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SB197: Residential Service Agencies - Reimbursement - Personal Assistance Services

Hearing of the Senate Finance Committee, Feb. 8, 2024

Position: FAVORABLE

The Public Justice Center (PJC) is a not-for-profit civil rights and anti-poverty legal services organization which seeks to advance social justice, economic and racial equity, and fundamental human rights in Maryland. Our Workplace Justice Project works to expand and enforce the right of low-wage workers to receive an honest day's pay for an honest day's work. **The PJC supports SB197, which would end the illegal misclassification of home care workers as independent contractors under certain Medicaid home care programs, improve the quality of home care jobs, and help address Maryland's home care workforce crisis at \$0 cost to the State of Maryland. The Maryland Department of Health is supporting the bill.**

Summary: SB197 will ensure that personal care aides (also known as home care workers) who work for home care agencies (called "residential service agencies" – RSAs – by the Health Code) under certain Medicaid programs are properly classified as employees and not illegally misclassified as independent contractors.

Combatting the illegal misclassification of employees as independent contractors—also known as “workplace fraud”—is a priority for Governor Moore, Comptroller Lierman, and Attorney General Brown.

- Real independent contractors have their own businesses, while employees do not. Calling an employee an “independent contractor” to avoid paying employment taxes and providing employee benefits like sick leave is called “misclassification” or “workplace fraud.”
- Just weeks ago, Governor Moore issued an executive order establishing a task force to combat this harmful practice. As the Governor’s press release noted, “Workplace fraud deprives workers of basic protections such as rights to minimum wage and overtime pay, health insurance coverage, and access to unemployment benefits. Businesses may also be put at a disadvantage when competitors misclassify workers. As a result, required taxes may be unpaid, which lowers state revenue and impacts funding to pay for critical public services.”¹
- As Gov. Moore noted, ending misclassification is “an important step toward a more equitable, competitive, and prosperous economy that lifts all Marylanders.”
- The press release also quotes Comptroller Lierman and Attorney General Brown, both of whom explained that misclassification hurts workers and law-abiding businesses alike.

¹ <https://governor.maryland.gov/news/press/pages/governor-moore-issues-executive-order-establishing-crossgovernmental-task-force-to-combat-workplace-fraud.aspx> The press release is also attached to this testimony.

When personal care aides are misclassified as independent contractors, it is both illegal and harmful.

- It is already illegal for the RSAs this bill covers² to classify personal care aides as independent contractors. If a worker's pay rate and schedule are set by an employer, and the employer can control how the work is done, that worker is an employee. Because of the structure of Maryland's Medicaid program, *all personal care aides this bill covers are already employees under the law*: RSAs set their pay, enforce their schedules, and ensure they comply with Medicaid rules.
- Misclassification hurts Maryland's personal care aides, those they care for, and law-abiding RSAs. These workers are not tax experts: they earn about \$15/hour and do the jobs available to them. When they are misclassified, they are cut out of the social safety net and lose protections like *sick leave, workers' compensation, health insurance*, and more – and they face a higher “self-employment” tax when they should be getting a tax refund. Misclassification also hurts those they care for by shrinking the size of the workforce. And it hurts law-abiding RSAs by forcing them to compete on an uneven playing field with RSAs that save money by misclassifying their workers.

SB197 is needed to stop the problem on the front end.

- Despite being illegal, the problem persists. More than 550 RSAs currently provide care through these Medicaid programs. Despite enforcement by the U.S. Department of Labor and guidance³ from the Maryland Office of the Attorney General, many RSAs still misclassify personal care aides as independent contractors. State and federal labor agencies do not have the resources bring so many RSAs to court, and most workers do not know their rights.
- This bill would fix the problem by providing that RSAs will only be reimbursed for in-home personal care under certain Medicaid programs if those who do the work are classified as employees. It is a simple solution to a serious problem.
- The bill does *not* prevent a home care worker from working as an independent contractor. Rather, the bill provides that if certain Medicaid programs are funding the work, the worker must be properly classified as an employee as the law requires.
- The bill's scope is limited. It does not apply to care paid out of pocket, by long-term care insurance, or under the Developmental Disabilities Administration.
- Most of the affected workers are already classified as employees. The bill's fiscal note shows that more than 80% of Medicaid-funded personal care aides are already classified as employees. The bill would not rock the industry – it would get the industry all the way to where it needs to be.
- MDH already has the classification data it needs to measure compliance. 2022's SB 600 / HB 544 – codified at § 19-4A-11(c) of the Health code – already provides the Maryland Department of Health with the information on worker classification that the Department needs to ensure compliance.

There is extraordinarily broad agreement that SB197 is the best way to tackle the problem.

- Most Maryland home care agencies support the bill. Most Maryland home care agencies support the bill because it would eliminate unfair competition.

² The bill covers personal care aides working for home care agencies and whose work is funded by Medicaid through the Maryland Department of Health's Office of Long Term Services and Supports.

³ <https://health.maryland.gov/ohcq/docs/Residential%20Service%20Agency%20Documents/2022-11-01%20RSA-PCA%20Guidance%20Document%20%281%29.pdf> The guidance document is also attached to this testimony.

- The Maryland Department of Health Supports the bill. For 2023's bill, MDH filed a letter of interest making clear that its only initial objection was an early effective date, but the agency supported the bill once its effective date was extended by a year. This year's bill reflects that agreement, and MDH is supporting it again this year.
- There is very broad support for the bill from other stakeholders. Supporters include consumer groups like AARP and Disability Rights Maryland, worker groups like 1199SEIU and the National Domestic Worker Alliance, legal experts like the National Women's Law Center and Women's Law Center of Maryland, and numerous home care agencies.

Improving home care job quality is a race equity issue and a gender equity issue.

- Maryland's home care workers are mostly Black women. About 90% are women and about 70% are Black. This majority women-of-color workforce deserves employee protections.
- The bill will decrease worker turnover and increase retention. The turnover rate for home care workers ranges between 60% and 80%. This extremely high turnover is traumatizing for those who rely on home care because of the intimacy of the work, involving help with bathing, toileting, dressing, etc.
- Home care workers and RSAs alike say employee status reduces turnover. During the 2023 hearings on this bill and the 2024 hearings in the House, multiple home care workers testified to this. Home care agencies also testified that transitioning from an independent contractor model to an employee model decreases turnover and does not cause workers to leave home care.

For these reasons, the PJC **SUPPORTS SB197** and urges a **FAVORABLE** report. Should you have any questions, please call David Rodwin at 410-625-9409 ext. 249.



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Governor Moore Issues Executive Order Establishing Cross-Governmental Task Force to Combat Workplace Fraud

Published: 1/11/2024

ANNAPOLIS, MD — Governor Wes Moore this week signed an [executive order](#) to renew and expand a cross-governmental task force dedicated to strengthening investigations and enforcement of laws regarding workplace fraud. The nine-member Joint Enforcement Task Force on Workplace Fraud, chaired by Maryland Department of Labor Secretary Portia Wu, includes Maryland Attorney General Anthony G. Brown and Comptroller Brooke E. Lierman.

"We will never tolerate the exploitation of Maryland workers," **said Gov. Moore.** "This order will help ensure that employees receive the pay and benefits they've earned while driving fair competition in the private sector. Today, we take an important step toward a more equitable, competitive, and prosperous economy that lifts all Marylanders."

[Workplace fraud](#) deprives workers of basic protections such as rights to minimum wage and overtime pay, health insurance coverage, and access to unemployment benefits. Businesses may also be put at a disadvantage when competitors misclassify workers. As a result, required taxes may be unpaid, which lowers state revenue and impacts funding to pay for critical public services.

"Companies that hire workers and misclassify them to circumvent our tax and labor laws are committing serious fraud that erodes basic rights and benefits, saddles workers with an undue financial burden, and undermines the economic well-being of our state," **said Comptroller Brooke E. Lierman.** "This executive order expands our ability to share information, coordinate resources, and investigate suspected workplace fraud to protect Marylanders and their families. We should all stand against this form of egregious theft. I thank Governor Moore for prioritizing this issue and I look forward to working as a partner in this initiative to build a stronger and fairer Maryland."

As outlined in the executive order, the task force will collaborate to share information and data across agencies and drive strategic and effective enforcement. It will identify industries where workplace fraud is more prevalent and focus efforts to address the problem, including stronger outreach to businesses and workers. The task force will also make recommendations on where regulations and laws may be strengthened.

"I commend Governor Moore's work to combat workplace fraud and protect Maryland workers and their families," **said Attorney General Anthony G. Brown.** "The reestablishment of the Joint Enforcement Task Force on Workplace Fraud is an important effort, along with our work with the Department of Labor to improve and enhance the role of my office and our resources to advance this critical priority. I look forward to continuing our work with the administration to ensure the relationship between Maryland employers and their employees remains fair and equitable."

The task force will advance the Moore-Miller Administration's efforts to make Maryland a fair and equitable place to work and do business. [Studies have shown](#) that workers of color, immigrants, young workers and those in low-wage employment are most at risk for exploitation, including misclassification and wage theft.

"This is a win for both businesses and workers," **said Maryland Department of Labor Secretary Portia Wu.** "Employees need to be classified correctly and paid fairly, and this keeps our businesses on a level-playing field in the competitive



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. Pursuant to Health General §19-4A-11, 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 individual to work,” and expressly includes “allowing an individual to work” and “instructing an individual to be present at a work site.”

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).

- 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.