

Testimony of Sarah Leberstein

National Employment Law Project

H.B. 5368: An Act Concerning Homemaker Services and Homemaker Companion Agencies

Hearing before the Committee on Labor and Public Employees

March 8, 2016

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Senator Gomes, Representative Tercyak, and Members of the Committee:

The National Employment Law Project is a non-profit, non-partisan research and advocacy organization specializing in employment policy. We are based in New York with offices across the country, and we partner with federal, state and local lawmakers on a wide range of workforce issues. Across the country, our staff is recognized as policy experts in areas such as unemployment insurance, wage and hour enforcement, minimum wages, and workplace protections for low-wage workers.

Among other issues, NELP has long worked to combat employers' misclassification of employees as independent contractors, a practice that lowers workplace standards, depresses worker pay, drains state and federal revenues of much-needed resources, and harms law-abiding businesses. NELP has also fought to improve the rights of and working conditions for home care workers, who have suffered from unjust exclusions from core labor standards and high rates of workplace violations. HB 5368 addresses these two key areas of concern, and we urge the Committee to support it.

I. Home Care Workers are vulnerable to independent contractor misclassification.

Personal care and home care services are seldom performed by individual independent businesses, but home care companies frequently mislabel their employees "independent contractors" and deny them basic workplace protections and benefits. Home care workers perform work that is an integral part of a home care agency's business, do not invest any capital in a business, and generally have little, if any, ability to set their duties, hours and wages. Agencies and other entities maintain the right to intervene if the level of services provided does not meet expectations, and they typically interact with the consumers to recover payments and set up the care or services needed. These factors all strongly indicate that home care workers are legally "employees" and should have the benefit of the core workplace protections that cover most other workers.

Unfortunately, independent contractor misclassification appears to be on the rise in the home care industry, where some employers require their workers to sign "independent contractor" agreements as a condition of getting a job, issue workers an IRS 1099 independent contractor form, or even force workers to convert from W2 employees to independent contractors to maintain their employment. The following are sample reported cases of independent contractor abuses in the home care industry:

- In a 2010 case against Lee's Industries, Inc. and Lee's Home Health Services, Inc. a home care agency required home care workers previously treated as employees to sign an agreement calling themselves independent contractors in order to keep their jobs, despite the fact that there were no changes to the job or to the worker's business status. The NLRB found that this constituted an improper labor practice.¹
- In a similar case, *Cooney v. O'Connor*, a Maryland home care agency had its employees sign an "Independent Contractor agreement" as a condition of getting a job and unsuccessfully

attempted to prevent former employees from collecting unemployment insurance benefits.² The Maryland Court of Special Appeals later concluded that the care providers were employees.³

- Caring First, Inc, a home health care agency in Florida, is being sued by the Department of Labor for misclassifying certain employees as independent contractors and paying them a flat hourly rate, regardless of the number of hours work.⁴
- A court found that franchisor Griswold International committed fraud by guaranteeing its franchisees a “proven” system under which franchisees could classify workers as independent contractors so neither clients nor franchisees were responsible for taxes or compliance with wage and hour or other labor or employment laws.⁵

NELP has also learned about companies the peddle the independent contractor model to home care agencies: Contractor Management Services, a company that advertises itself as a “full-service firm for companies utilizing Independent Contractors”,⁶ promotes the use of an “independent contractor model.”⁷ It has presented multiple webinars through the American Network of Community Options and Resources (ANCOR), a network of home care providers with other home care agencies, offering techniques to convert home care worker employees into independent contractors.^{8,9}

II. Misclassification deprives workers of essential workplace protections and social safety net benefits and depresses their income.

Misclassified workers do not give up all workplace protections by working under the independent contractor label, but challenging their classification – directly to their employer, before a labor enforcement agency or in the courts – can be a drawn-out and time-consuming battle, and many workers never challenge their misclassification or seek redress for the violations that stem from it, like unpaid overtime or the unemployment insurance payments they are denied. As a result of their outsized tax burden, the prevalence of wage violations, and unreimbursed businesses expenses, misclassified workers’ net income is significantly less than for similar workers paid as employees.

A home care company that treats its workers as independent contractors passes along the following responsibilities to those workers:

- Paying upfront the employer- and employee-side of Social Security and Unemployment (FICA and FUTA) taxes, currently 15.3% of pay, along with income taxes. W2 employees, in contrast, pay only half of that rate and the other half is paid by their employer.

- Additional state and local tax and reporting burdens placed on any worker running her own business, including requirements to pay for workers' compensation and other state licensing and insurance requirements for businesses.
- Calculating and remitting quarterly estimated self-employment taxes in addition to filing an annual return, as well as any individualized business tax deductions and credits.

By misclassifying workers as independent contractors, a home care business can also deny workers:

- Minimum wage and overtime pay protections;
- Compensation for on-the-job illnesses or injuries;
- Unemployment insurance if separated from work involuntarily;
- Employment-based benefits like health insurance and retirement contributions, or protection against discrimination.

Ensuring that home care employers abide by their legal responsibilities to workers is especially critical now, as new federal and state wage and hour rights come into effect in the industry for the first time in decades.¹⁰ The U.S. Department of Labor's home care rules, which extend federal minimum wage and overtime coverage to over two million home care workers previously excluded from fundamental labor protections under the Fair Labor Standards Act (FLSA), went into effect in 2015. Because the Connecticut Minimum Wage Act (MWA) covers domestic service workers to the same extent as the FLSA, home care workers in Connecticut also gained coverage under the state's minimum wage and overtime laws when the federal rules went into effect.¹¹ Connecticut's ability to hold home care employers accountable for compliance with FLSA and the CT MWA now will determine whether the DOL reforms take hold, delivering their promise of improved rights and standards for the industry and strengthening the state's ability to recruit and retain a qualified workforce as workforce demand skyrocket.

III. Independent contractor abuses strain federal, state, and local budgets.

Several government studies show that misclassification drains billions from federal and state revenues annually, costing federal revenues an estimated \$2.72 billion in 2006, according to a Government Accountability Office (GAO) report. The cost of independent contractor abuses to Connecticut is also staggering. A 1992 study estimated that misclassification abuses reduced state income tax receipts by \$65 million annually; the workers' compensation system lost \$57 million in unpaid premiums; and the unemployment insurance fund lost \$17 million.¹² Connecticut has joined a growing number

of states that have established taskforces to coordinate enforcement efforts, recovering critical resources and returning pay to workers. The 2011 annual report from the Joint Enforcement Commission on Worker Classification reported that from March 1, 2010 through February 28, 2011, 1,600 audits and another 9,000 individual wage complaint investigations resulted in the reclassification of approximately 6,500 workers and the discovery of roughly \$50 million in previously unreported or underreported payroll. During the same period, the Department of Revenue Services conducted audits that resulted in the assessment of \$611,568 in additional taxes, penalties and interest. But while these efforts were of huge benefit to the affected workers and to the state, many other workers never report violations and many abuses go unresolved.

IV. Independent contractor misclassification unfairly burdens responsible businesses.

Employers that classify workers correctly as W-2 employees are often unable to compete with lower-bidding companies reaping the benefits of artificially low labor costs. Law-abiding employers also suffer from inflated unemployment insurance and workers compensation costs. A 2010 study estimated that misclassifying employers shift \$831.4 million in unemployment insurance taxes and \$2.54 billion in workers compensation premiums to law-abiding businesses annually. Misclassification, especially when pervasive throughout an industry, skews markets and can drive responsible employers out of business.

V. HB 5368 is an Important Step towards Preventing Independent Contractor Abuses in the Home Care Industry.

HB 5368 would help to stem independent contractor abuses in the home care industry by designating certain home care registries as the employer of the home care workers they supply or refer to consumers for the purposes of workers' compensation benefits, Unemployment Insurance, and wages. By creating automatic coverage for these home care employers under key workplace laws, HB 5368 would place liability with the parties in the best position to ensure compliance with workplace laws; help secure rights for a group of workers who rarely, if ever, should be classified as independent business owners; would create more certainty for workers, employers and consumers.

Ensuring home care workers' and employers' inclusion in the workers compensation program will protect workers and homeworkers from financial ruin and place responsibility on home care companies as a cost of doing business. Medical bills and lost time from a work related injury can be an enormous burden on workers and their families.¹³ Losing a family member to a work-related death can have devastating consequence to a family's financial security. That is why the American worker's compensation system was created at the turn of the last century – to have employers assume responsibility for providing insurance that pays out certain benefits for workers injured on the job without regard to fault. This system is of special importance in the home care industry, where injury rates are especially high. A national survey of domestic workers found that 38% had suffered work-related wrist, shoulder, elbow or hip pain in the prior

12 months, 29% of housecleaners suffered from skin irritation and 29 % of caregivers suffered a back injury in the prior 12 months.¹⁴

By ensuring home care workers' access to Unemployment Insurance, HB 5368 will help mitigate the destabilizing effects of fluctuating employment and hours. It will encourage workers to stay connected to the labor force and to remain in their profession during periods of unemployment. With demand for home care workers projected to rise rapidly in the coming decade, there is a particularly important social interest in keeping these workers connected to this important profession.

HB 5368 will also help protect home care workers against the wage theft that plagues the industry. Home care workers are routinely subject to minimum wage and overtime violations, especially when paid flat weekly or monthly amounts for very long work days. *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities*, NELP's 2009 landmark study of employment practices in low-wage industries in the U.S.'s three largest cities—New York City, Chicago, and Los Angeles—revealed systemic and severe violations of employment and labor laws in the home care industry. Of the home healthcare workers surveyed, 17.5% experienced a minimum wage violation; 82.7% of workers who worked overtime were not paid the required overtime premium; and 90.4% of workers experienced an off-the-clock violation (that is, they worked before and/or after their schedule shift but were not paid for that work time). Making home care registries automatically liable for these wage and hour violations will eliminate confusion over workers' coverage, making it easier to recover against their employers when they experience abuses and signaling an increased level of oversight.

Finally, the bill holds the potential to even the playing field for different types of home care employers in the state by ensuring they all follow the same set of basic workplace rules.

Conclusion

Independent contractor abuses are increasingly common in the home care industry, but there is potential to reverse this damaging trend. HB 5368 would help to stem misclassification in the home care industry by creating automatic coverage for these home care employers under key workplace laws, thereby placing liability with the parties in a position to best ensure compliance with workplace laws; helping secure rights for a group of workers who rarely, if ever, should be classified as independent business owners; and creating more certainty for workers, employers and consumers.

¹ Lee's Industries, Inc. and Lee's Home Health Services, Inc. and Bernice Brown, Case No. 4-CA-36904 (Decision by National Labor Relations Board Division of Judges), 2/25/10; Ruckelshaus, Catherine K on behalf of National Employment Law Project Testimony before the United States Congress Senate Committee on Health, Education, Labor and Pensions. June 17, 2010, available at <http://www.nelp.org/content/uploads/2015/03/MisclassTestimonyJune2010.pdf>.

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- ² Markovitz, Brian, et al. Brief of Amici Curiae filed in Muriel Peters v. Early Healthcare Giver, Inc, page 24. December 16, 2013. http://www.mwela.org/sites/default/files/brief-bank/AnnaBrooks/MWELA_Amicus_Brief_Peters-v-EarlyHealthcareGiver.pdf
- ³ Sonner, J Opinion in the Court of Special Appeals of Maryland, No. 1788, September term, 2001. Elizabeth Cooney Personnel Agency, et al v. Joseph P. O'Connor, Jr, et al. Filed November 26, 2002.
- ⁴ Study, Emily. Home Health Care News. Feds Sue Home Care Provider Over Contract Workers. July 13, 2015. http://homehealthcarenews.com/2015/07/feds-sue-home-care-provider-over-contract-workers/?utm_source=Home+Health+Care+News&utm_campaign=6d1c6d4f6b-HHCN_7_14_157_13_2015&utm_medium=email&utm_term=0_8874f00bf0-6d1c6d4f6b-91017
- ⁵ Justia Dockets and Filings, Andersen et al v. Griswold International, LLC et al, retrieved July 16, 2015. <https://dockets.justia.com/docket/california/candce/4:2014cv02560/277971>
- ⁶ Contractor Management Services website, <https://www.ictherightway.com/>, retrieved 11/9/15.
- ⁷ Swager, Wendy and LaVoie, Patrick. Improving the Quality of Outcomes for Consumers and Direct Care Workers through the Agency with Choice and the Independent Contractor Model, 2014. Retrieved July 16, 2015. http://www.reinventingquality.org/docs/B_Wendy_Swager_and_Patrick_LaVoie_Leading_Practice_on_Comprehensive_Approaches.pdf
- ⁸ ANCOR website, retrieved November 10, 2015. Description of June 4, 2014 webinar, *Improving Quality Outcomes: The Independent Contractor and Agency with Choice Models*. <http://www.ancor.org/training-events/webinars/improving-quality-outcomes-independent-contractor-and-agency-choice-models>
- ⁹ ANCOR website, retrieved November 10, 2015. Description of September 25, 2013 webinar, *Direct Care Workers on the Competitive Edge – How Going Independent Will Bring More Money Under Managed Care*. <http://www.ancor.org/training-events/webinars/direct-care-workers-competitive-edge-%E2%80%93-how-going-independent-will-bring>
- ¹⁰ See generally, NELP webpage on home care worker rights, at <http://www.nelp.org/campaign/implementing-home-care-reforms/>.
- ¹¹ National Employment Law Project, *Home care worker rights in the states after the federal companionship rules change*, 2013. <http://nelp.org/content/uploads/2015/03/Home-Care-State-by-State.pdf>
- ¹² William T. Alpert, *Estimated 1992 Costs in Connecticut of the Misclassification of Employees*, Department of Economics, University of Connecticut (1992). See also, Sarah Leberstein “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Registries,” (NELP July 2015), available at <http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf>.
- ¹³ Occupational Safety and Health Administration, United States Department of Labor, Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job, June 2015, <http://www.dol.gov/osha/report/20150304-inequality.pdf>.
- ¹⁴ HomeEconomics, the Invisible and unregulated World of Domestic Work, National Domestic Workers Alliance, Center for Urban Economic Development, University of Illinois at Chicago, DataCenter, 2012, <http://www.domesticworkers.org/sites/default/files/HomeEconomicsEnglish.pdf>.