



Companions & Homemakers™

Home Care for Older Adults

LAW DEPARTMENT
613 NEW BRITAIN AVENUE
FARMINGTON, CONNECTICUT 06032
www.companionsandhomemakers.com

J. MARTIN ACEVEDO, GENERAL COUNSEL
EMAIL: martin.acevedo@elderly-care.com

DIRECT DIAL: (860) 751-0902
FACSIMILE: (860) 409-2531

March 3, 2011
Committee on Aging
Testimony Regarding Committee Bill No. 3
“An Act Concerning Criminal Background Checks For Employees of Homemaker-Companion Agencies and Home Health Agencies”

DEAR SENATOR PRAGUE AND MEMBERS OF THE COMMITTEE:

My name is Martin Acevedo. I am the General Counsel of Companions & Homemakers, Inc., a 20-year old homemaker-companion services provider registered with the Department of Consumer Protection. With ten offices throughout the State of Connecticut, our company cares for over 2,700 elderly consumers in their homes or places of residence and employs approximately 2,300 caregivers.

In 2006, our company worked very closely with the General Assembly in crafting Section 52 of Public Act 06-187, the first legislative enactment regulating the home care industry in Connecticut. Today, we are pleased to testify in support of most of the contents of Committee Bill No. 3.

The statute regulating providers of homemaker-companion services (codified at Chapter 400o of the General Statutes) mandates providers to perform “comprehensive background checks” for all homemaker, companion, and personal care workers placed with consumers. The statute, however, did not define what a “comprehensive background check” consists of. As a result, each provider is free to interpret the meaning of “comprehensive background check.”

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Committee Bill No. 3 addresses this void by defining this term. Furthermore, the bill correctly requires those seeking to operate a homemaker-companion agency to submit to a criminal background check as part of the process for obtaining a permit from the Department of Consumer Protection to operate a homemaker-companion agency. Bill No. 3 also requires home health agencies to conduct comprehensive background checks as well.

PROBLEM WITH THE USE OF THE TERM "REGISTRANT"

We respectfully oppose the Bill's use of the term "registrant" defined in Section 8 of Committee Bill No. 3. It defines "Registrant" as "any person, *other than an employee*, who provides companion services or homemaker services for a homemaker-companion agency." (Emphasis added.)

The reason for our objection is simple. Workers hired by homemaker-companion agencies to provide homemaker, companion, and personal care services ARE ALWAYS EMPLOYEES OF EITHER THE AGENCY, THE CONSUMER, OR BOTH. Unlike, for example, a nurse, an electrician, a plumber, etc., homemakers, companions, and personal care assistants are a category of unskilled, low-wage workers WHO DO NOT MEET THE DEFINITION OF INDEPENDENT CONTRACTOR UNDER CONNECTICUT LAW.

The use of the term of "Registrants" throughout Committee Bill No. 3 gives the mistaken, legally-incorrect impression that homemakers, companions, and personal care assistants can be "independent contractors." This would be inconsistent with established Connecticut case law and Connecticut Department of Labor regulations. (Attached to my

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testimony are some informational materials addressing the Registry-Independent contractor issue.)

In sum, we applaud the Committee's efforts to define "comprehensive background check" and urge it to amend the current statute accordingly. We also respectfully request that this Committee revise Bill No. 3 to remove any reference to the term "*Registrants*" as well as any reference to the term "*independent contractor*" as it appears in the current version of the statute.

I will be happy to address any questions.

ENCLOSURES:

- (1) CT DOL Advisory Memorandum citing CT Supreme Court case *Latimer v. Administrator* (1990).**
- (2) Paffen v. Griswold Special Care decision by CT Board of Unemployment Review.**
- (3) 2010 CT LAW TRIBUNE Article regarding referral agencies.**

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NOT ALL HOME CARE IS CREATED EQUAL

Referral agencies can turn consumers into accidental employers

By J. MARTIN ACEVEDO

Custodial in-home care (i.e., companionship, homemaker services, assistance with activities of daily living) continue to grow in popularity as an alternative to costly institutionalization. Once considered of a service exclusive to the elder consumer, custodial home care services also can be beneficial to those with terminal illnesses (end of life care) and individuals undergoing lengthy recuperation from an accident or illness.

Even state and federal governments have begun to recognize the critical role that custodial home care plays in health care reform and social services policy.

Given the increasing popularity of in-home care services, it is no surprise that a large number of new home care agencies have surfaced in the last few years. Effective Oct. 1, 2006, agencies have been subject to a registration requirement imposed

Unfortunately, many consumers often go for the cheapest alternative, without fully understanding the implications of their choice.

Not all these home care agencies, however, are created equal. Unbeknownst to the consumer, some of these lower priced agencies may not actually employ their caregivers. Instead, they "refer" the caregiver to the consumer. These referral agencies, also known as "registries," do not directly employ or supervise their caregivers but merely "place" them in the home of the consumer. As such, these agencies typically do not withhold payroll taxes from the worker's wages.

Some consumers also choose to hire help privately, instead of using the services of an employment-based (i.e., non-registry type) home care agency. Both choices can trigger a series of obligations and liabilities upon the consumer, the most prominent of which will be reviewed here.

dards. With the establishment of an employer-employee relationship, the consumer is responsible for, amongst other things, payment of local, state and federal taxes.



J. MARTIN ACEVEDO

Withholding Taxes

Save for situations involving services furnished by individuals who traditionally meet the definition of independent contractor, a consumer who (knowingly or accidentally) becomes an employer generally is responsible for withholding of taxes due the government. In the event of nonpayment of taxes, the government may institute legal action against the consumer or her estate for back taxes, interest and penalties, including criminal penalties. Given the often prolonged nature of home care services, the figure due the government over time can be substantial.

Similarly, the consumer-turned-private-employer may end up on the receiving end of a claim for unpaid unemployment taxes or an action to recoup any unemployment benefits paid to the worker.

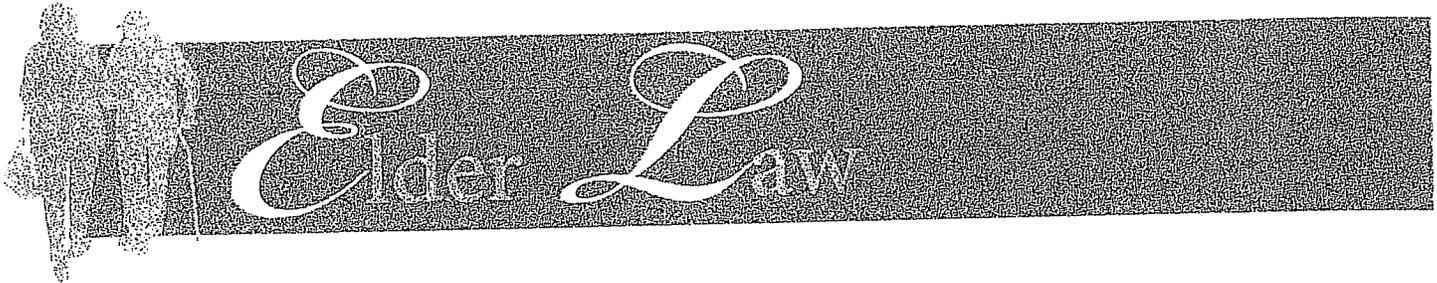
Like the tax issue, another area of concern involves workplace injuries. Under Connecticut law, employers are required to carry workers' compensation insurance for the protection of employees. In the case of a consumer who pays for the services of a worker "referred" by a registry (or who is hired privately by the consumer), that consumer would be held liable for job-related injuries suffered by the caregiver, including

CONSUMERS OFTEN ARE UNDER THE MISTAKEN IMPRESSION THAT ANY INJURY SUFFERED BY A CAREGIVER DURING THE COURSE OF EMPLOYMENT WOULD BE COVERED BY HOMEOWNER'S INSURANCE. THAT IS NOT THE CASE.

by Connecticut statute. The law requires agencies to register with the Department of Consumer Protection before conducting business. As of this writing, there are approximately 314 homemaker-companion agencies registered with the Department of Consumer Protection.

As more consumers opt to purchase home care services, the public is confronted with a wide array of choices and options.

Hiring caregivers through a registry or independent contractor referral agency generally will result in the creation of a private employer-employee relationship between the consumer and the caregiver. The same is true where the consumer hires the caregiver privately to provide services, as these workers do not typically meet the criteria for independent contractor status under IRS and Department of Labor stan-



applicable medical expenses and disability payments. Financial exposure could be significant, even for wealthy individuals.

Consumers often are under the mistaken impression that any injury suffered by a caregiver during the course of employment would be covered by homeowner's insurance. That is not the case. On the contrary, policies usually exempt coverage for such accidents.

Liability for unpaid taxes and on the job injuries are perhaps the two greater problems vexing consumers who wind up becoming the employer of record of a worker providing care in the home. As noted, consumers may accidentally become an employer when choosing to hire a worker through a registry or similar type of agency. There is a concern that these agencies often do not make full disclosure of the potential liabilities a client may face in such situations. The problem is compounded by a general lack of awareness of these issues amongst the public at large, including professionals such as attorneys, accountants, and other fiduciaries.

Confirm in Writing

To minimize the risk of becoming an accidental employer, the following minimum

steps should be taken when hiring a caregiver through an agency:

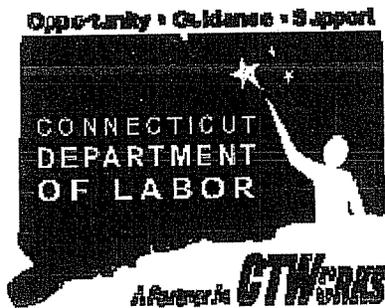
- Confirm the agency is duly registered with the Department of Consumer Protection.
- Have the agency confirm in writing which party is responsible for withholding all payroll taxes from the worker's paycheck, including social security, Medicare, unemployment, federal and state payroll taxes—watch for answers such as “you don't have to worry about taxes,” “the worker is responsible for taxes,” or “we 1099 the worker.”
- Have the agency confirm in writing that it carries workers' compensation insurance to cover caregivers (not just the agency staff) for job-related injuries occurring in the home of the consumer—feel free to request a copy of the agency's certificate of insurance evidencing such coverage.
- Under Section 20-670-3(b)(1) of the Regulations of Connecticut State Agencies, a homemaker-companion agency's written contract or “service plan” given to the consumer must include “a clear

definition of the employee, provider and client employment relationship.” Ask the agency for a copy of their standard contract or service plan and review the agency's statement in compliance with this section. It should contain, in clear and unambiguous terms, the nature of the relationship between the consumer, the agency and its caregivers.

At the end of the day, consumers should retain the ability to obtain whatever care meets their unique needs. Clients who choose to hire their own help privately certainly have the right to do so, but they should educate themselves in the myriad duties and responsibilities and the legal and tax implications of becoming a worker's employer of record.

Consumers who purchase services through an agency must understand that not all agencies are created equal, and that the choice of one particular agency over another should not be based upon cost alone. Rather, it should be based upon careful consideration of a variety of factors, including, most significantly, the agency's worker employment model. ■

J. Martin Acevedo is general counsel of Companions & Homemakers Inc. of Farmington, which offers elderly home care services.



December 1998

**RESPONSIBILITIES OF REGISTRIES, EMPLOYMENT AGENCIES
TEMPORARY HELP AGENCIES, EMPLOYEE LEASING COMPANIES, AND
PROFESSIONAL EMPLOYER ORGANIZATIONS UNDER THE
CONNECTICUT UNEMPLOYMENT COMPENSATION LAW**

Any individual who is referred to a client and is subsequently paid by the Registry/Agency may be considered an employee of the Registry/Agency. The Registry/Agency is acting as a temporary help agency when they pay the individual directly; the wages paid are subject to the Connecticut Unemployment Compensation Law. Individuals employed in this manner over one (1) year are considered leased employees. Such agencies should refer to the Department's leasing policy.

If an individual is referred to a client (commercial, domestic, or agricultural), the Registry/Agency receives only a placement fee and does not pay the individual's wages, then the individual is not considered an employee of the Registry/Agency. However, this does not automatically make the individual an Independent Contractor regarding his or her employment status with the client under the Connecticut Unemployment Compensation Law.

The individual will be considered a full or part-time employee of the client who pays the individual's wages, unless the individual is a valid Independent Contractor excluded from employment as defined in Section 31-222(a) (1) (B) (ii) of the Connecticut Unemployment Compensation Law. In a Connecticut Supreme Court decision dated August 14, 1990, (*Walter N. Latimer v. Administrator, U. C. Act (13863)*), it was stated that personal care assistants (PCA's) placed by a registry/Agency with a client who paid the PCA's were employees of the client. The Court ruled that "*The fact that the PCA's placed with the client by the registry signed an agreement that they were "independent contractors" is of no moment. Such provisions in a contract are not effective to keep an employer outside the purview of the Act when the established facts bring him within it.*"

Registries/Agencies should not advise their clients that the referred individual is an Independent Contractor. The Registry/Agency should inform their clients that the referred individual may well be considered the client's employee. Questions regarding employee vs. Independent Contractor status should be referred to the Connecticut Labor Department, Field Audit Unit. The telephone number at the Central Office location, 200 Folly Brook Boulevard, Wethersfield, CT 06109-1114, is (860) 236-6360. Local Field Audit Locations and telephone numbers are listed on the reverse side.

Connecticut Employment Security Appeals Division

New Query HELP: About This Page

Documents 1 to 1 of 1 matching the query "*@apdClaimant 'paffen'*".

- ①①①①① 1. ⚡ **ANNETTE C. PAFFEN v. GRISWOLD SPECIAL CARE FMCH, INC.,
9019-BR-97, decided 12/30/1997; Digest No. CE 3-00**
Abstract: Covered Employment. ABC Test applied even though FUTA specifically
exempted the employer's companion-sitter placement agency. The Superior Court for the
judicial district of Hartford, docket no. CV-98-0351244-S, affirmed the Board's decision on
June 18, 1999.
http://ctboard.org/adlib_docs/1997/9019br97.html

The index is up to date.

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STATE OF CONNECTICUT

Department of Labor

Employment Security Appeals Division

Board of Review

38 Wolcott Hill Road

Wethersfield, CT 06109

Telephone: (860) 566-3045 Fax: (860) 566-6932

Claimant's Name: ANNETTE C. PAFFEN

S.S. #: *****

Employer's Name, Address & Reg. No.

GRISWOLD SPECIAL CARE FMCH, INC.

2499 Main Street

Stratford, Connecticut. 06497

E.R. #: 93-078-16

Board Case No.: 9019-BR-97

1. Appeal from Referee's

determination

dated: September 25, 1997

Case No.: 9019-DD-94

2. Date appeal

filed: October 16, 1997

3. Appeal filed by: Employer

4. Date mailed to interested

parties: December 30, 1997 DECISION OF THE BOARD OF REVIEW

Provisions of the Connecticut General Statutes involved:

Section 31-222(a)(1)(B)

CASE HISTORY - SOURCE OF APPEAL:

The Administrator ruled the claimant eligible for unemployment benefits, and notified the

employer of its chargeability on November 8, 1994.

The employer appealed the Administrator's decision on October 17, 1994.

Associate Appeals Referee Ralph V. Dorsey affirmed the Administrator's ruling by a decision issued on September 25, 1997.

The employer appealed the Referee's decision to the Board of Review on October 16, 1997.

DECISION

Acting under authority contained in Section 31-249 of the Connecticut General Statutes, the Board of Review has reviewed the record in this appeal, including the tape recording of the Referee's hearing.

The Referee ruled that the appellant failed to establish, pursuant to Conn. Gen. Stat. §31-222 (a) (1)(B)(ii), that it did not employ the claimant. The Referee found that the claimant was engaged in employment as defined by the Connecticut Unemployment Compensation Act.

In support of its appeal, the employer/appellant concedes that for the purposes of the "ABC" test, the claimant is in an employment relationship with the subject employer. However, it is the employer's position that the employer, as a companion-sitter placement agency, is specifically exempted from FUTA withholding under federal law by I.R.C. § 3506,⁽¹⁾ in which Congress specifically intended to exempt such services from tax liability. Although we agree with the employer that it is specifically exempted from FUTA under I.R.C. § 3506 by virtue of its status as a companion-sitter agency, we find no merit to the employer's contention that it is entitled to the same exemption under Connecticut law. We thus conclude that there is no preemption issue before us and that the employer is liable for state unemployment compensation taxes under Connecticut law for its employment relationship with the claimant.

At the outset, we note that there is no parallel provision under Connecticut law which exempts the subject employer from state unemployment tax liability in the manner in which the subject employer is exempted under federal law pursuant to I.R.C. § 3506. The Connecticut Unemployment Compensation Act conforms to the federal requirements enunciated in I.R.C. § 3304, and thus is a federally-approved plan for the payment of unemployment compensation. As an approved law, the state law is independent of the federal law, and contains its own exemptions from employment. See Conn. Gen. Stat. § 31-222(a)(5)(A)-(M). Unlike the federal law, however, the Connecticut Unemployment Compensation Act does not exempt companion-sitter agencies such as the subject employer from covered employment. In the absence of an exemption under state law, we must determine whether the employer is subject to liability under the Connecticut Unemployment Compensation Act. See Conn. Gen. Stat. § 31-223(a). Based on our review, we find that the subject employer is subject to nonvoluntary liability pursuant to Conn. Gen. Stat. § 31-223(a), and that it has tax liability because the claimant was engaged in "employment" as that term is defined in Conn. Gen. Stat. § 31-222(a)(1).

Employment subject to the provisions of the Unemployment Compensation Act means any service by:

any individual who, under either common law rules applicable in determining the employer-employee relationship or under the provisions of this subsection, has the status of an employee. Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Conn. Gen. Stat. §31-222(a)(1)(B)(ii). This provision, the so-called ABC test, is in the conjunctive. Unless the party claiming the exception to the rule that service is covered employment satisfies all three prongs of the test, an employment relationship will be found. A worker is considered an employee until the party claiming the independent contractor exemption proves otherwise.

Based on our review of the record, we find that the employer has not established that the claimant was free from the employer's direction and control, both under contract and in fact, in connection with the performance of her services. We find that because the employer has failed to establish that the claimant was free from the employer's control and direction in connection with the performance of his services, it cannot satisfy Part A of the test.

Part B of the ABC test requires that the service of an independent contractor be performed outside the usual course of business for which the service is performed or outside of all places of business of the enterprise for which the service is performed. This subtest is in the alternative, and the employer need only establish that the service is either outside the course or place of its business. The place of business is not only the office, but the individual job sites at which the employer contracts to provide service. See Greatorex v. Stone Hill Remodeling, Board Case No. 1169-BR-88 (1/9/88), aff'd sub nom. Stone Hill Remodeling v. Administrator, Superior Court, Judicial District of Waterbury, 2/21/91; Feschler v. Hartford Dialysis, Board Case No. 995-BR-88, (12/27/88).

It is clear from the record that the claimant, as a companion-sitter, performed services within the usual course of the employer's business and at all business locations for which the employer had contracted for performances. We thus conclude that the employer has failed to establish part B of the ABC test.

The final prong of the ABC test requires a showing that the individual is "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." Conn. Gen. Stat. §31-222(a)(1)(B)(ii)(III). The C test requires a showing that the individuals have "one or more enterprises created by them which exist separate or apart from their relationship with [the contractor] and which will survive the termination of that relationship." F.A.S. International v. Reilly, *supra*, at 515. The Board has held that the statute does not require that an individual merely be able to engage in activity independent of that of the employer, but that the individual customarily be engaged in the independent activity at the time of rendering the service. Feschler v. Hartford Dialysis, *supra*. Although this does not necessarily require that the individual perform the independent activity simultaneously with the service or that an individual is precluded from entering into an exclusive service contract, it does place a heavy burden on the appellant to establish that the individual holds himself out to the public as one who regularly performs this service.

Described as potentially the most far-reaching provision of the ABC test, the C clause requires that the services be rendered by an individual in the capacity of an entrepreneur. "The double requirement, that the worker's occupation be 'independently established' and that he be 'customarily' engaged in it, clearly calls for an enterprise created and existing separate and apart from the relationship with the particular employer, an enterprise that will survive the termination of that relationship." Wilcox, The Coverage of Unemployment Compensation Laws, 8 Vand. L. Rev. 245, 264 (1955).

The claimant did not appear at the Referee's hearing to present evidence as to whether she was "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the services performed" within the meaning of Conn. Gen. Stat. §31-222(a)(1)(B)(III). However, even if the claimant did hold herself out to the public as

engaged in an independent business, the employer, at most, would satisfy only this last prong of the ABC test. As we stated above, the test is in the conjunctive, and an employment relationship will be found unless the employer can satisfy all three prongs of the test. Since the employer has failed to satisfy the A and B prongs of the test, we conclude that the claimant is an employee and that the claimant's services constituted covered employment.

Therefore, in so far as the "ABC" test is concerned, we find that the claimant and the employer were engaged in an employment relationship which subjected the employer to unemployment compensation tax liability pursuant to Conn. Gen. Stat. §31-222(a)(1)(B)(ii).

Accordingly, the decision of the Referee is affirmed, and the employer's appeal is dismissed. In so ruling, we adopt the Referee's findings of fact as modified above.

BOARD OF REVIEW

Bennett Pudlin, Chairman

In this decision, Board member William F. Jones and alternate Board member George Meehan concur.

BP:SCL:sm

**IF YOU WISH TO APPEAL THIS DECISION, YOU MUST DO SO BY JANUARY 30, 1998.
SEE LAST PAGE FOR IMPORTANT INFORMATION REGARDING YOUR APPEAL
RIGHTS.**

COPIES PROVIDED TO:

Attorney Patricia O'Malley

Special Care, Inc.

717 Bethlehem Pike, Suite 3-B

Erdenheim, PA. 19038

Department. of Labor

Wayne Medoff, Field Audit Unit

35 Courtland St., Rm. 217, 2nd fl.

Bridgeport, Connecticut. 06604

1. Section 3506 of the Internal Revenue Code provides in relevant part:

(a) ...a person engaged in the trade or business of putting sitters in touch with individuals who wish to employ them shall not be treated as the employer of such sitters (and such sitters shall not be treated as employees of such person) if such person does not pay or receive the salary or wages of the sitters and is compensated by the sitters or the persons who employ them on a fee basis.