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Who Will Care for the Elderly?: The Future of Home Care*

PEGGIE R. SMITH†

INTRODUCTION

Over the last several years, countless commentaries have posed some version of the question: “Who Will Care for the Elderly?”¹ The question underscores the growing concern with the care needs of an increasingly elderly population as the baby boomers and their parents age over the coming decades. Although the demand for home care services is expected to reach unprecedented highs,² the

* Unless otherwise indicated, portions of the following essay originally appeared in and expand upon scholarship from several earlier publications written by the author including Brief for Law Professors and Historians as Amici Curiae Supporting Respondents, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593); Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1835 (2007); Peggie R. Smith, *Direct Care Alliance Policy Brief No. 2: Protecting Home Care Workers under the Fair Labor Standards Act*, DIRECT CARE ALLIANCE, INC. (June 2009), http://blog.directcarealliance.org/wp-content/uploads/2009/06/6709-dca_policybrief_2final.pdf.

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1. See, e.g., Kelly Flynn, *But Who Will Care for Me?*, N.Y. TIMES (Oct. 10, 2012), http://www.nytimes.com/2012/10/10/booming/10story-booming.html?_r=0; Howard Gleckman, *Who Will Care for the Elderly and Disabled?*, KAISER HEALTH NEWS (July 20, 2009), <http://www.kaiserhealthnews.org/Columns/2009/July/072009Gleckman.aspx>; Robyn I. Stone & Joshua M. Weiner, *Who Will Care for Us? Addressing the Long-Term Care Workforce Crisis*, URBAN INST., 19 (Oct. 2001), http://www.urban.org/UploadedPDF/Who_will_Care_for_Us.pdf; Nora Super, *Who Will Be There to Care? The Growing Gap between Caregiver Supply and Demand*, NAT'L HEALTH POL'Y FORUM, 1-17 (Jan. 23, 2002), http://www.nhpf.org/library/background-papers/bp_caregivers_1-02.pdf.

2. See BURT S. BARNOW ET AL., OCCUPATIONAL LABOR SHORTAGES: CONCEPTS, CAUSES, CONSEQUENCES, AND CURES 148 (2013) (discussing the projected growth in the home care industry); *Home Health and Personal Care Aides*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK (2012–13 ed.) [hereinafter OCCUPATIONAL OUTLOOK HANDBOOK 2012–13],

future availability of home care workers does not look promising. Similar to child care, the demand for quality home care outstrips supply—an imbalance caused not only by an aging generation but also by unfavorable working conditions.

This Essay argues that a comprehensive answer to the question, “Who Will Care for the Elderly?” must represent the interests of elderly individuals who need care and their families, as well as the interests of home care workers, as workers, who should be fairly compensated and provided workplace benefits. Against the backdrop of limited funding for long-term care of the elderly, home care policies in the United States tend to privilege consumers of home care while ignoring the economic interests of women who labor as home care workers.³ This unfortunate dynamic most recently took center stage in the 2007 Supreme Court decision of *Long Island Care at Home, Ltd. v. Coke*.⁴

The *Coke* decision addressed the rights of home care workers under the Fair Labor Standards Act (FLSA), which guarantees most employees a right to a federal minimum wage and overtime compensation.⁵ In a unanimous decision, the Supreme Court ruled that hundreds of

<http://www.bls.gov/ooh/healthcare/home-health-and-personal-care-aides.htm> (noting that “[e]mployment of home health aides is expected to grow by 69 percent from 2010 to 2020, much faster than the average for all occupations,” and that “[e]mployment of personal care aides is expected to grow by 70 percent from 2010 to 2020, much faster than the average for all occupations”).

3. See Judith Feder, *Paying for Home Care: The Limits of Current Programs*, in FINANCING HOME CARE: IMPROVING PROTECTION FOR DISABLED ELDERLY PEOPLE 27, 44 (Diane Rowland & Barbara Lyons eds., 1991) (reviewing state and federal expenditures on home care and noting their limitations); Richard Kaplan, *Cracking the Conundrum: Toward a Rational Financing of Long-Term Care*, 2004 U. ILL. L. REV. 47, 62-64 (highlighting the limitations of Medicare to address the long-term care needs of older Americans); *id.* at 69-72 (noting structural features in Medicaid that limit its ability to fund long-term care); see also *Long-Term Care Financing: Growing Demand and Cost of Services are Straining Federal and State Budgets: Testimony Before the H. Subcomm. on Health, Comm. on Energy and Commerce*, 109th Cong. 11 (2005) (statement of Kathryn G. Allen, Director, Health Care-Medicaid and Private Health Insurance Issues) [hereinafter *Long-Term Care Financing*], <http://www.gao.gov/new.items/d05564t.pdf> (highlighting the consequences of inadequate funding for long-term care on elderly individuals).

4. 551 U.S. 158 (2007).

5. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206-207 (2006).

thousands of home care workers are not entitled to the most basic of federal labor protections.⁶ As this Essay discusses, the *Coke* decision threatens to further erode the precarious economic status of home care workers and undermine the quality of care that they provide to clients. Proposed federal initiatives could help reverse this trend and improve the employment rights of home care workers.

I. A SNAPSHOT OF THE HOME CARE INDUSTRY

The substantial growth of America's elderly population is the most significant factor driving the exploding demand for home care.⁷ In 1900, the United States population included 3.1 million people aged sixty-five and older, who accounted for 4% of the total population.⁸ By 2010, the sixty-five-and-older population had swelled to approximately 40 million, a figure that translated into just over 13% of the total population.⁹ According to projections, approximately 72 million Americans will be sixty-five and older by 2030, representing approximately 20% of the total population.¹⁰ The projected climb from 2010 to 2030 tracks the aging of the baby boom generation, which comprises the approximately 76 million people born in the United States

6. *Coke*, 551 U.S. at 170, 173-74.

7. See OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE FUTURE SUPPLY OF LONG-TERM CARE WORKERS IN RELATION TO THE AGING BABY BOOM GENERATION: REPORT TO CONGRESS, 4-5 (2003) [hereinafter FUTURE SUPPLY], <http://aspe.hhs.gov/daltcp/reports/ltework.pdf>.

8. WAN HE ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S. DEP'T OF COMMERCE, 65+ IN THE UNITED STATES: 2005, at 9 (2005), <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

9. ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2011, at 2 (2011), http://www.aoa.gov/aoaroot/aging_statistics/Profile/2011/docs/2011profile.pdf.

10. *Id.* at 3.

from 1946 to 1964.¹¹ The first wave of boomers turned sixty-five in 2011 and will reach age eighty-four in 2030.¹²

While many elderly individuals lead healthy lives, for others, disability and chronic health problems accompany longevity¹³ and create a need for long-term care.¹⁴ Such care involves services that assist the elderly with daily activities, such as dressing, bathing, toileting, eating, shopping, cooking, cleaning, taking medications, and visiting health-care providers.¹⁵ Although family members and other informal, unpaid caregivers represent the most critical source of long-term care to the elderly,¹⁶ the need for formal long-term care remains pressing.¹⁷ The pool of informal

11. JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974*, at 77 (1997) (describing the increase in birth rates that started in 1946 and leveled off in 1964); *see also* FUTURE SUPPLY, *supra* note 7, at 7-8 (discussing the effect that aging baby boomers will have on the demand for caregiving).

12. HE ET AL., *supra* note 8, at 6. The population growth of elderly Americans has been the most pronounced among individuals eighty-five and older. *See id.* This segment of the elderly population, which is the fastest growing, included 4.7 million people in 2003. *Id.* It is expected to double to 9.6 million in 2030, and to double yet again to 20.9 million in 2050, the point at which all of the remaining boomers will be eighty-five and older. *Id.*

13. *See Long-Term Care: Aging Baby Boom Generation Will Increase Demand and Burden on Federal and State Budgets: Testimony before the S. Special Comm. on Aging*, 107th Cong. 3 (2002) (statement of David M. Walker, Comptroller General of the United States), *available at* <http://www.gao.gov/new.items/d02544t.pdf> (highlighting medical conditions among the elderly that have led to an increase in demand for long-term care services).

14. FUTURE SUPPLY, *supra* note 7, at 3-5; H. Stephen Kaye et al., *The Personal Assistance Workforce: Trends in Supply and Demand*, 25 HEALTH AFF. 1113, 1115 (2006); Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 356-57 (2004) [hereinafter Smith, *Elder Care*].

15. HE ET AL., *supra* note 8, at 58 (distinguishing between activities of daily living which include personal care tasks such as bathing, eating, toileting, and dressing, and instrumental activities which include “household management tasks like preparing one’s own meals, doing light housework, managing one’s own money, using the telephone, and shopping for personal items”).

16. *See* ROBYN I. STONE, *LONG-TERM CARE FOR THE ELDERLY WITH DISABILITIES: CURRENT POLICY, EMERGING TRENDS, AND IMPLICATIONS FOR THE TWENTY-FIRST CENTURY*, 8 (2000), http://www.milbank.org/reports/0008stone/LongTermCare_Mech5.pdf; Kaye et al., *supra* note 14, at 1113.

17. Lynn F. Feinberg, *Issue Brief: State Support for Family Caregivers and Paid Home Care Workers*, NGA CTR. FOR BEST PRACTICES, 5 (2004),

caregivers has dwindled as more and more women, who constitute the majority of informal caregivers, have entered the workforce.¹⁸ As women juggle the demands of elder care responsibilities with child care and work, they often require assistance from formal caregivers.

The demand for formal care also stems from elderly individuals with long-term care needs who live alone or who lack family networks to provide assistance.¹⁹ This problem partially reflects the disproportionate number of elderly women who have outlived their spouses and who need long-term care as well as an increasing number of elderly individuals who never had children.²⁰ Formal care may also become urgent for those elderly persons who reside a substantial distance apart from family members. According to a 2004 study, 15% of informal caregivers for the elderly live at least an hour away from the person for whom they provide care.²¹

<http://www.subnet.nga.org/ci/assets/4-caregivers.pdf> (“Twenty-eight percent of community-based elders receive assistance from both family and paid in-home workers, and eight percent of elders receive care solely from paid in-home workers.”).

18. See U.S. GEN. ACCOUNTING OFFICE, GAO/PEMD-96-5, LONG-TERM CARE: SOME STATES APPLY CRIMINAL BACKGROUND CHECKS TO HOME CARE WORKERS, 4 (1996) [hereinafter LONG-TERM CARE] (connecting the increased reliance on home care with projections “indicat[ing] that labor force participation will continue to increase among women, who have traditionally provided much of the informal care for the elderly”).

19. Steven J. Katz et al., *Gender Disparities in the Receipt of Home Care for Elderly People With Disability in the United States*, 284 J. AM. MED. ASS’N 3022, 3022 (2000) (“[C]hanges in the pattern of living arrangements will increase the number of elderly people living alone and thus reduce the availability of informal care.”); Diane Rowland, *Measuring the Elderly’s Need for Home Care*, 8 HEALTH AFF. 39, 48 (1989) (“[M]ore than one in four elderly people with multiple impairments live alone. For this group, the absence of a resident caregiver is likely to result in a greater need for formal home care services.”).

20. See LONG-TERM CARE, *supra* note 18, at 4 (“Among those in need of home care, reliance on paid home care workers is also expected to rise, partly because adults in the baby boom generation have had smaller numbers of children and will therefore have fewer available to provide or supervise their care in old age.”); see also Smith, *Elder Care*, *supra* note 14, at 360-61 (discussing the gendered dimension of elder care as it relates to elderly women who have outlived their husbands).

21. Smith, *Elder Care*, *supra* note 14, at 367-68 (referencing a study conducted by the National Council on Aging).

Home care workers who deliver hands-on assistance to elderly individuals provide the bulk of formal long-term care.²² According to official statistics, approximately 1.8 million home care workers were employed in 2010.²³ This number, however, likely underestimates the total size of the workforce, as official reports do not capture the many workers who are hired directly by families.²⁴ A national study of home care workers serving Medicare recipients suggests the degree of undercounting; the study found that 29% of the workers were self-employed.²⁵ While precise numbers are elusive, researchers agree that the expanding need for long-term care has transformed home care into one of the fastest growing occupations in the country, with a projected employment growth rate of close to seventy percent between 2010 and 2020.²⁶

Yet even as the demand for home care will continue to climb for the foreseeable future, the industry picture is bleak when viewed from the perspective of home care workers. The typical worker is a low-income woman

22. MATURE MKT. INST., *MILES AWAY: THE METLIFE STUDY OF LONG-DISTANCE CAREGIVING*, 3 (2004), <https://www.metlife.com/assets/cao/mmi/publications/studies/mmi-miles-away-long-distance-caregiving.pdf>.

23. The 1.8 million figure reflects the combined total for home-health and personal-care aides. OCCUPATIONAL OUTLOOK HANDBOOK 2012–13, *supra* note 2.

24. See STEVEN L. DAWSON & RICK SURPIN, *DIRECT-CARE HEALTH WORKERS: THE UNNECESSARY CRISIS IN LONG-TERM CARE*, 12 (2001), <http://phinational.org/sites/phinational.org/files/clearinghouse/Aspen.pdf> (“[B]eneath the formal sector lies a gray-market workforce of paid caregivers who are hired directly by consumers, but whose income is not reported. The size of this unreported workforce is significant but unquantifiable.”); ROBYN I. STONE, *LONG-TERM CARE WORKFORCE SHORTAGES: IMPACT ON FAMILIES*, 2 (2001) [hereinafter STONE, *WORKFORCE SHORTAGES*], http://caregiver.org/caregiver/jsp/content/pdfs/op_2001_10_policybrief_3.pdf (“[M]any home care workers are hired privately and official federal statistics may not include them.”); see also 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*, 9 (2004) [hereinafter HOME HEALTH AIDES], <http://phinational.org/sites/phinational.org/files/clearinghouse/RNandHomeAide.s.pdf> (observing that there is “a sizable gray market of direct care workforce who consumers hire directly”).

25. See STONE, *WORKFORCE SHORTAGES*, *supra* note 24, at 2.

26. OCCUPATIONAL OUTLOOK HANDBOOK 2012–13, *supra* note 2.

between the ages of twenty-five and fifty-four.²⁷ She is unmarried and a mother of children under the age of eighteen.²⁸ There is a substantial likelihood that she is a woman of color, either African American or Hispanic.²⁹ There is a 20% chance that she speaks a language other than English at home.³⁰

In addition, the wages of home care workers are appallingly low, ranking near the bottom of wages earned by employees in the service industry.³¹ In 2009, workers received an average hourly wage of less than \$10.00, which places many of them below the poverty line.³² Because home

27. James Cooper & Diane Cooper, *Crisis in Workforce Supply—Read All About It!*, 13 ANNALS OF LONG-TERM CARE 23, 24 (2005) (adding that relative to workers in other jobs, the typical paid direct-care worker is “more likely to be nonwhite. Only 10-20% of direct care workers are male. Home care aides tend to be older than aides in other settings, and less likely to be native-born U.S. citizens.”); Rhonda J. V. Montgomery et al., *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know*, 45 GERONTOLOGIST 593, 595 (2005) (explaining that typical direct-care workers are women who are “much less likely to be under the age of 25 and more likely to be 65 years or older”).

28. U.S. GEN. ACCOUNTING OFFICE, GAO-01-750T, NURSING WORKFORCE: RECRUITMENT AND RETENTION OF NURSES AND NURSE AIDES IS A GROWING CONCERN: TESTIMONY BEFORE THE S. COMM. ON HEALTH, EDUCATION, LABOR & PENSIONS, 107th Cong. 22 (statement of William J. Scanlon, Director, Health Care Issues) (2001), available at <http://www.gao.gov/new.items/d01750t.pdf> (“Nursing home and home health care aides are also two to three times more likely as other workers to be unmarried and have children at home.”); STONE, WORKFORCE SHORTAGES, *supra* note 24, at 2 (“Compared to the workforce in general, nursing home and home health care aides are more likely to be non-white, unmarried and with children under age 18 at home.”).

29. DAWSON & SURPIN, *supra* note 24, at 12 (observing that “86 percent of [direct-care workers] are women, [and that] 30 percent are women of color”); Montgomery et al., *supra* note 27, at 595 (“[T]he home care industry tends to have somewhat fewer African American workers and proportionally more Hispanic or Latino workers.”).

30. Montgomery et al., *supra* note 27, at 595.

31. See Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. 81190, 81192 (proposed Dec. 27, 2011) (to be codified at 29 C.F.R. pt. 552) [hereinafter *FLSA Application*].

32. PARAPROFESSIONAL HEALTHCARE INST., WHO ARE DIRECT-CARE WORKERS?, 2-3 (2011) [hereinafter “WHO ARE DIRECT CARE WORKERS?”], <http://phinational.org/sites/phinational.org/files/clearinghouse/PHI%20Facts%203.pdf> (reporting a median hourly wage of \$9.46 for personal care aides and \$9.85 for home health aides).

care provides only part-time employment for many workers,³³ this hourly rate yielded median annual earnings of less than \$17,000 in 2009.³⁴ In light of these numbers, close to 40% of workers must rely on public assistance such as Medicaid and food stamps for additional support.³⁵ A lack of benefits, including health insurance, medical leave, and retirement plans,³⁶ further exacerbates home care workers' poor economic position. In addition, because workers are usually paid only for the time they work in a client's home, they must use their meager earnings to pay for time spent traveling between clients' homes.³⁷

Job dissatisfaction among home care workers also hinges on the work's physically demanding and emotionally draining character. Workers experience high rates of workplace injuries³⁸ and must deal with clients who suffer from cognitive impairments that can result in disruptive,

33. *Id.* at 2.; see also BERNADETTE WRIGHT, AARP PUB. POLICY INST., DIRECT CARE WORKERS IN LONG-TERM CARE, 1 (2005), <http://www.hcbs.org/files/75/3748/directcare.pdf> (reporting that "30.5% of home care aides . . . work part time").

34. WHO ARE DIRECT-CARE WORKERS?, *supra* note 32, at 2.

35. Steven Greenhouse, *Wage Protection for Home Care Workers*, N.Y. TIMES, Dec. 16, 2011, at B2; see also Susan Harmuth, *The Direct Care Workforce Crisis in Long-Term Care*, 63 N.C. MED. J. 87, 89 (2002) (highlighting a government report indicating that "nurse aides working in home care and nursing homes are twice as likely as workers in other occupations to receive public benefits, particularly food stamps and/or Medicaid-covered health benefits").

36. DAWSON & SURPIN, *supra* note 24, at 6 ("The quality of direct-care jobs tends to be extremely poor. Wages are low and benefits few; ironically, most direct-care staff do not receive employer-paid health insurance."); Rebecca Donovan, "We Care for the Most Important People in Your Life": *Home Care Workers in New York City*, WOMEN'S STUD. Q., Spring/Summer 1989, at 56, 62 (reporting on the lack of medical benefits available to home care workers).

37. See PAUL SOHN ET AL., NATIONAL EMPLOYMENT LAW PROJECT, FAIR PAY FOR HOME CARE WORKERS: REFORMING THE U.S. DEPARTMENT OF LABOR'S COMPANIONSHIP REGULATIONS UNDER THE FAIR LABOR STANDARDS ACT, 8 (2011), available at http://nelp.3cdn.net/ba11b257b1bb32f70e_4rm62qgkj.pdf.

38. See Brian J. Taylor & Michael Donnelly, *Risks to Home Care Workers: Professional Perspectives*, 8 HEALTH, RISK & SOC'Y 239, 245 (2006) ("[H]ome care workers face[d] many and varied hazards ranging across access issues, hygiene and infection, manual handling, aggression and harassment, domestic and farm animals, fleas and safety of home equipment.").

violent behavior.³⁹ In addition, workers commonly report that, despite their critical role in caring for the elderly, they are often treated with disrespect.⁴⁰

II. THE FIGHT FOR COMPENSATION AND THE *COKE* CASE

The story of Evelyn Coke vividly illustrates the economic constraints faced by home care workers and some of the legal challenges that must be confronted in order to transform the job into an economically viable occupation. Ms. Coke worked as a home care employee for a home care agency in New York, Long Island Care at Home, for more than twenty years. She often slept in her clients' homes and worked twenty-four-hour shifts.⁴¹ Ms. Coke claimed that Long Island Care at Home failed to pay her minimum wages and overtime wages in violation of the FLSA.⁴²

Enacted in 1938, the FLSA establishes minimum employment standards including a minimum wage and overtime compensation for hours worked in excess of forty hours a week.⁴³ As originally adopted, the FLSA did not reach individuals who worked inside of private homes performing domestic service type work because of doubt about whether they were engaged in interstate commerce.⁴⁴ Congress specifically extended coverage to these workers in

39. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 450 (2010–11 ed.) (commenting that some home care clients “are pleasant and cooperative; others are angry, abusive, depressed, or otherwise difficult”); see generally Peggie R. Smith, *The Pitfalls of Home: Protecting the Health and Safety of Paid Domestic Workers*, 23 CANADIAN J. OF WOMEN & L. 309 (2011) [hereinafter Smith, *The Pitfalls of Home*] (discussing the health and safety issues confronting home care workers).

40. Donovan, *supra* note 36, at 62-63 (observing that workers resent their “second-class position” and feel undervalued).

41. *The Fair Home Health Care Act: Hearing on H.R. 3582 Before the Subcomm. on Workforce Protections and the H. Comm. on Education & Labor*, 110th Cong. 3 (2007) (statement of Hon. Lynn C. Woolsey, Chairwoman, Subcomm. on Workforce Protections).

42. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 164 (2007).

43. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206(a)(1), 207(a)(1) (2006).

44. Patricia Mulkeen, Comment, *Private Household Workers and the Fair Labor Standards Act*, 5 CONN. L. REV. 623, 626 (1973).

1974, when it amended the FLSA to apply to employees “employed in domestic service in a household.”⁴⁵

In passing the 1974 domestic service amendments, Congress simultaneously limited their reach by crafting exemptions from the FLSA’s minimum wage and overtime provisions for casual babysitters and for persons who “provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.”⁴⁶ The legislative history of the 1974 amendments indicates that Congress, in exempting companions, intended to exclude those individuals who, similar to casual babysitters, worked in a casual, non-professional capacity for a private household.⁴⁷ The prevailing image of a companion was a neighbor or a friend who would spend time with an elderly person and who, because he or she was not a regular breadwinner, did not require the protection of the FLSA.⁴⁸ Thus, as explained by Senator Harrison Williams, the primary sponsor of the amendments, the companionship exemption was intended for “elder sitters’ whose main purpose of employment is to watch over an elderly or infirm person in the same manner that a babysitter watches over children.”⁴⁹ A companion was also understood as someone who worked directly for the individual household.⁵⁰

This image of a companion stands in stark contrast to most of today’s home care workers. Contrary to the one-on-one employment relationship between an employing household and a companion, many home care workers are

45. 29 U.S.C. § 206(f)(1) (2006) (including domestic service workers in the minimum wage provision); 29 U.S.C. § 207(l) (2006) (including domestic service workers in the overtime provision).

46. 29 U.S.C. § 213(a)(15) (2006).

47. See Brief for Law Professors and Historians as Amici Curiae Supporting Respondents at 12-13, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593) [hereinafter Brief for Law Professors and Historians].

48. *Id.*

49. Application of the Fair Labor Standards Act to Domestic Service, 66 Fed. Reg. 5481, 5482 (proposed Jan. 19, 2001) (quoting Sen. Williams during the 1974 FLSA Amendments).

50. See Brief for Law Professors and Historians, *supra* note 47, at 4-11.

employed by agencies.⁵¹ Also unlike companions who work on an itinerant basis, home care workers commonly work on a full-time, regular basis.⁵² In short, there is little similarity between the casual labor pattern of a neighbor who intermittently works as a companion and the regular, dedicated service performed by home care workers who shoulder significant responsibility for the economic wellbeing of their families.

After the enactment of the 1974 amendments, the Department of Labor (DOL) adopted regulations interpreting the companionship exemption that significantly increased its scope. First, the DOL defined companionship services in broad, sweeping terms to include the performance of a range of household and personal tasks that greatly exceeded the provision of companionship.⁵³ Second, the DOL provided that the exemption covers not only workers employed by private households but also workers employed by third-party employers, such as home care agencies.⁵⁴

At issue in *Coke* was the validity of the DOL regulation that interpreted the companionship exemption to exclude both home care workers employed by an individual homeowner employer and workers employed by a third-party employer as was the case with Evelyn Coke.⁵⁵ The Supreme Court ruled against Ms. Coke and held that because Congress did not clearly express its intentions in 1974 regarding the scope of the exemption, the DOL's interpretation of the exemption was reasonable and entitled to judicial deference.⁵⁶

The *Coke* decision illuminates a troubling fault line in discussions that focus on the importance of work-family policies that can help employed family members address

51. Brief for the Urban Justice Center et al. as Amici Curiae Supporting Respondent at 7, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593) (citing Rhonda J.V. Montgomery et al., *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know*, 45 GERONTOLOGIST 593, 597 (2005)).

52. See WRIGHT, *supra* note 33, at 1.

53. 29 C.F.R. § 552.6 (2012).

54. 29 C.F.R. § 552.109(a).

55. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 164 (2007).

56. *Id.* at 174-75.

caregiving. In the context of elder caregiving, such discussions all too frequently relegate the labor rights of home care workers to the needs of their elderly clients and the clients' families. Thus, critics claim that extending FLSA protection to home care workers will result in clients and/or their families being unable to afford home care.⁵⁷ Not only is this claim greatly exaggerated since public funds, notably Medicare and Medicaid, pay for most of the services provided by home care workers,⁵⁸ but more importantly the claim disregards the interests of workers to the most basic of federal labor protections.⁵⁹ To be sure, granting home care workers FLSA protection may require state and federal governments to shoulder greater responsibility for the cost of publicly funded home care.⁶⁰ However, in a caring society, collective responsibility for long-term care should be vastly preferred to placing the responsibility on the weary shoulders of poor and low-income home care workers by excluding them from minimum labor protections extended to the majority of employees in the United States.⁶¹

In addition, cost-based concerns fail to consider the costs that will be saved by reducing job turnover among home care workers.⁶² Estimates indicate that the average costs to replace a direct care worker range from \$4200 to

57. See Greenhouse, *supra* note 35.

58. See *FLSA Application*, *supra* note 31, at 81,232 ("Medicare and Medicaid together paid over one-half of the funds to freestanding agencies (37 and 19 percent, respectively). State and local governments account for 20 percent, while private health insurance accounts for 12 percent. Out-of-pocket funds account for 10 percent of agency revenues.").

59. See *id.*

60. See *id.* at 81,223 (noting that "because approximately 75 percent of expenditures on home health services are reimbursed by Medicare and Medicaid, the effect of the rule depends vitally on how Medicare and Medicaid respond to the increase in the cost of providing home health services"); see also Greenhouse, *supra* note 35 (stating the opinion of then Labor Secretary Hilda Solis that any increased costs associated with the proposal would be "modest").

61. See, e.g., *FLSA Application*, *supra* note 31, at 81, 232 (discussing the necessity of protecting such workers for both clients and the field).

62. Brief for AARP and Older Women's League as Amici Curiae Supporting Respondent at 13, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-693) [hereinafter AARP and Older Women's League] (citing DORIE SEAVEY, *THE COST OF FRONTLINE TURNOVER IN LONG-TERM CARE, BETTER JOBS BETTER CARE* 9 (Oct. 2004)).

\$5200.⁶³ Fears about skyrocketing costs are also highly exaggerated when one considers that a number of states already include home care workers within the ambit of their own state wage and hour laws.⁶⁴ These states recognize the value of providing home care workers with minimum labor protections, and the provision of such protections undermines many of the cost-based objections to extending coverage to third-party employed workers.⁶⁵

The *Coke* decision also underscores the failure of policymakers and others to appreciate the high degree to which the availability of quality home care is inextricably linked to the economic status of the home care workforce. Critics, for example, argue that extending FLSA protection to home care workers will reduce the availability of care for the elderly and, in turn, compromise the quality of care.⁶⁶

Ironically, the current reality suggests that the exact opposite is true. Home care workers are exiting the job—and, as a result, the quality of care is suffering—because of the job’s poor working conditions, including low compensation levels.⁶⁷ As the American Association of Retired Persons argued in its brief to the Supreme Court on behalf of Ms. Coke, the exemption of home care workers employed by third-party employers from the FLSA operates not to protect the interests of clients but to “compromise” their interests.⁶⁸

63. *Id.*

64. See *FLSA Application*, *supra* note 31, at 81,203-04 (overviewing the extent to which state minimum wage and overtime provisions apply to home care workers).

65. See *id.* at 81,197 (“The fact that these state statutes exist negates many of the objections raised in the past regarding the feasibility and expense of prohibiting third parties from claiming the companionship and live-in worker exemptions.”).

66. See Brief for the United States as Amicus Curiae at 16, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 04-1315) (highlighting various groups that submitted amicus briefs in *Coke* which indicated that the decision would increase the cost of home care and disrupt services for the elderly and disabled); Jonathan D. Colburn, *Home Health Firms Watch Developments in Overtime Case*, *SAN FERN. V. BUS. J.*, Jan. 30, 2006, at 9.

67. See *FLSA Application*, *supra* note 31, at 81,229 (“Job satisfaction, and the desire to remain in a given position, is highly correlated with wages, workload, and working conditions.”).

68. AARP and Older Women’s League, *supra* note 62, at 4.

Clients are disadvantaged by the severe labor imbalance that characterizes the home care industry.⁶⁹ Despite the projected growth of employment in home care jobs and the increased demand for workers, a labor shortage exists in the home care industry. Organizations that provide long-term care invoke the term “crisis” to describe the problems they face in “attracting and retaining” home care workers.⁷⁰ Significantly, turnover rates among workers are extremely high. For example, studies indicate that the turnover rate in the home care industry ranges from forty-four to ninety-five percent.⁷¹ Low wages and oppressive job conditions greatly exacerbate the shortage of home care workers. Faced with low-wage and low-status work, it is no surprise that many workers leave the job in search of more sustainable employment opportunities.⁷²

Poor compensation not only contributes to a shortage of workers but also endangers the quality of care provided to elderly and disabled persons.⁷³ A worker’s departure can have devastating consequences for a client who must adjust to a new worker and may experience service disruptions that can lead to hospitalization.⁷⁴ For other clients, turnover may culminate in their relocation to an institutional setting

69. See SEAVEY, *supra* note 62, at 15.

70. STONE, WORKFORCE SHORTAGES, *supra* note 24, at 1.

71. *FLSA Application*, *supra* note 31, at 81,231. While researchers agree that turnover in home care is a major problem, estimates of the problem vary. See, e.g., DAWSON & SURPIN, *supra* note 24, at 1 (reporting turnover rates among direct-care workers range between 40 and 100% annually); CAROL RAPHAEL, LONG-TERM CARE: CONFRONTING TODAY’S CHALLENGES, 1 (2003), <http://www.academyhealth.org/files/publications/lccchallenges.pdf> (reporting a 28% turnover rate for home health aides).

72. Harmuth, *supra* note 35, at 89.

73. See SEAVEY, *supra* note 62, at 15.

74. See, e.g., HOME HEALTH AIDES, *supra* note 24, at v (“In areas where levels of service have been reduced, elderly or chronically ill persons deprived of access to care must either remain in more restrictive, more costly environments . . . or seek care from family or friends. Both quality of care and quality of life suffer as people are denied services, or services are provided by persons less qualified or experienced.”); SEAVEY, *supra* note 62, at 15 (“Strong arguments can be made that turnover adversely affects continuity of care and care recipient relationships, causing disruptions that prevent or interfere with the development of relationships critical to both client and caregiver.”).

such as a nursing home.⁷⁵ Thus, far from undermining access to quality services, extending home care workers FLSA protection “will strengthen the home care workforce and result in higher quality of care and continuity of care for America’s older and disabled persons.”⁷⁶

Against this backdrop, it is imperative that steps are taken to protect the rights of home care workers to fair compensation. Providing this protection is essential to help alleviate the vulnerability of workers, redefine home care as valuable labor that merits respect, and link home care quality with improved working conditions.

III. THE NEED FOR FEDERAL REFORM

Although various state laws extend minimum wage and overtime protections to home care workers,⁷⁷ federal action is required to fully address the harmful consequences of the *Coke* decision and improve the rights of home care workers. In 2011, President Barack Obama announced new rules proposed by the DOL to revise the FLSA regulations so as to significantly limit the reach of the companionship exemption.⁷⁸ The proposal includes several changes to the existing regulations in order to provide home care workers, especially third-party workers, with greater protection.⁷⁹ In advancing the proposed revisions, the DOL emphasized the extent to which existing regulatory interpretations of the FLSA’s companionship exemption fail to account for the

75. See Ron Osterhout & Rick Zawadski, *On Homecare Workforce*, POL’Y & PRACTICE, Mar. 2006, at 30.

76. AARP and Older Women’s League, *supra* note 62, at 15.

77. See *supra* note 64 and accompanying text.

78. See Greenhouse, *supra* note 35. The current proposed revisions mark the fourth time that the DOL has proposed amending the FLSA regulations on domestic service in a manner that would limit applicability of the companionship exemption to third-party domestic workers. See *FLSA Application*, *supra* note 31, at 81,196 (indicating that the Department earlier proposed revisions in 1993, 1995, and 2001). The 2001 proposed revisions, issued under President William Clinton’s administration, were withdrawn by the Bush administration before they became final. See *Application of the Fair Labor Standards Act to Domestic Service*, 67 Fed. Reg. 16,668, 16,668 (proposed Apr. 8, 2002) (to be codified at 29 C.F.R. pt. 552).

79. See *FLSA Application*, *supra* note 31, at 81,190.

many changes in the home care industry since 1974.⁸⁰ The following discussion focuses on the relevance of three key proposed revisions.

A. *Redefining “Domestic Service Employment”*

First, the proposal redefines the phrase “domestic service employment” by deleting from the current regulatory definition the requirement that domestic work be performed in or about the home “of the person by whom he or she is employed.”⁸¹ The DOL reasoned that this phrase could lead to the erroneous conclusion that the FLSA applied only to those domestic workers employed by individual households and families and not to workers employed by third-party employers.⁸² The proposal also updates the illustrative list of domestic workers.⁸³ Current regulations include as examples of such workers “cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs.”⁸⁴ The proposals eliminate various outdated job titles such as “footmen” and “grooms” and adds to the list current occupations such as “nannies” and “home health aides.”⁸⁵

B. *The Understanding of Companionship Services*

The DOL also proposes amending the definition of “companionship services” to more closely align it with congressional intent.⁸⁶ A current DOL regulation defines companionship services as services for the “fellowship, care, and protection” of persons who cannot care for themselves.⁸⁷ However, the regulation includes services that greatly

80. *See id.*

81. *Id.* at 81,192.

82. *See id.*

83. 29 C.F.R. § 552.3 (2012); *see also FLSA Application, supra* note 31, at 81,192 (referencing Senate Report No. 93–690, at 20).

84. 29 C.F.R. § 552.3; *see also FLSA Application, supra* note 31, at 81,192 (referencing Senate Report No. 93–690, at 20).

85. *FLSA Application, supra* note 31, at 81,192.

86. *See id.* at 81,190, 81,192.

87. 29 C.F.R. § 552.6.

exceed the essential understanding of a companion as that involving fellowship and protection.⁸⁸ For example, the regulation provides that companionship services can include “meal preparation, bed making, washing of clothes, and other similar services.”⁸⁹ The regulation also allows the exemption to apply when a companion performs general household work, unrelated to the care of the client, as long as such general work “does not exceed 20 percent of the total weekly hours worked.”⁹⁰ This type of general housework includes household tasks such as vacuuming and dusting.⁹¹

The proposed regulation seeks to redefine companionship such that it reflects the understanding of a companion evident in the Act’s legislative history as “someone in the home primarily to watch over and care for the elderly or infirm person.”⁹² A 1974 House report made clear that congressional intent was not to exclude “employees whose vocation is domestic service” but to apply the exemption only to those for whom such service is a “casual form of employment.”⁹³ “Companionship,” as originally understood, explained the DOL, should be confined to situations in which provided services revolve around fellowship activities such as “playing cards, watching television together, visiting with friends and neighbors, taking walks or engaging in hobbies.”⁹⁴ In limiting the exemption to “casual” companions, the proposal eliminates an unjustifiable distinction that presently exists between domestic workers such as maids, gardeners and handymen, on the one hand, and home care workers, on the other hand. Under current law, the former are entitled to FLSA protection even if they work on a casual basis, while

88. *See id.*

89. *Id.*

90. *Id.*

91. *See id.*

92. *FLSA Application, supra* note 31, at 81,193.

93. *Id.* (referencing H.R. REP. NO. 93-913, at 36 (1974)).

94. *Id.*

the companionship exemption denies protection to many home care workers, even if they work on a full-time basis.⁹⁵

The proposal also eliminates the current provision that allows the exemption to apply even in instances where a worker spends up to twenty percent of her time performing general household work unrelated to the care of the person.⁹⁶ In its place, the DOL proposes a 20% allowance for intimate personal care services that are incidental to the provision of fellowship and protection such as making lunch for the elderly person or providing assistance with dressing and occasional grooming.⁹⁷ In other words, a companion will continue to be exempt as long as any housework that she does is capped at 20% of the total hours worked in a given week and as long as the work is performed on behalf of the care recipient and is of a personal nature.⁹⁸ The proposed change reflects the view that general household work, even when done by a companion, should be protected and not subjected to exclusion because it falls within the ambit of the type of work that Congress sought to protect when it amended the FLSA in 1974 to reach domestic workers.⁹⁹

C. *Third-Party Employment*

The DOL also seeks to revise the regulation at the heart of the *Coke* case which dealt with third-party employment.¹⁰⁰ Under the current regulation on this issue, workers employed by households, as well as those employed by a

95. The exemption only applies to domestic workers like home care workers who “provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.” 29 U.S.C. § 213(a)(15) (2006).

96. *FLSA Application*, *supra* note 31, at 81,193.

97. *Id.* at 81,193-94.

98. *Id.* (stating that “incidental services must be performed attendant to and in conjunction with the provision of fellowship and protection and in close physical proximity to the aged or infirm individual” and adding that “[s]hould the provision of these incidental services exceed 20 percent of the total hours worked in any workweek, then the exemption may not be claimed for that week and workers must be paid minimum wage and overtime”).

99. *See id.* at 81,193.

100. *Long Island Home Care, Ltd. v. Coke*, 551 U.S. 158 (2007).

third-party such as an agency, may be denied FLSA protection based on the companionship exemption.¹⁰¹

In opposing application of the exemption to third-party employees, advocates on behalf of the respondent in *Coke* had argued that the 1974 Amendments were intended to apply only to domestic workers employed by private households, as opposed to third-party employers.¹⁰² Two factors strongly supported this position. First, domestic workers employed by third parties were already included under the FLSA at the time of the amendments.¹⁰³ Thus, applying the exemption to these employees meant that previously covered domestic workers who performed companionship services would be excluded in the aftermath of the amendments. This result seemed illogical given that it completely contradicted Congress's purpose in amending the Act to expand coverage.¹⁰⁴ Second, the legislative history of the amendments indicated that Congress understood domestic service employment as "services of a household nature performed by an employee in or about a private home of the person *by whom he or she is employed*."¹⁰⁵

101. *See id.*

102. Respondent's Brief in Opposition at 21, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593); Brief for Law Professors and Historians, *supra* note 47, at 4.

103. *See Application of the Fair Labor Standards Act to Domestic Service*, 39 Fed. Reg. 35,383, 35,385 (Oct. 1, 1974) ("Employees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services . . . [were] subject to the [FLSA] prior to the 1974 Amendments."); *FLSA Application*, *supra* note 31, at 81,196 ("Congress did not intend for the 1974 Amendments, which sought to extend the reach of the FLSA, to exclude workers already covered by the Act. The focus of the floor debate concerned the extension of coverage to categories of domestic workers who were not already covered by the FLSA, specifically, those not employed by an enterprise-covered agency.").

104. *See* Brief for Law Professors and Historians, *supra* note 47, at 5 ("[I]t seems unlikely that Congress, while aiming to protect more domestic service employees, would have simultaneously excluded previously included domestic service employees without any reference to doing so in the Amendments' legislative history.").

105. *See* H.R. REP. NO. 93-913, at 35 (1974) (emphasis added); S. REP. NO. 93-690, at 20 (1974) (emphasis added); S. REP. NO. 93-300, at 22 (1973) (emphasis added).

Although this argument did not hold sway with the Supreme Court, it persuaded the DOL to propose a revision to the companionship exemption that would limit its application to the “individual, family or household employing the companion or live-in domestic worker, regardless of whether the family member employing the companion or live-in domestic worker resides in the home where the services are performed.”¹⁰⁶ As a result, third-party home care workers, like Evelyn Coke, would no longer be subjected to the exemption.

After the DOL issued the proposed rule in December 2011, it received 26,000 comments during the public comment period, two-thirds of which favored the proposed changes.¹⁰⁷ Even as resistance from Republican lawmakers and home care industry groups concerned about profits remains strong,¹⁰⁸ the DOL appears ready to release its final regulations.¹⁰⁹

CONCLUSION

The pressing need for formal home care will persist for the foreseeable future, as working families, and employed women in particular, struggle to balance their work obligations and caregiving responsibilities. Yet, despite the growing demand for home care, a labor shortage persists.¹¹⁰

106. *FLSA Application*, *supra* note 31, at 81,196.

107. See Sandra Butler, *Providing Labor Protections for Home Care Workers*, SCHOLARS STRATEGY NETWORK, 2 (June 2012), http://www.scholarsstrategynetwork.org/sites/default/files/ssn_basic_facts_butler_on_labor_protection_0.pdf.

108. In June 2012, Republicans proposed a new law, the “Companionship Exemption Protection Act,” which would preserve the *Coke* ruling and continue to deny home care workers FLSA protection. S. 3280, 112th Cong. (2012); see also *Home Care Aides Await Decision on New Labor Rules*, NPR (Feb. 3, 2013), <http://www.npr.org/2013/02/03/171000803/health-care-aides-await-labor-decision-on-minimum-wage> (describing opposition to the proposal from companies that employ home care workers).

109. See VNAA Policy Team, *DOL Sends Home Health Companionship Final Rule to OMB*, VISITING NURSE ASS’N OF AM. (Jan. 22, 2013), http://vnaa.org/article_content.asp?edition=3§ion=1&article=134 (noting that the Office of Management and Budget has ninety days to issue the final rule).

110. See Harmuth, *supra* note 35, at 93 (“The crisis is already here and, in the absence of appropriate and effective action, shortages will only get worse.”).

Turnover rates among home care workers are extremely high and attracting new and qualified workers to the field is an uphill battle. Home care consumers pay a price of the job's instability in the form of inconsistent care, poor quality care, and a lack of available care. This Essay has maintained that sustainable, long-term improvement on this front requires an approach that connects the availability of quality home care with policies that can help develop and support the home care workforce. As long as workers earn poverty-level wages and lack the resources to afford benefits such as health insurance, the problems of poor quality of care and high turnover rates will persist. While determining how to best resolve this problem is a complicated task, this essay has argued that the task should start with the very modest but important step of ensuring home care workers protection under the FLSA, the country's most basic labor law.