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Article

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Peggie R. Smith†

Home-based care workers have experienced a labor metamorphism of sorts over the last decade. The workers, most of whom are women,[1] care for children and the elderly from within the private sphere of the home in exchange for compensation.[2] Once invisible and ignored, they have become darlings of the labor movement. While they have not halted the persistent decline in union density, they have helped to reinvigorate organized labor. The transformation first attracted national attention in 1999 when the Service Employees International Union (SEIU) won the right to represent 74,000 home care workers in Los Angeles, California.[3] The victory marked the largest increase since 1941 in new union membership resulting from a single union election.[4] Six years later, SEIU charted new territory once again when more than 49,000 family child care providers in Illinois voted overwhelmingly to join the union.[5] The

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1. Ninety percent of all nursing home aides and home care aides are women. Rhonda J.V. Montgomery et al., *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know*, 45 GERONTOLOGIST 593, 595 (2005).

2. *See infra* notes 14–16 and accompanying text (defining family child care and home care).

3. Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUD. J. 1, 2 (2002).

4. *Id.*; Stu Schneider, *Victories for Home Health Care Workers*, DOLLARS & SENSE, Sept.–Oct. 2003, at 25, 26.

5. Peggie R. Smith, *Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers*, 55 KAN. L. REV. 321, 321 (2007).

vote netted labor its second largest membership election since 1941.[6]

In accomplishing these victories, the labor movement dispelled the myth that, because home-based care workers toil in the private setting of the home and are isolated from each other, they are unorganizable. Labor also perfected a new model of organizing, one capable of representing the workers even as the law views many of them as independent contractors who lack rights under the National Labor Relations Act (NLRA).[7]

This Article examines the labor movement's campaign to unionize home-based care workers, who are often deemed independent contractors, in both the child care and home care sectors. It focuses specifically on those workers who provide publicly subsidized care. In the wake of strong union advocacy, states have utilized various measures including legislation, gubernatorial executive orders, ballot initiatives, and intergovernmental cooperation agreements to extend labor law rights to this group of workers. Although the measures differ in terms of the actual bundle of rights granted, most share a common structural feature: they designate a state agency to function as an employer of record for the workers and to recognize a union representative on their behalf. To date, at least thirteen states have adopted such measures.[8]

The success of these recent state developments, which promise to improve the situation of home-based care workers, hinges significantly on transformations in the delivery of publicly subsidized child care and home care. Increasingly, states rely on individual care workers, rather than agencies that employ care workers, to deliver publicly funded care. For example, consumer-directed home care programs, which allow clients rather than home care agencies to hire and supervise workers, are growing in popularity.[9] Similarly, the use of family child care, whereby a provider cares for children in her own residence, is expanding relative to center-based child care.[10]

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6. *Id.*

7. *See* 29 U.S.C. § 152(3) (2000) ("[The] term 'employee' . . . shall not include . . . any individual having the status of an independent contractor.").

8. *See infra* notes 65–66 and accompanying text (listing states and their respective governmental measures).

9. A.E. Benjamin, *Consumer-Directed Services at Home: A New Model for Persons with Disabilities*, HEALTH AFF., Nov.–Dec. 2001, at 80, 81.

10. ELLEN GALINSKY ET AL., THE STUDY OF CHILDREN IN FAMILY CHILD CARE AND RELATIVE CARE: HIGHLIGHTS OF FINDINGS 1 (1994) ("Care in the

In both the family child care and home care settings, the state pays workers to provide care,[11] yet the compensation rates are too low to ensure a decent wage.[12] In addition, most states insist that home-based care workers are not government employees, but rather independent contractors to whom states owe no obligation under applicable labor and employment laws.[13] This dynamic has set the stage for union efforts to gain collective bargaining rights on behalf of publicly subsidized home-based care workers in order to provide such workers with a voice in negotiating with government agencies over the terms of their labor arrangements.

I. BACKGROUND: THE SHARED CHARACTERISTICS OF HOME-BASED CARE WORK

This Article uses the phrase "home-based care work" to refer to two types of paid caregiving that occur within the home: home care and family child care. Home care refers to in-home services provided to elderly and/or disabled individuals who require assistance with personal care tasks such as grooming, dressing, and bathing, and household activities such as shopping, cleaning, and meal preparation.[14] Most home care consumers are elderly individuals with long-term-care needs.[15]

home of a provider is the most prevalent form of child care for young children with employed mothers in the United States today.").

11. JOSHUA M. WIENER, CONG. RESEARCH SERV., STATE COST CONTAINMENT INITIATIVES FOR LONG-TERM CARE SERVICES FOR OLDER PEOPLE 13 (2000), *available at* http://www.urban.org/UploadedPDF/1000056.pdf.

12. Paula England et al., *Wages of Virtue: The Relative Pay of Care Work*, 49 SOC. PROBS. 455, 455 (2002) (explaining that those engaged in care work receive lower wages than expected based on their qualifications and the skill required for the job); Press Release, Bureau of Labor Statistics, Occupational Employment and Wages, 2006 (May 17, 2007), *available at* http://www.bls.gov/news.release/pdf/ocwage.pdf (listing lower wages for home-based care workers than for coatroom attendants).

13. *See* Peggie R. Smith, *Home Sweet Home? Workplace Casualties of Consumer-Directed Home Care for the Elderly*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 537, 556 (2007) (discussing the desire of states to craft consumer-directed home care programs so as to avoid liability to workers under labor and employment laws); Smith, *supra* note 5, at 353–56 (discussing how Rhode Island avoided workplace obligations to family child care providers through litigation).

14. U.S. GEN. ACCOUNTING OFFICE, GAO/PEMD-96-5, LONG-TERM CARE: SOME STATES APPLY CRIMINAL BACKGROUND CHECKS TO HOME CARE WORKERS 2 (1996), *available at* http://www.gao.gov/archive/1996/pe96005.pdf; Delp & Quan, *supra* note 3, at 3.

15. U.S. GEN. ACCOUNTING OFFICE, *supra* note 14, at 4 (noting that the typical home care recipient is "a woman with functional limitations who is

Family child care refers to child care services that a worker provides for compensation in her own residence to two or more unrelated children.[16]

Although the exact number of workers in home care and family child care is unclear,[17] researchers agree that the work is expanding. Indeed, the demand for home care is so strong that the job ranks among the top three industry sectors where experts project employment to grow the fastest over the coming years.[18] Employment in family child care is also on an upward trajectory; in many areas of the country, it is the fastest-growing segment of the child care industry.[19]

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very elderly, has a low income, and lives alone"); Benjamin, *supra* note 9, at 80 (reporting that a majority of long-term care recipients are elderly individuals who are cared for primarily in their homes).

16. KATIE HAMM & AVIS JONES-DEWEEVER, INST. FOR WOMEN'S POLICY RESEARCH, FAMILY CHILD CARE: RECENT TRENDS AND NEW DIRECTIONS 1 (2004), *available at* http://www.kwdi.re.kr/data/wotrend2/family_child_care_trends.pdf (describing family child care "as a paid provider who cares for two or more unrelated children in her home, although the provider may care for her own children at the same time").

17. *See* ALICE BURTON ET AL., CTR. FOR THE CHILD CARE WORKFORCE, ESTIMATING THE SIZE AND COMPONENTS OF THE U.S. CHILD CARE WORKFORCE AND CAREGIVING POPULATION 17 (2002), *available at* http://www.ccw.org/pubs/workforceestimatereport.pdf (estimating that there were 650,000 family child care providers caring for children aged five and under, excluding care provided by relatives for pay); *see also* AMY R. GILLMAN, SURDNA FOUND., STRENGTHENING FAMILY CHILD CARE IN LOW-INCOME COMMUNITIES 3 (2001), *available at* http://www.surdna.org/usr_doc/childcare.pdf ("Family child care is the fastest-growing segment of the child care industry and represents the most frequently used 'out of home' care in the country."); Daniel E. Hecker, *Occupational Employment Projections to 2014*, MONTHLY LAB. REV., Nov. 2005, at 70, 75 tbl.2 (reporting that 624,000 home-health aides were employed in 2004, and that 701,000 personal and home care aides were employed in 2004). *But see* NAT'L RESEARCH COUNCIL, WHO CARES FOR AMERICA'S CHILDREN? CHILD CARE POLICY FOR THE 1990S 151 (Cheryl D. Hayes et al. eds., 1990) (suggesting that these figures do not capture the full extent of the workforces given that "many family day care providers operate in the underground economy" and therefore "precise estimates of their numbers and the number of children they serve are illusive").

18. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Tomorrow's Jobs*, *in* OCCUPATIONAL OUTLOOK HANDBOOK 1, 6 fig.7 (2008–09), *available at* http://www.bls.gov/oco/reprints/ocor001.pdf (projecting personal and home care aides as the second fastest growing occupation between 2006 and 2016, and projecting home health aides as the third fastest growing occupation between 2006 and 2016); *see also* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Health Care*, *in* CAREER GUIDE TO INDUSTRIES 231, 234 (2006–07), *available at* http://www.bls.gov/oco/cg/pdf/cgs035.pdf (projecting a 66.4% growth rate for home health aides and a 60.5% growth rate for personal and home care aides between 2004 and 2014).

19. *See* GILLMAN, *supra* note 17, at 3 ("Family child care is the fastest-

The entry of women into the paid work force, and the changing structure of family life, has fueled the growth in both job sectors.[20] With respect to child care, the labor force participation rate for women with children under six years of age has risen from 18.6% in 1960[21] to 62.6% in 2005.[22] Because of this dramatic climb, many parents substitute paid child care for maternal care; for small children, families prefer family child care to other child care options such as center-based care.[23] The link between family child care's growth and the increase in women's labor force participation also reflects the effects of welfare reform legislation enacted in 1996.[24] The legislation conditioned receipt of benefits on employment, pushing mothers into the workforce, and thus bolstered the demand for child care, especially family child care.[25]

In the context of home care, the rise in women's labor force participation has combined with the graying of America to fuel the growth in the home care industry. As a result of aging baby boomers, seventy-two million Americans will be sixty-five or older by 2030,[26] double the number of Americans who were sixty-five or older in 2000.[27] In most households with elderly fami-

growing segment of the child care industry and represents the most frequently used out of home-care in the country.").

20. Smith, *supra* note 5, at 325.

21. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, at 417 tbl.659 (1999), *available at* http://www.census.gov/prod/99pubs/99statab/sec13.pdf (providing the percentage of married women in the workforce with children under six).

22. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT POPULATION SURVEY, 2005 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT 13–15 tbl.5 (2005), *available at* http://www.bls.gov/cps/wlf-table5-2006.pdf; *see also* JODY HEYMANN, THE WIDENING GAP 214 fig.A.2 (2000) (graphing the labor force participation rate of women with children between 1940 and 1999).

23. GALINSKY ET AL., *supra* note 10, at 1.

24. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. § 1305 (2000)); *see also* Bruce Fuller et al., *Welfare Reform and Child Care Options for Low-Income Families*, FUTURE OF CHILD., Feb. 2002, at 97, 102 (noting that—by conservative estimates—welfare reform prompted the movement of at least one million children into child care settings between 1996 and 1998).

25. *See* GILLMAN, *supra* note 17, at i ("With the advent of welfare reform, family child care has been touted by policymakers and others as a cost-effective way to . . . expand the child care supply in low-income communities.").

26. WAN HE ET AL., U.S. CENSUS BUREAU, 65+ IN THE UNITED STATES: 2005, at 1 (2005), *available at* http://www.census.gov/prod/2006pubs/p23-209.pdf.

27. *Id.*

ly members who need long-term care, women serve as informal care providers.[28] This provider pool is shrinking, however, as more and more women find it impossible to adequately care for aging relatives while also both working outside of the home and caring for children.[29] To address this caregiving gap, households are turning to home care workers.

Despite the rapid growth of the industries and the increased demand for home-based care workers, a shortage of qualified workers characterizes home care and family child care; moreover, high job turnover rates within the industry greatly exacerbate this problem. In the home care field, studies indicate that as many as half of all workers quit their jobs every year.[30] High turnover rates create general disruptions for clients and compromise the quality of care clients receive, as fewer workers often translate into clients receiving fewer hours of needed care.[31] Inadequate care caused by high turnover can ultimately result in serious consequences,[32] such as client hospitalization and even a client's relocation to an institutional setting such as a nursing home.

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28. EMILY K. ABEL, WHO CARES FOR THE ELDERLY? 4 (1991) (commenting that women represent seventy-two percent of all caregivers for the elderly); *see also* BELDEN RUSSONELLO ET AL., AM. ASS'N FOR RETIRED PEOPLE, IN THE MIDDLE: A REPORT ON MULTICULTURAL BOOMERS COPING WITH FAMILY AND AGING ISSUES 55 (2001), *available at* http://assets.aarp.org/rgcenter/il/in_the_middle.pdf (noting that women are much more likely to "talk to doctors, arrange for aides, and help with personal care").

29. *See* NORA SUPER, NAT'L HEALTH POLICY FORUM, WHO WILL BE THERE TO CARE? THE GROWING GAP BETWEEN CAREGIVER SUPPLY AND DEMAND 11 (2002), *available at* http://www.nhpf.org/pdfs_bp/BP_Caregivers_1-02.pdf ("Women, who traditionally cared for their parents, are now more likely to be in the workforce, and are having children later in life. These individuals are popularly called the 'sandwich generation,' because they are squeezed between parents and children.").

30. CANDACE HOWES, WAGES, BENEFITS AND FLEXIBILITY MATTER: BUILDING A HIGH QUALITY HOME CARE WORKFORCE 1 (2006), *available at* http://www.directcareclearinghouse.org/download/HowesSummaryFinal.pdf.

31. *Id.*; *see also* IRMA C. BERMEA, TEX. DEP'T OF HUMAN SERVS., EVALUATION OF PERSONAL ATTENDANT TRAINING PROGRAMS 9 (2001), *available at* http://www.dhs.state.tx.us/publications/SB95reportMarch2001.pdf (commenting on the shortage of home care workers in Texas and stating that "[f]or some disabled individuals, it means a lack of access to the home health care services they need to live healthy and productive lives").

32. *See* ROBYN I. STONE & JOSHUA M. WIENER, WHO WILL CARE FOR US? ADDRESSING THE LONG-TERM CARE WORKFORCE CRISIS 14–15 (2001), *available at* http://www.rwjf.org/files/publications/other/CareForUs.pdf; Robyn Stone, *The Direct Care Worker: The Third Rail of Home Care Policy*, 25 ANN. REV. PUB. HEALTH 521, 525 (2004).

In the context of family child care, between twenty-three and fifty-nine percent of family child care providers leave their jobs each year.[33] Such instability can undermine children's sense of security and hinder their social development.[34] Turnover can also adversely impact the workplace opportunities of parents who must miss work in order stay home with a child when a care provider quits.[35]

The demographic profile of home-based care workers combined with their economic status and poor working conditions help explain the difficulty in maintaining a stable workforce. Women account for the overwhelming majority—at least ninety percent—of home care workers[36] and family child care providers.[37] As with paid care work generally, race and ethnicity heavily mediate these occupations, resulting in overrepresentation of women of color, especially African Americans and Latinas.[38] Many of the workers are also immigrants, especially in the home care context.[39]

33. Christine M. Todd & Deanna M. Deery-Schmitt, *Factors Affecting Turnover Among Family Child Care Providers: A Longitudinal Study*, 11 EARLY CHILDHOOD RES. Q. 351, 352 (1996).

34. *See id*. at 351–52 (explaining that stable care arrangements produce higher levels of social development and academic achievement).

35. *See* HEYMANN, *supra* note 22, at 2 (noting that many parents cannot leave work to care for a sick child).

36. *See* Montgomery et al., *supra* note 1 (reporting that ninety percent of all home care workers are women).

37. MARY C. TUOMINEN, WE ARE NOT BABYSITTERS: FAMILY CHILD CARE PROVIDERS REDEFINE WORK AND CARE 5 (2003) (reporting that over ninety-eight percent of all family child care providers are women).

38. *See* STEVEN L. DAWSON ET AL., PARAPROFESSIONAL HEALTHCARE INST., DIRECT-CARE HEALTH WORKERS: THE UNNECESSARY CRISIS IN LONG-TERM CARE 12 (2001), *available at* http://www.directcareclearinghouse.org/download/Aspen.pdf (reporting that thirty percent of healthcare paraprofessionals are women of color); TUOMINEN, *supra* note 37, at 6 ("While women of color represent 13 percent of paid workers in the United States . . . women of color make up one-third of all paid child care workers . . . ." (citations omitted)); Paula England & Nancy Folbre, *Care, Inequality, and Policy*, *in* CHILD CARE AND INEQUALITY: RETHINKING CAREWORK FOR CHILDREN AND YOUTH 133, 133 (Francesca M. Cancian et al. eds., 2002) ("[W]omen of color are overrepresented in many of the most poorly paid caring jobs."); Montgomery et al., *supra* note 1 ("Almost half of the direct care workers . . . are non-White or Hispanic.").

39. *See* Montgomery et al., *supra* note 1, at 595; *see also* Lynn May Rivas, *Invisible Labors: Caring for the Independent Person*, *in* GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 70, 73 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002) (noting that a significant proportion of personal attendants are immigrants).

As a group, home-based care workers are disproportionately poor and low-income women whose earnings place them near the bottom of the economic ladder. In 2006, they earned less per hour than workers employed as locker room and coatroom attendants, gaming-booth cashiers, meter readers, and bicycle repairers.[40] In addition, most home-based care workers do not receive job-related benefits such as health insurance, medical leave, or retirement plans.[41]

These disadvantageous working conditions hinge, in part, on the work's close association with women's unpaid work in the home, and the traditional views regarding such work. Home-based care workers suffer from society's perception that family caregiving is unskilled labor with limited economic value, and the belief that women should perform such activities not for money, but out of love.[42] Consistent with this traditional view, research reveals that individuals who work in caregiving jobs experience a "wage penalty" that captures the social and economic devaluation of care work.[43]

The low earnings in home-based care work also highlight the point that those who most need care, including children and the elderly, are often least able to pay for it.[44] Absent family members providing informal care or paying for formal care, individuals in need of care routinely rely on the government for

40. Press Release, Bureau of Labor Statistics, *supra* note 12, at 14–21 (comparing the median hourly wages of the following jobs: child-care workers ($8.48); personal and home care aides ($8.54); locker room and coatroom attendants ($8.95); booth cashiers ($9.94); utility meter readers ($14.58); bicycle repairers ($10.48); and service station attendants ($8.53)).

41. *See, e.g.*, CTR. FOR THE CHILD CARE WORKFORCE, A PROFILE OF THE SAN MATEO COUNTY CHILD CARE WORKFORCE 4 (2002), *available at* http://www.sanmateo4cs.org/altruesite/files/4cs/GetFacts/2002ChildWorkforce.pdf; *see also* Smith, *supra* note 5, at 334 ("Rarely do [family child care] providers receive benefits such as health insurance, vacation time, or retirement plans."). For sources that discuss this issue in home care, see DAWSON ET AL., *supra* note 38, at 6 ("[The] quality of direct-care jobs tends to be extremely poor. Wages are low and benefits few; ironically, most direct-care staff do not receive employer-paid health insurance."), and Rebecca Donovan, *"We Care for the Most Important People in Your Life": Home Care Workers in New York City*, WOMEN'S STUD. Q., Spring/Summer 1989, at 56, 62 (1989) (reporting on the lack of healthcare benefits available to home care workers).

42. TUOMINEN, *supra* note 37, at 88–89.

43. *See, e.g.*, England et al., *supra* note 12, at 455 ("When we say that doing care work entails a 'wage penalty,' we mean that those in these occupations receive, on average, lower hourly pay than we would predict them to have based on the other characteristics of the jobs, their skill demands, and the qualifications of those holding the jobs.").

44. *Id*. at 456.

assistance.[45] Unfortunately, the reality of inadequate public support for family caregiving has troubling implications for those home-based care workers who provide publicly subsidized care. The high cost of and increasing demand for family care has led states to explore and adopt cost-savings strategies. In the context of child care, states regard family child care as a cost-effective approach to help meet the child care needs of women transitioning from welfare to work.[46] Similarly, in the context of home care, policymakers view consumer-directed home care as less costly than traditional agency-based home care.[47] Yet while these strategies may save money, states frequently fail to consider the cost borne by publicly subsidized workers in the form of low compensation rates and a lack of benefits.[48] While these problems adversely impact all workers who deliver subsidized care, they fall disproportionately on workers regarded as independent contractors of the state. Both family child care providers and consumer-directed home care workers tend to receive less than their cohorts—who work for child care centers and home care agencies—although they each provide the same care.[49]

II. CHALLENGES TO EMPOWERING HOME-BASED CARE WORKERS

Various factors have contributed to the labor movement's ability to unionize home-based care workers, including a favorable political climate and a convergence of interests between workers and consumers. While not minimizing the relevance of these factors, this Part examines some of the practical challenges that labor has had to confront in order to secure labor law rights for home care workers and family child care provid-

45. *Id.*

46. *See* GILLMAN, *supra* note 17, at i ("With the advent of welfare reform, family child care has been touted by policymakers and others as a cost-effective way to . . . expand the child care supply in low-income communities.").

47. *See* WIENER, *supra* note 11, at 11–12.

48. *See* Smith, *supra* note 5, at 337–38 (discussing the establishment of reimbursement rates for publicly subsidized family child care providers); Joshua M. Wiener et al., *Home and Community-Based Services in Seven States*, 23 HEALTH CARE FINANCING REV. 89, 109 (2002) (discussing the problem of low reimbursement rates in home care).

49. WIENER, *supra* note 11, at 13 ("Consumer-directed care is often less expensive than agency-directed care because independent workers receive less supervision and fringe benefits and sometimes lower wages than agency-directed employees.").

ers. These challenges include an atomized workforce and the work's location in individual homes.

A. MOBILIZING THE WORKERS

The invisibility of home-based care workers presents a first-order obstacle to organizing them. How does one effectively organize workers whose jobs seem completely antithetical to any notion of collective action? Before workers can be organized, they must be identified and mobilized. In the traditional arena of manufacturing jobs, this first-order step was relatively straightforward—union organizers could stand at the factory gate and both identify and recruit workers as they entered or departed.[50] This approach, however, has no utility when applied to home-based care workers. Not only are workers hidden in individual homes, but they are also fragmented throughout neighborhoods, towns, and cities.[51] Instead of laboring together in central locations, home-based care workers most commonly work alone in private homes. Even more problematic for organization purposes, a home care worker frequently cares for several clients,[52] and thus works at several different "worksites."

Labor has responded to this challenge by employing strategies to mobilize nontraditional workforces like home care workers and family child care providers. These strategies include reaching out to workers by forging ties with groups and organizations in their communities, using the media to reach workers,

50. *See, e.g.*, James T. Barnett & Manuel H. Johnson, *Private Sector Unions in the Political Arena: Public Policy Versus Employee Preference*, *in* WHAT ROLE FOR GOVERNMENT? 116, 119 (Richard Zeckhauser & Derek Leebaert eds., 1983) ("[O]rganizing workers at the factory gate is no longer as productive an activity as it was in the past."); *see also* Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 76 (2000) ("[T]he traditional model of organizing envisions a process whereby both the employer and the bargaining unit are readily identifiable. In manufacturing jobs, organizers can often contact workers by standing in the factory owner's parking lot or at the factory gate.").

51. *See, e.g.*, Barbara Rose, *Local 880: Labor's New Up-and-Comer*, CHI. TRIB., July 5, 2005, at 1 ("Isolated and scattered in homes around the state, working on and off as their circumstances change, they are a high-turnover group that is hard to reach."); Smith, *supra* note 5, at 340, 342 (discussing the difficulties that labor-organizing campaigns face trying to locate family child care providers and home care workers).

52. *See, e.g.*, Jessica Toledano, *Health Workers for Home-Bound to Vote on Union*, L.A. BUS. J., Feb. 8, 1999, *available at* 1999 WLNR 5466674 (describing the efforts of home care workers to unionize in California).

and holding rallies to vocalize issues of concern to workers.[53] In addition, union organizers commonly go door-to-door to contact workers at their homes.[54] Although extremely resource intensive, these strategies have allowed labor to effectively mobilize home-based care workers.

B. FOLLOWING THE MONEY: IDENTIFYING COMMONALITY FOR BARGAINING PURPOSES

Together with figuring out how to mobilize home-based care workers, unions must solve the dilemma posed by the fact that many home-based care workers lack a traditional employment relationship with a common employer for bargaining purposes. As this Section demonstrates, unions have tackled this obstacle by taking advantage of the increasingly public quality of home-based care work. Before elaborating on this point, the discussion first outlines how the structure of home-based care work impedes the formation of an employment relationship that can enable workers to engage in collective bargaining.

In the family child care industry, providers usually enter into individual contracts with the parents for whom they provide child care.[55] If the law were to recognize an employment

53. *See* Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 434 (1995) (describing the Workplace Project, a community-based worker center in Long Island, N.Y., dedicated to organizing immigrant workers, and its use of Spanish-language media to inform immigrant workers of their rights); Victor Narro, *Home Is Where the Union Is: Los Angeles Domestic Workers Find Innovative Ways to Exercise Their Rights*, THIRD FORCE, Jan.–Feb. 1998, at 18, 19 (discussing the Domestic Workers Association and describing its use of public-service announcements on Los Angeles Spanish-language radio and television stations to recruit members); Immanuel Ness, *Organizing Home Health-Care Workers*, WORKINGUSA, Nov. 1999, at 59, 73 (discussing the grassroots strategies that labor used to organize home health-care workers in New York including "public hearings, rank-and-file lobbying, polling, coalition building, rallies, organized press campaigns, and soliciting support from prominent leaders and public officials").

54. *See, e.g.*, Margarita Bauza, *Service Union Raises Workers' Pay, Hopes*, DETROIT FREE PRESS, Sept. 2, 2007, at 1A ("The union sidestepped those hurdles by visiting people at home, collecting signatures and passing out leaflets."); Patrice M. Mareschal, *Innovation and Adaptation: Contrasting Efforts to Organize Home Care Workers in Four States*, LAB. STUD. J., Mar. 2006, at 25, 32 (2006) (observing that in Oregon, SEIU gathered signatures in support of the initiative by "making house calls, engaging workers in political activism, and building coalitions with senior citizens and disabled persons").

55. *See* Position Statement, Nat'l Ass'n for Family Child Care, Best Practices for Family Child Care Union Organizing 1 (2006), *available at* http://

relationship in this context, it would be between the provider and each parent, and the relationship would appear to fall within the NLRA's coverage.[56] Because providers exercise considerable control over how they perform their jobs,[57] however, it is extremely unlikely that a provider-parent employment relationship exists. Instead, family child care providers generally operate as independent contractors and, as a result, they are outside the NLRA's purview.[58] Yet even if the law did regard the provider-parent relationship as an employment relationship covered by the NLRA, considerable hurdles to unionization would remain. As an initial matter, a provider could not engage in collective bargaining unless she joined forces with other providers, which would be no easy task given that providers typically work alone. Assuming, however, that a group of providers did join forces, a fatal problem would still remain because the providers, as a group, lack an identifiable parent-employer with whom to bargain, since each provider works for many different parents.

The difficulties in gaining employee status and in determining the employer for purposes of bargaining are absent in a center-based child care setting. In this context, where parents contract with the center to provide care and the center employs the workers, a union can readily identify both the bargaining

www.nafcc.org/documents/NAFCCUnionBestPractices.pdf ("Family child care providers are self-employed business owners who contract directly with clients and set the terms and conditions for the enrollment of children in their child care homes, including the program's tuition, fees and operating hours.").

56. Although the NLRA excludes domestic service workers from its definition of employee, the exclusion does not apply to family child care providers. The NLRA's domestic service exemption applies to anyone employed "in the domestic service of any family or person *at his home*." 29 U.S.C. § 152(3) (2000) (emphasis added). This language does not apply to a family child care provider because the provider cares for children in her own residence and not in the home of the children. By contrast, the NLRA's domestic service provision would seem to reach nannies as they work in the home of the person or family for whom they provide child care services.

57. *See* Position Statement, *supra* note 55, at 1. The National Labor Relations Board (NLRB) and the courts apply general agency principles that accord significant weight to the level of control that a company exercises over the "manner and means" by which a worker performs her job to distinguish between employees and independent contractors. *See* Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 874 (D.C. Cir. 1978) ("Control exercised over the 'manner and means of performance' . . . is the identifying characteristic of an employer/employee relationship.").

58. *See* 29 U.S.C. § 152(3) ("[The] term 'employee' . . . shall not include . . . any individual having the status of an independent contractor.").

unit (employees of the center), as well as the employer (the center).

The structure of home care lends itself to a comparable analysis. Most home care workers are employed by home care agencies and, similar to center-based child care workers in the family child care context, if employed by a private agency, they most likely possess rights under the NLRA.[59] In this scenario, the identification of a bargaining unit and the employer with whom to bargain does not pose any particular hurdles.

Obstacles, however, surface in the context of home care workers who are hired directly by individual clients and/or their family members. At first glance, because these independent workers likely can establish an employment relationship with clients, it appears that they may fare better than family child care providers in terms of securing protection under the NLRA. Unlike family child care providers, who clearly lack an employment relationship with the parents of the children for whom they care, independent home care workers may well qualify as employees of their clients (and/or family members of the clients) given that the clients may exert considerable control over the manner in which the workers perform their jobs.[60]

Yet even if such an employment relationship exists, it does not afford the worker protection under the NLRA. Like many labor and employment law statutes, the NLRA contains a domestic-service provision that exempts from coverage anyone employed "in the domestic service of any family or person at his home" including home care workers.[61] According to the National Labor Relations Board, this exemption applies where the "employment [is] on an individual and personal basis."[62] As a

59. To be exact, agency employees likely possess rights under the NLRA if they work for private agencies, as the NLRA does not apply to public-sector employees. 29 U.S.C. § 152(2) (excluding from the definition of "employer" all federal, state, and local government entities).

60. The hallmark of home care arrangements, whereby consumers direct their own care, is that they allow consumers "to have an employer/employee relationship with their individual service providers." U.S. DEP'T OF HEALTH AND HUMAN SERVS., IN-HOME SUPPORTIVE SERVICES FOR THE ELDERLY AND DISABLED: A COMPARISON OF CLIENT-DIRECTED AND PROFESSIONAL MANAGEMENT MODELS OF SERVICE DELIVERY, at iii (1999), *available at* http://aspe.hhs.gov/pic/pdf/6173.pdf.

61. 29 U.S.C. § 152(3); *see also* Smith, *supra* note 13, at 544 n.50 (listing statutes that have domestic-service exemptions attached).

62. 30 Sutton Place Corp., 240 N.L.R.B. 752, 753 n.6 (1979) (quoting Success Village Apartments, Inc. v. Local 376, UAW, 397 A.2d 85, 87 (Conn. 1978)).

result, home care workers in the employ of individual homeowners lack coverage under the NLRA. Even assuming workers could overcome this exception, they, like family child care providers, lack an identifiable entity with which to bargain, as each worker may have several employers, and the workers would seldom have employers in common.

Home-based care workers who provide publicly subsidized care have also tried to secure collective bargaining rights by claiming that they are employees of the government agencies that fund such care. Unfortunately, courts have rejected these claims and have ruled that publicly subsidized, home-based care workers have an independent contractor relationship with government funding agencies, not an employment relationship.[63] Despite these rulings, unions are focusing their organizing efforts on this group of workers. Because the workers are publicly funded, they share a point of commonality that unions hope to leverage. Since the government largely determines the compensation paid to workers and can best provide them with workplace benefits relative to individual consumers and/or their family members, the labor movement's goal is to persuade states both to treat the workers as quasi-public-sector employees, and also to negotiate with their labor representative regarding the terms under which they provide publicly funded care. The next Part examines the main legal strategies that unions have used to accomplish this objective. Given that the NLRA covers only private-sector employment,[64] these strategies occur outside of the context of the NLRA, and thus must take account of state and local public-sector labor relations statutes.

III. THE PROMISES AND PITFALLS OF LABOR CAMPAIGNS

As the previous Section discussed, when it comes to publicly subsidized home-based care workers, labor law usually classifies their relationship with the state as that of independent contractors. Despite this legal status, such workers now possess labor rights, including collective bargaining rights, in several states. To date, the labor movement has campaigned success-

63. *See infra* notes 70–73, 172–75 and accompanying text (discussing cases that address the issue of whether publicly subsidized home-care workers are public employees or independent contractors).

64. 29 U.S.C. § 152(2) (excluding from the definition of "employer" all federal, state, and local government entities).

fully to extend labor law protections to publicly subsidized home care workers in at least nine states, including California, Illinois, Iowa, Massachusetts, Michigan, Ohio, Oregon, Washington, and Wisconsin.[65] Family child care has experienced an even greater flurry of organizing activity. In the last two years, the labor movement has secured labor rights for publicly subsidized family child care providers in ten states: Illinois, Iowa, Kansas, Michigan, New Jersey, New York, Oregon, Pennsylvania, Washington, and Wisconsin.[66]

65. For California, see CAL. WELF. & INST. CODE § 12302.25(a) (West 2007); for Illinois, see 5 ILL. COMP. STAT. ANN. 315/3, 315/7 (West 2007); for Iowa, see Iowa Exec. Order No. 43, 28 Iowa Admin. Bull. 221 (July 4, 2005); for Massachusetts, see MASS. GEN. LAWS ch. 118G, §§ 28–33 (2006); for Michigan, see Interlocal Agreement Between the Department of Community Health and the Tri-County Aging Consortium (June 10, 2004) (on file with author) [hereinafter Michigan Interlocal Agreement], and MICH. DEP'T OF CMTY. HEALTH, BENEFICIARY ELIGIBILITY BULLETIN: HEALTH CARE ELIGIBILITY POLICY 04-07 (2004), *available at* http://www.michigan.gov/documents/HCEP_04-07_110034_7.pdf; for Ohio, see Ohio Exec. Order No. 2007-23S (July 17, 2007), *available at* http://www.governor.ohio.gov/Portals/0/Executive%20Order%202007-23S.pdf; for Oregon, see OR. REV. STAT. ANN. §§ 410.600–.614 (West 2003 & Supp. 2007); for Washington, see WASH. REV. CODE §§ 74.39A.220–.300 (2006); and for Wisconsin, see Wisconsin Office of the Governor, Wisconsin Quality Home Care Commission, http://www.wisgov.state.wi.us/appointments_detail.asp?boardid=213 (last visited Apr. 16, 2008).

66. For Illinois, see 305 ILL. COMP. STAT. ANN. 5/9A-11(b-5) (West Supp. 2006); for Iowa, see Iowa Exec. Order No. 45, 29 Iowa Admin. Bull. 370 (Jan. 16, 2006), and Iowa Exec. Order No. 46, 29 Iowa Admin. Bull. 373 (Jan. 16, 2006); for Kansas, see Kan. Exec. Order No. 07-21 (July 18, 2007), *available at* http://www.governor.ks.gov/executive/Orders/exec_order0721.htm; for Michigan, see DEBORAH CHALFIE ET AL., GETTING ORGANIZED: UNIONIZING HOME-BASED CHILD CARE PROVIDERS 18–19, 25 n.26, 31 n.176 (2007), *available at* www.nwlc.org/pdf/GettingOrganized2007.pdf (citing Interlocal Agreement Between the Michigan Department of Human Services and Mott Community College Creating the Michigan Home Based Child Care Council (July 27, 2006), and Letter from Jennifer Granholm, Governor of Mich., to Marianne Udow, Dir., Dep't of Human Servs., and M. Richard Shaink, President, Mott Cmty. Coll. (Sept. 1, 2006)); for New Jersey, see N.J. Exec. Order No. 23 (Sept. 5, 2006), *available at* http://www.state.nj.us/infobank/circular/eojsc23.htm; for New York, see N.Y. Exec. Order No. 12 (May 8, 2007), *available at* http://www.ny.gov/governor/executive_orders/exeorders/12.pdf; for Oregon, see OR. REV. STAT. § 657A.430 (2007); for Pennsylvania, see Pa. Exec. Order No. 2007-06 (June 14, 2007), *available at* http://www.portal.state.pa.us/portal/server.pt?open=512&objID=401&mode=2 (follow "Directives Management" hyperlink; then follow "Executive Orders" hyperlink; then follow "2007-06—Registered Family Child Care Providers" hyperlink) (requiring a state agency to "meet, confer and discuss with the exclusive representative" of registered family child care providers on issues of mutual concern), and Pa. Exec. Order No. 2007-07 (June 14, 2007), *available at* http://www.portal.state.pa.us/portal/server.pt?open=512&objID=401&mode=2 (follow "Directives Management" hyperlink; then follow "Executive Orders" hyperlink; then follow "2007-07—Subsidized

This extension of labor rights to independent home-based care workers often stems from state legislation, executive orders issued by state governors, and the acts of municipalities. Antitrust law, however, could interfere with such rights, as it generally prohibits independent contractors from engaging in collective bargaining.[67] Yet despite this general rule, under the state action doctrine, state regulation can immunize labor activity from antitrust review.[68] While the state action doctrine applies most clearly to state regulation, including legislation, it may also apply to regulation undertaken by governors in their executive capacity and by municipalities.[69]

A. HOME CARE

The home care campaign first achieved national attention in California, where SEIU, in its early attempts to procure labor rights for publicly funded home care workers, focused on the judiciary as a means for reform. Specifically, the union tried to persuade the California courts to recognize publicly funded home care workers—who cared for elderly and disabled clients in the Los Angeles County—as employees of the county under the Meyers-Milias-Brown Act,[70] the California law governing labor relations for local government employees.[71] SEIU

Child Care Providers Exempt From Certification or Regulation" hyperlink) (requiring a state agency to "meet, confer and discuss with the exclusive representative" of exempt family child care providers on issues of mutual concern); for Washington, see WASH. REV. CODE § 41.56.028 (2006 & Supp. 2008); and for Wisconsin, see Wis. Exec. Order No. 172 (Oct. 6, 2006), *available at* http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=2359.

67. The Sherman Act prohibits "[e]very contract, combination . . . or conspiracy" that unreasonably restrains competition. 15 U.S.C. § 1 (Supp. IV 2006). Although antitrust law exempts labor organizations, the exemption extends only to the organization of employees, not independent contractors. *See* Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 17 (2000)) (immunizing labor organization activities designed to carry out the "legitimate" purposes of labor unions from liability under antitrust laws); 29 U.S.C. § 152(3) ("[The] term 'employee' . . . shall not include . . . any individual having the status of an independent contractor.").

68. *See* Parker v. Brown, 317 U.S. 341, 351 (1943); *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW §§ 215–216 (3d ed. 2006) (explaining "state action" immunity).

69. *See* C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059, 1059–60 (2000); Jim Rossi, *Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism*, 83 WASH. U. L.Q. 521, 548 (2005).

70. *See* CAL. GOV'T CODE §§ 3500–3511 (West 1995 & Supp. 2008).

71. *See* Serv. Employees Int'l Union, Local 434 v. County of L.A., 275 Cal.

argued that the county, as the workers' employer, was obligated to negotiate with it as a representative of the county's home care workers.[72]

The court disagreed with this theory, holding that the workers were employed not by the county, but by the individual recipients of the workers' services.[73] In response to this judicial defeat, SEIU redirected its efforts to the legislative process, where it met success. In 1992, the California legislature passed a law that authorized, and later required, each county in the state to create "public authorities," agencies that would serve as the legal employer for home care workers for purposes of local collective bargaining laws.[74] Los Angeles County established a public authority in 1997,[75] and two years later SEIU won the right to represent the county's 74,000 home care workers.[76]

Hoping to follow in California's footsteps, the Oregon Public Employees Union (OPEU), an SEIU affiliate, supported a bill introduced in the Oregon legislature in 1999 that would have provided for the establishment of a statewide home care commission, and that would have given publicly funded home care workers in the state the ability to unionize.[77] When the bill died in the legislature,[78] OPEU switched tactics and successfully placed Measure 99 on the 2000 ballot.[79] The measure, which garnered the approval of sixty-three percent of the voters,[80] amended the Oregon Constitution to create a Home Care Commission. It serves as the workers' employer of record for purposes of collective bargaining[81] and enables the workers to

Rptr. 508, 510 (Ct. App. 1990).

72. *See id*.

73. *See id*. at 511.

74. *See* CAL. WELF. & INST. CODE § 12302.25(a) (West 2001); *see also* JANET HEINRITZ-CANTERBURY, PARAPROFESSIONAL HEALTHCARE INST., COLLABORATING TO IMPROVE IN-HOME SUPPORTIVE SERVICES 4–6 (2002), http://www.paraprofessional.org/publications/CA PA Report.pdf (stating that the organization and progress of California's In-Home Supportive Services Program created public authorities).

75. *See* Delp & Quan, *supra* note 3, at 11.

76. *See* Schneider, *supra* note 4, at 26.

77. *See* Mareschal, *supra* note 54, at 32.

78. *See id.*; Erin Hoover Barnett, *Caregivers' Measure on Ballot*, OREGONIAN, July 22, 2000, at D1.

79. *See* Erin Hoover Barnett, *State Strives to Improve Home Care*, OREGONIAN, Aug. 2, 2001, at D11.

80. *See* Mareschal, *supra* note 54, at 33.

81. OR. CONST. art. XV, § 11(3)(f) ("For purposes of collective bargaining, the Commission shall be the employer of record of home-care workers hired

unionize.[82] In addition, the workers are regarded as public employees of the state and thus subject to Oregon's Public Employee Collective Bargaining Act.[83] In 2001, the workers voted to have SEIU represent them.[84]

The approach to unionization of publicly funded home care workers in Washington followed a trajectory similar to that in Oregon. In 2001, legislators considered a bill that would have provided labor rights to home-based care workers through a public authority model comparable to those established in California and Oregon.[85] When the bill languished in committee, its proponents turned to a ballot initiative, known as the Homecare Quality Initiative.[86] Approximately sixty-two percent of Washington voters approved the initiative, which established a Home Care Quality Authority and granted collective bargaining rights to publicly subsidized home care workers.[87] During the 2002 legislative session, the legislature codified the text of the initiative.[88] The law names the authority as the employer of record for the workers for purposes of collective bargaining.[89]

Both Michigan and Wisconsin also use a public-authority model to recognize union representatives of publicly funded home care workers. These states' public authorities, however, were created not by legislation or executive order, but by intergovernmental cooperation agreements.[90] Such agreements ena-

directly by the client and paid by the State, or by a county or other public agency which receives money for that purpose from the State.").

82. *See id.* art. XV, § 11.

83. *See* Serv. Employees Int'l Union Local 503 v. Dep't of Admin. Servs., 123 P.3d 300, 303 (Or. 2005).

84. *See* Dave Hogan, *In-Home Care Workers Vote for Union Backing,* SUNDAY OREGONIAN, Dec. 16, 2001, at C10; Schneider, *supra* note 4, at 25.

85. *See* S. 5652, 57th Leg., Reg. Sess. (Wash. 2001); H.B. 1576, 57th Leg., Reg. Sess. (Wash. 2001).

86. *See* 2002 Wash. Initiative 775, *available at* http://www.secstate.wa.gov/elections/initiatives/text/i775.pdf; Mareschal, *supra* note 54, at 35.

87. *See* Mareschal, *supra* note 54, at 35.

88. *See* WASH. REV. CODE §§ 74.39A.220–.290 (2006).

89. *See id.* § 74.39A.270(1); Wash. State–Office of Fin. Mgmt. v. Serv. Employees Int'l Union, Local 775, No. 18805-U-04-4777, 2005 WA PERC LEXIS 141, at *2 (Wash. Public Employment Relations Commission Oct. 12, 2005) (noting that in 2004, the legislature amended the law "to shift the responsibility for bargaining on behalf of the employer from the [authority] to the Governor or the Governor's designee").

90. For a broad overview of such agreements, see THOMAS S. KURTZ, INTERGOVERNMENTAL COOPERATION HANDBOOK 8, 9, 13 (2006), *available at* http://www.newpa.com/download.aspx?id=45 (describing forms of cooperation among municipal governments in Pennsylvania, including intergovernmental cooperation agreements). *See also* Laurie Reynolds, *Intergovernmental Coop-*

ble local governments to join together to address shared problems or to provide coordinated services.[91] In the home care text, the agreements allow local governments to work together to improve the delivery and the quality of subsidized home care on behalf of consumers. In addition, the agreements enable cal governments to jointly facilitate the workplace interests of workers by designating an employer of record on behalf of the workers for bargaining purposes.

In Michigan, an intergovernmental agreement signed by the Michigan Department of Community Health and the Tri-County Aging Consortium established the Michigan Quality Community Care Council in 2004.[92] The agreement tasks the council with facilitating the provision of "employer-related functions" for publicly subsidized home care providers and promoting an effective home care system on behalf of consumers.[93] Under the agreement, the council also has "the right to bargain collectively and enter into agreements with labor organizations."[94] In 2005, more than 41,000 publicly subsidized home care workers in the state took the first step toward collective bargaining when they voted to elect SEIU as their representative in negotiations with the council.[95]

In Wisconsin, an intergovernmental cooperation agreement was used to establish a public authority known as the Quality Home Care Commission (QHCC),[96] which has the power to bargain collectively with labor organizations that represent publicly subsidized home care workers.[97] Whereas the council in

eration, Metropolitan Equity, and the New Regionalism, 78 WASH. L. REV. 93, 122–23 (2003) (stating that intergovernmental cooperative agreements can be characterized as "contracts for services; joint provisions of services; and the creation of a new unit of government").

91. *See, e.g.*, Reynolds, *supra* note 90, at 99.

92. *See* Michigan Interlocal Agreement, *supra* note 65, at 2.

93. *See id.* § 2.01 (stating that one purpose of the agreement is to "facilitate in the provision of certain employer-related functions for home and community care Providers").

94. *Id.* § 6.11.

95. Sharon Terlep, *Unions Recruit Health Workers*, DETROIT NEWS & FREE PRESS, Feb. 26, 2006, at 1D.

96. *See* Wisconsin Quality Home Care Commission, *supra* note 65. The power to enter into such agreements is derived from WIS. STAT. § 66.0301 (2005). The statute provides that municipalities may contract with each other for the "furnishing of services or the joint exercise of any power or duty required or authorized by law." *Id.* § 66.0301(2).

97. *Cf.* JOINT COMM. ON FIN., LEGIS. FISCAL BUREAU, QUALITY HOME CARE COMMISSION (DHFS–DISABILITY AND ELDER SERVICES) 3–5 (2007), *available at* http://www.legis.state.wi.us/lfb/2007-09budget/Budget%20Papers/

Michigan is statewide, Wisconsin has adopted a county approach similar to that utilized in California.[98] The Wisconsin agreement allows the state to contract with individual counties regarding the provision of publicly funded home care services.[99] While each county will continue to finance home care within its boundaries, the QHCC will serve as an employer of record for home care workers in the counties.[100]

Although the extension of labor rights to home care workers in Michigan and Wisconsin originates from intergovernmental cooperation agreements, as opposed to state legislative acts, the relevance of this difference to the workers seems insignificant from a practical standpoint. The workers in Michigan and Wisconsin, similar to those in California, Oregon, and Washington, now have the ability to vote for a union representative and the right to have a government agency recognize that representative for purposes of collective bargaining. There is, however, a legal difference for purposes of antitrust law between the use of state legislation and intergovernmental cooperation agreements.[101] As one scholar explains, "the acts of a state legislature . . . are *ipso facto* immune without further inquiry, [while] the acts of municipalities and other subordinate governmental entities are immune only if undertaken pursuant to a clearly articulated state policy."[102]

436.pdf (noting that the Commission is funded through the Service Employees International Union).

98. Minutes of the Health & Human Needs Committee, Human Services Board & Long Term Support 2 (Aug. 1, 2006) (recorded by Dawn MacFarlane), *available at* http://www.co.dane.wi.us/pdfdocs/minutes/hn20060801.pdf ("Michigan's Council is statewide, but our proposal is to start with Dane County and then add from there.").

99. *Cf. id.* at 1 (noting that the QHCC is governed by a resolution between Dane County and the State of Wisconsin).

100. So far, only Dane County has entered into an agreement with the state to form a QHCC, and as of yet, the workers have not voted to join a union. *See* JOINT COMM. ON FIN., *supra* note 97, at 4.

101. *See, e.g.*, Floyd, *supra* note 69, at 1063 ("Absent any definitive guidance from the Supreme Court, lower courts generally have assumed that state agencies should be treated like municipalities and other subordinate governmental units and that federal antitrust immunity should be accorded to their programs only if they are adopted pursuant to a clearly articulated policy adopted by the state legislature or the state supreme court acting in a legislative capacity.").

102. *Id.* at 1059–60 ("The Court has explained that because municipalities are not themselves sovereign, the clear articulation requirement is necessary to ensure that their acts truly represent the sovereign policy of the state itself.").

Because Michigan and Wisconsin rely on the acts of local governmental entities to extend labor rights to home-based care workers, the question arises as to whether those acts are immune from antitrust review. The acts will qualify for immunity "as long as a state confers permissive authority in general terms for a municipality to deal with a matter within the municipal government's discretion."[103] The intergovernmental cooperation agreements in Michigan and Wisconsin should readily satisfy this test given that both states authorize local governmental entities to address issues related to publicly subsidized home care.[104]

In a few states, including Illinois and Iowa, the labor movement was successful in persuading state governors to take action to extend labor law protections to publicly funded home care workers.[105] In Illinois, where low wages and a lack of benefits have long plagued home care workers,[106] SEIU Local 880

103. Rossi, *supra* note 69, at 548 (observing that the Supreme Court actually "abandoned the clear-articulation requirement in assessing municipal state-action immunity" and explaining that the Court made "state delegation to a municipal government" sufficient to "meet" the clear-articulation test).

104. MICH. COMP. LAWS ANN. §§ 124.501–.512 (West 2006); *see also* WIS. STAT. § 49.45(2)(a)(3) (2005) (providing that the Department of Health and Family Services may delegate to a county department the task of determining individual eligibility for various social services, including home health services, under section 49.46).

105. This approach also proved effective in Ohio. In July, 2007, the Governor of Ohio, Ted Strickland, signed an executive order that states that "[a]lthough [publicly funded home care workers] are not State employees, the State . . . shall engage in collective bargaining with the elected representative of the [workers]." Ohio Exec. Order No. 2007-23S, *supra* note 65, § 6. *But see* Letter from Maureen K. Ohlhausen, Dir., Office of Policy Planning, to William J. Seitz, Ohio State Senator (Feb. 14, 2008), *available at* http://www.ftc.gov/os/2008/02/V080001homecare.pdf (stating that Ohio Exec. Order No. 2007-23-S is likely to result in "certain anticompetitive conduct that is inconsistent with federal antitrust law and policy"). The letter was issued by the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics in response to a request by Ohio Senator William J. Seitz. *Id.* The Commission voted 4-1 to authorize issuance of the comments. *See* Press Release, Fed. Trade Comm'n, FTC Staff Submits Comments on Establishing Collective Bargaining for Independent Home Care Providers in Ohio (Feb. 15, 2008), *available at* http://www.ftc.gov/opa/2008/02/inhomecare.shtm. Commissioner Jon Leibowitz voted against issuance of the comments and issued a dissenting statement. *See* Dissenting Statement of Commissioner Jon Leibowitz in re Ohio Executive Order 2007-23S, Matter Number V080001 (2008), *available at* http://www.ftc.gov/os/2008/02/V080001dissentingstatementleibowitz.pdf.

106. *See, e.g.*, Jefferson Robbins, *Home Care Providers Seek Raises; State Pay Is Only $5 Per Hour*, ST. J.-REG. (Springfield, Ill.), Mar. 11, 1996, at 7;

garnered bargaining rights for the workers in 2003, following the election of the state's first Democratic governor in almost twenty years, Rod Blagojevich.[107] That year, Governor Blagojevich signed an executive order that requires the state to "recognize a representative designated by a majority of [the workers] as the[ir] exclusive representative" and to "engage in collective negotiations with said representative concerning all terms and conditions" of the workers' employment.[108] In 2005, the Illinois legislature codified the provisions of the executive order in the Illinois Public Labor Relations Act.[109]

The then-Governor of Iowa, Tom Vilsack, followed the lead of Governor Blagojevich when, in 2005, he signed an executive order that required a state agency to "meet and confer with the authorized representative of the individual [home care] providers, as designated by the majority of the individual providers."[110] Iowa's approach in granting individual home care workers a voice in shaping their labor arrangements with the state merits two key observations. First, meet-and-confer provisions, of the type contained in the Iowa executive order, typically possess less bite than collective bargaining provisions.[111] As explained by one commentator, "[i]nstead of serving as a satisfactory mechanism for dispute resolution, [meet-and-confer] statutes often cause greater frustrations in that they only require the employer to consider plans or proposals presented by the employee representative, rather than to engage in good faith collective bargaining."[112]

While it remains unclear whether Iowa's meet-and-confer executive order will eventually result in frustration,[113] it is

Brenda Warner Rotzoll, *Half of State Home Health Workers Uninsured*, CHI. SUN-TIMES, Mar. 23, 2001, at 21.

107. Christopher Hayes, *Healthcare Workers Win Raises*, IN THESE TIMES, Feb. 16, 2004, at 26.

108. Ill. Exec. Order No. 2005-1, 29 Ill. Reg. 3386 (Feb. 18, 2005).

109. *See* 5 ILL. COMP. STAT. ANN. 315/3(f), (n), (o) (West 2005 & Supp. 2007).

110. Iowa Exec. Order No. 43, *supra* note 65, ¶ 1.

111. *See, e.g.*, Harry T. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 896–99 (1973); David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689, 709–10 (1990).

112. Robert B. Moberly, *Public Sector Labor Relations Law in Tennessee: The Current Inadequacies and the Available Alternatives*, 42 TENN. L. REV. 235, 258 (1975).

113. Despite the meet-and-confer nature of the executive order, AFSCME, the elected representative of the workers, entered into a "Memorandum of Un-

worth noting that the protections home care workers receive under the order fall short of the collective bargaining rights given to state and local government employees by the Iowa Public Employment Relations Act.[114] For example, the Act grants public employees the right to "[n]egotiate collectively through representatives of their own choosing" and the right to "[e]ngage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[115] The executive order, in contrast, extends none of these rights to home care workers. Instead, it simply provides for a meet-and-confer process with an authorized representative of the workers.[116]

The second noteworthy observation about the executive order is that, contrary to the course of events in Illinois, the Iowa legislature has not codified the order's provisions into state law. The failure to do so leaves the workers vulnerable, as the order "can be overturned at any time by the authorizing Governor, a future governor, or the legislature."[117] As Michael Herman points out, "when a new Governor comes into office, she [usually] issues an executive order rescinding the orders of previous Governors."[118] By contrast, it is far more difficult to repeal an enactment of a state legislature, making legislation a more effective means of guaranteeing labor rights to home care workers than an executive order alone.

While states have taken various approaches in response to the labor movement's attempts to gain labor rights for home care workers, a key theme emerges from the unionization of publicly subsidized home care workers: the creation of public authorities. These public authorities serve not only as employers of record for the workers, but also as entities entrusted with ensuring the quality of home care services. The public authority structure in Oregon—the Home Care Commission[119]—is typical in this respect. By law, a majority of the Commission's

derstanding" with the State in December 2006. The Memorandum provides for a three percent raise for the workers. *See* Memorandum of Understanding Between Iowa Department of Human Services and the American Federation of State, County, and Municipal Employees, Iowa Public Employees Council 61, AFL-CIO (AFSCME) 1 (Dec. 2006), *available at* http://www.ime.state.ia.us/docs/CDAC-MemorandumOfUnderstanding.pdf.

114. *See* IOWA CODE §§ 20.1–.31 (2001).

115. *See id.* § 20.8.

116. *See* Iowa Exec. Order No. 43, *supra* note 65, ¶ 1.

117. *See* Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L.J. 987, 990 (1999).

118. *Id*.

119. *See* OR. CONST. art. XV, § 11(2)(a).

board members are consumers.[120] The board is responsible for ensuring high-quality care for consumers, providing training opportunities for workers, establishing worker qualifications, and maintaining a registry of qualified workers for the benefit of consumers searching for caregivers.[121] This strong emphasis on consumer protection, combined with the focus on empowering workers, underscores the labor movement's recognition that the interests of consumers and workers are inextricably linked. When workers are treated with respect and compensated with a living wage, they are more likely to invest in their jobs and to provide quality care.

Thus far, unionization has created tangible benefits that have improved the economic status of publicly subsidized home care workers. Those benefits include wage increases of close to twenty percent for workers in Michigan,[122] and thirty-four percent for workers in Illinois.[123] In Oregon, collective bargaining has gained workers wage increases, health benefits, and paid leave, as well as coverage under the state's workers' compensation statute.[124] Likewise, in Washington, the union contract with the state includes wage increases, health care coverage, dental and vision benefits, workers' compensation coverage, and vacation benefits.[125]

While the labor movement has been largely successful in winning the right to represent independent home care workers, it has experienced roadblocks. The most publicized setback oc-

120. *See id.*

121. *See id.* art. XV, § 11(1)(b).

122. *See* Cynthia Estlund et al., *New Ways of Governing the Workplace: Proceedings of the 2007 Meeting of the Association of American Law Schools Section on Labor Relations and Employment Law*, 11 EMP. RTS. & EMP. POL'Y J. 111, 131 (2007).

123. *See* SERV. EMPLOYEES INT'L UNION, HEALTH CARE DIV., BUILDING A NATIONAL MOVEMENT FOR QUALITY HEALTH CARE 3 (2004), http://www.seiu1984.org/appResources/scDocs/HealthDivision.Rpt.pdf; Joan Fitzgerald, *Getting Serious About Good Jobs*, AM. PROSPECT, Nov. 2006, at 33, 35.

124. *See, e.g.*, Mareschal, *supra* note 54, at 32–34 ("It provided for a pay increase of almost 10 percent, health insurance, workers' compensation, and paid time off."); SERV. EMPLOYEES INT'L UNION, *supra* note 123, at 3; SERV. EMPLOYEES INT'L UNION, WORKING TOGETHER FOR QUALITY PERSONAL CARE 5 (2005), http://s67.advocateoffice.com/vertical/sites/%7ba168c1b2-e6e9-4583-8bd1-9f21d62ca0c4%7d/uploads/%7b94c40e53-4fd4-47d2-aabf-71a33e87a66f%7d.pdf.

125. *See* Collective Bargaining Agreement by and Between the State of Washington and Service Employees International Union 775, at 18–23 (2007), *available at* http://www.hcqa.wa.gov/Collective_Barg/coll_barg_docs/SEIU_2007-2009.pdf.

curred in New Jersey. In 2003, a bill known as the Quality Home Care Act was introduced in both Houses of the New Jersey legislature.[126] The bill proposed the creation of several home care councils to operate publicly funded home care in the state.[127] The bill, which provided a ten-dollar-per-hour minimum wage for workers, designated the councils as the employers of the workers and gave workers collective bargaining rights.[128] In the face of considerable opposition, the bill ultimately died in committee.[129] The bill's demise, argues Patrice Mareschal, demonstrates the influence of the strong for-profit home care market in New Jersey.[130] Contrary to most other states, where SEIU has organized home care workers, New Jersey relies on for-profit agencies to deliver the overwhelming bulk of publicly subsidized home care.[131] The bill would have allowed each council to control all publicly funded home care in its region, effectively restricting for-profit agencies to serving only private-pay consumers.[132] Not surprisingly, much of the opposition to the bill originated with for-profit agencies that had an obvious financial incentive to maintain the status quo.[133] As Mareschal suggests, the New Jersey defeat highlights the need for unions to think strategically about how best to counter "the storm of business political activity"[134] in those states with politically influential for-profit home care agencies.

126. *See* Assemb. 3778, 2002 Leg., 210th Sess. (N.J. 2003).

127. *Id*.

128. *See* Patrice M. Mareschal, Agitation and Control: A Tactical Analysis of the Campaign Against New Jersey's Quality Home Care Act 21 (n.d.) (unpublished manuscript, available at http://depts.washington.edu/pcls/caringlaborconference/Mareschalpaper.pdf); *see also* Angela Stewart, *Proposed New Home Health Aide Rules Spur Arguments*, STAR-LEDGER (Newark, N.J.), June 24, 2003 ("[T]he workers now make an average hourly wage of $8.79.").

129. *See* Mareschal, *supra* note 128, at 19–20.

130. *Id.* at 21–23.

131. *See id*. at 17.

132. *See id*. at 20.

133. *See id*. at 21–23; *see also* Joseph Maddaloni Jr., *Bureaucratic Nightmare in the Making: Scrap McGreevey Proposal for a Public Authority to Oversee Home Health Care Services*, 172 N.J. L.J. 1027, 1027 (2003) (arguing that the Act failed to recognize the role that private home care agencies play in providing quality training for their home health workers). *But see* Arnold Shep Cohen, *The Case for Oversight of Home Health Care: A Public Authority Is Needed for an Industry Plagued by Staff Turnover Problems and Inadequate Care*, 173 N.J. L.J. 95, 95 (2003) (arguing that the Act will "vastly improve the delivery of personal care assistant services in New Jersey").

134. Mareschal, *supra* note 128, at 24.

B. FAMILY CHILD CARE

As Section A suggested, in the context of home care, states have responded to labor advocates in a variety of ways. In contrast, states have taken a much more uniform approach in the family child care context: they have relied overwhelmingly on executive orders to grant labor law rights to family child care providers. Of the ten states that presently have a process in place to recognize family child care unions, the governors in nine of those states signed executive orders mandating the process.[135] Illinois was the first state to bring publicly subsidized family child care providers into the scope of its labor laws, doing so in 2005 pursuant to an executive order.[136] The order, which mirrors an earlier order signed on behalf of home care workers in Illinois, requires the state to "recognize a representative designated by a majority of [the providers] . . . as the[ir] exclusive representative."[137] It also grants the "representative the same rights and duties granted to employee representatives by the Illinois Public Labor Relations Act."[138] Later that year, the Illinois legislature codified the order,[139] providing the workers with even stronger rights than those expressed in the order. Notably, the law states in clear terms that the providers are deemed state employees for the purpose of the Illinois Public Labor Relations Act,[140] and adds that the state "shall engage in collective bargaining" with their representative.[141]

Washington followed closely behind Illinois in granting authority for the state's publicly subsidized family child care providers to engage in collective bargaining with the state. In September 2005, Governor Christine Gregoire sent an executive directive to the Secretary of the State Department of Social and Health Services (DSHS), directing DSHS "to define a process for family child care providers . . . to have a strong, ongoing voice" in matters related to their working conditions.[142] The let-

135. The exception is Michigan, which uses an interlocal agreement to grant collective bargaining rights to publicly subsidized family child care providers. *See* CHALFIE ET AL., *supra* note 66, at 18–19.

136. Ill. Exec. Order No. 2005-1, *supra* note 108.

137. *Id*.

138. *Id*.

139. *See* 305 ILL. COMP. STAT. ANN. 5/9A-11(b-5) (West 2007).

140. *See* 5 ILL. COMP. STAT. ANN. 315/3(n).

141. 305 ILL. COMP. STAT. ANN. 5/9A-11(b-5).

142. Letter from Christine O. Gregoire, Governor, State of Wash., to Robin Arnold-Williams, Secretary, Dep't of Soc. and Health Serv., State of Wash.

ter also specified that the providers should have a chance to "select a representative for negotiations on their behalf with DSHS," and that DSHS should meet with the representative to discuss matters such as "reimbursement rates, regulation, and licensing procedures."[143] Shortly thereafter, the workers selected SEIU as their representative.[144] In 2006, the legislature codified the directive and strengthened its essential points. Under the law, providers are state employees who are entitled to representation for the purpose of "collective bargaining."[145] The law also designates the governor or a designee as the providers' employer of record.[146]

In 2005, AFSCME Council 75 presented union authorization cards to the Oregon Employment Relations Board (OERB) requesting permission to represent certified and registered family child care providers in Oregon.[147] The following year, SEIU Local 503 submitted union authorization cards to the OERB requesting to represent subsidized, license-exempt family child care providers in the state.[148] In both instances, OERB certified the cards, following which Oregon's governor, Theodore Kulongoski, issued executive orders directing state agencies to meet and confer with the relevant union officials on behalf of the providers "regarding issues of mutual concern."[149] In 2007, the Oregon legislature codified the provisions of both executive orders, but replaced the executive orders' "meet-and-confer" approach with a much stronger "collective bargaining" process.[150] The legislation provides that the state will serve as

(Sept. 16, 2005), *available at* http://www.governor.wa.gov/execorders/dir_05_09_16-2.pdf.

143. *Id.*

144. Paul Nyhan, *Child Care Operators to Join Union with Vote*, SEATTLE POST-INTELLIGENCER, Nov. 22, 2005, at B1.

145. WASH. REV. CODE § 41.56.028 (2006 & Supp. 2008).

146. *Id.* § 41.56.028(2).

147. Or. Exec. Order No. 05-10, 44-11 Or. Bull. 4 (Sept. 23, 2005).

148. Or. Exec. Order No. 06-04, 45-3 Or. Bull. 6 (Feb. 13, 2006).

149. Or. Exec. Order No. 06-04, *supra* note 148, at 2; Or. Exec. Order No. 05-10, *supra* note 147, at 2; *see also* Or. Exec. Order No. 07-03, 46-3 Or. Bull. 6 (Feb. 1, 2007) (requiring state agencies to "engage in collective negotiations and attempt to reach an agreement with [the unions], on behalf of their respective segments of the family child care provider population" during the period from 2009 to 2011).

150. OR. REV. STAT. § 657A.430(3) (2007) (stating that family child care providers "have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining on matters concerning labor relations").

the public employer of record for the providers,[151] and treats the providers as public employees for the sole purpose of "collective bargaining."[152]

The executive orders and subsequent statutes in Illinois, Washington, and Oregon comprise an approach that emphatically extends to publicly subsidized family child care providers state labor law protection in the form of collective bargaining rights. Iowa and Wisconsin, by comparison, permit the unionization of providers, but are far more restrictive in terms of the actual rights given to the providers.[153] In 2006, Iowa's governor signed executive orders regarding both registered family child care providers[154] and license-exempt providers of subsidized child care.[155] The orders provide that state agencies "shall meet and confer with the authorized representative" of the providers,[156] and that in doing so, the agencies "shall discuss issues of mutual concern, including training requirements, reimbursement rates, payment procedures, [and] health and safety conditions."[157] Although AFSCME has since won a union election, giving it the right to represent registered providers in Iowa,[158] the executive orders suffer from the same limitations discussed earlier in the context of the Iowa executive order for independent home care workers:[159] the orders grant the providers only meet-and-confer rights and do not treat the providers as state employees for any purpose. Finally, because the legislature has not codified the orders' provisions, any subsequent governor or legislature can eliminate these rights with the stroke of a pen.

151. *Id.* § 657A.430(2) ("For purposes of collective bargaining . . . the State of Oregon is the public employer of record of family child care providers.").

152. *Id.* § 657A.430(4) ("[F]amily child care providers are not for any other purpose employees of the State of Oregon or any other public body.").

153. Publicly subsidized family child care providers in Kansas and Pennsylvania also recently received the right to unionize as a result of executive orders that reflect a meet-and-confer approach. *See* Kan. Exec. Order No. 07-21, *supra* note 66; Pa. Exec. Order No. 2007-07, *supra* note 66; Pa. Exec. Order No. 2007-06, *supra* note 66.

154. *See* Iowa Exec. Order No. 45, *supra* note 66.

155. *See id.*

156. *See* Iowa Exec. Order No. 46, *supra* note 66, ¶ 1; Iowa Exec. Order No. 45, *supra* note 66, ¶ 1.

157. Iowa Exec. Order No. 46, *supra* note 66, ¶ 2; Iowa Exec. Order No. 45, *supra* note 66, ¶ 2.

158. *See* Clyde Weiss, *Standing Up and Speaking Out*, PUBLIC EMPLOYEE, Jan./Feb. 2007, at 26, 26.

159. *See supra* notes 110–16 and accompanying text.

The union status of family child care providers in Wisconsin is somewhat comparable to that of Iowa. In 2006, Wisconsin Governor Jim Doyle signed an executive order that takes the form of a meet-and-confer requirement.[160] The order requires the Department of Health and Family Services "to meet and confer with a recognized exclusive majority representative of family child care providers in Wisconsin" for the purpose of discussing various issues including "reimbursement and payment procedures," as well as training.[161] The providers have since voted to have AFSCME as their representative.[162] However, as is true of the Iowa order, the Wisconsin order has not been codified by the legislature, and the order does not regard the workers as state employees for any purpose.[163]

The legal approaches used by the states to extend labor rights to family child care providers all rely on establishing an employer of record, as is also true with the unionization of home care workers. Yet the unionization of family child care providers differs in one notable respect from the unionization of home care workers: the latter incorporates public authorities that are responsible for ensuring quality of services. The absence of such authorities in the context of family child care unionization raises an interesting observation. Although concerns about caregiving quality characterize both the home care and family child care campaigns, this issue seems to be most pronounced in the former context. The relative importance of caregiving quality in the home care campaigns may stem from the fact that home care consumers and their advocates appear to be much more vocal and organized in their demands for improved quality compared with parents who qualify for publicly subsidized family child care.[164] One possible explanation for this distinction is that home care consumers are also the recipients of such care. By contrast, parents who use family child care may be less informed about the quality of care their children receive given that the care occurs in their absence.[165]

160. *See* Wis. Exec. Order No. 172, *supra* note 66.

161. *Id*.

162. Judith Davidoff, *Union of Caring: AFSCME Gives Licensed Child Care Providers a New Voice*, CAPITAL TIMES (Madison, Wis.), Dec. 9–10, 2006, at A1.

163. Wis. Exec. Order No. 172, *supra* note 66 ("Family child care providers are not employees or agents of the State.").

164. *See, e.g.*, Delp & Quan, *supra* note 3, at 11–13 (discussing the involvement of consumer groups in the home care campaign in Los Angeles).

165. *But see, e.g.*, Andrew I. Batavia, *The Growing Prominence of Indepen-*

At present, it appears that while ten states have extended labor rights to publicly subsidized family child care providers, only three states have contracts in effect covering the providers: Illinois, Oregon, and Washington.[166] The Illinois contract mandates reimbursement rate increases between thirty-five and forty-nine percent over three years,[167] access to affordable health care, and incentives for providers to acquire training in early education.[168] In Oregon, where both AFSCME and SEIU represent publicly subsidized providers, the unions signed contracts that provide for substantial increases in reimbursement rates and a reduction in the time required to process payments to providers.[169] The Washington contract likewise requires increases in subsidy payments to providers. It also includes training subsidies for providers and a commitment to create an affordable health insurance plan.[170]

Despite these benefits, the union campaigns on behalf of publicly subsidized family child care providers have not met with uniform success. The remainder of this Section discusses the promise and ultimate pitfalls experienced by publicly subsidized family child care providers in Rhode Island and Mary-

dent Living and Consumer Direction as Principles in Long-Term Care: A Content Analysis and Implications for Elderly People with Disabilities, 10 ELDER L.J. 263, 265–66 (2002) (noting that the demand for access to quality, publicly subsidized consumer-directed home care began in the 1970s as part of the disability-rights and independent-living movements); Nancy Folbre, *Demanding Quality: Worker/Consumer Coalitions and "High Road" Strategies in the Care Sector*, 34 POL. & SOC. 8, 11, 12 (2006) (noting that quality of care is generally difficult to gauge in all contexts); Charles P. Sabatino & Simi Litvak, *Liability Issues Affecting Consumer-Directed Personal Assistance Services—Report and Recommendations*, 4 ELDER L.J. 247, 254 (1996); Heather Young & Suzanne Sikma, *Self-Directed Care: An Evaluation*, 4 POL'Y POL. & NURSING PRAC. 185, 185 (2003).

166. *See* Anne Ravana, *Maine Child Care Providers Set to Form Union*, BANGOR DAILY NEWS (Me.), Oct. 22, 2007, at B1.

167. *See* Position Statement, *supra* note 55, at 4.

168. Press Release, Serv. Employees Int'l Union, 49,000 Family Child Care Providers Negotiate Historic Contract in IL to Raise Standards for Quality Child Care Services (Dec. 13, 2005), *available at* http://www.seiu.org/media/pressreleases.cfm?pr_id=1275.

169. *See* Oregon AFSCME, *AFSCME, State Sign Landmark Child Care Providers Contract*, OREGONAFSCME.COM, Oct. 4, 2006, http://www.oregonafscme.com/index.cfm?zone=/unionactive/view_article.cfm&HomeID=44358; SEIU Local 503, *Child Care Agreement Reached: Agreement Makes Care More Accessible, Affordable*, SEIU503.ORG, Dec. 8, 2006, http://www.seiu503.org/care/child/Child_Care_Agreement_Reached.aspx.

170. *See* Family Child Care Contract, Contract for WA Family Child Care Providers 2007–2009, *available at* http://seiu925.wtf.localsonline.org/Early_Learning/FCCP_Contract/default.aspx (last visited Apr. 16, 2008).

land. These two states highlight very divergent approaches to the representation of family child care providers and usefully illustrate the range of obstacles that unions face as they try to improve providers' economic status.

Rhode Island is one of three states where the legislature approved a measure granting providers some level of representational rights only to have the governor veto the legislation.[171] In 2003, SEIU Local 1199 filed a lawsuit to challenge the perception that the state's publicly subsidized providers were independent contractors as opposed to public-sector employees.[172] A similar tactic had failed in California when SEIU attempted unsuccessfully to persuade the courts that publicly subsidized home care workers in Los Angeles County were employees of the County.[173] Yet SEIU Local 1199 had surprising early success when the Rhode Island Labor Relations Board (RILRB) ruled that the providers were state employees and issued an order giving them the right to unionize under the state's collective bargaining statute.[174] Unfortunately, the success proved to be short-lived, as Rhode Island's Republican governor filed a lawsuit blocking the decision. Eventually, the Rhode Island Superior Court sided with the governor and reversed the RILRB's decision.[175]

Following this defeat, SEIU lobbied to change the law, resulting in a bill known as the Family Child Care Providers Business Opportunity Act,[176] which retreated from the union's earlier position that the providers were unqualified state employees. Instead, the Act authorized the recognition of the providers as state employees only with respect to collective bar-

171. The other two states are California and Massachusetts. *See* CHALFIE ET AL., *supra* note 66, at 12.

172. *See In re* R.I., Dep'ts of DCYF & DHS (*Home Daycare Providers*), EE-3671, slip op. at 8 (R.I. State Labor Relations Board Apr. 6, 2004), *available at* http://www.dlt.state.ri.us/lrb/pdfs/Decisions/DecisionEE3671.pdf. The Rhode Island State Labor Relations Act is codified in R.I. GEN. LAWS §§ 28-7-1 to -7-48 (2003).

173. *See supra* notes 70–73 and accompanying text.

174. *See Home Daycare Providers*, EE-3671, slip op. at 29.

175. State v. State Labor Relations Bd., C.A. 04-1899, 2005 WL 3059297, at *8 (R.I. Super. Ct. Nov. 14, 2005); *see also* ANNE RODER & DORIE SEAVEY, INVESTING IN LOW-WAGE WORKERS 40 (2006), *available at* http://www.workingventures.org/ppv/publications/assets/206_publication.pdf.

176. H.R. 6099 (Substitute A as amended), 2005 Gen. Assemb., Jan. Sess. (R.I. 2005), *available at* http://www.rilin.state.ri.us/BillText05/HouseText05/H6099Aaa.pdf.

gaining.[177] In 2005, the General Assembly passed the bill, only to see it vetoed by the governor.[178] While the union has continued its efforts to reintroduce a similar bill in the legislature, the providers' best chance of securing collective bargaining rights at this point may well depend on a change in political climate.[179]

More recently, publicly subsidized family child care providers in Maryland encountered a major roadblock. For five years, SEIU tried unsuccessfully to persuade the Maryland legislature to pass a bill to extend bargaining rights to providers.[180] When the legislature failed to do so, the providers turned to the new Democratic governor, Martin O'Malley. In August 2007, O'Malley signed an executive order that allowed providers to designate an organization as their joint negotiating representative, and that required a state agency to meet and negotiate with the representative on all matters relating to reimbursement rates and other terms and conditions of the labor arrangement.[181]

Shortly after the order was signed, the providers voted to join SEIU Local 500.[182] The day before, however, a judge issued a temporary restraining order halting the executive order.[183] Notably, the motion for the order was filed by the Maryland

177. *Id*.

178. Donald Carcieri, Governor, Rhode Island, Child Care Veto Message (June 22, 2005), *available at* http://www.governor.ri.gov/documents/Child_Care_Veto_Message.pdf; *see also* RODER & SEAVEY, *supra* note 175, at 40.

179. A change in political climate ultimately led to the extension of labor law rights to publicly subsidized family child care providers in New York. In 2007, providers finally received the right to elect a representative that will be recognized by the state when newly elected Governor Eliot Spitzer signed an executive order that requires the state to recognize a representative elected by the providers and to meet with designated representatives "for the purpose of entering into a written agreement to the extent feasible." N.Y. Exec. Order No. 12 (May 8, 2007), *available at* http://www.ny.gov/governor/executive_orders/exeorders/12.html.

180. Tom LoBianco, *O'Malley's Orders Skirt Assembly*, WASH. TIMES, Aug. 16, 2007, at B3.

181. Md. Exec. Order No. 01.01.2007.14 (Aug. 6, 2007), *available at* http://www.gov.state.md.us/executiveorders/01.01.07.14childcareproviders.pdf.

182. Clifford G. Cumber, *Local Child Care Providers Support Move to Unionize*, FREDERICK NEWS-POST (Md.), Sept. 27, 2007, at B12.

183. *See* Md. State Family Child Care Ass'n v. O'Malley, No. C-07-291 (Cecil County Ct. Sept. 24, 2007), *available at* http://www.msfcca.org/case1.pdf and http://www.msfcca.org/case2.pdf (granting temporary restraining order); *see also* Tom LoBianco, *Judge Halts O'Malley Order*, WASH. TIMES, Sept. 25, 2007, at A1; Sarah Moses, *Child Care Providers Fight Unionization*, CUMBERLAND TIMES-NEWS (Md.), Oct. 8, 2007, at 1.

State Family Child Care Association (MSFCCA), a nonprofit organization of family child care providers in the state that had long voiced its opposition to SEIU's family child care campaign.[184] In opposing the union, MSFCCA objected to "SEIU's history and organizing tactics" and maintained that it was able to effectively represent the providers without charging the union dues required by SEIU.[185] The conflict highlights the importance of unions forging broad support, including organizations already advocating on behalf of providers.[186]

CONCLUSION

All indicators suggest that the need for paid home-based caregiving will remain a pressing issue for the foreseeable future. The need for family child care will persist given women's participation in the paid labor market and parental struggles to find an acceptable balance between work obligations and parenting responsibilities. Likewise, the demand for home care will climb steadily upwards as the baby-boom generation ages. Against this backdrop, one can reasonably expect that when it comes to publicly funded care in both contexts, states will continue to rely on workers who are legally considered independent contractors, not only because of consumer preference for such workers, but also because of their cost-savings' potential. By treating publicly subsidized home-based care workers not as state employees but as independent contractors, states are attempting to avoid liability to the workers under applicable employment and labor statutes.

This Article has examined the strategies the labor movement has used to reverse this process and to compel state governments to accept some responsibility for providing home-based care workers with decent wages and workplace benefits. Even though independent workers in home-based care may not technically qualify as public employees, the labor movement has relied on various measures—including legislation, gover-

184. *O'Malley*, No. C-07-291.

185. Md. State Family Child Care Ass'n, If You Get a Union Election Ballot, Say No to SEIU (n.d.), *available at* http://www.msfcca.org/sayno.doc; *see also* Clifford G. Cumber, *Family Child Care Providers Expect to Join Union*, FREDERICK NEWS-POST (Md.), Sept. 25, 2007, at A11.

186. *See* Position Statement, *supra* note 55, at 6 ("If family child care providers already have a voice in early care and education policy making, unions should respect the work being done and attempt to partner with existing family child care advocates, rather than ignoring and attempting to supplant them.").

nor-issued executive orders, ballot initiatives, and intergovernmental cooperation agreements—to force states to extend labor law rights to workers, most commonly by requiring a state agency to function as an employer of record for the workers and to recognize a labor representative on their behalf. With this approach, unions can enable home-based care workers to participate in shaping the terms and conditions of their work experiences, while simultaneously respecting the interests of care recipients.