



**Testimony Regarding Maryland Senate Bill 303
Before the Maryland Senate Finance Committee
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Thank you for this opportunity to submit written testimony to your committee on Senate Bill 303, a proposed exemption for agency-employed home care workers from unemployment insurance coverage. We submit this testimony on behalf of the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), the Service Employees International Union (SEIU), and the National Employment Law Project (NELP).

SEIU and AFSCME represent over 550,000 home care workers across the country from California, Oregon and Washington to New York and Massachusetts. SEIU and AFSCME have advocated on behalf of the rights of home care workers in collective bargaining as well as in courts and before administrative agencies, state legislatures and Congress. As the home care industry has expanded, SEIU and AFSCME have sought to insure that sufficient numbers of skilled and dedicated home care workers are available to meet the rapidly growing demand for these vitally important services. It is essential to this goal that home care workers are afforded the same minimum protections enjoyed by other workers under state and federal law.

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NELP is a non-profit research and advocacy organization that works to ensure good jobs and economic security for our nation's workers. For over 40 years, NELP has specialized in unemployment insurance programs (UI) and labor standards enforcement and access. We have a long history serving families hardest hit by economic downturns by ensuring that workers are properly paid and treated on the job, and by helping them retain access to unemployment benefits when they are separated from their job.

Introduction

Senate Bill 303 would create an exemption from the state's unemployment insurance system for agency-employed home care workers who have signed an independent contractor agreement with their home care agency employer. Its effect would be to allow home care agency employers to deprive these critical workers of the minimum cushion enjoyed by virtually all other workers during periods of unemployment. This unprecedented proposal is bad policy, for four reasons:

- (1) It would undercut the purposes of the state's unemployment insurance system, which is designed to keep workers economically secure and encourage their re-entry into the workforce;**
- (2) It would exacerbate a worker shortage and high turnover in an already-fragile industry where consumer demand is outpacing worker supply, by creating an incentive for home care workers to leave the field entirely just when they are needed the most;**
- (3) It would deny critical unemployment insurance to the very workers who need it the most: the low-income women of color who are struggling to support their families while providing home-based care to our elderly and disabled populations, who have no bargaining power when looking for a job, and**
- (4) It would encourage misclassification of employees as independent contractors who do not meet the traditional test for that categorization and thereby undermine application of other minimum labor standards and frustrate tax collection.**

I. SB 303 Would Undermine the Purposes of Unemployment Insurance Law.

The basic goals of our nation's unemployment insurance system are to provide involuntarily-unemployed workers with temporary income replacement while they look for work, and to stabilize the economy by maintaining consumer spending during an

economic downturn.⁴ When President Franklin D. Roosevelt sent the Social Security Act to Congress for consideration in January 1935, his vision for the unemployment insurance program was clear and compelling. Unemployment insurance “should be constructed in such a way as to afford every practical aid and incentive toward the larger purpose of employment stabilization.”⁵ The accompanying report of the Committee on Economic Security provided the details of the program, to serve as the “first line of defense” of unemployed families and the struggling economy.⁶

Unemployment insurance boosts the economy, by providing “counter-cyclical” economic growth in downturns.⁷ It also alleviates economic hardship by preventing workers from slipping into poverty.⁸ And, it helps employers and workers preserve skills and enhance productivity, because income provided by unemployment checks gives workers needed breathing room to search for a good job that matches their experience and skills, and enables employers to retain experienced workers during layoffs. This result benefits society as a whole; by encouraging workers to stay in the professions they have trained for, rather than having to shift from field to field out of short-term necessity, unemployment insurance helps insure that important occupations are not depleted of their experienced workers whenever periods of unemployment strike.

In recognition of these policy goals, last year Maryland revised its unemployment insurance law to close gaps in the coverage of part-time workers.⁹ Many states exclude part-time workers from UI benefits by requiring them to look for full-time work in order to receive UI. The result is that many part-time workers with significant labor force attachment are excluded from UI, even though their wages were subject to UI payroll taxes and their earnings prior to layoff meet state monetary eligibility rules.

In direct contradiction to the legislature’s action last year, SB 303 would undermine the overall purposes of the unemployment insurance system by exempting a large segment of low-wage workers in a socially important, fast-growing occupation. No legitimate rationale exists for the exclusion of agency-employed home care workers.

⁴ Advisory Council on Unemployment Compensation, “Defining Federal and State Roles in Unemployment Insurance (1996), at page 7.

⁵ Edwin Witte, *The Development of the Social Security Act* (University of Wisconsin Press: 1962), at page 128.

⁶ Murray Larson, “The Development of the Unemployment Insurance System in the United States,” 8 Vand.L.Rev. 181, 186 (1955).

⁷ Lawrence Chimerine, *et al.* “Unemployment Insurance as an Economic Stabilizer: Evidence of Effectiveness Over Three Decades,” U.S. Department of Labor, Unemployment Insurance Occasional Paper 9908 (1999).

⁸ U.S. Congressional Budget Office, “Family Income of Unemployment Insurance Recipients” (March 2004), at page 13.

⁹ <http://mlis.state.md.us/2009rs/billfile/hb0310.htm>.

II. Exempting Home Care Workers Would Exacerbate Worker Shortages and High Turnover Already Plaguing the Industry.

SB 303's exemption of home care workers would be counterproductive for this critical industry and in this economy. Taking away unemployment insurance for these workers will only exacerbate existing and projected worker shortages. Home care workers already struggling to make ends meet in their jobs will face even more incentives to leave the field altogether.

There are nearly two million home health care workers in the United States, working in private homes and assisting the elderly and disabled with personal care activities, light housekeeping, meal preparation, and medication management.¹⁰ Their efforts are crucial to the ability of the elderly and disabled to remain in their communities, living independent lives. These workers constitute one of the fastest-growing workforces in the country, playing a vital role in economic growth and job creation.¹¹ According to the Bureau of Labor Statistics, in 2008, Maryland had 45,815 direct care workers.¹² Home care workers are more likely women, nonwhite and unmarried with children.¹³ Most choose direct care work because they want to help people and are interested in working in health care.¹⁴

Low Pay and No Access to Benefits.

These jobs pay low wages and lack access to affordable benefits.¹⁵ In 2008, the national median hourly wage for personal and home care aides and home health aides was below \$10.00 (\$9.22 and \$9.84, respectively). Many of these workers (43%) work part-time, which reduces overall earnings. In 2008, annual earnings for all direct care workers averaged an astonishingly low \$17,000.¹⁶ The inadequacy of the wages they earn means that the families they support often live below the poverty level and rely on public

¹⁰ "Who are direct-care workers?" Paraprofessional Healthcare Institute, February 2010, available at <http://www.directcareclearinghouse.org/download/NCDCW%20Fact%20Sheet-1.pdf>, at page 2, (hereafter, "Who are direct care workers?").

¹¹ *Id.* at page 1.

¹² *Id.* at page 1.

¹³ Bernadette Wright, *Direct Care Workers in Long Term Care*, AARP Public Policy Institute (May 2005).

¹⁴ *Id.*

¹⁵ Steve Dawson and Rick Surpin, *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care*, The Aspen Institute (May 2001), available at

<http://www.directcareclearinghouse.org/download/Aspen.pdf>, (hereafter "Unnecessary Crisis").

¹⁶ Who are direct-care workers? at page 2.

benefits programs for support.¹⁷ Given the importance of this work, these low standards have seriously negative social consequences. The last thing we should tolerate is a worsening of these problems.

High Turnover and Worker Shortages.

The consequences of chronic low pay and lack of access to benefits are well known. Most states across the country report shortages of direct care workers, high turnover rates, lack of qualified staff, and difficulty retaining workers.¹⁸ The extremely high turnover rates in home care agencies, averaging 40 to 50 percent on an annual basis, are a product of poor job quality.¹⁹ The Department of Labor notes that turnover among personal and home care aides is high due to low pay and the high emotional demands of the job.²⁰

Given the dynamics of the workforce -- high turnover, low wages and few, if any, benefits -- it is becoming harder for elderly and disabled consumers to access care, and it becomes harder to ensure the quality and reliability of the care obtained. This “Care Gap” will continue to grow until the quality of direct care jobs improve.²¹

The problem is projected only to get worse in coming years. While the population over age 85 will double in the next 30 years, the number of persons in the demographic of most home care workers will increase by just 9%.²² The General Accounting Office has developed a calculation called the “elderly support ratio,” which represents the ratio of women aged 20-54 (the gender and age group currently providing the vast majority of

¹⁷ *Id.*, at page 3. (noting that 44% of direct care workers live in households earning below 200% of the federal poverty level, making them eligible for state and federal public assistance).

¹⁸ Dorie Seavey, *Engaging the Public Workforce Development System: Strategies for Investing in the Direct Care Workforce*, Better Jobs, Better Care, Issue Brief (January, 2006), available at <http://www.cael.org/newsroom/BJBCIssueBriefWFI0106.pdf>.

¹⁹ “Better Jobs Better Care: Retaining Long-Term Care Workers”, The Nat’l Conference of State Legislatures, *State Health Notes*, Vol. 25, #419 (Apr. 19, 2004).

²⁰ See Dep’t of Labor, *Occupational Outlook Handbook*, Bulletin 2600 (2006-07), available at <http://www.bls.gov/oco/>.

²¹ Unnecessary Crisis.

²² William J. Scanlon, *Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Testimony before the Senate Committee on Health, Education, Labor and Pensions*, GAO-01-750T (May 17, 2001) (available at <http://www.gao.gov/new.items/d01750t.pdf>)(hereafter “Scanlon”), at page 9. The total working age population (persons aged 18 to 64) will grow by just 16% during this time period. *Id.*

care) to persons aged 85 and over. In 2000, that ratio was 16:1. The ratio will drop to 12:1 by 2010, 9:1 by 2030, and 6:1 by 2040.²³

Maryland is projected to have a 45% increase in demand for new home health aides, and a 40% increase in demand for new personal and home care aides by 2016.²⁴

Depriving home health care workers unemployment benefits will only exacerbate this problem, making the profession more transient by creating further incentives for home health care workers to leave their profession altogether. During periods of unemployment, experienced home care workers will have no cushion enabling them to continue to seek work in the profession, but will be forced to take the first job available, adding to the worker shortage and hurting elderly and disabled consumers who wish to remain at home and avoid institutionalization.

III. SB 303 Would Exclude the Very Workers Who Need Unemployment Insurance the Most.

Home care workers are two to three times more likely than other workers to be single heads of households.²⁵ Two in five direct care workers live in households that receive one or more public benefit such as food stamps.²⁶ These are the workers who need unemployment insurance the most.

It is well-documented -- and illustrated by Maryland's enactment last year of part-time UI provisions -- that exclusions of part-time workers from unemployment insurance disproportionately impact low-wage and female workers, despite the fact that these workers have significant labor force attachment and have paid into the unemployment system.²⁷ Sixty-five percent of mothers with children under the age of six and 78 percent of women with children age six to 13 are in the labor force. These working mothers, many of them home care workers, carry a dual load, providing vital income to their families while still doing the lion's share of household duties.²⁸

²³ Scanlon, at page 9. The ratio of the entire working age population to the population over 85 will go from 39.5 workers per elderly person in 2000 to 22.1 in 2030 and 14.8 in 2040. Scanlon, *supra*, at 9.

²⁴ Paraprofessional Healthcare Institute, "State-by-State Projected Demand for New Direct-Care Workers," 2006-2016, *available at* <http://directcareclearinghouse.org/download/State%20Demand%20for%20DCWs%202006-16%20Revised.pdf>.

²⁵ Scanlon, at page 22.

²⁶ "Who are direct-care workers?" at page 3.

²⁷ *See, e.g.*, National Employment Law Project, "Part-Time Workers and Unemployment Insurance" (2004), <http://www.nelp.org/page/-/UI/parttimeui0304.pdf>

²⁸ NELP, "Why Unemployment Insurance Matters to Working Women and Their Families," http://nelp.3cdn.net/160e9cc27e3f2a6d6e_bwm6b5dz6.pdf, at page 1.

Home care workers need unemployment insurance to be able to stay connected to the labor force and to remain in their profession during periods of unemployment. Moreover, there is a particularly important social interest in keeping these workers connected to this important profession.

IV. The New Exemption Would Encourage Abuse and Undermine Other Minimum Labor Standards and Tax Laws.

It is important to recognize that Maryland's UI law already exempts true independent contractors. Lab. & Empl. Code Sec. 205(a). In addition, the law specifically requires the Secretary of the Department of Labor, Licensing and Regulation (DLLR) to adopt regulations clarifying how the independent contractor provisions apply to "certain industries, including the construction industry, the landscaping industry, and the home care services industry." Sec. 205 (b)(2). Thus, if individuals providing home care services through agencies are truly independent contractors, they are already exempt and, if the application of the exemption to this industry requires further clarification, it should be provided by the Secretary.

The purpose of the proposed exemption in SB 303, therefore, is not to exempt independent contractors, but rather to allow agency-employers to compel their homecare worker employees to waive the protections of the unemployment insurance system to which they would otherwise be entitled. SB 303 does not require that the workers who would lose these important benefits actually be independent contractors (under the clear criteria set forth in the prior section 205), but only that they enter into an agreement so providing. Home care agency employers need only condition employment upon a worker's signing of such an agreement in order to accomplish this end. The only other criteria SB 303 would establish – that the worker is free to work for other agencies and that the worker is permitted to negotiate the rate of payment – are also relatively meaningless. Few, if any, home care agencies currently prevent their employees from working for other agencies, and such a prohibition is probably unenforceable under Maryland law. Moreover, all workers are permitted to negotiate the rate of payment with their employer (or if the bill is referring to the rate of payment by the consumer, that rate is established by the state or federal government if the services are provided under Medicaid or Medicare as most home care services are).

Thus, SB 303 would encourage precisely the form of independent contractor misclassification that is the subject of increasing scrutiny, regulatory activity, and enforcement actions at the state and federal level.

Employers seeking to evade labor and employment laws are increasingly turning to independent contractor structures to escape responsibility for minimum wage and overtime, workers compensation, unemployment insurance, and collective bargaining.²⁹

²⁹ See generally, Testimony of Catherine Ruckelshaus, "Providing Fairness to Workers Classified as Independent Contractors," before the U.S. House of Representatives, Committee on Education and Labor Subcommittee on Workforce Protections (2007)

By calling employees “independent contractors,” employers stand to save upwards of 30% of payroll costs, while depriving workers and their families of the most fundamental work and pay protections, hurting law-abiding businesses that cannot compete, and costing the states and the federal government billions of dollars in unpaid taxes.

In recognition of the independent contractor problem, Maryland’s legislature just last year passed a separate law to combat independent contractor abuses in the construction and landscaping industries.³⁰ In addition, Maryland’s DLLR has proposed regulations and received comments regarding the application of the independent contractor test in the UI law to home care workers; these regulations are currently pending. These regulations should provide sufficient guidance to employers and employees, and obviate any argued need for SB 303’s end-run around Maryland’s UI independent contractor provision.

Home health care employers, including agencies in Maryland, are jumping on this independent contractor bandwagon, seeking to cut costs on the backs of workers and our state and federal tax revenues.³¹ Reacting to a court decision that one agency’s home care workers are not independent contractors under Maryland unemployment insurance law,³² the agencies are trying to create an unprecedented and special carve-out for their workers. This is bad policy for the reasons outlined above, would alter the time-tested test for determining covered employment under Maryland’s unemployment system, and would encourage evasion of other employment and tax laws.

Thank you for the opportunity to present testimony on this important issue impacting Maryland’s workers and the State’s most vulnerable citizens.

<http://www.nelp.org/page/-/Justice/IndependentContractorTestimony2007.pdf>, and studies cited therein.

³⁰ Workplace Fraud Act of 2009, *available at*

http://mlis.state.md.us/2009rs/chapters_noln/Ch_188_sb0909E.pdf

³¹ *See, e.g., Elizabeth Cooney Personnel Agency v. Joseph P. O’Connor, et al*, No. 1788, Md. Court of Special Appeals, Sept. term, 2001 (unpublished decision); a copy of the decision is attached to this testimony; *Bamgbose v. Delta-T Group Inc.*, No. 09-667, 2/8/10 (E.D. Pa.) (home care workers called independent contractors suing a temporary staffing agency for failing to pay overtime wages).

³² *Elizabeth Cooney Personnel Agency v. Joseph P. O’Connor, et al*, No. 1788, Sept. term, 2001.