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Wage Theft as Public Larceny

Elizabeth J. Kennedy[†]

INTRODUCTION

Even the palm trees were fakes. Details of the FBI takedown of Florence Bikundi included all the hallmarks of a massive fraud: a convicted imposter with multiple aliases, millions of dollars and jewelry stashed in dozens of bank accounts, the sprawling suburban mansion, and luxury cars set against an ornate, yet artificial, landscape.[1] Ms. Bikundi, the owner of multiple health care agencies, allegedly billed Medicaid over $75 million for fictitious home care services, and her arrest was heralded as the largest health care fraud takedown in the history of the District of Columbia.[2] Florence Bikundi was, herself, a counterfeit. Ten years earlier, as Florence Igwacho, a native of Cameroon with limited medical training, she "simply pretended to be a nurse," working under the name of an actual registered nurse, Karen Awah, and caring for patients at two Baltimore hospitals.[3] Igwacho's scheme collapsed when a colleague, staffed alongside the real Karen Awah at a separate hospital, recognized

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[†] Associate Professor of Law and Social Responsibility, Loyola University Maryland. The author thanks Erin Girbach for her research assistance, Sarah Leberstein and Richard Bardos for their insights and expertise, and the editors of the *Brooklyn Law Review* for their diligent work and helpful suggestions.

[1] Press Release, FBI, More Than 20 People Arrested Following Investigations into Widespread Health Care Fraud in D.C. Medicaid Program (Feb. 20, 2014), http://www.fbi.gov/washingtondc/press-releases/2014/more-than-20-people-arrested-following-investigations-into-widespread-health-care-fraud-in-d.c.-medicaid-program [http://perma.cc/24KM-QYEP] [hereinafter FBI Press Release]. The case is ongoing, and the most recent docket entry was March 7, 2016. Memorandum Opinion, United States v. Bikundi, 47 F. Supp. 3d 131 (D.D.C. Mar. 7, 2016) (No. 1:14-cr-00030-BAH), ECF No. 474; *see also* Jay Korff, *Florence Bikundi Arrested in Medicaid Fraud Crackdown*, WJLA (Feb. 20, 2014), http://wjla.com/news/crime/florence-bikundi-arrested-in-medicaid-fraud-crackdown-100429 [http://perma.cc/57A2-R8FP].

[2] FBI Press Release, *supra* note 1.

[3] *Imposter Registered Nurse Sentenced to 2 ½ Years for Practicing Nursing at Two Baltimore Hospitals*, MD. OFF. OF THE ATT'Y GEN. (July 8, 2003), https://www.oag.state.md.us/Press/2003/0708a03.htm [http://perma.cc/T3ZE-PGG8]; David Kohn, *Practical Nurse Gets Prison for Faked Credentials*, BALT. SUN (July 10, 2003), http://articles.baltimoresun.com/2003-07-10/news/0307100240_1_mercy-medical-registered-nurse-practical-nurse [http://perma.cc/U9WD-6QE7].

and reported the scam.[4] Florence Igwacho was sentenced to two-and-a-half years in prison for preying on people that Judge Lynn Stewart described as "vulnerable and helpless."[5] Upon Ms. Igwacho's release, she changed her last name to Bikundi (she also goes by Florence Ngwe) and, according to prosecutors, crafted a sophisticated and lucrative scheme to prey on not only the elderly and infirm but also the U.S. taxpayer.[6]

Considerable governmental resources are marshaled to identify, investigate, arrest, and prosecute Medicaid fraud rings like the one allegedly orchestrated by Ms. Bikundi.[7] The government may levy criminal penalties, such as a fine or imprisonment, and demand that a defendant forfeit any illegally obtained assets.[8] But what if Ms. Bikundi had stolen money not from taxpayers but from her employees? She could accomplish such a heist by paying her workers less than the minimum wage or by misclassifying them as independent contractors (and pocketing

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[4] MD. OFF. OF THE ATT'Y GEN., *supra* note 3.

[5] Kohn, *supra* note 3.

[6] FBI Press Release, *supra* note 1. As U.S. Attorney Ronald C. Machen Jr. explained in a press release issued following Bikundi's arrest, "This fraud diverts precious taxpayer dollars, drives up the costs of health care and jeopardizes the strength of a program that serves the most vulnerable members of our society." *Id.*

[7] No less than 10 governmental agencies collaborated in the investigation. These included

> the FBI's Washington Field Office; the U.S. Department of Health and Human Services, Office of Inspector General; the U.S. Secret Service; the Medicaid Fraud Control Unit of the District of Columbia's Office of the Inspector General; the Internal Revenue Service-Criminal Investigation; the U.S. Immigration and Customs Enforcement [] Office of Homeland Security Investigations []; the Office of Labor Racketeering and Fraud Investigations, Office of Inspector General, Department of Labor; the Social Security Administration, Office of Inspector General; and the Medicaid Fraud Control Unit of the Maryland Attorney General's Office. Assistance was provided by the District of Columbia's Department of Health Care Finance and other agencies.

FBI Press Release, *supra* note 1.

[8] *See*, *e.g.*, CTRS. FOR MEDICARE AND MEDICAID SERVS., REPORT TO CONGRESS, FRAUD PREVENTION SYSTEM, SECOND IMPLEMENTATION YEAR (2014), http://www.stopmedicarefraud.gov/fraud-rtc06242014.pdf [http://perma.cc/6XWV-XM6H]. Many state attorneys general have offices dedicated to overseeing the forfeiture of assets in connection with cases of Medicare and Medicaid fraud. With respect to Medicare, for fiscal year 2013, over $30 million in forfeited assets and over $14 million in civil penalties were deposited into the Medicare Trust Fund. DEP'T OF HEALTH AND HUMAN SERVS. & THE DEP'T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM, ANNUAL REPORT FOR FISCAL YEAR 2013, at 5 (2014), http://oig.hhs.gov/publications/docs/hcfac/FY2013-hcfac.pdf [http://perma.cc/Q468-8SKA]. One of the many examples included in the report of successful investigations and prosecutions of individuals engaged in health care fraud is the co-owner and operator of three Miami-based pharmacies, who was found to have made "illegal kickback payments to guarantee a stream of beneficiary information, which was used to submit false and fraudulent claims by the pharmacies to Medicare and Medicaid." ANNUAL REPORT FOR FISCAL YEAR 2013, *supra*, at 18-19. He "was sentenced to 168 months in prison, ordered to forfeit over $23 million, and ordered to pay a $100,000 fine." *Id.* at 18-19.

what otherwise would be mandated overtime and payroll taxes).[9] What if these critical home care services for the elderly and disabled were in fact provided, just not fairly compensated?[10]

While the arrests, searches, and seizures in the case of Florence Bikundi may have demonstrated that the federal government is "aggressively fighting back to protect the U.S. taxpayer and the integrity of [the government's] federal health care programs," there has been no such vigilance when it comes to protecting the low-wage worker and the integrity of workplace enforcement systems.[11] Although the illegal underpaying of employees—known as "wage theft"—is estimated to cost U.S. workers up to $50 billion per year (and to have collateral economic impacts on local and state economies), "the penalties under federal law for even willful and repeat violations are minimal."[12] In contrast to the hefty fines imposed for indirectly stealing from taxpayers through Medicaid fraud,[13] the maximum civil penalty for directly stealing from employees (such as by repeatedly or willfully failing to pay minimum wages) is only $1,100.[14] In the courts of law and public opinion, forging invoices for fake services is considered criminal, while fraudulently underpaying for real services, while also illegal, is perceived by some as a rational, if unscrupulous, business decision.[15] The

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[9] A 2008 study of workers in New York City found that the home care industry had one of the highest rates of overtime violations by employers. Nearly 83% of home care workers surveyed experienced overtime violations, and 84% worked "off-the-clock" without receiving pay for part of their working time. ANNETTE BERNHARDT ET AL., NAT'L EMP'T LAW PROJECT, WORKING WITHOUT LAWS: A SURVEY OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 24, 30-31 (2010), http://www.nelp.org/content/uploads/2015/03/WorkingWithoutLawsNYC.pdf [http://perma.cc/2ANN-LMFM].

[10] Press Release, Nat'l Emp't Law Project, Home Care Workers File Wage-Theft Class Action Against NYC Agency (Feb. 12, 2013), http://nelp.3cdn.net/e68b8d0101558a23_xdm6b3fez.pdf [http://perma.cc/2D6T-F4LQ].

[11] FBI Press Release, *supra* note 1.

[12] Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL'Y INST. (Sept. 11, 2014), http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/ [http://perma.cc/2D2S-6QJF].

[13] The punishment for a felony conviction under the False Claims Act is up to five years imprisonment (18 U.S.C. § 287 (2012)) and a fine of $250,000 for an individual and $500,000 for a corporation—or $100,000 for an individual and $200,000 for a corporation for a misdemeanor conviction. 18 U.S.C. § 3571(b)-(c) (2012).

[14] Meixell & Eisenbrey, *supra* note 12; 29 U.S.C. § 216 (e)(2) (2012). The FLSA provides for liquidated damages equal to two times the amount of wages illegally withheld. Under some parallel state wage and hour laws, a liquidated damages amount equal to treble the amount of illegally withheld wages may be available. *See* 29 U.S.C. § 216(b) (authorizing private actions and specifying the recovery available).

[15] *The Importance of Combatting Wage Theft: Senate Labor and Industry Committee Hearing on Raising the Minimum Wage*, 114th Cong. 5 (May 5, 2015) (written testimony of Michael Hollander, Staff Attorney, Community Legal Services, Inc.), http://clsphila.org/sites/default/files/issues/CLS%20Testimony%20on%20Wage%20Theft%20

particular demographics of the workforce and the organizational contours of the industry help explain this disparity and unlock potential solutions.

The vast majority of home care workers are low-income women of color who earn less than $13 an hour, a wage that places them near the bottom of the economic ladder.[16] Home care itself, like most domestic work, is associated with gendered, voluntary care roles and "women's work," which results in a devaluation of wages as compared with other, nongendered manual labor.[17] The demographic profile of domestic workers reflects structural issues of racial discrimination and immigration

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to%20Senate%20Labor%20and%20Industry%20Committee%20Hearing%20-%205-2015.pdf [http://perma.cc/3D5S-VJVL] ("From a practical standpoint, a 25% penalty makes wage theft a rational business decision. To illustrate this point, imagine an employer with 10 employees, each of whom he fails to pay $2000. In total, the employer has stolen $20,000 from his employees. If 8 of the 10 employees sue in court and win, the employer will have to pay out 8 * $2500 ($2,000 + $500 penalty) = $20,000. In other words, even if 8 of 10 employees are victorious in court, the employer pays out no more than he would have paid were he to have paid originally. Only if 9 of 10 employees successfully sue an employer for wage theft does the employer suffer any economic penalty.").

[16] LINDA BURNHAM & NIK THEODORE, NAT'L DOMESTIC WORKERS ALL., HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK 18-21 (2012) ("Seventy percent of domestic workers surveyed are paid less than $13 an hour by their primary employer, and less than 9 percent are paid more than $18 per hour."); *see also* DOMESTIC WORKERS UNITED & DATACENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY 2, 7, 16 (2006) [hereinafter HOME IS WHERE THE WORK IS] (93% of New York City's domestic workforce are women of color); PARAPROFESSIONAL HEALTHCARE INST., HOME CARE AIDES AT A GLANCE (2014), http://phinational.org/sites/phinational.org/files/phi-facts-5.pdf [http://perma.cc/2NWM-8HEX] [hereinafter PHI, AT A GLANCE].

[17] *See* Kristi L. Graunke, *"Just Like One of the Family": Domestic Violence Paradigms and Combating On-The-Job Violence Against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 155 n.136 (2002) (finding domestic workers' wages to be "often below or near the minimum wage"); Peggie R. Smith, *Laboring For Child Care: A Consideration of New Approaches to Represent Low-Income Service Workers*, 8 U. PA. J. LAB. & EMP. L. 583, 591 (2006) (linking low pay for a job to the perception of the job as "women's work"); HOME IS WHERE THE WORK IS, *supra* note 16, at 16. A survey of hundreds of workers in Maryland found that 51% of those surveyed reported earning less than Maryland's minimum wage. GREGORY GAINES ET AL., MONTGOMERY CTY. COUNCIL COMM. ON HEALTH AND HUMAN SERVS., WORKING CONDITIONS OF DOMESTIC WORKERS IN MONTGOMERY COUNTY, MARYLAND 8, 13 (2006), http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/agenda/cm/2006/060516/20060516_hhs01.pdf [http://perma.cc/M8FM-7RX7]. Hila Shamir, in her work on the distributive effects of employment law in markets of care, noted that the exclusion of domestic workers from employment law distributes the cost of care to domestic workers themselves, who subsidize the cost of their work to primary market workers. Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, 30 BERKELEY J. EMP. & LAB. L. 404, 453-54 (2009). Only two percent of domestic employers surveyed in Park Slope, Brooklyn, reported providing full medical benefits to their nannies, and another three percent reported helping with medical bills. PARK SLOPE PARENTS, 2015 NANNY COMPENSATION SURVEY 2015, at 44 (2015), http://cdn.parkslopeparents.com/images/2015NannySurvey Results_FINAL.pdf [http://perma.cc/2JH4-PAV4].

policies.[18] A complex racial and ethnic hierarchy, which reflects historical trends in migration, exists throughout the domestic work industry. A century ago, white European immigrants often worked as "live in" domestic workers.[19] As opportunities expanded in manufacturing and other industries with economic pathways toward higher paying work, white workers left the home care profession and domestic workers became more likely to be married women of color performing "live out" day work.[20] The scale of the domestic work industry also shifted, as more women entered the paid workforce overall, which created a greater demand for paid domestic workers to provide in-home care for the young, elderly, and disabled.[21]

Home care workers exemplify the "feminization of migration," a set of trends that motivate women from poor countries to migrate to the United States and other developed nations in response to the increasing demand for paid care work.[22] Women who immigrate to the United States face a constellation of barriers to enforcing their rights: isolation, communication difficulties, and persistent exclusion from federal and state workplace protections, among others.[23] Home care workers who report mistreatment by employers cite their race, immigration status, and language skills as significant factors contributing to the abuse.[24]

Given these limitations, and based on an understanding that two-thirds of the home care industry is financed by tax dollars—primarily through Medicare and Medicaid—this article advances several new strategies for deterring wage theft and recovering unpaid wages.

Part I of this article provides an overview of the demographic, structural, and regulatory forces currently propelling the growth of the rapidly expanding commercial home care industry. Part II introduces the incidence of wage theft and

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[18] *See* BERNHARDT ET AL., *supra* note 9, at 37-38.

[19] Christine E. Bose, *The Interconnections of Paid and Unpaid Domestic Work*, 8 S&F ONLINE, no. 1, Fall 2009, http://sfonline.barnard.edu/work/bose_01.htm [http://perma.cc/FYK4-CGA8].

[20] MIGNON DUFFY, MAKING CARE COUNT: A CENTURY OF GENDER, RACE, AND PAID CARE WORK 28-30 (2011).

[21] *Id.*

[22] *Id.*

[23] *See* Graunke, *supra* note 17, at 150-72 (documenting the various problems facing workers).

[24] *See* BERNHARDT ET AL., *supra* note 9, at 22. Of the workers who reported mistreatment, one-third (33%) felt that immigration status was a factor in their employer's actions, one-third (32%) felt race was a factor, and 18% felt language played a role. HOME IS WHERE THE WORK IS, *supra* note 16, at 2.

its impacts on home care workers, quality of care, and local communities. Part III examines the existing legal strategies for enforcing workplace standards, as well as the factors that limit the effectiveness of those tactics. Part IV proposes three alternative enforcement angles that could be used by workers, consumers, and advocates. First, the article considers whether wage theft by a Medicare or Medicaid participating home care employer might trigger liability under the *qui tam* provision of the False Claims Act. Second, the article considers whether the receipt of tax dollars imposes fiduciary duties on home care employers and whether this "employer-as-fiduciary" theory gives rise to viable claims by workers (and consumers and taxpayers) when employers illegally underpay or misclassify their employees. Lastly, this article suggests leveraging the authority of the Department of Health and Human Services Office of Inspector General to exclude home care employers from participating in federal health care programs (i.e, Medicare and Medicaid) upon a wage theft conviction.

This article's proposals for collaborative enforcement among providers and consumers of home care would augment the existing "bottom up" strategy and leverage the unique nature of home care work. Wage theft's impacts on the home care industry extend well beyond its immediate victims and destabilize the quality of care and the financial stability of local communities. While fake palm trees and forged identities may readily capture the attention of federal agencies, unchallenged wage theft siphons off an even greater amount of taxpayer dollars and public trust. Given the persistent limitations of federal and state law in combating wage theft, the alternative enforcement mechanisms proposed in this article have the potential to break new ground in enforcing standards and improving working conditions in this important, growing industry.

I. THE COMMERCIAL HOME CARE INDUSTRY

America's aging population is growing. The country's first wave of "baby boomers" will soon turn 70, and the number of seniors (currently around 40 million) is expected to double by 2050.[25] As more and more of these older adults attempt to "ag[e]

[25] JENNIFER M. ORTMAN ET AL., U.S. CENSUS BUREAU, NO. P25-1140, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 1 (2015), https://www.census.gov/prod/2014pubs/p25-1140.pdf [http://perma.cc/E3WZ-PZSY]. With people living longer, the demand for caregiving is expected to grow significantly. An estimated 27 million Americans will need direct care by 2050. U.S. DEP'T OF HEALTH AND

in place"[26] within their own homes, rather than in nursing facilities or hospitals,[27] many require help from personal care aides with daily activities such as dressing, bathing, toileting, housekeeping, shopping, and visiting doctors.[28] Others require more significant medical assistance that is better provided at home than in a hospital.[29] In those cases, home health aides, many of whom are certified, are employed to insert catheters, administer enemas, turn clients in bed, tube feed, insert suppositories, check vital signs and functions, and administer medications.[30] Most aging adults have complex medical and personal needs to which family members and neighbors are unable to attend.[31] Other informal strategies, such as receiving "Meals on Wheels" or episodic support from charitable organizations or volunteers, are also insufficient for people with complex needs. As a response to this clear and growing demand

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HUMAN SERVS., THE FUTURE SUPPLY OF LONG-TERM CARE WORKERS IN RELATION TO THE AGING BABY BOOM GENERATION 3 (2003), http://aspe.hhs.gov/sites/default/files/pdf/72961/ltcwork.pdf [http://perma.cc/Q4S3-GXS4].

[26] The Centers for Disease Control and Prevention define "aging in place" as "[t]he ability to live in one's own home and community safely, independently, and comfortably, regardless of age, income, or ability level." *Healthy Places Terminology*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/healthyplaces/terminology.htm [http://perma.cc/HKF7-E9J2] (last visited Mar. 4, 2016).

[27] According to a survey by the AARP, nearly 90% of Americans age 50 and older expressed a desire to remain in their homes as long as possible. Brief of Paraprofessional Healthcare Institute et al. as Amici Curiae in Support of Defendants-Appellants and Reversal at 5, Home Health Care Ass'n. v. Weil, 76 F. Supp. 3d 138 (D.C. Cir. 2014) (No. 15-5018), 2015 WL 848081.

[28] Personal care aides' duties may also include preparing meals, light housework, bill paying, and running errands. Molly Biklen, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act*, 35 COLUM. HUM. RTS. L. REV. 113, 132 (2003).

[29] Home care refers to any care received within an individual's home for causes including but not limited to acute illness, long-term health conditions, permanent disability, or terminal illness. *See generally* S. Mitchell Weitzman, *Legal and Policy Aspects of Home Care Coverage*, 1 ANNALS HEALTH L. 1, 3-4 (1992) (specifying the practical distinctions between home care and home health care and the policy implications of those distinctions). Specifically, home health care is the part-time administration of medical services by skilled medical staff that take place at a client's home instead of at a hospital or skilled nursing facility. When prescribed by a physician, this type of care is covered under Medicare benefit Part A. *What Part A Covers*, MEDICARE.GOV, https://www.medicare.gov/what-medicare-covers/part-a/what-part-a-covers.html [http://perma.cc/PF4C-HR7F] (last visited Mar. 4, 2016). Examples of such treatments include wound care, nursing care, nutritional therapy, physical therapy, injection administration, speech-language pathology services, and continued occupational services. *What's Home Health Care?*, MEDICARE.GOV, https://www.medicare.gov/what-medicare-covers/home-health-care/home-health-care-what-is-it-what-to-expect.html [http://perma.cc/H2FL-3MHB] (last visited Mar. 4, 2016); *see also* CTRS. FOR MEDICARE & MEDICAID SERVS., NO. 10969, MEDICARE AND HOME HEALTH CARE 7-9 (2010), https://www.medicare.gov/Pubs/pdf/10969.pdf [http://perma.cc/P6JH-5GYY].

[30] Biklen, *supra* note 28, at 132.

[31] Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV 1835, 1844-45 (2007).

(as well as the significant costs of care facilities), the home care industry has undergone a dramatic transformation, both in size and structure.

The Bureau of Labor Statistics has identified the home health care industry as having "*the* fastest growing employment of all industries."[32] With over two million home care aides and 80,000 employers,[33] the industry bears little resemblance to that of the 1960s and 1970s.[34] At that time, a home care worker was more likely to be a "companion"—someone who provided fellowship, company, and general assistance, rather than certified nursing care.[35] Since neighbors, family members, and untrained "elder sitters" provided most of the in-home assistance at that time, formal employers of home care workers were few.[36] This once informal sector has experienced precipitous growth, restructuring, and regulation, as well as significant labor shortages and high

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[32] Richard Henderson, *Industry Employment and Output Projections to 2022*, U.S. BUREAU OF LAB. STATS. (Dec. 2013) (emphasis added), http://www.bls.gov/opub/mlr/2013/article/industry-employment-and-output-projections-to-2022-1.htm [http://perma.cc/WZ2N-5B8A].

> The "home care industry" is comprised of two formally defined industries, Home Health Care Services (NAICS 621610) and Services for the Elderly and Persons with Disabilities (NAICS 624120). It also includes home care aides working directly for private households under publicly funded programs or private-pay arrangements—workers usually not captured in government surveys.

PHI, AT A GLANCE, *supra* note 16, at 4 n.1.

[33] PHI, AT A GLANCE, *supra* note 16, at 1.

[34] *Application of the Fair Labor Standards Act to Domestic Work*, http://www.regulations.gov/#!documentDetail;D=WHD-2011-0003-9830 [http://perma.cc/4T64-JW6U] ("The home care industry . . . has undergone dramatic expansion and transformation in the past several decades. . . . In the 1970s, many individuals with significant care needs were served in institutional settings rather than in their homes and their communities. . . . Today, direct care workers are for the most part not the elder sitters that Congress envisioned when it enacted the companionship exemption in 1974, but are instead professional caregivers."); PHI, AT A GLANCE, *supra* note 16, at 4 n.2 ("Home care aides include workers classified under two occupational codes within the home care and personal assistance industry: Personal Care Aides (SOC 39-9021) and Home Health Aides (31-1011). Additionally, large numbers of aides are employed by consumers under publicly financed programs that allow program participants to hire their own personal care workers. Beyond that, hundreds of thousands of additional aides are thought to work directly for individuals and their families under private arrangements in what is often referred to as the 'grey market.'").

[35] Smith, *supra* note 31, at 1860-61. As counsel for amici noted,

> [H]ome care workers often perform the same tasks that workers employed in nursing homes do, but without the close support from and immediate access to health care professionals that their counterparts in hospitals, nursing homes, and assisted living facilities receive—and without the wage and hour protections that their counterparts enjoy.

Brief for Paraprofessional Healthcare Institute et al., *supra* note 27, at 9 (footnote omitted).

[36] Smith, *supra* note 31, at 1844-45.

turnover,[37] each of which has had profound effects on the industry's ability to deliver quality care to consumers.[38]

Home care workers, most of whom are female immigrants, earn on average just over $21,000 a year, with a median hourly wage of only $9.83.[39] These numbers are inflated, however, given that a significant percentage of home care workers also suffer from wage instability and are often unable to find full-time work.[40] More than 20% of home care workers and their families rely on public assistance, and that percentage is likely to grow as states expand their Medicaid programs under the Affordable Care Act.[41]

As the size of the home care industry has changed, so has its structure.[42] What was previously an industry made up of small agencies has now witnessed large-scale consolidation, franchise

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[37] Kelly Kennedy, *High Turnover Affects Home Health Care Quality*, USA TODAY (Feb. 15, 2012), http://usatoday30.usatoday.com/news/washington/story/2012-02-15/home-health-care-turnover-quality/53109424/1 [http://perma.cc/9H6R-NX8A] ("High turnover[, which] is directly related to low wages," results in a greater turnover of caregivers; "employers who must pay to constantly retrain employees; and employees who are not able to advance in their careers . . . .").

[38] Robyn I. Stone, *The Direct Care Worker: The Third Rail of Home Care Policy*, 25 ANN. REV. PUB. HEALTH 521, 525 (2004) (noting that "problems with attracting and retaining direct care workers may translate into poorer quality and/or unsafe care, major disruptions in the continuity of care, and reduced access to care" and that "reduced availability and frequent churning of homecare workers may affect clients' physical and mental functioning").

[39] *Occupational Employment and Wages, May 2014*, U.S. BUREAU OF LAB. STATS., http://www.bls.gov/oes/current/oes399021.htm [http://perma.cc/ZJ7D-K4EQ] (last visited Mar. 4, 2016). There is significant variation depending on where home care workers live. Annual earnings for home care workers ranged from $17,710 in West Virginia to almost $30,080 in Alaska. *Occupational Employment and Wages*, *supra*. "One in four [home care aides] live in households below the federal poverty line . . . ." PHI, AT A GLANCE, *supra* note 16, at 2. The 2015 federal poverty guideline for an individual is $11,770, and for a family of three, it is $20,090. *2015 Poverty Guidelines, U.S. Dep't of Health and Human Services*, ASPE (Sept. 3, 2015), http://aspe.hhs.gov/poverty/15poverty.cfm#guidelines [http://perma.cc/7UAK-JMNY].

[40] PARAPROFESSIONAL HEALTHCARE INST., PAYING THE PRICE: HOW POVERTY WAGES UNDERMINE HOME CARE IN AMERICA 1 (Feb. 2015), http://phinational.org/sites/phinational.org/files/research-report/paying-the-price.pdf [http://perma.cc/W3VY-ZZKL] [hereinafter PHI, PAYING THE PRICE] (noting that only 40% of home care workers are employed full-time, resulting in an average annual wage of only about $13,000).

[41] PHI, AT A GLANCE, *supra* note 16, at 2.

[42] Not discussed in this article is the issue of "joint employers" in the home care industry, for which there are two models of third-party arrangements: traditional agency-based care and consumer-directed care. Agency-based care is a model in which a home care agency hires, trains, supervises, and assigns workers to provide services to a particular client, for which the agency is reimbursed with public funds. Under this model, the agency is considered an employer for purposes of the FLSA. In a consumer-directed care model, the client hires the home care worker and supervises the care. Under that model, the client may be considered an employer under the FLSA. The agency may still qualify as a "joint employer," however, in which case both the agency and the client could be liable as employers under the FLSA. Smith, *supra* note 31, at 1863.

agreements, and even publicly traded home care chains. Each agency is funded through a complicated system of public funding and private payments. Two of the most critical sources of funding for home care services are Medicare and Medicaid.[43] While Medicare is the largest single financier, accounting for 41% of all home care services,[44] Medicaid actually provides a more generous benefit, though it is limited to adults who lack the financial resources to pay for care themselves.[45] Significantly, the structure of Medicare payments for home health care changed in 2000 from a retroactive, cost-based system to a prospective payment system.[46]

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[43] AMY TRAUB & ROBERT HILTONSMITH, DEMOS, UNDERWRITING BAD JOBS: HOW OUR TAX DOLLARS ARE FUNDING LOW-WAGE WORK AND FUELING INEQUALITY 11 (2013), http://www.demos.org/publication/underwriting-bad-jobs-how-our-tax-dollars-are-funding-low-wage-work-and-fueling-inequali [http://perma.cc/74MN-BGGL]. The Medicaid program, through which the federal and state governments provide health care and services to low-income individuals, is subsidized by the federal government and administered by the states. A state participating in Medicaid must offer home health services as part of the program. *See* 42 U.S.C. § 1396d(a)(xvii)(7) (2013). The Centers for Medicare and Medicaid Service project that total national expenditures for health care in 2012 were $2.79 trillion, with $77.8 billion of that specifically spent on home health care. Anne B. Martin et al., *National Health Spending In 2012: Rate Of Health Spending Growth Remained Low For The Fourth Consecutive Year*, 33 HEALTH AFF., 67-77 (2014), http://content.healthaffairs.org/content/33/1/67.full.pdf+html [http://perma.cc/WSH2-2Y89].

[44] NAT'L ASS'N FOR HOME CARE & HOSPICE, BASIC STATISTICS ABOUT HOME CARE 3 (2010), http://www.nahc.org/assets/1/7/10hc_stats.pdf [http://perma.cc/G8KY-G9HR]. Medicare operates on a home health prospective payment system (PPS). Using a case-mix adjuster to analyze a patient's specific needs and characteristics, the PPS sets a specific payment rate for the care of individual clients, which is paid per 60-day episode. CTRS. FOR MEDICAID AND MEDICARE SERVS., REPORT TO CONGRESS: MEDICARE HOME HEALTH STUDY: AN INVESTIGATION ON ACCESS TO CARE AND PAYMENT FOR VULNERABLE PATIENT POPULATIONS 4-6 (2014), http://op.bna.com/hl.nsf/id/mwin-9r7lvt/$File/20141125%20CMS%20Home%20Health%20Study%20RTC%20final%20(4).pdf [http://perma.cc/5L5V-5P55]. Though the case-mix formula is adjusted for regional differences in wages, this distinction is made based on a national survey of wages. SCOTT R. TALEGA, CONG. RESEARCH SERV., R42998, MEDICARE HOME HEALTH BENEFIT PRIMER: BENEFIT BASICS AND ISSUES 12 (2013), https://www.fas.org/sgp/crs/misc/R42998.pdf [http://perma.cc/9P4T-ULUR].

[45] BRIAN O. BURWELL & WILLIAM H. CROWN, PUBLIC FINANCING OF LONG-TERM CARE: FEDERAL AND STATE ROLES (1994), https://aspe.hhs.gov/basic-report/public-financing-long-term-care-federal-and-state-roles#home [http://perma.cc/PS68-F9C7] ("Thus, the Medicaid program provides a more generous benefit package for long-term care services than the Medicare program, but these services are limited to persons who lack the financial resources to pay for their own care."). Moreover, the combination of federal and state outlays of Medicaid for home health care provides more total funding than Medicare. BASIC STATISTICS ABOUT HOME CARE, *supra* note 44 at 3. "Other public funding sources for home health include Medicaid, the Older Americans Act, Title XX Social Services Block Grants, the Veterans' Administration, and Civilian Health and Medical Program of the Uniformed Services . . . ." *Id.*

[46] U.S. GEN. ACCOUNTING OFF., GAO/HEHS-00-9, MEDICARE HOME HEALTH CARE: PROSPECTIVE PAYMENT SYSTEM WILL NEED REFINEMENT AS DATA BECOMES AVAILABLE 3 (2000), http://www.gao.gov/new.items/he00009.pdf [http://perma.cc/UN32-8EC5]. Medicare's revised Home Health Prospective Payment System features standardized 60-day episode payment rates and national per-visit rates. U.S. DEP'T OF HEALTH AND HUMAN SERVS., CTRS. FOR MEDICAID AND MEDICARE SERVS., MLN MATTERS 2-3 (2014), https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/

As the home care industry has expanded, franchised,[47] and consolidated,[48] direct care workers have begun to organize and demand higher wages, greater benefits, and improved working conditions.[49] Underscoring these demands has been a clamor for federal and state wage and hour standards. Until 1974, the Fair Labor Standards Act (FLSA), which established a "floor" for wages and a "ceiling" for hours, completely excluded domestic workers, including home care workers, from coverage for minimum wage rates, maximum hours, and overtime compensation.[50]

In 1974, Congress amended the FLSA to extend these minimum standards to most domestic workers but carved out a narrow exemption for employees providing "companionship services" to the elderly or disabled.[51] As discussed above, this narrow exemption was perhaps justified by the relatively informal, "companionship" nature of home care work as performed in 1974, but it is no longer appropriate given the size and scope of today's home care industry.[52] This language

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MLNMattersArticles/downloads/MM8969.pdf [http://perma.cc/YC5J-MFFC]. Payments to home health agencies are estimated to decrease by approximately 1.05% in calendar year 2014. Press Release, U.S. Dep't of Health and Human Servs., Ctrs. for Medicaid and Medicare Servs., Medicare Finalizes Home Health Payments for 2014 (Nov. 22, 2013), https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2013-Press-releases-items/2013-11-22-2.html [http://perma.cc/A4Z2-CUS5].

[47] DORIE SEAVEY & ABBY MARQUAND, CARING IN AMERICA: A COMPREHENSIVE ANALYSIS OF THE NATION'S FASTEST-GROWING JOBS: HOME HEALTH AND PERSONAL CARE AIDS 14-25 (2011), http://www.phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf [http://perma.cc/KH66-PG8N] ("[O]ne of the fastest growing players in the in-home care sector is for profit franchise chains that provide non-medical personal assistance services. This sector is highly fragmented with over 35 different franchise brands.").

[48] PARAPROFESSIONAL HEALTHCARE INST., THE IMPENDING THREAT TO THE NYC HOME CARE SYSTEM 1 (2013), http://phinational.org/sites/phinational.org/files/medicaid-redesign-watch-2.pdf [http://perma.cc/UMV2-XAPB] ("Already, private and community-based home care provider agencies are beginning to fold, merge, or be purchased.").

[49] Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413, 430, 445 (2012) (detailing the contemporary movement of domestic workers, which includes organizations such as Caring Across Generations, the National Domestic Worker Alliance, Domestic Workers United, Hand in Hand, and La Colectiva).

[50] Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 162 (2007). "Domestic workers" were defined as those employed by households (as opposed to agencies or businesses) in domestic service occupations, such as cooks, housekeepers, maids, and gardeners. *Id.* at 166-71.

[51] Application of the Fair Labor Standards Act to Domestic Service, 29 C.F.R. § 552 (2015). Congress also created an overtime exemption for "live-in" domestic service workers. *Id.* While domestic workers are slowly achieving more universal coverage under the FLSA, regulations promulgated under the Occupational Safety and Health Act explicitly exclude domestic workers "[a]s a matter of policy." Policy as to Domestic Household Employment Activities in Private Residences, 29 C.F.R. § 1975.6 (2014).

[52] Home Care Ass'n v. Weil, 799 F.3d 1084, 1087 (D.C. Cir. 2015) ("The growing demand for long-term home care services and the rising cost of traditional institutional care have fundamentally changed the nature of the home care industry.").

remained untouched and unchanged for nearly 40 years until the U.S. Department of Labor (DOL) issued final regulations, effective January 2015, that significantly narrowed the "companionship exemptions."[53]

Recognizing that home care work "merits . . . fundamental wage guarantees," and acknowledging consumers' need for a "stable and professional workforce [that would allow] them to remain in their homes and communities," the DOL's new rules extend basic minimum wage and overtime protections to the majority of home care workers.[54] Not surprisingly, home care employers challenged the promulgation and implementation of these new rules, but on August 21, 2015, the D.C. Circuit upheld the DOL's rules and reversed two decisions issued by the U.S. District Court for the District of Columbia that had previously struck down the revisions.[55] Although the decision is a certain victory for home care workers, the revised companionship regulations themselves do not ensure stable coverage under the FLSA. Home care workers will still face significant barriers to enforcing these newly acquired and legally affirmed rights. Closing the gaps in workplace laws for home care workers is an important first step, but as low-wage workers in other industries have experienced, an unchecked epidemic of wage theft by employers can undermine any statutory or regulatory gains.

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[53] "The final rules define 'companionship services' as the provision of fellowship and protection." Fellowship and protection will mean many different things to different people. For some, it may include conversation, playing games or making crafts, or accompanying the person to appointments or social events. The rule defines it as "engaging the person in social, physical, and mental activities," while protection involves physical presence to monitor the person's safety and well-being. "Care" may be included in companionship services, but only to the extent that it occurs in connection with the provision of fellowship and protection. Moreover, this ancillary care (assistance with daily living or ADL) is limited to 20% of the companion's weekly hours per care recipient. If a home care worker spends more than 20 hours a week delivering ADL, such as showers, toileting, and feeding, an employer (including "third-party employers, such as home care agencies," and any state agency found to be an employer) will not be able to claim an exemption from the FLSA overtime rules for such employees. NAT'L EMP'T LAW PROJECT, FEDERAL MINIMUM WAGE AND OVERTIME PROTECTIONS FOR HOME CARE WORKERS 2 (2015), http://www.nelp.org/content/uploads/NELP-Fact-Sheet-Companionship-Rules-Reform.pdf [http://perma.cc/DS8D-35AR].

[54] *We Count on Home Care: U.S. Court of Appeals Unanimously Upheld DOL Rule*, U.S. DEP'T OF LAB., WAGE AND HOUR DIV., http://www.dol.gov/whd/homecare/litigation.htm [http://perma.cc/8VDS-F7M8] (last visited Mar. 4, 2016).

[55] Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015); *see also* Noam Scheiber, *U.S. Court Reinstates Home Care Pay Rules*, N.Y. TIMES (Aug. 21, 2015), http://www.nytimes.com/2015/08/22/business/us-court-reinstates-home-care-pay-rules.html?_r=0 [http://perma.cc/SE67-5RNE].

II. AN EPIDEMIC OF WAGE THEFT

Wage theft is a term used to describe a broad spectrum of employer violations of federal and state laws that result in workers not being paid their legally mandated wages for hours worked.[56] "Wage theft is not incidental, aberrant, or rare," but rather, it is rampant, persistent, and pernicious and is committed by a wide range of employers within the home care industry.[57] "[T]hese unlawful practices result in millions of dollars of lost wages for workers who can least afford it."[58] A study of workers in low-wage industries across three U.S. cities found that in any given week, two-thirds had been the victim of at least one incidence of wage theft.[59] The researchers estimated that the average loss per worker over the course of a year was $2,634 out of total earnings of $17,616, a collective loss for workers in those three cities alone of $3 billion.[60] According to the Economic Policy

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[56] KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT (2009); *see also* Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1106-07 (2012). Low-wage workers, for whom the problem of wage theft is particularly acute, account for almost one-quarter of all U.S. adults. ORG. FOR ECON. CO-OPERATION AND DEV., OECD EMPLOYMENT OUTLOOK 2014 (2014), http://www.keepeek.com/Digital-Asset-Management/oecd/employment/oecd-employment-outlook-2014_empl_outlook-2014-en#page289 [http://perma.cc/A8M9-LRGW]. These workers earn an "average of $27,000 a year while working at least thirty hours per week." Ruan, *supra*, at 1107-08 (citing THE HENRY J. KAISER FAMILY FOUND., LOW-WAGE WORKERS AND HEALTH CARE 1 (2008), http://www.kff.org/kaiserpolls/upload/7804.pdf [http://perma.cc/E7Z3-D63L]).

[57] NAT'L EMP'T LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT 6 (2011), www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf [http://perma.cc/8P9Y-HB5H]. A 2008 (i.e., prerecession) survey of 4,387 low-wage workers in Chicago, Los Angeles, and New York underscored the barriers faced by low-wage workers when they seek redress for wage theft. ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 2 (2009), http://nelp.3cdn.net/b294e0aad2ba7008e3_2pm6br7gi.pdf [http://perma.cc/9R8K-26EM]. These "front-line" workers were employed by both large and small employers in a variety of industries, such as retail stores, residential construction, and home health care. *Id.* at 2, 31. The survey asked specific questions about their work and compensation in the previous work week. *Id.* Of the workers surveyed, 26% reported being paid less than minimum wage, with more than half underpaid by more than one dollar an hour. *Id.* at 2. For the low-wage workers that worked over 40 hours in a week, 76% faced unpaid or underpaid overtime. *Id.* These (and other) violations resulted in a wage theft of 15% of earnings for the surveyed workers, and if extrapolated to the nearly 1.12 million low-wage workers in the three cities, would result in low-wage workers losing more than $56 million per week. *Id.* at 6. Home care employers illegally denied overtime pay to nearly 83% of home care workers who had earned it and failed to properly compensate 90% of those who worked before or after their official shift. *Id.* at 35.

[58] Ruan, *supra* note 56, at 1107. *See generally* BERNHARDT ET AL., *supra* note 57, at 5.

[59] BERNHARDT, ET AL., *supra* note 57, at 5.

[60] Meixell & Eisenbrey, *supra* note 12, at 1.

Institute, "[i]f these findings in New York, Chicago, and Los Angeles are generalizable to the rest of the U.S. low-wage workforce, wage theft is costing more than $50 billion a year."[61]

Wage theft is particularly prevalent in the home care industry, which has created a workplace culture of noncompliance, illustrated by the cavalier reaction of one home care agency CEO to an overtime class action filed by her employees: "We just haven't paid overtime . . . . It's no mystery in this industry."[62] Home care is conducted within private homes, outside of public view and governmental inspection. Home care workers become victims of wage theft when their employers require "off-the-clock"[63] work or misclassify the workers as "independent contractors"[64] to evade payroll taxes.[65] Workers who are misclassified risk losing not only the protection of minimum wage and overtime laws, but also safety-net benefits like unemployment insurance, workers' compensation, and Social Security and Medicare.

Persistent and unchecked wage theft in the home care industry is exacerbated by employers' incentives to violate

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[61] *Id.*

[62] Daniel Massey, *Home Care Service Sued Over Pay Practices*, CRAIN'S N.Y. BUS. (Apr. 14, 2010, 12:43 PM), http://www.crainsnewyork.com/article/20100414/FREE/100419938/home-care-service-sued-over-pay-practices [http://perma.cc/8KFL-5KBH].

[63] ANNETTE BERNHARDT ET AL., EMPLOYERS GONE ROGUE, EXPLAINING INDUSTRY VARIATION IN VIOLATIONS OF WORKPLACE LAWS, (2013) ("Off-the-clock violations are above average for home health care . . . ."); *see also* Cole Stangler, *Home Care Workers' Lawsuit Alleging Wage Theft Exposes Growing Industry's Troubling Pay Practices*, INT'L. BUS. TIMES (June 16, 2015), http://www.ibtimes.com/home-care-workers-lawsuit-alleging-wage-theft-exposes-growing-industrys-troubling-pay-1969087 [http://perma.cc/UTT6-WVKG] ("[C]aring for seniors tends to forge emotional ties between workers and clients. While rewarding, the bonds can drive employees to put in extra time, whether or not they're properly compensated for it. 'Bad employers' . . . exploit that sense of obligation to extract unpaid labor.").

[64] *See, e.g.*, Lee's Industries, Inc., 355 N.L.R.B. 1267, 1268-69 (2010). After workers filed a lawsuit seeking unpaid overtime wages, the defendant home care agency told them that they had to sign an agreement calling them "independent contractors" if they wanted to keep their jobs. *Id.*; *see also* Cooney v. O'Connor, No. 1788 (Md. Ct. Spec. App. Nov. 26, 2002) (Maryland home care agency required its employees to sign an "Independent Contractor Application" as a condition of getting a job placement and unsuccessfully attempted to prevent former employees from collecting unemployment insurance benefits); Klausner v. Brockman, 58 S.W.3d 671, 674-75 (Mo. Ct. App. 2001) (two home care aides later found to be employees were directed to register a shell home care business, required to sign contracts deeming them to be independent contractors, and issued IRS 1099 Forms for Independent Contractors).

[65] *See Payroll Fraud: Targeting Bad Actors Hurting Workers and Businesses*: *Hearing Before the United States Congress Senate Comm. on Health, Education, Labor & Pensions*, 113th Cong. 2 (2013) (testimony of Catherine K. Ruckelshaus) ("Companies . . . [misclassify employees] to avoid having to report and pay FICA and FUTA taxes, evade labor organizing, skirt baseline labor standards like minimum wage and overtime, discrimination protections, health and safety and workers compensation, and unemployment insurance.").

workplace standards and employees' disincentives to pursue claims. In a recent study of the efficacy of workplace standards enforcement regimes, Professors Alexander and Prasad found that "the least politically, economically, and socially powerful and secure workers were the least likely to make claims, the most likely to experience retaliation, and the least likely to have accurate substantive and procedural legal knowledge."[66] These workers included women, those who lacked legal immigration status, and those with low education levels—demographics that mirror those of the home care industry.[67]

Unchecked wage theft negatively impacts ethical employers who may want to comply with legal standards but find it impossible to compete with law-breaking agencies in a slow economy. The incentives for employers to violate the law are clear. By engaging in wage theft, employers can illegally—and significantly—reduce their payroll costs and underbid competitors; this hurts law-abiding businesses and encourages unfair competition. These practices illegally siphon off state, local, and federal tax dollars, translating into millions of dollars in lost revenues for local governments.[68]

In a double blow to state and local economies, since low-income workers are likely to circulate their earnings in the local economy by spending on basic necessities like food, clothing, and

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[66] Charlotte Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1089, 1098-99 (2014); *see also* HOME ECONOMICS, *supra* note 16, at xii ("Among workers who are fired from a domestic work job, 23 percent are fired for complaining about working conditions, and 18 percent are fired for protesting violations of their contract or agreement. . . . 91 percent of workers who encountered problems with their working conditions in the prior 12 months did not complain because they were afraid they would lose their job. 85 percent of undocumented immigrants who encountered problems with their working conditions in the prior 12 months did not complain because they feared their immigration status would be used against them.").

[67] Alexander & Prasad, *supra* note 66, at 1098-99.

[68] SARAH LEBERSTEIN, NAT'L EMP'T LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 1 (2012), http://nelp.3cdn.net/0693974b8e20a9213e_g8m6bhyfx.pdf [http://perma.cc/EUF5-RXV3] (detailing numerous state and federal studies and estimates of costs); *see also* EASTERN RESEARCH GRP., INC., THE SOCIAL AND ECONOMIC EFFECTS OF WAGE VIOLATIONS: ESTIMATES FOR CALIFORNIA AND NEW YORK (2014), http://www.dol.gov/asp/evaluation/completed-studies/WageViolationsReportDecember2014.pdf [http://perma.cc/9Y88-XQ9D] (The report "estimates that minimum wage violations in California reduced payroll taxes by $167 million in 2010 . . . . In New York, the estimated reduction in payroll tax was $71.0 million in 2010 . . . . Minimum wage violations resulted in an estimated $113 million in lost federal income taxes in 2010 (between the two states). The California state government lost $14 million and the New York state government lost $8 million in income tax revenues in tax year 2010 due to minimum wage violations. Finally, minimum wage violations led to workers who had violations losing $4.5 million in EITC benefits in California and $1.1 million in EITC benefits in New York in 2010.").

housing,[69] any theft of those earnings by employers affects not only the low-wage home care worker, but also the other businesses that workers would have patronized in the absence of wage theft.[70] Moreover, when home care workers' wages are stolen by their employers, the workers and their families are often forced to rely on already strained public safety nets, such as food stamps, food banks, temporary assistance with utility bill payments, subsidized housing, and shelters.

III. EXISTING APPROACHES TO COMBATING WAGE THEFT

Deterring wage theft relies on effective and aggressive enforcement of the FLSA and complementary state laws and local ordinances, which in turn require resources and political support. As described below, recent shifts in enforcement priorities at the DOL and parallel state agencies have the potential to improve standards in the home care industry. Targeted industry strategies, together with innovative partnership and collective strategies, may be more effective than the traditional means of enforcing the FLSA, but they still face significant challenges.

A. Limited FLSA Enforcement

Home care workers who have experienced wage theft have three options for redress under existing workplace laws: file a complaint with the appropriate state or federal labor agency, file a private lawsuit under the FLSA or state wage and hour laws, or pursue both avenues.[71] Given the political nature of resource allocation for the public enforcement of wage and hour laws, these decisions are highly individual, personal, and

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[69] BURNHAM & THEODORE, *supra* note 16, at xi. Many indicate that their most basic needs go unmet. *Id.* ("60 percent spend more than half of their income on rent or mortgage payments. 37 percent of workers paid their rent or mortgage late during the year prior to being interviewed. 40 percent paid some of their other essential bills late during the same time period. 20 percent report that there were times in the previous month when there was no food to eat in their homes because there was no money to buy any.").

[70] HOUS. INTERFAITH WORKER JUSTICE CTR., HOUSTON, WE HAVE A WAGE THEFT PROBLEM (2012), https://stopwagetheft.files.wordpress.com/2012/05/2012-houston-wage-theft-report.pdf [http://perma.cc/7Y6A-L2VL].

[71] *See Backpay*, U.S. DEP'T OF LAB., http://www.dol.gov/dol/topic/wages/backpay.htm [http://perma.cc/5JX2-G5MW] (last visited Mar. 4, 2016); *How to File a Complaint*, U.S. DEP'T OF LAB., http://www.dol.gov/wecanhelp/howtofilecomplaint.htm [http://perma.cc/9Q32-E7AG] (last visited Mar. 4, 2016).

economically and emotionally costly.[72] Critics of the existing regulatory landscape have argued that when workers engage in a "cost-benefit analysis" of pursuing legal claims for wage theft by employers, the costs of an external, formal claim are often too great for low-wage workers, especially when compared with the modest (at best) benefits.[73]

Moreover, when home care workers pursue individual claims, the risk of retaliation by employers increases. Retaliation can take many forms, including termination, salary reduction, harassment, and adverse changes to schedules or assignments.[74] In a recent study of low-wage workers who pursued a claim against an employer for wage theft, about 43% experienced some form of retaliation.[75] Such retaliation is itself often without a helpful legal solution, given that the only remedy offered by traditional employment and labor law is an opportunity to pursue in court a claim for the retaliation—the very action that placed the worker in jeopardy in the first place. This is particularly evident when it comes to class action lawsuits, in which even the collective status of the plaintiffs does little to cover the individual risk. Having to "opt in" to a wage theft class action (as contrasted, for example, with an "opt out" consumer rights lawsuit) "requires [low-wage] workers to take the very public step of joining a lawsuit, rather than being part of an anonymous class represented by a few named plaintiffs."[76] As Natinya Ruan has observed, the existing framework for enforcing workplace labor standards creates a "self-perpetuating enforcement gap in low-wage workplaces"[77] in which, "[w]orkers are overdeterred from claiming, while employers are underdeterred from complying."[78]

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[72] Ruan, *supra* note 56, at 1111-12. Under the Obama administration, funding for workplace public enforcement improved, though "[w]hether these measures can reverse a three-decade long decline in DOL enforcement remains to be seen." *Id.* at 1114.

[73] *See* Alexander & Prasad, *supra* note 66, at 1103-04. Moreover, as the authors note, "incompetence and processing delays may render government agencies an unattractive forum for workers seeking effective and timely redress for workplace problems." *Id.* at 1105; *see*, *e.g.*, U.S. GOV. ACCOUNTABILITY OFF., GAO-09-458T, DEPARTMENT OF LABOR: WAGE AND HOUR DIVISION'S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT (2009) ("[The Government Accountability Office's] overall assessment of the [Wage and Hour Division's] complaint intake, conciliation, and investigation processes found an ineffective system that discourages wage theft complaints.").

[74] *See generally* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 8-II(D) (1998), http://www.eeoc.gov/policy/docs/retal.html#IIpartD [http://perma.cc/F4FW-QF2B].

[75] Alexander & Prasad, *supra* note 66, at 1104.

[76] *Id.* at 1113.

[77] *Id.* at 1107.

[78] *Id.* at 1108.

Moreover, the endemic inequality in bargaining power between home care workers and employers undercuts one-on-one negotiations.[79] As Ai-jen Poo, a domestic-worker organizer, explained, "When individual workers try to bargain with their employers, termination is the standard result since employers can simply hire another worker."[80]

B. Recent Federal Leadership

Following decades of critical underfunding,[81] short staffing, and claims backlog, the DOL's Wage and Hour Division (WHD) has entered a new era of vigorous and strategic enforcement.[82] Since 2009, the WHD has hired 300 new investigators to target industries and employers most likely to violate workplace standards, resulting in a recovery of over $1.3 billion in unpaid and owed wages.[83] David Weil, the newly confirmed head of the

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> [T]he failure of operational rights to create appropriate incentives in either the context of private lawsuits or government complaints means that the risk associated with enforcement is shifted to the parties who can least bear it. . . . As a result, the would-be law enforcers for whom costs are particularly heavy, the low-wage, front-line workers studied here, may choose simply to stay silent or to exit and drop out of the workplace dispute pyramid altogether.

Id. at 1106.

[79] AI-JEN POO, DOMESTIC WORKERS UNITED, ORGANIZING WITH LOVE: LESSONS FROM THE NEW YORK DOMESTIC WORKERS BILL OF RIGHTS CAMPAIGN 4 (2010), http://www.cew.umich.edu/sites/default/files/Organizingwithlove--FullReport-Cover_0.pdf [http://perma.cc/8ACY-22NZ] ("With no clear standards or laws to ensure basic rights, workers have to negotiate the terms of their employment individually day-by-day in situations where they lack any real bargaining power.").

[80] *Id.* at 8.

[81] "Between 1975 and 2004, the number of workplace investigators declined by 14% and the number of compliance actions completed declined by 36%—while the number of covered workers grew by 55%, and the number of covered establishments grew by 112%." ANNETTE BERNHARDT ET AL., BRENNAN CTR. FOR JUSTICE, UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 31 (2007), https://www.brennancenter.org/publication/unregulated-work-global-city-full-report-chapter-downloads [http://perma.cc/F2BB-QUME].

[82] *Working for a Fair Day's Pay*, U.S. DEP'T OF LAB., http://www.dol.gov/whd/statistics/ [http://perma.cc/XK48-5D5G] (last visited Mar. 4, 2016).

[83] Testimony of Nancy J. Leppink, Deputy Wage and Hour Administrator, Wage and Hour Division, U.S. Dep't of Lab. before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, Nov. 3, 2011, http://www.dol.gov/_sec/media/congress/20111103_leppink.htm [http://perma.cc/9JV5-AGUS]; Testimony of Thomas E. Perez, Secretary, U.S. Dep't of Lab., before the Subcommittee On Labor, Health & Human Services, Committee On Appropriations, U.S. Senate, Apr. 9, 2014, http://www.dol.gov/newsroom/congress/20140409_Perez [http://perma.cc/ER5W-BJVX]. The WHD collected approximately $240 million in back wages from employers this past fiscal year. *Working for a Fair Day's Pay*, *supra* note 82.

WHD,[84] had, as an academic and advisor to the DOL, recommended that the division focus its resources on particular "fissured" industries in which businesses employ high numbers of subcontractors and other contingent workers and disclaim any legal responsibility for wages and working conditions.[85] Now, as the agency's head, Weil has pursued that very strategy.[86] Under Weil's leadership, efforts to crack down on employee misclassification have yielded significant gains for workers in industries that frequently turn to subcontracting as a way to cut costs and avoid responsibility for labor standards.[87] The DOL has also begun to more aggressively partner with state governments and industry partners to strengthen enforcement efforts.[88]

Taking a more data-driven approach, the DOL commissioned a study to estimate the impact of state and federal minimum wage and overtime pay violations.[89] Based on the results of the study, which found pervasive minimum wage violations and a multitude of negative impacts on workers who become victims of such theft, the authors suggested that the findings be used as a targeting tool.[90] But despite its recent increases in staffing and a

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[84] *Dr. David Weil—Administrator, Wage and Hour Division*, U.S. DEP'T OF LAB., http://www.dol.gov/whd/about/org/dweil.htm [http://perma.cc/N7E3-QGXS] (last visited Mar. 4, 2016) (Weil sworn in on May 5, 2014).

[85] *See* DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION (2010), http://www.dol.gov/whd/resources/strategicEnforcement.pdf [http://perma.cc/XC4T-2DCQ]; *see also* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) (providing a detailed analysis of the impacts of industry subcontracting and reorganization on wages, working conditions, and income inequality).

[86] Lauren Weber, *Wage-Law Enforcer Favors Proactive Approach*, WALL ST. J. (Dec. 30, 2014), http://www.wsj.com/articles/boss-talk-wage-law-enforcer-favors-proactive-approach-1419972132 [http://perma.cc/J85Z-77NG].

[87] *Id.*; *see also* Steven Greenhouse, *Study Finds Violations of Wage Law in New York and California*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/business/study-finds-violations-of-wage-law-in-new-york-and-california.html [http://perma.cc/59CW-FLAJ] ("The number of investigators in the Wage and Hour Division has increased to 1,040 from 731 in 2008, the Labor Department said. Since 2009 the department has recovered $1 billion in back wages for workers who suffered minimum wage and other violations."). Amy B. Dean, *Meet Washington's Wage and Hour Enforcer*, AL JAZEERA AM. (Oct. 19, 2015, 2:00 AM), http://america.aljazeera.com/opinions/2015/10/meet-washingtons-wage-and-hour-enforcer.html [http://perma.cc/R63U-KJNC].

[88] *See* Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552 (2011). The DOL has entered into memoranda of understanding with state agencies in Alabama, California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New York, Utah, Washington, and Wyoming. *See Misclassification of Employees as Independent Contractors*, U.S. DEP'T OF LAB., http://www.dol.gov/whd/workers/misclassification/#newsroom [http://perma.cc/YS2G-XXC3] (last visited Mar. 4, 2016).

[89] EASTERN RESEARCH GROUP, *supra* note 68, at ES-1, ES-4.

[90] *Id.* at 61-64.

reduction in the backlog of claims, the DOL is still not adequately resourced to fully enforce the FLSA alone. Enforcing this critical piece of federal workplace protection requires partnership with state and local governments.[91] While operating with smaller budgets and varying degrees of political will, local and state agencies have the potential to craft enforcement approaches that are nimble, creative, and collaborative.

C. State and Local Innovation

State agencies have also provided more effective leadership in enforcing federal and state wage and hour laws, as well as in bridging some of the gaps in federal workplace protection in the home care industry.[92] States like New York, California, Connecticut, and Maryland, among others, have passed legislation designed to deter wage theft by requiring that employers notify employees of the particular amount and method of wage payment and subjecting employers who violate wage and hour standards to enhanced fines and criminal penalties.[93] Using more aggressive and effective enforcement techniques, the California Division of Labor Standards Enforcement has begun conducting more focused investigations of employers within targeted industries uring nonbusiness hours.[94] Likewise, in New York, the Attorney General has prioritized investigation and enforcement against employers who have repeatedly violated wage and hour laws, specifically targeting employers in certain industries.[95]

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[91] *See* Fine & Gordon, *supra* note 88.

[92] Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. & SOC. PROBS. 495, 508-19 (2006) (detailing the enforcement regimes of California, Maine, Massachusetts, and New York).

[93] For a summary of state wage-theft laws, see SOC'Y FOR HUMAN RES. MGMT., PAYMENT OF WAGES/DIRECT DEPOSIT LAWS (2014), http://www.shrm.org/legalissues/stateandlocalresources/stateandlocalstatutesandregulations/documents/wagepaymentlaw.pdf [http://perma.cc/M9YX-L2ZE].

[94] JULIE A. SU, LABOR & WORKFORCE DEV. AGENCY, A REPORT ON THE STATE OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT 1 (2013), http://www.dir.ca.gov/dlse/Publications/DLSE_Report2013.pdf [http://perma.cc/XF5X-KGAQ] ("In 2012, BOFE's more targeted, efficient use of inspections yielded the highest rate of civil penalty citations (80%) in the past 10 years.").

[95] Fine & Gordon, *supra* note 88, at 568-70. In 2009, the New York State Department of Labor launched a "Wage and Hour Watch" program, in which the DOL formally partnered with six community-based organizations (Make the Road New York, the Workplace Project, Centro del Derecho, Chinese Staff and Workers Association, RWDSU, and UFCW Local #1500) using a "neighborhood watch" model of workplace enforcement. *Id.* at 584 n.110; *see also* Friedman, *supra* note 92, at 528 ("When the [New York Labor] Bureau receives a complaint from a worker about a specific employer, it investigates every possible violation by that employer, and prioritizes complaints in which similar employers are committing violations.").

States have also been incubators for home care industry regulations. For example, some states extended state minimum wage protections to their home care workers even in advance of the federal government's proposed rules.[96] New York passed a Domestic Worker Bill of Rights in 2010, which, among other things, expanded minimum wage coverage to companions solely employed by households (as opposed to agencies) and mandated a higher rate of overtime pay for live-in domestic workers and live-out companions.[97] New York also passed a Home Care Worker Wage Parity Law, which established minimum "total compensation" requirements for home care workers who perform

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[96] *See* PARAPROFESSIONAL HEALTHCARE INST., WHICH STATES PROVIDE MINIMUM WAGE AND OVERTIME TO HOME CARE WORKERS? (2011), http://nelp.3cdn.net/6e193991edf8bd0df9_o6m6i28s2.pdf [http://perma.cc/TH73-PE5Q]; *see also* PARAPROFESSIONAL HEALTHCARE INST., STATE-BY-STATE PROJECTED DEMAND FOR NEW DIRECT-CARE WORKERS, 2006-16 (2009), http://phinational.org/sites/phinational.org/files/clearinghouse/State%20by%20State%20DCW%20Demand%20Projections%202006-16%20FINAL%20rev.pdf [http://perma.cc/UH8K-DJ5H]; PAUL K. SONN ET AL., NAT'L EMP'T LAW PROJECT, FAIR PAY FOR HOME CARE WORKERS: REFORMING THE U.S. DEPARTMENT OF LABOR'S COMPANIONSHIP REGULATIONS UNDER THE FAIR LABOR STANDARDS ACT app. (2011), http://www.nelp.org/content/uploads/2015/03/FairPayforHomeCareWorkers.pdf [http://perma.cc/K73F-P8KV] (stating that the amount and extent of coverage varies). Maine, for example, provides minimum wage and overtime coverage for all home care workers, without relevant exemptions. ME. REV. STAT. ANN. tit. 26, §§ 663, 664 (2013). Maryland extended minimum wage to all home care workers and overtime coverage to most, but it retained an exemption for workers employed by nonprofit agencies. MD. CODE ANN., LAB. & EMPL. § 3-415 (West 2014). Other states, like Ohio, provide a minimum wage but no overtime coverage for home care workers because the law adopts the FLSA exemptions. OHIO REV. CODE ANN. § 4111.03(A) (West 2007).

[97] Domestic Workers Bill of Rights, 2010 N.Y. Sess. Laws 481 (McKinney) (codified at N.Y. EXEC. LAW § 292 (LexisNexis 2016) (definitions); N.Y. EXEC. LAW § 296-b (LexisNexis 2015) (prohibiting discrimination against domestic workers); N.Y. LAB. LAW § 2 (LexisNexis 2015) (definitions); N.Y. LAB. LAW § 160 (LexisNexis 2015) (hours of labor for a day's work); N.Y. LAB. LAW § 161 (LexisNexis 2015) (one day of rest in seven, three days paid leave a year); N.Y. LAB. LAW § 170 (LexisNexis 2015) (hours of work for domestic workers); N.Y. LAB. LAW § 651 (LexisNexis 2015) (definitions); N.Y. LAB. LAW § 691 (LexisNexis 2015) (statement of employee rights and employer obligations); N.Y. LAB. LAW § 692 (LexisNexis 2015) (recordkeeping requirements); N.Y. WORKERS' COMP. § 201 (LexisNexis 2015) (definitions)). The law mandated time off from work (one day off in any seven day period; after one year of employment, three paid days of rest), established prohibitions against sexual harassment and other forms of workplace discrimination, and provided temporary disability benefits for part-time and full-time domestic workers. According to the law, a person is considered a domestic worker if he or she works in another person's home to care for a child, serves as a companion for a sick, convalescing, or elderly person, does housekeeping, or performs any other domestic service tasks. N.Y. LAB. LAW § 2(16) (LexisNexis 2013); N.Y. EXEC. LAW § 296-b (LexisNexis 2015). A person performing companionship services without additional domestic work such as cleaning services, however, is not subject to the overtime and day of rest rules. N.Y. STATE DEP'T OF LAB., FACTS FOR DOMESTIC WORKERS, https://labor.ny.gov/legal/laws/pdf/domestic-workers/facts-for-domestic-workers.pdf [http://perma.cc/3NFQ-3H64]; *see also* N.Y. STATE DIV. OF HUMAN RIGHTS, PROTECTION OF DOMESTIC WORKERS FROM HARASSMENT UNDER THE NYS HUMAN RIGHTS LAW, http://www.labor.ny.gov/sites/legal/laws/pdf_word_docs/domestic-workers/human-rights-trifold-domestic-workers.pdf [http://perma.cc/F5LH-SEJT].

Medicaid-reimbursed work for certified home health agencies, long-term home health care programs, and managed care plans.[98]

While certain states, including New York and California, have demonstrated legislative leadership and commitment to creative and collaborative enforcement strategies, state-by-state efforts alone are insufficient to raise standards in this national industry. As noted by Professors Fine and Gordon, since many of these state and local initiatives have emerged on an ad hoc basis, rather than through institutional policy, they may be difficult to sustain in the face of budget cuts or political regime change.[99] Enforcement strategies driven by workers, rather than regulators, may help overcome these persistent barriers to achieving greater stability and sustainability within this growing industry.

D. Collective Strategies

As an alternative to legislative and administrative strategies, home care workers have organized unions, cooperatives, and collectives as a means of generating stable employment and living wages, building collective political power, and enforcing workplace standards.[100] The success of these recent campaigns[101] dispels the myth that isolation and intimidation in the home care industry are insurmountable organizing obstacles.[102] Worker organizations like Domestic Workers United

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[98] N.Y. PUB. HEALTH LAW § 3614-C (LexisNexis 2015). The original proposal, which was ultimately not endorsed by the full committee, was "'intended to address the inconsistency in wages among home care workers' and thereby improve the recruitment and retention of high-quality home care aides." Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 81 (2d Cir. 2015) (quoting N.Y. STATE DEP'T OF HEALTH, PROPOSALS BEING RATED 71 (2011), http://www.health.ny.gov/health_care/medicaid/redesign/docs/proposals_being_rated.pdf [http://perma.cc/EFT2-YTSP]).

[99] Fine & Gordon, *supra* note 88, at 561.

[100] Elizabeth J. Kennedy, *When the Shop Floor is in the Living Room: Toward a Domestic Employment Relationship Theory*, 67 N.Y.U. ANN. SURV. AM. L. 643, 645, 683, 685 (2012). *See generally* Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417 (2005) (documenting the efforts of various worker centers).

[101] *See generally* Hina Shah & Marci Seville, *Domestic Worker Organizing: Building A Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413, 413-14, 430-35 (2012) (detailing successful state, national, and international campaigns for domestic worker justice, including the New York State Domestic Worker Bill of Rights, the establishment of Domestic Workers United and the National Domestic Worker Alliance, the International Labour Organization's adoption of the ILO Convention and Recommendation Concerning Decent Work for Domestic Workers, and multiple campaigns in California by a broad coalition of domestic worker advocacy organizations, worker collectives, and labor unions).

[102] Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1391 (2008). For a detailed history of the historical exclusion of domestic workers from mainstream labor unions, see, for example,

and campaigns like Caring Across Generations have developed transformative organizing models aimed at improving workers' lives as employees, parents, caregivers, and community members.[103] Rooted in communities of low-wage, immigrant workers, home care cooperatives like Cooperative Home Care Associates, Inc.[104] have helped to enforce evolving industry standards through formal and informal mediation and litigation and by providing domestic workers with leadership training and organizing opportunities.[105]

As Fine and Gordon note, the original architects of the FLSA envisioned an enforcement system in which worker-based organizations would directly participate in enforcing wage and hour laws.[106] They advocate for augmenting existing government enforcement by giving unions and worker organizations a formal role in enforcing compliance with minimum wage and overtime laws in low-wage industries.[107] The strategies proposed in the next part also rest on the principle that those "closest to the action" be empowered to work with government in order to detect, report, and prevent wage theft. While not intended to replace the traditional means of enforcing the FLSA described above, the complementary legal theories explored in Part IV may leverage

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DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA (2004).

[103] PAM WHITEFIELD ET AL., IS THERE A WOMEN'S WAY OF ORGANIZING? GENDER, UNIONS AND EFFECTIVE ORGANIZING 2, 12, 18, 21 (2009), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1025&context=reports [http://perma.cc/DNN7-4CKN] ("As immigrants, mothers, and women of color, they also wanted to address immigrant rights, healthcare reform, and other issues affecting workers outside the workplace. . . . [A]ddressing these 'whole life' issues inspired personal involvement and investment in the union."); JENNIFER ITO ET AL., TRANSFORMING LIVES, TRANSFORMING MOVEMENT BUILDING: LESSONS FROM THE NATIONAL DOMESTIC WORKERS ALLIANCE 9-10 (2014), http://www.soltransforminglives.org/pdf/sol-transforming-lives-executive-summary-4.pdf [http://perma.cc/VWU8-5E8U]. The formation of the "Excluded Worker Congress" at the 2010 U.S. Social Forum reflects a growing movement to organize all "excluded workers" (those who by law or policy are denied the right to organize and other fundamental labor rights), including (but not limited to) farm workers, guest workers, day laborers, domestic workers, and workers in right to work states. *See Background*, UNITED WORKERS CONGRESS, http://www.unitedworkerscongress.org/background--vision.html [http://perma.cc/CBQ7-SSPS] (last visited Mar. 4, 2016).

[104] COOPERATIVE HOME CARE ASSOCIATES, http://www.chcany.org [http://perma.cc/NP3W-35BR] (last visited Mar. 4, 2016).

[105] *See generally* Fine, *Edge of the Dream*, *supra* note 100 (documenting the efforts of various worker centers). *See also* Laura Flanders, *How America's Largest Worker Owned Co-op Lifts People Out of Poverty*, YES! MAG. (Aug. 14, 2014), http://www.yesmagazine.org/issues/the-end-of-poverty/how-america-s-largest-worker-owned-co-op-lifts-people-out-of-poverty [http://perma.cc/R9MF-H3UA] ("To raise industry standards, not just for CHCA workers but across the field, CHCA started the worker-run Paraprofessional Healthcare Institute (PHI) that trains agencies across the country while also fighting for policy shifts.").

[106] Fine & Gordon, *supra* note 88, at 575-76.

[107] *Id.* at 561 (such collaborations must be "formalized," "sustained," and "vigorous").

the unique nature of home care to include consumers and their families as potential partners in enforcing standards.

IV. PROPOSED ENFORCEMENT ALTERNATIVES

In addition to the "proactive" regime of DOL-WHD investigations, enforcing workplace standards in the United States also relies heavily on a system of "operational rights"—incentives for workers to bring individual and collective claims from the "bottom up."[108] Most laws—federal, state, and local—that establish workplace standards provide employees with the right to bring a private lawsuit against an employer that violates those standards.[109] The number of private lawsuits filed by employees seeking redress eclipses the number of enforcement actions initiated by the government.[110] In the context of home care workers, however, this system of operational rights, to be effective, must include targeted mechanisms for creative and collective enforcement.

Advocates for new models of workplace rights enforcement, particularly in low-wage industries, have recommended that the bottom-up structure be preserved but strengthened by a system that rebalances the costs and benefits in ways that benefit both employers[111] and employees.[112] For ethical, law-abiding employers who also operate on low profit margins, a system that more effectively enforces wage standards could allow them to compete on a more level playing field, rather than being forced to compete with unscrupulous employers whose law breaking gives them an economic advantage.

The following sections propose three alternatives to enforcing compliance with wage standards in the home care industry. The first proposed strategy is to apply the *qui tam* provision of the federal False Claims Act (FCA) to cases where

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[108] Alexander & Prasad, *supra* note 66, at 1069-73.

[109] *Id.* at 1070.

[110] *Id.*

[111] Elizabeth J. Kennedy & Michael B. Runnels, *Bringing New Governance Home: The Need for Regulation in the Domestic Workplace*, 81 UMKC L. REV. 899, 940-41 (2013) (summarizing the system of "co-regulation" as put forth by Professor Cynthia Estlund, which "supports the initiatives of 'high road' domestic employers—and equips domestic workers and their employers with the tools necessary to develop enforceable workplace agreements based on core industry standards and mutual interests").

[112] Alexander & Prasad, *supra* note 66, at 1108. One suggestion is for the U.S. Department of Labor to "establish an optional, one-way binding arbitration system, modeled on a program in place at The Coca-Cola Company, [which] would give workers a forum for speedy claim resolution." *Id.* at 1114. Under the Coca-Cola system, only the employer would be bound by the arbitrator's decision. The workers would still be free to pursue their claims externally. *Id* at 1115.

home care employers receive federal tax dollars through the Medicaid and Medicare programs but fail to pay wages in accordance with applicable law. Given the particular funding structure of these governmental programs, as well as recent *qui tam* decisions, a second strategy is articulated using a fiduciary duty framework. The third proposed strategy is to leverage the authority of the Department of Health and Human Services Office of Inspector General to exclude home care employers from participation in federal health care programs (e.g., Medicare and Medicaid) upon a conviction or administrative determination of wage theft.

A. False Claims Act Litigation

1. Traditional Application

Congress enacted the FCA in 1863 in response to concerns of rampant fraud by suppliers of goods to the Union Army during the Civil War.[113] Given the federal government's limited enforcement resources at the time, the key to the success of the FCA was its *qui tam* provision, which allowed private citizens, or "relators," to act as whistleblowers or "private attorneys general" by suing on behalf of the federal government and collecting a share of its recovery.[114] The FCA provided that any person who knowingly submitted false claims to the government was liable for double the government's damages, plus a penalty of $2,000 for each false claim; relators were originally entitled to 50% of the amount recovered.[115]

In its current form, the FCA creates liability for any person who knowingly submits a false claim to the government, uses a false statement to induce the government to pay a false claim, conspires to defraud the government into paying a false claim, or uses a false statement to reduce an obligation to pay the government.[116] Over time, the FCA has been amended to raise the

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[113] United States v. McNinch, 356 U.S. 595, 599 (1958) (describing the "sordid picture" painted for the Congress at the time the bill passed, when "the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war"). Through passage of the Act, "Congress wanted to stop this plundering of the public treasury." *Id.*

[114] *See* 31 U.S.C. § 3730(a)-(b) (2012) (outlining authority of DOJ and private persons to bring suit).

[115] CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 5-6 (Aug. 6, 2009), http://www.fas.org/sgp/crs/misc/R40785.pdf [http://perma.cc/H8RN-U8DF] (tracing the history of the contemporary FCA with reference to the Act of March 2, 1863, 12 Stat. 696).

[116] *See* 31 U.S.C. § 3729(a)-(b).

penalties for false claims from double to treble damages[117]—from $2,000 to a range of $5,000 to $10,000.[118] Relators, if successful, may collect up to 30% of the government's recovered damages.[119]

In addition to encouraging individual whistleblowers to report fraud, the *qui tam* provision incentivizes lawyers and third parties to actively investigate and look for claims. For those looking, the home care industry, much like the larger health care industry in which it participates, is likely rife with potential claims.[120] The most common types of claims initiated under the *qui tam* provision "assert fraud in connection with federally funded healthcare services under Medicare, Medicaid, and defense-procurement contracts."[121] According to a recent report by the Government Accountability Office, approximately $63 billion worth of "improper payments" were made in fiscal year 2014 under the Medicare and Medicaid programs.[122]

Given the significant lack of procedural legal knowledge on the part of low-wage workers, incentives for lawyers and third parties to look for *qui tam* claims are particularly important in

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[117] *Compare* 31 U.S.C. 3729(a) (1982), *with* 31 U.S.C. 3729(a) (1986). The prior statutory penalty of $2,000 had been set in 1863. S. REP. No. 99-345, at 4 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5269 ("The False Claims Act currently permits the United States to recover double damages plus $2,000 for each false or fraudulent claim.").

[118] *Compare* 31 U.S.C. 3730(d)(2) (1982), *with* 31 U.S.C. 3730(d)(2) (1986).

[119] 31 U.S.C. § 3730(c)-(d) (2012).

[120] *See, e.g.*, *Examples of Health Care Fraud—Fiscal Year 2014*, INTERNAL REVENUE SERV., http://www.irs.gov/uac/Examples-of-Healthcare-Fraud-Investigations-Fiscal-Year-2014 [http://perma.cc/75SK-YXAF] (last visited Mar. 4, 2016) (listing examples, including the owners of a home health care company sentenced to 120 months in prison in connection with a $20 million health care fraud scheme).

[121] David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1944 (2014).

[122] U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-482T, IMPROPER PAYMENTS: GOVERNMENT-WIDE ESTIMATES AND USE OF DEATH DATA TO HELP PREVENT PAYMENTS TO DECEASED INDIVIDUALS 3 (2015), http://www.gao.gov/assets/670/669026.pdf [http://perma.cc/7ART-97UY] (estimating improper payments under Medicare fee-for-service at $45,754,000,000 and under Medicaid at $17,492,000,000). The government has previously estimated losses around $48 billion, an amount that former Attorney General Eric Holder suggested was lower than the actual figure of between $60 and $90 billion. Merrill Matthews, *Medicare and Medicaid Fraud is Costing Taxpayers Billions*, FORBES (May 31, 2012, 3:08 PM), http://www.forbes.com/sites/merrillmatthews/2012/05/31/medicare-and-medicaid-fraud-is-costing-taxpayers-billions/ [http://perma.cc/KMG5-V3BW]. For fiscal year 2014, the government reported that it had recovered $2.3 billion through FCA claims against the health care industry. Press Release, Dep't of Justice, Office of Pub. Affairs, Justice Dep't Recovers Nearly $6 Billion in False Claims Cases in Fiscal Year 2014 (Nov. 20, 2014), http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014 [http://perma.cc/FV46-9HGU] (marking "five straight years the department has recovered more than $2 billion in cases involving false claims against federal health care programs such as Medicare, Medicaid and TRICARE, the health care program for the military").

the home care industry.[123] To wit, a recent study found that "women, workers without legal immigration status, workers employed by low-road employers, and those who identified as 'Asian or other race' were all less likely . . . to know where to file a workplace complaint with a government agency."[124] As discussed in Part I, most home care workers fit this demographic profile.

Using the FCA to enforce minimum wage and hour standards is not a new idea. *Qui tam* claims have been used to enforce prevailing wage requirements in government construction contracts at both the federal (Davis-Bacon Act[125]

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[123] Other recent approaches to incentivizing third parties and lawyers to ferret out fraud in health care spending include several of the 2010 amendments passed as part of the Affordable Care Act, which make it easier for whistleblowers to sue on the government's behalf by limiting "Public Disclosures" and expanding the definition of "Original Source." Pub. L. No. 111-148, 124 Stat. 119, 901-902 (2010); *see* MICHAEL TABB, THE IMPACT OF 2010 HEALTH CARE LEGISLATION ON FALSE CLAIMS ACT LITIGATION (2011), http://www.greenellp.com/wp-content/uploads/2011/04/Michael-Tabb-PPACA-Amendments.pdf [http://perma.cc/D9S5-FQ46]. Others have previously recognized the potential for incentivizing lawyers and third parties to use the FCA as a tool for patient protection. *See, e.g.*, John M. Parisi, *A Weapon Against Nursing Home Fraud and Abuse*, TRIAL, Dec. 1999, at 48 (noting that while most attorneys engaged in negligent care or other tort-based litigation related to patient abuse are unfamiliar with the FCA, its use can "ensure that nursing home residents who receive federal benefits also get the care they need").

[124] Alexander & Prasad, *supra* note 66, at 1096.

> Approximately 23% of workers had accurate procedural legal knowledge; a corresponding 77% did not know where to file a workplace complaint with the government. Interestingly, even those workers who knew how to make a government complaint were unlikely to act on that knowledge, as 96% of workers who did make a claim on the job made it directly to their employers, rather than to a government agency or other third party. Moreover, the 23% result may actually be inflated, as a worker's knowledge of government complaint procedures was self-reported, with no way for researchers to test the accuracy of workers' responses.

Id. at 1095. Moreover, as this and other academic studies recognize, undocumented workers are less likely to make a complaint to the government for fear of detection and deportation. *Id.* at 1096; *see also* Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1101-03 (2011) (discussing unauthorized immigrants' mistrust of even friendly or status-neutral U.S. government institutions).

[125] The Davis-Bacon Act's prevailing wage provisions apply to the Related Acts, under which federal agencies assist construction projects through "grants, loans, loan guarantees, and insurance." *See* 29 C.F.R. § 5.2(c) (2016); 40 U.S.C. § 3141 (2012). Contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works *must* pay their laborers and mechanics employed under the contract no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area. 40 U.S.C. § 3142(a)-(b) (2012). The Davis-Bacon Act directs the Department of Labor to determine such locally prevailing wage rates. *Id.*; *see, e.g.*, U.S. *ex rel.* Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Const. Co., 183 F.3d 1088, 1089 (9th Cir. 1999) (describing *qui tam* action brought by union alleging that construction company failed to pay prevailing wages under Davis-Bacon Act).

and Service Contract Act[126]) and state (various state prevailing wage statutes) levels. When a construction contractor or subcontractor fails to pay its workers prevailing wages pursuant to the Davis-Bacon Act, a worker has the right to recover those prevailing wages, as well as file a *qui tam* lawsuit, for the false claims the contractor made when it certified, pursuant to the Act, that such prevailing wages were paid. If the court determines that such false claims have been made, significant civil penalties may be imposed on the contractor, from which a portion may be recovered by the *qui tam* whistleblower.

Applying the *qui tam* provision in the context of home care wage theft is less straightforward. Reimbursements to home care agencies are calculated on a projected, episodic basis, rather than on a retroactive reimbursement system. Therefore, unlike with other instances of Medicare fraud or even home care fraud such as that alleged in the Florence Bikundi case, it is hard to ascertain specific or certain damages to the government. In a case in which the government received its fair share of the bargained-for rate, but the direct care worker did not, would the government be seeking to "recover" a loss? And if not, how might the *qui tam* reward—the 30% incentive considered key to the FCA's success—be calculated?

2. Judicial Interpretation

Recent amendments to the FCA have given it even greater potential for application in the context of home care wage theft.[127] Prior to 2009, the FCA made liable a person who "knowingly presents, or causes to be presented, to an officer or employee of the United States . . . a false or fraudulent claim for

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[126] 41 U.S.C. § 351 (2012). The McNamara-O'Hara Service Contract Act *requires* contractors and subcontractors performing services on prime contracts in excess of $2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement. 41 U.S.C. § 351(a). The Department of Labor "issues wage determinations on a contract-by-contract basis in response to specific requests from contracting agencies," and "[t]hese determinations are incorporated into the contract." *The McNamara-O'Hara Service Contract Act*, U.S. DEP'T OF LAB., http://www.dol.gov/whd/govcontracts/sca.htm [http://perma.cc/K8U7-LHWN] (last updated Mar. 3, 2016) ("For contracts equal to or less than $2,500, contractors are required to pay the federal minimum wage as provided in Section 6(a)(1) of the Fair Labor Standards Act.").

[127] *See*, *e.g.*, Andrew E. Shipley, *Trends in False Claim Act Litigation*, ASPATORE, May 2013, at *1, 2013 WL 1736890 ("Over the past few years, legislative changes and court decisions affecting the False Claims Act have enlarged the pool of potential plaintiffs, expanded the legal theories available to them, and weakened potential defenses.").

payment or approval."[128] The Fraud Enforcement and Recovery Act of 2009, however, expanded liability and the reach of the FCA to subcontractors and indirect recipients of government funds.[129] Today, liability attaches when someone "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[130] "False claims" are those claims submitted pursuant to a contract or other agreement "by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation."[131] The simplest type of false claim is a request for payment for work or services that were not performed or delivered, as in the Florence Bikundi case.

3. Applicability in Cases of Wage Theft

While the Bikundi case is relatively straightforward, consider the case of Muriel Peters, a Maryland home care worker and victim of wage theft. Ms. Peters is a certified nursing assistant who worked for Early Health Care Giver, Inc. (EHCG), a home care agency.[132] She worked 119 hours every two-week pay period providing in-home care for an elderly Montgomery County woman.[133] By participating in a Medicaid-funded program, EHCG received $16 an hour for every hour of care it provided, out of which it would pay Ms. Peters $12 an hour and keep the remaining $4.[134] This was true for every hour Ms. Peters worked, even those hours above 40 each week,[135] for which (pending the DOL rules narrowing the companionship definition, discussed in Part I) she should have been receiving wages equal to time and a half.[136] *Qui tam* liability in this case hinged on whether EHCG's failure to pay Ms. Peters violated the FCA. If so, Ms. Peters, the woman she cares for, or a home care worker organization could use the *qui tam* provision to blow

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[128] 31 U.S.C. § 3729(a)(1) (2008).

[129] United States *ex rel.* Tran v. Comput. Scis. Corp., 53 F. Supp. 3d 104, 116-17 (D.C. Cir. 2014).

[130] 31 U.S.C. § 3729(a)(1)(B) (2012).

[131] *United States ex rel. Tran*, 53 F. Supp. 3d at 117.

[132] Peters v. Early Healthcare Giver, Inc., 97 A.3d 621, 623 (Md. 2014).

[133] *Id.*

[134] *Id.*

[135] *Id.* ("EHCG paid Peters $12 per hour for all of her work, including the hours she worked in excess of 40 hours per week.").

[136] Under Maryland's Wage and Hour Law, MD. CODE ANN. LAB. & EMPL. § 3-402 (2015), and its Wage Payment and Collections Law, MD. CODE ANN. LAB. & EMPL. § 3-502 (2012) and MD. CODE ANN. LAB. & EMPL. § 3-505 (2008), an employee like Ms. Peters is guaranteed a minimum wage and overtime pay, to be paid regularly while employed, and in full at the termination of employment. *Peters*, 97 A.3d at 624-25.

the whistle on EHCG's illegal underpayment—the wage theft—and recover a portion of the damages.

To determine whether or not such a *qui tam* claim might be successful in this case (and in cases of wage theft more generally), the case of *United States v. Science Applications International Corporation* (*SAIC*) provides guidance.[137] In that case, the United States alleged that a government contractor, SAIC, had submitted false statements certifying its compliance with conflict-of-interest provisions in its contract with the Nuclear Regulatory Commission.[138] SAIC's claims for payments under the contract, argued the government, were also false in light of the company's noncompliance.[139] No party disputed that SAIC, like EHCG, had performed the agreed-upon services and—according to the testimony of trial witnesses—performed them well.[140] Instead, the court held that the government was required to prove its case via a "certification theory," which requires a plaintiff to establish that a claim "rests on a false representation of compliance with an applicable federal statute, federal regulation, or contractual term. False certifications can be either express or implied."[141] Thus, at issue was whether SAIC had made any material, express, false certifications, and if not, whether SAIC was liable under the FCA for false certifications that were only "implied."

The contractor in *SAIC* argued that it could only be liable under the FCA for an implied false certification of compliance with a legal requirement if such compliance (with a statute, rule, or contract) was *expressly designated as a condition of payment*.[142] This was the standard the Second Circuit previously established in *Mikes v. Straus*.[143] Under the *Mikes* standard, the Centers for Medicare and Medicaid Services (CMS) would have to expressly designate compliance with the FLSA or other applicable wage and hour laws as a condition of reimbursement for a plaintiff to successfully argue that wage theft is a violation of the FCA. The district court in *SAIC*, however, in rejecting the contractor's arguments that its payment invoices contained no factually false

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[137] United States v. Sci. Applications Int'l Corp. (*SAIC I*), 626 F.3d 1257 (D.C. Cir. 2010).

[138] *Id.* at 1263.

[139] *Id.*

[140] United States v. Sci. Applications Int'l Corp. (*SAIC II*), 958 F. Supp. 2d 53, 77 (D.C. Cir. 2013) ("There is evidence in the record that SAIC provided 'extremely high' quality work to the NRC and that the NRC continued to use SAIC's work even after it discovered the alleged OCIs.").

[141] *SAIC I*, 626 F.3d at 1266 (citation omitted).

[142] *Id.* at 1271.

[143] Mikes v. Straus, 274 F.3d 687 (2d Cir. 2001).

statements about the services performed or false express certifications of compliance with any of the contract provisions, rejected the *Mikes* standard and instead allowed the government to proceed on a theory of "implied false certification."[144]

This lower threshold for liability would require a plaintiff to "prove by a preponderance of the evidence that compliance with the legal requirement in question is *material to the government's decision to pay*."[145] In other words, SAIC was liable because the government might not have paid SAIC had it known of its potential conflicts of interest (i.e., its implied certification with the conflict policy in its contract). This approach follows the Ninth and Tenth Circuits' approach to the conditions under which FCA liability attaches for implied false certifications.[146] The court concluded in *SAIC* that the government had presented unrebutted evidence that SAIC's violation of the no-conflict provisions constituted "information critical to the [government's] decision to pay."[147]

Applying the *SAIC* court's approach to wage theft, if there is a requirement in its contract with Medicare or Medicaid that a home care provider comply with laws (e.g., FLSA), a court will find that at each request for reimbursement, the employer is implicitly certifying to the government that it is indeed compliant.[148] Compliance with wage and hour laws would be "critical to the government's decision to pay" for at least four reasons: the government's obligation to protect the legal rights of the employees themselves, the loss of potential tax revenues owed to the government as a result of certain forms of wage theft, the potential for wage theft to diminish the quality of care received by other taxpayers, and the potential for such wage theft, in the

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[144] *SAIC II*, 958 F. Supp. 2d at 65 (explaining that under the implied certification theory, "a claim is false if 'the contractor withheld information about its noncompliance with material contractual requirements'").

[145] *SAIC I*, 626 F.3d at 1271 (emphasis added).

[146] *See* United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1169-70 (10th Cir. 2010); Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993, 997-98 (9th Cir. 2010).

[147] *See* United States v. Sci. Applications Int'l Corp., 555 F. Supp. 2d 40, 49-51 (D.D.C. 2008) (quoting United States v. TDC Mgmt. Corp., 288 F.3d 421, 426-27 (2002)).

[148] By requiring that the government prove that compliance was an express condition precedent in implied certification cases, the court in *Mikes* made clear that in the context of healthcare fraud, the FCA had the potential to become a "blunt instrument to enforce compliance with all medical regulations." *Mikes*, 274 F.3d at 699-700. Unlike the massive web of healthcare regulations ranging from Medicare and Medicaid reimbursement to treatment protocols to patient protections, the laws and regulations at issue in allegations of wage theft are very few and are central to the operation of the home care provider.

aggregate, to significantly destabilize a critically important and expanding industry.

Ideally, the Medicaid and Medicare programs would avoid the unsettled circuit approaches to implied certification by making compliance by home care contractors with federal wage and hour laws an express condition for reimbursement for home care services. Even under an implied certification framework, however, a home care agency that submits a request for Medicare reimbursement at the same time that it has failed to pay its workers legally mandated overtime could be held to be submitting "false or fraudulent" requests. This is true even if the amounts requested are neither directly linked to a certain hourly rate by the worker (i.e., the agency may not be literally "pocketing" a difference between what the government is paying and what it is paying the worker for services) nor expressly designated in the contract (i.e., compliance with wage and hour law) as a condition of payment.

Provided an express or implied certification theory is applied in a case of wage theft, such as the Muriel Peters scenario, a second issue is the calculation of damages. When a home care employer is reimbursed for care—even high quality care—that is provided to the consumer (unlike in the Bikundi case, where no care was actually provided), what is the loss to the federal government? Medicare or Medicaid has paid the exact same amount it would pay to an employer who does comply with minimum wage and hour standards. The hourly wages received by home care workers account for about half of the rates paid or received by employers.[149] At issue, then, is whether employers are unjustly enriched by failing to pay mandated minimum wages or overtime rates, as calculated by the difference between the wage paid to workers and the value of the services for which the agency has been reimbursed.

This was a question for the *SAIC* court, given that SAIC had, by all accounts, provided the type of high quality services for which the government had contracted. The only issue was that SAIC was not in compliance with conflict-of-interest provisions in the underlying contract, a contract violation for which damages were difficult to establish. The government argued that had it known about the conflicts of interest, it would have made no

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[149] The average rate paid by state Medicaid programs to agencies providing personal care services was $17.73 per hour in 2010. In comparison, the median wage received by home care workers (under both private and public pay arrangements) was $9.40 per hour. PARAPROFESSIONAL HEALTHCARE INST., COMPARING COST OF PERSONAL CARE SERVICES AND CAREGIVER PAY 1-2 (2012), http://www.phinational.org/sites/phinational.org/files/clearinghouse/pcs-rates-and-worker-wages.pdf [http://perma.cc/NQM4-FA69].

payments whatsoever for the consulting advice and technical assistance that it received. At trial, the jury was instructed to calculate as damages the amount that the government paid to SAIC over what it would have paid had it known about the conflicts of interest.[150] The jury was explicitly instructed *not* to calculate the value of the services provided.[151]

Damages in FCA cases, like most traditional contract remedies, are intended to put the government in the position it would have been in had it not been for the defendant's false claims.[152] In calculating the amount of damages in an FCA case, courts typically use one of two frameworks: "benefit-of-the-bargain"[153] or "out-of-pocket-cost."[154] In a case where the court applies the benefit-of-the-bargain standard, damages will equal the difference between the market value of the contracted-for goods or services and the market value of those goods or services as actually received.[155] There are cases, however, in which it is difficult to ascertain the market value of the goods or services, in which case the court will assess damages as the difference between the price the government paid (its "out of pocket costs") and the actual value to the government of what it received.[156]

Under both of these approaches, however, it is possible to conclude that the government is owed no damages when a company provides the contracted-for service, but for some other reason (e.g., noncompliance with a statute, rule, or contract provision) is liable under the FCA. This is often the case with

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> The damages that the United States is entitled to recover under the False Claims Act are the amount of money that the government paid out by reason of the false claims over and above what it would have paid out had SAIC not made the false claims. . . . Your calculations of damages should be limited to determining what the Nuclear Regulatory Commission paid to [SAIC] over and above what the NRC would have paid had it known of SAIC's organizational conflicts of interest. Your calculation of damages should not attempt to account for the value of services, if any, that SAIC conferred upon the Nuclear Regulatory Commission.

SAIC I, 626 F.3d at 1278.

[151] *Id.*

[152] *Id.*

[153] United States *ex rel.* Feldman v. Van Gorp, 697 F.3d 78, 87 (2d Cir. 2012).

[154] United States *ex rel.* Roby v. Boeing, 73 F. Supp. 2d 897, 906-07 (S.D. Ohio 1999)

[155] *See* United States v. Bornstein, 423 U.S. 303, 316 n.13 (1976); United States *ex rel.* Roby v. Boeing Co., 302 F.3d 637, 646-47 (6th Cir. 2002).

[156] *SAIC I*, 626 F.3d at 1279 ("[I]f the value that conforming goods or services would have had is impossible to determine, then the fact-finder bases damages on the amount the government actually paid minus the value of the goods or services the government received or used."); United States *ex rel.* Feldman v. Van Gorp, 697 F.3d 78, 88 (2d Cir. 2012).

FCA claims triggered by the Anti-Kickback Statute. Healthcare providers that accept kickbacks are ineligible to participate in Medicare and Medicaid and are subject to liability under the FCA. How should damages be calculated when the government has received the exact same quality of care for which it bargained, but the doctor made more money than he should have because of the kickback? One argument is that there are no damages, since the government received the benefit of its bargain. The moral hazard inherent in adopting this argument is clear. Just as a lack of wage theft enforcement incentivizes unscrupulous employers to gain a competitive advantage by breaking the law, in the absence of any real damages, doctors would be incentivized to violate the Anti-Kickback Statute. For this reason, in cases such as these, courts have found that all government outlays under the contract are recoverable as damages.[157]

Thus, even in those cases where the government may not have suffered an actual loss or "economic damages," courts have imposed "damages" to prevent a defendant from benefiting from its misconduct.[158] The court in *SAIC* was reluctant, however, to extend this equitable principle as far as the government would have liked, which would have been to impose the total amount it had paid to SAIC as damages. The Court of Appeals ruled that the government would be required to present some evidence "that the services it received were truly worthless," and the jury could determine, in light of the contractor's evidence, whether that was true.[159] This would appear to shift the focus of the FCA damages inquiry away from an earlier line of cases that attempted to remedy contractors' unjust enrichment and instead require provable financial injury.

In the context of home care, there are several stakeholders who might serve as relators. Clearly, the home care worker herself would be best positioned to report any underpayment of wages or misclassification of employment status. But, for reasons

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[157] For example, in *United States v. Rogan*, the Seventh Circuit held:

> Nor do we think it important that most of the patients for which claims were submitted received some medical care—perhaps all the care reflected in the claim forms. . . . [Defendant] Edgewater did not furnish any medical service to the United States. The government offers a subsidy (from the patients' perspective, a form of insurance), with conditions. *When the conditions are not satisfied, nothing is due* Thus the entire amount that Edgewater received . . . must be paid back.

517 F.3d 449, 453 (7th Cir. 2008) (emphasis added).

[158] *Id.*

[159] *SAIC I*, 626 F.3d at 1279-80.

discussed in Part III, she may be reluctant, unwilling, or unable to come forward. An alternative, for which the home health care industry may be uniquely positioned, would be to incentivize individual consumers of such services and members of their families to report wage theft experienced by their care provider.

Though sometimes characterized as adversarial, the interests of individual consumers or their family members are often aligned with those of the care provider.[160] Families and consumers want to ensure high-quality, consistently provided care. Combatting wage theft (and indeed, advocating for higher wages and benefits more generally) is therefore in the interest of consumers and families, at least as it relates to services paid for by Medicare and contracted through an agency.[161] The consumer and her family members are often well positioned to discover wage theft. A consumer's son may develop an individual relationship with the home care employee providing care to his mother. He, unlike those engaged in public workplace enforcement, may have significant opportunities to talk with the home care worker in private and outside the scrutiny of the agency-employer.

Incentivizing private persons (i.e., workers, consumers, and family members) to blow the whistle on wage theft through the use of *qui tam* litigation could help mitigate the limitations on public enforcement. Given the low wages endemic to the home care industry, however, any recovery that is based solely on a percentage of a worker's owed wages may not be a sufficient financial reward. Still, unlike in the securities or tax arena, whistleblowers of home health care fraud often have a significant nonmonetary incentive to report abuse: ensuring a high degree of quality care. Incentivizing or encouraging underpaid or misclassified workers to bring a *qui tam* action under the FCA (or, as Professor Pandya suggests, reporting such cases of wage theft

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[160] The Caring Across Generations campaign has brought together worker organizations, consumer advocates, and families, including

> AFSCME and the SEIU to 9 to 5, the Alliance of Retired Americans, the National Day Laborer Organizing Network and the YWCA. Labor Secretary Hilda Solis, the daughter of a domestic worker, addressed the 700-strong crowd: "America must be a nation where dignity and respect are afforded equally and rightfully to caregivers and to loved ones alike."

Laura Flanders, *A Campaign About Caring*, NATION, Apr. 30, 2012, at 21, 22. Ai-jen Poo, Caring Across Generations's director, was recently awarded a MacArthur Fellowship. Elizabeth O'Brien, *Macarthur 'Genius' Tackles the U.S. Elder-Care Problem*, MARKETWATCH (Feb. 12, 2015, 5:01 AM), http://www.marketwatch.com/story/macarthur-genius-tackles-the-us-elder-care-problem-2015-02-12 [http://perma.cc/F6BF-PZJ4].

[161] Instances of wage theft by self-paying (i.e., not publicly funded or subsidized) individual employers would not likely trigger FCA liability.

to the taxing authority as a tax informant)[162] could serve as a new approach to combatting the problem of wage theft.

If, however, *qui tam* litigation in the context of wage theft is foreclosed by federal courts' interpretations of implied certification requirements or by the calculation of damages, equitable arguments remain. That the receipt of federal dollars should impose additional responsibilities, including fiduciary duties, on home care providers is an argument rooted in principles of unjust enrichment and the collateral impacts of wage theft on both quality of care and local economies.

B. Fiduciary Duty Framework

A second theory of liability that makes wage theft in the home care industry akin to "public larceny" considers whether the entrustment of public monies, through the Medicare and Medicaid programs, makes home care employers fiduciaries of these funds. If so, wage theft—underpayment or misclassification—would constitute a breach of those fiduciary duties, giving rise to a claim (by the taxpayers or, derivatively, the employee) for civil damages. This section explores whether fiduciary theory might provide a basis for additional deterrence of wage theft in the home care industry and help stabilize systems of care for the elderly, disabled, and their families.

Using a fiduciary duty framework in the context of wage theft sheds greater light on the full spectrum of wage theft victims. Unlike the purely private sector, home health care is an industry fully supported by public monies provided by individual taxpayers who expect to benefit in various ways from the industry. Whether as consumers, family members who would otherwise themselves have to provide care to loved ones, or residents of communities that rely on employer tax contributions for adequate

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[162] Looking at this question through the lens of taxation, Professor Pandya articulates a basis for wage theft as a trigger for tax liability under federal law. *See generally* Sachin S. Pandya, *Tax Liability for Wage Theft*, 3 COLUM. J. TAX L. 113 (2012). Employers who fail to pay minimum wages or misclassify employees as independent contractors, Pandya argues, pay less than the fair market value for the services their employees provide. *Id.* at 120. That difference in value is therefore additional income unreported by the employer. *Id.* at 142. The IRS entices people to report tax fraud by offering between 15% and 30% of the back taxes and other funds ultimately recovered by the IRS. Karie Davis-Nozemack & Sarah Webber, *Paying the IRS Whistleblower: A Critical Analysis of Collected Proceeds*, 32 VA. TAX REV. 77, 85-86 (2012). Similar incentives are provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act, which offers whistleblowers between 10% and 30% of monies recovered as a result of tips about insider trading and other violations of securities law. Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, § 922, 124 Stat. 1842, 1957.

revenue, the beneficiaries of home care are numerous. When wage theft occurs in the home care industry, therefore, its victims extend beyond the individual care worker. A fiduciary duty framework would acknowledge this complex relationship between employer, consumer, care provider, and taxpayer.

While fiduciary relationships appear in many legal environments (e.g., trusts, wills, corporate governance), outside of the proscribed statutory frameworks (e.g., ERISA), fiduciary duty theory has not been applied in the employment context. Fiduciary duties may broadly be categorized as either duties of loyalty or duties of care.[163] A fiduciary relationship is predicated on public policy and service—a fiduciary provides services in exchange for trust.[164] While a fiduciary is arguably restrained by these duties, the demand for his or her services is arguably enhanced as a result of those commitments to care and loyalty.[165] While this system is designed to benefit all parties in the relationship, "[t]he private law does not apply fiduciary duties without first making an effort to determine whether the relationship at issue is truly a fiduciary one."[166]

Whereas traditional fraud is a type of deception, fraud within a fiduciary relationship (sometimes referred to as constructive fraud) is a type of betrayal. Since fiduciary fraud cannot exist unless there is first a fiduciary relationship, a determination of whether a fiduciary relationship exists in the home care relationship is necessary. If indeed there is such a relationship, the next determination is how best to calibrate the underlying fiduciary duties. In a fiduciary relationship, fraud is committed when the legal duties owed by the fiduciary (in this case, the home care employer) to the beneficiary (here, taxpayers) are violated by the fiduciary (arguably by violating FLSA and other legal workplace standards). There will be no fraud unless the employer uses the relationship and the taxpayers' reliance on the relationship to betray the taxpayer. It is, therefore, the fiduciary relationship that is at the heart of any fiduciary fraud case.

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[163] TAMAR FRANKEL, *Fiduciary Duties*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 127 (Peter Newman ed., 1998). As noted by Judge Easterbrook and Professor Fischel, "Fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings." Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993).

[164] FRANKEL, *supra* note 163, at 127.

[165] *Id.* at 128.

[166] Ethan J. Leib et al., *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 93 (2013).

To succeed on a claim of fiduciary fraud, a plaintiff must prove that the defendant did in fact have a fiduciary duty and that the defendant did in fact breach that duty by taking advantage of the position of trust in order to harm the plaintiff.[167] In the case of Medicare providers, such as home care agencies, their particular duties and obligations owed to various stakeholders are set forth in an agreement with the Secretary of Health and Human Services.[168] This contract stipulates that the agency will perform certain services in accordance with statutes and regulations and in return will be eligible to receive reimbursement from the Secretary for those services. Though not a fiduciary by statute, because CMS holds itself out to the public as a "trusted fiduciary," some have argued that such a relationship could reasonably be construed.[169] Arguably, if a home care agency receives funds that were allocated by CMS with the expectation that certain minimum wages would be paid, failure (especially a willful failure) to actually pay those minimum wages could constitute a breach of a derivative fiduciary duty, should one exist.

While not directly characterizing the relationship between home care employers, employees, and taxpayers as fiduciary in nature, Congress has taken steps to root out fraud in the health care industry by creating criminal and civil penalties for providers that overbill or otherwise defraud Medicare and Medicaid.[170]

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[167] 121 AM. JUR. TRIALS § 1 (2011).

[168] Brief of Quality Reimbursement Services, Inc., as Amicus Curiae in Support of Respondents at 2, Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817 (2013) (No. 11-1231) (agreement mandated by section 1866 of the Social Security Act, 42 U.S.C. § 1395cc).

[169] *Id.* (citing United States v. Mitchell, 463 U.S. 206, 224-25 (1983)). CMS "often refer[s] in various public issuances to its fiduciary responsibility to make appropriate payments from the trust fund." *Id.* at 11-12. "The mandate for implementing the Medicare program tasks CMS with fiduciary responsibilities that require us to develop an effective and efficient payment system . . . ." *Id.* at 12 (citing 71 Fed. Reg. 27798, 27884 (May 12, 2006)); 72 Fed. Reg. 47130, 47247, Aug. 22, 2007 (noting the secretary's "fiduciary responsibility to the Medicare trust fund to ensure that Medicare pays only for covered services"); 71 Fed. Reg. 47870, 47908, Aug. 18, 2006 (stating that CMS has "a fiduciary responsibility to administer the trust fund in order to provide quality care for our beneficiaries").

[170] 18 U.S.C. § 1035 (Supp. 1996) predates these more recent efforts and governs false statements related to health care matters. Under this provision, whoever

> knowingly and willfully . . . falsifies, conceals or covers up by any trick, scheme or device a material fact; or . . . makes any materially false, fictitious or fraudulent statements or representations, or uses any materially false writing or document [with knowledge of the falsity], . . . in connection with the delivery of or payment for health care benefits, items or services

is liable for a fine, imprisonment of not more than 5 years, or both. *Id.* It is arguable that the existence of this more specific section prohibits prosecution under the False Statements Act, 18 U.S.C. § 1001 (2012), for the same conduct.

Recognizing the impacts of health care fraud on the costs of care, Congress passed the Criminal Health Care Fraud Statute,[171] which makes it a crime to knowingly and willfully make any false statement or representation of material fact in any application for any benefit or payment under any health care benefit programs.[172] Moreover, the federal crime of Theft or Embezzlement in Connection with Health Care[173] makes anyone found to be "knowingly and willfully converting or intentionally misapplying the assets of a health care benefit program" liable for a fine or imprisonment of not more than 10 years (or both).[174] Reframing home care wage theft as a "misapplication" of federal health care program funds, even if not originally contemplated under the statute, could support an argument that such a misapplication has given rise to a breach of fiduciary duty.

Perhaps a more cogent fiduciary argument would characterize Medicare and Medicaid funding as a trust fund, with the government and taxpayers as settlors, home care employers as trustees, and employees and consumers as third-party beneficiaries.[175] Taxpayers fund the trust with the understanding that the government will allocate the funds as needed for the purpose of providing healthcare to the elderly, disabled, and infirm.[176] Home care employers would then have fiduciary

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[171] 18 U.S.C. § 1347 (2012).

[172] As used in the statute, any "health care benefit program" includes "any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract." 18 U.S.C. § 24 (2012).

[173] 18 U.S.C. § 669 (1994).

[174] *Id.* In addition to possible criminal liability, providers are also exposed to substantial civil liability for health care fraud under the Civil False Claims Act, 31 U.S.C. §§ 3729-3733 (2012), and the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7 (2012). Moreover, 42 U.S.C. § 1320a-7a (2012), the Civil Monetary Penalties Law, establishes an administrative action that may be pursued in lieu of a criminal or civil action. The law provides that any person presenting or causing the presentation of a claim for Medicaid or Medicare benefits for medical items or services that the provider knows or should know is false is subject to a penalty of $10,000 per item or service. *Id.* In addition, the provider is "subject to an assessment of not more than 3 times the amount claimed for each item." *Id.* The provider is also subject to being excluded from the Medicaid and Medicare programs. *Id.*

[175] *See* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 435, 438-45 (1998) (outlining the relationships at the heart of trust law and discussing in particular whether trust law may, in certain contexts, help to "facilitat[e] an important set of socially beneficial transactions that would be difficult or impossible without trust law").

[176] *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 625-31 (1995). Professor Langbein notes that while the Restatement (Second) of Trusts characterizes the trust as "a fiduciary relationship with respect to property," trusts are, in fact, contracts in which the parties negotiate the terms and distribution of assets. *Id.* at 627 (quoting RESTATEMENT (SECOND) OF TRUSTS § 2 (AM. LAW INST. 1959)).

obligations to ensure that the monies received from the settlors are distributed to the employee beneficiaries in accordance with law. Any failure (again, especially a knowing and willful failure) to ensure that the monies are legally distributed to home care workers would constitute a breach of fiduciary duty by the home care employer.

This type of framework is consistent with the goals of a fiduciary society, which emphasizes "cooperation and identity of interest pursuant to acceptable but imposed standards."[177] Cooperation among home care employers, employees, and the government is critical to ensuring a high quality of care for consumers. A society based on fiduciary relationships "permits the government to moderate between altruistic goals and individualistic, selfish desires, as well as between the social goal of increasing the common welfare and the individual desire to appropriate more than a 'fair share.'"[178] In the context of enforcing minimum standards in an industry quite necessary for "the common welfare," this proposed fiduciary framework could help ensure the highest quality of care for consumers by compelling increased compliance with federal standards for home care workers already doing their "fair share" for unfair wages.

C. Medicare/Medicaid Exclusion

The threat of potential exclusion from participation in Medicaid and Medicare may be one of the most effective ways to deter wage and hour violations in the home care industry. In other industries, local and state governments have begun to enact legislation that explicitly excludes contractors that engage in wage theft from receiving governmental contracts. Houston's wage theft ordinance, enacted in 2013, which restricts the city from doing business with known wage theft offenders, established a public database to track offenders.[179] Other cities and counties across the country have begun to respond in similar ways, as local budgets bear the brunt of wage theft's collateral financial impacts.[180] Cook County, Illinois, recently became the largest

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[177] Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 802 (1983).

[178] *Id.*

[179] CITY OF HOUS., TEX., WAGE THEFT ORDINANCE NO. 2013 (2013).

[180] For a detailed examination of wage theft ordinances and campaigns across the country, see NAT'L EMP'T LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT (2011), www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf [http://perma.cc/3RH8-A9VP]. These include, for example, providing for treble damages for minimum wage violations (Arizona, Idaho, Massachusetts, New Mexico, and Ohio), lengthening the amount of time that plaintiffs

county to pass such an ordinance, which not only precludes government contracts for companies that engage in wage theft but also excludes them from obtaining business licenses or property tax incentives.[181]

On the federal level, the Congressional Progressive Caucus (CPC) has attempted, with moderate success, to amend the House appropriations acts in order to disqualify from receiving federal contracts any corporation that violated the FLSA in the last five years.[182] As the CPC stated, "No working American should ever worry that her employer might steal a part of her paycheck, especially if she works for a contractor paid by the federal government."[183] While a home care worker's employer may not be a "federal contractor," her paycheck is no less the product of public monies, and the wage theft is no less a breach of the public's trust.[184] Participation in the Medicare program on the part of providers is voluntary.[185] Like federal contractors, Medicare providers voluntarily agree to perform services in the manner required by their agreements with the government in exchange for payment.[186]

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have to bring wage violations claims (California, Florida, New York, Oregon, Washington, Ohio, Arizona, and New Mexico), revoking business licenses for employers who engage in wage theft, and enacting stronger criminal penalties. *Id.* at 20, 23, 31, 34.

[181] Alejandra Cancino, *Cook County OKs Ordinance to Combat Wage Theft*, CHI. TRIBUNE (Feb. 10, 2015, 4:38 PM), http://www.chicagotribune.com/business/breaking/ct-cook-county-wage-theft-0211-biz-20150210-story.html [http://perma.cc/2AJJ-STCF].

[182] Currently, the House has passed the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, the Department of Defense Appropriations Act, the Energy and Water Development and Related Agencies Appropriations Act, and the Financial Services and General Government Appropriations Act with these wage theft amendments attached. Brady Meixell, *Congress Takes Steps to Stop Wage Theft by Federal Contractor*, ECON. POL'Y INST. (July 28, 2014, 3:28 PM), http://www.epi.org/blog/congress-takes-steps-stop-wage-theft-federal/ [http://perma.cc/JRR3-JU92].

[183] *See* Press Release, Congressional Progressive Caucus, House of Representatives Moves to Protect Workers (June 10, 2014), http://cpc.grijalva.house.gov/press-releases/house-of-representatives-moves-to-protect-workers1/ [http://perma.cc/7ATE-79WL].

[184] A federal contractor is defined, generally speaking, as

> any business or organization that (1) holds a single Federal contract, subcontract, or Federally assisted construction contract in excess of $10,000.00; (2) has Federal contract or subcontracts that combined total in excess of $10,000.00 in any 12-month period; or (3) holds Government bills of lading, serves as a depository of Federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount will be subject to requirements under one or more of the laws enforced by OFCCP.

Jurisdiction, U.S. DEP'T OF LAB., http://www.dol.gov/ofccp/regs/compliance/faqs/juristn.htm [http://perma.cc/6TJD-UAWK] (last visited Mar. 4, 2016).

[185] Queen City Home Health Care Co. v. Sullivan, 978 F.2d 236, 247 (6th Cir. 1992).

[186] *See, e.g.*, *In re* Univ. Med. Ctr., 973 F.2d 1065, 1076-77 (3d Cir. 1992) (holding that Medicare provider agreements are executory contracts, which like other government contracts are subject to assumption or rejection by a debtor under the

Perhaps the most actionable and enforceable solution to the issue of wage theft by home health care agencies would be to statutorily exclude such employers from participation in Medicaid and Medicare. Similar to the use of debarment proceedings to enforce compliance in the federal contracting arena, the Department of Health and Human Services Office of Inspector General has broad powers of exclusion.[187] Given how dependent most home care agencies are on reimbursement from these programs, the mere threat of exclusion may prove a powerful weapon in the hands of home care workers and their advocates.

According to 42 U.S.C. § 1320a-8(a)(3), a person (or agency) who knowingly engages in financial fraud as a payee under Medicare or Medicaid is subject to a civil monetary penalty of up to $5,000, as well as assessments of not more than twice the amount of the payments so fraudulently received, and *possible* exclusion from participation in Medicare, Medicaid, and other federal health care programs.[188] Mandatory grounds for exclusion include a conviction for program-related crimes, or in other words,

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Bankruptcy Code); Richey Manor, Inc. v. Schweiker, 684 F.2d 130, 137 (D.C. Cir. 1982) (noting that the provider agreement is a contract between the provider and the Secretary of Health and Human Services); Delta Health Grp., Inc. v. United States Dep't of Health and Human Servs., 459 F. Supp. 2d 1207, 1209 (N.D. Fla. 2006) ("The provider agreement, at bottom, acts as a contract with the federal government in which the provider agrees to furnish quality nursing services to Medicare beneficiaries in compliance with all the applicable federal and state regulations.").

[187] The Office of Inspector General was established in the U.S. Department of Health and Human Services to identify and eliminate fraud, waste, and abuse in the Department's programs and to promote efficiency and economy in departmental operations. The Office carries out this mission through a nationwide program of audits, inspections, and investigations. U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF THE INSPECTOR GEN., SPECIAL ADVISORY BULLETIN ON THE EFFECT OF EXCLUSION FROM PARTICIPATION IN FEDERAL HEALTH CARE PROGRAMS 1 (2013), http://oig.hhs.gov/exclusions/files/sab-05092013.pdf [http://perma.cc/8YAC-LXRA]. "The enactment of the Health Insurance Portability and Accountability Act (HIPAA), Public Law 104-1911, in 1996," as well as the "Medicare Prescription Drug Improvement and Modernization Act of 2003 and the Patient Protection and Affordable Care Act of 2010, expanded OIG's exclusion waiver authority." *Id.* at 4-5.

[188] The precise language is as follows:

> (3) Any person (including an organization, agency, or other entity) who, having received, while acting in the capacity of a representative payee pursuant to section 405(j), 1007, or 1383(a)(2) of this title, a payment under subchapter II, VIII, or XVI of this chapter for the use and benefit of another individual, converts such payment, or any part thereof, to a use that such person knows or should know is other than for the use and benefit of such other individual shall be subject to, in addition to any other penalties that may be prescribed by law, a civil money penalty of not more than $5,000 for each such conversion. Such person shall also be subject to an assessment, in lieu of damages sustained by the United States resulting from the conversion, of not more than twice the amount of any payments so converted.

42 U.S.C. § 1320a-8(a)(3) (2012).

crimes related to the delivery of an item or service.[189] In the case of wage theft, an employer may argue that any payment to an employee for services is *ancillary* to the actual provision of such services (i.e., it is not a program-related crime). On the other hand, 42 U.S.C. § 1320a-7(b)(7) makes *permissive* the exclusion of an individual that the Secretary of Health and Human Services determines, in an administrative proceeding, has committed an act proscribed by certain statutes, such as the Anti-Kickback Statute.[190]

Section 1320a-7 would compel the mandatory exclusion of a home care provider from any federal health care program[191] upon conviction of health care fraud "consisting of a *felony* related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct."[192] The Secretary *may* exclude providers for the same conduct that results in a misdemeanor conviction. Whether home care workers, consumers, or their advocates may leverage this statutory exclusion to enforce wage theft remains to be seen. Arguably, the receipt by employers of federal funds for the express purpose of providing home-based medical care, when those funds are not disbursed in accordance with law, is a form of theft. If, however, wage theft is not recognized as theft in connection with "health care fraud," and given the existing limitations on FLSA enforcement, it may be necessary to amend the statute to clarify that a conviction or administrative finding of wage theft constitutes permissive grounds for exclusion.

The effects of exclusion are severe and longstanding.[193] If, following exclusion, a home care provider were to continue to participate in a federal health care program, as Ms. Bikundi did, that person or organization may also be civilly liable under the

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189 42 U.S.C. § 1320a-7a(a)(1); *see* Anderson v. Thompson, 311 F. Supp. 2d 1121, 1125 (D. Kan. 2004).

190 *Anderson*, 311 F. Supp. 2d at 1121 (holding that 15 years was an acceptable and mandatory duration of exclusion for a hospital executive convicted of violating the Anti-Kickback Statute).

191 A "Federal health care program" is defined as "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government . . . [or a] State health care program." 42 U.S.C. § 1320a-7b(f). "Among the most significant Federal health care programs are Medicare, Medicaid, TRICARE, and the veterans' programs." U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 187, at 6-9.

192 42 U.S.C. § 1320a-7a(3).

193 An excluded person who submits a claim for payment to a federal health care program or causes such a claim to be submitted may be subject to civil monetary penalties of $10,000 for each claimed item or service furnished during the period that the person was excluded. *See* Social Security Act, 42 U.S.C. § 1128(a)(1)(D) (2012); U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 187, at 6-9.

FCA for knowingly presenting or causing to be presented a false or fraudulent claim for payment.[194] The severe consequences of exclusion contrast starkly with the relatively minor punishments for wage theft generally, which is why such a strategy may prove more effective than traditional statutory enforcement. Putting employers on notice that wage theft violations could permanently disrupt their business operations would create a more level playing field among these agencies and would deter employers from engaging in a "race to the bottom" to comply with minimum wage and overtime laws.

CONCLUSION

The number of home care jobs in the United States is projected to grow five times faster than jobs in all other industries. According to the Bureau of Labor Statistics, the United States will need one million new home care workers by 2022.[195] As the industry expands and constitutes a larger share of the nation's overall workforce, enforcing workplace standards will have tremendous implications. Home care workers, who care for the vulnerable, are themselves some of the most vulnerable in the contemporary American workforce. Often isolated geographically, socially, and politically, they work inside private homes and outside of public view or governmental inspection. Wage theft in this federally subsidized industry should be regarded as public larceny, a crime that produces multiple and varied victims, including workers, care recipients, taxpayers, and family members. When wage theft goes unchecked, ethical employers who comply with legal standards are forced to compete with unscrupulous competitors whose law breaking affords them an economic advantage. Poor workplace standards create high rates of employee turnover and low morale, which threatens the quality of care for aging and disabled populations.

Fake palm trees purchased with false invoices for phony services, at a cost to federal taxpayers of millions of dollars, clearly warrants the resources of federal investigation and prosecution. Punishing the perpetrators of fraud, deterring future schemes, and recovering stolen public monies are all necessary for the long-term viability of the home care industry. But the employer who illegally underpays its *genuine* employees with

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[194] *See* 31 U.S.C. §§ 3729-3733 (2012).

[195] *Employment Projections*, U.S. DEP'T OF LAB., http://data.bls.gov/projections/occupationProj [http://perma.cc/R6L2-BPE7] (last visited Mar. 4, 2016).

public monies when the employees provide *real* services is no less of a criminal, and no less of a threat to the industry, than one who fabricates care completely.

Given the persistent limitations on federal and state law in this context, reducing wage theft in the home care industry requires both traditional and nontraditional (as well as individual and collective, "bottom-up" and "top-down") mechanisms. Creative approaches to curbing violations, such as those proposed in this article—*qui tam* litigation, employer fiduciary duties, and Medicaid/Medicare exclusion—could benefit an ever-growing slice of the nation's most vulnerable workers and consumers of care.