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**INDEPENDENT CONTRACTOR MISCLASSIFICATION IS MAKING
EVERYTHING WORSE: THE EXPERIENCE OF HOME CARE
WORKERS IN MARYLAND**

DAVID J. RODWIN*

ABSTRACT

The COVID-19 pandemic has exposed and magnified existing problems in the American health care system. One of these problems—existing at the intersections of race, age, disability, class, power, poverty, and health—is the widespread misclassification of home care workers as independent contractors. Home care workers, who are predominantly women and people of color, provide personal assistance services and health care supports to older adults and people with disabilities in home- and community-based settings, usually for very low wages. Misclassification cuts them out of the social safety net in case of job loss or injury, imposes a greater tax burden than that of properly classified employees, reduces businesses' tax contributions to state unemployment insurance funds, makes it difficult or impossible to obtain the protections of anti-discrimination statutes, increases the likelihood of wage theft, and creates a race to the bottom among businesses. Further, misclassification makes it harder to effectively manage the COVID-19 pandemic by making home care a less appealing job at a time of increasing need, putting an additional obstacle in the way of state government contacting workers directly about public health protocols, and disincentivizing home care employers from providing appropriate training and personal protective equipment. Using Maryland as a case study, this Article aims to explain these challenges, articulate some of the barriers standing in the way of correcting them, and propose solutions to chart a path forward.

* David J. Rodwin, staff attorney at the Public Justice Center in Baltimore, Maryland. Thank you to the members of the Saint Louis University School of Law's Journal of Health Law & Policy for their many contributions to this article. I am also grateful to my colleagues at the PJC for their commitment to doing the hard work necessary to make lasting change—and for remaining kind and upbeat while doing it. Finally, I thank the home care workers who have shared their experiences with me and entrusted the PJC to represent them.

I. INTRODUCTION

The COVID-19 pandemic has exposed and magnified existing problems in the American health care system.¹ One of these problems—existing at the intersections of race, age, disability, class, power, poverty, and health—is the widespread misclassification of home care workers as independent contractors.² Home care workers—predominantly women and people of color—provide personal assistance services and health care supports to older adults and people with disabilities in home- and community-based settings, usually for very low wages.³ Using Maryland as a case study, this Article aims to (1) explain home care worker misclassification and some of its harms, (2) provide examples of how home care worker misclassification makes it harder to effectively manage the pandemic, (3) articulate some of the barriers standing in the way of correcting the problem, and (4) propose solutions to chart a path forward.

II. HOME CARE WORKER MISCLASSIFICATION AND ITS HARMS

A. *Misclassification Generally*

Workers in the United States generally fall into two legal categories: employees and independent contractors.⁴ “[M]isclassification occurs when a worker who should be considered an employee of a business—and receive a W-2 form to file with tax returns—is treated as a self-employed, ‘independent’ contractor, and receives a 1099-MISC (miscellaneous income) form instead.”⁵ The misclassification addressed in this Article—*independent contractor misclassification*—is different from other kinds of worker misclassification, such as misclassification of overtime-exempt employees.⁶

1. See David Blumenthal & Shanoor Seervai, *Coronavirus is Exposing Deficiencies in U.S. Health Care*, HARV. BUS. REV. (Mar. 10, 2020), <https://hbr.org/2020/03/coronavirus-is-exposing-deficiencies-in-u-s-health-care> (discussing weaknesses in American health care, particularly primary care capacity).

2. See REBECCA SMITH, NAT’L EMP. L. PROJECT, INDEPENDENT CONTRACTORS AND COVID-19: WORKING WITHOUT PROTECTIONS 1 (2020) (discussing how millions of workers, including home care workers, who are misclassified as independent contractors lack employment-related protections during the COVID-19 pandemic).

3. PHI NAT’L, U.S. HOME CARE WORKERS: KEY FACTS 2, 3 (2017).

4. See SARAH LEBERSTEIN & CATHERINE RUCKELSHAUS, NAT’L EMP. L. PROJECT, INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY INDEPENDENT CONTRACTOR MISCLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT 1 (2016) (asserting that most workers are classified as employees unless they operate an independent business, thus making them independent contractors).

5. FRANÇOISE CARRÉ, ECON. POL’Y INST., (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION 1 (2015).

6. See, e.g., *Miller v. Team Go Figure, L.L.P.*, Civil Action No. 3:13-cv-1509-O, 2014 U.S. Dist. LEXIS 65425, at *18–19 (N.D. Tex. May 13, 2014) (examining, among other things, whether

Statutes define “employee” and “independent contractor” differently,⁷ but a rough shorthand for the difference between these worker classifications is that independent contractors are self-employed and operate their own businesses, whereas employees are not self-employed and do not operate their own businesses.⁸ A common example of an independent contractor is a plumber who uses their own tools, markets themselves to the general public, is paid by the job rather than the hour, works for many different people, and can increase profits by exercising managerial skill.⁹ An example where a court would typically find an employment relationship is a cook at a restaurant who does not use their own tools, wears the restaurant uniform, and earns a set hourly rate.¹⁰ Misclassification occurs when an employer assigns the classification of independent contractor to a worker who is legally an employee.¹¹ Home care workers engaged to work by a home care agency generally do not operate their

an employee “was misclassified as a salaried exempt employee” exempt from the Fair Labor Standards Act’s (FLSA) overtime provisions).

7. For example, FLSA provides that “[e]mploy’ includes to suffer or permit to work.” 29 U.S.C. § 203(g). The Internal Revenue Code defines “employer” as “the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that . . . if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term ‘employer’ . . . means the person having control of the payment of such wages.” 26 U.S.C. § 3401(d). Maryland’s workers’ compensation statute provides that an individual “is presumed to be a covered employee while in the service of an employer under an express or implied contract of apprenticeship or hire” unless “an employer shall establish that the individual performing services is an independent contractor in accordance with the common law or is specifically exempted from covered employment under this subtitle.” MD. CODE ANN., LAB. & EMPL. § 9-202 (LexisNexis 2020). Maryland’s unemployment insurance statute provides that “regardless of whether the employment is based on the common law relation of master and servant,” that work is presumed to be covered employment if it is performed “for wages” or “under a contract of hire,” *id.* § 8-201, though that presumption may be rebutted if “(1) the individual who performs the work is free from control and direction over its performance both in fact and under the contract; (2) the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and (3) the work is: (i) outside of the usual course of business of the person for whom the work is performed; or (ii) performed outside of any place of business of the person for whom the work is performed,” *id.* § 8-205.

8. LEBERSTEIN & RUCKELSHAUS, *supra* note 4.

9. *See id.* at 2–3 (discussing various attributes of an independent contractor).

10. *See id.* at 2 (The authors point out that “[c]ourts and administrative agencies consider a variety of facts to determine whether the worker is truly running a separate business, and these considerations are given varying weights depending on the worker protection or law. Common questions include the following: Does the company have the right to control the work? Does the worker have an opportunity for profit or loss based on a capital investment in the business? Does the work require specialized skill and independent initiative? Is the work needed on a long-term or permanent basis? Is the work an integrated part of the business engaging the worker? Decision-makers are supposed to consider all relevant factors. No single element of the work relationship determines whether the worker is an employee or independent contractor.”).

11. CARRÉ, *supra* note 5.

own businesses; rather, the agency pays them an hourly rate to perform specific duties for the agency's clients.¹² Accordingly, courts that examine the issue typically find that such home care workers are employees, not independent contractors.¹³

Misclassification causes a broad array of harms to those affected because employees enjoy many workplace protections that independent contractors do not; much of the social safety net is designed to protect employees only.¹⁴ As a general matter, employees have rights (such as social safety net protections, favorable tax treatment, wage minimums, and protections from certain forms of discrimination); these are contrasted with independent contractors' responsibilities (such as obtaining their own health and liability insurance, paying additional taxes, and paying operating costs like gas for transportation and equipment used in their trade).¹⁵

For example, unemployment insurance protections generally apply to employees but not to independent contractors.¹⁶ As a result, employees misclassified as independent contractors generally cannot receive unemployment payments if they lose their jobs unless they can establish their correct employment status through an administrative process that can involve protracted appeals.¹⁷ This issue received greater attention recently when the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act temporarily extended broader unemployment coverage—called Pandemic Unemployment Assistance—to independent contractors (properly classified or not), briefly patching this significant hole in the safety net.¹⁸

Workers' compensation protections also generally apply to employees but not to independent contractors.¹⁹ A worker classified as an employee who

12. *See, e.g.*, *Acosta v. Heart II Heart, LLC*, Civil Action No. 2:17-cv-1242, 2019 U.S. Dist. LEXIS 178260 (W.D. Pa. Oct. 15, 2019).

13. *Id.*

14. *LEBERSTEIN & RUCKELSHAUS, supra* note 4, at 3.

15. *Id.* *See also* *CARRÉ, supra* note 5, at 2 (explaining that “[m]isclassified workers are ineligible for unemployment insurance, workers’ compensation, minimum wage, and overtime, and are forced to pay the full FICA tax and purchase their own health insurance”).

16. *See, e.g.*, MD. CODE ANN., LAB. & EMPL. § 8-205 (LexisNexis 2020) (showing that unemployment insurance in Maryland does not extend to independent contractors).

17. *See id.* § 8-806 (setting out the process for determination of claims, including a determination by a claims examiner and potential review by the Board of Appeals).

18. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2102(a)(3)(A)(ii)(II), 134 Stat. 281, 313–14 (2020) (extending Pandemic Unemployment Assistance to an individual who “is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation”).

19. *See, e.g.*, MD. CODE ANN., LAB. & EMPL. § 9-202 (LexisNexis 2020). NAIC/IAIABC JOINT WORKING GRP., WORKERS’ COMP. TASK FORCE, AN OVERVIEW OF WORKERS’ COMPENSATION INDEPENDENT CONTRACTOR REGULATORY APPROACHES 2 (2009).

suffers a workplace injury should be able to obtain workers' compensation benefits without much delay.²⁰ This is not the case for an employee misclassified as an independent contractor. A misclassified employee may be able to contest their employment classification, eventually establish that they were misclassified, and receive workers' compensation payments, but that process takes time, months at a minimum.²¹ During that time, the injured worker may be physically unable to work and earn money to pay for basic expenses like rent, electricity, and food.²² As a result, misclassified workers who suffer workplace injuries face greater risk of extreme poverty and homelessness than properly classified employees.²³ This is an especially serious concern for misclassified home care workers, given their low wages and very high rates of workplace injury, most commonly resulting when workers overexert themselves through lifting and repositioning their clients.²⁴

Misclassification also has tax consequences. "Businesses that misclassify fail to pay mandatory payroll taxes—Social Security and Medicare (FICA) and unemployment insurance (UI)—and workers' compensation insurance."²⁵ This results in a greater tax burden on workers (requiring the worker to pay the full FICA tax rather than half, with the other half borne by the employer), the loss of tax revenue by local, state, and federal governments, and "the added cost of providing social services to uninsured workers."²⁶ Facing an increased tax burden and often unaware of tax benefits, such as the earned income tax credit, many low-income workers do not file tax returns at all.²⁷ One long-term consequence is that these workers pay less into social security and therefore have

20. See, e.g., MD. CODE ANN., LAB. & EMPL. §§ 9-701–50 (LexisNexis 2020) (setting out Maryland's workers' compensation claim, hearing, and appeal procedures).

21. *Id.*

22. Lydia DePhillis, *The Workers' Compensation System Is Broken – and It's Driving People into Poverty*, WASH. POST (Mar. 4, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/04/the-workers-compensation-system-is-broken-and-its-driving-people-into-poverty/>.

23. *Id.*

24. See generally STEPHEN CAMPBELL, PHI NAT'L, WORKPLACE INJURIES AND THE DIRECT CARE WORKFORCE 3 (2018); BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., INJURIES TO CAREGIVERS WORKING IN PATIENTS' HOMES 1 (1997) ("[T]he home health care industry logs relatively large numbers of lost worktime injuries resulting from highway accidents, all types of overexertion when assisting patients, and falls inside and outside their homes."); CARRÉ, *supra* note 5, at 3.

25. CARRÉ, *supra* note 5, at 2.

26. *Id.* at 1–2. See also LEBERSTEIN & RUCKELSHAUS, *supra* note 4, at 4 ("[M]isclassification—also called payroll fraud—drains billions from federal and state revenues annually.").

27. LEBERSTEIN & RUCKELSHAUS, *supra* note 4, at 3; Dan Caplinger, *Here's the Tax Break the IRS is Begging You to Take*, USA TODAY (Feb. 5, 2020), <https://www.usatoday.com/story/money/2020/02/05/tax-break-earned-income-tax-credit/41115319/>.

less to use when they become eligible for the program's benefits.²⁸ This makes it more difficult for workers to retire and increases poverty among older adults.²⁹

Further, most employment discrimination laws apply only to employees and not to independent contractors.³⁰ When misclassified workers are discriminated against because of race, sex, age, disability, or another protected category, they face a threshold hurdle of first pleading and proving their status as employees, on top of their burden of pleading and proving discrimination.³¹

Finally, misclassification robs employees of bedrock wage protections. Under the federal Fair Labor Standards Act and most state wage laws, employees have the right to a minimum wage and an overtime rate of time-and-a-half for all hours worked beyond forty in a workweek.³² Employees misclassified as independent contractors are frequently paid less than minimum wage, paid the same low hourly rate even when they work overtime, and denied any pay for compensable travel time (i.e., time spent traveling from worksite to worksite).³³ This wage theft can cost low-wage workers thousands of dollars a year.³⁴

Employers that misclassify their workers generally do it "to avoid several employment-related obligations and thereby save on labor and administration costs and gain advantage over competitors."³⁵ By misclassifying, employers save money on payroll taxes, state and federal unemployment insurance, workers' compensation insurance, disability insurance, minimum and overtime wages, and other costs.³⁶ Business owners profit from these lower costs, creating an unfair advantage over businesses that do not misclassify.³⁷ The cost savings are significant: businesses that misclassify their employees as independent

28. CAROLINE BRUCKNER & THOMAS L. HUNGERFORD, FAILURE TO CONTRIBUTE: AN ESTIMATE OF THE CONSEQUENCES OF NON- AND UNDERPAYMENT OF SELF-EMPLOYMENT TAXES BY INDEPENDENT CONTRACTORS AND ON-DEMAND WORKERS ON SOCIAL SECURITY 26 (2019).

29. Kathleen Romig, *Social Security Lifts More Americans Above Poverty Than Any Other Program*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/social-security/social-security-lifts-more-americans-above-poverty-than-any-other-program> (last updated Feb. 20, 2020).

30. *Coverage*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/coverage> (last visited Oct. 7, 2020).

31. *See, e.g.*, *Lockett v. Allstate Ins. Co.*, 364 F. Supp. 2d 1368, 1384 (M.D. Ga. 2005) ("Plaintiff's status as an independent contractor renders federal discrimination statutes inapplicable.").

32. *See* 29 U.S.C. § 206 (minimum wage); *Id.* § 207 (overtime); MD. CODE ANN., LAB. & EMPL. § 3-413 (LexisNexis 2020) (Maryland minimum wage); *Id.* § 3-415 (Maryland overtime).

33. CARRÉ, *supra* note 5, at 3.

34. *See generally* CELINE McNICHOLAS ET AL., ECON. POL'Y. INST., TWO BILLION DOLLARS IN STOLEN WAGES WERE RECOVERED FOR WORKERS IN 2015 AND 2016—AND THAT'S JUST A DROP IN THE BUCKET 3 (2017).

35. CARRÉ, *supra* note 5, at 4.

36. *Id.*

37. *Id.*

contractors can save as much as thirty percent of payroll costs.³⁸ The incentive to reduce costs by misclassifying workers can create a race to the bottom among businesses trying to compete.³⁹

In short, the harms of misclassification include cutting workers out of the social safety net in case of job loss or injury, imposing a greater tax burden on workers than properly classified employees, reducing businesses' tax contributions to state unemployment insurance funds, making it difficult or impossible to obtain the protections of anti-discrimination statutes, increasing the likelihood of wage theft, and creating a race to the bottom among businesses.

B. *Misclassification of Home Care Workers*

Misclassification is worse in industries where women, Black people, and Latinos are overrepresented, such as house cleaning and in-home care.⁴⁰ The Public Justice Center (PJC) in Maryland, where I practice, frequently represents misclassified workers in industries such as construction, cleaning, driving, and caregiving. Most of the workers we represent in these cases are Black or Latino.

Misclassification is especially prevalent in the home care industry.⁴¹ Home care workers provide critical in-home support to older adults and people with disabilities and are compensated at poverty-level wages.⁴² The two official occupations that make up the home care workforce—personal care aides and home health aides—are two of the country's fastest-growing occupations.⁴³ There are already more than 2,250,000 home care workers in the United States, including more than 30,000 in Maryland, where their numbers are projected to continue increasing.⁴⁴

38. *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT. EMP. L. PROJECT (Oct. 26, 2020), <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/> [hereinafter *Independent Contractor Misclassification*].

39. See Rebecca Dixon, *NELP Denounces DOL's Independent Contractor Proposed Rule That Would Expose More Workers to Wage Theft, Misclassification*, NAT. EMP. L. PROJECT (Sept. 22, 2020), <https://www.nelp.org/news-releases/nelp-denounces-usdols-independent-contractor-proposed-rule-expose-workers-wage-theft-misclassification/>.

40. *Independent Contractor Misclassification*, *supra* note 38.

41. LEBERSTEIN & RUCKELSHAUS, *supra* note 4, at 4.

42. *Home Health Aides and Personal Care Aides*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm> (last modified Sept. 1, 2020).

43. *Fastest Growing Occupations*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/fastest-growing.htm> (last modified Sept. 1, 2020).

44. *National Data: Direct Care Worker Employment, 2009 to 2019*, PHI NAT'L: WORKFORCE DATA CTR. (2020), <https://phinational.org/policy-research/workforce-data-center/#states=24&tab=National+Data&var=Wage+Trends> (showing home health aides as the third-fastest growing occupation and personal care aides as the fourth-fastest growing occupation); *State Data (Maryland): Direct Care Worker Employment, 2009-2019*, PHI NAT'L: WORKFORCE DATA CTR.

Home care workers are largely women of color. Nationally, eighty-seven percent of home care workers are women, and sixty-two percent are people of color.⁴⁵ In Maryland, eighty-seven percent are women, and seventy-six percent are people of color.⁴⁶ The median hourly wage of Maryland home care workers is between twelve and thirteen dollars, which is significantly below a living wage.⁴⁷ In Baltimore, the vast majority of home care workers are Black women.⁴⁸ Many are forced to work long hours at multiple jobs to feed their families and pay the rent—and even then, forty-six percent of Maryland home care workers rely on means-tested public assistance for themselves and their families.⁴⁹

Poor working conditions—including misclassification—lead to high turnover, disrupting consistency of care for those who depend on it.⁵⁰ In my experience representing home care workers in cases of wage theft against home care agency employers a very high percentage of Maryland home care workers have been misclassified as independent contractors; denied overtime pay for overtime work; and denied pay for the time they spent traveling directly from one home to another, which is compensable work.

(2020), <https://phinational.org/policy-research/workforce-data-center/#states=24&tab=State+Data&var=Employment+Trends>.

45. KEZIA SCALES, PHI NAT'L, IT'S TIME TO CARE: A DETAILED PROFILE OF AMERICA'S DIRECT CARE WORKFORCE, 11–12 (2020).

46. *State Data (Maryland): Direct Care Workers by Race and Ethnicity, 2018*, PHI NAT'L: WORKFORCE DATA CTR. (2020), <https://phinational.org/policy-research/workforce-data-center/#states=24&tab=State+Data&var=Race+and+Ethnicity>; *State Data (Maryland): Direct Care Workers by Gender, 2018*, PHI NAT'L: WORKFORCE DATA CTR. (2020), <https://phinational.org/policy-research/workforce-data-center/#states=24&tab=State+Data&var=Gender>.

47. *State Data (Maryland): Direct Care Workers by Gender, 2018*, PHI NAT'L: WORKFORCE DATA CTR., *supra* note 46.

48. KEZIA SCALES, PHI NAT'L, THE DIRECT SERVICES WORKFORCE IN LONG-TERM SERVICES AND SUPPORTS IN MARYLAND AND THE DISTRICT OF COLUMBIA 20 (2018).

49. *State Data (Maryland): Direct Care Workers Accessing Public Assistance, 2018*, PHI NAT'L: WORKFORCE DATA CTR. (2020), <https://phinational.org/policy-research/workforce-data-center/#states=24&tab=State+Data&var=Public+Assistance>.

50. Nationally, the home care worker turnover rate can surpass sixty percent. *See* Sarah Portlock, *Help Wanted (a Lot): Home-Health Aides*, WALL ST. J. (Aug. 22, 2014, 11:30 AM), <http://www.wsj.com/articles/help-wanted-a-lot-home-health-aides-1408721457>. This high turnover rate “is a critical cost driver for the long-term care industry, affecting the fiscal health of providers, the quality of care that long-term care consumers receive, and the efficiency of resource allocation within the public payer system.” DORIE SEAVEY, BETTER JOBS BETTER CARE, THE COST OF FRONTLINE TURNOVER IN LONG-TERM CARE 4 (2004). A 2005 study of an increase in home care workers' wages in the Bay Area found that turnover fell by fifty-seven percent following the wage increase. Candace Howes, *Living Wages and Retention of Homecare Workers in San Francisco*, 44 INDUS. RELS. 139, 140 (2005).

The poor working conditions home care workers face are the result of racism.⁵¹ Home care workers are considered a subset of the domestic worker workforce and have historically been excluded from fundamental labor protections.⁵² In a costly concession to Southern senators unwilling to endorse a law that would grant minimum wages to domestic workers—the vast majority of whom were Black women—the original FLSA as passed in 1938 expressly excluded domestic workers from its coverage.⁵³ The Act’s 1974 amendments changed that, but Congress drafted an exception for “companionship services” meant to include “elder-sitting” by family members or neighbors.⁵⁴ The United States (U.S.) Department of Labor interpreted this “companionship” exclusion broadly, allowing even for-profit home care agencies to avoid paying their home care worker employees minimum wage or overtime.⁵⁵ In 2013, the Department of Labor reinterpreted FLSA’s exclusion of “companionship” care such that most home care workers would no longer be excluded from that law’s wage protections.⁵⁶ When that regulation took effect on January 1, 2015, most home care workers, for the first time, were guaranteed federal minimum wage and labor protections.⁵⁷ Notably, for-profit agencies are no longer able to claim the exemption to avoid paying their employees minimum wage and overtime under federal law.⁵⁸

However, the longtime, racist exclusion of home care workers from labor protections persists in undermining protections for home care workers at for-

51. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 97 (2011).

52. Malkie Wall, *Essential Work, Disposable Workers: Why Home Care Workers Need Labor Protections*, CTR. FOR AM. PROGRESS ACTION FUND (Sept. 3, 2020, 9:02 AM), <https://www.americanprogressaction.org/issues/economy/news/2020/09/03/178589/essential-work-disposable-workers-home-care-workers-need-labor-protections/>.

53. Julia Wolfe et al., *Domestic Workers Chartbook*, ECON. POL’Y INST. (May 14, 2020), <https://www.epi.org/publication/domestic-workers-chartbook-a-comprehensive-look-at-the-demographics-wages-benefits-and-poverty-rates-of-the-professionals-who-care-for-our-family-members-and-clean-our-homes/>.

54. Ted Boehm, *How Will the Final Rule of Companionship Exemption Impact You?*, W. PA. HEALTHCARE NEWS (Nov. 17, 2013), <https://www.wphealthcarenews.com/how-will-the-final-rule-of-companionship-exemption-impact-you/>.

55. *Domestic Service Final Rule Frequently Asked Questions (FAQs)*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/direct-care/faq> (last visited Oct. 7, 2020).

56. *Fact Sheet # 79A: Companionship Services Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LAB. (Sept. 2013), <https://www.dol.gov/agencies/whd/fact-sheets/79a-flsa-companionship>.

57. *Home Care Ass’n of Am. v. Weil*, 799 F.3d 1084 (2015).

58. *Id.*

profit agencies.⁵⁹ Multiple home care employers have stated on the record in PJC lawsuits that industry practice is to classify home care workers as independent contractors.⁶⁰ Based on my observations and conversations with private attorneys, the private bar has not actively fought this wage theft because the potential recoveries are too small (in part because group cases are rendered more difficult due to the lack of a shared worksite, meaning that workers often do not know their coworkers), and the risks of litigation are too high (in part because judgments may not be collectable).

Coupled with the very low pay that most home care workers receive, the prevalence of independent contractor misclassification is likely a significant part of the reason why there are not enough home care workers to meet the country's growing need for this workforce.⁶¹

III. MISCLASSIFICATION MAKES IT HARDER TO EFFECTIVELY MANAGE THE PANDEMIC

Misclassification of home care workers is a serious problem on its own, hurting workers—often women of color—by cutting them out of the social safety net and hurting consumers by increasing worker turnover and damaging the continuity and quality of care.⁶² But even apart from these baseline harms, the impact of misclassification increases the challenges of effectively navigating the COVID-19 pandemic.

A. *Misclassification Makes Home Care a Less Appealing Job at a Time of Increasing Need*

First, misclassification is worsening the shortage of needed home care workers at a time when demand is increasing even more quickly than usual.⁶³ It is now widely accepted that nursing home settings present particular dangers to

59. See Steven Greenhouse, *U.S. to Include Home Care Aides in Wage and Overtime Law*, N.Y. TIMES (Sept. 17, 2013), <https://www.nytimes.com/2013/09/18/business/us-to-include-home-care-workers-in-wage-and-overtime-law.html>.

60. *Kelly v. Pinnacle Group*, 2015 Md. Cir. Ct. LEXIS 295, at *6.

61. *New Research Sounds Urgent Alarm to Overhaul Home Care Industry & End Abusive Work Conditions*, NAT'L EMP. L. PROJECT (Sept. 22, 2017), <https://www.nelp.org/news-releases/new-research-sounds-alarm-overhaul-home-care-industry-end-abusive-work-conditions/>.

62. *Misclassification of Workers by Home Care Agencies Coming Under Increased Scrutiny*, READY HANDS (Nov. 10, 2015), <https://readyhands.com/misclassification-of-workers-by-home-care-agencies-coming-under-increased-scrutiny/>.

63. Alison Knezevich, *They Serve the Vulnerable, But Many Low-Wage Home Care Workers Overlooked in Pandemic, Baltimore Area Advocates Say*, BALT. SUN (June 08, 2020, 5:00 AM), <https://www.baltimoresun.com/coronavirus/bs-md-home-health-aides-pandemic-20200608-mdk-sudv3qjg6hptnhpbtjrwqu-story.html>.

older adults during the COVID-19 pandemic.⁶⁴ As of May 2020, more than a third of all COVID-19 deaths in the United States were in long-term care settings.⁶⁵ As of June 2020, COVID-19 had killed an astonishing twelve percent of all nursing home residents in New Jersey, translating to a devastating figure of more than 5100 nursing home deaths.⁶⁶ By the end of July 2020, more than 60,000 U.S. nursing home residents—and more than 760 nursing home staff—had died from COVID-19.⁶⁷

When an individual's personal circumstances allow for it, home- and community-based settings for those who need services and supports are considered more desirable than institutional settings.⁶⁸ As the Supreme Court has noted, “[i]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.”⁶⁹ Further, “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”⁷⁰

The benefits of home- and community-based services are now even clearer given the dangers nursing home settings present for COVID-19 outcomes. But as residents of nursing facilities seek to move out into the community, who will do the work of providing the home- and community-based care they need to allow them to live outside a nursing home? Before the pandemic, our country already faced a shortage of home care workers.⁷¹ Where will all the new home care workers we need come from? Despite how complicated many tend to make the issue, there is a simple answer: good jobs with good pay and strong worker

64. Olga Khazan, *The U.S. is Repeating Its Deadliest Pandemic Mistake*, ATLANTIC (July 6, 2020), <https://www.theatlantic.com/health/archive/2020/07/us-repeating-deadliest-pandemic-mistake-nursing-home-deaths/613855/>.

65. Karen Yourish et al., *One Third of All U.S. Coronavirus Deaths Are Nursing Home Residents or Workers*, N.Y. TIMES (May 11, 2020), <https://www.nytimes.com/interactive/2020/05/09/us/coronavirus-cases-nursing-homes-us.html>.

66. Joaquin Sapien & Joe Sexton, “*Fire Through Dry Grass*”: Andrew Cuomo Saw COVID-19's Threat to Nursing Homes. Then He Risked Adding to It., PROPUBLICA (June 16, 2020, 6:00 AM), <https://www.propublica.org/article/fire-through-dry-grass-andrew-cuomo-saw-covid-19-threat-to-nursing-homes-then-he-risked-adding-to-it>.

67. Brian E. McGarry et al., *Severe Staffing and Personal Protective Equipment Shortages Faced by Nursing Homes During the COVID-19 Pandemic* 39 HEALTH AFF. 1812, 1812 (2020).

68. CHARLIE LAKIN ET AL., ASS'N UNIV. CTR. ON DISABILITIES, THE EFFECTS OF COMMUNITY VS. INSTITUTIONAL LIVING ON THE DAILY LIVING SKILLS OF PERSONS WITH DEVELOPMENTAL DISABILITIES? 4 (2011).

69. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600–01 (1999).

70. *Id.*

71. Robert Espinoza, *New Research: 7.8 Million Direct Care Jobs Will Need to Be Filled by 2026*, PHI NAT'L (Oct. 6, 2020, 12:12 PM), <https://phinational.org/news/new-research-7-8-million-direct-care-jobs-will-need-to-be-filled-by-2026/>.

protections get filled easily, while bad jobs with low pay and poor worker protections do not.⁷² Few people will rush to join a workforce featuring low wages, lack of a safety net, and extra taxes.

B. Fears of Joint Employer Liability Have Worsened Misclassification and Made It Harder for the State to Contact Workers Directly

In Maryland, aside from a relatively small number of “private duty” workers who work directly for consumers, who pay for care out-of-pocket or with funds from long-term care insurance, home care workers are hired by home care agencies.⁷³ The State’s health code defines these agency entities as residential service agencies (RSAs) and requires them to obtain a license to function in the State.⁷⁴ The greatest single source of funding for home care is Medicaid, which is jointly funded by the federal and state governments but mostly administered by the states.⁷⁵

Maryland’s fear of being labeled a joint employer of Medicaid-funded home care workers—and thus potentially jointly liable for wage violations—has led it to take a laissez-faire approach to these workers.⁷⁶ This approach makes it harder to manage the pandemic because there are no longer any established channels to communicate directly with workers and because the State is reluctant to require that home care agencies take particular actions with respect to their home care workers.⁷⁷

Maryland formerly had two programs through which a Medicaid recipient could receive home care.⁷⁸ The first, called the “independent provider” program, allowed about 4500 workers to perform home care independent of a third-party home care agency and receive payment for their work directly from the State, through a fiscal intermediary.⁷⁹ A union, the American Federation of State, County and Municipal Employees (AFSCME), collectively bargained with the State on behalf of these workers to establish the wage rates at which they would

72. Martha Ross & Nicole Bateman, *Low-Wage Work Is More Pervasive Than You Think, and There Aren’t Enough “Good Jobs” to Go Around*, BROOKINGS: THE AVE. (Oct. 6, 2020, 12:41 PM), <https://www.brookings.edu/blog/the-avenue/2019/11/21/low-wage-work-is-more-pervasive-than-you-think-and-there-arent-enough-good-jobs-to-go-around/>.

73. MD. CTR. ON ECON. POL’Y, *EXPANDING HOME CARE OPTIONS IN MARYLAND* 2–3 (2017).

74. See MD. CODE ANN. HEALTH-GEN. §§ 19-4A-01, -04 (LexisNexis 1990).

75. Molly O’Malley Watts, *Medicaid Home and Community-Based Services Enrollment and Spending*, KAISER FAM. FOUND. 1 (2020), <https://www.kff.org/medicaid/issue-brief/medicaid-home-and-community-based-services-enrollment-and-spending/>. See also U.S. DEP’T OF HEALTH & HUM. SER. OFF. ASS’T SEC’Y FOR PLAN. & EVAL., *AN OVERVIEW OF LONG-TERM SERVICES AND SUPPORTS AND MEDICAID: FINAL REPORT* 4 (2018).

76. MD. CTR. ON ECON. POL’Y., *supra* note 73, at 6–7.

77. Knezevich, *supra* note 63.

78. MD. CTR. ON ECON. POL’Y., *supra* note 73, at 1.

79. *Id.* at 5.

be paid.⁸⁰ But in 2014, as the U.S. Department of Labor moved toward amending the FLSA’s “companionship services” regulation—effectively granting FLSA wage protections to home care workers—the administration of Republican Governor Larry Hogan abruptly cancelled the program out of fear that it could be held liable for workers’ overtime and travel-time wages as a joint employer.⁸¹ This left Maryland only one other means of delivering Medicaid-funded home care: the “agency-only” model, through which Medicaid funds are provided to RSAs.⁸²

Governor Hogan’s cancellation of the independent provider program deprived Maryland of its only means of communicating directly with thousands of home care workers. In the past, Maryland could have passed information to “independent provider” home care workers through AFSCME and trusted that AFSCME would relay that information to workers promptly and efficiently.⁸³ Maryland could have easily worked with AFSCME to develop and implement pandemic-specific training or additional safety protocols.⁸⁴ And as an entity whose job it was to hear and reflect worker experiences and concerns, AFSCME could have served as a valuable source of public health information for the State.⁸⁵ With the independent provider program now cancelled, that is no longer an option.

The Office of Health Care Quality within the Maryland Department of Health does not regularly communicate with RSAs and is hesitant to provide any instructions to them regarding their workforce beyond what the regulations already provide.⁸⁶ More rigorous oversight—and, potentially, insistence on certain terms and conditions of employment—could give rise to a judicial finding that Maryland is the workers’ joint employer, making it liable for any unpaid overtime and travel-time wages.⁸⁷ Joint employment is not a bad thing, and states like California have managed being designated a joint employer of independent provider home care workers to the benefit of workers and

80. See MD. DEP’T OF HEALTH & MENTAL HYGIENE, REPORT ON THE STATUS OF INDEPENDENT HOME CARE PROVIDERS PARTICIPATING IN WAIVER PROGRAMS 1–2 (2013).

81. MD. CTR. ON ECON. POL’Y, *supra* note 73, at 6–7.

82. *Id.* at 2.

83. AM. FED’N OF STATE, CNTY & MUN. EMPLOYEES, AFSCME OFFICER’S HANDBOOK 9 (2017).

84. *Education & Training*, AM. FED’N OF STATE, CNTY. & MUN. EMPS., <https://www.afscme.org/member-resources/education-training> (last visited Oct. 7, 2020).

85. *History*, AM. FED’N OF STATE, CNTY. & MUN. EMPS., <https://www.afscme.org/about/history> (last visited Oct. 7, 2020).

86. OFF. OF HEALTH CARE QUALITY, MD. DEP’T OF HEALTH, https://health.maryland.gov/ohcq/ac/docs/RSA%20Clarification%20DRAFT%209-11-2.docx.doc%20final_4_1.pdf (last visited Oct. 7, 2020).

87. MD. CTR. ON ECON. POL’Y, *supra* note 73, at 5–6.

consumers alike.⁸⁸ Nevertheless, a fear of being labeled a joint employer may have led Maryland to tacitly tolerate the misclassification of home care workers. The administration of Governor Hogan generally opposes any additional regulations on businesses.⁸⁹ This opposition extends even to businesses effectively acting as middle-men for state money, collecting a toll for the provision of Medicaid-funded home care, and causing less money to reach workers.⁹⁰ Though Maryland licenses home care agencies and requires them to obtain and maintain that license, it does not require that they classify their workers as employees.⁹¹

During the pandemic, Governor Hogan issued several potentially helpful executive orders, but these orders were simply posted on government websites and largely ignored by RSAs. As a result, many workers were never made aware of the orders.⁹² For example, on March 13, 2020, Governor Hogan designated “providers of health, long-term, or acute inpatient care” as “essential persons” and granted them state-funded childcare.⁹³ This should have been good news for home care workers, who are unquestionably providers of long-term care, but none of the many home care workers with whom I spoke had any idea that they had been designated “essential” or that they had gained any new entitlement. Given school closures, the lack of knowledge about the childcare option meant more home care workers quit or relinquished shifts to care for their children.⁹⁴

As another example, on April 9, 2020, the Maryland Department of Health issued a directive applicable to home care workers providing care through RSAs that set out certain health screening protocols for workers and consumers of home care to prevent the spread of COVID-19.⁹⁵ However, all of the home care

88. See PAMELA J. DOTY ET AL., DEPT. OF HEALTH & HUM. SERVS., ANALYSIS OF STATE EFFORTS TO COMPLY WITH FAIR LABOR STANDARDS ACT PROTECTIONS TO HOME CARE WORKERS 13–14 (2019).

89. Emily Kimball, *Governor Hogan: ‘Maryland Is Open for Business,’* MD. BUS. NEWS (Jan. 15, 2015), <https://open.maryland.gov/blog/governor-hogan-maryland-is-open-for-business/>.

90. Robert Espinoza, *We Finally Have a Coronavirus Bill for Home Care Workers*, PHINAT’L (Mar. 23, 2020), <https://phinational.org/we-finally-have-a-coronavirus-bill-for-home-care-workers/>.

91. MD. CODE REGS. 10.07.10.04 (2020).

92. *COVID-19 Pandemic: Orders and Guidance*, STATE OF MD. OFF. OF GOVERNOR, <https://governor.maryland.gov/covid-19-pandemic-orders-and-guidance/> (last visited Oct. 7, 2020) [hereinafter *Orders and Guidance*].

93. Md. Exec. Order No. 20-03-25-01 (Mar. 13, 2020), <https://governor.maryland.gov/wp-content/uploads/2020/03/Child-Care-Access.pdf>.

94. Megan Leonhardt, *Lack of School and Child Care Could Mean Losing ‘a Generation of Working Parents’*, CNBC (Aug. 6, 2020, 9:01 AM), <https://www.cnbc.com/2020/08/06/lack-of-school-and-child-care-may-push-some-parents-out-of-workforce.html>.

95. Letter from Robert R. Neall, Sec’y, Md. Dep’t. Health, to Autism Waiver Providers, Brain Injury Waiver Providers, Home and Community-Based Options Waiver Providers, Model Waiver Providers, Community First Choice Providers, Community Personal Assistance Services Providers, Increased Community Services Providers 1, 2–4 (Apr. 9, 2020), <https://mmcp.health.maryland.gov/>

workers with whom I spoke told me that their RSA employers did not inform them of these protocols. Whether because of the State's fears of joint employer liability, a desire to encourage RSAs to use an independent-contractor model, simply being overwhelmed by the other demands of the pandemic, or some other reason, the State's failure to publicize these orders effectively deprived home care workers of their protections and squandered their potential.⁹⁶

In March and April 2020, advocates for home care workers and consumers in Maryland formed an ad hoc coalition to try to communicate information to the State about how its COVID-19 policies were failing home care workers and other direct care workers.⁹⁷ Members of this broad coalition included 1199SEIU (a health care union that represents home care workers in a number of jurisdictions outside Maryland), the Alzheimer's Association - Greater Maryland Chapter (an organization dedicated to improving dementia care), Caring Across Generations (an advocacy organization dedicated to improving care for workers and consumers), Caroline Center (a workforce development organization in Baltimore focused on entry-level fields, including home care), LeadingAge Maryland (a trade association of non-profit care providers), the Maryland Association of Centers for Independent Living (an organization that advocates for people with disabilities), National Domestic Workers Alliance (an organization that advocates for domestic workers, including home care workers), National Employment Law Project (a nonprofit organization that advocates for workers' rights), the PJC, and SEIU Local 500 (a multisector union in Maryland and Washington, D.C.).⁹⁸ On April 2, 2020, this coalition sent a letter to Governor Hogan setting out five requests: (1) require that home care agencies inform their direct care workers that the Governor has designated them essential workers, and they are therefore entitled to free childcare; (2)

Medicaid%20COVID19/14_04.09.2020%20-%20COVID-19%2014_Waiver%20Program%20Telehealth%20and%20Telephonic%20Guidance_rev-%20Final.pdf.

96. *Orders and Guidance, supra*, note 92.

97. Letter from Md. Coal. for Home Care Workers, to Lawrence J. Hogan Jr., Governor, State of Md. 1, 1 (Apr. 2, 2020), <http://www.publicjustice.org/wp-content/uploads/2020/08/home-care-ltr-4.2.20.pdf>.

98. *Id.* See also *Who We Are*, 1199SEIU FUNDS, <https://www.1199seiubenefits.org/about-1199seiu-funds/who-we-are/> (last visited Oct. 7, 2020); *About*, ALZHEIMER'S ASS'N, <https://www.alz.org/about> (last visited Oct. 7, 2020); *Policy Agenda*, CARING ACROSS GENERATIONS, <https://caringacross.org/policy-agenda/> (last visited Oct. 7, 2020); *Who We Are*, CAROLINE CTR., <https://caroline-center.org/who-we-are> (last visited Oct. 7, 2020); *About LeadingAge Maryland*, LEADINGAGE MD., <https://www.leadingagemaryland.org/page/about> (last visited Oct. 7, 2020); *Centers for Independent Living (CILs)*, MD. DEP'T. OF AGING, <https://aging.maryland.gov/accesspoint/Pages/Centers-for-Independent-Living.aspx> (last visited Oct. 7, 2020); *About the National Domestic Workers Alliance*, NAT'L DOMESTIC WORKERS ALL., <https://www.domesticworkers.org/about-us> (last visited Oct. 7, 2020). *About Us*, NAT'L EMP. L. PROJECT, <https://www.nelp.org/about-us/> (last visited Jan. 26, 2021); SEIU Local 500, <https://www.seiu500.org/> (last visited Jan. 26, 2021).

require that home care agencies provide their direct care workers with personal protective equipment (PPE), soap, and hand sanitizer; (3) create clear guidance for care workers on pandemic-specific issues and require that all home care agencies distribute such guidance to their workers; (4) increase wages for Medicaid-funded home care workers through a wage pass-through; and (5) increase outreach, services, supports, and training to family caregivers.⁹⁹

The Secretary of the Maryland Department of Health responded on April 15, 2020, referencing the specific requests and indicating a willingness to collaborate but declining to provide any specific commitments.¹⁰⁰ The coalition then sent a second letter on April 17, 2020, refining and supplementing the initial requests with even more specific, detailed information.¹⁰¹ For example, regarding the request for pandemic-specific training for home care workers, the letter provided links to two free or low-cost options—one by the National Association of Health Care Assistants and the other by NextStep—and explained how the Department of Health could efficiently and inexpensively train every home care worker paid with Medicaid money in the State.¹⁰² The coalition received no response.¹⁰³ Many of the issues raised by the coalition in its April 2020 letters were later validated in an analysis published months later in *JAMA Internal Medicine* in August 2020.¹⁰⁴ It is unclear why the State chose not to follow the suggestions set out in these coalition letters. One reason may be its fear that more communication with workers, and more work requirements, may lead to the State being considered a joint employer.¹⁰⁵ Another may be the Hogan administration's reluctance to ask RSAs to take actions with regard to their home care workforce that might conflict with the fiction that these workers are truly independent contractors.

The practice of independent contractor misclassification—which shifts responsibilities and attendant costs from businesses to their workers—serves as a metaphor for how this country's various levels of government have shifted responsibility downward during the COVID-19 pandemic. The federal government has sought to push responsibility to the states for COVID-19 testing

99. Letter from Md. Coal. for Home Care Workers, *supra*, note 97, at 1–3.

100. Letter from Robert R. Neall, Sec'y, Md. Dep't. Health, to David Rodwin, Att'y, Pub. Just. Ctr. 1, 1, 3 (Apr. 15, 2020), <http://www.publicjustice.org/wp-content/uploads/2020/08/home-care-ltr-4-15-20.pdf>.

101. Letter from Md. Coal. for Home Care Workers, to Robert Neall, Sec'y, Md. Dep't Health 1, 1 (Apr. 17, 2020), <http://www.publicjustice.org/wp-content/uploads/2020/08/home-care-ltr-4.17.20.pdf>.

102. *Id.* at 2–3.

103. Alison Knezevich, *supra* note 63.

104. Madeline R. Sterling et al., *Experiences of Home Health Care Workers in New York City During the Coronavirus Disease 2019 Pandemic: A Qualitative Analysis*, *JAMA INTERNAL MED.* E1, E5 (Aug. 4, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2769096>.

105. MD. CTR. ON ECON. POL'Y, *supra* note 73, at 5–7.

(including obtaining the materials necessary to perform tests) and for the development and implementation of public health protocols (like masking and social distancing).¹⁰⁶ States like Maryland have mirrored the federal government's approach by leaving to counties the job of setting and enforcing social distancing standards for their jurisdictions, creating a confusing patchwork of messages and public health protocols that vary across a single state.¹⁰⁷

Similarly, rather than undertaking a coordinated effort to ensure that Governor Hogan's various orders were followed, the Hogan administration left responsibility for their implementation to individual employers like RSAs. Not surprisingly, RSAs did not undertake any coordinated effort to inform workers that they had been categorized as essential, and thus that they had been granted child care; rather, workers were left on their own to learn this information (or not), and then learn how to access the child care made available to them on paper.¹⁰⁸ Just as federal Paycheck Protection Program loans largely did not go to Black-owned businesses in Baltimore,¹⁰⁹ and instead went to better-resourced businesses, the benefits granted to essential workers largely did not go to home care workers and likely went to better-resourced "essential persons."¹¹⁰ The Hogan administration undertook no organized effort to inform Maryland's home care workers that they were categorized as essential or that they were entitled to this new child-care benefit. Many workers quit or reduced their work hours as a result.¹¹¹ And now these frontline workers are faced with the additional burdens

106. Sarah H. Gordon et al., *What Federalism Means for the US Response to Coronavirus Disease 2019*, JAMA HEALTH F. (May 8, 2020), <https://jamanetwork.com/channels/health-forum/fullarticle/2766033>.

107. *Social Gathering Limit: Frequently Asked Questions*, STATE OF MD. 1, 1 (June 12, 2020), https://commerce.maryland.gov/Documents/BusinessResource/FAQs_Social%20Gatherings_final.pdf.

108. Letter from Marlana R. Hutchinson, Acting Dir., Off. Long Term Servs. & Supports to Residential Serv. Agency Providers 1, 1, 3 (June 5, 2020), <https://mmcp.health.maryland.gov/Medicaid%20COVID19/Guidance%20Relating%20to%20Nursing%20and%20Personal%20Assistance%20Services%20During%20COVID-19%20Pandemic.pdf>; Md. Exec. Order No. 20-03-25-01 (Mar. 13, 2020), http://marylandpublicschools.org/Documents/HP/1863_001.pdf.

109. Holden Wilen, *Left Behind: Data Shows Black-Owned Businesses in Baltimore Were Largely Shut Out of PPP Funding*, BALT. BUS. J. (July 31, 2020, 7:00 AM), <https://www.bizjournals.com/baltimore/news/2020/07/31/baltimore-black-owned-businesses-shut-out-of-ppp.html>.

110. Adie Tomer & Joseph W. Kane, *How to Protect Essential Workers During COVID-19*, BROOKINGS (Mar. 31, 2020), <https://www.brookings.edu/research/how-to-protect-essential-workers-during-covid-19/>.

111. Sterling et al., *supra* note 104.

of getting training, PPE, childcare, and other critical resources, all in the middle of a pandemic.¹¹²

C. *Misclassification Creates Perverse Incentives that Interfere with Effective Management of the Pandemic*

Misclassification also creates perverse incentives for home care businesses that make it harder to effectively manage the pandemic. Businesses that properly classify their employees regularly impose additional training or work requirements on them. However, businesses that misclassify their workforce may want to avoid doing so to maintain the fiction that their workers are independent contractors, not employees subject to their control.¹¹³

This problem manifests in numerous ways. For example, businesses that misclassify their home care workers may want to avoid providing their workers with critically important COVID-19 training.¹¹⁴ These home care agencies may believe that providing training would demonstrate a degree of control that in a court of law would support a finding of an employment relationship.¹¹⁵ This belief is harmful because appropriate training of home care workers is necessary to protect them, their families, their communities, and those for whom they care.¹¹⁶ Agencies could and should train workers on how they can minimize their risk of becoming infected with the virus or infecting others, including those for whom they care, a population that includes people whose age or disabilities may already increase the likelihood of worse outcomes if they are infected.¹¹⁷ The content of such training could include information on how the virus spreads, what environments and activities present the most risk, how to properly socially distance, what sorts of masks provide the most protection, and how to properly use and care for masks and other PPE. As it stands now, though, very few workers are receiving this potentially lifesaving training.¹¹⁸

As a second example, businesses that misclassify employees as independent contractors are negatively incentivized not to provide their home care workers with supplies like masks and hand sanitizer.¹¹⁹ This is because some analyses

112. Theresa A. Allison, et al., *Extreme Vulnerability of Home Care Workers During the COVID-19 Pandemic—A Call to Action*, JAMA INTERNAL MED. E1, E1 (Aug. 4, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2769095>.

113. Rick A. Pacynski, *Legal Challenges in Using Independent Contractors*, 72 MICH. BAR J. 671, 672 (1993).

114. Sterling et al., *supra* note 104.

115. David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 155 (2015).

116. Sterling et al., *supra* note 104.

117. *Control and Prevention*, U.S. DEP'T LAB.: OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/SLTC/covid-19/controlprevention.html> (last visited Oct. 7, 2020).

118. Sterling et al., *supra* note 104.

119. Knezevich, *supra* note 63.

regarding employment classifications examine whether the worker is required to use their own tools or equipment.¹²⁰ Home care agencies may believe that providing their workers with masks and hand sanitizer would increase the likelihood that a court would find the agencies to be the workers' employers.¹²¹ Without covering such essentials for home care workers, workers are left to use their own meager wages to buy the masks and hand sanitizer needed to do their jobs. This is especially dangerous given that many home care workers rely on public transit to reach the homes of those for whom they care, and many workers care for multiple individuals in a single day. Workers may not have money to purchase enough masks and hand sanitizer to follow recommendations such as changing masks between patients.¹²²

IV. BARRIERS TO CORRECTING THE PROBLEM

If misclassification of home care workers is so harmful, why does it persist? First, policymakers respond to organized, well-funded constituencies, and there is currently no such constituency for home care workers in Maryland.¹²³ Since Governor Hogan's 2015 termination of the independent provider program—through which the union AFSCME represented about 4500 home care workers—there has not been any unionized home care in Maryland.¹²⁴ No private home care agency is unionized; unions cite the difficulty of organizing workers who often do not even know each other, given that their workplaces are so spread out.¹²⁵ This leaves home care workers laboring in isolation and without unions to organize and advocate for them. While advocates in Maryland did create an ad hoc coalition to advocate for the shared interests of workers and consumers, the Hogan administration ignored their efforts.¹²⁶ Unions that represent large worker constituencies are more effective at demanding action;¹²⁷ this is less true for ad hoc coalitions comprised largely of non-profit actors.

Business interests, however, are both organized and well-funded.¹²⁸ These interests are adept at consolidating and leveraging power through trade

120. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141–42 (4th Cir. 2017).

121. *Mid-Continent Casualty Co. v. Davis*, 683 F.3d 651, 655, 657 (5th Cir. 2012).

122. Knezevich, *supra* note 63.

123. *Homecare*, 1199 SEIU UNITED HEALTHCARE WORKERS E., <https://www.1199seiu.org/homecare> (last visited Oct. 6, 2020).

124. *Id.*

125. Knezevich, *supra* note 63.

126. Letter from Md. Coal. for Home Care Workers, *supra* note 98, at 1.

127. James B. Kau & Paul H. Rubin, *The Impact of Labor Unions on the Passage of Economic Legislation*, 2 J. LAB. RSCH. 133, 141 (1981).

128. *Lobbying Strategies and Tactics*, BRITANNICA, <https://www.britannica.com/topic/interest-group/Lobbying-strategies-and-tactics> (last visited Oct. 6, 2020) [hereinafter *Lobbying Strategies and Tactics*].

associations.¹²⁹ These trade associations hire skilled—and expensive—lobbyists whose job it is to influence legislators.¹³⁰ During Maryland’s 2020 legislative session, the PJC introduced two similar bills designed to address the problem of misclassification, both of which are discussed in greater detail below.¹³¹ Both had hearings in the Economic Matters Committee of the Maryland House of Delegates on March 10, 2020.¹³² House Bill 1448, which addressed misclassification generally, garnered written opposition testimony from three of Maryland’s most powerful corporate interests: Maryland Chamber of Commerce, the National Federation of Independent Business, and Associated Builders and Contractors.¹³³ House Bill 1415, which addressed misclassification in the home care industry, garnered written opposition from the home care industry trade association—the Maryland National Capital Home Care Association.¹³⁴ The lobbyists who represent these business groups have personal relationships with legislators, who listen closely to their arguments.¹³⁵ While the bills had written and oral testimony in their favor from a broad cross section of worker and consumer groups, as well as the Office of the Attorney General, it is extraordinarily difficult to overcome the power of the business lobby, which can afford to keep numerous full-time lobbyists in Annapolis.¹³⁶

129. *Id.*

130. *Trade Association*, BRITANNICA, <https://www.britannica.com/topic/trade-association> (last visited Oct. 6, 2020). *See also* Paul Sullivan, *What the Small Player Can Expect When Using a Lobbyist*, N.Y. TIMES (Jan. 25, 2013), <https://www.nytimes.com/2013/01/26/your-money/what-the-small-player-can-expect-when-using-a-lobbyist.html>; *Lobbying Strategies and Tactics*, *supra* note 129.

131. H.B. 1448, 2020 Gen. Assemb., Reg. Sess. (Md. 2020); H.B. 1415, 2020 Gen. Assemb., Reg. Sess. (Md. 2020).

132. *Legislation Details for H.B. 1415*, MD. GEN. ASSEMBLY, <http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/HB1415?ys=2020RS> (last updated Sept. 22, 2020); *Legislation Details for H.B. 1448*, MD. GEN. ASSEMBLY, <http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb1448?ys=2020RS> (last updated Sept. 22, 2020).

133. H.B. 1448, 2020 Gen. Assemb., Reg. Sess. (Md. 2020). *See also* Letter from Maryland Chamber of Commerce to Chairman Davis and Members of the Maryland House Economic Matters Committee (Mar. 10, 2020) (on file with Maryland General Assembly); Letter from National Federation of Independent Businesses-Maryland to Chairman Davis and Members of the Maryland House Economic Matters Committee (Mar. 10, 2020) (on file with Maryland General Assembly); Letter from Associated Builders and Contractors, Inc. to Chairman Davis and Members of the Maryland House Economic Matters Committee (Mar. 10, 2020) (on file with Maryland General Assembly).

134. Letter from Maryland-National Capitol Homecare Association on H.B. 1415 to House Econ. Matters Committee 1, 1 (Mar. 10, 2020), http://mgaleg.maryland.gov/cmte_testimony/2020/ecm/4695_03102020_103652-788.pdf.

135. Josh Kurtz, *Annapolis Firm Adds Govt. Relations Consultant for Health Care Work*, MD. MATTERS (Jan. 6, 2020), <https://www.marylandmatters.org/blog/annapolis-firm-adds-govt-relations-consultant-for-health-care-work/>.

136. H. ECON. MATTERS COMM., REPORT ON COMM. TESTIMONY AND WITNESS SIGNUP HB1415, Md. Gen. Assemb. (Mar. 10, 2020).

Second, misclassification of home care workers persists because it saves home care agencies money.¹³⁷ Payroll taxes, unemployment and workers' compensation insurance, provision of health care under the Affordable Care Act, and other obligations can increase a business's costs by up to forty percent.¹³⁸ Maryland compensates home care agencies just \$18.03 per hour for Medicaid-funded home care, and as a result many home care employers that rely on Medicaid funding would rather risk a wage-theft lawsuit than survive on very narrow profit margins.¹³⁹

Third, misclassification persists because of "industry practice" and the power of inertia. Perhaps because most home care workers were excluded from coverage under the FLSA for so long, home care employers became accustomed to classifying their workers however they wanted without the threat of a FLSA suit.¹⁴⁰ Further, in establishing their business policies and practices, many home care agencies rely not on the advice of attorneys, but on word of mouth from others in the community.¹⁴¹ Until there is more enforcement to hold offending employers accountable, these longstanding industry dynamics will likely continue to make it so that many home care agencies misclassify. Several home care agency defendants that the PJC has sued have cited industry practice as an explanation for their classification of home care workers as independent contractors. These defendants have sought to use that supposed reliance to escape FLSA's three-year statute of limitations for "willful" violations and enhanced damages under both FLSA and Maryland's wage laws.¹⁴² Such arguments generally fail, but they show the power of enduring and self-serving industry norms.

Fourth, the problem persists because it is diffuse, meaning it is not concentrated in any one location, and is therefore less visible. The nature of home care work is that it is spread out in the community rather than in a single workplace.¹⁴³ This leads to far fewer opportunities for workers to talk with

137. See LEBERSTEIN & RUCKELSHAUS, *supra* note 4 ("In key industries in our economy, however, independent contractor misclassification is prevalent and has become standard operating practice for companies looking to save on payroll costs, outbid competitors, or avoid workplace regulations.").

138. *Id.* at 4.

139. Caitlin Connolly, *Home Care Workers Call for End to Wage Theft*, NAT'L EMP. L. PROJECT (May 2, 2016), <https://www.nelp.org/blog/home-care-workers-call-for-end-to-wage-theft/>.

140. Caitlin Connolly, *Independent Contractor Classification in Home Care*, NAT'L EMP. L. PROJECT (Dec. 31, 2015), <https://nelp.org/publication/independent-contractor-classification-in-home-care/>.

141. *How to Start a Home Health Care Business*, TRUIC, <https://howtostartanllc.com/business-ideas/home-care/> (last visited Oct. 8, 2020).

142. *Aytch v. Trulife Health Servs., LLC*, No. CV ELH-17-2769, 2018 WL 1784461, at *1 (D. Md. Apr. 12, 2018).

143. PHI NAT'L, U.S. HOME CARE WORKERS: KEY FACTS 11 n.1 (2019).

coworkers about their wages and working conditions, which stymies the spread of knowledge about workers' rights and makes it harder to bring collective- and class-action lawsuits challenging unlawful practices like misclassification.¹⁴⁴

Fifth, misclassification persists because Maryland's current administration is focused more on implementing the message of Governor Hogan's slogan that the State is "open for business" than on proactive enforcement of wage laws.¹⁴⁵ Maryland's Labor and Employment Code grants the Commissioner of the Department of Labor's Division of Labor and Industry the authority to conduct investigations to determine whether workers' wage rights have been violated on the Commissioner's own initiative, even without a worker's complaint.¹⁴⁶ Nevertheless, the State's Department of Labor is mostly reactive, relying on individual worker complaints rather than proactive investigations of problematic industries.¹⁴⁷ A greater commitment to strategic enforcement—including proactive investigations of high-violation industries, regardless of whether individual workers have filed complaints—would help reduce misclassification.¹⁴⁸

V. SOME SOLUTIONS TO ADDRESS THE PROBLEM OF MISCLASSIFICATION OF HOME CARE WORKERS

Despite the long history and continued prevalence of home care agencies misclassifying their home care workers, a number of relatively simple solutions exist that can help remedy the problem.

A. *Training for Workers*

All Certified Nursing Assistant (CNA) and Geriatric Nursing Assistant (GNA) certificate programs should include requirements to educate students about independent contractor misclassification, how to spot it, and what to do about it. Before the pandemic, I regularly gave presentations to such CNA/GNA programs in the Baltimore area. Many of the students have experience working as home care workers, because in Maryland a CNA/GNA certificate is not needed to provide home care services.¹⁴⁹ A great many of these students were

144. Kalena Thomhave, *Who Cares for the Care Workers?*, AM. PROSPECT (Dec. 21, 2018), <https://prospect.org/economy/cares-care-workers/>.

145. Debbi Wilgoren, *Gov. Larry Hogan's State of Business Address: 'The Fight for Maryland's Future'*, WASH. POST (June 4, 2019), https://www.washingtonpost.com/local/md-politics/gov-larry-hogans-state-of-business-address-the-fight-for-marylands-future/2019/06/04/6befeb8c-8705-11e9-98c1-e945ae5db8fb_story.html.

146. MD. CODE ANN., LAB. & EMPL. § 3-103(a) (2017).

147. *Wage Issues – Having Problems with My Pay*, MD. DEP'T. OF LAB. <https://www.dllr.state.md.us/labor/wagepay/wpremedies.shtml> (last visited Dec. 16, 2020).

148. DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC IMPROVEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 83 (2010).

149. Md. Code Regs. 10.07.05.11 (2020).

misclassified. Educating workers about their rights can help them question workplace policies, avoid employers with bad policies, and decide whether and how to challenge such policies, including through litigation.

B. *Guidance, Reporting, and Enforcement*

States should pass legislation, similar to that which the PJC is advancing, that provides for guidance, reporting, and enforcement: guidance for home care agencies on misclassification, reporting by those agencies to the state of wage and employment classification data for Medicaid-funded home care, and increased enforcement by state agencies to eliminate misclassification in the home care industry. A bill the PJC championed during the 2020 legislative session with Maryland Delegate Terri Hill, a medical doctor and advocate for racial equity, sought to accomplish these goals in the following ways.¹⁵⁰ First, House Bill 1415 required that State agencies collaborate to produce a short, plain-language guidance document concerning the application of Maryland's wage laws to the employment of home care workers by RSAs and to update that document every year.¹⁵¹ This guidance document would include (1) relevant definitions of "employ," "employee," "employer," and "independent contractor;" (2) the concept of independent contractor misclassification and the potential for legal liability arising from it; and (3) information on how RSAs can avoid misclassifying their workers.¹⁵² The bill then required RSAs to certify on an annual basis that they had read and would comply with the most recent version of the guidance document.¹⁵³ These guidance provisions sought to eliminate the potential role of RSAs claiming ignorance in setting employment classification policies.

Next, the bill required RSAs to report to the State the hourly wage rate, employment classification, and overtime pay practices for every worker who provides care funded by Medicaid.¹⁵⁴ The State already requires use of a computerized system through which workers phone in and out of their shifts at the homes of Medicaid recipients.¹⁵⁵ The bill would have added a few columns to the automatically generated spreadsheet that already shows which worker

150. H.B. 1415, 2020 Gen. Assemb., Reg. Sess. (Md. 2020). *See also* Luke Broadwater, *Democratic Del. Terri Hill of Howard County to Enter Race for U.S. Rep. Elijah Cummings' Seat in Congress*, BALTIMORE SUN (Nov. 18, 2019), <https://www.baltimoresun.com/politics/bs-md-pol-hill-congress-20191118-hbbgpvhp3zakjdmv6uxox6ka4-story.html>.

151. Md. H.B. 1415.

152. *Id.*

153. *Id.*

154. *Id.*

155. *In-Home Supports Assurance System (ISAS): Frequently Asked Questions (FAQs) for Providers*, MD. DEP'T OF HEALTH, <https://mmcp.health.maryland.gov/longtermcare/Resource%20Guide/05.%20ISAS/Additional%20FAQs%20and%20Contact%20Resources/ISAS%20FAQ%20Provider%20Issues%20CFC+CO%20Providers.pdf> (last visited Jan. 27, 2021).

provided care through which RSA to which Medicaid recipient, along with the clock-in and clock-out times of that worker each shift.¹⁵⁶ Without such a reporting requirement, the State has no knowledge of whether workers paid with state money are classified as employees or independent contractors, how much they are being paid, or whether they receive overtime pay for hours worked beyond forty in a work week. It is bad policy for a state to ignore whether its money is used to support good jobs or to exploit workers.¹⁵⁷

Finally, the bill sought to encourage enforcement of existing wage laws in two ways. It instructed relevant State agencies to coordinate to ensure that RSAs do not misclassify home care workers as independent contractors¹⁵⁸ and further instructed the State Department of Health not to issue or renew a license to an RSA found to be misclassifying its home care workers.¹⁵⁹

Despite garnering support from the American Association of Retired Persons of Maryland, 1199SEIU, the Maryland Office of the Attorney General, and other influential actors, and despite a successful hearing, the bill did not progress in Maryland's 2020 legislative session, which was cut short by the pandemic.¹⁶⁰ The PJC is hopeful that a version of this guidance, reporting, and enforcement bill will make further progress in the next session.

C. *Strong Independent Provider Programs with Union Representation*

Rather than insisting that all Medicaid-funded home care be provided by private agencies, Maryland should restore and revitalize an independent provider program. Many states have such programs.¹⁶¹ Maryland's decision to cancel its version in 2015 was devastating for workers and consumers alike; workers lost higher pay, and consumers lost the greater flexibility the program offered.¹⁶² A robust independent provider program like California's—where the State ensures that workers are properly classified and covered by the social safety net—is one way to reduce misclassification.¹⁶³

D. *Increase Medicaid Reimbursement Rates and Include a Wage Pass-Through to Workers*

As noted above, one reason that home care agencies are motivated to misclassify is the low Medicaid reimbursement rate they receive. A wage pass-

156. *Id.*

157. *See, e.g.*, Md. State Fin. & Proc. 18-101-09 (requiring payment of a living wage for certain state service contracts).

158. Md. H.B. 1415.

159. *Id.*

160. Legislation Details for H.B. 1415, *supra* note 132.

161. SARAH LEBERSTEIN ET AL., NAT'L EMP. L. PROJECT, UPHOLDING LABOR STANDARDS IN HOME CARE 10-11 (2015).

162. MD. CTR. ON ECON. POL'Y, *supra* note 73, at 7.

163. LEBERSTEIN ET AL., *supra* note 161, at 12-13.

through is an increase in reimbursement rates for Medicaid-funded direct services with a requirement that a certain amount of the increase be “passed through” to the worker.¹⁶⁴ A wage pass-through could also be implemented in a manner similar to the more familiar “medical loss ratio,” i.e., the percentage of funds spent on things other than care.¹⁶⁵ Increasing the Medicaid reimbursement rate would decrease the incentive that home care agencies have to misclassify their home care workers, allowing them to make a greater profit without misclassifying.¹⁶⁶

E. Encourage the Establishment of Home Care Cooperatives

Worker-owned home care cooperatives, like Cooperative Home Care Associates (CHCA) in the Bronx, operate with different incentives than most for-profit home care agencies.¹⁶⁷ They pride themselves on job quality and retention.¹⁶⁸ Unlike a typical for-profit home care agency, CHCA offers a free, month-long training for workers in both English and Spanish; mentorship for newer workers; full-time hours; above-average wages; employment supports; and opportunities for career advancement and worker-ownership.¹⁶⁹ Unsurprisingly, better jobs are associated with higher retention: whereas turnover rates in the home care industry can exceed sixty percent, CHCA’S turnover rate is about twenty percent.¹⁷⁰ Given the predominance of Black women in the home care workforce, worker-owned cooperatives also provide an opportunity to increase Black-owned businesses. Encouraging the establishment of more such cooperatives would also improve job quality and help reduce misclassification without relying on government policy or the priorities of changing state and federal administrations.

VI. CONCLUSION

Misclassification of home care workers as independent contractors was a major problem before the pandemic, one that fell disproportionately on the women of color who predominate in the workforce. Misclassification is now a

164. OFF. DISABILITY, AGING & LONG-TERM CARE POL’Y, U.S. DEP’T OF HEALTH & HUM. SERVS., STATE WAGE PASS-THROUGH LEGISLATION: AN ANALYSIS 1 (2002).

165. *Medical Loss Ratio*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/Medical-Loss-Ratio> (last visited Dec. 16, 2020).

166. OFF. DISABILITY, AGING & LONG-TERM CARE POL’Y, *supra* note 164.

167. Kaitlyn Mattson, *More Home Care Agencies May Become Employee-Owned as Aging Owners Exit*, HOME HEALTH CARE NEWS (Oct. 2, 2018), <https://homehealthcarenews.com/2018/10/more-home-care-agencies-may-become-employee-owned-as-aging-owners-exit/>.

168. *Id.*

169. *See generally* COOP. HOME CARE ASSOCS., <http://www.chcany.org/> (last visited Dec. 16, 2020).

170. Mattson, *supra* note 167.

public health hazard that increases risks to workers, consumers, and communities, and will make it more difficult to address the growing need for home care. Preventing and remedying misclassification will improve the lives of workers, help meet the country's growing need for these workers, and improve health outcomes. Advocates and policymakers should prioritize efforts to reduce the misclassification of home care workers as an issue of race, gender, and health equity, as well as general public health.