

Kraft, Tammy

Subject: FW: FW: SB 180 Hearing
Attachments: RSA-PCA Guidance Document.pdf

From: Matt Auman <matt.auman@homecentris.com>
Sent: Friday, February 10, 2023 10:48 AM
To: Beidle, Pamela Senator <Pamela.Beidle@senate.state.md.us>
Subject: SB 180 Hearing

Senator Beidle,

I am writing to thank you for sponsoring SB 180. I was in the audience at the hearing yesterday and my name was invoked a few times. As an introduction, I am the CEO of HomeCentris Healthcare, Maryland's largest provider of Medicaid home care services. I am also on the board of MNCHA, Maryland's home care trade association. We are strongly supporting this bill as Danna Kaufmann testified.

This bill is so important for many reasons that were discussed yesterday. Most importantly, it would level the competitive playing field for all of Maryland's RSA, it would allow for better training of caregivers, it would ensure employee protections to a class of caregivers that is not benefitting from them now, and it will increase revenue to Maryland as payroll taxes will be collected more reliably.

I do not agree with the lone dissenting witness yesterday that converting from a 1099 model to a W2 model would be administratively burdensome. In 2018, we made this same conversion to a W2 model for nearly 1,300 caregivers in approximately six months. Most RSAs have 10-50 caregivers which would not pose a large burden. I also do not agree with him regarding the legality of the 1099 model. As the Maryland DOL, Attorney General, and Department of Health wrote in the attached Guidance Document, a 1099 model is a misclassification of workers and "illegal." See attached. Unfortunately, this Guidance Document has done nothing to move RSA providers to adopt a W2 model and that is why attaching Medicaid reimbursement to compliance, as SB 180 does, is necessary.

If there is anything I can do to help support this bill with your fellow committee members, please let me know. I would be happy to meet with them and discuss the bill in detail.

Thank you.

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Understanding how Maryland's employee protection laws apply to residential service agencies (RSAs) and personal care aides (PCAs)

Maryland's RSAs sometimes wrongly classify PCAs (that is, anyone paid to provide personal care services) as independent contractors rather than employees.¹ When this happens, it is called *worker misclassification* and it is illegal. This guidance document explains (1) some differences between employees and independent contractors in the context of personal care, (2) worker misclassification and how it can cost RSAs money and hurt PCAs, and (3) some steps RSAs can take to ensure that their classification policies comply with Maryland's Labor and Employment Code.

1. What is the difference between "employees" and "independent contractors"?

- **There are two kinds of workers under Maryland's employment laws: employees and independent contractors.** In general, independent contractors are in business for themselves, while employees are not. If an RSA pays a PCA an hourly wage to perform personal care and oversees the PCA's work, the worker should usually be classified as an employee. A worker can sometimes be an "employee" under one law and an "independent contractor" under another, because different laws have different purposes and define these terms differently. Even if the IRS has accepted the classification of PCAs as independent contractors, you should not assume that a court would reach the same conclusion under Maryland's employee protection laws, which are humanitarian statutes designed to broadly protect workers and are therefore more favorable to employees.
- **Maryland's wage laws and sick leave law—including the Wage and Hour Law, Wage Payment and Collection Law, and Healthy Working Families Act—have a very broad definition of employee.** Most workers are employees, not independent contractors, under these laws. A worker's status as an employee cannot be changed by a contract or other document (like an "independent contractor agreement") that labels the worker as an independent contractor. To determine a worker's proper classification, courts consider factors related to whether workers are in business for themselves. When the employer exercises, or has the right to exercise, direction and control over the performance of an individual's work, the worker is an employee and not an independent contractor. The Maryland Labor and Employment Code defines the term "employ" broadly as "to engage an

¹ Maryland law defines "personal care" as "a service that an individual normally would perform personally, but for which the individual needs help from another because of advanced age, infirmity, or physical or mental limitation." Md. Code Ann., Health – Gen. Article § 19-301(n)(1). Personal care includes help in walking, getting in and out of bed, bathing, dressing, feeding, and general supervision and help in daily living. *Id.* § 19-301(n)(2)(i)-(vi).



individual to work,” and expressly includes “allowing an individual to work” and “instructing an individual to be present at a work site.”

- Applying these factors to RSAs and PCAs, (1) RSAs typically have authority to set and enforce conduct policies, including policies designed to ensure that workers comply with the Maryland Department of Health’s rules for Medicaid providers; (2) RSAs typically pay PCAs an hourly wage, which means that PCAs have no opportunity for profit or loss dependent on any managerial skill; (3) PCAs typically do not invest in their own equipment and cannot hire others to do the work instead of them; (4) personal care does not require advanced certifications and does not involve business-like skill; (5) PCAs typically have a working relationship with RSAs that is at least several months long; and (6) RSAs are typically in the business of providing personal care. Therefore, PCAs are more likely to be RSAs’ employees than independent contractors within the meaning of Maryland’s wage and sick leave laws. In cases where PCAs recruit their own clients, that fact alone does not make them independent contractors if factors otherwise suggest the existence of an employment relationship.
- **Maryland’s unemployment insurance law also has a broad definition of employee.** Under this law, a PCA is presumed to be an employee, not an independent contractor, unless the RSA can satisfy a test called the “ABC test.” Applying this test to RSAs and PCAs, (1) RSAs typically have the ability to control or direct PCAs’ work, (2) PCAs do not customarily have their own business, and (3) although the work is typically performed in individuals’ homes, personal care is typically the type of work that RSAs perform. Therefore, PCAs are more likely to be employees than independent contractors within the meaning of Maryland’s unemployment insurance law. For illustrations of how Maryland’s unemployment insurance law applies to workers like PCAs, see the [Code of Maryland Regulations \(COMAR\) 09.32.01.18-3](#).
- **Maryland’s workers’ compensation law also defines employee broadly.** Under this law, a worker is presumed to be an employee unless the employer can show that the worker is an independent contractor under the “common law” test. Applying this test to RSAs and PCAs, (1) RSAs typically have the power to hire PCAs, (2) RSAs typically pay wages to PCAs, (3) RSAs typically have the power to fire PCAs, (4) RSAs typically have the power to control PCAs’ conduct, and (5) personal care is typically part of the regular business of RSAs. Therefore, in the context of RSAs, PCAs are more likely to be employees than independent contractors within the meaning of Maryland’s workers’ compensation law.



2. How can misclassification of PCAs as independent contractors hurt RSAs and PCAs?

- **Misclassification hurts RSAs because it is illegal and can lead to costly investigations and lawsuits.** The Maryland Department of Labor or U.S. Department of Labor may investigate, require payment of unpaid wages and money damages to workers, and even get a court order requiring the RSA to change its classification and compensation practices. In addition, PCAs may sue an RSA for unpaid wages that they should have been paid as employees. PCAs may bring these cases individually or, in some circumstances, as class actions on behalf of other workers. A court may order the RSA to pay workers damages up to three times the wages they should have been paid. An RSA held liable under Maryland's Wage and Hour Law and Maryland's Wage Payment and Collection Law may also be responsible for the attorneys' fees of PCAs who sue them. Under these laws, individual owners of a corporation (including an RSA) may also be held personally liable for unpaid wages and attorneys' fees, putting their personal assets at risk.
- **Misclassification can also have severe tax consequences for RSAs.** If the Maryland State Department of Assessments and Taxation (SDAT) or U.S. Internal Revenue Service (IRS) finds that an RSA has failed to pay employment taxes for PCAs who should have been classified as employees, SDAT and/or the IRS may require that the RSA pay tens of thousands of dollars—or more—in back taxes and penalties.
- **Misclassification also hurts PCAs by denying them important legal protections.** These include unemployment benefits, workers' compensation, sick leave, and the right to overtime pay (for hours worked beyond 40 in a workweek) and travel-time pay (for time spent traveling from one client's home to another client's home).

3. What steps can an RSA take to ensure it follows Maryland's employee protection laws?

- **Do: Talk to a lawyer.** Employment law can be complicated. Lawyers who practice employment law can help ensure that your RSA follows Maryland law. While it may cost money to ask a lawyer about your RSA's worker classification policies, a labor investigation or a lawsuit could cost far more.
- **Do: Visit the Maryland Department of Labor's [website](#) for guidance and to learn about various outreach programs offered by the Department to employers.**



- **Do not: Assume something is legal just because others do it.** People sometimes assume a business practice is legal just because other businesses do it. Some rely on advice from friends when establishing their business's worker classification policies. But this can be dangerous, especially in industries where legal violations are common. And in Maryland, "industry practice" is not a defense to a suit for unpaid wages.
- **Do not:** Assume that if you employ a PCA on a salary basis that you don't have to pay overtime pay. PCAs are entitled to overtime wages.
- **Do: Take action to correct your RSA's employment classification policies if you believe they may be incorrect.** Changing the classification of your RSA's PCAs from independent contractors to employees does not mean you will automatically be subjected to lawsuits or liability. The best way to protect your business—and your own assets—is to make sure your RSA follows the law.



CERTIFICATION

To obtain an initial license from the Maryland Department of Health to operate as an RSA and every 3 years thereafter, an individual with authority over the RSA's pay or employment practices must complete the following certification.

I, _____ [print your name], certify that (1) I have read and understood the above guidance and (2) _____ [name of RSA] will comply with the Maryland Labor and Employment Code's requirements concerning the classification of employees.

If the RSA receives payments from the Maryland Department of Health for the provision of home care, personal care, or similar services through any Medicaid program (CFC, CO, CPAS, ICS, CP, or similar): I certify that _____ [name of RSA] does / does not [check one box] use personal care aides who have been classified as independent contractors.

Signature of individual with authority
over RSA's pay or employment practices

Date