TESTIMONY BY JOHN D. SHULANSKY TO THE AGING COMMITTEE - MARCH 13, 2012

Senator Prague, Representative Serra, and esteemed members of the Committee:

My name is John Shulansky. I am a partner in EldersChoice of Connecticut, LLC a Homemaker Companion Agency and an Employer Fee Paid Agency. EldersChoice is not a franchise; we are a partner with EldersChoice operating in Pennsylvania, and Maryland. While I endorse the intent of HB 5439, the bill as proposed has significant unintended consequences that cause direct harm the consumer and jeopardize the public interest. There are two primary issues with the bill language:

1. Under proposed changes to the Fair Labor Standards Act (FLSA) to be enacted later this month, home care providers will be treated as non-exempt employees; however, ***these rule changes continue the federal exemption for home caregivers that are considered "household employees."*** HB 5439 does not recognize household employees. (A copy of the US DOL Fact Sheet is included with this testimony.)
2. Not all non-medical home care delivery is the same. The body of scientific evidence demonstrates that the consumer benefits when care is provided by a single continuous caregiver living in the home, especially consumers with dementia, brain injuries, and other chronic illnesses. There is a real difference between services provided on a "shift" or "hourly" basis, and services provided by caregivers living in the home for an extended period – those very same caregivers who are exempt from FLSA as household employees.

The net combined effect of HB5439 and the revised FLSA is to increase costs to the consumer by as much as 60 percent or there will be multiple caregivers in the consumer's home. More consumers will hire caregivers privately, which circumvents the intent of this Bill and the protections provided by the State. These consequences have serious detrimental effects to the cost, quality and delivery of care.

The best way for live-in caregivers to be provided Medicare, social security and unemployment benefits, and workers compensation, is to **amend** this Bill to mirror an approach adopted by the Commonwealth of Pennsylvania and at least 16 other states:

1. **Amend this bill to exempt caregivers who meet the definition of "household employees".** This is defined in CGS §12-707 (9) and cites Federal law. The responsibilities of household employers for income tax reporting and withholding, unemployment benefits and workers' compensation insurance are explicit in federal and state law.
2. **Amend this bill to require all Agencies and Registries to provide separate, specific written disclosure to the consumer** regarding the employment status of the caregiver that must be signed at commencement of service. The Pennsylvania Notice of Direct Care Worker Status required by law[1] is attached and represents an example of best practice.

Passage of this bill without these changes will most likely force the close of my business in Connecticut. EldersChoice only refers caregivers to be direct household employees working 24/7 in a private residence. We do this because our consumers benefit from the continuity of care these caregivers provide; EldersChoice provides ongoing case management and coordination. We are diligent and transparent in our disclosures to our customers regarding financial responsibility for caregiver's income and benefits. In great part this is because we follow the Pennsylvania requirements in most aspects of our business in order to comply with their stringent standards regarding caregiver qualifications, consumer disclosures, and oversight. We would encourage the General Assembly to look to Pennsylvania for examples of best practices in the home care industry.

[1] 28 P.S. §611.57 (c) (7)

UNITED STATES DEPARTMENT OF LABOR

Wage and Hour Division (WHD)

FACT SHEET

Proposed Rule Changes Concerning In-Home Care Industry under the Fair Labor Standards Act (FLSA)

The Fair Labor Standards Act (FLSA or Act) was passed in 1938 to provide minimum wage and overtime protections for workers, to prevent unfair competition among businesses based on subminimum wages, and to spread employment by requiring employers whose employees work excessive hours to compensate employees at one-and-one-half times the regular rate of pay for all hours worked over 40.

The FLSA did not initially protect workers employed directly by households in domestic service, such as cooks, housekeepers, maids, and gardeners. However, domestic workers that were employed by enterprises covered under the FLSA, such as gardeners employed by landscaping companies or a cook employed by a caterer, did received minimum wage and overtime protections even if their work was in or about a private household.

Congress extended FLSA coverage to "domestic service" workers in 1974, amending the law to apply to employees performing services of a household nature in or about a private home. There is no indication in the legislation or the Congressional history that those employees covered before this amendment, domestic workers employed by third parties, were to be excluded.

While Congress expanded protections to "domestic service" workers, the 1974 Amendments also created a limited exemption from both the minimum wage and overtime pay requirements of the Act for casual babysitters and companions for the aged and infirm, and created an exemption from the overtime pay requirement only for live-in domestic workers.

Although the regulations governing these exemptions have been substantially unchanged since they were promulgated in 1975, the in-home care industry has undergone a dramatic transformation. There has been a growing demand for long-term in-home care, and as a result the in-home care services industry has grown substantially. However, the earnings of in-home care employees remain among the lowest in the service industry, impeding efforts to improve both jobs and care. Moreover, the workers that are employed by in-home care staffing agencies are not the workers that Congress envisioned when it enacted the companionship exemption (i.e., neighbors performing elder sitting), but are instead are professional caregivers entitled to FLSA protections. In view of these changes, the Department believes it is appropriate to reconsider whether the scope of the regulations are now too broad and not in harmony with Congressional intent.

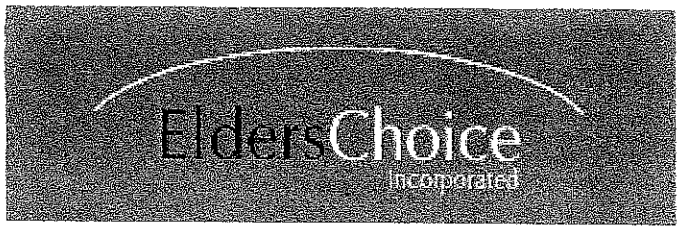
Proposed Changes to the Companionship and Live-In Worker Regulations

The Department is proposing to revise the regulations to accomplish two important purposes. First, the Department seeks to more clearly define the tasks that may be performed by an exempt companion. Second, the proposed regulations would limit the companionship exemption to companions employed only by the family or household using the services. Third party employers, such as health care staffing agencies, could not claim the exemption, even if the employee is jointly employed by the third party and the family or household.

The proposed regulations limit a companion's duties to fellowship and protection. Examples of activities that fall within fellowship and protection may include playing cards, watching television together, visiting with friends and neighbors, taking walks, or engaging in hobbies. The proposed regulations provide some allowance for certain incidental intimate personal care services, such as occasional dressing, grooming, and driving to appointments, if this work is performed in conjunction with the fellowship and protection of the individual, and does not exceed 20 percent of the total hours worked by the companion in the workweek.

The Department's proposal makes clear that employees performing services that do not fall within the revised definition of companionship services are not considered exempt from the minimum wage and overtime requirements:

- The proposal would clarify that "companionship services" do not include the performance of medically-related tasks for which training is typically a prerequisite. The current regulations specifically identify trained personnel such as nurses as outside the scope of the exemption, and this clarification more clearly identifies what constitutes medically-related services.
- Under the proposed rule, any work benefiting other members of the household, such as preparing meals or performing housekeeping or laundry for other members of the household, does not fall within the allowable incidental duties of an exempt companion.
- The Department proposes to revise the third party regulation to apply the companionship and live-in domestic worker exemptions only to workers employed by the individual, family or household using the worker's services. Under the proposed rule, the minimum wage and overtime exemptions would not be available to third party employers, such as home health care agencies, even if the household itself may claim the exemption (such as in a joint employment relationship).
- The proposed regulations would revise the recordkeeping requirements for live-in domestic workers. Under the proposal, employers would be required to maintain an accurate record of hours worked by such workers, just as other covered employees must keep such records.



Consumer Notice of Direct Care Worker Status

I _____ understand that:
PRINT NAME

Initial Only One Section Below

_____ Initials

The direct care worker who will be providing services in my home is an employee of ___[Agency]_____. _____[Agency]_____ is responsible for withholding State and Federal Income tax, Federal Unemployment tax, Social Security taxes and Medicare taxes on behalf of the direct care worker. [Name of Agency] is also responsible for paying workers' compensation insurance to cover the direct care worker in the event of an accident or injury on the job.

OR

_____ Initials

The direct care worker who will be providing live-in services in my home is not an employee of EldersChoice, Inc., and therefore, may be considered my employee. Since the direct care worker may be my employee, I may be responsible for withholding and reporting State and Federal Income tax, Federal Unemployment tax, Social Security taxes and Medicare taxes on behalf of the direct care worker. I also understand that the direct care worker is not covered by workers' compensation insurance.

_____ Initials

I have been informed that EldersChoice, Inc.

maintains bonding and general liability insurance _____does not maintain general and professional liability insurance covering the direct care worker. If EldersChoice, Inc. does not maintain general and professional liability insurance, and the direct care worker is not covered under workers' compensation. I have been advised to check my homeowner's or renter's insurance to determine if it covers any injury or accident involving the direct care worker while working in my home.

_____ CONSUMER SIGNATURE

_____ DATE

_____ AGENCY REPRESENTATIVE SIGNATURE

_____ DATE