NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 15-5018

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

HOME CARE ASSOCIATION OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

DAVID WEIL, et al.

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF AMICUS CURIAE AARP IN SUPPORT OF APPELLANTS URGING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Amicus curiae AARP submits the following information in accordance with D.C. Cir. R. 28(a)(1):

A. Parties and Amicus. All parties appearing before the District Court and in this court are listed in the Brief for Appellants, except that the Amicus Curiae joining this brief is AARP and the attorneys representing AARP on the brief are employed at AARP Foundation Litigation.

B. Rulings Under Review. The government has appealed the December 22, 2014 opinion and order vacating the third-party employment regulation, 29 C.F.R. § 552.109 (Dkt. ## 21, 22), and the January 14, 2015 opinion and order vacating the companionship-services regulation, 29 C.F.R. § 552.6 (Dkt. ## 32, 33). The rulings were issued by the Honorable Richard J. Leon in No. 1:14-cv-00967-RJL (D.D.C.).

C. Related Cases

We are unaware of any pending related cases.

/s/ Daniel B. Kohrman
Counsel for Amicus Curiae AARP

CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Insurance Plan, also known as the AARP Health Trust.

AARP has no parent corporation, nor has it issued shares or securities.

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GLOSSARY

FLSA	Fair Labor Standards Act
DOL	Department of Labor
ADL	Activities of Daily Living

STATEMENT OF INTEREST OF AMICUS CURIAE AARP

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities, and fights for the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. Since its founding in 1958, AARP has advocated for access to affordable health care, including access to home and community-based services, and for controlling costs without compromising quality.

AARP's interest in this matter is to preserve and expand the labor pool needed to deliver quality home care to enable people to live in their homes and communities. AARP has a substantial interest in assuring both that there is an adequate supply of home care workers to meet the growing demand for their services and that older workers have greater economic security.

As advocates for adults 50-plus, many of whom are consumers of long-term services and support, AARP recognizes that they have a very real interest in affordable access to home care services. As such, AARP supports the Department of Labor's efforts to update its regulations to reflect an accurate depiction of modern long-term services and supports and ensure that the statutory wage protections are applied to many home care workers.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Department of Labor (DOL) regulations at issue in this case will ensure that most home care workers are protected by the Fair Labor Standards Act's ("FLSA") overtime and minimum wage requirements. Home care is among the fastest-growing industries in the United States. PHI, *Occupational Projections for Direct-Care Workers 2012–2022: December 2014 Update*, at 2 (2014) [hereinafter *Occupational Projections*], http://goo.gl/oKKF7J. However, this industry's workforce continues to face persistently low wages, leaving millions of home care workers in poverty, and resulting in difficulties for consumers in finding and keeping good home care workers. *See* Nat'l Emp't Law Project, Fact Sheet on the DOL's Proposed Rule Revising Companionship and Live-In Domestic Worker Regulations 1 (2012), http://goo.gl/5ieSxi.

Wages for many home care workers are kept intractably low, not because of the intrinsic value of the work, but in part because home care workers have been excluded from the most basic FLSA protections. Workers who perform comparable tasks in assisted living residences or in nursing facilities enjoy those protections.

The final regulations issued by the DOL do not "seize unprecedented authority to impose overtime and minimum wage obligations." *Home Care Ass'n of Am. v. Weil*, No. 14-cv-967 (RJL), slip op. at 17-18 (D.D.C. Dec. 22, 2014).

Rather, they simply reflect the DOL's use of its existing statutory authority to incorporate into the regulations a more precise and updated understanding of what "companions" do, versus what home care workers do on a daily basis. The low wages paid to home care workers create a barrier to recruiting an adequate supply of home care workers to meet an increasing demand by an aging population for home and community-based services. While the revised regulations may require some changes in the cost and delivery of long-term services and supports, it leaves individuals and caregivers options to avoid or minimize these costs.

ARGUMENT

I. The Regulations Ameliorate the Lack of Wage Protection that is One Barrier to Recruiting and Maintaining a Sufficient Supply of Home Care Workers, Thus Helping to Close the Growing Care Gap

A. There is a strong and growing demand for home care as the Boomer generation ages and overwhelmingly prefers to age in place

As the Boomer generation ages, the number of older adults will reflect a much larger share of the U.S. population. Specifically, the population of people 80-plus – those most likely to need long-term care - will increase by 79 percent between 2010 and 2030, by another 44 percent between 2030 and 2040, and by another 17 percent between 2040 and 2050. Donald Redfoot et al., AARP Pub. Policy Inst., *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in the Availability of Family Caregivers* 3 (2013) at 5-6 [hereinafter *Growing Care Gap*], http://goo.gl/mYk0nb. This represents an

increase in the 80-plus population from approximately 12 million people in 2010 to almost 35 million in 2050. *Id* at 5-6, Fig. 3.

Maintaining independence, choice, and control is a paramount concern for people as they age; the vast majority (89%) of Americans age 50-plus want to remain in their own homes as long as they can. *See, e.g.*, AARP Pub. Policy Inst., *Providing More Long-Term Support and Services at Home: Why It's Critical For Health Reform* 1 (2009), http://goo.gl/JxO3o. Aging in place, as opposed to in a nursing facility, is also a less costly option both for consumers and for government programs. On average, for instance, the Medicaid program can provide home and community-based services to three people for the cost of serving one person in a nursing facility. Ctr. for Health Care Strategies, Inc., *Medicaid-Funded Long-Term Care: Toward More Home- and Community-Based Options* 1 (2010), http://goo.gl/J6zAhU.

For these reasons, the demand for home care services that meet individuals' needs and preferences to "age in place" will grow dramatically in the coming years. *See Occupational Projections*, *supra*, at 5. The Bureau of Labor Statistics estimates that the direct care[1] workforce exceeded 3.5 million workers in 2012, and

[1] As used in this brief, the term "home care workers" is intended to describe workers who provide broad array of home-based care, while the terms "home health aides" and "personal care aides" refer to subcategories of workers who provide different types of services in the home. The term "direct care workers" is

it projects that demand will call for an additional 1.3 million direct care workers by 2022. *Id.* at 1. Given Americans' strong preference for home care, it is unsurprising that this demand for direct care workers will be disproportionately concentrated in the home care workforce. For instance, the number of jobs for Personal Care Aides and Home Care Aides will increase by 49 percent in the coming decade, making these among the top ten fastest-growing occupations in the United States. *Id.* at 2; *see also* Bureau of Labor Statistics, Table 10. *The 30 occupations with the largest projected number of total job openings due to growth and replacements*, 2010-20, http://goo.gl/RR1WLB (last modified Feb. 1, 2012) (showing that Home Health Aides and Personal Care Aides are in the top half of the list of the top 30 occupations with the largest projected number of total job openings).

B. With a decline in the number of available family caregivers per person in need of care, the expected supply of home care workers is projected to fall far short of the increased demand for home care services

Unpaid home care provided by family caregivers is the "backbone" of long-term services and supports in the United States. *See* Jennifer L. Wolff et al., *Caregivers of Frail Elders: Updating a National Profile*, 46 The Gerontologist 344, 344 (2006). Caregivers are expected to perform a variety of daily tasks for

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intended to describe all workers who provide any of these services in either home-based settings or facility-based settings.

their loved ones, from providing companionship and supervision, to carrying out various personal care tasks, such as bathing and dressing, to administering multiple daily medications. Lynn Feinberg et al., AARP Pub. Policy Inst., *Valuing the Invaluable: 2011 Update—The Growing Contributions and Costs of Family Caregiving* 4-5, http://goo.gl/sFG0Cj. Collectively, unpaid family caregivers contribute approximately $450 billion in unpaid care annually. *Id*. at 4. However, the ratio of potential family caregivers to people likely in need of care is expected to decline precipitously over the next few decades, from 7-to-1 in 2010 to 4-to-1 in 2030, to less than 3-to-one in 2050. *See Growing Care Gap* at 1, 7.

As unpaid care by family caregivers becomes less available, individuals will increasingly need to turn to paid home care workers as another option. However, despite its status as a fast-growing industry, the supply of home care workers is projected to fall well short of this skyrocketing demand. Every geographic region in the country has long reported a shortage of home care workers. *See* Health Res. & Servs. Admin., U.S. Dep't of Health & Human Servs., *Nursing Aides, Home Health Aides, and Related Health Care Occupations: National and Local Workforce Shortages and Associated Data Needs*, 14 (2004); Dorie Seavey & Vera Salter, *Paying for Quality Care: State and Local Strategies for Improving Wages and Benefits for Personal Care Assistants*, at i (2006), http://goo.gl/q2V1oH. Providers face challenges with recruitment and retention of workers, with some

studies finding turnover rates for workers ranging from 44 to 65 percent. Inst. of Med., *Retooling for an Aging America: Building the Health Care Workforce* 21, 199 (Nat'l Acads. Press, 2008) [hereinafter *Building the Health Care Workforce*], http://goo.gl/yVny2Z; Dorie Seavey & Abby Marquand, PHI, *Caring in America: A Comprehensive Analysis of the Nation's Fastest-Growing Jobs: Home Health and Personal Care Aides* 69 (2011) [hereinafter *Caring in America*], http://goo.gl/TDfMiJ. A shortage of paid and unpaid home care workers in the face of strong and increasing demand has created a "care gap," leaving many people with inadequate or even no access to care.

The longstanding care gap will only continue to widen in the coming years. *Occupational Projections*, *supra,* at 1. The population of adults in later old age will increase, while the number of adults in their primary caregiving years (ages 40-54) will remain relatively stable, resulting in a dwindling supply of potential caregivers – both unpaid family caregivers and paid workers – in relation to the numbers who need care. *See, e.g.*, *Building the Health Care Workforce*, *supra,* 17-21. The growing shortage of home care workers threatens to compromise the health and safety of people in need of care. Unless home care workers' pay and working conditions are improved, it will be very challenging to grow the home care workforce to meet the unprecedented demand for their services. *Occupational Projections, supra,* at 5.

C. Inadequate pay for home care workers is a significant barrier to meeting the increased demand for home care services, and the DOL regulations address this problem

Home care workers are among the lowest paid workers in the U.S. service industry. *See* Bureau of Labor Statistics, *Occupational Employment and Wages — May 2013*, at tbl. 1 (2014), http://goo.gl/ZkDDFr (Personal Care Aides had a mean hourly wage of $9.67 in 2013); Robyn I. Stone & Joshua M. Wiener, *Who Will Care for Us? Addressing the Long-Term Care Workforce Crisis* 3 (2001). In 2012, Home Health Aides earned a median wage of $10.01 per hour, and Personal Care Aides earned $9.57 per hour – significantly less than the $16.71 per hour median wage for all U.S. workers. PHI, *Facts 3: America's Direct Care Workforce – November 2013 Update* (2013), [hereinafter *Direct Care Workforce*], http://goo.gl/rWbWz9. Consequently, half of home care workers' households rely on some sort of public assistance. *Caring in America*, *supra*, at 58.

This predicament is neither new nor transient. In 2001, the median annual income for Home Care Aides was $12,300. Ctr. for California Health Workforce Studies, Univ. of California, San Francisco, *An Aging U.S. Population and the Health Care Workforce: Factors Affecting the Need for Geriatric Care Workers* 31 (2006). And, since 2002, while inflation-adjusted hourly wages for direct care workers have declined overall, home care workers face the worst declines in pay, as Home Health Aides experienced an eleven percent decline. *Direct Care*

Workforce, *supra*, at 3. Especially in light of the challenging work conditions discussed *infra*, wages must be higher if home care work is to become a competitive option for workers, particularly those workers who are new to the direct care workforce.

The low pay earned by home care workers is one major factor deterring many direct care workers from seeking employment in individuals' homes. *See, e.g.*, *Building the Health Care Workforce*, *supra*, at 199, 220 ("[w]ages for direct-care workers are low and do not appear to adequately support the recruitment and retention of these workers . . . Evidence shows that higher wages do in fact lead to lower rates of turnover among all types of direct-care workers [cites omitted]."); *Occupational Projections*, *supra*, at 5; Paraprofessional Healthcare Inst, *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care* 2 (2001) [hereinafter *Unnecessary Crisis in Long-Term Care*], http://goo.gl/QT9JgS. Because employers who offer home care services are vying for the same pool of workers as nursing facilities that already must provide FLSA protections to their workers, home care needs to be a competitive option for these workers. If a worker with the same skill set in the same occupation can choose between one work environment that provides a guarantee of minimum wage and overtime pay and another that does not, that worker will typically choose the option that provides these guarantees. Unless home care workers are adequately compensated

(and given training and other career opportunities), a large proportion of the pool of potential home care workers will instead choose to provide care in nursing facilities, thereby exacerbating the shortage of home care workers. In short, if home care workers cannot earn enough to support themselves and their families, the home care industry will continue to face significant difficulties recruiting and retaining a quality workforce.

The growing home health "care gap" is a multifaceted problem that requires a multifaceted response, and there is no one "catch-all" solution. However, updating the DOL regulations to mandate FLSA protections for many home care workers helps eliminate one major barrier to growing this workforce.

II. The Regulations Reflect the Reality that Home Care Workers' Crucial and Difficult Work is Equivalent to Services Provided in Institutional and Other Settings and Should be Compensated Equally

The "companionship services" envisioned by Congress in 1974 bears little resemblance to the reality of home care provided today. The 1974 FLSA amendments exempt "companions" and casual "babysitters" from FLSA's wage protections, Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7, 88 Stat. 55, 62 (1974), and the prior regulatory regime brought home care workers within the ambit of this exemption. But as home care changed and expanded, the regulatory construction of the exemption grew from incorporating a narrow category of home companions to encompassing a far wider array of direct care

workers that provide challenging services to people in need of care. The regulations embrace the modern reality that home care services offer an alternative to facility-based care and are now irrevocably a large part of public and private delivery of long-term services and supports. Workers providing in-home care are no less worthy of wage protections than other "domestic service" employees, such as nannies and housekeepers, who are covered by the FLSA's wage protections.

In addition to the critical importance of these services to the individuals receiving care, workers who provide that care experience stressful work environments that compound the impact of low wages, including "high workloads, unsafe working conditions, inadequate training, a lack of respect from supervisors…, and few opportunities for advancement." *Id.*

Providing direct care today is difficult and dangerous work, regardless of where and to whom it is provided. Many direct care workers provide regular assistance with activities of daily living (ADLs), such as bathing, dressing, eating, toileting, and transferring. The degree of assistance with ADLs provided by direct care workers is as diverse and complex as the individuals they assist. For example, while some individuals may need only minimal assistance with climbing into and out of a bathtub, others may require total assistance with bathing. Direct care workers must also be ever-vigilant to observe changes in an individual's condition, prepare meals, administer medications, and provide oversight for individuals with

cognitive impairments. *See* Bernadette Wright, AARP Pub. Pol'y Inst., *Direct Care Workers in Long-Term Care* 1 (2005), http://goo.gl/h8bjYa.

Direct care workers, and in particular home care workers, also experience among the highest rates of workplace injury in the nation. *Id*. Nursing facilities must offer "assistance devices to prevent accidents," such as mechanical lifts, walkers, and grab bars designed to help residents get into bed, walk, or take a bath with less assistance from facility staff. 42 C.F.R. § 483.25(h) (2010). However, due to coverage limitations in many public programs, individuals residing at home generally do not have access to those devices. Martin Kitchener, et. al., *Assistive Technology in Medicaid Home- and Community-Based Waiver Programs*, 48 The Gerontologist 181, 181-89 (2008). As a result, many home care workers must physically lift people in their care, putting an added strain on the worker's physical health that their counterparts in nursing facilities may not experience.

Home care workers—many of whom, under the previous regulatory definition, would be classified as "companions" exempt from FLSA protections—perform an array of services for individuals who require daily assistance. As an example, the District of Columbia offers an assortment of home and community-based services through a Medicaid program known as the "Elderly and Persons with Physical Disabilities Waiver" (the "EPD waiver"). *See* Dist. of Columbia Dep't of Health Care Fin., *EPD Waiver Program Participant Handbook* 12-14

(2013), http://goo.gl/zCXMxR. Among the services available under the EPD waiver are personal care aide services, which provide assistance with an individual's ADLs, such as bathing, grooming, dressing, toileting and eating. *Id.* at 13.

Workers in facility-based settings, such as assisted living and nursing facilities, provide comparable, if not identical, services to those performed by workers in individual homes; however, workers in facility-based settings enjoy FLSA's wage protections, while home care workers do not. As an example, workers in nursing facilities are expected to provide a wide array of medical and non-medical services to ensure the safety and well-being of their residents. As a condition of nursing facilities' participation in federal programs, nursing facilities generally must provide "the necessary care and services" that would enable a resident "to attain or maintain the highest practicable physical, mental, and psychosocial well-being." 42 C.F.R. § 483.25 (2010). Consequently, the individuals who provide these necessary services are expected to perform a wide variety of daily tasks for facility residents, from assistance with ADLs to managing medications to ensuring a safe physical environment for residents. *See, e.g.*, 42 C.F.R. § 483.25(a), 483.60, and 483.70 (2010).

Assisted living is an increasingly popular form of residential care due to "its goal of providing a setting to 'age in place,'…while maintaining a high degree of

independence." Daniel J. Burdick, et. al., Daniel J. Burdick et al., *Predictors of Functional Impairment in Residents of Assisted-Living Facilities: The Maryland Assisted Living Study,* 60A J. Gerontology 258 (2005). The specific services provided at these facilities vary greatly, but the vast majority of assisted living residences provide some combination of assistance with ADLs, medication management, and nursing services. Catherine Hawes, et al., *A National Study of Assisted Living for the Frail Elderly: Final Summary Report* 12 (2000), http://goo.gl/I4xrVk.

Direct care workers who provide services in assisted living and nursing facilities, who already enjoy FLSA protections, provide comparable services to those provided in individual homes. Due to the close similarity in the services that they provide, home care workers deserve to be compensated at levels equivalent to those of their counterparts in institutional and other settings.

III. Although the Regulations May Impose Some New Requirements, Consumers and Family Caregivers Have Options to Achieve Compliance and Mitigate Possible Costs

There is no question that the regulations, once implemented, may trigger some changes in the delivery of services, and possibly the cost of services to some. However, home care agencies' fears about devastating increased costs are unwarranted. However, home care agencies' fears about devastating increased costs are unwarranted. Even home care agencies' own survey showed that while

76.3 percent of agencies who do not currently pay overtime predicted "significant" cost increases would result from overtime pay, in reality, more than 50 percent of agencies that already pay overtime experienced only a "minimal" to "moderate" *actual* cost increase. *See* Nat'l Ass'n for Home Care and Hospice, *Companionship Services Exemption Survey*, at Slide 18 (2012).

To the extent that FLSA protections for home care workers may result in some increased cost to individual families, families may choose to adjust their care arrangements to minimize that cost. For instance, if a consumer or family needs a non-live-in home care worker for more than 40 hours, and that worker's duties do not fall within the revised "companionship services" definition, the family may choose to avoid paying overtime by hiring a second worker to cover the extra hours. Or, a family whose loved one needs round-the-clock care and employs a live-in caregiver supplied by a home care company could move to a shift system, in which different care workers covered different periods of time throughout the day to achieve continuous coverage without exceeding 40 hours for any given worker. Or, they could consider hiring the worker directly as a "live-in" worker. *See* 29 C.F.R. § 552.102 (2010) (explaining the "live-in worker" exemption).

Of course, each family's situation is unique, and thus each family's preferred arrangement will vary depending on the hours and types of assistance needed, the availability of family caregivers, and countless other factors. Some consumers

may prefer to employ one worker, whom they trust and with whom they have a long-standing relationship, to assist them with intimate personal care tasks. However, others may place more value on having more than one worker who understands their needs and preferences; this way, they have a backup worker with that familiarity and personal experience to turn to if the primary worker is ill or unable to work at a scheduled time.

While there is an understandable concern about continuity of care when multiple workers are involved, continuity of care does not only mean care supplied by a single worker. With strong communication among home care workers, the consumer, and any family caregivers, continuity need not suffer. Moreover, continuity of care also means continuing attention and quality, both of which can suffer when a worker is fatigued from working too many hours. Also, as noted above, the home care industry faces exceptionally high turnover in the workforce (*see Caring in America*, *supra*, at 69) in part due to low wages, which significantly now detracts from continuity of care because it leads to a dearth of workers with extensive, hands-on experience in providing care. *See Unnecessary Crisis in Long-Term Care*, *supra*, at 10. Finally, continuity means avoiding gaps in care, which requires adequate back-up systems and workers, so that another worker is available when a regularly scheduled worker is unavailable. An inadequate supply of workers and high turnover, which leads to an insufficient number of experienced

workers, makes this type of continuity difficult if not impossible to achieve. Ultimately, the regulations may require some consumers and their families to make some adjustments in how they structure their caregiving arrangements, but the regulations need not cause disruptions in care or significant increases in the cost of care. Although any solution will likely require some changes to current circumstances, consumers and families have choices that allow them avoid or mitigate cost increases that may result from the regulations while still getting the care they need.

CONCLUSION

For the reasons set forth above, the Court should reverse the district court's decision.

Respectfully submitted,

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February 27, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 3,855 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point times roman typeface using Microsoft Word 2010.

Dated: February 27, 2015

/s/ Daniel B. Kohrman
Daniel B. Kohrman
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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on February 27, 2015 the foregoing Brief of Amicus Curiae AARP Supporting Appellants, David Weil, et al. was electronically filed with the Clerk of the Court for the United States Court of Appeals of the D.C. Circuit using the appellate CM/ECF system which will send notice of such filing to the following registered CM/ECF users:

Dated: February 27, 2015

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