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HB 489: Residential Service Agencies – Reimbursement – Personal Assistance Services

Hearing of the House Health and Government Operations Committee, February 23, 2023

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 HB 489**, which would ensure that home care workers who provide care under certain Medicaid programs are properly classified as employees and not misclassified as independent contractors.

Problem: Many of the personal care aides who provide in-home care under Medicaid programs are misclassified as independent contractors, denying them access to the social safety net and reducing job quality when Maryland faces a shortage of these important workers.

- Between 20,000 and 30,000 personal care aides work under Medicaid programs operated by the Maryland Department of Health's Office of Long Term Services and Supports,¹ which this bill concerns.
- Despite enforcement by the U.S. Department of Labor and a clear [guidance document](#) produced by the Office of the Attorney General,² many home care agencies (called "residential service agencies" – RSAs – by Maryland's Health Code) that employ personal care aides under these programs wrongly call the workers independent contractors. The widespread misclassification of these workers hurts everyone:
 - *It hurts workers* by worsening job quality, cutting them out of the social safety net (making it harder for them to get benefits like sick days and workers' compensation) and imposing on them a higher "self-employment" tax burden when they should be getting a tax refund.
 - *It hurts consumers* by disincentivizing RSAs from providing training to their workers, by shrinking the size of the workforce so many Marylanders depend on, and by increasing worker turnover, which – given the intimate nature of the work – can be traumatizing.
 - *It hurts law-abiding RSAs* that face unfair competition from other RSAs that choose to save money by shirking their obligations as workers' employers.
 - *It hurts the State of Maryland* by depriving it of employment tax revenue for things like the unemployment insurance trust fund – revenue Maryland and its workers depend on.

¹ These programs include the Home and Community-Based Options Waiver, Community First Choice, Community Personal Assistance Services, Increased Community Services, Program of All-Inclusive Care for the Elderly, Medical Day Care Services, and Model Waiver for Medically Fragile Children. HB 489 does not apply to any programs operated under the Developmental Disabilities Administration.

² This guidance resulted from the passage of 2021's HB 652, sponsored by Delegate Lily Qi. A copy of the guidance document is attached to this testimony.

HB 489's Solution:

- HB 489 would fix the problem by providing that the Maryland Department of Health only reimburse RSAs for in-home personal care provided under certain Medicaid waiver programs if the aides who do the work are classified as employees. It is a simple solution to a problem that has long eluded one.
- HB 489 does not assign a label to any employment relationship. Rather, it exercises Maryland's authority to decide what kinds of jobs public money should support. Maryland has long used this authority in other contexts, as shown by Maryland's Prevailing Wage Law (for public works contracts) and Living Wage Law (for certain state contracts for services). Maryland's home care workers are just as important as construction workers and also deserve the state's attention.
- Aside from Maryland's clear authority to decide what kinds of jobs it wants public dollars to support, the workers covered by this bill are employees under the law, not independent contractors: RSAs set their pay rates, enforce state rules and regulations, track their time, and often impose a variety of other controls over the terms and conditions of their work.
- HB 489 will level the playing field for law-abiding home care agencies, professionalize a marginalized workforce, improve quality of care, and ensure that public dollars are not used to violate the law.
- Last year's SB600 – codified at § 19-4A-11(c) of the Health code – already provides the Maryland Department of Health with the information it needs to ensure compliance with this year's HB 489.

Improving the quality of personal care jobs is a *race equity* issue and a *gender equity* issue.

- About 90% of Maryland's personal care aides are women and about 70% are Black.
- When these workers are misclassified as independent contractors, it hurts them, their families, and their communities.

For the foregoing reasons, the PJC **SUPPORTS HB 489** and urges a **FAVORABLE** report. Should you have any questions, please call David Rodwin at 410-625-9409 ext. 249.



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.