



February 2014

Home Sweet Home - Workplace Casualties of Consumer-Directed Home Care for the Elderly

Peggie R. Smith

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjlepp>

Recommended Citation

Peggie R. Smith, *Home Sweet Home - Workplace Casualties of Consumer-Directed Home Care for the Elderly*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 537 (2007).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol21/iss2/10>

This Speech is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

HOME SWEET HOME? WORKPLACE CASUALTIES OF CONSUMER- DIRECTED HOME CARE FOR THE ELDERLY†

PEGGIE R. SMITH*

INTRODUCTION

Public funding for home care workers enables many elderly individuals who require long-term care to age in place, in their homes and their communities, rather than in an institutional setting such as a nursing home.¹ As the demand for home care services grows,² a noticeable shift in health care policy is occurring. Whereas health care professionals traditionally direct the provision of publicly-funded home care services, states are increasingly funding consumer-directed home care.³ Consumer-directed care (“CDC”) emphasizes the ability of disabled and elderly persons to evaluate their own needs, to choose the services that will best satisfy those needs, and to direct home care workers in delivering those services.⁴

† On November 9, 2006, the *Notre Dame Journal of Law, Ethics & Public Policy* hosted a symposium entitled “Long-Term Care for America’s Elderly: Who is Responsible, and How Will it Be Achieved?”. Professor Smith was the first speaker at the Symposium. Her remarks have been revised for publication.

* Professor of Law, University of Iowa, College of Law. J.D., Harvard Law School, 1993; M.A., Yale University, 1990; B.A., Yale University, 1987.

1. The Supreme Court’s decision in *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999) increased access to home care services for the disabled. See Andrew I. Batavia, *A Right to Personal Assistance Services: “Most Integrated Setting Appropriate” Requirements and the Independent Living Model of Long-Term Care*, 27 AM. J. L. & MED. 17 (2001) (discussing *Olmstead* and consumer-directed care).

2. BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK—TOMORROW’S JOBS 5 (2005), <http://www.bls.gov/oco/pdf/oco2003.pdf> [hereinafter OCCUPATIONAL OUTLOOK HANDBOOK] (listing home health aides as the occupation that is expected to grow the fastest between 2004 and 2014, with an expected growth rate of 60 percent).

3. See A.E. Benjamin & Ruth E. Matthias, *Work-Life Differences and Outcomes for Agency and Consumer-Directed Home-Care Workers*, 44 GERONTOLOGIST 479, 480 (2004); Heather Young & Suzanne Sikma, *Self-Directed Care: An Evaluation*, 4 POL’Y, POL. & NURSING PRAC. 185, 185 (2003).

4. See *infra* Part I.A. (discussing consumer-directed home care and distinguishing it from agency home care).

CDC stands in sharp relief to professional home care models, often referred to as agency-based care.⁵ Under the latter approach, professionals hire, train, supervise, and, if necessary, terminate home care workers.⁶ By contrast, a consumer-directed approach enables clients, as consumers, to make key decisions regarding home care including whom to hire as a worker, the type of services to be provided, how they should be provided, and whether to fire the worker.⁷ While CDC proponents applaud its ability to empower consumers,⁸ this Essay argues that CDC conflicts with the availability of workplace rights for home care workers.

The conflict hinges on the home care labor arrangement. In agency-based home care, the agency employs the workers and must abide by applicable employment laws.⁹ Under a CDC model, however, the labor arrangement is often murky; because CDC heightens the likelihood that the law will deny coverage to home care workers based on a determination that they are either independent contractors or exempt domestic service employees,¹⁰ workers may be unsure if they even have a legally protected employment relationship. Assuming that a statutory employment relationship exists, the question arises as to whom the relationship runs. Possible answers include the consumer and public funding agencies that sponsor home care programs.

Despite the growing importance of home care, the legal literature is virtually void of scholarship that considers CDC's impact on the workplace rights of home care workers.¹¹ This

5. A.E. Benjamin, *Consumer-Directed Services at Home: A New Model for Persons with Disabilities*, 20 HEALTH AFFS. 80, 82 (2001) (describing the delivery of home care by agencies).

6. Jane Tilly et al., *Consumer-Directed Home and Community Services Programs in Five Countries: Policy Issues for Older People and Government*, 24 GENERATIONS 74, 74 (2000) (“[T]raditional homecare programs rely on public or private agencies to supply and supervise the workers who serve program beneficiaries.”).

7. Benjamin & Matthias, *supra* note 3, at 480 (noting that in CDC home care, clients are “able to recruit and hire their own workers and supervise their own services with modest or minimal agency involvement”); Tilly et al., *supra* note 6, at 77 (“Consumer direction gives beneficiaries . . . the power to hire, fire, and supervise workers.”).

8. See, e.g., A.E. Benjamin & Ruth E. Matthias, *Age, Consumer Direction, and Outcomes of Supportive Services at Home*, 41 GERONTOLOGIST 632, 634 (2001) (“[S]upporters of consumer direction argue that recipients who direct their own services become more empowered in the process of designing and guiding their own care . . .”).

9. See *infra* Part I.

10. See *infra* discussion accompanying notes 50–51.

11. For exceptions, see Sandra L. Hughes & Charles P. Sabatino, *Addressing Liability Issues in Consumer-Directed Personal Assistance Services (CDPAS): The*

Essay helps to fill that gap by examining select employment statutes to demonstrate how the transition from publicly-funded agency care to CDC may hamper workers' ability to achieve legal recognition and protection as rights-bearing employees. It also explores the labor movement's emergence as a powerful force to promote the workers' economic well-being and to halt the efforts of state and local governments to cast them as "rightless" independent contractors.

Part I of this Essay discusses some of the relevant themes that characterize long-term care for the elderly. These themes include CDC's growing popularity, the aging of the baby boom generation, and the harsh working conditions that prevail in home care. Parts II and III explore CDC's implications for home care workers, focusing on workplace rights and protections. Part II approaches the analysis from the standpoint of elderly clients as consumers. It considers the following question: how, and to what extent, does a transition from agency care to CDC influence the availability of employment rights for home care workers? Part III considers the same question but from the perspective of government agencies that sponsor consumer-directed home care programs on behalf of elderly persons who qualify for publicly-funded services. As the discussion in this Part reveals, state funding agencies generally look to disclaim mandated employer obligations for home care workers in CDC programs, arguing that the workers are state contractors, not employees.

Part IV considers what the future might hold for home care workers in CDC programs. On the one hand, states will likely continue structuring consumer-directed home care so as to minimize the possibility that they will incur employment liability to workers.¹² On the other hand, the labor movement will likely continue advancing innovative organizing approaches to challenge the exclusion of consumer-directed home care workers from employment statutes.¹³ By pressing state legislatures to designate a "public authority" to serve as an employer of record for the workers, labor unions have helped to reverse the erosion of workplace rights.¹⁴

National Cash and Counseling Demonstration, 35 STETSON L. REV. 251 (2005); Charles P. Sabatino & Simi Litvak, *Liability Issues Affecting Consumer-Directed Personal Assistance Services—Report and Recommendations*, 4 ELDER L.J. 247 (1996).

12. See *infra* discussion accompanying notes 127–31 (discussing the financial motivations that help fuel CDC).

13. See *infra* Part IV.B.

14. See *infra* discussion accompanying notes 142–45.

I. TRANSFORMATION AND STAGNATION:
A SNAPSHOT OF THE HOME CARE INDUSTRY

A. *Contrasting Models of Home Care:
Agency Based and Consumer Directed*

Home care refers to the range of in-home services provided to individuals with long-term care needs to enable them to function as independently as possible for as long as possible. These services primarily consist of personal and household duties, but may also encompass low-level medical tasks such as administering medications and checking temperatures.¹⁵ Under the traditional agency approach to delivering home care, clients have little choice about who cares for them. The agency hires and trains the worker, determines work hours, and decides how the work is to be performed.¹⁶

Critics of this traditional model argue that agencies are often unresponsive to clients, relegating clients' needs and interests to the demands of the agency. For example, agencies may schedule workers without considering the clients' desires.¹⁷ Thus, a client who prefers to stay up late at night but who requires assistance in preparing for bed may be forced to go to bed early because of the worker's inflexible schedule.¹⁸ Such an approach, observers contend, unnecessarily restricts clients' autonomy.¹⁹ While agency-based care remains the primary method to deliver publicly-funded home care,²⁰ dissatisfaction with it has prompted the growth of CDC.

CDC reflects the philosophy that "individuals with long-term care needs should be empowered to make decisions about the services and supports they receive, including having primary control over the nature of the services, and who, when, and how the services are delivered"²¹ The majority of states have some

15. See Jane Aronson & Sheila Neysmith, "You're Not Just in There to Do the Work": *Depersonalizing Policies and the Exploitation of Home Care Workers' Labor*, 10 GENDER & SOC'Y 59, 60 (1996); Anna Loengard & Jeremy Boal, *Home Care of the Frail Elderly*, 20 CLINICS IN GERIATRIC MED. 795, 796 (2004).

16. James R. Knickman & Robyn I. Stone, *The Public/Private Partnership Behind the Cash and Counseling Demonstration and Evaluation: Its Origins, Challenges, and Unresolved Issues*, 42 HEALTH SERVICES RES. 362 (2007).

17. Benjamin, *supra* note 5, at 82; Tilly et al., *supra* note 6, at 78.

18. Benjamin, *supra* note 5, at 82.

19. See, e.g., Young & Sikma, *supra* note 3, at 186 ("Consumer-directed services challenge the protective nature of most home- and community-based service programs for older adults . . . and the attitude that consumers with disabilities are childlike in their need for protection.").

20. Knickman & Stone, *supra* note 16, at 363.

21. *Id.* at 364.

form of consumer-directed home care program.²² Variations among the programs reveal that CDC is best conceived as “a continuum of approaches based on the level of decision making, control, and autonomy allowed in a particular situation.”²³

Although the initial development of consumer-directed home care programs primarily served young disabled adults,²⁴ the recent proliferation of programs reflects the growth in America’s elderly population and the accompanying long-term care consequences. Between 2003 and 2030, the percentage of people in the United States aged 65 and older is expected to increase from 12 percent of the total population to 20 percent.²⁵ The projection parallels the aging of the baby boom generation.²⁶ The generation includes the 76 million Americans born between 1946 and 1964.²⁷

For many elderly individuals with disabilities, aging has generated a demand for long-term care to help with activities such as bathing, meal preparation, toileting, shopping, and managing medications.²⁸ While most elderly individuals who need assistance rely on family and friends to provide informal, unpaid care,²⁹ the demand for formal care has risen as the supply of informal caregivers has dwindled.³⁰ To help fill this caregiver gap, states are turning to publicly-subsidized home care.

22. DANIEL R. LEVINSON, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, STATES’ REQUIREMENTS FOR MEDICAID-FUNDED PERSONAL CARE SERVICE ATTENDANTS 23–30 (2006), <http://oig.hhs.gov/oei/reports/oei-07-05-00250.pdf> (showing in Appendix B that thirty-eight states offer CDC programs that rely on Medicaid funding).

23. Robyn I. Stone, *Consumer Direction in Long-Term Care*, 24 GENERATIONS 5, 5–6 (2000) [hereinafter Stone, *Consumer Direction*].

24. See Andrew I. Batavia, *The Growing Prominence of Independent Living and Consumer Direction as Principles in Long-Term Care: A Content Analysis and Implications for Elderly People with Disabilities*, 10 ELDER L.J. 263, 279 (2002).

25. WAN HE ET AL., U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF COMMERCE, 65+ IN THE UNITED STATES: 2005, at 1 (2005), <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

26. See DOUG OWRAM, BORN AT THE RIGHT TIME: A HISTORY OF THE BABY-BOOM GENERATION (1996).

27. See JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 77 (1996) (describing the increase in birth rates that started in 1946 and leveled off in 1964).

28. See Douglas A. Wolf, *The Family as Provider of Long-Term Care: Efficiency, Equity, and Externalities*, 11 J. AGING & HEALTH 360, 366 (1999).

29. *Id.* at 361 (observing that family members are the main source of care for the elderly).

30. *Cf.* UNITED STATES GENERAL ACCOUNTING OFFICE, LONG-TERM CARE: SOME STATES APPLY CRIMINAL BACKGROUND CHECKS TO HOME CARE WORKERS 4 (1996), <http://www.gao.gov/archive/1996/pe96005.pdf> (connecting the increased reliance on home care with projections which “indicate that labor

Although home care has mushroomed over the past decade, and will continue to do so for the foreseeable future,³¹ the industry picture looks dim when viewed from the perspective of home care workers. Home care as a job lags near the bottom of the economic ladder. In 2003, the median hourly wage for workers was less than \$9.00 an hour,³² and when annualized for full-time employment, they earned less than \$17,000.³³ A lack of work-related benefits compounds the problem of low wages. Home care workers rarely receive benefits such as employer paid health insurance or pension plans.³⁴ In addition, the work is physically demanding and workers routinely confront workplace hazards including combative clients, muscle problems occasioned by lifting and moving immobile clients, and unsafe neighborhoods.³⁵

This disadvantageous state of affairs offers little hope for a workforce that is dominated by low-income women³⁶ and disproportionately home to members of racial ethnic groups, especially African Americans and Hispanics.³⁷ Because many of these women are single mothers,³⁸ the job's poor compensation and the lack of benefits are particularly troublesome. Not surprisingly, many home care workers rely on public assistance to sustain themselves and their families.³⁹ For those workers who are

force participation will continue to increase among women, who have traditionally provided much of the informal care for the elderly”).

31. See OCCUPATIONAL OUTLOOK HANDBOOK, *supra* note 2 (noting that home care has an expected growth rate of close to 60 percent by 2014).

32. BERNADETTE WRIGHT, AARP PUBLIC POLICY INSTITUTE, DIRECT CARE WORKERS IN LONG-TERM CARE 1 (2005), <http://www.hchs.org/files/75/3748/directcare.pdf> (reporting a 2003 median hourly wage of \$8.75 for home health aides and \$8.05 for personal and home care aides).

33. *Id.* (reporting annualized full-time employment earnings of \$16,750 for personal and home-care aides, and \$18,200 for home-health aides).

34. STEVE DAWSON & RICK SURPIN, THE ASPEN INSTITUTE, DIRECT CARE HEALTH WORKERS: THE UNNECESSARY CRISIS 6 (2001), <http://www.directcareclearinghouse.org/download/Aspen.pdf> (“The quality of direct-care jobs tends to be extremely poor. Wages are low and benefits few . . .”) (citation omitted).

35. Margaret A. Denton et al., *Working in Clients' Homes: The Impact on the Mental Health and Well-Being of Visiting Home Care Workers*, 21 HOME HEALTH CARE SERVICES Q. 1, 6 (2002) (citations omitted).

36. DAWSON & SURPIN, *supra* note 34, at 12 (“The typical direct-care worker is a low-income woman . . .”).

37. See *id.* (stating that “86 percent of [direct care workers] are women, 30 percent are women of color”).

38. *Id.* (“The typical direct-care worker . . . is a single mother . . .”).

39. *Id.* at 2 (“[M]any low-income health care workers are still entangled in public programs such as food stamps . . .”). See also WILLIAM SCANLON, U.S. GENERAL ACCOUNTING OFFICE, NURSING WORKFORCE RECRUITMENT AND RETENTION OF NURSES AND NURSE AIDES IS A GROWING CONCERN 13 (2001), <http://www.gao.gov/new.items/d01750t.pdf> (reporting that “aides working in nursing

immigrants and in some cases undocumented, their economic situation may be further hampered by limited alternative employment opportunities.

While the working conditions of both agency-based home care workers and CDC workers require improvement, studies indicate that the former group fares slightly better than the latter group in terms of tangible bread-and-butter issues. In a study of California's publicly-funded home care program, In-Home Supportive Services (IHSS), researchers found that workers hired under consumer direction received wages that were 30 percent less than those received by agency employed workers.⁴⁰ With respect to fringe benefits, 40 percent of California agency workers received health benefits, paid sick leave and paid vacation, while few CDC workers received such benefits.⁴¹

These differences confirm the importance of examining CDC's effects on the employment rights of home care workers. As stated in the introduction, the potential negative impact of consumer-directed home care for workers pivots on the labor arrangement. Eligibility for unemployment compensation, minimum wage and overtime protection, social security and the like, depends on the workers' status as employees as opposed to self-employed independent contractors.⁴² Both of the two primary tests to determine worker status, the common law control test⁴³ and the economic reality test,⁴⁴ underscore the putative employer's right to control the means and methods of the

homes and home health care are more than twice as likely as other workers to be receiving food stamps and Medicaid, and they are much more likely to lack health insurance").

40. Benjamin & Matthias, *supra* note 3, at 482. Despite the 30 percent wage differential reported by the study's authors, they inexplicably conclude with the following observation: "we conclude that there is little difference in worker outcomes between the two models." *Id.* at 486.

41. See Tilly et al., *supra* note 6, at 80 (reporting on a study by A.E. Benjamin).

42. Marc Linder, *What Is an Employee? Why It Does, But Should Not, Matter*, 7 LAW & INEQUALITY 155, 157-58 (1989) (listing various "benefits and protections conditioned on the existence of an employment relationship").

43. See, e.g., Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 282 (2006) ("Under the right to control test, 'employees' are defined as those whose work tasks the employer controls and 'independent contractors' are those whose work tasks are not controlled by the employer.").

44. The economic reality test defines "employee" according to the purpose of the statute and considers whether the worker is dependent on the business as a matter of economic realities. The test evaluates a range of factors, in addition to control, to determine whether an employment relationship exists, including the workers' investment in the facilities, opportunities for profit or

worker's performance.⁴⁵ The greater the control, the more likely it is that an employment relationship exists.⁴⁶ With agency-based home care, the agency usually exercises considerable control over the worker,⁴⁷ and consequently qualifies as the worker's employer. CDC complicates this picture as it involves far more potential employers than does agency care. The next two Parts of the Essay examine two possible employers: individual consumers and public agencies that fund and operate home care programs.

II. CONSUMERS AS POTENTIAL EMPLOYERS

Because CDC reflects a continuum, defined by the degree of control the consumer possesses,⁴⁸ whether a given consumer is an employer depends on the specific labor arrangement and the applicable law. However, as the following discussion illustrates, even when a consumer exercises sufficient control over a worker to trigger an employment relationship, the law may still deny the worker coverage by treating her as an exempt domestic service employee. Domestic service exemptions, which are common components in employment laws, typically operate to exclude individuals who perform domestic activities in the households of their employers.⁴⁹ The exemptions often encompass home care because the work entails duties that overlap with those performed in domestic service.⁵⁰ Because the exemptions tend to apply only to an employment relationship that involves a private

loss, the permanence of the relationship, and the skill of the workers. *United States v. Silk*, 331 U.S. 704, 716 (1947).

45. See Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 314 (2001) ("Both [tests] have control and domination as their central concern . . .").

46. See David L. Gregory, *Br(e)aking the Exploitation of Labor?: Tensions Regarding the Welfare Workforce*, 25 FORDHAM URB. L.J. 1, 9 (1997).

47. See *supra* discussion accompanying notes 6 and 16.

48. See *supra* note 23 and accompanying text.

49. See generally NOW LEGAL DEFENSE AND EDUCATION FUND, *OUT OF THE SHADOWS: STRATEGIES FOR EXPANDING STATE LABOR AND CIVIL RIGHTS PROTECTIONS FOR DOMESTIC WORKERS* app. B (1997) (providing a state-by-state overview of employment laws that exclude domestic service).

50. See, e.g., *infra* note 56 and accompanying text (Fair Labor Standards Act's definition of domestic service extends to home care); *infra* note 86 and accompanying text (Occupational Safety and Health Administration's regulation defining domestic service extends to home care); *infra* note 94 and accompanying text (definition of domestic service in workers' compensation statutes extends to home care).

household as an employer,⁵¹ they primarily pose concerns for consumer-directed home care workers. This Part examines the status of home care workers employed by individual consumers under federal employment laws as well as state workers' compensation statutes.

A. *The Fair Labor Standards Act*

The Fair Labor Standards Act (FLSA) requires covered employers to comply with minimum wage⁵² and overtime provisions.⁵³ In 1974, Congress amended the FLSA and specifically extended coverage to domestic service employees⁵⁴ performing services of a household nature in or about the private home of the person by whom they are employed.⁵⁵ The Department of Labor (DOL) has interpreted domestic service to encompass home care workers including "nurses, certified nurse aides, home health aides, and other individuals providing home health care services . . . in or about a private household."⁵⁶

Despite the 1974 amendment, employers can still deny certain domestic service employees FLSA protection because of the Act's companionship services exemption. The exemption excludes a subset of domestic service employees from the FLSA, namely persons "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves."⁵⁷ Because the DOL has concluded that domestic service extends to home care workers,⁵⁸ the companionship services exemption may

51. See, e.g., *Success Vill. Apartments, Inc. v. Local 376*, 397 A.2d 85, 87 (Conn. 1978) (domestic service for purposes of the National Labor Relations Act applies to employment on an individual and personal basis); 29 C.F.R. § 1975.6 (2006) (domestic service employers for purposes of the Occupational Safety and Health Act refers to those "individuals who, in their own residences, privately employ persons"); 29 C.F.R. § 552.3 (2006) (for FLSA purposes domestic service employment is defined as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed").

52. 29 U.S.C. § 206(a)(1) (2000).

53. 29 U.S.C. § 207(a)(1).

54. 29 U.S.C. § 206(f)(1) (including domestic service workers in the minimum wage provisions); 29 U.S.C. § 207(l) (including domestic service workers in the overtime provisions).

55. 29 C.F.R. § 552.3 (2006).

56. Alfred B. Robinson Jr., Opinion Letter, Fair Labor Standards Act: Domestic Service Exemption, FLSA 2005-13 (Mar. 17, 2005), <http://hr.blr.com/timesavers.aspx?id=17553>.

57. 29 U.S.C. § 213(a)(15) (2000).

58. See *supra* note 56 and accompanying text.

relieve their employers of an obligation to provide minimum wages and overtime.⁵⁹

At present, it is unclear if the companionship services exemption applies to home care workers employed by agencies. Several courts have decided the issue,⁶⁰ with most holding that the exemption covers workers employed by private households as well as workers employed by third-party employers such as home care agencies.⁶¹ However, the Second Circuit Court of Appeals reached the opposite result in *Coke v. Long Island Care Home*.⁶² According to *Coke*, home care agencies must abide by the FLSA and pay workers minimum wages and overtime.⁶³

Coke is currently on appeal to the Supreme Court⁶⁴ and as a result, the FLSA status of agency workers is in limbo. If the Supreme Court affirms *Coke*, agency home care workers will receive FLSA protection even if their work would otherwise fall under the rubric of companionship services, while the law will exclude similarly situated workers employed by individual consumers. Although this distinction is unlikely to result in CDC home care workers receiving less than the minimum wage given that their median hourly wage exceeds the minimum wage,⁶⁵ it may have an adverse affect on overtime compensation. If an agency-employed home care worker cares for more than one client, and the total hours worked for all clients exceed forty in a

59. If a domestic service employee qualifies for an exception to the companionship services exemption, she will still be covered by the FLSA. There are two exceptions: the general household work exception and the trained personnel exception. 29 C.F.R. § 552.6 (2006) (explaining the companionship services exemption does not apply if such services include general household work that exceeds “20 percent of the total weekly hours worked”); *id.* (“The term ‘companionship services’ does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.”).

60. See generally Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the 21st Century*, 92 IOWA L. REV. (forthcoming 2007) [hereinafter Smith, *Aging and Caring*] (listing cases and examining the FLSA’s approach to home care workers employed by third-party home care agencies).

61. *Id.* See also 29 C.F.R. § 552.109(a) (2006) (“Employees who are engaged in providing companionship services . . . and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act’s minimum wage and overtime pay requirements . . .”).

62. *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118 (2nd Cir. 2004), *vacated* 126 S. Ct. 1189 (2006), *aff’d in part, vacated in part*, 462 F.3d 48 (2nd Cir. 2006), *cert. granted*, 127 S. Ct. 853 (U.S. Jan. 5, 2007) (No. 06-593).

63. *Coke*, 376 F.3d at 135.

64. See *Long Island Care at Home v. Coke*, 127 S. Ct. 853 (U.S. Jan. 5, 2007) (No. 06-593).

65. See *supra* notes 32–33 and accompanying text (noting the median wage for home care workers).

week, the agency must provide overtime compensation.⁶⁶ Hence an agency worker, who cares for two clients in a week—working twenty-five hours for one and nineteen for the other—is entitled to overtime compensation. By contrast, if each of the two clients is a separate consumer employer, the worker will not qualify for overtime even though the total hours exceed forty in a week. To qualify for overtime in a CDC context, the worker must work more than forty hours a week for a single consumer.

B. *The National Labor Relations Act*

The National Labor Relations Act (NLRA)⁶⁷ guarantees employees the right to organize and to form a union for purposes of collective bargaining.⁶⁸ The NLRA expressly excludes domestic service workers from coverage.⁶⁹ While the Act does not define the term “domestic service,” according to the National Labor Relations Board (NLRB), it applies to “employment on an individual and personal basis.”⁷⁰ Based on this understanding, the NLRB has held that the exemption does not exclude from the NLRA individuals in domestic service who are employed by an organization, such as a home care agency, to provide personal care services.⁷¹

For example, in *Ankh Services*, a home care agency contracted with the state of Missouri to serve various clients, including the elderly.⁷² The NLRB found that the agency exercised “substantial, if not total, control over the wages, hours, and other terms and conditions of employment of its in-home service work-

66. 29 C.F.R. § 778.103 (2006) (“If in any workweek an employee is covered by the [FLSA] and is not exempt from its overtime pay requirements, the employer must total all the hours worked by the employee for him in that workweek . . . and pay overtime compensation for each hour worked in excess of the maximum hours . . .”).

67. Ch. 372, §§ 1–15, 49 Stat. 449, 449–57 (1935) (current version at 29 U.S.C. §§ 151–169 (2000)); 29 U.S.C. § 152(3) (2000).

68. 29 U.S.C. § 157.

69. Section 2(3) of the Act excludes from the definition of “employee” anyone employed “in the domestic service of any family or person at his home.” 29 U.S.C. § 152(3).

70. 30 Sutton Place Corp., 240 N.L.R.B. 752, 753 n.6 (1979) (quoting *Success Vill. Apartments, Inc.*, *supra* note 51, at 87).

71. *See, e.g.*, *Success Vill. Apartments, Inc.*, *supra* note 51, at 87 (stating that the meaning of “domestic service” under the NLRA “cannot be enlarged to include a maintenance crew or a clerical staff for a 924-unit housing complex”); *Shore Club Condo. Ass’n v. NLRB*, 400 F.3d 1336 (11th Cir. 2005) (workers who performed maintenance and cleaning services at a condominium were domestic service workers covered under the NLRA as employees of the condominium).

72. *Ankh Services, Inc.*, 243 N.L.R.B. 478, 478 (1979).

ers, and that the Employer is thus able effectively to engage in meaningful bargaining over these matters with a labor organization representing them.”⁷³ The agency insisted that despite this finding, it had no obligation to bargain with a representative of the workers because they were exempt domestic service employees.⁷⁴ The Board rejected this argument, concluding that the workers were not “employed by the homeowner or resident of the home in which they perform their domestic services.”⁷⁵ The Board further observed that even if services are domestic in quality and performed in the home, the exclusion does not apply when the employer is an agency.⁷⁶

Although agency home care workers possess NLRA bargaining rights, the same cannot be said for workers in the employ of individual consumers. The NLRA clearly excludes this latter group of workers given that the exemption applies to “employment on an individual and personal basis.”⁷⁷ The result is that those home care workers who most need the Act’s protections are denied them. That said, even if the NLRA did apply to consumer-directed home care workers, it would be difficult, if not impossible, for such workers to bargain effectively with their consumer clients. Questions that I raised in the context of domestic service apply with equal force to home care work.⁷⁸

Imagine . . . that a group of domestics joined together and designated a union as their representative, and that the household employers of those workers were legally obligated to bargain with the union. What would such a bargaining model look like? . . . Because the workers would most likely work for different employers, would the union have to bargain for a separate agreement for each worker? . . . [B]ecause most domestics work for several households simultaneously, would a given worker have different, potentially conflicting agreements depending on the particular employer? . . . These questions reveal that trying to squeeze domestic service into the existing bargaining model would be impractical⁷⁹

73. *Id.* at 479.

74. *Id.* at 480.

75. *Id.*

76. *Id.*

77. 30 Sutton Place Corp., 240 N.L.R.B. 752, 753 n.6 (1979) (quoting Success Vill. Apartments, Inc., *supra* note 51, at 87).

78. Peggie Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45 (2000) [hereinafter Smith, *Organizing the Unorganizable*].

79. *Id.* at 79–90.

In addition to these practical limitations, it stands to reason that most elderly persons who employ home care workers through publicly-funded CDC programs are not financially positioned to bargain with the workers to pay decent wages or provide fringe benefits. Compared with CDC, an agency-based home care model is far better situated to advance the collective interests of publicly-funded home care workers.

C. *The Occupational Safety and Health Act*

The Occupational Safety and Health Act (OSH Act)⁸⁰ “assure[s] so far as possible every working man and woman in the Nation safe and healthful working conditions.”⁸¹ The Act does not exempt domestic service from coverage but DOL regulations interpreting the Act do exempt the work.⁸² The relevant regulation states that “individuals who, in their own residences, privately employ persons for the purpose of performing . . . what are commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children, *shall not be* subject to the requirements of the Act with respect to such employment.”⁸³

Because the DOL defines “domestic service” employers as those “individuals who, in their own residences, privately employ persons”⁸⁴ the exemption does not extend to home care workers who deliver services under an agency-based care model. Consequently, these workers are entitled to the OSH Act’s protections.⁸⁵ By contrast, the DOL has interpreted the domestic service exemption to include home care workers employed by private households.⁸⁶ Thus, consumers receiving home care services under a CDC model are not obligated to comply with spe-

80. See 29 C.F.R. § 1975.6 (2006). See also Smith, *Aging and Caring*, *supra* note 60 (discussing the exclusion of domestic service from the OSH Act).

81. 29 U.S.C. § 651 (2000).

82. 29 C.F.R. § 1975.6.

83. *Id.* (emphasis added).

84. *Id.*

85. Although the OSH Act covers agency-based home care workers, the scope of that coverage is unclear. As I argue elsewhere, because the Act was developed against the backdrop of industrial and commercial workplaces, it seems unlikely that much, if any, thought was given to application of the Act to the home as workplace. Smith, *Aging and Caring*, *supra* note 60.

86. Letter from R. Davis Layne, Acting Assistant Secretary, Occupational Safety & Health Admin., to John J. Genuise, Principal, Byington & Genuise, L.L.C. (Feb. 21, 2001) (explaining that 29 C.F.R. § 1975.6 “include[s] domestic household tasks performed for an elderly member of the household which has employed the employee in question”), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=23540.

cific safety and health standards or the OSH Act's general requirement that employers keep their workplaces free from recognized hazards likely to cause death or serious physical harm.⁸⁷ As a result, the Act offers CDC workers no protection from various hazards including dangerous household objects, exposure to blood or other infectious material, and injuries occasioned by lifting and moving clients.⁸⁸ This result is unsettling when one considers, for example, that home care workers experience serious musculoskeletal injuries at a rate higher than any other occupational group because the job requires frequent lifting and moving of elderly clients who often have limited mobility.⁸⁹

D. Workers' Compensation

Workers' compensation programs provide medical, disability, and other benefits for injuries and illnesses that arise out of employment and occur in the course of employment.⁹⁰ Because state law governs the workers' compensation system, coverage for home care workers varies by state.⁹¹ Nevertheless, several general observations can be made. First, home care workers employed by agencies appear to have little difficulty maintaining claims under state workers' compensation programs.⁹² Second, whether the laws cover consumer-directed workers depends significantly on whether they cover domestic service. Although most state statutes either do not define domestic service or do so in vague terms,⁹³ the available evidence indicates that, as a mat-

87. See 29 U.S.C. § 654(a)(1)–(2) (2000).

88. Smith, *Aging and Caring*, *supra* note 60.

89. Clare L. Stacey, *Finding Dignity in Dirty Work: The Constraints and Rewards of Low-Wage Home Care Labour*, 27 *SOC. OF HEALTH & ILLNESS* 837, 843 (2005).

90. 1 A. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 1.01(d) (2005).

91. PRICE V. FISHBACK & SHAWN EVERETT KANTOR, *A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION* 5 (2000) ("Workers' compensation . . . was from the beginning legislated at the state level . . . and has remained a state responsibility ever since.").

92. The differing judicial posture between domestic service workers employed by members of private households and those employed by agencies likely reflects Larson's observation that in the latter, the employer can pass the costs on to consumers. 4 A. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 72.02[5] (2005) ("It has always been assumed, rightly or wrongly, that the cost of compensation protection did not become a burden upon the employer directly, since he was expected to pass the cost along to the consumer in the price of the product.").

93. See SUSAN FLANAGAN, *ACCESSING WORKERS' COMPENSATION INSURANCE FOR CONSUMER-EMPLOYED PERSONAL ASSISTANCE SERVICE WORKERS: ISSUES, CHALLENGES AND PROMISING PRACTICES* 13 (2004), <http://aspe.hhs.gov/daltcp/>

ter of statutory interpretation, home care gets routinely classified as domestic service.⁹⁴ Third, at least half of all states deny compensation to domestic service workers when they are employed by private households.⁹⁵ Thus even if a home care consumer exercises a requisite level of control over the worker to warrant an employment relationship, under the statute the state may still deny compensation to the worker.

Home care claimants who have avoided being classified as domestic service employees have successfully demonstrated that their duties are sufficiently distinct from the traditional household duties associated with domestic service. *Viola v. Workman's Compensation Appeal Board* illustrates the point.⁹⁶ Claimant, employed by a private household to care for an elderly woman, administered medication to the client, helped her in and out of the bathtub and bed, assisted in getting her dressed, and fed her.⁹⁷ Based on these duties, the court found that the domestic service exemption did not apply and the claimant was entitled to workers' compensation because she did not do housework nor did she perform "domestic or maid services."⁹⁸ *Viola* and similar cases suggest that the more a home care worker's duties resemble those of a practical nurse, the more likely it is that she can escape the domestic service exemption.⁹⁹

III. PUBLIC AGENCIES AS POTENTIAL EMPLOYERS

Even though individual consumers who employ home care workers may not have to comply with employment law mandates, an employment relationship may still exist to offer workers some

reports/paswork.pdf ("Forty-five states and five territories do not define domestic service in the definition section of their workers' compensation laws.").

94. *Id.* at 32 (stating that "the majority of state agency staff reported that personal care fell under domestic service").

95. *See* Sabatino & Litvak, *supra* note 11, at 289 ("Domestic or household employment is entirely excluded from the workers' compensation system in the majority of states.").

96. *Viola v. Workman's Comp. App. Bd.*, 549 A.2d 1367 (Pa. Commw. Ct. 1988).

97. *Id.* at 1367-68.

98. *Id.* at 1369.

99. *See also* Dunagan v. Folkers, 1996 NE Wrk. Comp. LEXIS 267 ("Even if the employment is within a private household, it may be distinguishable from domestic service if its essence is . . . that of practical nursing . . .") (quoting LARSON, WORKMEN'S COMPENSATION LAW, § 50-30 (1995)); *McCallister v. Workers' Comp. App. Bd.*, 132 Cal. Rptr. 527 (Cal. Ct. App. 1976) ("[I]nasmuch as the applicant's service was solely to care for and wait upon an elderly and invalid woman, and included no duties in connection with the maintenance or functioning of a household, she was not excluded by the statutory provision . . .").

protection. Most notably, a public agency that sponsors a consumer-directed home care program may qualify as an employer. Although this issue appears not to have arisen frequently in the reported case law, courts have addressed it in the context of the FLSA, California's collective bargaining statute, and workers' compensation statutes. This Part surveys the terrain of these statutes.

A. *Public Agencies as Employers Under the FLSA*

*Bonnette v. California Health and Welfare Agency*¹⁰⁰ is one of the few cases to consider whether an employment relationship exists, for purposes of the FLSA, between public agencies that sponsor a CDC program and home care workers who provide care in the program.¹⁰¹ The case concerned California's home care program, IHSS.¹⁰² Plaintiff home care workers were hired by individual consumers who paid for the workers' services with funds provided by the state.¹⁰³

The workers argued that the state agencies were sufficiently involved in the home care arrangement between consumers and workers to qualify as the latter's employer under the FLSA. Although the consumers were responsible for the day-to-day supervision of the workers as well as hiring and firing them,¹⁰⁴ the agencies determined the consumer's financial eligibility to participate in the program; the need for home care services; the tasks to be performed by the worker for the consumer; the number of hours that each worker would work; and the rate and method of payment to the worker.¹⁰⁵ Based on the foregoing, the Ninth Circuit Court of Appeals held that the agencies exercised sufficient control over the home care relationship to render them employers of the workers.¹⁰⁶

100. *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).

101. *See also* *Godlewska v. Human Dev. Ass'n., Inc.*, 2006 U.S. Dist. LEXIS 30519 (E.D.N.Y. May 18, 2006) (concluding that sufficient facts existed to permit a finding that municipal public agencies involved with the delivery of home care were employers under the FLSA).

102. *See supra* note 40 and accompanying text (referencing the California In-Home Support Services program).

103. *Bonnette*, 704 F.2d at 1468.

104. *Id.*

105. *Id.*

106. *Id.* at 1470.

B. *Public Agencies as Employers Under California's Meyers-Milias-Brown Act*

Despite the favorable *Bonnette* ruling, the California Court of Appeals adopted a contrary view when it addressed a similar question under the Meyers-Milias-Brown Act (MMBA),¹⁰⁷ the California law governing labor relations for local government employees. The Service Employees International Union (SEIU) initiated the case, *Service Employees International Union, Local 434 v. County of Los Angeles*,¹⁰⁸ against the County of Los Angeles in a bid to compel the County to negotiate with it on behalf of publicly-funded home care workers in the County.¹⁰⁹ Over a vigorous dissent,¹¹⁰ the court concluded that primary authority to supervise the workers rested with the individual consumers and that the County exercised insufficient supervisory control over the workers to qualify as an employer under the MMBA.¹¹¹

C. *Public Agencies as Employers Under Workers' Compensation*

Jurisdictions have taken very different approaches when deciding if public agencies that sponsor CDC programs qualify as home care employers for purposes of state workers' compensation statutes. California was one of the first jurisdictions to tackle the question in *In-Home Supportive Services v. Workers' Compensation Appeals Board*.¹¹² Claimant, Marjorie Bouvia, an IHSS home care worker, filed for workers' compensation after she injured her back while helping a client out of a car.¹¹³ Although Ms. Bouvia appears to have been an employee of her client,¹¹⁴ she was not entitled to compensation from the client because California's workers' compensation statute excludes private domestic service employment, understood to encompass home care services.¹¹⁵

Consequently, the court focused on whether Ms. Bouvia had a covered employment relationship with the state given that the

107. CAL. GOV'T. CODE § 3500 (West, current through Ch. 1 of 2007 Reg.Sess. urgency legislation).

108. *Serv. Employees Int'l Union, Local 434 v. County of Los Angeles*, 275 Cal. Rptr. 508 (Cal. Ct. App. 1990).

109. *Id.* at 510.

110. *Id.* at 524 (Johnson, J., dissenting) ("[T]he county has the right to control the activities of the IHSS providers whether it exercises it or not.") (emphasis omitted).

111. *Id.* at 514-15.

112. *In-Home Supportive Servs. v. Workers' Comp. App. Bd.*, 199 Cal. Rptr. 697 (Cal. Ct. App. 1984).

113. *Id.* at 700.

114. *Id.* at 704.

115. *Id.* at 701 & n.5.

state administered the IHSS program. The court concluded that such a relationship did exist because the state exercised sufficient control over IHSS home care workers.¹¹⁶ The state determined the amount and nature of IHSS services required by the client, the type of services to be provided, and the number of hours of service to be provided per week.¹¹⁷ In addition, the state directly compensated the IHSS worker for the services performed.¹¹⁸

More recently the Illinois Workers' Compensation Commission has considered whether Illinois state agencies that sponsor publicly-funded home care programs are employers of participating home care workers under the state's workers' compensation statute.¹¹⁹ In a series of cases, the Commission has given an affirmative answer, despite the agencies' insistence that they only have an independent contractor relationship with the workers and that the clients employ the workers.¹²⁰ Along with emphasizing that the agencies control the work performed, the Commission observed that the legislature did not intend "that those handicapped persons receiving [home care] services . . . should be burdened by the cost of providing coverage" to the workers under the state's workers' compensation statute.¹²¹

Minnesota achieved by statute the result in *In-Home Supportive Services* and the Illinois cases. The Minnesota workers' compensation statute provides that if the state publicly funds home care services, "then the worker is an employee of the state for workers' compensation purposes."¹²² Such a statute eliminates the uncertainty of litigation, being especially beneficial to home care workers who might otherwise be excluded from coverage on the theory that they are independent contractors.¹²³

116. *Id.* at 703-04.

117. *Id.* at 703.

118. *Id.* *But see* *Harrington v. Michigan*, 13 Michigan Workers' Comp. Law Rep. 1389 (Workers' Comp. App. Comm'n 1999) (stating that a Michigan state agency was not the employer of a publicly-funded home care worker because home care workers did not qualify as employees under the relevant statute).

119. 820 ILL. COMP. STAT. ANN. 305/8 (West 2004).

120. *See* *Platt v. Ill. Dep't of Human Servs.*, No. 02 WC 22894, 2005 Ill. Wrk. Comp. LEXIS 1000, at *2-*3 (Ill. Workers' Comp. Comm'n Dec. 14, 2005) (listing cases).

121. *Turner v. Illinois*, No. 96 WC 36051, 2002 Ill. Wrk. Comp. LEXIS 261, at *11 (Indus. Comm'n of Ill. March 18, 2002).

122. FLANAGAN, *supra* note 93, at 33.

123. *Id.* ("The Minnesota law was enacted in response to an unfavorable experience . . . encountered in treating [personal assistant service] workers as independent providers (e.g., independent contractors)."); *id.* at viii (referring to personal assistant service workers as "workers who work for service recipients in and around their homes").

On the other end of the spectrum is the Oregon approach which sharply contrasts with the Minnesota statute, and precludes a determination that a home care worker is a public employee under the common law control test. Oregon law provides that the state shall not be liable for workers' compensation to "home care workers" by virtue of the fact that they provide publicly-funded home care services, irrespective of whether the state "selects the person for employment or exercises any direction or control over the person's employment."¹²⁴

The above discussions in Parts II and III indicate that while exceptions exist, the move from agency home care to consumer-directed home care has eroded the already precarious employment status of home care workers. Workers cannot reliably depend on securing protection from individual consumers given that some employment laws simply deny coverage where the relationship is between a private household employer and a worker. Moreover, even when an employment relationship does exist, the problem remains that some elderly individuals who participate in CDC may lack the wherewithal, financial or otherwise,¹²⁵ to comply with legally-mandated employment obligations. As between elderly consumers and government-sponsored home care programs, the latter can best ensure that home care workers receive basic workplace protections as well as access to benefits such as health insurance.¹²⁶ Although states have been disinclined to shoulder this responsibility, the next Part argues that doing so can benefit both home care workers and elderly consumers.

IV. PITFALLS AND PROMISES: STATES DIG IN AND ORGANIZED LABOR STEPS UP

A. *Linking Improved Working Conditions with Quality Home Care*

From the perspective of policymakers, CDC's attractiveness seems to stem as much from its potential to contain long-term care costs as from its ability to empower elderly consumers by allowing them more control over their care. Faced with an aging

124. OR. REV. STAT. § 411.590 (2005).

125. In some instances, surrogate decision-makers can help incapacitated consumers comply with employment-related obligations. See Marshall B. Kapp, *From Medical Patients to Health Care Consumers: Decisional Capacity and Choices to Purchase Coverage and Services*, 3 AGING & MENTAL HEALTH 294, 296-99 (1999).

126. See Yoshiko Yamada, *Profile of Home Care Aides, Nursing Home Aides, and Hospital Aides: Historical Changes and Data Recommendations*, 42 GERONTOLOGIST 199, 204 (2002) (reporting that in 1998, public funds paid for the majority of all home care services in the United States).

elderly population that presents significant challenges to health care funding, states are looking for cost-savings strategies.¹²⁷ Evidence suggests that CDC can help reduce the costs of providing long term care to the elderly.¹²⁸ Relative to agency care, CDC involves less administrative expenses¹²⁹ and experts believe that consumers may make more efficient use of health care resources.¹³⁰

Of course, CDC's cost-savings potential also hinges on the extent to which states can eliminate the responsibilities and costs associated with an employment relationship as between the state and its publicly-funded home care workers.¹³¹ As more states turn to CDC programs, one can reasonably expect that the programs will continue to strive to insulate public entities from liability as the workers' employers. As a report prepared for the U.S. Department of Health and Human Services observes, "[b]y carefully structuring and documenting the consumer-worker employment relationship . . . states [can] minimize[] the likelihood of a credible claim that the state, rather than the consumer, is the worker's employer" ¹³² So structured, it is unlikely that states will have to abide by the aforementioned employment obligations such as paying overtime to home care workers or providing workers' compensation.

In theory such an approach will decrease the cost of home care but the point is debatable. Treating home care workers as independent contractors, thereby denying them the most basic workplace rights, is not a cost-free proposition. The working conditions in home care are woeful, so much so that the annual

127. See, e.g., JOSHUA M. WIENER, STATE COST CONTAINMENT INITIATIVES FOR LONG-TERM CARE SERVICES FOR OLDER PEOPLE 29–30 (2000) (discussing cost-saving strategies that states are exploring to curb long-term care expenditures for the elderly), <http://www.urban.org/UploadedPDF/1000056.pdf>.

128. See, e.g., Stone, *Consumer Direction*, *supra* note 23, at 7 ("[M]any state policy-makers in the United States are finding consumer direction increasingly appealing . . . [because of] the potential for cost savings.").

129. Benjamin, *supra* note 5, at 81 ("Because consumer direction reduces or eliminates the need for home care agencies and case managers, service costs are expected to be lower."); Stone, *Consumer Direction*, *supra* note 23, at 7 (observing that CDC "[s]avings are also realized through the reduction in administrative costs that would have been accrued in managing a service-package program").

130. BARBARA PHILLIPS & BARBARA SCHNEIDER, Changing to Consumer-Directed Care: The Implementation of the Cash and Counseling Demonstration in Florida 10 (2004), <http://aspe.hhs.gov/daltcp/Reports/FLchange.pdf>.

131. *Id.* at 2–3 (observing that because consumers and not the state qualify as employers of home care workers under CDC programs, states can potentially reduce costs, including those associated with collective bargaining).

132. See Hughes & Sabatino, *supra* note 11, at 351.

turnover rate is estimated at 40 percent.¹³³ It should come as no surprise that home care workers desire alternative employment opportunities so that they can leave behind a job that is physically demanding, often injurious, and characterized by low wages and few benefits.¹³⁴

Home care consumers pay a price for the job's instability in the form of inconsistent care and compromised quality of care.¹³⁵ When workers leave their jobs, consumers must adjust to new workers, a transition that can be especially taxing if the consumer is responsible for hiring and training the worker. Failure to locate a new worker in a timely manner can result in visits to hospital emergency rooms or even relocation to an institutional setting such as a nursing home.¹³⁶ Importantly, early research has shown a positive correlation between improved working conditions and quality of care.¹³⁷ A study evaluating the impact of higher wages for home care workers in San Francisco suggests that increased wages enhance workers' commitment to the job, reduce job turnover, and improve the overall quality of care provided.¹³⁸

States that avoid employment responsibilities to home care workers risk exacerbating the current difficulties with attracting and retaining workers who are committed to delivering quality care.¹³⁹ While an employment relationship with the state does not guarantee decent working conditions, it can provide workers

133. Candace Howes, *Living Wages and Retention of Homecare Workers in San Francisco*, 44 IND. RELS. 139, 143 (2005).

134. See *supra* notes 32–35, 88–89 and accompanying text (discussing home care's working conditions).

135. DORIE SEAVEY, THE COST OF FRONTLINE TURNOVER IN LONG-TERM CARE 15 (2004), <http://www.bjbc.org/content/docs/TOCostReport.pdf> (“Strong arguments can be made that turnover adversely affects continuity of care and care recipient relationships, causing disruptions that prevent or interfere with the development of relationships critical to both client and caregiver.”).

136. IRMA C. BERMEA, TEXAS DEPARTMENT OF HUMAN SERVICES, EVALUATION OF PERSONAL ATTENDANT TRAINING PROGRAMS 9 (2001), <http://www.dhs.state.tx.us/publications/SB95reportMarch2001.pdf> (commenting on the shortage of home care workers and stating that “[f]or some disabled individuals, it means a lack of access to the home health care services they need to live healthy and productive lives”).

137. Christopher Wellin, *Scrutinizing Familial Care in Consumer-Directed Long Term Care Programs: Implications for Theory and Research*, in CONSUMER VOICE AND CHOICE IN LONG-TERM CARE 195, 205 (Suzanne R. Kunkel & Valerie Wellin eds., 2006) (“There is ample evidence . . . that the quality and continuity of paid elder care are influenced by structural work conditions . . .”).

138. Howes, *supra* note 133, at 140–41, 144.

139. See *supra* notes 32–35 (highlighting poor working conditions in home care).

an opportunity to join forces and bargain with the state over the terms and conditions that govern their provision of publicly-funded care. As the next section discusses, the labor movement can help workers achieve this objective even if they do not qualify as state employees under applicable collective bargaining statutes.

B. *The Unionization of Publicly-Funded Home Care Workers*

The labor movement has been an active force in organizing publicly-funded home care workers, including workers who are independent state contractors under CDC programs. The SEIU spearheaded labor's first major accomplishment on this front in California.¹⁴⁰ As discussed in Part III.B., SEIU lost its legal battle to convince the California Court of Appeals that the County of Los Angeles was the employer of its publicly-funded home care workers under the MMBA.¹⁴¹ Following the court's decision, the SEIU waged and won a political battle that resulted in the enactment of legislation that required each county to form a "public authority" agency to operate the county's home care program and to serve as the workers' employer of record for the purpose of collective bargaining.¹⁴² The law essentially created an employment relationship, even as the counties would not qualify as employers based on the common law control test.¹⁴³ With the law in place, the SEIU organized and won the right to represent 74,000 IHSS home care workers in Los Angeles County.¹⁴⁴

Since then, the labor movement has aided in the passage of legislation that extends collective bargaining rights to home care workers in CDC in other parts of the country including Illinois,

140. For useful discussions of SEIU's home care campaign, see Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUD. J. 1 (2002).

141. See *supra* Part III.B.

142. Delp & Quan, *supra* note 140, at 1; Smith, *Organizing the Unorganizable*, *supra* note 78.

143. See *supra* Part III.B. (discussing the ruling of the California Court of Appeals that the County of Los Angeles was not the employer of the county's publicly-funded home care workers under the MMBA).

144. Delp & Quan, *supra* note 140, at 1; Smith, *Organizing the Unorganizable*, *supra* note 78. See also SERVICE EMPLOYEES INTERNATIONAL UNION, BUILDING A NATIONAL MOVEMENT FOR QUALITY HEALTH CARE 3 (2004) [hereinafter BUILDING A NATIONAL MOVEMENT], <http://www.seiu1984.org/appResources/scDocs/HealthDivision.Rpt.pdf> (stating that "[m]ore than 150,000 California home care workers are now in SEIU and aides in 19 California counties have now won health insurance benefits").

Oregon, Washington, and Iowa.¹⁴⁵ The unionization of home care workers has had a notable and positive impact on the economic status of the workers, leading to increase pay rates, health insurance benefits, and workers' compensation coverage.¹⁴⁶ Labor's home care campaign has also tried to respect the basic premise of CDC. For example, while negotiating on behalf of workers in Alameda County, California, the SEIU was concerned about consumers arbitrarily dismissing workers.¹⁴⁷ Yet, the union contract between SEIU and the County ultimately granted to the consumers a right to terminate employed home care workers, with or without cause.¹⁴⁸ As a union representative commented, "I came to understand how intensely personal this job is, and how important it was that the consumers had a choice in who touched their bodies."¹⁴⁹ To help those workers who did lose their jobs, the union developed a registry of alternative job opportunities.¹⁵⁰

CONCLUSION

Over the coming decades, as increasing numbers of elderly Americans require long-term care, states will likely continue to expand access to publicly-funded, consumer-directed home care. Not only is home the setting of choice for most disabled elderly individuals,¹⁵¹ but research also indicates that many prefer the ability to control their own care.¹⁵² Yet while the shift from agency-based care to CDC allows elderly consumers greater self determination, this Essay has argued that it can jeopardize the availability of fundamental workplace rights for home care workers. This Essay's examination of various employment statutes elu-

145. BUILDING A NATIONAL MOVEMENT, *supra* note 144, at 3 (discussing legislation to allow home care workers to engage in collective bargaining in Oregon, Washington, and Illinois).

146. *See id.* (highlighting the benefits of unionization).

147. Delp & Quan, *supra* note 140, at 12–13 (quoting a home care worker: "Sometimes these elderly consumers accuse us of ridiculous things like stealing their clothes, and we might get fired or unfairly branded. The union contract should protect us from being fired unreasonably.").

148. *Id.* at 12.

149. Delp & Quan, *supra* note 140, at 13 (quoting Patricia Ford of the SEIU, Local 616).

150. *Id.* CDC's privileging of the consumer's right to engage in arbitrary terminations over job security for workers remains an issue of concern to policy experts. *See* Lori Simon-Rusinowitz et al., *Implementation Issues for Consumer-Directed Programs: A Survey of Policy Experts*, 24 GENERATIONS 38 (2000).

151. Robyn Stone, *The Direct Care Worker: The Third Rail of Home Care Policy*, 25 ANN. REV. PUB. HEALTH 521, 521 (2004).

152. Benjamin, *supra* note 5, at 87; Young & Sikma, *supra* note 3, at 186.

cidates some of the difficulties that home care workers confront when trying to secure protection from consumers as well as from public agencies that fund and operate home care programs.

Given the cost of long-term care and the increased demand for such care, the desire of state and local governments to establish CDC programs to curb costs is understandable. At the same time, however, policymakers should be more attentive to the potential costs associated with CDC. Depriving home care workers of workplace entitlements, when the job is already riddled with disadvantages, may further frustrate efforts to build a stable and committed workforce. While this deprivation clearly undermines the well being of home care workers, consumers also stand to suffer.

Even as home care workers in CDC programs may not technically qualify as public employees of state funding agencies, they should at least be treated as *quasi* or *de facto* public employees given that they are compensated with public funds and are subject to state regulations.¹⁵³ The labor movement's campaign to organize home care workers reflects this awareness. Through the use of public authorities, unions have created employers of record for workers and have successfully bargained with the authorities to promote the interests of both workers and consumers. Empowering elderly home care consumers is certainly a worthwhile goal, and as the labor movement has demonstrated, empowering workers is a worthwhile goal as well.

153. A similar observation holds true in the context of family child care providers who provide publicly subsidized care. See Peggie R. Smith, *Welfare, Child Care, and The People Who Care: Union Representation of Family Child Care Providers*, 55 KAN. L. REV. 321, 357-59 (2007) (arguing that many of the providers should be deemed state employees).