

Independent contractor classification in home care

Correct classification of workers as employees is key to securing their legal protections and ensuring fair competition by law-abiding businesses. Rarely are home care workers really running an independent business, despite many job structures that purport them to be.

Home care workers are vulnerable to independent contractor misclassification

Personal care and home care services are seldom performed by individual independent businesses, but home care agencies frequently mislabel their employees “independent contractors” and deny them basic workplace protections and benefits. Home care workers perform work that is an integral part of a home care agency’s business, do not invest capital in a business, and generally have little, if any, ability to set their duties, hours and wages. Agencies and other entities maintain the ability to intervene if the level of services provided does not meet expectations, and they typically interact with the consumers to recover payments and set up the care or services needed.

Also called “payroll fraud,” independent contractor misclassification is more common in lower-wage jobs like construction and janitorial, and is on the rise in home care, where some employers require their workers to sign “independent contractor” agreements as a condition of getting a job. Numerous courts have found home care companies’ classification of their workers as “independent contractors” to be improper (see page 2) because few home care workers are really running their own business. Yet some consultants and law firms continue to advise home care employers on how to set up an independent contractor model for their workforce. Contractor Management Services (CMS) notes on its website that “driven by the attractive financial returns and the need to match service capacity with patient needs, many home healthcare agencies are increasing their reliance on independent contractors for delivery.”¹ CMS has presented multiple webinars through the American Network of Community Options and Resources (ANCOR), an association that includes some home care providers, offering techniques to convert home care worker employees to independent contractors.²

Some home care companies have recently announced they will switch their workers from independent contractor to employee status, perhaps in response to increased scrutiny of the 1099 business model. On-line home care providers HomeHero and Honor both launched using an independent contractor model, but company leaders have recently said publicly that they will convert to an employee model.³ HomeHero co-founder and CEO Kyle Hill told the L.A. Business Journal that he hopes to have the company’s 1,200 caregivers switched over by

summer 2016,⁴ and Honor CEO Seth Sternberg announced his company will make a similar transition.⁵

Home care workers should very seldom, if ever, be classified as independent contractors. A recent US Department of Labor (US DOL) Administrator's Interpretation (AI) describing the breadth of coverage of the Fair Labor Standards Act (FLSA) to employees is an important reminder that most workers are covered by the FLSA, despite what their employers may label them.⁶

Implications and consequences of 1099 status

Being classified as an independent contractor, also known as having 1099 status, has many consequences. If a home care agency treats a home care worker as an independent contractor, that person is considered to be running his or her own business and this means that the individual is responsible for:

- Paying upfront the employer- and employee-side of Social Security and Unemployment (FICA and FUTA) taxes, currently 15.3% of pay, along with income taxes. W2 employees, in contrast, pay only half of that rate and the other half is paid by their employer.
- Additional state and local tax and reporting burdens placed on any worker running her own business, including requirements to pay for workers' compensation and other state licensing and insurance requirements for businesses.
- Calculating and remitting quarterly estimated self-employment taxes in addition to filing an annual return, as well as any individualized business tax deductions and credits.

A 1099 form is the form that the IRS requires businesses to use to report payment for services of non-employees.

To all other workers who are regular employees, businesses must issue a W-2 form and make proper payroll withholdings for each tax year.

Most significantly, being an independent business means that a worker is not entitled to the protections of minimum wage or overtime pay, compensation for on-the-job illnesses or injuries, unemployment insurance if separated from work involuntarily, employment-based benefits like health insurance and retirement contributions, or protection against discrimination.

The home care agency's classification is not the final word

Only workers who run a separate business should be classified as independent contractors. Workers who are paid an hourly wage to provide services through an entity, such as a home care agency whose business is to arrange and oversee the services delivered by the worker, should generally be classified as employees. Courts in Maryland, North Carolina, Pennsylvania, and elsewhere have found that agencies that treated their home care workers as independent contractors violated the law.⁷ If an agency misclassifies a home care worker as an independent contractor, she can challenge her status and try to enforce her rights as an employee.

Sample reported cases of home care worker misclassification

- In a case against franchisor Griswold International, California franchisees asserted that Griswold fraudulently promised them a system under which workers could be classified as independent contractors so that neither clients nor franchisees were responsible for taxes or compliance with wage and hour or other labor or employment laws.⁸

- In a 2010 case against Lee's Industries, Inc. and Lee's Home Health Services, Inc. a home care agency required home care workers previously treated as employees to sign an agreement calling themselves independent contractors in order to keep their jobs, despite the fact that there were no changes to the job or to the worker's business status. The NLRB found that this constituted an improper labor practice.⁹
- In a similar case, *Cooney v. O'Connor*, a Maryland home care agency had its employees sign an "Independent Contractor agreement" as a condition of getting a job and unsuccessfully attempted to prevent former employees from collecting unemployment insurance benefits.¹⁰ The 2001 decision from Maryland Court of Special Appeals concluded that the care providers were employees.¹¹
- Caring First, Inc, a home health care agency in Florida, is being sued by the Department of Labor for misclassifying certain employees as independent contractors and paying them a flat hourly rate, regardless of the number of hours worked.¹²

Conclusion and recommendations

Independent contractor abuses are increasingly common in the home care industry, but there is potential to reverse this damaging trend. Home care workers, now covered by the Fair Labor Standards Act (FLSA), benefit from the recent US DOL Administrator's Interpretation (AI) on independent contractors. As the AI urges, "correct classification of workers as employees or independent contractors has critical implications for the legal protections that workers receive, particularly when misclassification occurs in industries employing low wage workers." Home care workers, particularly vulnerable to labor violations, and law-abiding businesses that treat their home care workers as employees will benefit greatly from increased scrutiny of independent contractor misclassification.

Resources

- Contact the National Employment Law Project at 202-640-6516 or visit www.nelp.org.
 - *Independent Contractor vs. Employee: Why misclassification matters and what we can do to stop it* (NELP, May 2016), <http://www.nelp.org/content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>.
 - *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, (NELP, July 2015), <http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf>.
 - *Upholding Labor Standards in Home Care: How to Build Employer Accountability into America's Fastest-Growing Jobs* (NELP, Dec. 2015), <http://www.nelp.org/content/uploads/Report-Upholding-Labor-Standards-Home-Care-Employer-Accountability.pdf>.
 - U.S. Department of Labor's Wage and Hour Division *Administrator's Interpretation*, (USDOL, July 2015), https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf.
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Endnotes

- ¹ Contractor Management Services website, <https://www.ictherightway.com/>, retrieved May 18, 2016.
- ² ANCOR website, retrieved November 10, 2015. Description of June 4, 2014 webinar, *Improving Quality Outcomes: The Independent Contractor and Agency with Choice Models*. <http://www.ancor.org/training-events/webinars/improving-quality-outcomes-independent-contractor-and-agency-choice-models>; ANCOR website, retrieved November 10, 2015. Description of September 25, 2013 webinar, *Direct Care Workers on the Competitive Edge – How Going Independent Will Bring More Money Under Managed Care*. <http://www.ancor.org/training-events/webinars/direct-care-workers-competitive-edge-%E2%80%93-how-going-independent-will-bring>.
- ³ Home Hero website, retrieved July 15, 2015 and May 18, 2016, <https://www.homehero.org/help-center/legal/terms-of-use> and Honor website, retrieved May 19, 2016, <https://www.joinhonor.com/terms>.
- ⁴ Ellingson, Annlee, *Why HomeHero is converting all of its independent contractors to W-2 employees* (L.A. Business Times, March 1, 2016), <http://www.bizjournals.com/losangeles/news/2016/03/01/why-homehero-is-converting-all-of-its-independent.html>.
- ⁵ Sternberg, Seth, *Gig economy can leave workers, families behind*, (The Mercury News, Feb 15, 2016), http://www.mercurynews.com/opinion/ci_29510360/seth-sternberg-gig-economy-can-leaveworkers-families. See also *Employers in the On-Demand Economy: Why Treating Workers as Employees is Good for Business* (NELP, March 2016), <http://www.nelp.org/content/uploads/Fact-Sheet-Employers-in-the-On-Demand-Economy.pdf>.
- ⁶ Weil, David. U.S. Department of Labor, Wage and Hour Division. Administrator's Interpretation No. 2015-1, July 15, 2015. http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf
- ⁷ In *Cooney v. O'Connor*, a Maryland home care agency required its employees to sign an "Independent Contractor agreement" as a condition of getting a job placement and unsuccessfully attempted to prevent former employees from collecting unemployment insurance benefits. A 2002 opinion from the Court of Special Appeals of Maryland found the care providers in the case to be employees. In a similar 2010 Pennsylvania case against Lee's Industries and Lee's Home Health Services, a home care agency forced home care workers previously treated as employees to sign an agreement calling themselves independent contractors in order to keep their jobs, despite the fact that there were no changes to the job or to the worker's business status.
- ⁸ Justia Dockets and Filings, Andersen et al v. Griswold International, LLC et al, retrieved July 16, 2015. <https://dockets.justia.com/docket/california/candce/4:2014cv02560/277971>
- ⁹ Lee's Industries, Inc. and Lee's Home Health Services, Inc. and Bernice Brown, Case No. 4-CA-36904 (Decision by National Labor Relations Board Division of Judges), 2/25/10; Ruckelshaus, Catherine K on behalf of National Employment Law Project Testimony before the United States Congress Senate Committee on Health, Education, Labor and Pensions. June 17, 2010. <http://www.nelp.org/content/uploads/2015/03/MisclassTestimonyJune2010.pdf>
- ¹⁰ Markovitz, Brian, et al. Brief of Amici Curiae filed in Muriel Peters v. Early Healthcare Giver, Inc, page 24. December 16, 2013. http://www.mwela.org/sites/default/files/brief-bank/AnnaBrooks/MWELA_Amicus_Brief_Peters-v-EarlyHealthcareGiver.pdf
- ¹¹ Sonner, J Opinion in the Court of Special Appeals of Maryland, No. 1788, September term, 2001. Elizabeth Cooney Personnel Agency, et al v. Joseph P. O'Connor, Jr, et al. Filed November 26, 2002.
- ¹² Study, Emily. Home Health Care News. *Feds Sue Home Care Provider Over Contract Workers*. July 13, 2015. http://homehealthcarenews.com/2015/07/feds-sue-home-care-provider-over-contract-workers/?utm_source=Home+Health+Care+News&utm_campaign=6d1c6d4f6b-HHCN_7_14_157_13_2015&utm_medium=email&utm_term=0_8874f00bf0-6d1c6d4f6b-91017