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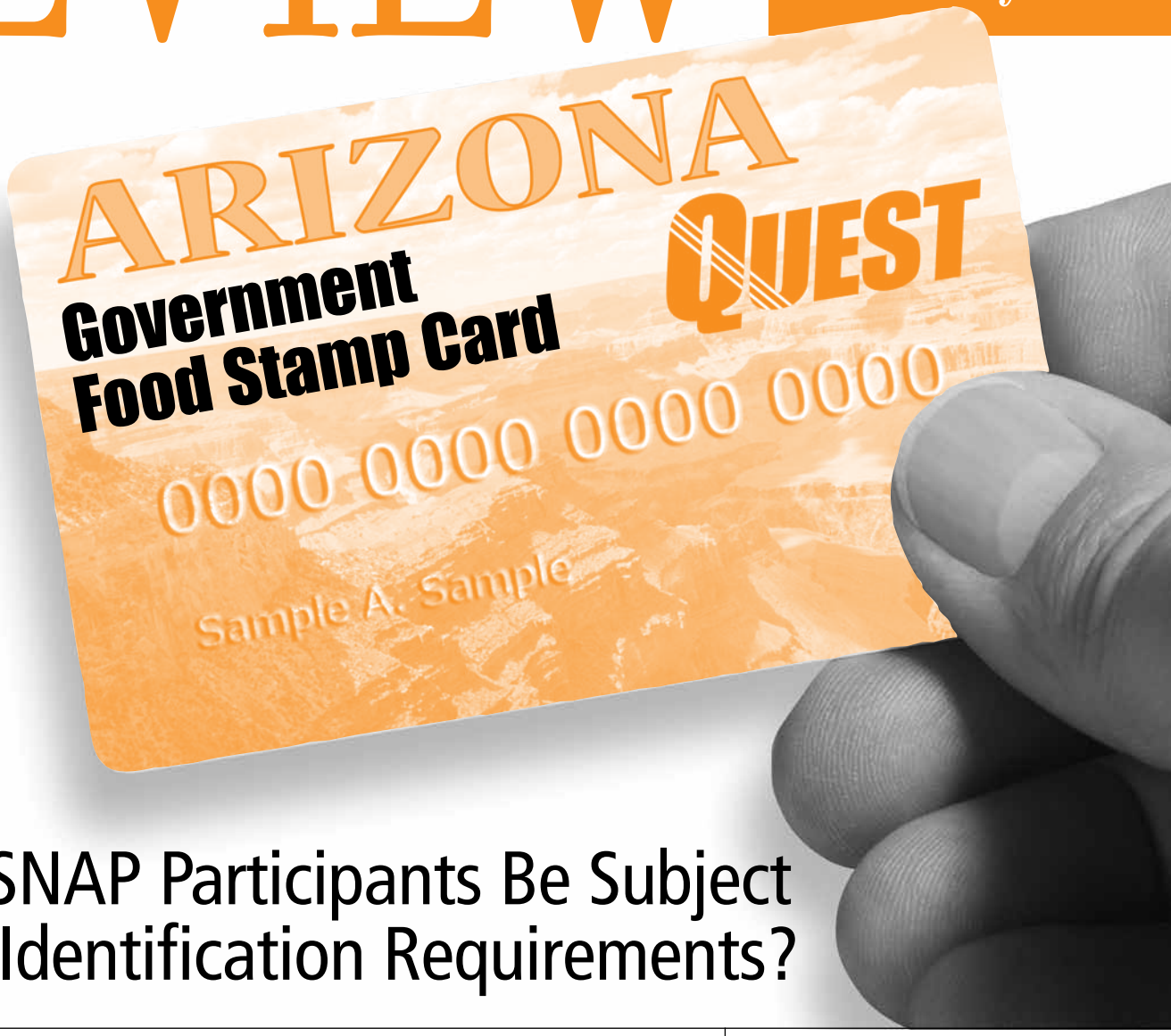

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How the FAIR LABOR STANDARDS ACT Fails Home Health Aides and Consumers

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Home health care workers, also known as home health aides, personal care aides, or direct care workers, provide essential in-home care that older and disabled people need to live independently in noninstitutional settings. As the American population ages, demand for home health care is rapidly increasing; it is one of America's fastest growing professions, with over 1.5 million new positions expected to be created in the field before 2018.[1] However, demand for home health care is outpacing the available supply of workers. Home health care work is physically and emotionally demanding, but because home health care workers are exempt from the Fair Labor Standards Act, they are not guaranteed federal minimum-wage or overtime protections.

Home health care workers' low wages have severe negative consequences for both workers and consumers. Home health care workers are part of America's working poor; 45 percent of workers fell below 200 percent of the federal poverty line in 2010.[2] Low wages have led to fewer workers entering the field and an astronomical rate of turnover. As a result, consumers suffer care gaps, reduced continuity of care, lower-quality care from inexperienced and untrained workers, and even reduced quality of life.

AARP, a nonprofit, nonpartisan organization for people 50 and over, advocates increasing and improving access to long-term care supports and services sufficient to allow long-term care recipients to remain in the community and to avoid institutionalization in nursing facilities. AARP has filed amicus curiae briefs supporting overtime wages for agency-employed home health care workers in several cases—*Long Island Care at Home Limited v. Coke* and *Bayada Nurses Incorporated v. Commonwealth*, to name two—to further those goals.[3]

Here we outline the history of the Fair Labor Standards Act's "companionship exemption," which exempts home health care workers from overtime and minimum-wage protections. We detail its negative impact on workers and consumers and explain why

[1]PHI, Occupational Projections for Direct-Care Workers 2008–2018 at 1 (Feb. 2010), http://bit.ly/r5jeYO.

[2]PHI, Who Are Direct-Care Workers? 3 (Feb. 2011), http://bit.ly/qxUfgU.

[3]*Long Island Care at Home Limited v. Coke*, 551 U.S. 158 (2007); *Bayada Nurses Incorporated, v. Commonwealth*, 8 A.3d 866 (Pa. 2010).

wages have not increased with demand. We describe advocates' efforts to improve home health care wages through litigation and legislation.

History of the Companionship Exemption

The Fair Labor Standards Act sets the federal minimum wage, requires "time-and-a-half" overtime pay for hours worked in excess of forty per week, and largely prohibits child labor.[4] Through the "enterprise coverage" provision, the Act covers employees of enterprises that do at least $500,000 in business annually.[5] This does not apply to many types of employees such as "companionship workers."

The Fair Labor Standards Act was designed in response to poor conditions and wages for workers in industrial jobs; domestic employees were outside the legislation's initial scope.[6] This changed in 1974, when Congress extended the Act's coverage to most domestic employees—cooks, maids, and chauffeurs.[7] Among the amendments were an exemption for home health care workers, then called "companions," or domestic employees who provide "companionship services for individuals who (because of age or infirmity) are unable to care for themselves."[8]

The purpose of these amendments was to improve and professionalize working conditions for domestic employees. While congressional opponents were skeptical that domestic workers performed the difficult labor that deserved federal protections, most recognized that domestic service employees worked "long days for poor wages and often faced demeaning treatment."[9] Proponents of the 1974 amendments hoped that the new law would create a modern arm's-length employment relationship between employers and domestic workers.

So-called companions, however, were treated differently from other domestic workers by opponents to the amendments. They were distinguished from full-time employees who worked to make a "daily living."[10] Home health care was seen as a source of supplemental income, not a profession. The work was analogized to babysitting; home health care workers were viewed as "elder sitters" who watched television and visited with elder adults while the primary caregiver was unavailable.[11] The position might also require incidental work but nothing more strenuous than occasionally preparing lunch.[12] Subjecting these employees to Fair Labor Standards Act requirements was seen as, for households, an additional burden unwarranted by the undemanding work in question.[13] While professionalization was seen as desirable for domestic employees, it was anathema to the inherently personal

[4]Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2011). The federal minimum wage has been $7.25 an hour since July 2009. (29 U.S.C. § 206(a)).

[5]29 U.S.C. § 203(s)(1)(A)(ii) (2011). The U.S. Department of Labor estimates that over 130 million workers are protected by the Fair Labor Standards Act (U.S. Department of Labor, Wages and Hours Worked: Minimum Wage and Overtime Pay (rev. Aug. 23, 2004), http://1.usa.gov/ojm16Y).

[6]Pres. Franklin D. Roosevelt expressly rejected the idea of Fair Labor Standards Act coverage for domestic workers: "[N]o law ever suggested intended [sic] a minimum wages and hours bill to apply to domestic help" (Suzanne B. Mettler, *Federalism, Gender and the Fair Labor Standards Act of 1938*, 4 Polity 635, 647 (1994)). See also Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 American University Law Review 851, 892 (1999) (analyzing contemporary views on women, race, and domestic service as they affected exemption and reform efforts).

[7]29 U.S.C. § 206(f) (2011). For a list of all covered domestic employees, see 29 § C.F.R. 552.3 (2011).

[8]29 U.S.C. § 213(a)(15) (2011).

[9]Molly Biklen, Note, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act*, 35 Columbia Human Rights Law Review 113, 123 (2003). One sponsor explained that domestic employees were not treated with the "dignity and respect that ought to come with honest work," and, "in lieu of fair wages, they are often given secondhand clothing and leftover food" (119 Cong. Rec. 24799 (1973)).

[10]119 Cong. Rec. at 24801.

[11]*Id.*

[12]*Id.*

[13]*Id.* at 24797–98.

and social relationship between caregiver and client.[14]

In 1975 the U.S. Department of Labor promulgated regulations implementing the 1974 amendments, which remain in effect. These regulations define companionship services as "fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs."[15] The regulations stipulate that "companionship services" may encompass related housework, such as "meal preparation, bed making, washing of clothes, and other similar services" for the consumer.[16] Home health care workers who spend up to 20 percent of their time performing tasks unrelated to the consumer but for the benefit of the consumer's household are still exempt pursuant to this regulation.[17] Home health care workers employed by third-party agencies are also exempt from Fair Labor Standards Act protections even if the agency falls under the enterprise coverage provision and is required to pay its other employees minimum wage and overtime.[18]

Home Health Care Workforce Today

Today's home health care workers are not casual social companions; they are professionals employed in a rapidly expanding industry. Home health care workers provide support—and independence—to older Americans and those with disabilities, many of whom would be forced into institutionalized care in nursing facilities if they did not have access to home health care services. Americans overwhelmingly prefer to age in place; thus the demand for home health care services is rapidly expanding as the population ages.[19]

Consumers' desire to age in place aligns with emerging case law and social policy. In *Olmstead v. L.C.* the U.S. Supreme Court decided that unjustified institutionalization was discrimination based on disability and violated the integration mandate of the Americans with Disabilities Act.[20] Subsequent cases and federal initiatives to expand Medicaid waivers and encourage states to shift funding away from institutional care and toward community-based services further clarified the alignment between consumers' wishes and the law.[21]

These dynamics are also helping shape the health care workforce and the way home health care workers are regarded. Some 1.7 million Americans worked as home health aides as of 2008, and this number is growing.[22] By 2016 employment in the field is expected at least to triple; the industry is projected to expand at over three times the expected rate of employment growth across all other fields.[23] Despite the professionalization of the home health care industry, its exponential growth, and the need for these services by Americans with disabilities, neither the companionship exemption nor the Labor Department regulations have been modified since their implementation in the 1970s.

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[14]Biklen, *supra* note 9, at 126–30.

[15]29 C.F.R. § 552.6 (2010).

[16]*Id.*

[17]*Id.*; *Coke*, 551 U.S. 158.

[18]29 C.F.R. § 552.109(a) (2011).

[19]Teresa A. Keenan, AARP, Home and Community Preferences of the 45+ Population 1 (Nov. 2010), http://bit.ly/qVxM6K.

[20]*Olmstead v. L.C.*, 527 U.S. 581 (1999).

[21]For a collection of post-*Olmstead* cases, see U.S. Department of Justice, DOJ Olmstead Litigation (June 22, 2011), http://1.usa.gov/oPUaH0. For a discussion of the shift toward community-based care, see U.S. Department of Health and Human Services, Our Commitment to Community Integration: Community Living Initiative (n.d.), http://1.usa.gov/qlbwdc.

[22]Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook 449 (2010–2011 ed.), http://1.usa.gov/qFCYci.

[23]PHI & Direct Care Workers Association of North Carolina, The 2007 National Survey of State Initiatives on the Direct-Care Workforce: Key Findings 4 (Dec. 2009), http://bit.ly/n6Vw9H.

The companionship exemption is incongruous with other provisions of the Fair Labor Standards Act and does not reflect the reality of the work performed by today's home health aides. First, today's home health care workers' essential assistance to their clients entails demanding personal care tasks, such as assistance in eating, bathing, and toileting; household services, such as cleaning, cooking, and transportation; and paramedical tasks, such as medication management, range-of-motion exercises, and skin and back care. Simple companionship—the essence of the exemption as envisioned by Congress—constitutes a small portion of the services of home health care workers today and is often incidental to other types of care.[24]

Second, modern home health aides are not the casual, part-time help envisioned by the writers of the 1974 amendments. Some 70 percent of home health care workers are formally employed by agencies, and they are predominantly full-time professionals, who are the sole support for their families.[25] Nevertheless, home health care workers are also part of America's working poor, and 46 percent rely on food assistance or other federal benefits.[26] The 1974 amendments were designed to raise professional domestic workers' standard of living and end their dependence on public services, but, due to the companionship exemption, a segment of the professional domestic workforce continues to live in or near poverty.[27]

The companionship exemption's implementing regulations are also contrary to the express congressional intent of expanding the Fair Labor Standards Act's reach.[28] Before 1974, most home health aides working for third-party employers were covered by the Act through the "enterprise coverage" provision. The regulations continued to exempt workers who were employed directly by households and had no previous Fair Labor Standards Act coverage, and the regulations stripped other workers of preexisting protections under the Act.[29]

Impact of the Exemption on Workers and Patients

Exemption from Fair Labor Standards Act protections has severe negative consequences for home health care employees and consumers. Although most home health care workers are paid at least the federal minimum wage, most do not receive overtime pay.[30] Since home health care workers employed by third-party agencies are often required to travel long distances between clients' homes and are not reimbursed for gas or transportation, these expenses often drive the workers' net compensation below minimum wage. Many home health aides take home less than minimum wage even if they are paid at a higher rate.[31] A 2009 study found that home health care workers in two-thirds of states earn below 200 percent of the federal-poverty-level wage for one-person households.[32]

The exemption's impact on the home health care workforce is exacerbated by the group's lack of access to health care and other benefits. Lack of health

[24]Paul K. Sonn et al., National Employment Law Project, Fair Pay for Home Care Workers: Reforming the U.S. Department of Labor's Companionship Regulations Under the Fair Labor Standards Act 5 (Aug. 2011), http://bit.ly/pLdo4B.

[25]*Id.* at 6; see H. Stephen Kaye et al., *The Personal Assistance Workforce: Trends in Supply and Demand*, 25 Health Affairs 1113, 1118 (2006), http://bit.ly/p1fw42 (finding that 44.5 percent of home care employees worked variable hours or under thirty-five hours per week). High turnover rates and the on-call nature of some home care jobs lead to unpredictable hours and prevent some from working full-time.

[26]PHI, *supra* note 2, at 3.

[27]See 119 Cong. Rec. 24799 (describing proposed 1974 amendments as "simple choice—a living wage or continued reliance upon public assistance for domestic service employees").

[28]Sonn et al., *supra* note 24, at 4.

[29]*Id.*

[30]*Id.* at 8.

[31]*Id.*

[32]PHI, State Chart Book on Wages for Personal and Home Care Aides, 1999–2009 at 2 (July 2010), http://bit.ly/nGlh4L.

insurance benefits is notable because home health care is physically demanding work, requiring employees to lift or move clients. Home health aides often work alone, without the assistance of colleagues, in homes without the equipment required to reduce the risk of injury to them and their patients.[33] Home health care employees suffer back injuries at an alarmingly high rate, higher than the national average for all sectors of employment, and three times higher than the rate of injury for hospital nursing aides.[34] Despite these high rates of injury, one-third of home health care workers lack health insurance coverage, and, of the insured, one-fifth rely on public plans.[35]

The companionship exemption also has severe negative consequences for consumers. Because home health care agencies are not required to pay overtime, agencies often require aides to work longer hours for clients who need constant care.[36] The long hours many home health aides work lead to stress and fatigue and a lower quality of care for consumers.[37] Rates of employee turnover are high, even among most home health care employees who do not work extended hours: on average, 40 percent to 50 percent of employees leave their jobs every year.[38] These high rates of turnover are easily explained—home health care workers are reimbursed at poverty-level wages for work that is physically and emotionally demanding in a field that offers few benefits and little chance of advancement, and workers frequently leave in search of more promising opportunities.[39] However, these high rates of turnover hurt consumers because they lead to the provision of care by less experienced workers, gaps in coverage, reduced continuity in care, and reduced health and quality of life.[40] Turnover also results in higher prices for lower-quality care since employers must constantly invest in recruiting new employees.[41]

Other Factors Contributing to Low Wages

Despite rapidly expanding demand, wages and benefits have not improved enough through the natural operation of market forces to supply sufficient workers to end vacancies and turnover. State and federal funding in the home health care market worsens the problem. In 2008 nearly 80 percent of home health care was financed by public funds, with Medicaid paying for most in-home long-term care.[42] Medicaid funds dominate the market; however, Medicaid rate-setting practices operate to keep wages artificially low.

States typically set provider rates as a percentage of historic expenditures. Rates reflect past, not current, costs of care, particularly since most states do not auto-

[33]Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 Iowa Law Review 1835, 1883–85 (2007). Home care employees risk exposure to communicable disease and blood-borne pathogens alongside orthopedic hazards. Note that home health care employees usually do not benefit from Occupational Safety and Health Administration regulations because their workplaces are private homes (*id.*).

[34]Bureau of Labor Statistics, *supra* note 22, at 450; Smith, *supra* note 33, at 1883–85.

[35]PHI & Direct Care Workers Association of North Carolina, *supra* note 23, at 6.

[36]Sonn et al., *supra* note 24, at 8–9.

[37]*Id.*

[38]Dorie Seavey & Vera Salter, AARP Policy Institute, Paying for Quality Care: State and Local Strategies for Improving Wages and Benefits for Personal Care Assistants 2 (Oct. 2006), http://bit.ly/qcU71C.

[39]See, e.g., Sharyn J. Potter et al., *An Examination of Full-Time Employment in the Direct Care Workforce*, 25 Journal of Applied Gerontology 356, 359 (2006).

[40]*Id.* at 357.

[41]Dorie Seavey, Better Jobs Better Care, The Cost of Frontline Turnover in Long-Term Care 4 (Oct. 2004), http://bit.ly/nXhD6f. Seavey estimates that the direct cost of turnover is at least $2,500 per worker; however, she argues that most home care agencies underestimate the true cost of turnover by failing to account for indirect costs, such as lower productivity and reduced quality of care (*id.* at 14–19).

[42]Centers for Medicare and Medicaid Services, National Health Expenditure Projections 2009–2019, at 3 tbl.10 (n.d.), http://go.cms.gov/nM5hza.

matically adjust home health care rates annually for inflation.[43] This creates extreme downward pressure on wages. Home health care agencies, which in many states set home health care wages, must keep costs low to avoid spending more than will be reimbursed by Medicaid; even those who want to raise wages are often unable to do so because of low reimbursement ceilings that do not reflect actual costs. State processes are also budget-driven and susceptible to political pressure; providers are therefore "subject to considerable uncertainty regarding their year-to-year funding."[44] While private payer funds might create countervailing upward pressure on wages in other market sectors, only 20 percent of long-term care funding comes from private payers; with such limited competition, wages stagnate.[45]

Home health care workers also suffer a wage penalty, or earn less than expected for their work given their job characteristics and qualifications. The wage penalty persists across nearly all caregiving professions, even those protected by the Fair Labor Standards Act, due to gender stereotypes that stem from home-care-type work's close association with women's unpaid labor in the home.[46] For example, home child care and other care work are often viewed as socially important but "unskilled, emotional work of only marginal economic value."[47] Popular perceptions of home health care work and the value of gendered labor likely contribute to low home health care wages.

Routes to Reform

Improved conditions for home health care workers and the quality of care received by consumers have been sought through litigation, legal reform efforts at the state and local levels, and federal regulatory change. Although litigation efforts in federal courts have been largely unsuccessful, efforts to change and enforce state wage and hour laws have succeeded. Moreover, the Labor Department announced in 2010 that it may reconsider the definition of "companionship services" and the applicability of the exemption to third-party employers.[48]

Federal Litigation

In *Long Island Care at Home* the Supreme Court upheld 29 C.F.R. § 552.109(a), which exempts home health care workers employed by third-party agencies from Fair Labor Standards Act protection.[49] Other companionship exemption regulations exempt only those employed in "domestic service," which is defined as work performed in the "private home (permanent or temporary) of the person by whom he or she is employed."[50] Without Section 552.109(a), workers employed directly by consumers would be exempt, but third-party employees would be covered by the Fair Labor Standards Act's enterprise provisions. Evelyn Coke, an employee of Long Island Care at Home, sued her employer in 2003; she argued that she was entitled to minimum-wage and overtime protections under the Act and asked that the Court find Section 552.109(a) invalid.

[43]PHI & Institute for the Future of Aging Services, Office of Disability, Aging and Long-Term Care Policy, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, State Wage Pass-Through Legislation: An Analysis 2–3 (Dec. 20, 2002), http://1.usa.gov/qmqXQ5; Seavey & Salter, *supra* note 38, at iv.

[44]Seavey & Salter, *supra* note 38, at 25.

[45]Centers for Medicare and Medicaid Services, *supra* note 42.

[46]See, e.g., Peggie R. Smith, *Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers*, 55 University of Kansas Law Review 321, 336–37 (2007); Paula England, *Emerging Theories of Care Work*, 31 Annual Review of Sociology 381 (2005) (presenting five hypotheses explaining wage penalties experienced by care workers); Paula England et al., *Wages of Virtue: The Relative Pay of Care Work*, 49 Social Problems 455 (2002) (finding a pay gap for care workers possibly attributable to gendered nature of care work).

[47]Smith, *supra* note 46, at 337.

[48]Application of the Fair Labor Standards Act to Domestic Service, 75 Fed. Reg. 13 (Dec. 20, 2010), http://1.usa.gov/pWx3k9.

[49]*Coke*, 551 U.S. 158.

[50]29 C.F.R. § 552.3 (2011).

Coke's argument was two-pronged. First, the companionship exemption regulations are listed in two parts—"General Regulations" and "Interpretations"—and Section 552.109(a) is categorized as an interpretation, not a regulation. Coke argued that agency interpretations did not carry the force of regulations and might be disregarded. Moreover, she argued, the interpretation is directly contrary to the legislative goal of the 1974 amendments to extend coverage to uncovered domestic workers because it stripped already-covered home health care workers employed by third-party agencies of Fair Labor Standards Act protections.

Coke also challenged 29 C.F.R. § 552.6, which defines companionship services as possibly including tasks "such as meal preparation, bed making, washing of clothes, and other similar services" as long as they are in the service of "a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs." Coke argued that Section 552.6 was overly broad because it would allow a qualified individual to hire a full-time cleaner or cook with no companionship responsibilities to avoid paying the minimum wage.

The Second Circuit largely agreed with Coke and invalidated Section 552.109(a).[51] The court found that Section 552.6 was a reasonable implementation of an otherwise ambiguous Fair Labor Standards Act provision that must be enforced. However, the court found that Section 552.109(a) was an interpretation and was not entitled to judicial deference because it was contrary to legislative intent.[52] The Supreme Court vacated the Second Circuit's decision in January 2006.[53] The Court ordered reconsideration of the case in light of a Labor Department advisory memorandum explaining the applicability of the companionship exemption post-*Coke*.[54] Upon reconsideration the Second Circuit again found Section 552.109(a) unenforceable.[55]

In a unanimous decision the Supreme Court reversed the Second Circuit and upheld Section 552.109(a).[56] The Court emphasized that agencies had the power to create regulations that fill gaps left by federal legislation; because these regulations fill a statutory gap in a reasonable manner, they constitute an appropriate use of the agency's rulemaking power and demand deference from courts.[57] Relying heavily on the Labor Department's 2005 advisory memorandum, the Court rejected Coke's argument that the third-party employer exemption was contrary to the purpose of the 1974 amendments; since the legislation did not specify which home health care workers would be exempt or covered, the decision was within the Labor Department's rulemaking authority.[58] That Section 552.109(a) was listed as an interpretation was immaterial; the regulation had undergone notice and comment and was likely listed in "interpretations" because it was a clarification of a more general regulation, not because the agency thought it less important than the "general regulations."[59]

Coke foreclosed challenges to Sections 552.109(a) and 552.6 in the federal courts. However, the decision made clear that the Labor Department had the authority to change the regulations, and the agency placed the companionship exemption on its 2011 regulatory agenda.[60]

[51]*Coke v. Long Island Care at Home Limited*, 376 F.3d 118 (2d Cir. 2004).

[52]*Id.* at 131.

[53]*Long Island Care at Home Limited. v. Coke*, 546 U.S. 1147 (2006).

[54]Memorandum from Alfred B. Robinson Jr., Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, to Regional Administrators and District Directors (Dec. 1, 2005), http://1.usa.gov/plcDLN.

[55]*Coke v. Long Island Care at Home Limited*, 462 F.3d 48 (2d Cir. 2006).

[56]*Long Island Care at Home Limited v. Coke*, 551 U.S. 158 (2007).

[57]*Id.* at 173–74.

[58]*Id.* at 167–68.

[59]*Id.* at 169–70.

[60]Application of the Fair Labor Standards Act to Domestic Service, 75 Fed. Reg. 13, *supra* note 48.

State Fair Labor Laws Not Preempted by the Fair Labor Standards Act

In the aftermath of *Coke*, the companionship exemption has come under fire in the states. The Fair Labor Standards Act is relatively comprehensive, but it was not designed to preempt all state labor laws. The "savings clause" of the Act, 29 U.S.C. § 218(a), permits states to set a higher minimum wage than the federal standard and prohibits noncompliance with state statutes that are equal to or more generous than the Act.[61]

Concern for the standard of living of low-wage workers generally and concern for home health care worker staffing shortages and turnover rates have led many states to legislate better wages for home health care workers. These wage increases take many forms—state minimum-wage and overtime laws, city and municipal living-wage laws, and wage pass-through programs to raise wages for targeted groups of the direct care workforce.

The implementation and the modification of minimum-wage laws at the state level have generated the broadest expansion in wage and hour protections for home health care workers. As of 2011, fifteen states had passed legislation providing home health care workers with both minimum-wage protections and overtime pay.[62] Six more states and the District of Columbia provide minimum-wage but no overtime coverage.[63] State wage laws vary widely, some directly adopting language from the Fair Labor Standards Act and others creating their own standards and exemptions; no single model for reform has emerged. For instance, home health care workers in Arizona, Nebraska, and North Dakota all benefit from minimum-wage laws but not overtime coverage; however, none of these states has an overtime law.[64] Many states that provide both minimum-wage and overtime coverage for home health care workers also continue to exempt private-household-employed workers and live-in workers.[65] Nevertheless, changes in state minimum-wage laws have greatly extended wage and overtime coverage for home health care workers.

Municipal minimum-wage and living-wage ordinances also benefit home health care workers. As of July 2011, some 125 municipalities had enacted living-wage ordinances, and nine cities, including San Francisco, Santa Fe, and Albuquerque, had passed minimum-wage laws.[66] Both city minimum-wage and living-wage laws aim to establish, by creating wage floors above the otherwise prevailing state or federal minimum, a wage that allows workers to provide for their families while avoiding reliance on public benefits.[67] Both types of law have significant limitations. Living-wage laws apply only to businesses that receive city contracts or tax breaks; however, they are more likely to survive legal challenges.[68] City minimum-wage laws, by contrast, apply to most businesses operating within mu-

[61]29 U.S.C. § 218.

[62]Colorado, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New York, New Jersey, Pennsylvania, Washington, and Wisconsin (Sonn et al., *supra* note 24, at 24–25).

[63]California, Arizona, North Dakota, South Dakota, Nebraska, and Ohio (*id.*).

[64]*Id*.

[65]Workers employed by private households are exempted in Colorado, Hawaii, Illinois (if four or fewer household employees), Michigan (if two or fewer employees), Montana, and Pennsylvania, whereas live-in workers are exempted in Michigan, Minnesota (no compensation for on-call overnight hours if no work performed), Nevada, and Washington (*id.*).

[66]National Employment Law Project, Local Living Wage Laws and Coverage (July 2011), http://bit.ly/oI0X8D.

[67]See, e.g., Buffalo, N.Y., City Ordinances § 96-19(a)(2) (2003) (living-wage ordinance finds "unacceptable that contracting decisions involving the expenditure of city funds could foster conditions placing a burden on limited social services"); Santa Fe, N.M., City Code § 28-1.2(H) (Supp. 2011) (citywide minimum-wage law states that "when businesses do not pay a livable wage, the community bears the cost in the form of increased demand for taxpayer-funded social services").

[68]See, e.g., *Rui One Corporation v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004) (upholding city minimum wage ordinance against equal protection and due process clause challenge), cert. denied, 543 U.S. 1081 (2005); *Visiting Homemaker Service of Hudson County v. Board of Chosen Freeholders*, 883 A.2d 1074 (N.J. Super. Ct. App. Div. 2005) (upholding county living-wage ordinance on state-law grounds). But see *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098 (La. 2002) (invalidating living-wage law under state constitution as contrary to police power).

nicipal limits and benefit more workers. However, ten states have passed laws forbidding local governments from enacting citywide minimum-wage laws.[69]

States also provide targeted assistance to specific groups of workers through wage pass-throughs, or programs that provide extra funding to care providers through grants or the state Medicaid program for the express purpose of increasing wages. Massachusetts, for instance, manages a salary reserve allocation for state home health care contractors; up to 15 percent of the allocation may be used on payroll and benefits, but contractors must use the rest to increase workers' wages.[70] More than half of the states have experimented with wage pass-through programs for at least one group of care workers.[71]

State Litigation

Although efforts to extend minimum-wage and overtime protections have failed in the federal courts, state courts have upheld state minimum-wage and overtime protections for home health care workers under the Fair Labor Standards Act's savings clause. Pennsylvania's Minimum Wage Act, for example, extends minimum-wage and overtime protections to home health care workers employed by third-party agencies.[72] In the wake of *Coke*, Bayada Nurses Incorporated, a Pennsylvania home health care provider, mounted an unsuccessful challenge to the state law in 2007.

In 2005 the Pennsylvania Department of Labor and Industry investigated Bayada for not paying its home health care workers the overtime wages to which they were entitled under state law. When the department requested an audit of Bayada's payroll records, Bayada claimed that it was not required to pay overtime compensation and sought in state court a declaratory judgment to that effect.[73]

Bayada argued that the Pennsylvania regulation defining domestic service employment and exempting only individual household employers from overtime wage requirements was an improper interpretation of the Minimum Wage Act.[74] Bayada argued instead that the Minimum Wage Act should be interpreted in light of the Fair Labor Standards Act, and the domestic services definition should be preempted by the Fair Labor Standards Act's companionship exemption. Bayada also claimed that it was not the exclusive employer of its home health care workers, but that the workers were jointly employed by Bayada and its customers; therefore, if the regulation were upheld, Bayada should be exempt from overtime requirements pursuant to the household employer exemption.[75]

In *Bayada Nurses Incorporated v. Commonwealth* both the commonwealth court and, on appeal, the Supreme Court of Pennsylvania rejected Bayada's positions.[76] The courts agreed that the Fair Labor Standards Act did not preempt more generous state laws.[77] Both courts also found that the regulation was a valid interpretation of Pennsylvania's Minimum Wage Act and upheld the regulation.[78] The courts concluded that the household employer exemption could be claimed only by householders; even if Bayada was not the sole

[69]Paul K. Sonn, Brennan Center for Justice, Citywide Minimum Wage Laws: A New Policy Tool for Local Governments 6 (May 2006), http://bit.ly/oSz4C4.

[70]PHI & Direct Care Workers Association of North Carolina, *supra* note 23, at 8–9.

[71]*See id.* at 8; PHI & Institute for the Future of Aging Services, *supra* note 43, at 2.

[72]43 Pa. Stat. Ann. § 333.105(a)(2) (West 2011); 34 Pa. Code § 231.1(b) (2011).

[73]*Bayada Nurses Incorporated v. Commonwealth* (*Bayada I*), 958 A.2d 1050 (Pa. Commw. Ct. 2007).

[74]34 Pa. Code § 231.1(b).

[75]The Pennsylvania law exempts domestic service performed in or about a private dwelling "for an employer in his capacity as a householder" (34 Pa. Code § 231.1(b)).

[76]*Bayada Nurses Incorporated v. Commonwealth* (*Bayada II*), 8 A.3d 866 (Pa. 2010); *Bayada I*, 958 A.2d 1050.

[77]*Bayada II*, 8 A.3d at 882–23; *Bayada I*, 958 A.2d at 1059–60.

[78]*Bayada II*, 8 A.3d at 882; *Bayada I*, 958 A.2d at 1057–58.

employer of its workers, it was still obligated to pay overtime wages.[79]

The *Bayada* decision vindicated the rights of home health care workers and is a lesson for advocates. While *Coke* stands for the Labor Department's power to redefine the companionship exemption and underlines the necessity of regulatory change to provide wage and hour protections for home health care workers at the national level, *Bayada* shows the importance of advocacy at the state level and the gains to be had through local legislation and the Fair Labor Standards Act's savings clause.

Proposed Federal Regulations

Although states and municipalities have made strides to improve compensation for home health care workers, uniform and comprehensive minimum-wage and overtime coverage is possible only through federal reform. In 2010 the Labor Department put the companionship exemption on its fall semiannual regulatory agenda, and the agency has held listening sessions in preparation for the potential publication of proposed amendments.[80] Legislation introduced in the U.S. Senate and House this year would end the companionship exemption.[81] Conversely Home Instead Senior Care, a national home care agency, is seeking a congressional sponsor for a bill that would preserve the exemption.[82]

Although the Labor Department has considered amendments to the companionship exemption on several occasions, none of the proposed changes has ever been implemented.[83] In 2001 the Labor Department issued a notice of proposed rulemaking that would have extended Fair Labor Standards Act protections to home health care workers.[84] The notice's extensive evaluation of the legislative history of the Act and the companionship exemption announced that the regulations "exempt types of employees far beyond those whom Congress intended to exempt when it enacted section 13(a)(15)."[85] Nevertheless, the proposed rule was withdrawn in 2002 in response to concerns about the revisions' potential cost to businesses.[86] If the Labor Department decides to propose a regulatory change, a proposed regulation would likely be issued in October 2011.[87]

■ ■ ■

A home health care workforce of the size and capacity necessary to meet consumer needs is critical to aging and disabled Americans. State and local reform efforts have yielded great gains for home health care workers in spite of disappointing outcomes in the federal courts. However, the industry will remain unable to attract sufficient workers to meet exponentially growing demand without higher wages and overtime protections.

Authors' Note

The views expressed in this article are strictly ours and do not necessarily reflect the opinion of AARP or its affiliates, including the AARP Foundation.

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[79]*Bayada II*, 8 A.3d at 882–83; *Bayada I*, 958 A.2d at 1058.

[80]Application of the Fair Labor Standards Act to Domestic Service, 75 Fed. Reg. 13, *supra* note 48.

[81]Direct Care Job Quality Improvement Act, H.R. 2341, 112th Cong. (2011).

[82]Industry Affairs Action Center Home Instead Senior Care, Companionship Overtime Exemption Provision (n.d.), http://bit.ly/ogfhMq.

[83]Application of the Fair Labor Standards Act to Domestic Service, 58 Fed. Reg. 69310 (proposed Dec. 30, 1993) (to be codified at 29 C.F.R. pt. 552); Application of the Fair Labor Standards Act to Domestic Service, 66 Fed. Reg. 5481 (proposed Jan. 19, 2001) (to be codified at 29 C.F.R. pt. 552).

[84]66 Fed. Reg. at 5482.

[85]*Id.*

[86]Application of the Fair Labor Standards Act to Domestic Service, 67 Fed. Reg. 16668 (April 8, 2002).

[87]Application of the Fair Labor Standards Act to Domestic Service, 75 Fed. Reg. at 14.

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