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National Employment Law Project
New Haven Legal Assistance

H.B. 5260: An Act Concerning Domestic Workers & Overtime Pay

Hearing before the Committee on Labor and Public Employees

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Good afternoon and thank you for the opportunity to testify today.

The National Employment Law Project (NELP) is a non-profit, non-partisan research and advocacy organization specializing in employment policy. We are based in New York with offices across the country. For 45 years, we have partnered with federal, state, and local lawmakers on a wide range of workforce issues. Our staff is recognized as policy experts in areas such as wage and hour standards and enforcement, the economic impact of low-wage jobs, unemployment insurance, and access to employment. We have worked with dozens of state legislatures across the country and with the U.S. Congress on measures to boost pay for low-wage workers and to strengthen accountability for labor standards.

New Haven Legal Assistance Association, Inc. (LAA) is a nonprofit organization that was incorporated on April 7, 1964 to "secure justice for and to protect the rights of those residents of New Haven County unable to engage legal counsel." LAA was one of the first legal services programs established and the federal government used it as a model for similar programs throughout the country

NELP and LAA testify today in opposition to HB 5260, which would allow for-profit home care corporations to pay their employees for only a portion of their 24-hour work shifts, even when the employees cannot leave their worksite. This legal loophole would apply only to domestic employers, thereby reducing domestic and home care workers, who are almost all women and disproportionately women of color, to second-class status in the state's labor laws. This proposal comes on the heels of a historic 2015 reform that extended federal and, by extension, state, minimum wage and hour rights to most home care workers. HB 5260 thus threatens to undermine a long overdue civil rights victory that has the potential to finally raise the industry' persistently low wages and standards. And, it would safeguard corporate profits at the expense of workers' rights. We urge the Labor Committee to reject this troubling proposal.

1. <u>HB 5260 would undermine home care workers' newly established wage and hour rights.</u>

After decades of unjust exclusion from basic labor standards, the nation's two million home care workers secured a historic victory last year.[i] The U.S. Department of Labor Home Care Rules, which extend the federal Fair Labor Standard Act's (FLSA) minimum wage and overtime protections to most home care workers, went into effect in 2015. The Rules contain two major changes. First, they clarify and narrow what constitutes FLSA exempt "companionship services," limiting the exemption to workers whose principal duties are the provision of fellowship and protection. Second, they disallow home care agencies and other third-party employers from claiming either the companionship exemption from minimum wage and overtime or the overtime exemption for live-in domestic workers. These two changes significantly narrowed a decades old loophole in federal law.

The Connecticut Minimum Wage Act (CMWA) covers domestic service workers to the same extent as the FLSA. Thus, home care workers in Connecticut did not have state-level wage and hour rights before 2015 but gained the coverage of state protections when the federal rules went into effect.[ii]

Connecticut home care agencies are now required to pay workers at least the minimum wage for all hours worked and overtime for hours over 40 in a week, and must keep accurate records of their workers' work hours and pay. HB 5260 seeks to roll back home

care agencies' legal responsibilities, however, by redefining what counts as "hours worked" for the purposes of the Connecticut Minimum Wage Act. Specifically, the recommendation would allow a third party employer such as a for-profit home care agency to ***not*** pay domestic workers for part of a 24-hour shift if the employer signs an agreement with the worker excluding from pay meal periods, sleep time, and "off-duty" time, even if the worker cannot leave the client's home. This special rule would apply only to domestic employers – not to companies operating in other sectors.

2. HB 5260 would permit home care agencies to engage in abusive pay practices.

In NELP and LAA's many years of work in the home care sector, we have seen significant abuse of workers assigned to 24-hour "live-in" shifts. We have spoken with and represented 24-hour shift workers who were paid a flat per diem rate or an hourly rate for a set number of hours, usually between 10 and 13, whether or not the worker took the scheduled meal breaks, was permitted a full night's sleep, and regardless of the actual daily or weekly hours worked. In our experience, home care agencies have failed to track 24-hour workers' actual work hours, adjust worker pay to reflect changes in hours worked, or pay an overtime premium when workers worked over 40 hours in a week. The following are examples of violations of 24-hour shift workers' workplace rights:

- In 2013, NELP, along with co-counsel, filed a class action lawsuit in New Jersey State court against multi-state home care agency Future Care, which paid its home care employees an hourly rate of between $10 and $11 for 10 hours per 24-hour shift. Lead plaintiff Marlene Gilkes and her coworkers routinely worked more than 10 hours per day but were never compensated for the time. Nor did Future Care pay Ms. Gilkes an overtime premium for hours over 40 in a week, although she worked as many as 90 hours per week or more. Ms. Gilkes maintained her own residence at all times.
- Also in 2013, NELP, along with co-counsel, filed a class action complaint in New York State court against Future Care Health Services and Americare Certified Special Services, home care agencies that paid their employees a flat "live in" rate of $115-120 per day, regardless of their total daily or weekly hours, resulting in sub-minimum wage rates.[iii] The defendant agencies also failed to pay workers an overtime premium.

- Around 2011-2012, several New York home care agencies assigned employees to work 24-hour shifts caring for clients who had previously received services from two employees working alternating 12-hour shifts, presumably to curb their labor costs.[iv] Workers complained that their clients' service needs prevented them from sleeping more than a couple hours at a time; often, the worker had no private area or even a bed to sleep on. Yet the agencies paid workers a flat per diem or set hourly

rate that amounted to less than the minimum wage, and denied workers overtime pay.

If HB 5260 were passed, we would expect home care agencies in Connecticut to require workers to sign boilerplate agreements similar to the pay arrangements described above, if they have not already done so. Individual workers would not be in a position to refuse to sign such an agreement and expect to get or keep a job. A worker who attempted to claim pay for her work hours would likely face serious challenges to asserting her rights: the employer would likely present the signed agreement to a decision-making body, such as a labor enforcement agency or court, to challenge her claim. And low-wage workers don't often keep their own work records. Many workers might assume they had no right to be paid for their time because they signed the agreement.

3. <u>HB 5260 would create a standard far worse than federal law.</u>

Under federal law, employees who are required to remain on call on the employer's premises, or so close to the premises that they cannot use the time effectively for their own purposes, are considered to be working and therefore entitled to pay for such on call time.[v] Under well-established law, an employee is not considered to be completely relieved from duty and cannot use the time effectively for his own purposes unless he or she is definitely told in advance that he or she may leave the job and will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable the worker to use the time effectively for his or her own purposes depends upon all of the facts and circumstances of the case.[vi]

Federal law provides narrow exceptions to the general standard described above. One exception applies to employees required to be on duty for 24 hours or more.[vii] In such cases, federal law allows the employer and the employee to agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. According to federal regulation, where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.

A second exception applies to employees who resides on their employer's premises on a permanent basis or for extended periods of time.[viii] Where residential employees can engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when they <u>*may leave the premises for purposes of their own*</u>, federal law accepts a reasonable agreement of the parties which takes into consideration all of the pertinent facts.

HB 5260 would create a standard far lower than the federal law because it does not condition the exclusion from pay of so-called "off duty" time on the employee's ability to leave the client's premises or otherwise effectively use the time for her own purposes. Moreover, HB 5260 allows an employer to benefit from these arrangements with regards to any workers it assigns to work in clients' homes for shifts of 24 hours or more. The proposal is not limited to residential workers who live on their employer's premises, as the federal standard provides.

A home care or other domestic employer that hires a worker to work 24-hour shifts often does so because the client requires continual supervision, even if the client doesn't need constant hands-on care. A worker may be able to watch TV, eat a meal, or make a personal phone call while she continues to work to monitor the client to prevent against falls, accidents or wandering. And, even if the worker is theoretically allowed to leave the client's home for a short time, if the client's home is at a significant distance from the worker's home and/or the worker has no means of transportation, the worker can't effectively use this "free" time to spend with family or attend to other personal needs. It is entirely foreseeable that an agency would require workers to agree to count such time as unpaid time even if the worker can't truly use that time as she would like. Such arrangements could lead to the types of abusive practices described in section 2., above.

4. <u>HB 5260 seeks to safeguard home care industry profits at the expense of worker pay.</u>

Ample research shows that the home care industry has continued to grow and profit even as home care worker wages have stagnated, and even fallen in real terms.[ix]

Revenues in the home health industry have grown 48 percent over the past 10 years, and CEO compensation at the four publicly-traded national home healthcare chains, adjusted for inflation, has increased over 150 percent since 2004.[x] In contrast, home care workers' average hourly wages (adjusted for inflation) have declined by nearly 6 percent since 2004.[xi] Part of the problem is that home care agencies take a significant portion of client payments and reimbursement rates for overhead and profit. According to the 2015 Private Duty Benchmarking Study, for example, surveyed home care employers paid workers just over 50 percent of their annual revenues, and had gross profit margins of nearly 40 percent.[xii] Another contributing factor has been low standards and poor enforcement of the laws that do exist. Erosion of home care worker minimum wage and overtime rights would thus undermine any progress towards narrowing the significant disparity between rising corporate profit and stagnating worker pay.

Conclusion

Connecticut, like much of the country, faces a rapidly-growing demand for home and community based services. The state's workforce of 27,000 personal care aides and home health aides is projected to grow by 38% between 2012 and 2022.[xiii] Median wages of just $12.50 per hour, combined with wage stagnation and poor standards, may weaken the state's ability to recruit and retain a qualified workforce, however. And HB 5260 threatens to roll back home care workers' newly won wage and hour rights and depress worker pay at exactly the moment when the industry requires stronger standards.

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[i] *U.S. Department of Labor Home Care Rule: What's Next*? (National Employment Law Project, 2015), http://www.nelp.org/content/uploads/Fact-Sheet-Home-Care-Rule-Implementation-Whats-Next.pdf

[ii] National Employment Law Project, *Home care worker rights in the states after the federal companionship rules change*, 2013. http://nelp.org/content/uploads/2015/03/Home-Care-State-by-State.pdf

[iii] Moreno v. Future Care Health Servs., Inc., 43 Misc. 3d 1202(A), 992 N.Y.S.2d 159 (N.Y. Sup. Ct. 2014).

[iv] *See, for example, Melamed v. Americare*, 11-CV-4699; *Johnson, et al. v. Shah, et al*., 11-CV-1956 (E.D.N.Y.); "Advocates File Suit to Stop Arbitrary Terminations of Home Health Services," NYLAG Press Release, April 29, 2011), available at http://www.nylag.org/sites/default/files/JOHNSON_v_SHAH_PR_4.29.11.pdf

[v] 29 CFR §785.17.

[vi] 29 CFR §785.16.

[vii] 29 CFR §785.22.

[viii] 29 CFR §785.23.

[ix] Irene Tung and Sarah Leberstein, *Giving Caregivers a Raise: The Impact of a $15 Wage Floor in the Home Care Industry,* (National Employment Law Project, February 2015), available at http://www.nelp.org/content/uploads/2015/03/Giving-Caregivers-A-Raise.pdf.

[x] Id.

[xi] Id.

[xii] The *6th Annual Edition of the Private Duty Benchmarking Study* (Home Care Pulse, pages 65-68, 2015).

[xiii] PHI State Data Center, retrieved February2016. http://phinational.org/policy/states/connecticut.