

Tax Section

Part 2 | *Educating and encouraging clients to protect the health and safety of caregivers.*

By John L. Roberts, CELA



SUSTAINABLE HOME CARE

Beginning in 2006, Susan Gallagher provided 24/7 home care to an impecunious 95-year-old Marist priest at his apartment in Boston. Brain injury and multiple strokes left her patient incompetent, and Susan's round-the-clock care made it possible for him to continue living at home. The agency that issued her paychecks paid her for only 8 hours each day with no overtime, no matter how many hours she worked.

During the decade Susan provided home care, the agency supervised and approved her hours, told her how to provide care, and enforced her compliance with their procedures. When Susan filed a claim with the agency for retroactive overtime on her unpaid hours, her claim was summarily dismissed.

Boston employment lawyer Paul L. Nevins appealed Susan's case, based on

the agency's control and supervision of Susan's work and other labor and tax law factors that would classify her as an employee of the agency. But the Massachusetts Appeals Court decided that Susan "did not provide services to [the care agency] and cannot be deemed its employee for the purpose of the Wage Act or the overtime statute."¹

Attorney Nevins argued that Medicaid reimbursement regulations for the Personal Care Attendant program² create a "well-intended fiction" that styles elderly and disabled people as "employers" of caregivers who actually work for the care agency.³ The Appeals Court disagreed and affirmed dismissal of Susan's claim because she "was employed by the consumer for her services," not by the care agency, which is only a "fiscal intermediary."⁴ The state government and its administrative agencies avoided the role of

Susan's employer, because Susan "did not provide services to [the fiscal intermediary], much as the drivers did not provide services to the taxicab garage."⁵

"That's the everyday reality," says Tom Breedlove, a director of a payroll service that maintains a 50-state summary of labor laws affecting privately paid domestic workers.⁶ "It's similar to trust cases, where the trust *beneficiary*, who is the person receiving care, is deemed to be the employer, even if that person lacks cognitive skills," he says. "The exception would be in a situation where a home care agency or other entity employs the caregivers and has explicitly assumed the responsibilities of an employer."

A flood of retroactive wage and hour claims similar to the *Gallagher* case were filed in many other states by home care workers seeking retroactive overtime for their work during the years of litigation leading up to the *Weil* decision in 2015.⁷ *Weil* affirmed



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1 *Gallagher v. Cerebral Palsy of Massachusetts, Inc.*, 92 Mass. App. Ct. 207, 213-14 (2017).

2 PCA Program Regulations at 130 CMR 422.000. <http://www.mass.gov/eohhs/docs/masshealth/regs-provider/regs-personal-care.pdf>.

3 *Gallagher, supra*, Appellant's Brief at 10.

4 *Gallagher, supra*, at 210.

5 *Gallagher, supra*, at 213.

6 *Nanny Tax Requirement in Your State*, <http://www.myhomepay.com/Answers/RequirementsByState>. (last visited June 19, 2018).

7 *Home Care Association of America, et al. v. Weil*, 799 F.3d 1084, 1095 (D.C.



Fair Labor Standards Act (FLSA) regulations that ended exemptions for home care agencies, who will now have to pay overtime to caregivers and companions they employ.

Courts that considered the retroactive wage and hour cases issued decisions similar to the result in Susan Gallagher’s case, relying on the idea that third-party payers provide only management services, and are insulated from the status of employer of home care workers.⁸ The “fiscal intermediary” status was preserved even where the defendants had ownership and control of the care coordinating agencies and the apartment buildings where the disabled

clients live.⁹ Clients who had serious mental and physical disabilities, such as Down syndrome, brain injury, and autism, were still considered to be employers and thus able to invoke the FLSA companionship services exemption.

Educating Your Clients

The FLSA exemptions for live-in and companionship still apply in many states for domestic workers hired by individuals and families. The exemptions are especially important for people with Alzheimer’s dementia who need continuity of caregivers. (See “Sustainable Home Care, Part 1,” April/May/June 2018 *NAELA News*.)

If your clients make use of an exemption under the FLSA or an analogous state labor law to sustain their home care plans, help them understand the steps they must take to protect themselves and their care providers.

Professional trustees and fiscal intermediaries already know that they have to protect their beneficiaries by making sure that workers’ compensation insurance covers home care work-

ers. Some trustees and guardians engage a management company, such as Team Risk Management Strategies of San Diego, to act as an “employer of record,” which insulates their high net worth beneficiaries from any employer liabilities. But for clients of modest means, you may be the only voice telling them they need to get a workers’ compensation policy and comply with wage and hour laws if they decide to become employers.

Both parties put each other at risk when a caregiver is not compensated and treated fairly.

Karen Stonehouse, Protective Services Case Supervisor for Greater Springfield [Massachusetts] Senior Services, reports that poorly paid “caregivers who financially exploit elders may rationalize elder financial abuse with an attitude of: ‘I deserve it.’”

“If there is no family involved in the elder’s life, the caregiver begins to fill the elder’s emotional needs beyond the work of care, and then may become emboldened to demand financial help to buy a car, cash to pay for first and last months’ rent on an apartment or pay for their own babysitter. Whatever families can do to express gratitude to the paid caregiver is beneficial,” she

Cir. 2015), cert. denied 136 S.Ct. 2506 (2016).

8 See *Richert v. LaBelle HomeHealth Care Service, LLC*, No. 2:16-cv-437 (S.D. Ohio Sept. 29, 2017) 2017 WL 4349084.

Hypolite v Healthcare Services of New York, No. 16-CV-04922, 2017 WL 2712947, at *4 (S.D.N.Y. June 23, 2017) (majority of opinions concluded that January 1, 2015 is the effective date of the Final Rule). *Hypolite* explains how tasks and duties of the worker determine whether an employee is exempt, and how the jobs that home health aides perform are tailored to each client.

9 *Tinsley v. Covenant Care Services, LLC*, 228 F.Supp.3d 911, 924-25 (E.D. Missouri 2017).



“There has been progress for domestic workers employed by agencies and attendants who are paid through Medicaid programs.”

says. “Very rarely do I hear of an aide who was integrated into the family who ends up exploiting the elder.”

But some families may continue to think they can avoid paying taxes that fund their caregivers’ basic benefits of Social Security retirement and disability insurance, and unemployment compensation. This attitude is rooted in the decades of struggle for fair compensation for caregivers. The long history was dramatized in *The Help*, the best-selling novel and movie set in the early 1960s, where lead characters Minnie and Aibileen debated whether to risk their jobs by complaining about low wages and no Social Security.¹⁰ For a timeline documenting the slow progress in home care compensation, see the online version of this article.

In the 2016 Boston case that Attorney Nevins argued for Susan Gallagher, the court left Susan uncompensated for years of overtime.

In other situations where there is proper estate planning, a family member who provides long hours of care may be indirectly compensated with an inheritance. But that is not the case for people who work only for wages paid by the family.

Attorney Nevins sees the connection between quality care and fair compensation. “If the care workers are properly compensated, we can encourage a lot of people to take care of their

parents at home and reduce the cost of end-of-life care.

“My grandmother died at home; my grandfather was waked in our living room, also. We didn’t put them in nursing homes,” says Nevins.

The *Weil* decision has meant progress for domestic workers employed by agencies, as well as for attendants who are paid through Medicaid programs. Following *Weil*, the Massachusetts Personal Care attendant reimbursement system that Susan Gallagher had worked under began paying for limited amounts of overtime, as well as sick leave.¹¹

Still, the glaring deficiency of independent home care work remains the lack of fringe benefits like “sick leave or, most importantly, health insurance.”¹² Because most home care workers lack paid sick or vacation time, they are “forced to choose between earning crucial income and endangering their own health — not to mention exposing their often-vulnerable clients to sickness.”¹³

The findings of a Wisconsin caregiving survey conducted 20 years ago are still valuable today in understanding the three-way dynamics of the caregiver-elder-family relationships. The survey stated that:

Workers usually displayed deference, intuition, and sensitivity toward families, working around family boundaries and respecting the primacy of family bonds. Their effectiveness was not easy for all family members to acknowledge; however, relatives were usually dealing with a high level of stress and exhaustion themselves in coping with the disabled person during evenings and weekends. Relatives sometimes revealed the power of small meaningful initiatives quietly taken by creative and observant workers. “She does things before I even ask her to!” exclaimed one tired, grateful daughter.¹⁴

The great irony in the vocation of caregiving is the humility and sacrificial attitude that is required for the work can undermine the status of the worker in the eyes of an unappreciative world.¹⁵ Elder and special needs law attorneys have the opportunity to remind clients that home care workers have traditionally been placed on the “lowest rung” of America’s health care ladder.¹⁶ Working with allied professionals, we can encourage clients to recognize the value of home care workers who make it possible for elders to continue living at home. ■

11 *Supra* n. 2.

12 Keigher, *The Interests Of Three Stakeholders In Independent Personal Care For Disabled Elders*, 23 *Journal of Health and Human Services Administration* 136, 153 (Fall 2000) www.jstor.org/stable/25780944.

13 Kozak-Oxnard, *Care and Community Empowerment: Coalition-Building Between Home Care Workers And Disability Rights Activists*, *Columbia Journal of Gender and Law* 70, 84 (2017), citing Paraprofessional Healthcare Institute,

Paying the Price: How Poverty Wages Undermine Home Care in America, Quality Care Through Quality Jobs, (Feb. 2015).

14 Keigher, *supra* at 152.

15 *Id.*

16 Keigher, *supra*, at 37.

10 Kathryn Stockett, “The Help” at 128.

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