects workers, and then refers them to an agency for the completion of employment/payroll paperwork. In addition, the participant or representative trains, manages, and discharges workers (to the extent they wish to)."[21]

Union and state officials made no secret of their reasoning. As "employees" of a private company in a state without right-to-work protections, caregivers could again be forced to pay 3.2 percent of their paychecks to SEIU 775 as a condition of caring for, in most cases, loved ones and close friends.[22]

The secretary of the Washington State Department of Social and Health Services (DSHS) acknowledged to legislators that the change would allow the union to impose "a closed shop."[23]

When asked by *The Seattle Times* whether SB 6199 was about requiring caregivers to support his union, SEIU 775's president replied, "Anything that allows for stronger unions... is obviously good in and of itself."[24] The union's secretary-treasurer made similar comments in an interview with *The News Tribune:*

> "...[Adam] Glickman said the possibility of a union in which workers can't opt out of collective bargaining costs without religious objection would be 'a good thing' that would make SEIU a 'stronger union.' Glickman said sidestepping a Supreme Court decision, within legal bounds, to reach that goal is not unethical as some Republicans have claimed. 'I don't think there's anything wrong with states

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[19] Natalie Brand. "Dhingra wins Legislative District 45, Democrats control both legislative chambers." *King 5*. November 8, 2017. https://www.king5.com/article/news/politics/dhingra-wins-legislative-district-45-democrats-control-both-legislative-chambers/281-490007926

[20] The Washington State Legislature's official bill page for SB 6199, including text and history, is available online at: https://app.leg.wa.gov/billsummary?BillNumber=6199&Year=2017&Initiative=false

[21] Janet O'Keeffe, Paul Saucier, Beth Jackson, Robin Cooper, Ernest McKenney, Suzanne Crisp and Charles Moseley. "Understanding Medicaid Home and Community Services: A Primer, 2010 Edition." U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. October 28, 2010. https://aspe.hhs.gov/reports/understanding-medicaid-home-community-services-primer-2010-edition-0

[22] Maxford Nelsen. "Forcing union membership is no way to run government-funded home health care. *The Seattle Times*. March 25, 2018. https://www.seattletimes.com/opinion/forcing-union-membership-is-no-way-to-run-government-funded-home-health-care/

[23] Bill Moss. Letter to the Washington State Senate Health and Long Term Care Committee. January 26, 2018. https://www.freedomfoundation.com/wp-content/uploads/2018/02/Senate-Health-and-Long-Term-Care-Hearing-1-25-18-Response-to-question-..._-002.pdf

[24] David Rolf. Interviewed by Jim Brunner of *The Seattle Times* on "The Overcast" podcast. February 16, 2018. https://soundcloud.com/seattletimesovercast/ep-69-seiu-leader-david-rolf-on-labors-wa-agenda-and-reshaping-the-union-movement

legislating their values even if those values conflict with Supreme Court decisions,' he said."[25]

The state has since hired a vendor to manage the workforce using an agency with choice model and is in the early stages of transitioning caregivers over to the new vendor. According to DSHS, the first pilot group of about 200 caregivers began logging hours for the vendor on October 1, 2021. About 16,000 more will transition over on Feb. 1, 2022, and the remaining 30,000 will transition on April 1, 2022.[26] By the summer, caregivers will likely find themselves back where they were before *Harris*, with nearly $1,000 per year being diverted from their paychecks to SEIU 775 and nothing they can do about it.[27]

Washington's experience, combined with the fact that the BBBA is using the promise of federal funding to incentivize states to adopt an agency with choice model — which HHS has not historically recommended — strongly suggests the goal is to deprive caregivers of their constitutional right to refrain from union dues payments on a technicality.

The SEIU Model in Washington State

The BBBA's endorsement of the agency with choice model is just one of the many ways the legislation seeks to transform the nation's HCBS into Washington's likeness. Since 2001, SEIU has dominated and shaped the state's home care system, ensuring that a healthy portion of the Medicaid funds intended for client care end up in the union's treasury, where they are used to subsidize the union's wide-ranging political agenda.

While large and increasing amounts of Medicaid funds are expended on HCBS in Washington state, many of the union-operated training and employee benefits programs — the kind the BBBA seeks to expand around the country — suffer from a lack of accountability, high administrative costs, and apparent cronyism, and fail to produce the intended results.

Training

In 2011, Washington voters approved Initiative 1163,[28] a union-backed ballot measure that created the most robust training requirements for home care aides in the country, with most providers required to obtain and maintain a home care aide certificate by completing 75 hours of initial training and 12 hours of annual continuing education.[29] Washington state's experience with mandated training requirements for home care workers serving Medicaid clients has produced, at best, mixed results.

As a result of the initiative, all training for IPs must be provided by a single "training partnership" selected by the IPs' union, SEIU 775.[30] Unsurprisingly, the entity selected by SEIU 775 — the SEIU Healthcare NW Training Partnership (TP) — was one that it created and that it claims is now the largest such training operation for home caregivers in the country.

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[25] Walker Orenstein. "Inslee signs controversial union bill despite calls for a veto." *The News Tribune*. March 27, 2018. https://www.thenewstribune.com/news/politics-government/article206839864.html

[26] Washington State Department of Social and Health Services. "Pilot and Hiring Phases." Accessed October 28, 2021. https://www.dshs.wa.gov/sites/default/files/ALTSA/stakeholders/documents/CDE/CDWA%20Overlay%20-%20Hiring%20Phases%20by%20County.pdf

[27] Joseph O'Sullivan. "How unions are racking up new wins in Democratic-controlled Washington state." *The Seattle Times*. August 2, 2021. https://www.seattletimes.com/seattle-news/politics/how-unions-are-racking-up-new-wins-in-democratic-controlled-washington-state/

[28] Bailey Ludlam. "Washington Long-Term Care, Initiative 1163 (2011)." Ballotpedia. Accessed October 28, 2021. https://ballotpedia.org/Washington_Long-Term_Care,_Initiative_1163_(2011)

[29] Washington State Department of Health and Human Services. "Individual providers." Accessed October 28, 2021. https://www.dshs.wa.gov/altsa/home-and-community-services/individual-providers

[30] RCW 74.39A.360.

Under Article 15.4 of the 2021-23 collective bargaining agreement (CBA) currently in effect between the state of Washington and SEIU 775, the state pays $0.435 for every hour worked by an IP to the TP.[31] The Partnership reported total revenue of $42.3 million on its tax return for FY 2020, and its executive director was paid $245,379.[32] SEIU 775 and the Training Partnership share officers, office space and a call center. And the state's financial obligation towards the Training Partnership has proven lucrative for SEIU 775 as well. In FY 2020, the TP paid $3.4 million — 8.1 percent of its total revenue that year — to SEIU 775.[33]

Further, the TP consistently collects more in revenue than it expends on training, leading to steadily increasing net assets and cash holdings. From FY 2012 to 2020, the TPs' expenses increased by 352 percent, while its net assets increased by 668 percent. The TP also pays steadily increasing amounts to SEIU 775, totaling $17.8 million from 2013-20.

SEIU Training Partnership Revenue and Expenses

Year	Revenue	Expenses	Net Assets	Paid to SEIU 775
FY 2020	$42,334,393	$38,345,728	$17,775,913	$3,428,305
FY 2019	$32,885,504	$32,059,904	$13,787,248	$2,627,071
FY 2018	$31,644,127	$29,533,784	$12,961,648	$2,570,763
FY 2017	$27,223,994	$24,558,564	$10,851,305	$2,077,623
FY 2016	$25,102,293	$20,782,659	$8,185,875	$2,024,206
FY 2015	$18,632,059	$18,609,068	$3,866,241	$1,921,508
FY 2014	$21,137,787	$20,312,161	$3,843,250	$1,852,089
FY 2013	$13,022,417	$12,664,658	$3,017,624	$1,286,194
FY 2012	$11,105,663	$10,886,695	$2,659,865	Unknown
Total	**$223,088,237**	**$207,753,221**	**$76,948,969**	**$17,787,759**

Source: Form 990 tax returns submitted by the TP to the IRS.

The state's statutorily required financial obligation to the TP as the monopoly provider of mandated training to IPs has, predictably, limited providers' choices, resulted in poor customer service, and has made it difficult for some rural providers to access required training. After all, the TP's revenue is completely untethered from its performance.

And alternatives are available. In fact, more than 50 other entities are certified by DSHS to offer the same 75-hour, long-term care training provided by the TP — they just can't serve the IPs SEIU 775 represents. Most would also likely be ineligible to receive training grant funds under Sec. 22302 of the BBBA.[34]

Despite the hundreds of millions of Medicaid dollars paid to the TP since passage of I-1163 in 2011, recruitment and retention challenges continue to plague the state, and a series of audits conducted by the Washington State Auditor suggests the stringent training requirements bear at least some of the blame.

A 2014 audit found that, despite efforts in prior years to improve the completion rate, only one-third of

[31] Article 15 of the 2021-23 collective bargaining agreement currently in effect between the State of Washington and SEIU Local 775. Available online at: https://ofm.wa.gov/sites/default/files/public/labor/agreements/21-23/nse_homecare.pdf

[32] The most recent Form 990 filed by the Training Partnership with the Internal Revenue Service is available online at: https://apps.irs.gov/pub/epostcard/cor/510673005_202006_990_2021052618210524.pdf

[33] *Ibid.*

[34] Washington State Department of Social and Health Services. "Find a Training Class." Accessed October 28, 2021. https://fortress.wa.gov/dshs/adsaapps/Professional/training/training.aspx

persons seeking a home care aide certificate completed the training and were certified within required deadlines. The auditor noted that, "Program managers told us they believe that the failure of workers to complete the certification has resulted in a higher turnover rate, which can affect continuity of care for clients."[35]

The audit further reported that,

> "Program managers recognize that both completion rates and timeliness need to be improved, but point out that some factors are outside their control. For example, some people caring for a family member might decide not to pursue the 75 hours of required training needed to gain the certificate. Agency officials suggested that some workers leave the home care aide certificate program to pursue other types of certifications. For example, becoming a certified nursing assistant requires about 10 additional training hours but may lead to greater employment opportunities. Some people simply change their minds about working in the field, and others fail background checks. All these reasons affect home care aide certificate completion rates."[36]

In other words, the training requirements themselves were problematic.

A subsequent audit in 2016 found that the home care aide "certification completion rates have remained flat" despite efforts to increase passage, including lowering exam passing scores.[37] Of course, the TP gets paid the same regardless of the success or failure of its trainees in passing the state home care aide certification exam, and may even benefit from being paid to train students a second time who were unable to earn their certificate the first time.

Finally, the most recent state audit from 2019 examined reducing training requirements for certain caregivers as a way to boost recruitment:

- "Broad demographic trends and various studies suggest a growing need for long-term care, though it is difficult to quantify. Those trends and studies also suggest there will be an insufficient number of caregivers to meet that need."
- "The expected shortages in long-term care workers mean that families of people with disabilities, including those who are eligible for Medicaid, will likely face challenges in finding qualified caregivers. One possible way to address future unmet need is to expand training and certification exemptions beyond those currently afforded to parents and adult children."
- "By reducing the training requirements and offering the flexibility of online training, extended family members may be more inclined to become individual providers and be paid for their services."

Overall, however, the auditor's report concluded without making any formal recommendations given the lack of hard data about the effectiveness of the training.[38]

Despite repeated studies by the auditor, no empirical evidence to date suggests Washington state's training requirements have measurably improved client care. Instead, the primary purpose of the training, in addition to serving as another revenue source for SEIU 775 via the TP, appears to be allowing the union

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[35] Washington State Auditor's Office. "Initiative 1163: Long-Term Care Worker Certification Requirements." December 18, 2014. https://portal.sao.wa.gov/ReportSearch/Home/ViewReportFile?arn=1012952&isFinding=false&sp=false

[36] *Ibid.*

[37] Washington State Auditor's Office. "I-1163: Long-term Care Worker Certification Requirements 2016." August 4, 2016. https://portal.sao.wa.gov/ReportSearch/Home/ViewReportFile?arn=1017262&isFinding=false&sp=false

[38] Washington State Auditor's Office. "Assessing Extended Family Exemptions for Individual Providers." February 21, 2019. https://sao.wa.gov/wp-content/uploads/Tabs/PerformanceAudit/PA_I-1163-Extending_Family_Exemptions_ar1023358.pdf

to argue for higher wages and benefits at the bargaining table on the unproven assumption that time spent in a TP classroom increases the value of caregivers' labor.

Health Insurance

Pursuant to Article 9.2 of the current CBA between SEIU 775 and the State of Washington, the state pays $3.79 for every hour worked by an IP to the SEIU Healthcare NW Health Benefits Trust (HBT) for the purposes of offering health insurance benefits to certain IPs.[39]

Though paid for by Medicaid, eligibility for benefits and benefit amounts are both determined by the HBT. To qualify for benefits at present, an IP must work at least 80 hours per month and pay a nominal premium of $25 per month.[40]

As part of the SEIU 775 constellation, housed in the union's downtown Seattle office, the HBT pays both the TP and SEIU 775 for various administrative services. From FY 2010-19, the HBT paid nearly $24.5 million to the TP and a further $2.4 million to the union.

SEIU Health Benefits Trust Revenue and Expenses

Year	Revenue	Benefits paid	Admin. Expenses	Paid to SEIU TP	Paid to SEIU 775	Total expenses	Net Assets
FY 2019	$258,351,358	$185,625,028	$25,642,234	$6,238,379	$408,025	$211,267,262	$241,327,232
FY 2018	$239,391,455	$167,558,616	$23,480,649	$6,318,960	$289,510	$191,039,265	$186,867,423
FY 2017	$203,533,519	$143,743,328	$18,587,123	$3,228,773	$215,483	$162,330,451	$141,741,573
FY 2016	$190,079,616	$124,180,837	$7,128,097	$3,563,183	$255,370	$131,308,934	$100,540,754
FY 2015	$168,660,785	$148,524,734	$4,834,052	$2,275,922	$173,843	$153,358,786	$41,770,072
FY 2014	$149,889,337	$145,671,055	$4,072,234	$1,565,043	Unknown	$149,743,289	$26,468,073
FY 2013	$125,875,145	$129,225,279	$2,722,813	$595,073	$265,576	$131,948,092	$26,322,025
FY 2012	$124,576,251	$116,158,847	$2,358,374	$413,886	$355,999	$118,517,221	$32,394,972
FY 2011	$113,703,712	$103,572,725	$1,972,905	$233,802	$343,533	$105,545,630	$9,881,942
FY 2010	$102,781,675	$105,398,688	$1,391,848	$33,693	$80,453	$106,790,536	$1,723,860
Total	**$1,676,842,853**	**$1,369,659,137**	**$92,190,329**	**$24,466,714**	**$2,387,792**	**$1,461,849,466**	**$809,037,926**

Source: Form 990 tax returns submitted by the HBT to the IRS.

Like the TP, the HBT pays high, and rapidly growing, amounts towards administrative expenses. Since FY 2010, the HBT's revenue has increased 250 percent, but benefits paid have increased by only 176 percent. Meanwhile, the HBT's administrative expenses have increased by 1,842 percent and its net assets by 14,000 percent. In FY 2019, only 71.2 percent of the HBT's revenue went towards paying out benefits to IPs.[41]

Part of the HBT's asset accumulation can be explained by its transition from a fully insured plan to a self-funded plan in August of 2016. Instead of paying premiums, as a self-funded plan, the HBT needs enough reserves to manage unexpectedly high claims. An employee benefits consultant for the HBT testified

[39] *See* Article 9 of the 2021-23 collective bargaining agreement currently in effect between the State of Washington and SEIU Local 775. Available online at: https://ofm.wa.gov/sites/default/files/public/labor/agreements/21-23/nse_homecare.pdf

[40] SEIU 775 Benefits Group. "Get Covered." Accessed October 28, 2021. https://www.myseiubenefits.org/health/get-covered/

[41] The most recent Form 990 tax return submitted by the SEIU Healthcare NW Health Benefits Trust to the IRS is available online at: https://apps.irs.gov/pub/epostcard/cor/201842198_201906_990O_20201008173594l2.pdf

before the Washington State Legislature in 2017 that self-funded plans are recommended to have at least 16 weeks of reserves available.[42] As of June 2019, the HBT had cash and investment assets sufficient to cover nearly 67 weeks of benefits.[43]

This should come as no surprise, given the HBT's structure. In the private-sector, employers have financial incentives to limit health insurance costs. There is no such dynamic with the HBT. As currently structured, SEIU is able to determine (1) through bargaining, the amount that a third-party, the state, will pay for IPs' health benefits, (2) worker eligibility for health benefits, and (3) the amount to spend on benefits. This structure creates incentives to overcharge and under-deliver for benefits, and to steer funds towards SEIU affiliates. Finally, the HBT has never been — and, as an ERISA-governed trust, probably cannot be — audited by the state, and the lack of public disclosure or financial transparency requirements from the HBT further decreases its accountability.

Retirement

As required by Article 21.2 of the CBA between SEIU 775 and the State of Washington, the state pays the SEIU 775 Secure Retirement Trust (SRT) $0.80 for every hour an IP works in order to provide retirement benefits for eligible IPs.

As with the HBT, the SRT unilaterally determines benefit eligibility requirements, vesting standards and benefit amounts. Also like the HBT, it faces minimal financial transparency obligations and lacks any incentives to control costs or maximize benefits for IPs, leaving it largely unaccountable. The SRT is a relatively new benefit though, like the other funds operated by SEIU 775, it has begun finding ways to pay the union for various services.

SEIU Secure Retirement Trust Revenue and Expenses

Year	Revenue	Benefits paid	Admin. Expenses	Paid to SEIU 775	Total expenses	Net Assets
FY 2020	$44,644,639	$533,393	$4,148,825	$28,457	$4,682,218	$110,883,823
FY 2019	$27,179,610	$0	$3,529,176	N/A	$3,529,176	$59,039,680
FY 2018	$16,030,748	$0	$2,246,448	N/A	$2,246,448	$35,389,246
FY 2017	$21,861,841	$0	$256,895	N/A	$256,895	$21,604,946
Total	**$109,716,838**	**$533,393**	**$10,181,344**	**$28,457**	**$10,714,737**	**$226,917,695**

Source: Form 5500 annual returns submitted by the TP to the U.S. Dept. of Labor

Despite collecting nearly $110 million in the first years of its existence, the SRT has paid only 0.5 percent of this in benefits to IPs.[44] Though the SRT's net assets are growing rapidly, it has spent 19 times as much on administrative expenses as it has on benefits to IPs.

The experience of the SRT suggests that, at least in the early years, states that use additional federal Medicaid funds to stand up new benefit programs for home care aides may find themselves spending most

[42] Galen Li. Testimony before the Washington State Senate Ways and Means Committee, February 14, 2017. https://www.tvw.org/watch/?clientID=9375922947&eventID=2017021247&startStreamAt=6088&stopStreamAt=6172&autoStartStream=true

[43] According to Part X of the HBT's most recent Form 990 tax return filed with the IRS for the period ending June 30, 2019, the HBT had $808,772 in non-interest-bearing cash, $34,504,959 in savings, and $202,775,264 invested in publicly traded securities, for a total of $238,088,995, or 128 percent of the $185,625,028 in benefits the HBT paid out during the 52 weeks FY 2019. 52 weeks multiplied by 128 percent equals 67 weeks.

[44] *See* the most recent Form 5500 annual return submitted by the SEIU 775 Secure Retirement Trust to the U.S. Department of Labor. Available online at: https://efast2-filings-public.s3.amazonaws.com/prd/2021/04/14/20210414220900NAL0008190289002.pdf

of the money on administrative costs, with little to no benefit provided to caregivers.

Referral Registry

The newest benefit for IPs to be included in the CBA between SEIU 775 and the state of Washington funds a duplicative, third-party referral registry. Article 14.5 of the CBA obligates the state to contribute $0.03 for every hour worked by an IP to "a third-party vendor jointly selected by the State and the Union" for the purposes of offering "an online and telephone based registry referral service" to connect IPs seeking work with Medicaid clients seeking caregivers.[45]

Unsurprisingly, the selected vendor — Carina[46] — was created and is managed by SEIU 775. Its executive director received $222,490 in compensation in FY 2019.[47]

As a newer and less expensive benefit than training or health insurance, Carina has yet to collect the eye-popping revenue of other SEIU 775-operated trust funds.

Carina Revenue and Expenses

Year	Revenue	Expenses	Net Assets
FY 2019	$1,782,155	$1,979,088	$1,867,978
FY 2018	$1,587,974	$588,584	$2,064,912
Total	**$3,370,129**	**$2,567,672**	**$3,932,890**

Source: Form 990 tax returns submitted by Carina to the IRS.

Nevertheless, the fact that the state agreed to pay for Carina's creation and management is noteworthy if only because DSHS *already operated*, and continues to operate, its own taxpayer-funded referral registry.[48]

As another example of how Medicaid-funded and union-selected/affiliated benefit trusts face no accountability for performance, the state and union have faced (and dismissed) an IPs' grievance pointing out that Carina has yet to offer any "telephone based" referral services, despite the obligatory language to that effect in the CBA.[49]

The BBBA's Financial Benefit to Unions

While it is impossible to measure the extent to which the BBBA, if adopted, would steer Medicaid funds into union treasuries, it could amount to hundreds of millions — if not billions — of dollars.

The exact cost of the HCBS components of the BBBA is not presently known. The Congressional Budget Office has yet to complete its analysis of the September 27 version of the bill, let alone the Oct. 28 version.[50] Press reports commonly suggested the original version of the bill would direct $400 billion to HCBS, as President Biden called for in March 2021 as part of his "American Jobs Plan."[51] However, a more recent September analysis by the union-aligned Economic Policy Institute estimated the original bill

[45] *See* Article 14 of the 2021-23 collective bargaining agreement currently in effect between the State of Washington and SEIU Local 775. Available online at: https://ofm.wa.gov/sites/default/files/public/labor/agreements/21-23/nse_homecare.pdf

[46] *See* https://www.carinacare.com/

[47] The most recent Form 990 filed by Carina with the Internal Revenue Service is available online at: https://apps.irs.gov/pub/epostcard/cor/320530631_201906_990_2021012117625095.pdf

[48] *See* http://www.hcrr.wa.gov/

[49] Ann Green. Letter to Kenneth J. Finlayson, Jr. August 18, 2021. https://www.freedomfoundation.com/wp-content/uploads/2021/10/G21-085_GrievanceResponse.pdf

[50] Phillip L. Swagel. Letter to U.S. Sen. Mitch McConnell regarding "Information About CBO's Cost Estimates for Reconciliation Legislation in the House of Representatives." October 6, 2021. https://www.cbo.gov/system/files/2021-10/57529-Reconciliation-Estimates.pdf

[51] The White House. "FACT SHEET: The American Jobs Plan." March 31, 2021. https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/

would direct $344 billion to "long term care."[52]

The Kaiser Family Foundation estimates Medicaid spent $114 billion on HCBS in FY 2021 and that, if another $400 billion was evenly spent over the next 10 years, it would amount to "at least" a 33 percent/$40 billion annual increase over the baseline, and "even more if state spending also increases."[53]

A Freedom Foundation research paper documented that, in 2017, unions like SEIU and AFSCME collected $147 million in dues deducted from Medicaid payments to 358,000 home care aides in eight states, including Washington, Oregon, California, Minnesota, Illinois, Connecticut, Massachusetts and Vermont.[54] That amount has almost certainly increased since. In California, for instance — home to the bulk of currently unionized caregivers nationwide — the two unions representing caregivers in the state's In-Home Supportive Services (IHSS) program saw their dues revenue cumulatively increase 11 percent, from $104.6 million in 2017 to $115.6 million in 2020.[55]

Assuming the same held true for other unions, current baseline practices resulted in unions collecting about $163 million in 2020.

If all else remained equal, simply increasing HCBS funding by 33 percent annually over 10 years, as the Sept. 27 version of the BBBA would do, would presumably increase union dues revenue in the states in which caregivers for Medicaid clients are already unionized by an equivalent amount, translating to an extra $54 million in dues annually for unions, or $540 million over 10 years.

Year	SEIU 2015			
	Total Dues	**Total members**	**IHSS Members**	**Average member dues**
2017	$78,814,307	192,376	179,729	$409.69
2020	$89,089,900	188,778	180,048	$471.93

Year	UDW			
	Total Dues	**Total members**	**IHSS Members**	**Average member dues**
2017	$25,780,529	81,448	81,050	$316.53
2020	$26,554,910	72,149	72,149	$368.06

Year	Combined			
	Total Dues	**Total members**	**IHSS Members**	**Average member dues**
2017	$104,594,836	273,824	260,779	$381.98
2020	$115,644,810	260,927	252,197	$443.21

Source: Forms LM-2 submitted by SEIU 2015 and UDW to the U.S. Dept. of Labor.

[52] Adam S. Hersh. "'Build Back Better' agenda will ensure strong, stable recovery in coming years." Economic Policy Institute. September 16, 2021. https://www.epi.org/publication/iija-budget-reconciliation-jobs/

[53] MaryBeth Musumeci. "How Could $400 Billion New Federal Dollars Change Medicaid Home and Community-Based Services?" Kaiser Family Foundation. July 16, 2021. https://www.kff.org/medicaid/issue-brief/how-could-400-billion-new-federal-dollars-change-medicaid-home-and-community-based-services/

[54] Maxford Nelsen. "Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity." The Freedom Foundation. July 2018. https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf

[55] According to Statement B, Item 36 of the Form LM-2 submitted by SEIU 2015 to the U.S. Department of Labor for calendar year 2017, the union collected $78,814,307 in dues that year. SEIU 2015's LM-2 for 2017 is available online at: https://olmsapps.dol.gov/query/orgReport.do?rptId=668930&rptForm=LM2Form
Further, Statement B, Item 36 of the union's LM-2 for 2020 indicated the union collected $89,089,900 in dues. SEIU 2015's LM-2 for 2020 is available online at: https://olmsapps.dol.gov/query/orgReport.do?rptId=750539&rptForm=LM2Form
Similarly, the United Domestic Workers of America/AFSCME Local 3930 reported collecting $25,780,529 in dues on Statement B, Item 36 of its 2017 LM-2, and $26,554,910 on its 2020 LM-2. UDW's 2017 LM-2 is available online at:

However, the BBBA is engineered specifically to *increase* the unionization of home caregivers, though the extent to which it would do so is impossible to predict.

If states without right-to-work protections for private-sector employees in which home care aides are currently unionized and working under a fiscal/employer agent model switch to an agency with choice model in the same way Washington did, hundreds of thousands of caregivers could be forced to pay union dues.

For instance, in Washington state, 26 percent of Medicaid-paid IPs — almost 12,200 caregivers — were not paying dues as of July 2021.[56] On average, SEIU 775 members pay about $920 in dues per year, so again requiring all IPs to pay dues as a condition of employment next year, via the transition to the agency with choice model, should increase the union's annual revenue by about $11.2 million.

The boost to unions from mandated dues payment would be even more dramatic in states like California, where only half of IHSS providers are currently union members. The California Department of Social Services reports there are about 520,000 caregivers in the IHSS program,[57] but between them, SEIU 2015 and UDW claim only 261,000 members.[58] Forcing the other 259,000 to pay union dues would increase the unions' annual revenue by about $115 million.

Combined, mandating union membership for HCBS caregivers in Washington and California alone — where about 80 percent of currently unionized HCBS caregivers work — would increase union dues collection by at least $1.26 billion over 10 years. Factor in 33 percent more Medicaid spending on HCBS services — meaning more and/or better compensated caregivers — and this amount rises to $1.68 billion.

Further, HCBS caregivers in some or all of the other 42 states will likely end up being unionized because of the BBBA's promotion of union membership and silencing of speech critical of unions, generating still more, but indeterminate, dues revenue for unions, though the right-to-work laws presently on the books in 27 of these states would at least prevent caregivers from being forced to pay dues even under an agency with choice model.[59]

Lastly, unions will almost certainly be funneled additional, non-dues revenue through employer-funded and union-administered benefits trusts and collect additional deductions from HCBS caregivers' Medicaid payments as political contributions.

At the high end of the spectrum, consider what would happen if every state HCBS model ended up looking like Washington's as a result of the BBBA, complete with unionization under an agency with choice model and an array of union-operated training programs and benefits trusts.

At present, every hour an IP works costs the state of Washington between $21.91 and $24.71. Between dues deducted from IPs' wages and payments by union-affiliated trusts to the union itself, about 2.7 percent of these hourly rates find their way to SEIU 775.

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https://olmsapps.dol.gov/query/orgReport.do?rptId=670792&rptForm=LM2Form The union's 2020 LM-2 is available online at: https://olmsapps.dol.gov/query/orgReport.do?rptId=752424&rptForm=LM2Form

[56] According to payroll data obtained by the author from the Washington State Department of Social and Health Services via a request submitted via Chapter 42.56 RCW, the Public Records Act.

[57] California Department of Social Services. "In Home Supportive Services (IHSS) Program." Accessed October 28, 2021. https://www.cdss.ca.gov/inforesources/ihss

[58] Schedule 13 of SEIU 2015's LM-2 Form for 2020 indicates the union had 180,048 public homecare worker members. The LM-2 is available online at: https://olmsapps.dol.gov/query/orgReport.do?rptId=750539&rptForm=LM2Form
Schedule 13 of UDW's LM-2 Form for 2020 indicates the union had 72,149 members that year.

[59] National Conference of State Legislatures. "Right-To-Work Resources." Accessed October 28, 2021. https://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx

If (1) the BBBA increases annual HCBS spending from $114 billion to $154 billion, (2) 75 percent of HCBS funds go towards caregiver payroll and benefits, and (3) Washington state's model spreads nationwide, meaning 2.7 percent of all HCBS worker payroll and benefits payments went to unions, it would amount to annual revenue for unions of $3 billion, or $30 billion over 10 years.

Allocation of IPs' Payroll Costs in Washington			
Compensation	**Cost/hour**	**Paid to SEIU 775**	
		%	**$**
Wages	$16.85-$19.65	3.20%	$0.54-$0.63
Health benefits	$3.79	0.16%	$0.006
Retirement	$0.80	0.06%	$0.001
Training	$0.44	8.10%	$0.035
Referral registry	$0.03	0.00%	$0.000
Total	**$21.91-$24.71**	**2.65-2.71%**	**$0.58-$0.67**
Source: Current CBA between the State of Washington and SEIU 775.			

Reducing this amount by about 25 percent based on (1) the fact that half the nation's population lives in right-to-work states and cannot be required to pay union dues and (2) the assumption that only about half of unionized caregivers in such states would join a union, puts the annual revenue for unions from HCBS funds at about $2.25 billion, or $22.5 billion over 10 years, under the BBBA.

Reducing this amount by 15 percent, as the Oct. 28 version of the BBBA appears to do, places the annual amount at about $1.9 billion.

Of course, states will diverge in their approaches, with some being more union-friendly than others, caregivers in some states may opt not to unionize at all, and the additional funding for HCBS under the BBBA has yet to be determined.

Whatever the exact amount, it is clear that unions stand to gain significantly from the ability to capture massive amounts of Medicaid funds under the BBBA.

The Legality of Deducting Union Dues from Medicaid Payments

Another factor with the potential to dramatically affect the ability of unions to access HCBS funds involves the interpretation of a longstanding federal Medicaid statute.[60] Specifically, 42 U.S.C. § 1396a(a)(32) provides that, with certain enumerated exceptions, "no payment" for Medicaid services be made to "anyone other than… the person or institution providing such care or service."

Nevertheless, since SEIU unionized California's IHSS caregivers in the 1990s, states that have allowed for the unionization of their workforce of HCBS caregivers have also deducted union dues directly from the Medicaid payments made to these caregivers and forwarded the funds to the applicable unions. Effectively, these states are making Medicaid payments to third parties who provide no services to Medicaid beneficiaries in direct violation of federal law.

While *Harris v. Quinn* at least gave home care aides the right to refrain from authorizing such deductions, unions and sympathetic state officials have implemented a variety of coercive practices and policies

[60] For more detailed discussions of this issue, see:
Maxford Nelsen. "As HHS Secretary, Becerra Would Back Labor Unions over Home-Care Workers." *National Review*. March 3, 2021. https://www.nationalreview.com/2021/03/as-hhs-secretary-becerra-would-back-labor-unions-over-home-care-workers/
Maxford Nelsen. Comments on Notice of Proposed Rulemaking, File Code CMS-2444-P, RIN 0938-AU73. September 28, 2021. https://www.regulations.gov/comment/CMS-2021-0130-0033
Maxford Nelsen. "Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity." The Freedom Foundation. July 2018. https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf

designed to make it easy for unions to sign people up for dues payments and very difficult for caregivers to opt out.

For instance, all eight states deducting union dues from Medicaid payments to caregivers allow for some union access to employee orientation or training programs for the purposes of soliciting membership. In Washington, caregivers must participate in two captive-audience sessions as part of their onboarding process and once a year thereafter as part of their continuing education.

While dues deductions can be authorized via multiple means — in writing, electronically, telephonically, etc. — and at any time, unions often insist that dues cancellations be submitted in writing during arbitrary annual escape periods as short as a few days.

Worst of all, unions in Washington, California and Minnesota have all faced legal actions by a growing number of caregivers whose signatures were forged by union organizers on membership forms.[61]

All of these coercive practices are enabled by states' role as the dues-collector for unions. If dues were not collected via payroll deduction, home care aides could still pay union dues if they wish but would have to make their own payment arrangements with the union, giving them far greater control over their membership in the process.

Unfortunately, the federal law requiring caregivers to be paid directly and in full for their services has yet to be meaningfully enforced.

During the Obama administration, HHS chastised Washington state for withholding dues from caregivers' Medicaid payments but did nothing to enforce the law. Instead, despite admitting that federal law does not provide for "exceptions to the direct payment principle," it tried to give the practice legal cover via adoption of an administrative regulation in 2014 allowing states to make deductions from Medicaid payments for "benefits customary for employees," arguably including union dues.

The Trump administration, recognizing the regulation contradicted the statutory direct payment requirement, repealed it but was unable to take any enforcement action to bring states into compliance before President Biden's inauguration. Under Biden's secretary Xavier Becerra, HHS recently proposed to reinstate the Obama-era regulation purporting to authorize the deductions.

If the statute is ultimately interpreted to prohibit such deductions, it would help ensure that both currently unionized caregivers and any unionized as a result of the BBBA have a meaningful choice about whether to sign up for union membership and pay union dues. If, however, states and unions are allowed to continue coercively seizing dues from caregivers' Medicaid payments, many thousands will find themselves paying dues to this private special interest against their will.

Political influence of unions representing HCBS caregivers

The unions that currently represent HCBS caregivers in eight states tend to be exceptionally active politically, a result of exploitative practices and limited representational obligations.[62]

In the context of HCBS, there are no workplaces in the traditional sense. Caregivers work in their clients'

[61] The Freedom Foundation. "SEIU Hit with Second RICO Suit." September 30, 2021. https://www.freedomfoundation.com/litigation/seiu-hit-with-second-rico-suit/

[62] *See generally,* Maxford Nelsen. "Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity." The Freedom Foundation. July 2018. https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf

homes which, often, are also their own. Consequently, there are no workplace issues for a union to mediate or resolve. For example, there is simply no mechanism for a caregiver serving their adult child to file a grievance against that child for the conditions in the caregivers' home. Further, the topics subject to bargaining are typically far more limited than in the private-sector or even in the case of traditional public employees like teachers. In *Harris,* the U.S. Supreme Court recognized that HCBS caregivers occupy an "unusual status" and that, as a result, the "powers and duties" of the unions representing them are "sharply circumscribed."[63]

Finally, the number of contracts the union must negotiate is typically limited. In Washington state, SEIU 775 negotiates a single collective bargaining agreement with the state once every two years on behalf of the state's roughly 45,000 caregivers, an on-and-off process that generally lasts a few months. For this limited service, the union collects $44 million in revenue per year.[64]

By way of comparison, the Washington Education Association — the state's largest union — represents nearly 100,000 teachers and public-school employees, negotiates hundreds of collective bargaining agreements with school districts around the state, and provides traditional workplace representation services. Its annual revenue is about the same as SEIU 775's.[65]

The union generates its revenue via an exceptionally high dues rate — 3.2 percent of caregivers' gross wages.[66] The average caregiver pays nearly $900 per year in dues.[67] State employees, by contrast, are generally employed full-time, amply compensated, and receive a higher level of traditional workplace representation, but pay only 1.5 percent of their gross wages in dues, averaging $850 per member per year.[68]

What SEIU 775 doesn't spend representing caregivers, it spends on politics. For years, the union has estimated that 40 percent or more of the dues members pay — which are divided among SEIU 775, the SEIU Washington State Council and the SEIU headquarters in Washington, D.C. — goes to support activities unrelated to workplace representation.[69] In 2020, SEIU 775 reported spending $2.8 million on "political activities and lobbying."[70]

Indeed, HCBS Medicaid funds have made SEIU 775 arguably the preeminent political force in Washington state[71] — surpassing even the teachers' union, which has twice as many members.

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[63] *Harris v. Quinn,* 573 US 616 (2014). https://www.supremecourt.gov/opinions/13pdf/11-681_j426.PDF

[64] *See* Statement B, Item 49 of SEIU 775's LM-2 report for 2020. Available online at: https://olmsapps.dol.gov/query/orgReport.do?rptId=747518&rptForm=LM2Form

[65] *See* Part I, Line 12 of the Washington Education Association's Form 990 tax return filed with the Internal Revenue Service for FY 2019. Available online at: https://apps.irs.gov/pub/epostcard/cor/910460645_201908_990O_2020120217462374.pdf

[66] *See* Item 21 of SEIU 775's Form LM-2 for 2020. Available online at: https://olmsapps.dol.gov/query/orgReport.do?rptId=747518&rptForm=LM2Form

[67] *Ibid.* Divide Statement B, Line 36 of SEIU 775's Form LM-2 for 2020 ("Dues and Agency Fees") by Schedule 13 ("Total Members/Fee Payers").

[68] Divide Statement B, Line 35 of AFSCME Council 28's Form LM-2 for FY 2021 ("Dues and Agency Fees") by Schedule 13 ("Total Members/Fee Payers"). Available online at: https://olmsapps.dol.gov/query/orgReport.do?rptId=782993&rptForm=LM2Form

[69] *See* the statement of chargeable and nonchargeable expenses the union prepared in accordance with *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) and includes in its new member solicitation packets. Available online at: https://www.freedomfoundation.com/wp-content/uploads/2018/07/SEIU-775-membership-solicitation-packetmembership-formHudson-notice-May-2018.pdf

[70] *See* Statement B, Item 51 of SEIU 775's Form LM-2 for 2020. Available online at: https://olmsapps.dol.gov/query/orgReport.do?rptId=747518&rptForm=LM2Form

[71] Austin Jenkins. "Unions in Washington state secure wins under Democratic one-party rule in Olympia." *KUOW*. August 2, 2021. https://www.kuow.org/stories/unions-in-washington-state-secure-wins-under-democratic-one-party-rule-in-olympia
Joseph O'Sullivan. "How unions are racking up new wins in Democratic-controlled Washington state." *The Seattle Times.* August 2, 2021. https://www.seattletimes.com/seattle-news/politics/how-unions-are-racking-up-new-wins-in-democratic-controlled-washington-state/

Conclusion

Caregivers who serve Medicaid-eligible adults with functional disabilities work difficult jobs and provide an important service. Further, the demand for in-home care is growing as the population ages. However, even if Congress determines that additional funding for HCBS is warranted in principle and can develop a fiscally responsible method to pay for the added cost without harming the nation's fragile and slowing economy, there is simply no excuse for sending billions of dollars in Medicaid funds to one of the nation's largest and most politically aggressive special interest groups.

Congress should not let labor unions hide behind the elderly and persons with disabilities while rigging Medicaid for their own enrichment. To prevent this from happening, any additional HCBS funding made available to states should come without strings attached and leave states free to experiment and develop programs that make sense, instead of using federal funds to incentivize a union-centric model that harms caregivers and Medicaid clients and wastes taxpayer dollars.

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