

**Connecticut Association of Home Care  
Registries**

**Opposes**

**Raised Bill No. 911**

The Connecticut Association of Home Care Registries ("CAHCR") opposes Raised Bill No. 911 (the "Bill") because it would require a registry to provide notices to its consumer clients and its caregiver clients concerning matters over which the registry has no control and concerning matters which the registry lacks sufficient information or legal expertise to address. Also, the proposed notices would have the effect of misrepresenting a registry's business to its consumer clients and its caregiver clients, and create unnecessary fear and uncertainty for such clients.

CAHCR submits that the bill would do a serious disservice to consumers who seek to self-manage their own home care and to the caregivers who choose to offer their services as independent contractors.

The Bill appears premised on a fundamental misunderstanding of how a registry operates in the home-care market.

Registries provide their consumer clients with just-in-time access to pre-background screened, pre-credential verified home-care providers. A registry's services are *referral* services and, in some cases, administrative support for the caregiver relationship between a consumer and a referred caregiver.

Registries provide their caregiver clients with access to client opportunities.

CAHCR submits that requiring a registry to provide the notifications that the Bill proposes would be at best confusing and at worst grossly misleading. Each of the proposed notices is discussed in detail below.

### I. Notice to Consumer Clients

The Bill would require a registry to provide each consumer with a notice meeting the following requirements:

Sec. 3. (NEW) (*Effective January 1, 2012*) (a) A registry shall provide each consumer with a notice specifying the duties, responsibilities, obligations and legal liabilities of such registry to the individual supplied or referred to or placed with the consumer and to the consumer. The

notice shall be given to the consumer before the commencement of services. If the registry maintains an Internet web site, a sample of the notice shall be posted on such Internet web site.

(b) The notice to the consumer shall be in a form approved by the commissioner and shall include, at a minimum, the following information:

(1) The consumer's responsibility for:

(A) Day-to-day supervision of the employee,

(B) Assigning duties to the employee,

(C) Hiring, firing and discipline of the employee,

(D) Provision of equipment or materials for use by the employee,

(E) Performing a comprehensive background check on the employee, and

(F) Ensuring credentials and appropriate certification of the employee.

Comments:

- The notice would characterize caregivers as “employees,” which generally is not accurate, as most if not all caregivers who obtain client referrals through a registry operate as independent contractors. A registry member of the CAHCR within the past couple years was involved in a dispute with the Connecticut Employment Security Division (the “Division”), in which the Division ultimately concluded that the caregiver at issue was *not* an employee of the registry and was *not* an employee of the consumer, but instead was an independent contractor.
- A registry has no right to dictate to a client the allocation of duties referenced in items (1)(A) through (D), as those matters are separately negotiated by the client and a caregiver.
- Registries always are responsible for items (1)(E) and (F); but, as mentioned, the caregivers commonly operate as independent contractors, not “employees.”

The Bill also would require a registry to provide a consumer with a statement meeting the following requirements.

(2) A statement identifying the registry as an employer, joint employer, leasing employer or nonemployer, as applicable, along with the responsibility the registry will assume for the payment of wages, taxes, Social Security, overtime and minimum wage, workers' compensation and unemployment compensation insurance payments and any other applicable payment required under state or federal law.

Comments:

- While a registry would identify itself as a nonemployer relative to a caregiver, that characterization would have no legal effect on the Internal Revenue Service ("IRS") of the U.S. Department of Labor ("DOL"). Moreover, a registry's status relative to a caregiver is dictated by federal statutes over which federal agencies have exclusive jurisdiction. Thus, for a state statute to require a registry to opine on matters governed by federal law is fundamentally inappropriate.
- Similarly, a registry would include in the statement that it does not assume any responsibility for the payment of any of the items described in paragraph (2). These payment obligations are dictated by federal statutes; they are not voluntary. The statement's declaration that a registry assumes, or does not assume, these payment obligations would not be binding on the IRS or the DOL. If, for example, a registry were to state that it is assuming the payment obligation for Social Security taxes, but the IRS were to determine that the consumer is liable for those taxes, the IRS could collect the taxes from the consumer – regardless of what the statement provides.
- In addition, if a registry were to provide a consumer with a statement that it does not assume any responsibility for the payment of Social Security, overtime and minimum wage, workers' compensation and unemployment compensation insurance payments, the consumer would reasonably infer, by process of elimination, that the consumer *must be* responsible for

making those payments – which would *not* be true in most cases, because caregivers commonly operate as independent contractors. Furthermore, as home-care providers, these individuals likely would be exempt from any overtime requirements.

- The catchall requirement at the end that would require a registry to state its obligations “under any other applicable payment required under state or federal law” would impose an overwhelming burden on a registry that is far afield from its business model. A registry is not in the business of providing consumers with legal advice on these issues.

The Bill would require registries to create unnecessary fear for elderly and infirm consumers, by requiring the following notice:

(3) A statement that, regardless of the registry's status, the consumer may be considered an employer under law and, if that is the case, the consumer may be held responsible for the payment of federal and state taxes, Social Security, overtime and minimum wage, unemployment, workers' compensation insurance payments and any other applicable payment required under state or federal law.

#### Comments:

- A consumer who receives home care from an independent contractor would *not* be subject to any of the requirements described. To state that they “may be” would be highly misleading and would likely result in consumers opting not to accept referrals from a registry.
- The clear effect of such an *in terrorem* notice would be to drive consumers away from registries. The consequence would be *vulnerable* consumers obtaining caregivers on their own – without the background-screening and credential-verification protections that registries provide. Alternatively, consumers could instead obtain care through homemaker-companion agencies, but at a higher price and with caregivers earning less.

The Bill would create a trap for the unwary registry or for the registry that through administrative oversight neglects to provide the required notice.

(c) A registry's failure to give the notice required pursuant to subsection (a) of this section to a consumer shall not relieve the consumer of any of his or her duties or obligations as an employer. In the event a registry fails to give such notice to the consumer and the consumer is later held liable to the employee for payment of wages, taxes, workers' compensation or unemployment compensation, the consumer shall have a right of indemnification against the registry, which shall include, but not be limited to, the actual amounts paid to or on behalf of the employee, as well as the consumer's attorneys' fees and costs.

#### Comments:

- This is another provision that greatly expands the business of a registry. A registry is not in the business of providing consumers with advice on legal issues; nor does it involve itself in the relationship between a consumer and a caregiver. Rather, a fundamental distinction between a registry and an employee-based agency is that a registry is *not* a provider of *home care*, but rather *is* a provider of caregiver *referrals*. Thus, a registry remains detached from the care relationship, so the consumer and a caregiver can structure it in the manner that they choose, not how the registry chooses. It follows that to impose on a registry a duty of indemnification with respect to matters in which a registry has no involvement would be highly inequitable and inappropriate.

#### II. Notice to Caregiver Clients

The defects in the notice the Bill would require a registry to provide its consumer clients also exist with respect to the proposed notice for a registry's caregiver clients.

Sec. 4. (NEW) (*Effective January 1, 2012*) (a) A registry shall provide each individual supplied or

referred to or placed with a consumer with a notice that sets out such individual's legal relationship with the registry and the consumer. The notice shall be given to such individual upon being recruited by the registry. If the registry maintains an Internet web site, a sample of the notice shall be posted on such Internet web site.

(b) The notice to the individual shall be in a form approved by the commissioner, and shall include, at a minimum, the following information:

(1) The duties, responsibilities, obligations and legal liabilities of the registry to the consumer and the individual. Such description shall include the following information:

(A) A statement as to the party responsible for the payment of the individual's wages, taxes, Social Security, unemployment and workers' compensation insurance,

(B) A statement identifying which party will be responsible for the individual's hiring, firing, discipline, day-to-day supervision, assignment of duties and provision of equipment or materials for use by the individual, and

(C) A statement that, under state and federal law, an individual treated as an independent contractor may enjoy less protection than one who is treated as an employee.

Comments:

- The comments above concerning a registry's inability to dictate to a consumer and caregiver the allocation of the listed duties, and the inappropriateness of a registry advising a consumer about matters over which federal agencies have exclusive jurisdiction and which are not binding on those agencies, apply here with equal force.

- Furthermore, to require a registry to provide a caregiver with a notice describing the individual's legal relationship with a consumer is highly inappropriate for a registry, because the legal status of that relationship would be dictated (i) by the terms and conditions of the relationship, which the consumer and the caregiver separately negotiate, and (ii) by the specific attributes of each caregiver, such as the extent to which such caregiver has other clients, advertises his or her services, and possesses other indicia of being self-employed.
- The requirement to provide an independent contractor with a notice advising that as an independent contractor the individual may enjoy less protection than one who is treated as an employee, once again, positions a registry as a provider of legal advice. In addition, such a notice could well be viewed by an independent contractor as insulting and condescending, as the notice suggests that the individual does not fully understand the ramifications of his or her decision to operate as an independent contractor. Finally, such a statement reasonably could be viewed by recipients as expressing the judgment of the government that independent-contractor status is not in an individual's best interests, which is grossly misleading, as in many cases such business model can be financially advantageous to home-care providers.

### III. Conclusion

For the reasons set forth above, CAHCR opposes the enactment of Raised Bill No. 911. CAHCR submits that the Bill would create confusion and uncertainty for a home-care market that currently is functioning well and meeting the needs of consumers who seek to self-manage their care and caregivers who have chosen to offer their services as independent contractors.

For additional information about CAHCR or the basis for its opposition to the Bill, please contact:

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