Testimony and Statement for the Record of

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Co-Founder of Family Private Care, Inc.
On behalf of Private Care Association, Inc.

Hearing on

Leveling the Playing Field:

Protecting Workers and Businesses affected by Misclassification

Before the United States Senate
Committee on Health, Education, Labor, and Pensions

June 17, 2010

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Chairman Harkin, Ranking Member Enzi and Members of the Committee, thank you for the opportunity to testify today on the topic of worker classification. My name is Gary Uber and I am a co-founder of Family Private Care, Inc. a licensed nurse registry[1] operating in the State of Florida. I am testifying today on behalf of Private Care Association, Inc.,[2] which is a member of the Coalition to Preserve Independent Contractor Status.[3]

As a threshold matter, I support the Committee's interest in the proper classification of workers as employees or independent contractors. Our nurse registry has devoted substantial time and expense to developing systems designed to ensure that the independent contractors with whom it does business are properly classified.

I have serious concerns, however, about the possible effects of certain proposals aimed at ensuring proper classification, such as S. 3254, the *Employee Misclassification Prevention Act*. My concerns are that the increasingly intensified government efforts to identify misclassified workers and punish the firms that do business with them can result in firms, such as mine, deciding that the regulatory risks of doing business with independent contractors have become intolerable. If that were to occur, the millions of legitimate independent contractors,[4] who – like any other business – need clients to survive, would begin to close their businesses and start looking for employment. In the home-care industry, that is not a prospect that the caregivers with whom we do business would welcome.

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[1] Chapter 400 of the Florida Statutes Annotated ("FSA"), section 400.462(15), defines a *nurse registry* as:

> Any person that procures, offers, promises, or attempts to secure health-care-related contracts for registered nurses, licensed practical nurses, certified nursing assistants, home health aides, companions, or homemakers, who are compensated by fees as independent contractors, including, but not limited to, contracts for the provision of services to patients and contracts to provide private duty or staffing services to health care facilities licensed under chapter 395 or this chapter or other business entities. (Emphasis added).

[2] www.privatecare.org. The Private Care Association, Inc. is a national association representing caregiver registries. Caregiver registries (i) provide background-screening and credential-verification services for independent-contractor caregivers, and (ii) assist such caregivers in finding client opportunities. Many registries also provide administrative support for the care relationships they facilitate.

[3] www.iccoalition.org.

[4] *See, e.g.*, Bureau of Labor Statistics News Release *The Employment Situation – May 2010*, Table A-8 *Employed persons by class of worker and part-time status*, USDL-10-0748 (June 4, 2010), reporting 8.952 million self-employed workers during May 2010, and 8.910 million in April 2010. It is submitted that a material number of these individuals are legitimate independent contractors.

By way of background, I am a former military corpsman who obtained a masters degree in social work and became a hospital administrator. I left that job in 1998 to pursue my entrepreneurial passion and establish my own business, a nurse registry. I feel very fortunate that I had the opportunity at that time to leave my employment and become an entrepreneur. Every day, I feel blessed that my nurse registry empowers caregivers to operate their own business.

Our registry has been in business for twelve years; it does business with approximately 800 registered caregivers – all of whom operate as independent contractors. We also have an office staff of 45 employees. The caregivers who obtain client opportunities through our registry are principally certified nursing assistants and companions. Most of their clients are consumers. The consumers generally offer two types of opportunities, namely, (i) hourly opportunities, and (ii) live-in opportunities.

Florida began regulating registries in 1947.[5] Currently, a registry operating in the State of Florida is licensed as a "nurse registry."[6] In Florida, as of June 11, 2010, there were approximately 345 licensed nurse registries,[7] and 2,356 licensed home health agencies,[8] which are providers of home care that operate with employee caregivers. The demand for home care in Florida exceeds the number of caregivers available to meet that demand, so both agencies and registries are always actively seeking caregivers. This means that caregivers have ample opportunity to choose whether they will work as employees or as independent contractors.

A principal attraction for caregivers to work as independent contractors is that they can make more money as independent contractors, because they receive a much larger portion of a client payment than a caregiver who works as an employee of an agency. Also, caregivers have more control over when they work and for whom they work, since registries merely offer them client opportunities, and they alone decide which opportunities to pursue. It is industry practice for caregivers to register with multiple registries, so the opportunities available through our registry will seldom if ever represent the totality of the opportunities from which a caregiver can choose. Once a caregiver and a client agree to work together, they are the only parties that can terminate the care relationship; a nurse registry has no right to interfere with or to terminate a care relationship. Under the registry model, caregivers work for their clients and they are paid by their clients, albeit commonly through an escrow account that a registry maintains to facilitate the delivery of a client's payment.

The principal functions of a caregiver registry are to introduce consumers to caregivers who have passed a rigorous background-screening and credential-verification protocol, help a consumer find caregivers who meet the consumer's specifications, and provide administrative support for those care relationships, which generally includes reporting the amount of client fees a caregiver receives on an Internal Revenue Service Form 1099.[9]

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[5] *See, Repeal of Nurse Registry Regulation?*, Staff of Florida House of Representatives, Committee on Health Care Licensing and Regulation, at p. 5 (October, 1999).

[6] *See, above*, note 1.

[7] See, http://ahca.myflorida.com/MCHQ/Long_Term_Care/FDAU/docs/SummaryAllActive.pdf.

[8] Id.

[9] Internal Revenue Service data indicate that the compliance rate for recipients of Forms 1099 is 97%. *E.g., TAX COMPLIANCE Opportunities Exist to Reduce the Tax Gap Using a Variety of Approaches*, GAO-06-1000T, at 11

Caregivers who obtain client referrals through our registry generally are exempt from the overtime and minimum-wage requirements imposed by the Fair Labor Standards Act (the "FLSA"), because they are covered by the FLSA's companionship exemption[10] when they perform services at a care recipient's private home.

As mentioned, I have concerns with S. 3254, the *Employee Misclassification Prevention Act*. My principal concerns are as follows:

1. The proposed penalties for misclassification would increase to an intolerable level the financial risks associated with doing business with independent contractors;
2. The proposed recordkeeping requirements are unworkable for a caregiver registry;
3. The proposed notice requirement would adversely affect the working relationship between an independent contractor and the contractor's clients;
4. The proposed anti-retaliation provision could reward unethical conduct; and
5. The bill overall appears premised on the false assumption that the decision whether an individual will work as an employee or independent contractor is made by a firm doing business with the individual, rather than by the individual.

I. The proposed penalties for misclassification would increase to an intolerable level the financial risks associated with doing business with independent contractors

Caregiver registries are a high-volume, low margin business; we operate with hundreds, and some even thousands, of caregivers. The *economic realities* test used to determine whether an individual is an employee or independent contractor for purposes of the FLSA[11] creates substantial uncertainty for registries, because an important consideration under that test is the degree to which a caregiver is economically dependent on a registry. Registries commonly do not know that answer, and need to rely on the representations caregivers make to us about their other clients, but those representations are not always reliable

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(July 26, 2006) GAO, *Tax Gap: Making Significant Progress in Improving Tax Compliance Rests on Enhancing Current IRS Techniques and Adopting New Legislative Actions*, GAO-06-453T, at 17, (Feb. 15, 2006); GAO, *Tax Compliance: Reducing the Tax Gap Can Contribute to Fiscal Sustainability but Will Require a Variety of Strategies*, GAO-05-527T, at 18 (Apr. 14, 2005).

[10] 29 U.S.C. § 213(a)(15).

[11] The U.S. Court of Appeals for the Fifth Circuit recently explained the economic realities test in *Cromwell v. Driftwood Elec. Contrs., Inc*., 348 Fed. Appx. 57, 59 (5th Cir. 2009):

> To determine if a worker qualifies as an employee under the FLSA, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008). To aid in that inquiry, we consider five non-exhaustive factors: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Id.* No single factor is determinative.

Under current law, the FLSA risk is manageable for registries, because the companionship exemption exempts caregivers from its overtime and minimum-wage mandates, so long as the exemption requirements are satisfied. Under the bill, if caregivers under contract with a registry were determined to be employees of the registry, the registry would be exposed to a penalty of up to $1,100 per caregiver, in my case, $880,000 (800 caregivers x $1,100) – regardless of any violation of the minimum-wage or overtime requirements.

If the misclassification were determined to be *repeated* or *willful*, the maximum penalty would increase to $5,000 per caregiver, which for our registry would be $4,000,0000. Since our registry has been treating caregivers as independent contractors for 12 years, our registry might be determined to have *repeatedly* misclassified caregivers, which would expose it to the higher penalty. Operating a business under a potential liability of this magnitude is intolerable, especially in light of the possibility of personal liability under the FLSA.[12]

If nurse registries no longer existed, caregivers and consumers would both suffer. Caregivers would be left principally with two options, namely, working as an employee at a facility or as an employee of an employee-based agency. Their only other option would be to work for consumers directly, which would leave the consumers vulnerable because the critical background-screening and credential-verification that registries provide would be missing. Consumers would need to fend for themselves in that regard.

While one might suggest another possible option: that a registry simply ensure that caregivers are paid overtime; that is not feasible for caregiver registries, because a caregiver's fee is determined and paid by the consumer, not the registry. A registry has no right to compel a consumer to pay overtime.

Also, I have found that for most cases there is a finite amount of funds available to pay for home care. For consumers whose home care is paid for with a long-term care insurance policy, these policies typically pay a *capitated* fixed amount per day or per week. For consumers who pay for home care with private funds, they, too, typically operate on a fixed budget. Government programs, such as Medicaid, already are stretched, and under the recently enacted *Patient Protection and Affordable Care Act of 2010*, Medicaid programs will soon begin covering an estimated 16 million additional new participants,[13] some of whom will likely need home care.

Since the option of simply ensuring that caregivers are paid overtime is not feasible for nurse registries, and the elimination of registries from the marketplace would harm not only the registry owners and their office staff but also the caregivers and consumers who currently rely on registries, the bill would have devastating consequences for the nurse-registry industry. Moreover, even outside our industry, for any firm that does business with a significant number of independent contractors, the excessive penalties the bill proposes would cause such a firm to thoughtfully consider whether prudent judgment would permit it to continue those relationships.

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[12] *E.g., Lambert v. Ackerley*, 180 F.3d 997, 1011-12 (9th Cir. 1999); *Chao v. Hotel Oasis, Inc.* 493 F.3d 26 (1st Cir. 2007).

[13] Congressional Budget Office, Cost estimate to Speaker Nancy Pelosi, U.S. House of Representatives, Washington D.C. (March 20, 2010).

If firms were to decide to discontinue doing business with independent contractors, the unfortunate victims would be the millions of legitimate independent contractors who find it increasingly difficult to maintain their business, as their potential client base diminishes. I respectfully submit that the confiscatory penalties the bill proposes for worker misclassification are inadvisable.

II. The proposed recordkeeping requirements are unworkable for a caregiver registry

The bill also proposes a recordkeeping requirement for hours worked. Because our caregiver registry does business only with independent-contractor caregivers, we are not familiar with the detailed and complex U. S. Department of Labor ("DOL") regulations that govern the determination of compensable hours worked.

Equally important, a caregiver registry cannot require caregivers to comply with any specific guidelines for reporting their hours worked, in order to avoid compromising the caregivers' independent-contractor status for other purposes, and because they work for consumers, not for us. Consequently, the number of hours worked that caregivers would report would be determined exclusively by the caregivers and/or their clients; there would be no uniformity in the manner by which such hours are determined.

Furthermore, for live-in cases, which generally pay a fixed amount per day, caregivers likely would report as hours worked all hours they spend at a consumer's home. A likely outcome of this exercise would be for a caregiver to overestimate the number of compensable hours worked while on a live-in case, and become dissatisfied with the daily rate that a consumer pays for such work. While the dissatisfaction likely could be resolved after ascertaining the truly compensable hours worked, a government policy that creates this type of conflict seems counterproductive. Furthermore, because for these live-in cases a caregiver's fee is generally determined as a fixed amount per day, the reporting of hours would serve no purpose other than to satisfy a new government mandate.

For the reasons mentioned, the proposed requirement that firms maintain records of hours worked by independent contractors is inappropriate for independent contractors who perform services pursuant to fee arrangements that are *not* based on an hourly rate, and it is unworkable for the nurse registry industry.

III. The proposed notice requirement would adversely affect the working relationship between an independent contractor and the contractor's clients

The content of the proposed notice requirement suggests that a caregiver's decision to work as an independent contractor is actually being made by the nurse registry, and is highly suggestive that such decision is probably not in the caregiver's best interests. The proposed notice would "inform the individual of the individual's classification," would direct the individual to a DOL website containing information "about the rights of employees under the law," and advise the individual that his or her "rights to wage, hour and other labor protections depend on [the individual's] proper classification as an employee or non-employee." Such

information injects an element of adversity into the relationship between a caregiver and a nurse registry, and encourages a caregiver to seek assistance from the government to protect his or her interests.

For home care, this type of notice is counterproductive. As mentioned, in Florida, the demand for caregivers exceeds the supply, and there are far more employee-based agencies than there are registries. Caregivers register with a nurse registry only after they have made the affirmative decision to work as independent contractors. A caregiver's independent-contractor status is not something that a registry imposes on the caregiver.

Furthermore, caregivers commonly register with multiple nurse registries. The bill would require that each time a caregiver registers with another nurse registry, the registry would need to provide the caregiver with another notice.

At best, the net result of this proposal would be to impose yet another paperwork burden on businesses that increases their cost of operations, with little discernable benefit. At worst, a likely effect of a notice such as that proposed would be to increase the probability of some type of lawsuit being filed against a nurse registry in the event a registry ever decides to cease doing business with a particular caregiver or is unable to offer a caregiver the volume of client referrals that the caregiver is seeking.

IV. The proposed anti-retaliation provision could reward unethical conduct

The anti-retaliation provisions the bill proposes could have adverse consequences for nurse registries. As noted, nurse registries commonly rely heavily on representations by caregivers as to their being a legitimate independent contractor. If a caregiver were to provide false information in that regard, a registry might decide to cease doing business with the caregiver, because caregiver honesty and integrity are extremely important in this industry. Caregivers provide their care in their clients' homes, including many hours while their client is asleep.

The bill's anti-retaliation provisions would prohibit a registry from severing its relationship with a caregiver who provided false information about the caregiver's professed independent-contractor status and, as a result, was determined to be an employee of the registry for purposes of the FLSA or federal employment taxes.

At a minimum, I would urge that the anti-retaliation provision be qualified so it would apply only to the extent that an individual did not provide any false information that the company relied upon when engaging the individual as an independent contractor.

Another potential problem the anti-retaliation provision would create is that it would increase the litigation risks associated with severing a relationship with any caregiver who opposes any practice, files a complaint or institutes a proceeding concerning an individual's status for purposes of the FLSA or federal employment tax purposes. Such a caregiver could always allege that the relationship was severed in retaliation for such actions. While anti-retaliation provisions are not uncommon for employment relationships, this represents an unprecedented expansion of this concept to independent contractors. Because of the litigation

risks it would create for even *bona fide* independent-contractor relationships, I respectfully urge that such a provision not be enacted.

V. The bill overall appears premised on the false assumption that the decision whether an individual will work as an employee or independent contractor is made by a firm doing business with the individual, rather than by the individual

Finally, the bill appears premised on the false assumption that the decision whether a caregiver will work as an employee or independent contractor is being made by a registry, rather than the caregiver. The bill would punish a firm for doing business with an individual as an independent contractor if the individual were determined not to be an independent contractor. In an industry such as ours, we offer our services only to self-employed caregivers. We do our best to ensure that any caregiver who applies for registration actually is an independent contractor.

We necessarily need to rely heavily on what a caregiver tells us. If a caregiver provides a registry with materially false information, which results in the caregiver not qualifying as an independent contractor, the bill would still penalize only the registry; the caregiver would be unaffected. Worse still, the registry would be prohibited from severing its relationship with that caregiver.

In my view, consideration should be given to developing some type of statutory protection for firms that reasonably rely on representations made to them by individuals who represent themselves as being self employed, and such firms should not be prohibited from severing their relationship with an individual who provides the firm with materially false information and is determined to have been misclassified.

VI. Conclusion

As noted, I fully support the Committee's interest in proper worker classification. I fear, however, that an approach to this issue that subjects firms that do business with independent contractors to the prospect of excessive financial penalties in the event of misclassification can have the unfortunate effect of reducing opportunities for legitimate independent contractors. Especially in today's economic climate, but even when our economy is strong, a government policy that has the effect of limiting economic opportunities for individuals is inadvisable.

The effects of the bill would not be limited to firms that do business with independent contractors. They and the independent contractors would certainly be directly affected, but other firms and the larger economy would be indirectly affected. In home care, the employee-based firms would benefit, as they would be able to pay caregivers less and charge consumers more, because the competitive effect of nurse registries that keep client fees low and caregiver fees high would be eliminated. Of course, consumers and caregivers would suffer. Outside of home care, firms that currently do business with independent contractors would likely pass through to their customers, in the form of higher prices, the higher operating costs they would incur due to their inability to continue outsourcing projects to independent-contractor specialists to achieve high efficiency.

In my view, a better approach for encouraging proper worker classification would be to develop additional safe harbors that provide greater certainty for firms that operate in industries with significant numbers of independent contractors, and to help educate individuals who seek to work as independent contractors on the actions they should take to properly establish themselves as independent contractors.

I believe current law is adequate for deterring companies from intentionally misclassifying workers as independent contractors,. Under the FLSA, the prospect of liquidated damages plus attorneys' fees is more than sufficient to discourage firms from knowingly engaging in such practices.

Thank you for the privilege to testify this morning. I would be pleased to answer any questions you might have.

SUPPLEMENTAL SHEET

Gary Uber
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On behalf of Private Care Association, Inc.

It is submitted that the Fair Labor Standards Act ("FLSA") in its current form provides a sufficient deterrent against worker misclassification. The prospect of liquidated damages plus attorneys' fees effectively discourages firms from knowingly engaging in such practices.

Certain proposals aimed at ensuring proper classification, such as S. 3254, the *Employee Misclassification Prevention Act*, would increase the financial risks associated with doing business with independent contractors to an intolerable level, which could result in companies ceasing to do business even with legitimate independent contractors. If that were to occur, the millions of *legitimate* independent contractors, who – like any other business – need clients to survive, would begin to close their businesses and start looking for employment.

Our principal concerns with S. 3254 are as follows:

6. The proposed penalties for misclassification would increase to an intolerable level the financial risks associated with doing business with independent contractors;
7. The proposed recordkeeping requirements are unworkable for a caregiver registry;
8. The proposed notice requirement would adversely affect the working relationship between an independent contractor and the contractor's clients;
9. The proposed anti-retaliation provision could reward unethical conduct; and
10. The bill overall appears premised on the false assumption that the decision whether an individual will work as an employee or independent contractor is made by a firm doing business with the individual, rather than by the individual.

The Committee's interest in proper worker classification is a laudable one, but it should be certain that no action is taken that could eliminate economic opportunities for legitimate independent contractors.

It is submitted that an alternative approach for encouraging proper worker classification would be to develop additional safe harbors that provide greater certainty for firms that operate in industries with significant numbers of independent contractors, and to help educate individuals who seek to work as independent contractors on the actions they should take to properly establish themselves as independent contractors.

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