Testimony of Craig Becker

Counsel to the Plaintiff in *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007)
Associate General Counsel, Service Employees International Union
25 E. Washington St., Suite 1400
Chicago, IL 60602

on H.R. 3582, the Fair Home Healthcare Act

Before the Subcommittee on Workplace Protections of the
Committee on Education and Labor
United States House of Representatives
October 25, 2007

Chairwoman Woolsey, Ranking Member Wilson, and other distinguished members of the subcommittee:

Thank you for giving me the opportunity to appear before you today. When I appeared before the United States Supreme Court on April 16 of this year to argue on behalf of Evelyn Coke in the case that gives rise to the proposed bill, H.R. 3582, the Fair Home Healthcare Act, several of the Justices expressed concern about the additional cost that would result if homecare workers employed by third-party agencies were protected by the minimum standards contained in the Fair Labor Standards Act. I would liked to have responded by asking the Justices to look into the audience and see me client, Ms. Coke, who once cared for frail elderly and disabled individuals, sitting in her wheel chair, being cared for by her adult son. I would have liked to have responded in that manner so that the Justices could have understood the human consequences of holding down costs by excluding close to one million workers who provide physically and emotionally demanding and often life-sustaining care for the elderly and disabled in their homes the right to be paid the minimum wage and to receive extra pay when they work overtime. The conventions of argument in the high court prevented me from doing that so I was very pleased when your Committee invited me here today to testify. Unfortunately, Ms. Coke is now too ill to travel so I appear here today to speak not only for her but for the hundreds of thousands of homecare workers across the country like her who labor outside the protections of this country's most basic labor law.

I have represented individual workers and labor unions since 1982. I have taught labor and employment law at the UCLA School of Law, the University of Chicago Law School, and Georgetown Law School. I have published several articles on the Fair Labor Standards Act. For the past 15 years I have served as Associate General Counsel to the Service Employees International Union. The Union represents hundreds of thousands of homecare workers across the country. During that same time period, I have litigated a number of cases on behalf of homecare workers under the Fair Labor Standards Act, including the case recently decided by the Supreme Court, *Long Island Care at Home, Ltd. v. Coke*.[1]

The Fair Labor Standards Act and the Companionship Exemption

The Fair Labor Standards Act (FLSA), adopted in 1938, guarantees American workers a minimum wage and payment at a rate of one and one-half times their regular rate for hours worked in excess of 40 in one week.[2] Adoption of these minimum employment standards was based on a congressional finding that employment below such standards was "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[3]

However, the Act was not originally applied to domestic employees, maids, butlers, cooks, and similar employees who worked in private homes because regulating their working conditions was thought to fall outside Congress' power under the commerce clause. In 1961 and 1962, Congress extended the Act's coverage to employees employed in an "enterprise engaged in

commerce,"[4] including domestic employees so employed.[5] In 1974, Congress passed a sweeping set of amendments to the FLSA, extending the coverage of the Act in several significant respects, including to all domestic employees, even those employed solely by private households.[6] Congress' intent at that time was to afford nearly universal coverage. The House Committee Report explained that it was "the committee's intention to extend the Act's coverage in such a manner as to completely assume the Federal responsibility insofar as it is presently practicable."[7] Such a purpose was consistent with the Supreme Court's observation that "[b]readth of coverage" is "vital to [the Act's] mission."[8]

While generally extending the coverage of the Act in 1974, Congress adopted one narrow exception to the extension of coverage to domestic employees – excluding babysitters and individuals providing "companionship services to individuals who (because of age or infirmity) are unable to care for themselves."[9] In full, the resulting exemption from both the Act's minimum wage and overtime requirements covers:

> any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

Congress intended the exemptions of babysitters and companions to be parallel. Senator Harrison Williams, the primary sponsor of the amendments, defined a companion as an "elder sitter."[10] And both Committee Reports make clear that Congress did not intend exempt employees in either category to be "regular breadwinners or responsible for their families' support."[11] In adopting the exemption, Congress was "not concerned with the professional domestic who does this as a daily living."[12] Rather, Congress intended to exempt only the casual form of employment epitomized by the teenager from around the block who occasionally watches another family's children on a Friday night or "people who might have an aged father, an aged mother, an inform father, an infirm mother, and a neighbor comes in and sits with them."[13]

After the adoption of the amendments in 1974, however, the Department of Labor (DOL) adopted regulations that radically broadened the companionship exemption in a manner inconsistent with both Congress' intent and the DOL's treatment of babysitters . The DOL defined "companionship services" to include performance of a range of personal and domestic tasks not limited to provision of fellowship.[14] In addition, the DOL provided that companions employed by third-party agencies and employed on a regular, even full-time, basis, unlike babysitters so employed, fall within the exemption.[15]

The Supreme Court's Recent Decision Applying the Companionship Exemption to Homecare Workers Employed by Third-Party Agencies

The question at issue in *Long Island Care at Home, Ltd. v. Coke* was whether the DOL's regulation providing that the companionship exemption encompasses employees employed by third-party agencies rather than only by individual consumers and their families is consistent with Congress' intent. The United States Court of Appeals for the Second Circuit had struck the regulation down, reasoning that "[i]t is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered."[16] But the Supreme Court reversed, holding that because Congress did not clearly express its intention in 1974, the courts must defer to the DOL's construction of the companionship exemption.[17] In an editorial on June 22, 2007, *The New York Times* opined, "[T]he justices were completely silent on the question of whether denying overtime to home health employees is good policy, let along morally justifiable. Clearly it is neither."[18]

I urge this Committee to recommend that Congress now make its intentions clear on this important question by amending the FLSA to provide that only employees employed on a casual basis to provide companionship services, and thus not employees employed by third party agencies, are exempt from the Act's protections.

Excluding Homecare Workers From the Minimum Standards Contained in the FLSA is Both Unsound Labor and Employment Policy and Unsound Long-Term Care Policy[19]

In 1974, when the exemption was adopted, homecare, like babysitting, was largely provided by neighbors and friends. But since that time a homecare industry has been created and has experienced explosive growth. There are now almost 25,000 homecare agencies in the U.S., with almost three-quarters being for-profit.[20] For-profit companies employed 62% of home health care aides as of 1999.[21] Due to an aging population and the fact that both the elderly and disabled increasing desire to remain in their homes, nonprofessional homecare is now the fastest growing occupation in the United State.[22] Leaving this rapidly expanding, professional homecare industry outside the ambit of out nation's most basic employment law is inconsistent with both the historic purpose of the FLSA and Congress' progressive expansion of its coverage since 1938. Congress should not leave this gaping hole in what should be the broad, nearly universal coverage of the FLSA.

The continued exclusion of homecare workers from the protections of the FLSA cannot be justified on grounds rooted in labor and employment policy. Today's homecare workers can no longer be compared to the neighborhood teenager who babysits on a Friday night. Close to half of all home care workers work year-round, full-time.[23] Despite the misleading term used in the statute – companionship services -- homecare workers perform a range of personal and domestics tasks for clients they typically do not know before being assigned to care for them. Homecare workers bath, feed and move their clients. They cook for their clients and clean their

homes. They assist their clients to take medication and use the toilet. They do almost everything except sit and provide companionship. And homecare workers often perform these essential services for two or more clients during a single work day. In fact, on average, each agency-employed homecare worker cares for five or more clients in an eight-hour work day.[24]

Homecare work is physically and emotionally demanding, resulting in rates of occupational injury far above the average for all private employees (280.5 occupational injuries and illnesses involving days away from work per 10,000 full-time workers compared to 188.3 for all private industry).[25] The injury rate in home care is worsened by the fact that, unlike in a nursing homes, home care aides must lift and transfer clients without the help of a mechanical lifting device or the assistance of co-workers.[26] Home care workers often suffer emotional abuse from mentally impaired clients who may have severe behavioral problems.[27] Homes may be "untidy and depressing," and clients may be "angry, abusive, depressed, or otherwise difficult."[28] Workers who perform similar work in nursing homes and like facilities are fully covered by the FLSA. There simply is no valid reason why those who perform this work in private homes should not be similarly covered.

Almost 90% of homecare workers are women and they are predominantly members of minority groups (34 % African American; 18% Latina; and 20.4% immigrant).[29] Exemption of homecare workers thus has a disproportionate impact on women and minorities and increases existing income inequalities. For that reason, just as women's rights advocates and civil rights organizations lobbied Congress to extend the FLSA to domestics in 1974,[30] they now advocate closing the companionship loophole.[31]

Placing homecare workers outside the mainstream of workers covered by our nation's most fundamental employment standards is not only unsound labor and employment policy, but also unsound long-term care policy as we face a growing shortage of workers willing and able to perform these essential services. There is a well-documented and growing shortage of homecare workers as a result of the aging population and the increasing cost of and growing dissatisfaction with nursing home care. It is this shortage of homecare workers that led advocates for the aged and disabled, for example, the AARP and American Association of People with Disabilities to support Ms. Coke's position in the Supreme Court. The AARP forcefully argued that exempting homecare workers employed by third party agencies from "the minimum requirements of the FLSA does not serve, bur rather compromises the interests of both older and disabled persons."[32]

Employment of home health aides is projected to increase by 56% in the next decade, making it the fastest growing occupation in the nation. Employment of personal and home care aides is expected to grow by 41% during the same time period, making it tenth on that list.[33] As of 2004, federal statistics documented 701,000 personal home care aides and 624,000 home health care aides.[34] The Bureau of Labor Statistics projects that there will be a need for 974,000 home health aides and 988,000 personal and home care aides by 2014.[35]

Unfortunately, the demographics of those who provide the services are not keeping up

with those in need of them. While the population over age 85 will double in the next 30 years, the number of persons in the demographic of most home care workers will increase by just 9%.[36] The General Accounting Office has developed a measure called the "elderly support ratio," which represents the ratio of women aged 20-54 (who currently provide the vast majority of care) to persons aged 85 and over. In 2000, that ratio was 16:1. The ratio is projected to drop to 12:1 by 2010, 9:1 by 2030, and 6:1 by 2040.[37] Nor is the resulting care gap likely to be filled by informal, uncompensated care because the number of potential family caregivers for each person needing care is also projected to decrease from 11 in 1990 to 4 in 2050.[38]

This labor shortage has already produced adverse consequences for home care clients. Medicaid home care clients have filed lawsuits in federal and state court challenging home care payment rates on the ground that their inadequacy has caused a shortage of necessary services.[39] They have documented incidents where individuals in need of critical services have been trapped for hours in bed or in a bathroom, or without food or water, because of the unavailability of home care aides.[40] The critical shortage of home care aides also "encourage[s] unnecessary and premature institutional placements among Medicaid participants."[41] Those unnecessary placements, in turn, cost the federal and state governments far more than would otherwise be spent on home care services.

The current and growing labor shortage is made worse by low wages and the demanding nature of the work.[42] The AARP observes that "[t]he undersupply of home are workers is consistently attributed to inadequate wages and benefits, and the shortage of workers leads to both reductions in quality of care and disruption in access to care for older and disabled persons."[43] The Bureau of Labor Statistics found that the earnings of home care workers "remain among the lowest in the service industry," with a 1998 mean annual income for home health aides of $16,250 and for home care aides of $14,920.[44] One in five home health care aides lives below the poverty level and they are twice as likely as other workers to receive food stamps and to lack health insurance.[45]

Many potential home care workers have the option to choose jobs that are better paying or less demanding than home care, and those that do choose home care work often leave it shortly thereafter.[46] File clerks, for example, earn significantly more than home care aides.[47] Turnover, attributable to low wages as well as the physically and emotionally demanding nature of homecare,[48] has been estimated at 40-100% per year by agencies interviewed for a recent news article and at 12-60% by the Department for Health and Human Services.[49] This turnover is expensive, costing approximately $3,362 each time a worker needs to be replaced.[50] It also tends to diminish the quality and continuity of patient care.[51]

When the FLSA was extended to domestic employees in 1974, Congress recognized the positive effect coverage would have on both the size and quality of the domestic workforce. The Senate Committee Report explained:

[T]he demand for household workers is not being met. Bringing domestics under

> the Fair Labor Standards Act would not only assure them a minimum wage but would enhance their status in the community. It is expected that the supply of domestic workers will increase as their pay and working conditions improve. Minimum wages should serve to attract skilled workers to these jobs at a time when the need for skilled domestic employees is greatly increasing.[52]

The same unmet demand exists today for homecare workers and a similar extension of coverage would have a similar positive effect on that workforce. In words that apply equally to the extension of coverage to home care workers being considered today, Senator Javits explained in 1972, "The more the job becomes dignified and recognized as honorable employment, such as any other employment – working in a factory or working here – the better it will be from the point of view of getting that kind of service, which Americans so urgently need."[53] As the AARP informed the Supreme Court, "Providing a living wage will attract more workers as well as increase job satisfaction and retention for those already providing care."[54]

In 2001, the Clinton administration proposed a sweeping revision of the companionship regulations based on a careful analysis of Congress' intent and the policy interests at stake.[55] The proposals included both a narrower definition of companionship services and a reversal of the rule exempting employees of third-party agencies. However, the proposals did not become final because they were withdrawn by the Bush administration without any form of analysis or justification shortly after it assumed office.[56]

The failure of both the judicial and executive branches to address this critical problem demands legislative action.

Cost Objections Are Not Well Founded

The primary objection to the Fair Home Healthcare Act is that it will increase the cost of homecare. This cannot be considered a valid objection or providers of all essential services would be exempt from the FLSA's protections. Yet police and fire personnel are covered, hospital employees are covered, nursing home employees are covered, and other providers of essential services are covered. Why should homecare workers uniquely carry the burden of society's need for their services.

Moreover, the economic impact of the proposed legislation has been seriously overstated. In part this is due to a failure to consider that some portion of any increase in costs due to higher wages will be offset by savings from reduced turnover.[57] In its 2001 proposal, the Clinton Administration estimated the effect on Medicare costs as negligible given limited expenditures for homecare services under that program. Additional Medicaid costs were estimated at between $30 and 40 million, of which 57% would have been the federal share. The combined public and private increase in expenditure was estimates to be no more than $75 million.[58]

Suggestions that extending these minimum protections to homecare workers will lead to

excessive costs and a deleterious effect on the quality of care are definitively belied by the fact that a significant number of states, for example my home state of Illinois,[59] already cover homecare workers under their state wage and hour laws and no opponent of the proposed legislation has been able to point to any evidence of an adverse effect on long-term care in those states.

Moreover, a large proportion of the services provided by homecare workers is publicly funded. Medicare and Medicaid account for more than half of the funds paid to free-standing homecare agencies.[60] The federal and state governments should not purchase these essential services at prices that depend on workers not being paid in compliance with the minimum standards of the FLSA. As President Roosevelt stated, "A self-supporting and self-respecting democracy can plead . . . no economic justification for chiseling workers' wages or stretching workers' hours."[61]

Finally, and most importantly, consumers of homecare services well understand that the greatest threat to their ability to secure these essential services is not any increase in costs that might result from homecare workers gaining the same rights enjoyed by virtually all other American workers to be paid in accordance with the minimum standards established in the FLSA. Rather, consumers understand that the greatest threat to their ability to secure such services lie in homecare workers *not* gaining that right and continuing to labor in the shadows of our economy. As the AARP concluded its argument to the Supreme Court in Ms. Coke's case, "FLSA protections should be extended to home care workers . . . as such protections will strengthen the home care workforce and result in higher quality of care and continuity of care for America's older and disabled persons."[62]

The Fair Home Healthcare Act Is a Proper Solution to the Problem

The Fair Home Healthcare Act would amend the Fair Labor Standards Act to make the exemptions of babysitters and companions parallel. The language of the companionship exemption would be amended by inserting the limiting term "on a casual basis," which currently precedes only the term "to provide babysitting services," before the term "to provide companionship services" thus exempting only employees who provide babysitting or companionship services "on a casual basis." In addition, the Act would make clear that the exemption only applies to employees whose employment is "irregular or intermittent" and does not apply to employees "whose vocation is the provision of babysitting or companionship services," who are "employed by an employer or agency other than the family or household using such services," or whose employment exceeds 20 hours per week. These criteria are drawn directly from the DOL current definition of "on a casual basis" which was promulgated shortly after Congress adopted the 1974 amendments.[63]

Domestic employees who live in the homes where they work, including homecare workers, would continue to be exempt from the FLSA's overtime provision.[64]

In short, the Act would place under the FLSA's protective umbrella all employees who make their living providing the essential services that constitute today's homecare while leaving unprotected only those casual employees who do not need such protection and who Congress intended to exclude in 1974.

Conclusion

I urge the Committee to recommend that Congress adopt the Fair Home Healthcare Act and thank you for inviting me here today to testify concerning the Act.

Endnotes

1. 127 S.Ct. 2339 (2007).

2. 29 U.S.C. §§ 206, 207.

3. 29 U.S.C. § 202(a).

4. 29 U.S.C. §§ 206(a), 207(a)(1), 203(r) and (s).

5. *See, e.g.*, *Brennan v. Veterans Cleaning Service, Inc*., 482 F.2d 1362 (5th Cir. 1973); *Homemakers Home and Health Care Services, Inc. v. Carden*, 1974 U.S.Dist.LEXIS 9150 (M.D.Tenn. April 4, 1974), *aff'd*, 538 F.2d 98 (6th Cir. 1976). *See also* 1972 DOLWH LEXIS 19 at *2-3 (Aug. 20, 1972); Wage and Hour Opinion Letter 147, 1971 WL 33084 (Nov. 17, 1971).

6. Publ. Law 93-259 (1974).

7. H.R. Rep. No. 93-232, 93d Cong., 1st Sess. 8 (May 29, 1973).

8. *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950).

9. 29 U.S.C. § 213(a)(15). An additional exemption to the Act's overtime provisions was created for live-in domestic employees. *See* 29 U.S.C. § 213(b)(21).

10. Senator Williams explained, "'Companion,' as we mean it, is in the same role – to be there and to watch an older person, in a sense." Thereupon, Seantor Burdick interjected, "in other words, an elder sitter," and Senator Williams replied, "Exactly." 119 Cong. Rec. 24801 (1973).

11. H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 36 (March 15, 1974); S. Rep. No. 93-690, 93d Cong., 1st Sess. 20 (Feb. 22, 1974).

12. 119 Cong. Rec. 24801 (1973) (statement of Senator Burdick).

13. 119 Cong. Rec. 24801 (1973) (statement of Senator Burdick).

14. 29 C.F.R. § 552.6 provides:

> As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

15. 29 C.F.R. § 552.109(a). The contrasting regulations covering babysitters are at 29 U.S.C. §§ 552..5, 552.104, and 552.109(b).

16. 376 F.3d 118, 133 (2d Cir. 2004).

17. 127 S.Ct. 2339 (2007).

18. Congress and the Caregivers, *The New York Times*, June 21, 2007, A22.

19. The following section of my testimony has benefitted from the briefs of amicus curiae AARP *et al.*, Alliance for Retired Americans *et al.*, and Urban Justice Center *et al.* filed in *Long Island Care at Home*.

20. National Center for Health Workforce Analyses, Nursing Aides, Home Health Aides, and Related Occupations viii, 12 (U.S. Dep't of Health and Human Servs., 2004).

21. Rhonda J.V. Montgomery, *et al.*, A Profile of Home Care Workers from the 2000 Census, 45:5 Gerontologist 593, 596 (2005).

22. Bureau of Labor Statistics ("BLS"), U.S. Department of Labor, *Occupational Outlook Handbook* 2006-2007 (Nursing, Psychiatric and Home Health Aides) (available at http://www.bls.gov/oco/home.htm).

23. Montgomery *et al.* at 595, 597; Yoshiko Yamada, *Profile of Home Care Aides, Nursing Home Aides, and Hospital Aides: Historical Changes and Data Recommendations*, 42:2 Gerontologist 199, 202 (2002).

24. National Association for Home Care and Hospice, *Basic Statistics about Home Care*, Table 15 (2001) (available at http://www.nahc.org/consumer/hcstats.html); National Association for Home Care and Hospice Care, *Basic Statistics about Home Care*, Table 14 (2004) (available at http://www.nahc.org/04HC_stats.pdf).

25. Nat'l Center for Health Workforce Analysis, Nursing Aides, Home Health Aides, and Related Health Care Occupations 10, 109 (U.S. Dep't of Health and Human Servs., 2004).

26. BLS (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides).

27. UCSF Center for California Health Workforce Studies, *An Aging U.S. Population and the Health Care Workforce: Factors Affecting the Need for Geriatric Care Workers* 33 (Feb. 2006) (available at http://www.futurehealth.ucsf.edu/geria/062404-Geria%20Final.pdf).

28. BLS (Personal and Home Care Aides); *see also id.* (Nursing, Psychiatric and Home Health Aides); Jane Gross, *New Options (and Risks) in Home Care for Elderly*, *The New York Times*, Mar. 1, 2007.

29. UCSF, Health Workforce Studies, Table B2.

30. Representative Shirley Chisholm led the effort to extend the FLSA to domestic employees. In fact, 17 of the 19 women then serving in Congress, representing both parties, wrote a letter to the House Committee expressing "great concern" that the extension of coverage to domestic workers might be dropped from the bill. H.R. Rep. 93-913 at 34. Senator Williams recognized that "many who watch out legislative activities view the coverage of domestics as an effort to remedy racial and sexual discrimination." 119 Cong. Rec. 24,799 (1973).

31. The Asian American Legal Defense and Education Fund, Mexican American Legal Defense and Educational Fund, Puerto Rican Legal Defense and Education Fund, National Women's Law Center, National Partnership for Women and Families, and Washington Lawyers' Committee for Civil Rights and Urban Affairs filed a brief in support of Ms. Coke in the Supreme Court.

32. *Long Island Care at Home*, Brief Amici Curiae of AARP and Older Women's League at 4.

33. BLS (Tomorrow's Jobs); Daniel E. Hecker, *Occupational Employment Projects to 2014*, Monthly Labor Rev., Nov. 2005, at 75 (citing BLS statistics).

34. BLS (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides); Hecker at 75 (citing BLS statistics).

35. *Id.*

36. William J. Scanlon (Director, Health Care Issues, General Accounting Office), *Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Testimony before the Senate Committee on Health, Education, Labor and Pensions*, GAO-01-

750T, at 9 (released May 17, 2001) (available at http://www.gao.gov/new.items/d01750t.pdf). The total working age population (persons aged 18 to 64) will grow by just 16% during this time period. *Id.*

37. Scanlon at 9; UCSF Health Workforce Studies at 34 (citing United States General Accounting Office, *GAO analysis of U.S. Census Bureau projections of total resident population*, Middle Series (Dec. 1999)). The ratio of the entire working age population to the population over 85 will go from 39.5 workers per elderly person in 2000 to 22.1 in 2030 and 14.8 in 2040. Scanlon at 9. These figures assume relatively high immigration, one million net annually, through 2030. UCSF Health Workforce Studies at 35.

38. Nora Super, National Health Policy Forum Background Paper, *Who Will Be There to Care? The Growing Gap between Caregiver Supply and Demand* 3 (Jan. 23, 2002) (available at http://www.nhpf.org/pdfs_bp/BP_Caregivers_1-02.pdf) (2040 projections) (citing National Family Caregivers Association, Family Caregiving Statistics, Kensington, Maryland, 2000).

39. Dorie Seavey and Vera Salter, *Paying for Quality Care: State and Local Strategies for Improving Wages and Benefits for Personal Care Assistants* 14-17 (American Ass'n of Retired Persons: 2006) (available at http://assets.aarp.org/rgcenter/il/2006_18_care.pdf). The legal claims in these actions have been based on requirements of the Medicaid statute and federal prohibitions against discrimination based on disability. Two cases have resulted in settlements, a federal lawsuit that prompted Mississippi to agree to increase payments to personal care attendants by $0.50 per hour and to seek funding from the legislature for additional pay increases, and a state court case that caused New Hampshire to agree to establish a new rate-setting methodology based on the average cost of providers. *Id.* A California lawsuit was dismissed on the ground that the Medicaid statute does not confer individually enforceable rights and that the state was not violating disability law. *Sanchez v. Johnson*, 416 F.3d 1051, 1061, 1067-68 (9th Cir. 2005). A district court order requiring Arizona to offer a rate of pay that guarantees that clients will receive the services for which they qualify is on appeal to the Ninth Circuit. *Ball v. Biedess*, 2004 WL 2566262 **6-7 (Aug. 13, 2004), *on appeal sub nom. Ball v. Rodgers*. A class has been certified and a motion to dismiss denied in a pending Wisconsin case. *See Nelson v. Milwaukee County*, 2006 WL 290510, No. 04-C-193 (E.D. Wis. Feb. 7, 2006); *Bzdawka v. Milwaukee County*, 238 F.R.D. 469 (E.D. Wis. Oct. 13, 2006).

40. *See, e.g., Ball*, 2004 WL 2566262 at *4 & n.3.

41. Allen J. LeBlanc et al., *State Medicaid Programs Offering Personal Care Services*, 22:4 Health Care Financing Rev. 155, 170 (2001).

42. General Accounting Office, *Adults with Severe Disabilities: Federal and State Approaches for Personal Care and Other Services*, GAO/HEHS-99-101, at 35 (May 1999).

43. *Long Island Care at Home*, Brief Amici Curiae of AARP and Older Women's League at 8.

44. 66 Fed. Reg. 5483 (2001) (citing BLS Occupational Employment Statistics survey).

45. William J. Scanlon, Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides is a Growing Concern: Testimony before the Senate Committee on Health, Education, Labor and Pensions, GAO-01-750T, at 13 (released May 17, 2001).

46. Scanlon at 12; Seavey and Salter *at* 1-2. In 2000, file clerks earned more than home health aides and significantly more than personal and home care aides. Paraprofessional Healthcare Institute, *Long-Term Care Financing and the Long-Term Care Workforce Crisis: Causes and Solutions* 19 (Citizens for Long-Term Care: 2003) (available at http://www.paraprofessional.org/publications/CLTC_doc_rev1.pdf) (citing BLS data).

47. Paraprofessional Healthcare Institute, *Long-Term Care Financing and the Long-Term Care Workforce Crisis: Causes and Solutions* 19 (Citizens for Long-Term Care: 2003) (available at http://www.paraprofessional.org/publications/CLTC_doc_rev1.pdf) (citing BLS data).

48. BLS (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides); Yamada at 204.

49. Gross, *New Options*; National Center for Health Workforce Analyses et al., *Nursing Aides, Home Health Aides, and Related Health Care Occupations – National and Local Workforce Shortages and Associated Data Needs* 14 (U.S. Dep't Health and Human Servs.: 2004) (available at ftp://ftp.hrsa.gov/bhpr/nationalcenter/RNandHomeAides.pdf) (citing R. Stone, *Frontline Workers in Long-Term Care: A Background Paper* (Institute for the Future of Aging Services: 2001)). Super at 4 (national turnover of 28%); Seavey & Salter at 2 (40-50% annual turnover); New York Association of Homes & Services for the Aging, *The Staffing Crisis in New York's Continuing Care System: A Comprehensive Analysis and Recommendations* 17 (2000) available at http://www.nyahsa.org/docs/Staff.pdf (40-60% turnover in one year and 80-90% in 2 years).

50. Robyn Stone, *The Direct Care Worker: A Key Dimension of Home Care Policy*, 16:5 Home Health Care Management & Practice 339, 341. Stone points out that this figure does not even take into account lost productivity during time that new workers are trained and gain experience, or the attrition between initial hiring and placement. *Id.*

51. Stone at 341.

52. S. Rep. 93-300, 93d Cong., 1st Sess. 21 (July 6, 1973). *See also* S. Rep. No. 93-690 at 19 (same); 119 Cong. Rec. 24,360 (1973) ("[I]n many areas of the country, including New York, . . . there are not enough workers willing to engage in domestic employment to meet the demand. Bringing minimum wage coverage to domestics will be one step, and a very important step, to bringing some measure of dignity to this type of employment and thus serve to attract a more qualified and more stable workforce to the job.").

53. 118 Cong. Rec. 24,705 (1972).

54. *Long Island Care at Home*, Brief Amici Curiae of AARP and Older Women's League at 11.

55. 66 Fed. Reg. 5481 *et seq*. (2001).

56. 67 Fed. Reg. 16668 (2002).

57. *Long Island Care at Home*, Brief Amici Curiae of AARP and Older Women's League at 12-13 (and sources cited therein).

58. 66 Fed. Reg. 5486.

59. 820 ILCS 105/3(d), 105/4(a)(1), 105/4a and Ill. Admin. Code tit. 56, § 210.110 (exempting individuals employed in domestic service but defining category to exclude "person whose primary duty is to be a companion for individual(s) who are aged or infirm")

60. 66 Fed. Reg. 5483.

61. Quoted in H.R. Rep. No. 93-913 at 8.

62. *Long Island Care at Home*, Brief Amici Curiae of AARP and Older Women's League at 15.

63. 29 C.F.R. § 552.5 provides that "the term casual basis. . . shall mean employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting." 29 C.F.R. § 552.104(b) further provides that employment "would usually be on a 'casual basis,' whether performed for one or more employers, if such employment by all such employers does not exceed 20 hours per week in the aggregate." Finally, 29 C.F.R. § 552.109(b) provides that "[e]mployees who are engaged in providing babysitting services and who are employed by an employer or agency other than the family or household using their services are not employed on a 'casual basis' for purposes of the section 13(a)(15) exemption. Such employees are engaged in this occupation as a vocation."

64. 29 U.S.C. § 213(b)(21).