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Serving in the Master's House: Legal Protection for In-Home Care Workers in the United States

*Richard Michael Fischl**

SUMMARY: 1. Introduction. – 2. Labor stories. – 3. The emerging law of in-home care work: Three initiatives. – 4. Evaluating the initiatives. – 5. References. – Appendices.

1. *Introduction*

This essay will focus on the developing forms of legal protection available in the United States to those whose principal place of work is another person's home and who are paid to do what is broadly referred to as "care work."¹ The particular services vary widely – from housecleaning, to child care, to companionship and routine health care management for the elderly and the infirm – but the labor market demographics do not: This is low-wage/no-benefit work performed almost exclusively by women and primarily by women of color and of extra-national origin (Blackett, 2011; Boris, Klein, 2015; Markkanen, Quinn, Sama, 2015).

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¹For a perceptive explication of what counts as "care work" in in-home as well as institutionalized settings, see Duffy, Armenia, Stacey (2015).

At first blush, this may seem like an odd topic for a collection devoted, in the words of the original call for papers, to “the transformation of the enterprise in the global economy” and to phenomena such as “geographically extensive value chains” and the emancipation of the firm “from any commitment to a particular location.” But I am struck by the relevance of the developments under consideration – italicized below and once again quoting the call for papers – to the challenges that have long been faced by those engaged in the necessarily local and profoundly personal provision of in-home care work in the US:

- *The “evolution of the organisational framework” of the enterprise:* The “outsourcing” of care work has deep roots in the eighteenth and nineteenth centuries – when families of means commonly employed domestic servants – but during the past fifty years the phenomenon has increasingly become a feature of life in the middle class, the working class, and among the poor, as the provision of caring services has shifted dramatically from the family to a mix of market alternatives (where family resources permit) and state supported services (where they do not) (Duffy, 2015).
- *The “problems arising from the identification of the employer in relations between a plurality of actors” and the resulting “need to define the legal position of the actors involved in this plurality of relations”:* In the in-home care context, the players include individual workers; organizations that represent them (principally labor unions and worker centers) as well as those representing various cohorts of care recipients (e.g., AARP for the beneficiaries of elder care); private third-party placement firms; and state and national governments, which fund and to a lesser extent otherwise regulate much of this work (Boris and Klein, 2015). In the context of this “plurality of actors,” an emerging issue of central importance is the identity of the “employer” when the state pays the tab but the immediate beneficiary of services “hires” and directs the work performance of the individual provider.
- *The “assimilation between small business owners and self-employed workers” facing “asymmetrical power relationships” and a “lack of protective measures”:* Here too there is an important analog from in-home care work and particularly in the context of family child care, where services are frequently provided by individuals and small

enterprises treated as independent contractors and thus beyond the protective scope of most US labor and employment law.

- *The “fragmentary” legal and institutional responses* to the challenges faced by such workers via hard law (e.g., the application of wage and hour law to domestic workers), soft law (e.g., union- and state-maintained registries for matching the would-be beneficiaries of care with qualified and trained home care providers), and no law at all (or so it almost invariably seems at the common law baseline).

In sum, “[h]ome care’s past prefigured the future[,]” anticipating by decades many of the legal challenges faced by workers in the so-called “new economy” (Boris, Klein, 2015, 15).

There is a further important link between in-home care work and the topics addressed in this collection. The economic and organizational trends under examination – the continued dismantling of internal labor markets, the relentless outsourcing of services (via labor contractors) and production lines (via supply chains), and the nigh giddy erasure of the local – conspire to create a world of precarious employment and variable work-scheduling practices in which it is increasingly difficult, economically as well as logistically, for a family to “care for its own.” These developments thus account for much of the recent dramatic growth in the in-home care work industry (Boris, Klein, 2015), which growth in turn makes it possible for those with significant caring responsibilities – a labor market cohort still quite nearly as gendered as that of the outsourced version – to participate in the brave new world of work.

The essay proceeds thus. In Part I, I explore the historical exclusion of in-home care workers from legal protection with a pair of labor stories. The first is an account of the role of “domestic servants” in the development of the common law of employment and the eventual though decidedly partial displacement of common law by statute. In the beginning confined to persons quite literally engaged in the provision of “domestic” (i.e., household) services, during the late nineteenth century the category became the default status for those working the underside of the then-emerging employment relation – not for nothing was it called master/servant law – and in that form defined those entitled to protection under modern labor and employment legislation. Yet in a twist that continues to complicate their plight, the “pioneers” in the field of abject personal service were left behind in the legislative reform efforts of the twentieth Century, though, contrary to what has become the conventional wisdom, their exclusion from those

efforts began not with the New Deal but decades earlier as states enacted the first generation of workers compensation laws.

The second story is an account drawn from my own experience as a labor lawyer litigating cases about the legal rights of confidential secretaries – a class of workers whose responsibilities are in a variety of ways the white-collar analog to what domestic workers do in the home – an experience that offers a telling glimpse into the values and assumptions that animate the resistance to legal protection for both groups to this day.

Part II turns to contemporary efforts in the US to improve the legal lot of those who provide in-home care work, exploring initiatives at both state and federal levels to extend wage-and-hour protection to live-in domestic workers as well as to providers of companionship services for the elderly and the disabled; to protect the interests of in-home workers engaged in the provision of a wide variety of care services via the state-by-state enactment of a “Bill of Rights for Domestic Workers”; and to designate in-home care workers whose compensation is provided by public funding as “employees” of the state – or of a state-created institutional proxy – for purposes of collective bargaining over wages and other salient issues, notwithstanding the fact that some key incidents of traditional employer prerogative (e.g., hiring, firing, and directing the provision of services) are exercised primarily by the beneficiaries of care or their families.

Part III examines the promise and perils of the respective initiatives. The model of “constructing” an employment relationship for collective bargaining purposes seems particularly well-suited (again in the words of the call for papers) for “counter[ing] the trend towards the individualization of interests and the decline in solidarity among workers,” while the wage-and-hour and “bill of rights” initiatives present the same enforcement difficulties faced by most individual-rights regimes and especially those providing protections for low-wage workers. Yet on closer examination, these individual-rights initiatives likewise reveal a critical solidaristic dimension in the campaigns to enact them as well as efforts to secure their enforcement, as labor unions and worker centers deploy rights-based innovations to organize and otherwise advance the interests of in-home care workers. At the same time, success on the collective-bargaining front is threatened by a pattern of retrenchment at the state level and also by a recent Supreme Court decision that just could not find its way past understandings of the employment relation traceable to nineteenth-century master-servant law.

2. *Labor stories*

2.1. *Another look at the legal history of "domestic servants"*

Unlike the poor, the modern conception of the employment relation has not always been with us. Well into the nineteenth century, American jurists understood and organized the world of work in much the same way they organized the rest of what we think of today as "contract law" – i.e., as discrete bodies of legal doctrine governing the respective "relations between landlord and tenant, guardian and ward, master and servant, and also relations of factors, brokers, corporations, and so on, in a manner analogous to the way they had been treated by Blackstone" (Orren, 1991, 61-62; Gilmore, 1974). According to the conventional wisdom, a central feature of US legal development during the latter part of the century was the shift "from status to contract" – i.e., the shedding of such feudal remnants in favor of a regime in which the parties to all manner of relationships freely and mutually constructed their terms of engagement in the shadow of a unified body of largely facilitative contract law.

Whatever historical truth this narrative might hold in other contexts, the recent work of legal historian Christopher Tomlins has persuasively made the case that the story was otherwise for the American working class in the late nineteenth century – that during this era "'employees' become 'servants,' not vice versa" (Tomlins, 2011, 355-56) and the wide variety of work relationships previously governed by a potpourri of discrete regimes were absorbed into a single jural category, "master and servant," a category reserved in the earlier period for use in the context of household service (Tomlins, 1993). Tomlins argues that the conventional "status to contract" narrative has obscured this latter development and that "by concentrating upon the loosening of the bonds of explicit servitude – apprenticeship, indentured servitude, and eventually slavery – we have ignored the changes, the tightenings, in the social and legal meaning of employment" that occurred during this era as well (Tomlins, 2011, 356). In keeping with its roots in domestic service, the master-servant relationship that emerged as the default status for all forms of employment "had a necessary authoritarian component distinguishing [it] from other kinds of contracts: The employer was entitled not only to receipt of the services contracted for in their entirety prior to payment but also to the obedience of the employee in the process of rendering them" (Tomlins, 1993, 279-80; Orren, 1991). In other words, employees – working in a

wide variety of institutional settings – were the new servants, domesticated, if not domestic, since they “gave at the office” (or, more often, the factory, mill, mine, shipyard, or farm) instead of in the master’s house.

At least in broad outline, the conventional wisdom has the next chapter in the story right – i.e., the partial displacement of master/servant law by a flurry of labor and employment legislation enacted during the twentieth century. But there is a profoundly ironic twist rendered visible by the light Tomlins sheds on the provenance of the common law baseline: In statute after reformist statute, the workers whose legal status had come to define the employment relation – and thus the boundaries of what the legislative flurry sought to reform – were left outside the protective sweep of the emerging body of law. Existing histories of how domestic servants came to find themselves on the cutting room floor, written without the benefit of the insights offered by Tomlins, miss this dimension of the story entirely.

Because of their focus on the key federal statutes of the New Deal era – the Fair Labor Standards Act, the National Labor Relations Act, and the Social Security Act – those histories miss a second dimension of the domestic servant saga as well. To be sure, they rightly note that the express exclusion of domestic servants from each of those statutes went hand-in-hand with an exclusion for agricultural workers and that the two occupational cohorts had several telling characteristics in common. For one thing, in the New Deal era there were doubts as to whether the federal power to regulate “interstate commerce” could reach workers involved in the provision of such intensely local services as household and farm work, and the exclusions may thus have been driven in some measure by the drafters’ desire to ensure that the legislation would survive constitutional review. Regional economic interests may have also played a role, given the centrality of low-wage agricultural and domestic work to the Southern economy and the prominence of representatives from the region in the New Deal congressional coalition. The accommodation of an uglier but related regional interest loomed large as well, for in the 1930s the excluded occupational cohorts were the source of employment for nearly two-thirds of African-American workers.² Although the matter is not without controversy (DeWitt, 2010; Leroy,

² In 1930, 36.1% of African-Americans were employed in agriculture and 28.6% were employed in domestic and personal service. United States Department of Commerce 1930, *Statistical abstract of the United States*, Washington, 75 tab. 2.

Hicks, 1999; Linder, 1987) – and virtually all concerned acknowledge the surprising paucity of reference to, let alone controversy about, the subject exclusions in the legislative history of these statutes – an unholy trinity of constitutional caution, regional economic interest, and Southern racial domination has thus become the standard account of how domestic servants and farmworkers found themselves on the outside looking in during the New Deal era (DeWitt, 2010; Palmer, 1995; Perea, 2011).

Yet none of the existing histories acknowledge a pattern of exclusionary practice that pre-dates the New Deal legislation by a quarter century and is difficult to attribute to the historical forces associated with the standard account. Thus, between 1910 and 1920, forty-three of what were then forty-eight states enacted workers' compensation (WC) statutes, requiring or enabling employers within their jurisdictions to insure their employees against workplace injuries and occupational disease.³ As it happens, all but six of those states excluded domestic servants from statutory coverage.⁴ Although some jurisdictions did so by negative implication – typically, by limiting statutory protection to a specific list of hazardous occupations that did not include domestic service – most states defined WC coverage more broadly and expressly excluded domestic servants.⁵ Like the

³ See Appendix I: State-by-State Treatment of Domestic and Agricultural Workers Under Workers Compensation Laws, *infra*. By 1935, three of the five hold-out states had adopted WC statutes (North Carolina, South Carolina, and Florida), and the remaining two enacted statutes in 1939 (Arkansas) and 1948 (Mississippi). See *id.* (The US did not have 50 states until 1959, when Alaska and Hawaii were admitted to the union.)

⁴ The statutes adopted by New Jersey, Maryland, Iowa, and Pennsylvania seemingly covered domestic servants. The statutes adopted by Ohio and Connecticut had no specific exclusion for domestic servants but governed only those employers with five or more employees, thus excluding domestic servants working in most US households. The other 37 states excluded all domestic servants from statutory coverage. (Appendix 1.)

⁵ Twenty-three states enacted statutes with express exclusions for domestic workers, and 14 states did so by negative implication (Appendix I, note 1). New York – which enacted the first WC statute in the country in 1910 and played a leading role in the development of WC principles in the US (Witt 2004) – provided a template for both approaches. In the 1910 statute, New York took the negative implication approach and provided coverage for a list of specific jobs (e.g., bridge building and demolition, scaffolding work) “determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessary or substantially unavoidable ...,” and domestic servants were not on that list (1910 N.Y. Laws 1945 § 215). Most of the states enacting statutes at the beginning of the decade

New Deal statutes enacted two decades later, virtually all of the jurisdictions excluding domestic workers excluded agricultural laborers as well.⁶ Significantly for our purposes, the “early adopters” – of WC generally and of the exclusions for domestic and farm workers in particular – were northern and western states, and the holdouts, which did not enact WC until a decade or two later, were all from the deep South.⁷

The high uniform exclusion of the familiar occupational cohorts from the emerging body of WC law could not plausibly have been a product of constitutional caution (since these developments took place at the state level, where concerns about the reach of the federal commerce power would not have come into play) or of a triumph of Southern economic and racial policies (since the practices in question originated in northern and western states and spread to the South). Rather, the state-level exclusionary practices seem far more likely to have been driven by the contemporaneous understanding of the problems the WC statutes were designed to address – i.e., the dramatically increasing incidence of death and injury flowing from industrial accidents and the barriers to recovery for same posed by late nineteenth-century tort law (such as the negligence standard and the fellow-servant rule) (Witt, 2004). The factory – rather than the home or the farm – was thus the original focus of the remedial efforts, and it is not a surprise that classes of workers not exposed to the hazards of industrial production found themselves on the outside of reformist efforts.

Yet the WC developments also suggest that it is a mistake to treat the forces driving the respective exclusions for domestic servants and agricultural workers as historically linked in every respect. On the agriculture side, for example, there is

took a similar approach, excluding domestics by negative implication (Appendix I). In 1913, New York amended its statute and “flipped the default,” broadly defining *prima facie* WC coverage and providing specific exclusions, domestic servants among them (1913 N.Y. Laws 2277). The overwhelming majority of states that adopted WC laws after 1913 adopted this latter approach (Appendix I).

⁶ Except in the cases of Vermont and Delaware – where the WC statutes contained express exclusions for domestic servants but no exclusion for agricultural workers – every other state treated agricultural workers in the same manner as domestic servants, excluding both cohorts (either expressly or by negative implication) or including both (Appendix I, note 2).

⁷ See Appendix I and note 3, *supra*; see also Witt 2004, p. 18 (“southern states tended to be laggards in the development of work-accident law reform, following paths charted by northern states”).

evidence of organized opposition by farm interests to the inclusion of their workers in state WC schemes (Fishback, Kantor, 2000, 108), while there is no evidence of a similar effort among the employers of domestic servants. At the same time, John Fabian Witt's magnificent study of the history of WC reveals the deeply patriarchal nature of the ideological lenses through which late nineteenth- and early twentieth-century lawmakers viewed the problem of industrial accidents and may thus suggest an independent basis for the treatment of domestic servants. As Witt observes, "[t]he central preoccupation of those who sought to address the industrial-accident crisis was injury to the male wage earner with a dependent wife and children[,] and "this model of the family—the so-called family wage—played an influential role in the development of the American law of accidents" (Witt 2004, 19-20). The statutes in question were, after all, originally denominated "workmen's" or "workingmen's" compensation laws, and the "gender specificity [was] no coincidence" (Witt 2004, 20). To take but one telling example, under the express terms of the New York WC statute, which became a model in this respect and many others for a majority of the "early adopters" of WC, recovery for the death of a worker was available for a dependent "widow or next of kin," and – as interpreted by the courts – "widowers were neither next of kin nor widows" and thus not entitled to statutory compensation for the death of a working wife (pp. 132-33). The erasure of working *women* that otherwise characterizes so much of this body of law would go a long way to explain why women's *work* would likewise find itself on the cutting room floor, and make no mistake about the gendered nature of contemporaneous domestic service, since the workforce in question was overwhelmingly female and the work was by some distance the most common source of paid employment for American women.⁸

There is neither the time nor the space here to undertake anything like a complete history of these developments and their implications for what I have referred to as the standard account of the domestic servant and agricultural

⁸ According to the 1930 US Census figures, women comprised 82% of those classified as "servants," including both "cooks" and "other servants," employed in domestic rather than institutional settings (such as hotels and boarding houses). United States Department of Commerce 1930, tab. 49 (reporting that women comprised 371,095 out of 565,392 total cooks and 1,263,864 out of 1,433,741 total other servants). Moreover, nearly 30% of "gainful[ly]" employed women worked in "domestic and personal service," half again as many as those who worked in either manufacturing or clerical jobs and twice as many as those who worked in professional positions, principally teachers and nurses. *Id.* at 55 tab. 48, 63 tab. 49.

worker exclusions, but two additional observations are in order. First, my focus on gender in the genesis of the exclusion for domestics should not be read to preclude the operation of a racial dimension as well. The racial politics of the New Deal are well documented, and, as noted earlier, together the domestic and farm labor exclusions covered nearly two-thirds of African-Americans in paid employment in the US, a devastating racial impact difficult to ascribe to mere oversight. While the “too much collateral damage” argument raised by some to challenge the racial domination narrative – i.e., the claim that race could not have been a factor since the majority of US workers adversely impacted by the domestic and farm labor exclusions were white (DeWitt, 2010) – may have some force in the context of agriculture (where over 70% of the workers were indeed native whites), the argument is less convincing in the context of domestics (where native whites made up just over a third of the workforce, nearly half were African-American, and most of the rest were foreign born).⁹

The case for a racial dimension in the development of WC is more difficult to make, since there were few African-Americans in the early adopting states before the first wave of northern migration coinciding with World War I (Witt, 2004). Yet the story offered thus far may well help to account for the “dog that did not bark” in the legislative history of the New Deal statutes. Thus, against the backdrop of a longstanding and widespread state-level practice of excluding domestic and farm labor from the protections of workplace regulation, adopting the same exclusions in the New Deal context might well have appeared to representatives from even the most progressive and otherwise worker friendly northern states to be unremarkable and merely business as usual.¹⁰ It would not

⁹ Among domestic servants in 1930, 555,761 (36%) were native white; 264,167 (17%) were foreign-born white; 714,630 (46%) were African-American; and 27,224 (2%) were “other,” a classification that included “Mexicans, Indians, Chinese, Japanese, Filipinos, Hindus, Koreans, Hawaiians, etc.” United States Department of Commerce 1930, 85 tab. 3 (combined figures under “Domestic and personal service—Servants” for “Cooks” and “Other servants” apart from those working in “Hotels, restaurants, boarding houses, etc.”). For the corresponding figures in agriculture, see *id.* at 75 tab. 2.

¹⁰ Buttressing this inference is the fact that a similar developmental pattern is evident among the states that took the lead in enacting unemployment insurance statutes and did so before the scheme was “federalized” by the passage of the Social Security Act of 1935. Following the approach taken by Wisconsin, which passed the nation’s first unemployment insurance act in 1931, a majority of those states likewise adopted express domestic servant and agricultural worker exclusions, and once again the exclusionary pattern had its genesis in

have been the first time, nor was it to be the last, that a failure to “remember the ladies” would be business as usual for American lawmakers.

2.2. Confidential secretaries, in-home care work, and the gender connection

For a half decade between law school and law teaching, I worked as an appellate lawyer for the National Labor Relations Board, and most of my cases involved efforts by the agency to secure reinstatement and backpay for employees fired for union organizing and (in the language of the National Labor Relations Act) “other concerted activities for the purpose of . . . mutual aid or protection.”¹¹ In what eventually became my “career” case – in the sense that it was with me from my first day on the job until the day I departed, as well as in the sense that I have been writing about the case ever since I joined the academy – the general manager of an electric power company in rural Indiana fired his long-time personal secretary because she had signed a petition protesting the dismissal of a fellow employee who suffered the loss of an arm as a result an on-the-job injury.¹² There was no serious question that the signing of the petition by the secretary and most of the firm’s other employees was “concerted activity for the purpose of . . . mutual aid or protection” nor that the manager had fired her because of her role in the protest; indeed, her signature was prominently displayed John Hancock-style among the names immediately following the text of the petition, and her boss abruptly dismissed her the first opportunity he had after receiving the offending document. But a complication lay in the firm’s claim that she was a “confidential employee” outside the scope of statutory protection because of her service as personal secretary to the firm’s general manager.

The details of the treatment of confidential employees under the Labor Act need not detain us; in a nutshell, employees who provide confidential assistance to management officials in the exercise of labor relations responsibilities are deemed ineligible for inclusion in a bargaining unit of other employees and are arguably excluded altogether from the Act’s protection. Ordinarily, the personal secretary to a firm’s general manager would easily fit that definition, but the

northern and western states. (Appendix II: Unemployment Insurance Statutes Enacted before Enactment of Social Security Act of 1935 (8/14/35), *infra*).

¹¹ 29 U.S.C. § 157.

¹² *NLRB v. Hendricks County REMC*, 454 U.S. 170 (1981).

record in the case revealed that the manager in question had handled the firm's labor relations matters with the assistance of outside counsel and did not share the correspondence, working documents, and the like with his secretary, keeping the pertinent materials in a locked file behind his desk. As the Labor Board and the reviewing courts noted, this was an unusual arrangement, but the small-town rural context as well as the fierce sense of solidarity among the firm's employees evident in the offending petition may well have prompted the manager to avoid sharing the firm's labor relations plans and strategies with an employee who was otherwise by all accounts a most capable and efficient personal assistant.

Three months out of law school, the case seemed like a slam-dunk to me, for the facts were not seriously in dispute, and the equities strongly favored an employee heartlessly fired for taking a courageous but respectful stand to defend a disabled colleague. The firm's only plausible argument was that employees with access to confidential information of *any* kind – not just confidential labor matters – should be treated as “confidential employees,” and there was dictum in a then-recent Supreme Court opinion supporting that view. Yet such an expansion would have upended four decades of labor law and abruptly denied collective bargaining rights to all manner of professional and other white-collar workers – and to many blue- and pink-collar workers whose tasks made them privy to employer secrets – so the policy calculus seemed strongly in our favor as well. Nevertheless, the grown-ups at the agency were deeply concerned about our prospects, and when I pressed them to explain the source of their doubts, the best anyone could do was to proclaim that the personal secretary to a firm's general manager *just had to be* a confidential employee, and no amount of conscientious fact-finding and careful parsing of the applicable legal test could avoid what they saw as this basic and undeniable truth.

As was so often the case in those early days of practice, the grown-ups were right, for I managed to lose the case not once but twice in the federal court of appeals before the slimmest of Supreme Court majorities came to the rescue of the courageous secretary. The oral arguments at the appellate level were excruciating exercises, with judge after judge pressing various versions of the point that the general manager's personal secretary just had to be a confidential employee and dismissing my best efforts to demonstrate that, on *this* record, *this* manager had carefully kept *this* secretary out of *this* loop when it came to labor matters. I am slow but not stupid and thus began to sense that something more was going on here, and the big reveal came at the moment a kindly senior judge

on one of the panels interrupted my presentation to ask, "Counsel, don't you see that union rights are awfully hard to swallow when you're talking about someone's personal secretary? It would be like . . . like union rights for your *wife!*"

At the time, I had neither a personal secretary nor a wife, and, though I adored and greatly admired my father, it occurred to me that there was no person on earth who might benefit more from union representation than my mother, who raised six children and ran a household without a net or, for that matter, a domestic servant. Why then, I wanted to ask, were legal rights for either wives or personal secretaries so unthinkable? Yet I had been permitted a glimpse of what I came eventually to think of as the hidden topography of American labor law – the values and assumptions, in James Atleson's elegant phrasing, that run so deep in legal decision making they scarcely need explaining let alone defending (Atleson, 1983). And what were the values and assumptions I had encountered among my senior colleagues at the NLRB and so many of the federal judges who heard the secretary's case? Simply this: that the power and prerogatives of the beneficiary of intimate services were of greater moment than the needs and interests of the provider, and that the loyal provision of such services was incompatible with the notion of countervailing rights or the law's intrusion. It is no coincidence that the work in question was *women's* work, and if the confidential secretary was the proxy wife in the workplace, then the domestic servant is very much the proxy wife in the home. Once you understand that, the rest of the way US law has traditionally treated in-home care work begins to make sense.

3. *The emerging law of in-home care work: Three initiatives*

In the 1960s and early 1970s, there was a second wave of workplace legislation, including the key antidiscrimination laws associated with the Civil Rights era (Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967) as well as "minimum standards" regulation such as the Occupational Health and Safety Act of 1970 (OHSA). Yet domestic servants once again found themselves on the outside of reformist efforts, expressly excluded from OSHA coverage and gaining little traction on the antidiscrimination front, since the statutes in question establish jurisdictional thresholds (e.g., Title VII governs employers with 15 or more employees) the staff at Downton Abbey might

satisfy, but that leave most workers in domestic service without federal coverage.

The first sign of hope came in the mid-1970s by way of an important change to the coverage of the Fair Labor Standards Act – more about that in a moment – and the past two decades have seen the emergence of three ambitious initiatives that have had varying degrees of success and geographical dispersion: the extension of federal and state wage-and-hour protection to workers who provide companionship and/or live-in care for the elderly, the infirm, and the disabled; the state-by-state enactment of a “Bill of Rights for Domestic Workers” designed to protect the interests of care workers providing a wide variety of in-home services; and the designation of in-home care workers whose compensation is provided by public funding as “employees” of the state – or of a state-created institutional proxy – for purposes of collective bargaining over wages and other salient issues. The sections that follow offer a closer look at each of these initiatives.

3.1. *Wage and hour law: The companionship and live-in exemptions for elder and other in-home care work*

Since the New Deal, US wage and hour law has been governed in the first instance by the Fair Labor Standards Act (FLSA), which establishes a federally mandated minimum hourly wage as well as a mandatory time-and-a-half overtime premium for work in excess of 40 hours per week. Individual states may and frequently do establish higher minimums and overtime premiums for employers operating within their borders and also with some frequency extend state coverage to workers excluded from the protection of the federal statute.¹³

As mentioned earlier, domestic servants were by terms excluded from the original text of the FLSA, but in 1974 Congress amended the statute to end that exclusion and cover a wide swath of workers providing cooking, cleaning, child care, and other household services. Statutory exemption was continued, however,

¹³ The current federal minimum wage – established in 2009 – is \$7.25/hour, but 29 states as well as the District of Columbia have established higher minima, the highest of which are the District (at \$10.50) and the states of California and Massachusetts (at \$10.00). See United States Dep’t of Labor, Wage & Hour Division, *Minimum Wage Laws in the States – Consolidated State Minimum Wage Update Table* (Effective Date: 1 January 2016), available at <http://www.dol.gov/whd/minwage/america.htm>. [Accessed 24 January 2016.]

for “live-in” domestic servants as well as providers of “companionship” services for the elderly, the infirm, and the disabled. In the language of the sponsors of the 1974 legislation, the latter exemption was designed for those who would keep their charges company and ensure their basic safety and well-being even if those services included “incidental” personal care and household work, such as preparing an occasional meal or light washing and cleaning. To police the line between exempt companions and the larger class of newly covered domestic workers, the Department of Labor early on established a rule that eliminated the companionship exemption for those whose performance of such “incidental services” exceeded 20% of the weekly hours worked.¹⁴

In a world in which most such care was provided by family – which is to say by wives, daughters, and daughters-in-law – the companionship exemption no doubt seemed like a sensible effort to avoid “making a federal case” out of relatively minor gap-filling services offered by neighbors, fellow parishioners, and the occasional “sitter.” But a series of developments during the final decades of the twentieth century conspired to transform the nature and institutional dimensions of elder and other in-home care in the US, including:

- an aging population;
- the increasing “medicalization” of elder care (from blood-pressure monitoring to medication management to other paramedical tasks);
- the decline in institutionalized forms of elder and other care in favor of in-home services;
- the decline of the family wage and the entry into the labor market of large numbers of women who had previously provided elder and other care in their so-called “spare time”;
- the expansion of Medicaid funding for long-term home care services;
- and (prompted in no small part by the availability of public funding) the dramatic rise of third-party home care agencies, which today employ nearly three-quarters of those providing elder and other care services in the recipients’ homes.

(Boris, Klein, 2015; Duffy, Armenia, Stacey, 2015.) Indeed, in-home health care is the fastest growing occupational cohort in the US (Duffy, 2015).

Responding to these and related developments, 19 states and the District of

¹⁴ The history of this legislation is set forth in *Home Care Association v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015).

Columbia (D.C.) have adopted various forms of wage-and-hour coverage for companionship and live-in service providers. For example, with minor variations, California, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, North Dakota, Ohio, Washington, and D.C. extend minimum wage protections to persons otherwise subject to the FLSA companionship exemption. All but North Dakota and Ohio likewise extend overtime protections to such workers, and all but Nevada and Washington eliminate the live-in exemption. Again with minor variations, Colorado, Hawaii, Illinois, Michigan, Montana, Nebraska, Pennsylvania, and Wisconsin likewise provide wage-and-hour protection to FLSA companions – and, except in Michigan, extend such protection to live-in workers as well – but they limit coverage to those hired by third-party agencies and retain the FLSA exemption for those companions hired directly by families.¹⁵

On the federal side, on January 1, 2016, the Department of Labor under President Obama implemented regulations making important changes in the interpretation and enforcement of the companionship and live-in exemptions:

- First, the regulations sharply narrow the definition of “companionship services” to “fellowship” and “protection,” which include activities such as playing cards, visiting with friends and neighbors, and taking walks, but do not include personal care services (such as bathing and feeding), minor medical care, or general household services (meal preparation, cleaning, and so on). Accordingly, if the latter efforts constitute 20% or more of the individual’s weekly work, the companionship exemption does not apply.
- Second – and following the lead of a number of the aforementioned states – the regulations limit both the companionship and live-in exemptions to those engaged directly by the care beneficiary or her family and deny it to home care workers employed by third-party agencies.¹⁶

¹⁵ Paywizard.org, (2016). *Minimum Wage Provisions Home Care Aides – Federal and per State*. [online] Available at: <http://www.paywizard.org/main/salary/minimum-wage/home-care-aides>; id., *Overtime Pay Provisions Home Care Aides – Federal and per State*. [online] Available at: <http://www.paywizard.org/main/salary/labor-law/overtime-pay/home-care-aides>

¹⁶ <http://www.dol.gov/wbd/homecare/faq.htm>.

Once again, the FLSA establishes the wage-and-hour “floor” beneath which states may not go, and accordingly these new regulations can be expected to have a sweeping effect on the 31 states that have not adopted legislation protecting companionship and live-in service providers.¹⁷

Turning to the question of enforcement, on the federal side there are public and private avenues for relief against employers who violate minimum wage and overtime provisions. The Wage and Hour Division of the US Department of Labor has the authority to investigate violations – either on its own initiative or in response to a complaint – and to secure a range of remedies from the restoration of unpaid wages to civil and criminal penalties.¹⁸ For willful and repeat offenders, civil fines of up to \$1,100 may be imposed for each violation; criminal prosecution may result in fines of up to \$10,000 and, for a second conviction, imprisonment.¹⁹

Private rights vindication is also available in the form of individual lawsuits as well as “collective actions” under by the FLSA. The statute also authorizes recovery of unpaid wages as well as liquidated damages calculated at twice that amount plus reasonable attorneys’ fees, but punitive damages are unavailable. Because the potential recovery for an individual low-wage worker is ordinarily too meager to make litigation viable, the statute authorizes “collective actions” that enable multiple claimants to aggregate their claims against an employer. These actions differ from the traditional class action in at least one significant respect: a class-action plaintiff’s representation of similarly situated claimants is presumed unless and until they “opt out” of the proceeding, but, in order to benefit from an FLSA collective action, an individual claimant must affirmatively “opt in” by filing a consent-to-join forms with the court. (Ruan, 2012.)

Employers none too happy with “whistleblowers” – employees who initiate or participate in proceedings alleging wage and hour violations – are nonetheless prohibited from discharging or engaging in any other retaliation against them. A variety of remedies are available when they do, including lost wages as well as compensatory damages, equitable relief such as reinstatement, and reasonable

¹⁷ As this essay was going to press, an effort by third-party agency representatives to enjoin enforcement of these new regulations was rejected in a carefully reasoned opinion issued by a unanimous three-judge panel of the Court of Appeals for the D.C. Circuit. *Home Care Association v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015).

¹⁸ <http://www.dol.gov/whd/regs/compliance/whdfs44.htm>. [Accessed 24 January 2016.]

¹⁹ <http://www.dol.gov/whd/regs/compliance/mwposter.htm>. [Accessed 24 January 2016.]

attorneys fees.²⁰ Although the question is not settled, there is also authority for an award of punitive damages in FLSA retaliation cases.²¹

At the state level, the specifics vary but most jurisdictions provide public as well as private enforcement options that at least in broad outline track the federal model. The most notable recent development on this front is the enactment of “wage theft prevention acts” by well over a dozen states and D.C., virtually all of which require employers to provide detailed and accurate pay rate information to employees upon hire and over the course of their employment, with the dual purpose of incentivizing employer compliance through transparency and at the same time easing the evidentiary burden on employees who pursue claims. Other common provisions include substantially increased penalties for wage and hour violations, enhanced protections against whistleblower retaliation, and augmented judicial powers (such as the freezing of assets) for securing compliance with remedial orders. (Boris, Jokela, Undén, 2015; Dasse, 2014; Weisbard, Leonard, 2015.)

3.2. The “Bill of Rights for Domestic Workers” movement

The current decade has seen the enactment of a “Bill of Rights for Domestic Workers” (BOR) in a half dozen states. The movement began with New York in 2010,²² and it subsequently spread to Hawaii,²³ California,²⁴ Massachusetts,²⁵ Connecticut,²⁶ and Oregon;²⁷ as this went to press, a bill was under consideration

²⁰ 29 U.S.C. § 216(b).

²¹ See, e.g., *Shea v. Galaxie Lumber*, 152 F.3d 729 (7th Cir. 1998).

²² New York Domestic Workers Law 2010, 13A N.Y. Prac., Employment Law in New York § 7:263 (2d ed.) (2015).

²³ Act 248, 2013 Session, §§ 1-2, amending Hawai'i Revised Statutes §§ 378-1 and 378-2, available at http://www.capitol.hawaii.gov/session2013/bills/GM1351_.PDF. [Accessed 24 January 2016.]

²⁴ Cal. Lab. Code § 1450 et seq. (2014).

²⁵ Massachusetts General Laws 149 §§ 190, 191 et seq. (2015).

²⁶ An Act Concerning Service and the Commission on Human Rights and Opportunities, 2015 Conn. Legis. Serv. P.A. 15-249 (S.B. 446) (WEST).

²⁷ Employment Protections for Domestic Workers, Oregon Statutes, Ch. 457, § 1 (2015).

in a seventh jurisdiction as well.²⁸ Who counts as a legally protected “domestic worker” varies by state. Oregon’s law, for example, covers nannies, house cleaners, and housekeepers in private homes but excludes home care workers, who have collective bargaining rights as discussed in the next section of the essay. Connecticut’s law, by contrast, covers home care workers as well as other domestics, but its reach is limited to households with three or more employees.

The specific “rights” at issue likewise vary. Apart from Connecticut, each of the states extends to domestic workers the protections of minimum wage and overtime law. On the wage and hour front, Hawaii adds the right to be paid at least twice a month, and Massachusetts adds a guarantee of two weeks’ severance pay in the event of termination without cause.

With the exception of California, each of the states provides protection against sexual, racial, and other forms of harassment. Connecticut and Oregon add protections against discrimination in hiring and firing, and Connecticut’s law further provides a right to a reasonable leave of absence for a disability resulting from a pregnancy. Hawaii’s original bill contained hiring discrimination provisions as well, but – in what has become a familiar pattern in the US when antidiscrimination efforts meet claims of religious freedom – the provisions were reportedly scrapped after “religious groups in the state ... expressed concern that employers would not be allowed to fire people who work in their home but espouse different religious views or attempt to indoctrinate children with their religious views” (Bapat, 2013).

Other rights include a weekly “day of rest” (Hawaii, Massachusetts, New York, and Oregon); the right to daily sleep, rest, and meal breaks (Massachusetts and Oregon); a right to cook personal meals on the employer’s premises (Oregon); and a right to privacy in connection with such personal activities as making phone calls (Massachusetts).

In terms of enforcement, the principal effect of these statutes was to eliminate the exclusion of domestic workers from existing wage and hour and antidiscrimination laws, and thus domestic workers now have recourse to the same mix of public and private remedial options enjoyed by employees in other occupations. Hawaii offers a unique enforcement innovation through its Office of

²⁸ Illinois Domestic Worker Bill of Rights 2013 (SB 1708), available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1708&GAID=12&DocTypeID=SB&SessionID=85&GA=98>. [Accessed 24 January 2016.]

Community Services (OCS), established specifically for the purpose of assisting “low-income, immigrant, and refugee populations to overcome and alleviate workforce barriers to economic self-sufficiency through an array of community-based programs and services.”²⁹ The OCS has contracted with non-profit immigrant resource centers in four locations throughout the state to provide a variety of services to the target populations, including assistance to domestic workers in learning about the rights afforded them by the Hawaii BOR and in availing themselves of its protection.³⁰

3.3. *Bargaining in the shadow of the state*

3.3.1. *Collective representation for home care workers*

Since the late 1990s, home care workers – who provide in-home services to the elderly, the disabled, and the infirm through Medicaid funded state-run programs – have secured the right to bargain collectively with public authorities in ten states: California,³¹ Connecticut,³² Illinois,³³ Maryland,³⁴ Massachusetts,³⁵ Minnesota,³⁶ Missouri,³⁷ Oregon,³⁸ Vermont,³⁹ and Washington.⁴⁰ Home care workers initially secured bargaining rights in several additional states but subsequently lost those rights as a result of political developments discussed in Part III of the essay. Yet this is a growing and sizeable workforce, and the unionized cohort has been estimated at over 440,000 workers (Rhee, Zabin, 2009).

²⁹ <http://labor.hawaii.gov/ocs/>.

³⁰ <http://labor.hawaii.gov/domestic-workers-rights/>.

³¹ Cal. Welf. & Inst. Code § 12301.6 (1999).

³² Conn. Gen Stats. §§ 17b-706 (2012).

³³ Ill. Compiled Stats. § 2405/3 (2003).

³⁴ Md. Code, Health—General §§ 15-901 to 15-907 (2011).

³⁵ Mass. Gen. Laws 118E §§ 70-75 (2006).

³⁶ Minn. Stats. § 179A.54 (2013).

³⁷ Missouri Rev'd Stats. §§ 208.850-208.871 (2008).

³⁸ Ore. Rev'd Statutes §§ 410.595-410.625 (2001).

³⁹ 21 Vt. Stats. §§ 1631-1644 (2013).

⁴⁰ Wash. Rev'd Code § 74.39A.270 (2004).

Early efforts to organize for purposes of bargaining with state program administrators over wages and other benefits foundered on the objection that home care workers were “really” the employees of the individual care recipients and their families rather than of the state. (As it happens, that argument has recently captured the fancy of a majority of US Supreme Court Justices, and more on that too in Part III.) In the 1990s, the Service Employees International Union (SEIU) – collaborating with disability, consumer, and senior citizen organizations – secured passage of legislation in California requiring the establishment of county-level public authorities that would serve as “employers of record” for home care workers providing services through California’s In-Home Support Services program. (Boris, Klein, 2015.) Thus originated the idea of creating an “employer” via state law that could engage in collective bargaining with a labor organization representing individual providers, and versions of this model have been successfully employed to enable collective bargaining by home care workers in each of the states listed above. What follows is a description of the mechanics of the model as well as the results of a decade and a half of collective bargaining in the shadow of the state.

- *The path to bargaining rights:* Bargaining rights for home care workers were in each case the product of efforts by a union-led political coalition that frequently included organizations representing care beneficiaries and consumer groups, but the particular means used to secure the requisite legal authority differed by jurisdiction. In Oregon, Washington, and Missouri, the rights were established via public referendum. In Illinois, Maryland, and Connecticut, bargaining rights were initially secured by an executive order issued by the state’s governor, and in each case the rights were subsequently codified by statute. In the remaining states, bargaining rights were secured in the first instance through the legislature.
- *The employer-side bargaining representative:* Bargaining in California continues to operate on a county-by-county basis, but every other jurisdiction has established or designated a state-wide bargaining entity. In some states, the entity is a commission created entirely for this purpose (e.g., the “Home Care Commission” in Oregon and the “Personal Care Attendant Quality Home Care Workforce Council” in Massachusetts); in other states, the union representing home care workers bargains directly with representatives of an existing state

office (such as the governor in Washington and the departmental program administrators in Maryland).

- *The employee-side bargaining representative*: Following the approach used in the US for both private and public sector collective bargaining, elections are authorized in each state to determine whether a majority of the home care workers desires union representation. In California, the elections were conducted at the county level, and various SEIU, AFSCME, and other union locals have won representative status in 55 of the state's 58 counties. The other states required state-wide elections, resulting in representative status for the SEIU in Connecticut, Illinois, Massachusetts, Minnesota, Oregon, and Washington; for AFSCME in Maryland and Vermont; and for a joint SEIU/AFSCME local in Missouri.

The gains established in collective bargaining likewise vary by state, but a number of discernible patterns have emerged. First and foremost, the contracts in all ten jurisdictions establish wage rates that substantially exceed existing minimum-wage levels. In the State of Washington, for example, under the current collective contract, wages range from \$11.50/hour at the entry-level to \$15.65 for workers with substantial experience and training.⁴¹ Oregon has a starting wage of \$13.75;⁴² and Massachusetts recently agreed to a \$15/hour starting wage effective in 2018.⁴³ Other benefits frequently contracted for are health insurance, including dental and vision;⁴⁴ workers compensation coverage;⁴⁵ on-the-job health and safety protection (such as state-provided masks, exam gloves, and hand sanitizer);⁴⁶ transportation benefits (including passes for public transportation and

⁴¹ Collective Bargaining Agreement: The State of Washington and Service Employees International Union Healthcare 775NW, Effective July 1, 2015, Through June 30, 2017 (*Washington Agreement*) at A-2, available at http://ofm.wa.gov/labor/agreements/15-17/nse_homecare.pdf.

⁴² 2013-2015 Collective Bargaining Agreement Between Home Care Commission and Service Employees International Union, Local 503, OPEU (*Oregon Agreement*) at 19-20, available at http://www.oregon.gov/DAS/CHRO/docs/lr/13_15_SEIU-HCC_final.pdf.

⁴³ See <http://www.mass.gov/eobhs/gov/newsroom/press-releases/eobhs/baker-administration-negotiates-new-contract-pca.html>.

⁴⁴ See, e.g., *Oregon Agreement*, 18; *Washington Agreement*, 13-14.

⁴⁵ See, e.g., *Washington Agreement*, 16.

⁴⁶ See, e.g., *Oregon Agreement*, 29-30.

personal vehicle mileage allowances);⁴⁷ and paid time off.⁴⁸

Two additional features are worthy of particular note and may help account for the frequent support for home health care worker bargaining rights among advocacy organizations representing various cohorts of care beneficiaries. Thus, common to virtually all of the agreements are provisions that establish training support for home care workers, ranging from free-of-charge instruction in first aid, CPR, safe-lifting, and nutrition; to reimbursement for tuition and books in connection with job-relevant college coursework; to mandatory continuing education programs for participation in which workers are paid at their contract compensation rates.⁴⁹ Home care workers obviously benefit from the resulting opportunity to develop and improve their skills, and care recipients benefit from the promise of trained caregiving.

Several of the contracts also establish referral registries to assist home care workers in finding placements and care beneficiaries in finding suitable caregivers. The details vary, but the picture that emerges falls somewhere between a traditional union hiring hall and Angie's List. The Oregon registry, for example, operates as an on-line data-base that can be freely accessed by "customers," the term typically used in these agreements for persons eligible for in-home care in connection with a Medicaid-funded, state-run program. On the supply side, a would-be caregiver is permitted to post her name, contact information, and service profile on the registry so long as she has passed a criminal background check and complied with certain orientation, training, and continuing education requirements; profiles may be removed for misconduct, poor performance, or a violation of pertinent regulations by the caregiver. A "customer" seeking a referral simply enters the desired search criteria, and the registry generates a randomized list of matching referrals.⁵⁰ Washington operates a registry with similar listing eligibility and removal features, but a "customer" search generates a referral based on seniority or, if the customer identifies special needs or preferences (e.g., facility with a particular language), referral of the most senior provider who meets

⁴⁷ See, e.g., *Oregon Agreement*, 24-25; *Washington Agreement*, 13.

⁴⁸ See, e.g., *Oregon Agreement*, 25-27; *Washington Agreement*, 16.

⁴⁹ See, e.g., *Oregon Agreement*, 31-33; *Washington Agreement*, 21-25.

⁵⁰ See *Oregon Agreement*, 13-16.

those needs and preferences.⁵¹ For the home health care worker, then, the registry offers a potentially valuable source of work; and, for the “customer,” the registry provides reliable source of trained and qualified care-givers.

Two final features of the collective bargaining agreements, each of them common in US labor relations, need mention as well. First, the agreements invariably provide grievance procedures that permit the resolution of pay, referral, and other disputes via a series of steps of increasing formality and culminating in arbitration, appeal to a state employment relations tribunal, or some other final dispute resolution mechanism.⁵² Second, the agreements provide a funding mechanism for the union’s representation activities. Historically, such provisions have required payment of a “fair share” fee to the union via automatic payroll deduction as a condition of continued employment.⁵³ The legal enforceability of “fair share” agreements has, however, been called into question by the Supreme Court’s 2014 decision in *Harris v. Quinn*, which will be discussed in Part III of the essay, and many bargaining agreements negotiated since that decision have made payments to the union voluntary.⁵⁴

3.3.2. *Transplanting the model: Organizing family child care workers*

Using the “state as employer” model, bargaining rights have likewise been established for a second occupational cohort over the course of the past decade: family child care workers who serve in state and federally funded programs providing in-home “day care” services for children. Connecticut,⁵⁵ Illinois,⁵⁶ Maryland,⁵⁷ Massachusetts,⁵⁸ Minnesota,⁵⁹ New Jersey,⁶⁰ New Mexico,⁶¹ New

⁵¹ See *Washington Agreement*, 18-20.

⁵² See, e.g., *Oregon Agreement*, 16-17; *Washington Agreement*, 10-12.

⁵³ See, e.g., *Oregon Agreement*, at 5, 8.

⁵⁴ See, e.g., *Washington Agreement*, at 6-7.

⁵⁵ Conn. Gen Stat. Ann § 17b-705a (West 2013).

⁵⁶ 5 I.L.C.S. 315/7 (2014).

⁵⁷ MD Code, Family Law, § 5-595.3 (2010).

⁵⁸ Mass. Gen. Laws. Ann. ch. 15D § 17 (West 2012).

⁵⁹ Minn. Stat. Ann. § 179A.52 (West 2013).

⁶⁰ N.J. Stat. Ann. § 30:5B-22.2(a) (West 2010).

⁶¹ N.M.S.A.1978, § 50-4-33 (2009).

York,⁶² Oregon,⁶³ Rhode Island,⁶⁴ Vermont,⁶⁵ and Washington⁶⁶ have all taken this step, and over 200,000 of these workers are represented by unions (Rhee, Zabin, 2009). Again as in the case of home care workers, bargaining rights for family child care workers were initially established in several other states and have since been withdrawn, a development to which I will return in Part III.

For present purposes, a detailed picture of the history and contours of collective bargaining in family child care would be needlessly duplicative of the home care work story, so I will focus here on a handful of key differences between the two contexts. First, the individuals in this cohort work in their own homes – or in the homes of other providers – rather than in the homes of the families whose children they supervise. Moreover, they typically think of themselves as self-employed, rather than as employed by others, and frequently hire workers of their own. They are often former child care professionals who have decided to go into business on their own because they desire more workplace autonomy and/or because they need or wish to continue gainful employment while staying at home with their own children. They pay dearly for that choice, subjecting themselves to a variety of state licensing requirements (e.g., re supervision ratios and fire prevention measures) and netting on average \$7.14/hour with no benefits, which is less than the federal minimum wage of \$7.25/hour and considerably less than what they would make if they worked at a child-care center. Indeed, in states and localities with a higher minimum wage, they may earn substantially less per hour than their own employees. (Armenia, 2015.)

As with home care, collective bargaining has brought substantial gains to such workers. To offer a few illustrations, in Illinois, the initial contract authorized an immediate 10% increase in pay rates and an additional 28-to-34.5% increase over the ensuing 39 months. Family child care workers in Oregon secured an 18% rate increase as well as expanded state subsidies for child care, thus increasing the demand for their services. In Washington, the state child care subsidy was

⁶² McKinney's Labor Law § 695-b (2010).

⁶³ O.R.S. § 329A.430 (2007).

⁶⁴ R.I. Gen. Laws § 40-6.6 (West 2013).

⁶⁵ 33 V.S.A. § 3602 (2014).

⁶⁶ West's R.C.W.A. 41.56.028 (2007).

increased by \$45.5 million, and workers additionally secured \$750,000 in job training subsidies. (Rhee, Zabin, 2009.) The current Connecticut agreement provides pay rate increases of 3-to-10% for each of the four years under contract and \$200,000 per year in professional development funds for training and job-relevant coursework; it also establishes a working group to explore the feasibility of offering subsidized health benefits to covered workers.⁶⁷

4. *Evaluating the initiatives*

4.1. *Invisible no more*

Given the exclusion of domestic workers from virtually the entire body of workplace regulation developed in the twentieth century, the initiatives just described are nothing short of extraordinary. The successes in securing wage and hour, antidiscrimination, and other protections via legislative and regulatory reform are particularly impressive, given the limited political power of low-wage working women, most of them of color and/or of extra-national origin. The collective-bargaining successes are likewise remarkable, given these demographic vulnerabilities as well as the challenge of organizing and representing a workforce without a common workplace. The material gains on both fronts – including sizeable pay increases and a profusion of benefits – have been considerable.

Moreover, each of the collective-bargaining successes was enabled by an earlier victory either in the state legislature, in the governor's office, or through a popular referendum authorizing the establishment of a bargaining relationship in the first place. Taking the wage and hour, Bill of Rights, and collective bargaining initiatives together, we are talking about political victories in 26 states – and, in nearly half of those, of victories on multiple fronts. In an era of deep legislative gridlock at the federal level – and at a time when the US labor movement is supposed to be on the ropes – this is a truly impressive record of law reform achievement. To be sure, there is a familiar pattern to the dispersion of these

⁶⁷ Collective Bargaining Agreement Between Connecticut Office of Early Childhood and CSEA-SEIU Local 2001 (The Child Care Union), July 1, 2013 to June 30, 2017, Articles Twelve, Thirteen, and Fifteen. Available at <http://www.ctchildcare.org/files/2014/06/Child-Care-Contract.pdf>.

successes, for the 26 states are in the terminology of American political punditry overwhelmingly “blue” or “purple,” with only a handful of “red” states in the mix. Yet the recent successes of state minimum-wage initiatives in what are now reliably “red” states – Alaska, Arkansas, Nebraska, and South Dakota – suggest that the plight of the working poor may have more traction with the voting public than it does with their elected representatives or other US political elites.⁶⁸

4.2. *The considerable advantages of collective bargaining over statutory rights*

Yet the difference between what has thus far been accomplished via statute alone and what has been accomplished through collective bargaining is striking. Important as they are, the gains made by extending minimum wage and overtime protection to domestic workers are modest quite nearly to a fault. For example, an individual with two dependents working a forty-hour week at the federal minimum wage of \$7.25/hour will still make less than the federal poverty threshold for a year of work; indeed, even in the US jurisdiction with the highest minimum (D.C. at \$10.50), she would scarcely exceed that mark.⁶⁹ The antidiscrimination coverage available to domestic workers – in the half-dozen states that have enacted a Bill of Rights for Domestic Workers and thus provide them with any antidiscrimination coverage at all – is for the most part limited to protection from sexual, racial, and other forms of harassment. This laudable achievement addresses one of the most insidious forms of exploitation in the domestic work context, but in four of the six jurisdictions it regrettably does not include the protection against discrimination in hiring and firing available to the vast majority of other American workers. The additional gains secured by the Bill of Rights movement – a mandatory “day of rest”; a right to work breaks; a right to prepare and eat a meal over the course of the working day; and a right to make unmonitored personal calls – are so basic to the material needs and dignitary interests of working people that their denial, in the words of Supreme Court

⁶⁸ National Conference of State Legislatures, *2014 Minimum Wage Ballot Measures* (11/6/14), available at <http://www.ncsl.org/research/labor-and-employment/minimum-wage-ballot-measures.aspx>.

⁶⁹ U.S. Dep't of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *2015 Poverty Guidelines* (9/3/15), available at <https://aspe.hhs.gov/2015-poverty-guidelines#thresholds>.

Justice Hugo Black, would constitute working conditions “too bad to have to be tolerated in a humane and civilized society like ours.”⁷⁰

By contrast, the achievements from collective bargaining are far more substantial, typically including pay rates at half again to over twice the federal minimum wage, health and safety benefits, transportation allowances, paid days off, and substantial investments in job training. Moreover, in terms of *enforcing* those rights – that is to say, when we look at the law in action as opposed to what’s merely on the books – the bargaining model likewise offers considerable advantages over the statutory alternatives.

Consider the challenges that abound in securing compliance with wage and hour law for those previously excluded by the companionship and live-in exemptions. On the public enforcement side, federal and state agencies are woefully underfunded and understaffed, particularly in the wake of the 2007 Recession and resulting cuts in public sector spending. (Ruan, 2012; Rogers, 2011.) Even in the best of times, agencies will seldom proceed against any but the most flagrant and inveterate violators, and the likelihood of an enforcement proceeding against a particular third-party provider of home care services – let alone an individual or a family in states where the law applies to them – is vanishingly small.

As noted earlier, rights vindication via private lawsuit is available in the form of individual claims as well as “collective actions” authorized by the FLSA. To be sure, the statute authorizes recovery of unpaid wages as well as liquidated damages and reasonable attorneys’ fees. But given (1) the low wage rates ultimately at stake, (2) the unavailability of punitive damages, and (3) the access-to-justice challenges faced by most low-wage workers, individual suits are seldom economically viable. Collective actions are a more promising vehicle but depend on the presence of target employers large enough to make claim aggregation pay, and many home care workers are employed by small third-party firms or individuals and families. Even in the context of larger firms, there are significant procedural hurdles. For one thing, recent Supreme Court decisions have upheld employment contracts that require legal claims to be submitted to binding arbitration, as well as contract provisions banning class claims in the arbitral context. Moreover, the requirement that FLSA claimants “opt in” to collective

⁷⁰ *National Labor Relations Board v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

actions – and the resulting need to track down and persuade potential claimants to take this step – may substantially increase litigation costs as well as the incentives for resistance, since by opting in a claimant will make his active support for the lawsuit known to the employer and thus increase the high and very real risk of retaliation. (Ruan, 2012; Boris, Jokela, Undén, 2015.)

As a result of such impediments to enforcement, documented noncompliance with wage and hour law is so common in the US that it even has a name: “wage theft” (Rogers 2011). Indeed, survey data in New York suggests that a majority of domestic workers were not getting the overtime pay required by that state’s Bill of Rights fully two years after enactment (Lerner, 2012). Because the workplace of the domestic worker is a private home – rather than a factory or an office – the challenge of locating workers and informing them of their rights is a daunting one and frequently made more difficult by language and cultural barriers (Semple, 2011). Surveillance and spot-check techniques that are potentially viable in traditional workplace settings would predictably prompt vigorous political opposition and might raise privacy issues of a constitutional dimension in the home care setting.

Union representation, on the other hand, is perhaps the most effective means of overcoming the enforcement problems that plague the wage-and-hour and Bill of Rights approaches. Representation does not stop when the ink is dry on a collective agreement but instead continues through the contract term, providing workers with an institutional mechanism (a) for keeping them apprised of their rights; (b) for policing and correcting individual contract violations through both informal and formal grievance procedures; and (c) for identifying patterns of difficulty that can be raised in the next round of bargaining or via other collective action. In the care work context, the “registry” device may offer a promising approach to quick and low-key dispute resolution by offering the prospect of a new placement – rather than unemployment together with a long and costly lawsuit – when an existing care arrangement founders on the rocks of personality clashes or conflicting expectations.

The benefits that have attended collective bargaining for home care workers are typical of those available to employees in the US who are represented by unions, but unions – and successful unionization efforts – are increasingly rare in the contemporary US economy, so it’s fair to ask how the successes here were achieved by what might seem like a most unlikely cohort of workers. One answer is that low-wage service work has in general been the bright spot in the otherwise

fairly bleak story of the contemporary labor movement. The Justice for Janitors campaigns of the 1990s as well as more recent campaigns to organize hospitality workers, food and security service employees, poultry processing employees, car wash attendants, and home care workers have met with many surprising “against the odds” successes. An important reason for this is that such service work cannot, at least as yet, be shipped elsewhere – let alone overseas – and accordingly employers cannot deploy nor plausibly threaten to deploy what is ordinarily the most powerful weapon they have to resist unionization. Care work is likewise, again so far, relatively immune to the second best weapon in the employer union-resistance arsenal – i.e., mechanization. Finally, turning to the organizing strategies deployed in the campaigns described here, efforts to develop solidarities with the recipients of care – by focusing on the benefits to all concerned of such features as enhanced job training and worker-beneficiary matching mechanisms – have often if by no means invariably proven successful in removing what would otherwise be the most powerful source of potential opposition to bargaining rights for home care workers (Boris, Klein, 2015).

4.3. *Second thoughts*

4.3.1. *The promise of statutory rights*

That is where this project, as I had originally conceived it, would have ended: as further evidence, if further evidence were needed, of the superiority of collective bargaining and representation in comparison with enacting and enforcing statutory rights as a vehicle for improving the lives of a widely dispersed and particularly vulnerable cohort of low-wage workers. But in the process of immersing myself in this large and growing body of law and literature, I have come to a more nuanced view, at once more concerned about the prospects on the ground for collective bargaining and at the same time a bit more sanguine in my assessment of the benefits of statutory reform.

On the latter front, I begin with the observation that it is obviously far too early to tell what the wage-and-hour and Bill of Rights initiatives will accomplish, since the first Bill of Rights for Domestic Workers was enacted in 2010, and since, for most US home care workers, the expansion of wage-and-hour coverage came into effect on January 1, 2016. Moreover, though it is an all-too-common rookie error among legal scholars to ignore the enforcement dimension of law reform proposals and developments – in the familiar taunts of the playground bully who

is asked to desist, “Who’s going to make me?” and “You and whose army?” – there is a corresponding occupational hazard in blithely assuming that law has no effect unless and until the army shows up at the door. Thus, many individual and corporate employers of home care and other domestic workers may be expected to comply with the terms of these laws once they learn of them, and the public-education dimension of the campaigns to enact them may well have brought at least the existence of the new standards and perhaps the need for them as well to fairly widespread attention. Indeed, conformity may be greatest among the growing cohort of large third-party firms in the home care industry, since they frequently tout their law-compliance services as a major benefit to would-be consumers and simply pass along the costs. At the same time, individual states are experimenting with promising mechanisms to increase worker awareness of their rights and to better enable them to enforce them, from the Wage Theft Prevention Statutes already enacted in over a dozen states to Hawaii’s effort to provide such assistance to domestic servants via state-contracted non-profit immigration resource centers.

The struggles for enactment and enforcement of statutory rights can likewise achieve additional salutary ends in the larger effort – now the subject of its own ILO convention – to make domestic service “decent work” (Blackett 2011). For one thing, worker centers and grass-roots advocacy organizations (most prominently, the National Domestic Workers’ Alliance) have been a source of robust community building among care workers as well as a powerful engine for law reform and enforcement (Boris, Jokela, Undén, 2015; Boris and Klein, 2015; Little, 2015). For another, contemporary unions have increasingly touted their capacity to secure enforcement of existing statutory rights as an organizing strategy among low-wage workers (Fischl, 2007). And for yet another, as demonstrated in the late Phyllis Palmer’s pathbreaking exploration of the role of the civil rights and women’s liberation movements in post-World War II efforts to gain Fair Labor Standards Act inclusion for domestic and agricultural workers, “the most important weapon of the weak is their struggle with the powerful over meaning and symbols” (Palmer, 1995, p. 417), and the contest over cultural meaning – of understanding caregiving as *work* and of viewing the claims to dignity and justice by care workers as every bit as worthy as the claims to dignity and justice by those for whom they care – has been energetically engaged in each of the law reform efforts described above.

Finally, it may well be that the greatest virtue of these rights-based initiatives is

their staying power; once in place, legally recognized rights seem to be difficult to revoke, a feature that distinguishes them from the collective bargaining initiatives, and more on that in a moment.

4.3.2. *The limits and perils of bargaining with the state*

Despite the remarkable gains achieved by collective bargaining for home care and family child care workers, the promise of this model *outside* those contexts may be limited, for most of the work provided by others in domestic service – from nannies and elder-care nurses to cooks and housekeepers – is privately funded. To be sure, the strategy of finding common cause with service beneficiaries on issues such as worker training and reliable placements might offer some possibilities for transplanting the “referral registry” mechanism to the private sector setting. An experiment in Oregon – which has recently opened its on-line home care referral registry to privately paying consumers – offers intriguing possibilities (Boris, Jokela and Undén, 2015), and the resulting transparency in the labor market for home care may well provide an avenue for “nudging” compliance with wage and hour and other workplace regulations. But unlike settings in which the state is paying the tab – thus substantially enhancing the prospect of workers and beneficiaries finding common ground on non-wage issues – the beneficiaries of privately funded domestic service are paying out of pocket, and the antagonism of interests with respect to the basic wage bargain may in the end crowd out points of potential mutual interest.

Even when it is available, collective bargaining “in the shadow of the state” has considerable vulnerabilities, as recent political developments have made all too clear. Except in the handful of states that adopted it via popular referendum, the model depends for its very existence on enabling legislation or executive order, and either can be amended or repealed by a subsequent less worker- and union-friendly legislature or governor. This is precisely what happened in Wisconsin in 2011, when a newly elected Republican governor and legislative majority eliminated pre-existing collective bargaining rights altogether for home health care as well as family child care workers as part of a now infamous package of anti-union initiatives (Fischl, 2011). It happened again last year in Ohio, when a Republican governor rescinded executive orders promulgated by his Democratic predecessor establishing collective bargaining rights for the home health care and family child care workers in that state (Pelzer, 2015). It has happened as well in Kansas, Maine, and Michigan, and there are ominous signs in Illinois, in each case

the result of a change in party control of the governor's office and/or the state legislature.⁷¹ This is, as we used to say, not a coincidence. It is of a piece with Republican efforts at the state level to eliminate public sector collective bargaining altogether, and to defund private sector unions via the enactment of "right to work" laws, and these state level efforts may well represent the greatest threat to collective bargaining in the US today. The relative immunity of referendum-based collective bargaining from such reversals of fortune – together with the recent success of minimum wage referenda revealing popular traction for the cause of low-wage workers in even the "reddest" of states – suggest that this may be an important vehicle for future efforts to secure decent work for care workers.

In the meantime, there is yet another threat to the collective bargaining model, this one coming from the federal judiciary. The Supreme Court's 2014 decision in *Harris v. Quinn*⁷² addressed a challenge to the "fair share" provision in a collective-bargaining agreement covering home care workers in Illinois, denominated "personal assistants" (PAs) in the pertinent state statute. In a nutshell, the Court concluded that individual PAs enjoy a First Amendment "freedom of association" right to refuse to pay for the benefits they receive from union representation. The Court distinguished an earlier decision – *Abood v. Detroit Board of Education*⁷³ – which had rejected such a challenge in a case involving public (i.e., government) employees, concluding that the PAs in *Harris* were actually the employees of the individual beneficiaries of state-funded care and only "partial" or "quasi" but not "full-fledged" public employees.⁷⁴ Subsequent developments suggest that *Abood* may not long be good law for even the fully fledged,⁷⁵ and, at least in the public sector, this augurs poorly for the

⁷¹ See Jackson, 2015 (Kansas – family child care workers); Pearson and Garcia, 2015 (Illinois – home health care and family child care workers); Maine. Rev. Stat. Ann. § 8308, repealed by Act of Apr. 17, 2012, ch. 641 LD 1894 (family child care workers); *Michigan Department of Human Services, Mott Community College Dissolve Agreement That Created Michigan Home Based Child Care Council* 2011.

⁷² 134 S. Ct. 2618.

⁷³ 431 U.S. 209 (1977).

⁷⁴ 134 S. Ct. at 2638.

⁷⁵ See *Friedrichs v. California Teachers Ass'n*, 2014 WL 10076847 (9th Cir. 2014), cert. granted 135 S.Ct. 2933 (June 30, 2015).

continued viability of the principal means US unions have long employed to fund their representation and bargaining activities.

The Court's assertion that the PAs were "really" the employees of the elderly, disabled, and infirm persons whom they serve through the State's home care rehabilitation program – the "customers," in the language of the pertinent statute – is worth a closer look, for it reveals judicial thinking still very much in the thrall of nineteenth-century understandings of the employment relation and thus brings us full circle to the legal history of domestic service with which the essay began. Thus, a majority of justices focused on the incidents of absolute authority over the PAs possessed by the customer, including the final say in deciding whether to engage a particular PA, whether and when to terminate the relationship, and how the services should proceed in the interim – in other words, the power to hire, fire, and direct the course of work.⁷⁶

Responding that the customers and the State were better understood as "joint employers" of the PAs, and the PAs thus full-fledged public employees under *Abood*, the dissent described at some length the robust role played by the State with respect to each of these incidents of employer power:

Illinois sets all the workforce-wide terms of employment. Most notably, the State determines and pays the employees' wages and benefits, including health insurance (while also withholding taxes). By regulation, Illinois establishes the job's basic qualifications: for example, the assistant must provide references or recommendations and have adequate experience and training for the services given. So too, the State describes the services any personal assistant may provide, and prescribes the terms of standard employment contracts entered into between personal assistants and customers. Illinois as well structures the individual relationship between the customer and his assistant ... Along with both the customer and his physician, a state-employed counselor develops a service plan laying out the assistant's specific job responsibilities, hours, and working conditions. That counselor also assists the customer in conducting a state-mandated annual performance review, based on state-established criteria, and mediates any resulting disagreements. . .

Before a customer may hire an assistant, the counselor must sign off on the employee's ability to follow the customer's directions and communicate with him. And although only a customer can actually fire an assistant, the State can effectively do so

⁷⁶ 134 S. Ct. at 2624-2625.

by ... withhold[ing] payment from an assistant (or altogether disqualify[ing] her from the program) based on credible allegations of customer abuse, neglect, or financial exploitation.⁷⁷

It is a not uncommon experience in reading US judicial opinions to find oneself tempted to conclude that the majority and the dissent are talking about two entirely different cases, but in *Harris* the differing perspectives reveal much about the majority's understanding of the employment relation. Consider the state-employed counselor, who in the dissent's recounting plays a significant role in hiring and assessing the qualifications of a PA, in the development of a "service plan" that specifies the responsibilities, hours, and working conditions of the PA, and in the mandatory annual evaluation of a PA's work. Yet the counselor's existence does not even merit *mention* in the majority opinion until the final sentence of the five-paragraph passage devoted to its description of the PA/customer relationship.⁷⁸ Instead, the customer seems to be alone at the wheel because of the right to have a final say at the critical moments, and it is certainly true that a PA will not be hired, a "service plan" will not go into effect, and a disfavored PA will not be retained in a placement unless the customer agrees. Thus, in the majority's view, the customer is the employer because *real* employers possess such absolute authority over their charges. By contrast, the State's role in the relationship is dialogic and one of shared governance; it merely "assists," "suggests," "helps," and "mediates" the customer's decision-making via the Counselor Who Must Not Be Named, and pay no attention to the man behind the curtain who established the home care program, defined its parameters, and is footing the bill. Speaking of footing the bill, this authoritarian understanding of the employment relation would also go a long way to account for the otherwise inexplicable erasure in the majority opinion of the health insurance benefits enjoyed by the PAs. Those benefits were the product of collective bargaining with the PAs' union rather than of the legislation providing such benefits to the rest of the State's workforce – that is, the product of shared governance rather than sovereign command – and thus they just did not count in the majority's assessment of the State's putative status as an employer.

The State is not the only party given short shrift in the majority's framing of

⁷⁷ Id. at 2646-2647 (citations omitted).

⁷⁸ Id. at 2624-2625.

the case. The entire legal structure of home care provision in Illinois, and in the other states that have adopted the “bargaining in the shadow of the state” model, is the product of over a quarter century of struggles by and between home care workers, unions, and worker centers seeking to make home care decent work; disabled and aged persons and the advocacy organizations that represent them seeking to enhance the availability and quality of care; and public officials pursuing a mix of cost-containment and constituent service goals. As the *Harris* dissent put it:

Workforce shortages and high turnover have long plagued in-home care programs, principally because of low wages and benefits. That labor instability lessens the quality of care, which in turn, forces disabled persons into institutions and (massively) increases costs to the State. The individual customers are powerless to address those systemic issues; rather, the State—because of its control over workforce-wide terms of employment—is the single employer that can do so. And here Illinois determined (as have nine other States) that negotiations with an exclusive representative offered the best chance to set the Rehabilitation Program on firmer footing. Because of that bargaining, ... home-care assistants have nearly doubled their wages in less than 10 years, obtained state-funded health insurance, and benefited from better training and workplace safety measures. The State, in return, has obtained guarantees against strikes or other work stoppages—and most important, believes it has gotten a more stable workforce providing higher quality care, thereby avoiding the costs associated with institutionalization.⁷⁹

Yet even this account leaves out an important dimension of how the collective bargaining model developed. The designation of the recipients of home care as “customers” with considerable control over PAs and their work had its genesis in California – the state that originated this model – and grew out of the efforts of the “independent living” movement among disabled persons seeking to wrest control from medical professionals who too often treated them as patients to be managed rather than as self-actualizing individuals who “best understood their [own] needs and how to meet them.” Independent living centers ultimately played a crucial role in the effort to persuade the California legislature to extend collective bargaining rights to

⁷⁹ *Id.* at 2648 (citations omitted).

home care workers by creating county-level public authorities with whom they could bargain, agreeing that this would promote higher quality care but insisting as part of the package that the beneficiaries of care “would retain consumer control over the authorities and retain the right to hire, fire, and direct their attendants.” (Boris, Klein, 2015, p. 102, 196.)

The legislation that emerged – and has served as a basic template for one of the most promising innovations in modern labor law – thus empowered home care workers by giving them a seat at the bargaining table and the individuals with whom they work by giving due regard to their considerable interest in controlling the delivery of their own care. As *Harris* confirms, jurists who still view the employment relation through nineteenth-century lenses are likely to mistake the latter for simply another instance of master-meets-obedient-servant and to have no idea at all of what to make of the former.

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Appendix I: State-By-State Treatment of Domestic Servants and Agricultural Laborers Under Workers Compensation Laws*						
<i>State</i>	<i>Date of Enactment</i>	<i>Citation</i>	<i>Exclusion for Domestic Servants</i>	<i>Pertinent Provision</i>	<i>Exclusion Type</i> ¹	<i>Exclusion for Agricultural Laborers</i> ²
New York	25.06. 1910	1910 N.Y. Laws 1945	Yes	§ 215	Negative Implication ³	Yes
Kansas	14.03. 1911	1911 Kan. Sess. Laws 382	Yes	§ 6	Negative Implication	Yes
Washington	14.03. 1911	1911 W.V. Acts 345	Yes	§ 2	Negative Implication	Yes
Nevada	24.03. 1911	1911 Nev. Stat. 362	Yes	§ 3	Negative Implication	Yes
New Jersey	04.04. 1911	1911 N.J. Laws 134	No			No
California	08.04. 1911	1911 Cal. Stat. 796	Yes	§ 6(2)	Negative Implication	Yes
New Hampshire	15.04. 1911	1911 N.H. Laws 181	Yes	§ 1	Negative Implication	Yes

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¹ “Express” means the statute provided for broad coverage and imposed an “express” (i.e., specific) exclusion for domestic servants. “Negative Implication” means the statute covered only specified groups of workers (most commonly, those in a listed series of “inherently dangerous jobs”) that did not include domestic servants.

² Except in the cases of Vermont and Delaware – where the WC statutes contained express exclusions for domestic servants but no exclusion for agricultural workers – every other state treated agricultural workers in the same manner as domestic servants (i.e., express exclusion; exclusion by negative implication; or no exclusion at all).

³ In 1913, New York passed an amended version of the statute, which provided for broad coverage but specifically excluded domestic servants and agricultural workers. 1913 N.Y. Laws 2277, § 3(4).

Wisconsin	03.05. 1911	1911 Wis. Sess. Laws 43	Yes	§ 2394- 7(2)	Negative Implication	Yes
Illinois	26.05. 1911	1911 Ill. Laws 330	Yes	§ 1	Negative Implication	Yes
Ohio	15.06. 1911	1911 Ohio Laws 524	Small Employer ⁴	§ 20-1		Small Employer ⁴
Massachusetts	28.07. 1911	1911 Mass. Acts 998	Yes	Pt. I, § 2	Express	Yes
Michigan	20.03. 1912	1912 Mich. Pub. Acts 20	Yes	Pt. I, § 2	Express	Yes
Maryland	15.04. 1912	1912 Md. Laws 1624	No			No
Rhode Island	29.04. 1912	1912 R.I. Acts & Resolves 204	Yes	Art. I, § 2	Express	Yes
Arizona	24.05. 1912	1912 Ariz. Sess. Laws 491	Yes	§ 4	Negative Implication	Yes
Oregon	25.02. 1913	1913 Or. Laws 188	Yes	§ 10	Negative Implication	Yes
Texas	16.04. 1913	1913 Tex. Gen. Laws 426	Yes	Pt. I, § 2	Express	Yes
Iowa	18.04. 1913	1913 Iowa Acts 154	No			No
Nebraska	21.04. 1913	1913 Neb. Laws 578	Yes	Pt. I, § 6(2)	Express	Yes

⁴ Ohio and Connecticut limited the coverage of their statutes to employers with five or more employees, thus excluding domestic servants, agricultural workers, and everyone else working for smaller employers.

Minnesota	24.04. 1913	1913 Minn. Laws 675	Yes	Pt. 2, § 8	Express	Yes
Connecticut	29.05. 1913	1913 Conn. Pub. Acts 1735	Small Employer ⁴	Pt. A, § 2		Small Employer ⁴
West Virginia	01.10. 1913	1913 W.Va. Acts 64	Yes	§ 9	Express	Yes
Kentucky	21.03. 1914	1914 Ky. Acts 226	Yes	§ 14	Express	Yes
Louisiana	18.06. 1914	1914 La. Acts 44	Yes	§ 2	Negative Implication	Yes
Wyoming	27.02. 1915	1915 Wyo. Sess. Laws 172	Yes	§ 4	Negative Implication	Yes
Indiana	08.03. 1915	1915 Ind. Acts 392	Yes	Pt. I, § 9	Express	Yes
Montana	08.03. 1915	1915 Mont. Laws 168	Yes	Pt. I, § 3(b)	Express	Yes
Oklahoma	22.03. 1915	1915 Okla. Sess. Laws 471	Yes	§ 2	Negative Implication	Yes
Maine	01.04. 1915	1915 Me. Laws 265	Yes	§ 1(II)	Express	Yes
Vermont	01.04. 1915	1915 Vt. Acts & Resolves 275	Yes	Pt. II, § 4	Express	No
Colorado	10.04. 1915	1915 Colo. Sess. Laws 515	Yes	§ 4(d)(III)	Express	Yes
Pennsylvania	02.06. 1915	1915 Pa. Laws 736	No			No
South Dakota	10.03. 1917	1917 S.D. Sess. Laws ch. 375, p. 832	Yes	Pt. 1, § 8	Express	Yes

New Mexico	13.03. 1917	1917 N.M. Laws 209	Yes	§ 10	Negative Implication	Yes
Utah	15.03. 1917	1917 Utah Laws 306	Yes	§ 50(2)	Express	Yes
Idaho	16.03. 1917	1917 Idaho Sess. Laws 252	Yes	Pt. I, § 3(b)	Express	Yes
Delaware	02.04. 1917	1 Del. Laws 763 (1917)	Yes	§ 141	Express	No
Virginia	21.03. 1918	1918 Va. Acts 637	Yes	§ 15	Express	Yes
North Dakota	05.03. 1919	1919 N.D. Laws 258	Yes	§ 2	Express	Yes
Tennessee	15.04. 1919	1919 Tenn. Pub. Acts 369	Yes	§ 6(c)	Express	Yes
Missouri	28.04. 1919	1919 Mo. Laws 456	Yes	§ 5	Express	Yes
Alabama	23.08. 1919	1919 Ala. Laws 206	Yes	Pt. 2, § 8	Express	Yes
Georgia	17.08. 1920	1920 Ga. Laws 167	Yes	§ 15	Express	Yes
North Carolina	11.03. 1929	1920 N.C. Sess. Laws 117	Yes	§ 2(a)	Express	Yes
Florida	10.06. 1935	1935 Fla. Laws 1457	Yes	§ 2(1)	Express	Yes
South Carolina	17.07. 1935	1935 S.C. Acts 1231	Yes	§ 2(a)	Express	Yes
Arkansas	15.03. 1939	1939 Ark. Acts 777	Yes	§ 2(c)	Express	Yes
Mississippi	13.04. 1948	1948 Miss. Laws 507	Yes	§ 3(1)	Express	Yes

Appendix II: Unemployment Insurance Statutes Enacted before Enactment of Social Security Act of 1935 (8/14/35)						
<i>State</i>	<i>Date of Enactment</i>	<i>Citation</i>	<i>Exclusion for Domestic Servants</i>	<i>Pertinent Provision</i>	<i>Exclusion for Agricultural Laborers (see note 2)</i>	<i>Pertinent Provision</i>
Wisconsin	28.01.1932	1932 Wisc. Sess. Laws 57	Yes	§ 108.02(2)	Yes	§ 108.02(1)
Utah	14.03.1935	1935 Utah Laws 43	No		Yes	§ 3(a)
Washington	21.03.1935	1935 Wash. Sess. Laws 438	No		No	
New York	25.04.1935	1935 N.Y. Laws 1028	No		Yes	§ 502(1)
New Hampshire	29.05.1935	1935 N.H. Laws 154	Yes	§ 1(VI)(b)	Yes	§ 1(VI)(a)
California	25.06.1935	1935 Cal. Stat. 1226	Yes	Art. 2, § 7(b)	Yes	Art. 2, § 7(a)
Massachusetts	12.08.1935	1935 Mass. Acts 633	Yes	§ 5	Yes	§ 5

