

Testimony of Sally Dworak-Fisher

National Employment Law Project

Support for Residential Service Agencies – Reimbursement – Personal Assistant Services (HB 489)

Hearing before the Health and Government Operations Committee

February 23, 2023

Sally Dworak-Fisher
Senior Staff Attorney

National Employment Law Project
1350 Connecticut Ave, NW
Suite 1050
Washington, DC 20036

(202) 315-5589
sdworak-fisher@nelp.org

The National Employment Law Project (NELP) is a 50-year-old non-profit, non-partisan research and advocacy organization specializing in employment policy. We partner with federal, state, and local lawmakers and local stakeholder groups on a wide range of workforce issues. Across the country, our staff is recognized as policy experts in areas such as unemployment insurance, wage and hour enforcement, minimum wage, and workplace protections for low-wage workers. NELP's work includes a focus on combatting misclassification of employees as independent contractors. **NELP supports HB 489 as a sensible solution to a serious problem.**

Independent contractor misclassification degrades working conditions, hurts law-abiding businesses, and depletes government coffers. Independent contractors run their own businesses and have the power to make investment decisions, set prices, and decide how and to whom to market themselves. Yet too many businesses mislabel their employees as independent contractors. Why? Because misclassifying employees as independent contractors helps the bottom line; this “payroll fraud” enables businesses to pocket up to 40% of payroll costs by avoiding employee-related taxes.¹ It also shifts business costs to workers and degrades working conditions. Misclassified employees lose minimum wage and overtime protections, workers’ compensation coverage, unemployment insurance, and the right to form a union and bargain collectively. They are also doubly penalized tax-wise, losing access to refunds for low-income employees while gaining significant tax burdens as supposedly “self-employed” business owners.

Law-abiding businesses and government coffers suffer too. As the United States Treasury Inspector General found, the practice “plac[es] honest employers and businesses at a competitive disadvantage.”² Cheating businesses pressure others to shed labor costs, creating a “race to the bottom” where following suit is necessary to remain competitive.³

State coffers also suffer as businesses avoid paying payroll taxes that fund social insurance programs. Conservative estimates suggest that the federal and state governments lose billions of dollars per year in unreported payroll taxes and unemployment insurance contributions.⁴

Misclassification is prevalent in occupations where workers of color are overrepresented, including direct care services. Misclassification is especially prevalent in labor-intensive, low-paid occupations, and where the work is performed in isolation, such as the in-home work that personal care aides provide.⁵ It is also strikingly racialized, occurring disproportionately in occupations in which people of color, including Black, Latinx, and Asian workers, are

¹ Françoise Carré, *(In)Dependent Contractor*, ECON. POL’Y INST. at 5 (Jun. 8, 2015), <https://files.epi.org/pdf/87595.pdf>. See also *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT’L EMP. L. PROJECT at 5 (Oct. 2020), <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>.

² Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success* at 1 (2018-IC-R002: Feb. 20, 2018), <https://www.tigta.gov/sites/default/files/reports/2022-02/2018IER002fr.pdf>.

³ See David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 139-41 (2017).

⁴ *Misclassification Huge Costs*, *supra* n. 14, at 2-3. See also Carré, *supra* n. 23, at 2.

⁵ See Carré, *supra* n. 1 at 6, *Huge Costs*, *supra* n. 1 at 4.

overrepresented, including the home care and personal care fields.⁶ Thus, workers of color are disproportionately denied bedrock workplace protections and benefits through misclassification, which exacerbates income inequality and economic insecurity for Black and brown communities.

Personal Care Aides providing care under the Medicaid programs affected by HB 489 are employees of Residential Service Agencies (RSAs). Independent contractors are business owners. They have the power to make decisions about how to increase profits, whether or when to risk a loss, what prices to charge and how to market the business; they negotiate work terms at arms-length. Personal care aides who provide care under Medicaid programs operated by the Maryland Department of Health’s Office of Long Term Services and Supports are *not* independent contractors to the RSAs. They perform care work integral to the RSA’s mission under terms and conditions set by the RSA. RSAs set pay rates, assign and monitor the work, track the amount of time worked, enforce compliance with Medicaid rules, and issue pay. Personal care aides are unquestionably employees of the RSAs.

HB 489 is a good government solution. Maryland has an interest in ensuring that Medicaid waiver monies—half of which are state dollars and half of which are federal—are properly spent on providing care, not misappropriated to support violations of the law. HB 489 promotes this interest. If passed, it will proactively prevent misclassification by ensuring that personal care aides are properly classified as employees by the RSAs that employ them. This is a common sense, good-government strategy to reduce misclassification and help ensure that RSAs comply with state employment law—an improvement that will level the playing field for RSAs while benefiting personal care workers the consumers for whom they care.

For these reasons, NELP supports HB 489 and urges a FAVORABLE report.

⁶ NELP analysis of March 2022 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, see *CPS Annual Social and Economic Supplement*, U.S. Census Bureau, <https://data.census.gov/mdat/#/search?ds=CPSASEC2022> (on file with author). See also PHI, *Direct Care Worker Disparities, Key Trends and Challenges* (Feb. 22, 2022), <https://www.phinational.org/resource/direct-care-worker-disparities-key-trends-and-challenges/> (women of color comprise majority of direct care workforce).