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## Consider the Caregivers: Reimagining Labor and Immigration Law to Benefit Home Care Workers and Their Clients

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# CONSIDER THE CAREGIVERS: REIMAGINING LABOR AND IMMIGRATION LAW TO BENEFIT HOME CARE WORKERS AND THEIR CLIENTS

**Abstract:** A looming shortage of over half a million direct care workers within the next decade threatens to leave elderly and disabled individuals without much-needed care. Existing U.S. labor and immigration laws render long-term care work undesirable and providers prone to exploitation. Despite the extension of the Fair Labor Standards Act’s protections to many home care workers in 2015, flawed enforcement mechanisms prevent workers from effectuating their new-found rights. Additionally, restrictive visa programs and crackdowns on undocumented employment limit noncitizens’ ability to secure positions in the industry. As a result, the home care system facilitates the exploitation of home care workers, contributes to high turnover rates, and creates instability for elderly and disabled individuals who rely on caregivers to remain in their communities. This Note argues that Congress should support strategic labor law enforcement initiatives, grant amnesty to undocumented workers, and reform the employment-based visa program to give higher preference to all essential workers. This Note further demonstrates how these actions will benefit both caregivers and their clients.

## INTRODUCTION

Marjorie Salmon, who immigrated to Brooklyn, New York from Jamaica, has provided home care services to elderly clients for over two decades.<sup>1</sup> In exchange for offering around-the-clock care to a man in his seventies who suffers from dementia and Parkinson’s disease, she receives \$160 per day as well as food and lodging.<sup>2</sup> Her client has good and bad moments—one morning he threatens to hurt her, and another day he compliments her appearance.<sup>3</sup> Ms. Salmon cooks her client’s meals, helps him bathe, and cleans up his soiled diapers.<sup>4</sup> She keeps the doors locked so that he does not wander away.<sup>5</sup>

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<sup>1</sup> Andy Newman, *On the Job, 24 Hours a Day, 27 Days a Month*, N.Y. TIMES (Sept. 2, 2019), <https://www.nytimes.com/2019/09/02/nyregion/home-health-aide.html> [<https://perma.cc/N382-S6RL>].

<sup>2</sup> *Id.*

<sup>3</sup> *See id.* (describing how Marjorie Salmon’s client’s demeanor shifts due to his struggle with Alzheimer’s disease).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Home care workers like Ms. Salmon provide direct care to elderly and disabled individuals in their homes.<sup>6</sup> Although home care industry norms and specific caregiver-client relationships vary, Ms. Salmon's story exemplifies the nation's reliance on home care workers to perform essential, yet psychologically and physically taxing services for very low wages.<sup>7</sup> Demographic and social trends are increasing demand for home care workers such as Ms. Salmon.<sup>8</sup> The problem of how to attract and retain these workers will grow more pressing in coming years, and the United States will experience a substantial shortage of caregivers—unless labor and immigration laws affecting the industry undergo substantial changes.<sup>9</sup>

The enforcement mechanisms available to home care workers who want to assert their rights under existing federal wage and hour laws remain weak.<sup>10</sup> Home care workers with claims for violations of the Fair Labor Standards Act (FLSA), which requires payment of minimum and overtime wages and outlines limited workplace standards, must file complaints with the Department of Labor (DOL) or initiate private lawsuits.<sup>11</sup> Home care workers cannot rely on

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<sup>6</sup> See KEZIA SCALES, PHI, IT'S TIME TO CARE: A DETAILED PROFILE OF AMERICA'S DIRECT CARE WORKFORCE 3–4 (2020), <https://phinational.org/resource/its-time-to-care-a-detailed-profile-of-americas-direct-care-workforce/> [<https://perma.cc/V5B3-AJ5H>] (explaining that direct care workers assist their clients with activities such as attending to household chores and consuming meals).

<sup>7</sup> See ELANA D. BUCH, INEQUALITIES OF AGING: PARADOXES OF INDEPENDENCE IN AMERICAN HOME CARE 5, 9 (2018) (describing the minimal pay home care workers receive and the emotional labor that they must perform when interacting with clients); Soo Oh, *The Future of Work Is the Low-Wage Health Care Job*, VOX (July 3, 2017), <https://www.vox.com/2017/7/3/15872260/health-direct-care-jobs> [<https://web.archive.org/web/20201028132643/https://www.vox.com/2017/7/3/15872260/health-direct-care-jobs>] (illustrating how home care work puts stress on workers' bodies). Home care workers need to have the strength to lift equipment and brace clients. Oh, *supra*. Moreover, the home care industry has an elevated incidence of injury compared to many other fields. *Id.*

<sup>8</sup> See BUCH, *supra* note 7, at 3–4 (linking the increasing need for home care to shifts in the composition of the population as well as changes in family and gender dynamics).

<sup>9</sup> See Robyn I. Stone & Natasha Bryant, *The Politics of Immigration: Who Will Care for Grandma?*, 42 GENERATIONS—J. AM. SOC'Y ON AGING 50, 54–55 (2018–2019) (suggesting that allowing more immigrants to work as caregivers could mitigate the shortage); Leah Zallman et al., *Care for America's Elderly and Disabled People Relies on Immigrant Labor*, 38 HEALTH AFF. 919, 925 (2019) (listing policy changes, including increases in wages, improved training, and immigration reform to tackle retention problems and attract more home care workers).

<sup>10</sup> See Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL'Y REV. 93, 104–05, 125 (2019) (indicating that low-wage and immigrant workers struggle to address Fair Labor Standards Act (FLSA) violations by lodging complaints and pursuing litigation); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 59 (2005) (explaining that the Department of Labor (DOL) largely relies on employee complaints to enforce the FLSA and launch investigations).

<sup>11</sup> Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219; Hallett, *supra* note 10, at 104–05; Weil & Pyles, *supra* note 10, at 62. The DOL investigates employers in the absence of worker complaints, but the agency often relies on workers to draw its attention to potential violations. Weil & Pyles, *supra* note 10, at 59. In 2004, nearly 80% of the Wage and Hour Division's (WHD) investigations occurred in response to complaints. *Id.* After the DOL obtained new leadership during the Obama administration, the proportion of inquiries initiated by employees fell to less than 50% in

the DOL's Wage and Hour Division (WHD) to proactively investigate their employers.<sup>12</sup> Additionally, intentional worker misclassification excludes increasing numbers of home care workers from the FLSA's protections.<sup>13</sup> Individuals working directly for clients and their families are left with few safeguards.<sup>14</sup> These regulatory gaps exacerbate severe retention problems in the industry, which has a turnover rate hovering around fifty percent.<sup>15</sup>

Although experts predict that the aging baby-boomer generation will increase demand for home care services in the coming decades, immigration restrictions limit the pool of workers available to fill these roles.<sup>16</sup> Employment-based visa programs give preference to foreign-born workers with high levels of education and professional skill, effectively foreclosing lawful opportunities for prospective home care workers to secure positions in the industry.<sup>17</sup> In turn, limited legal immigration options may prompt undocumented individuals to seek off-the-books employment in the informal home care sector, where wage and hour regulations do not apply.<sup>18</sup>

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2017. David Weil, *Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change*, J. INDUSTR. RELS., June 2018, at 1, 5.

<sup>12</sup> See Janice Fine, *New Approaches to Enforcing Labor Standards: Co-enforcement Partnerships Between Government and Civil Society Are Showing the Way Forward*, 2017 U. CHI. LEGAL F. 143, 145 (remarking that enforcement agencies lack the resources to audit all workplaces). In 2012, there was less than a 1% chance that the DOL would investigate a given employer for violating federal wage and hour laws within the year. Daniel J. Galvin, *Deterring Wage Theft: Alt-labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSP. ON POL., 324, 327 (2016).

<sup>13</sup> See NELP: NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR CLASSIFICATION IN HOME CARE 1–2 (2015), <https://www.nelp.org/wp-content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf> [<https://perma.cc/2FK3-CGSZ>] (identifying misclassification as a threat to home care workers' ability to assert their rights).

<sup>14</sup> See 29 U.S.C. § 213(a)(15) (exempting those providing companionship services from the FLSA's minimum wage provisions); Third Party Employment, 20 C.F.R. § 552.109 (2020) (permitting family members who act as joint employers to claim the companionship services exemption); Companionship Services, 20 C.F.R. § 552.6 (defining a companionship services provider). The DOL's third-party employer regulation allows families that act as joint employers to avoid paying minimum and overtime wages. 20 C.F.R. § 552.109.

<sup>15</sup> See Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1835, 1847 (2007) (estimating that approximately half of home care workers leave their jobs every year).

<sup>16</sup> Zallman et al., *supra* note 9, at 919, 925.

<sup>17</sup> 8 U.S.C. § 1153(b)(1)–(5); see Sarah J. Rasalam, Note, *Improving the Immigration Policy of the United States to Fulfill the Caregiving Needs of America's Elderly Population: The Alternatives to Outsourcing Grandma*, 16 ELDER L.J. 405, 424 (2008) (arguing that the United States needs to establish a visa program for home care workers to meet growing demand for long-term care); Kayleigh Scalzo, Note, *American Idol: The Domestic and International Implications of Preferring the Highly Educated and Highly Skilled in U.S. Immigration Law*, 79 GEO. WASH. L. REV. 926, 930 (2011) (noting that U.S. visa programs give preference to highly skilled workers).

<sup>18</sup> See Zallman et al., *supra* note 9, at 922–23 (stating that undocumented individuals who provide long-term care services are more likely than U.S. citizens to work for third-party agencies or families through the gray market).

Unions, think tanks, and legislators have proposed various policies to improve home care jobs and attract additional care workers to meet the growing demand.<sup>19</sup> The Service Employees International Union organizes home care workers as part of its “Fight for \$15” campaign to raise the federal minimum wage.<sup>20</sup> Scholars recommend changes to immigration policy that would make it easier for prospective home care workers to obtain visas.<sup>21</sup> Members of Congress introduced the Direct CARE Opportunity Act in September 2019 to provide funding to organizations that recruit and train home care workers.<sup>22</sup> Despite the urgent need for such reforms, efforts to raise the federal minimum wage, change or create immigration programs, or enact legislation aimed at improving home care jobs have thus far come up short.<sup>23</sup>

This Note presents two policy recommendations to address labor and immigration issues in the U.S. home care industry.<sup>24</sup> It first argues that Congress

<sup>19</sup> See *infra* notes 20–23 and accompanying text (elaborating on various stakeholders’ proposed plans to reform the home care industry and address the likely shortfall of home care workers in the near future).

<sup>20</sup> *Why It Matters?*, SEIU, <https://www.seiu.org/cards/home-care-and-the-fight-for-15> [<https://perma.cc/R75V-KJAU>]. The “Fight for \$15” movement pushes to increase the minimum wage and unionize low-wage workers. *About Us*, FIGHT FOR \$15, <https://fightfor15.org/about-us/> [<https://perma.cc/XM88-B8TK>]. It originated when fast food workers went on strike in 2012 to demand higher wages and the ability to join a union. *Id.*

<sup>21</sup> CYNTHIA HESS & JANE HENRICI, INST. FOR WOMEN’S POL’Y RSCH., INCREASING PATHWAYS TO LEGAL STATUS FOR IMMIGRANT IN-HOME CARE WORKERS 1 (2013), <https://iwpr.org/publications/increasing-pathways-to-legal-status-for-immigrant-in-home-care-workers/> [<https://perma.cc/HAX9-SHY3>] (offering several proposals for immigration reform that would allow noncitizens to legally work in the home care field); Rasalam, *supra* note 17, at 424.

<sup>22</sup> Direct CARE Opportunity Act, H.R. 4397, 116th Cong. (2019); Direct CARE Opportunity Act, S. 2521, 116th Cong. (2019). The Direct CARE Opportunity Act would establish a grant program for organizations to offer direct care workers increased training and professional opportunities. H.R. 4397; S. 2521. Institutions seeking funding would provide proposals outlining their projects. H.R. 4397; S. 2521. These programs would aim to attract new direct care workers and encourage them to stay in the industry. H.R. 4397; S. 2521. The bill could improve home care work by providing more training and offering new pathways for advancement. Alexia Fernández Campbell, *Home Care Workers Have a Lousy Job. A New Bill in Congress Aims to Change That.*, VOX (Sept. 19, 2019), <https://www.vox.com/2019/9/19/20868302/home-care-workers-care-opportunity-act> [<https://web.archive.org/web/20200930054541/https://www.vox.com/2019/9/19/20868302/home-care-workers-care-opportunity-act>]. The bill, however, does not address immigration reform for home care workers. See H.R. 4397 (lacking any reference to immigration legislation); S. 2521 (missing language concerning changes to immigration laws).

<sup>23</sup> See Hallett, *supra* note 10, at 95 (noting that the federal minimum wage has remained stagnant since 2009); H.R. 4397—*Direct Creation, Advancement, and Retention of Employment Opportunity Act*, CONGRESS.GOV (2019–2020), <https://www.congress.gov/bill/116th-congress/house-bill/4397/all-actions-without-amendments?s=1&r=7> [<https://perma.cc/B6SV-R2GU>] (showing no activity related to the CARE Opportunity Act after the House referred it to two committees in September 2019); Elaine Kamarck & Christine Stenglein, *Can Immigration Reform Happen? A Look Back*, BROOKINGS (Feb. 11, 2019), <https://www.brookings.edu/blog/fixgov/2019/02/11/can-immigration-reform-happen-a-look-back/> [<https://perma.cc/WRL3-RCPW>] (reporting that Congress has failed to pass immigration far-reaching reform legislation since 1986).

<sup>24</sup> See *infra* notes 25–26 and accompanying text (describing the proposed reforms).

should enact the Wage Theft Prevention and Wage Recovery Act (WTPWRA) or similar legislation to bolster FLSA protections for home care workers through strategic enforcement and community partnerships.<sup>25</sup> This Note further contends that the legislature should grant amnesty to undocumented immigrants, including home care workers, and reformulate the preference structure of immigrant employment-based visa programs to proactively address the shortfall of caregivers in the United States.<sup>26</sup> Part I of this Note provides a basic overview of employment in the home care industry as well as the labor and immigration laws that impact it.<sup>27</sup> Part II discusses how this legal framework creates specific challenges for home care workers.<sup>28</sup> Finally, Part III proposes changes to the FLSA's enforcement mechanisms as well as immigration reforms to benefit both caregivers and their clients.<sup>29</sup>

### I. SITUATING THE HOME CARE INDUSTRY AT THE CROSSROADS OF LABOR AND IMMIGRATION LAW

Because a significant number of noncitizens work in the home care industry, U.S. labor and immigration law both shape the regulation of this burgeoning field.<sup>30</sup> Home care workers are often resigned to difficult conditions and inadequate compensation due to gaps in the current legal framework.<sup>31</sup> Section

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<sup>25</sup> Wage Theft Prevention and Wage Recovery Act, H.R. 3712, 116th Cong. (2019); Wage Theft Prevention and Wage Recovery Act, S. 2101, 116th Cong. (2019). The Wage Theft Prevention and Wage Recovery Act (WTPWRA) would target wage and hour law violations in industries where abuse is most pervasive and foster collaboration between the government and grassroots organizations. *See* H.R. 3712 § 3(4)(B)–(C) (listing the purposes of the proposed legislation to amend the FLSA). This law would also create more severe punishment for wage theft, allow workers to receive complete remuneration for unpaid wages, and facilitate workers' ability to recoup earnings through litigation. *Id.* § 3(1)–(3).

<sup>26</sup> *See* HESS & HENRICI, *supra* note 21, at 15 (highlighting an amnesty program as a means to improve conditions for noncitizens working in the home care industry); Stone & Bryant, *supra* note 9, at 54–55 (advocating for the expansion of visa programs to attract direct care workers); Conor Friedersdorf, *The Nationalist Case for Amnesty*, THE ATLANTIC (Feb. 15, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/immigration-amnesty/582688/> [<https://perma.cc/39B6-7FLR>] (arguing that amnesty would benefit U.S. citizens as well as undocumented immigrants); Rasalam, *supra* note 17, at 439 (arguing for the creation of a new visa category for home care workers).

<sup>27</sup> *See infra* notes 30–158 and accompanying text.

<sup>28</sup> *See infra* notes 159–239 and accompanying text.

<sup>29</sup> *See infra* notes 241–287 and accompanying text.

<sup>30</sup> *See* Smith, *supra* note 15, at 1837 (defining “home care” as services provided by compensated individuals so that elderly and disabled people can attend to their daily needs, including making meals, getting dressed, using the bathroom, and cleaning the house); Zallman et al., *supra* note 9, at 923–24 (illustrating that immigrants comprise nearly one third of the home care workforce). Home care workers fall under the larger umbrella of “long-term services and supports” (LTSS) providers. SCALES, *supra* note 6, at 7. In addition to working in individual residences, LTSS workers perform services in places such as nursing homes and adult daycare centers. *Id.*

<sup>31</sup> *See* Laura Dresser, *Cleaning and Caring in the Home: Shared Problems? Shared Possibilities*, in THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 111, 117 (Annette Bernhardt et al. eds., 2008) (articulating that home care workers receive

A of this Part describes the features of modern home care, including the demographics of the workforce and predictions regarding caregiver shortages.<sup>32</sup> Section B provides insight into the evolution of federal wage and hour protections for professional home care workers.<sup>33</sup> Section C outlines immigration laws that affect the home care workforce.<sup>34</sup>

### A. Caring for Elderly and Disabled Individuals at Home

The home care industry consists of agencies and individuals that provide direct care to seniors and disabled individuals in their own residences in exchange for payment.<sup>35</sup> Although workers performing these tasks possess various titles, this Note defines “home care worker” as a person who provides services to elderly and/or disabled clients in their homes for compensation.<sup>36</sup> Home care workers help clients accomplish activities of daily living, which can include cooking meals, completing household chores, and putting on clothes.<sup>37</sup> The professionalization of home care developed as part of a New Deal initiative to employ caregivers to assist seniors and those with enduring medical conditions in their residences.<sup>38</sup>

Demand for home care services has ballooned in recent years due to demographic shifts and increased interest in receiving long-term care at home.<sup>39</sup>

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low wages and rarely enjoy benefits like employer-provided health insurance); Julia Lippitt, Note, *Protecting the Protectors: A Call for Fair Working Conditions for Home Health Care Workers*, 19 ELDER L.J. 219, 221–22 (2011) (describing home care work as mentally and physically draining).

<sup>32</sup> See *infra* notes 35–66 and accompanying text.

<sup>33</sup> See *infra* notes 67–112 and accompanying text.

<sup>34</sup> See *infra* notes 113–158 and accompanying text.

<sup>35</sup> See SCALES, *supra* note 6, at 7–8 (noting that caregivers can work directly for their clients, their clients’ families, or for third-party agencies); Smith, *supra* note 15, at 1837 (specifying that home care workers receive payment for their work in clients’ homes). Some home care clients pay for services themselves, whereas others use private or government-sponsored health insurance programs. Nancy E. Shurtz, *Long-Term Care and the Tax Code: A Feminist Perspective on Elder Care*, 20 GEO. J. GENDER & L. 107, 144–49 (2019).

<sup>36</sup> See Smith, *supra* note 15, at 1838 (listing alternative titles for workers that care for clients in the home, including “home-health aides, home-care aides, and personal-care aides” (footnotes omitted)). According to the DOL, home health aides can administer limited medical services under a nurse’s supervision. Lippitt, *supra* note 31, at 221. In contrast, home care and personal aides do not need supervision and may assist clients only with tasks such as dressing, eating, and cleaning. *Id.*

<sup>37</sup> Smith, *supra* note 15, at 1837.

<sup>38</sup> Jennifer Klein & Eileen Boris, “We Have to Take It to the Top!”: *Workers, State Policy, and the Making of Homecare*, 61 BUFF. L. REV. 293, 298 (2013). During the Great Depression, the government instituted programs intended to facilitate economic growth and increase employment. *Id.* The Works Progress Administration (WPA) administered the Homemaker Service, which provided unemployed women with childcare positions. *Id.* The WPA also hired workers to provide services to elderly and ill individuals in their homes, thereby moving them out of hospitals. *Id.* This workforce largely consisted of Black women who had worked in domestic roles prior to their unemployment. *Id.*

<sup>39</sup> Smith, *supra* note 15, at 1837 (linking the increase in the need for home workers to the growth of the U.S. elderly population).

Elderly baby boomers will enlarge the share of the U.S. population aged sixty-five and older to over twenty percent by 2030.<sup>40</sup> In addition, as people live longer, they are more likely to require ongoing care for disabilities and long-term medical conditions.<sup>41</sup> Demand for professional home care is linked to increases in the number of women seeking employment outside the home, to more individuals residing far away from aging family members, and to elderly people outliving their relatives.<sup>42</sup> At the same time, more elderly individuals wish to receive direct care at home instead of in nursing or other long-term care facilities.<sup>43</sup> Moreover, experts anticipate that interest in home care will rise dramatically as a result of the COVID-19 pandemic.<sup>44</sup> These changes, coupled with the rapid expansion of the U.S. elderly population, could contribute to a shortfall of over half a million direct care workers within ten years.<sup>45</sup>

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<sup>40</sup> SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. CENSUS BUREAU, THE BABY BOOM COHORT IN THE UNITED STATES: 2012 TO 2060, at 2 (2014), <https://www.census.gov/library/publications/2014/demo/p25-1141.html> [<https://perma.cc/8RBR-7BNM>]. Baby boomers consist of U.S. residents born between the end of World War II and the mid-1960s. *Id.* The eldest members of this generation started to turn sixty-five in 2011. *Id.* At that time, they numbered approximately seventy-seven million individuals. *Id.* Baby boomers are expected to increase the percentage of Americans between the ages of sixty-five and eighty-four to 18% and the population over the age of eighty-four to 2.5% by 2030. *Id.* at 7. In 2018, 16% of the U.S. population was over the age of sixty-four. *Age and Sex*, U.S. CENSUS BUREAU (2018), <https://data.census.gov/cedsci/table?q=elderly&tid=ACST1Y2018.S0101&hidePreview=true> [<https://perma.cc/WVJ7-PVDJ>]. Although the total number of baby boomers will decline as the population ages, this demographic shift will increase demand for long-term care. COLBY & ORTMAN, *supra* note 40, at 2; Zallman et al., *supra* note 9, at 919.

<sup>41</sup> See Smith, *supra* note 15, at 1844 (asserting that enhanced life expectancy increases demand for long-term direct care).

<sup>42</sup> *Id.* at 1844–45. Women supply the lion's share of home care provided without compensation. *Id.* at 1845. Factors including the lack of vacancies in nursing homes and increased numbers of individuals who can pay for home care have also contributed to the increased preference for home care as opposed to institutional options. Rebecca M. Fowler, *Home Healthcare Workers and the Fair Labor Standards Act*, 1 J. HEALTH & LIFE SCI. L. 107, 109 (2008) (listing these developments as contributing to the expansion of home care services).

<sup>43</sup> See Lippitt, *supra* note 31, at 220 (citing lower costs and enhanced efficacy as factors contributing to the growing preference for home care). An ethnographic study of caregivers and their clients indicates that seniors prefer home care as a means to retain greater independence as their health declines. BUCH, *supra* note 7, at 4.

<sup>44</sup> Daniella Silva, *Coronavirus Concerns Show Enhanced Need, Demand for Home Care, Experts Say*, NBC NEWS (May 23, 2020), <https://www.nbcnews.com/news/us-news/coronavirus-concerns-show-increased-need-demand-home-care-experts-say-n1211261> [<https://perma.cc/JH7A-9AHZ>] (mentioning families' concerns about placing seniors in long-term care facilities due to the spread of COVID-19 and the increased need for home care workers to assist virus survivors).

<sup>45</sup> Zallman et al., *supra* note 9, at 920 (citing NAT'L CTR. FOR HEALTH WORKFORCE ANALYSIS, HEALTH WORKFORCE PROJECTIONS: NURSING ASSISTANTS AND HOME HEALTH AIDES 1 (2016), <https://bhw.hrsa.gov/sites/default/files/bhw/nchwa/projections/directcareworkersfactsheet.pdf> [<https://perma.cc/9J9F-Q56H>]) (estimating that the projected 34% increase in demand for direct care workers will produce a shortage of 650,000 workers); *supra* note 43 and accompanying text (surveying social factors that contribute to the increased demand for home care services).



This demand, coupled with the high cost of long-term care, has created an industry that spans the formal and informal economies.<sup>46</sup> Although Medicare does not cover home care services in most instances, Medicaid offers limited funding for certain types of caregiving in the home.<sup>47</sup> Given the lack of coverage through public programs, individuals often purchase private insurance or pay out-of-pocket for care.<sup>48</sup> Home care workers can function as employees, work as independent contractors for third-party agencies, or contract directly with consumers.<sup>49</sup> The latter arrangement operates as an informal “gray market.”<sup>50</sup>

Despite the home care industry’s status as one of the most rapidly expanding fields in the United States, workers receive minimal compensation.<sup>51</sup> Salaries remain well below the \$15.00 mark, with an average hourly wage of

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<sup>46</sup> Howard Gleckman, *Where Will Our Home Care Aides Come from?*, FORBES (Feb. 18, 2018), <https://www.forbes.com/sites/howardgleckman/2018/02/28/where-will-our-home-care-aides-come-from/?sh=2bcbe5f0383f> [<https://perma.cc/L77S-DRZL>] (explaining that many families hire caregivers directly because they cannot otherwise afford home care services); see GENWORTH FIN., INC., GENWORTH COST OF CARE SURVEY 2019: SUMMARY AND METHODOLOGY 1 (2019) (providing estimates concerning the cost of home care services), <https://pro.genworth.com/riiproweb/productinfo/pdf/131168.pdf> [<https://perma.cc/E2GB-W2XB>]; Shurtz, *supra* note 35, at 156–58 (describing funding mechanisms for home health care). See generally Demetra Smith Nightingale & Stephen A. Wandner, *Informal and Nonstandard Employment in the United States: Implications for Low-Income Working Families*, URBAN INST. BRIEF 20 (Urban Inst., Washington, D.C.), Aug. 2011, at 1, 1, <https://www.urban.org/sites/default/files/publication/32791/412372-informal-and-nonstandard-employment-in-the-united-states.pdf> [<https://perma.cc/3GFX-CVPJ>] (defining the scope of the informal economy). The median price for a year of home care services was \$52,624 in 2019. GENWORTH FIN., INC., *supra*, at 1.

<sup>47</sup> See Shurtz, *supra* note 35, at 156–58 (outlining which home care services public health insurance programs cover). Medicare will cover home care expenses only if the services meet specific criteria. *Id.* at 157. For example, services must follow a period of hospitalization lasting at least three days and cannot involve around-the-clock care. *Id.* In contrast to Medicare beneficiaries, Medicaid recipients may obtain waivers from their state governments to fund home care services. *Id.*

<sup>48</sup> *Id.* at 158. In 2019, the median hourly rate for home care provided through a licensed agency was \$23.00. GENWORTH FIN., INC., *supra* note 46, at 2.

<sup>49</sup> Smith, *supra* note 15, at 1846. Employers typically exercise a large degree of control over their employees, including supervising their work and purchasing the materials they need to complete their tasks. Abigail S. Rosenfeld, Comment, *ABC to AB 5, The Supreme Court of California Modernizes Common Law Doctrine in Dynamex Operations West, Inc. v. Superior Court*, 61 B.C. L. REV. E. SUPP. II.-112, II.-112 n.1 (2020) (citing *Employee*, BLACK’S LAW DICTIONARY (11th ed. 2019)), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss9/13> [<https://perma.cc/Z7GE-HZ8P>]. In contrast, traditional independent contractors function more like small businesses, and the hiring enterprise exerts less control over their activities. *Id.* at II.-112 n.2 (citing *Independent Contractor*, BLACK’S LAW DICTIONARY, *supra*).

<sup>50</sup> See Paula Span, *If Immigrants Are Pushed Out, Who Will Care for the Elderly?*, N.Y. TIMES (Feb. 2, 2018), <https://www.nytimes.com/2018/02/02/health/illegal-immigrants-caregivers.html> [<https://perma.cc/2CWN-XW9B>] (describing the “gray market” as an economic phenomenon wherein clients contract with workers outside of the formal employment system).

<sup>51</sup> See Klein & Boris, *supra* note 38, at 295 (describing home care as the quickest growing profession and characterizing the work as being low-paid); *Fastest Growing Occupations*, U.S. BUREAU LAB. STAT., [https://www.bls.gov/emp/tables/fastest-growing-occupations.htm#ep\\_table\\_103.f.1](https://www.bls.gov/emp/tables/fastest-growing-occupations.htm#ep_table_103.f.1) [<https://perma.cc/EK7H-9YPU>] (Sept. 1, 2020) (listing “Home health and personal care aides” as one of the fastest-growing jobs in the United States).

\$12.71 in 2019.<sup>52</sup> Moreover, home care positions frequently lack benefits such as employer-provided health insurance.<sup>53</sup> Due to subpar wages and the nature of the job, some home care providers work for hours on end without time to rest.<sup>54</sup> Thus, many have to turn to public assistance programs to survive.<sup>55</sup> The industry suffers from a high incidence of turnover, which is due in part to inadequate compensation and benefits.<sup>56</sup>

The dearth of home care industry regulation reflects the abysmal treatment of domestic work and the people who perform it throughout history.<sup>57</sup> The low remuneration and social standing associated with home care work reflects deeply rooted racism and sexism.<sup>58</sup> Negative attitudes toward work performed in the home stem from slavery, when white slave holders forced Black women to serve as caregivers and housekeepers.<sup>59</sup> Additionally, the societal expectation that women should care for elderly and sick family members

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<sup>52</sup> *Occupational Employment and Wages, May 2019*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/oes/current/oes311011.htm> [<https://perma.cc/7YPS-8LMV>] (July 6, 2020). This estimate encompasses home care workers who work in a variety of settings. *Id.* The U.S. Bureau of Labor Statistics categorizes “Home Health Aides” as those who perform very limited health care services as well as companionship services. *Id.* By comparison, the average hourly wage for registered nurses was \$37.24 in 2019. *May 2019 National Occupational Employment and Wage Estimates United States*, U.S. BUREAU LAB. STAT., [https://www.bls.gov/oes/current/oes\\_nat.htm#00-0000](https://www.bls.gov/oes/current/oes_nat.htm#00-0000) [<https://perma.cc/R8GC-T4RR>] (Mar. 31, 2020).

<sup>53</sup> Lippitt, *supra* note 31, at 222; Dresser, *supra* note 31, at 117 (explaining that home care employers often do not offer benefits to workers, including health insurance).

<sup>54</sup> Lippitt, *supra* note 31, at 222. In some circumstances, home care workers provide services nonstop for a full twenty-four-hour period. *Id.*

<sup>55</sup> SCALES, *supra* note 6, at 14; Smith, *supra* note 15, at 1849 (noting that approximately one third of single parent home care workers get food stamps); Alexia Fernández Campbell, *Home Health Aides Care for the Elderly. Who Will Care for Them?*, VOX (Aug. 21, 2019), <https://www.vox.com/the-highlight/2019/8/21/20694768/home-health-aides-elder-care> [<https://web.archive.org/web/20201102115912/> <https://www.vox.com/the-highlight/2019/8/21/20694768/home-health-aides-elder-care>] (asserting that many home care workers need help to eat and pay their bills). A recent report indicates that over 40% of direct care workers utilize government assistance programs. SCALES, *supra* note 6, at 14.

<sup>56</sup> See SCALES, *supra* note 6, at 19–20 (asserting that higher pay and enhanced benefits would decrease issues with turnover in the home care industry); Smith, *supra* note 15, at 1847 (noting that retention is a huge challenge in the home care industry).

<sup>57</sup> Domestic Service Employment, 29 C.F.R. § 552.3 (2020) (defining domestic work as labor performed in individual residences); Dresser, *supra* note 31, at 123–24; see *infra* notes 58–61 and accompanying text (explaining that the devaluation of domestic work is intertwined with discrimination against women and people of color). Under the FLSA, domestic work refers to “services of a household nature performed by an employee in or about a private home (permanent or temporary).” 29 C.F.R. § 552.3.

<sup>58</sup> Dresser, *supra* note 31, at 123–24. The poor treatment and lack of protection for home care workers result from disrespect for caregiving, a traditionally female task, and bias against communities that disproportionately provide these services. *Id.*

<sup>59</sup> See Terri Nilliasca, Note, *Some Women’s Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform*, 16 MICH. J. RACE & L. 377, 384 (2011) (rooting the devaluation of domestic workers in the racist hierarchy of slavery). The “Mammy” trope, which cast Black women in the role of caring for white children, is one example of how racism and sexism have intersected to shape enduring societal perceptions of domestic work. *Id.*

free of charge has contributed to the denigration of this labor.<sup>60</sup> As a result, the devaluation of caregiving and the individuals who provide it has shaped legislation concerning the home care industry.<sup>61</sup>

Today, women and individuals from Black and Latinx communities dominate home care occupations.<sup>62</sup> Nearly ninety percent of home care workers are female.<sup>63</sup> Moreover, people of color make up approximately two-thirds of the direct care workforce, and about a third of the individuals working for home care agencies were not born in the United States.<sup>64</sup> Ten and a half percent of home care agency workers are noncitizens with legal work authorization.<sup>65</sup> Although it remains challenging to accurately assess the number of undocumented individuals working as caregivers, one recent estimate suggests that they comprise more than four percent of the direct care workforce.<sup>66</sup>

### *B. Federal Wage and Hour Protections for Home Care Workers*

Despite the inherent opportunities for exploitation in the home care industry, federal wage and hour laws have not always protected home care workers.<sup>67</sup> Congress did not design the FLSA—which establishes a federal minimum wage, requires enhanced payment for overtime hours, and sets certain stand-

<sup>60</sup> See Dresser, *supra* note 31, at 123 (explaining that the devaluation of caregiving is linked to the fact that women traditionally performed these services without receiving compensation).

<sup>61</sup> Nilliasca, *supra* note 59, at 390–91 (comparing labor laws’ neglect of domestic workers to a refusal to protect women of color from their white employers); see Dresser, *supra* note 31, at 123–24 (arguing that racism diminishes the social valuation and compensation of home care work). These forces combine to create downward pressure on home care workers’ wages. Dresser, *supra* note 31, at 124.

<sup>62</sup> SCALES, *supra* note 6, at 12 (noting that more than 60% of home care workers are people of color); Zallman et al., *supra* note 9, at 919, 922.

<sup>63</sup> SCALES, *supra* note 6, at 11 (stating that 87% of home care workers are women). The pay differential within the home care industry puts women of color at a disadvantage when compared to their white male counterparts. *Id.* at 15. One report showed that, on average, women of color working in home care made \$1.25 less than white male home care workers. *Id.* (comparing median hourly wages).

<sup>64</sup> Zallman et al., *supra* note 9, at 923. The proportion of immigrants working in home care includes noncitizens with legal status, undocumented individuals, and naturalized U.S. citizens. *Id.* About a quarter of the direct care workers providing services through the informal economy are immigrants. *Id.* at 924.

<sup>65</sup> *Id.* at 923–24. Noncitizens with legal work authorization are overrepresented in the home care industry relative to their share of the overall U.S. population. See *id.* (noting that noncitizens with legal work authorization comprise about 5% of the total population and a little over 10% of the home care agency workforce).

<sup>66</sup> *Id.* at 924. Experts estimate that 4.3% of direct care workers lack legal immigration status. *Id.* The proportion of undocumented home care workers working off the books through the gray market could be even higher. See *id.* at 921 (indicating that the study may have underestimated the number of informal caregivers and undocumented workers).

<sup>67</sup> See Home Care Ass’n of Am. v. Weil, 799 F.3d 1084, 1090 (D.C. Cir. 2015) (affirming that the DOL could extend FLSA protections to home care employees working for third-party agencies); *supra* notes 53–55 and accompanying text (emphasizing that home care workers frequently receive inadequate compensation and work in challenging circumstances).

ards for workplace conditions—with home care in mind.<sup>68</sup> Congress enacted the FLSA as part of the New Deal to shield vulnerable workers from abuse and ensure that they could earn enough money to support themselves and their families.<sup>69</sup> When the law went into effect during the late 1930s, its protections did not extend to domestic workers.<sup>70</sup>

In 1974, Congress brought many workers engaged in domestic service under the FLSA's coverage.<sup>71</sup> Despite federal legislators' efforts to expand the scope of labor protections, the Fair Labor Standards Amendments of 1974 (1974 Amendments) still exempted providers of "companionship services."<sup>72</sup> The DOL characterized companionship services as tasks completed to help elderly and disabled individuals look after themselves, including cleaning, cooking, and doing laundry.<sup>73</sup> Even if home care workers engaged in activities beyond the scope of such duties, the exemption still applied if other tasks occupied less than twenty percent of their time.<sup>74</sup> As a result, the 1974 Amendments incorporated certain domestic workers, such as butlers and gardeners, but left many professional home care workers without federal wage and hour protections.<sup>75</sup>

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<sup>68</sup> Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219. Covered employees must receive one and a half times their normal rate of pay for hours worked beyond a forty-hour week. *Id.* § 207(a)(1). The minimum wage mandated for covered employees in the FLSA sets a wage floor, currently \$7.25 per hour. *Id.* § 206(a)(1). State and local governments can set a minimum wage above the federal limit, as New York City and New York State have done. N.Y. LABOR LAW § 652 (McKinney 2020). The minimum wage in New York City is \$15.00 per hour, whereas the minimum wage is lower elsewhere in the state. *Id.*

<sup>69</sup> Smith, *supra* note 15, at 1860 (explaining that the purpose of the FLSA was to protect workers from exploitation and to make sure they made enough money to meet their basic needs).

<sup>70</sup> *Id.* The initial exclusion of domestic workers from the FLSA's coverage relates to the perception that labor completed in the home did not demand legal regulation. Lippitt, *supra* note 31, at 225. Additionally, legislators did not believe that domestic workers participated in interstate commerce, and were thus beyond the reach of congressional regulation. Smith, *supra* note 15, at 1860.

<sup>71</sup> Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified as amended in scattered sections of 29 U.S.C.); Smith, *supra* note 15, at 1860. The Fair Labor Standards Amendments of 1974 (1974 Amendments) encompassed domestic workers such as personal chefs, private chauffeurs, and housekeepers. Smith, *supra* note 15, at 1860–61 (citing Domestic Service Employment, 29 C.F.R. § 552.3 (2006)).

<sup>72</sup> Fair Labor Standards Amendments of 1974 § 7. The motivation behind the 1974 Amendments was the extension of protection to individuals working in a home setting. Fowler, *supra* note 42, at 110.

<sup>73</sup> Fowler, *supra* note 42, at 111 (citing Companionship Services, 29 C.F.R. § 552.6 (2008)).

<sup>74</sup> 29 C.F.R. § 552.6 (2020). Domestic tasks unrelated to caring for the client could account for only a small percentage of the worker's activities each week. *Id.* The regulation specifically excluded tasks that a person with medical expertise would need to provide. *Id.*

<sup>75</sup> Smith, *supra* note 15, at 1860–61. The DOL's decision to classify home caregiving as domestic work enabled courts to apply the companionship services exemption to exclude home care workers from the FLSA's coverage. *Id.* at 1861. Prior to the agency's decision to change its approach to the companionship exemption in 2015, federal regulations dictated that the carveout for those providing companionship extended to caregivers working for agencies. Third Party Employment, 29 C.F.R. § 552.109 (2008); Smith, *supra* note 15, at 1861.

In the wake of the 1974 Amendments, federal courts were asked to consider the companionship services exemption in the context of home care.<sup>76</sup> In 1990, in *McCune v. Oregon Senior Services Division*, the U.S. Court of Appeals for the Ninth Circuit held that home care workers living in their clients' homes could not invoke FLSA protections because they were domestic service workers providing companionship services.<sup>77</sup> A decade later, the U.S. Court of Appeals for the Tenth Circuit considered whether the companionship services exemption applied to home care employees working for third-party agencies.<sup>78</sup> In 2000, in *Johnston v. Volunteers of America, Inc.*, the Tenth Circuit affirmed that the exemption included home care agency employees, despite statutory language indicating that it applied only to caregivers working directly for their clients.<sup>79</sup> Subsequent district court rulings embraced *Johnston's* reasoning.<sup>80</sup>

The U.S. Supreme Court later considered the applicability of the FLSA companionship services exemption to home care workers.<sup>81</sup> In 2007, in *Long*

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<sup>76</sup> *McCune v. Or. Senior Servs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990); Smith, *supra* note 15, at 1861–65 (recounting the string of cases litigated to determine whether professional home care services fell within the scope of the companionship services exemption); see Lippitt, *supra* note 31, at 227 (stating that the companionship services exemption, as outlined in the 1974 Amendments and subsequent DOL regulations, applied to a majority of home care workers).

<sup>77</sup> *McCune*, 894 F.2d at 1110–11; Smith, *supra* note 15, at 1861 (describing the holding in *McCune v. Oregon Senior Services Division* and explaining that it was the first case to consider the applicability of the companionship services exemption to home care workers). In 1990, in *McCune*, the U.S. Court of Appeals for the Ninth Circuit deferred to the DOL's interpretation of the companionship services exemption. 894 F.2d at 1110. The majority rejected the plaintiffs' contention that the exemption could apply to companionship service providers working only on a casual basis. *Id.* Moreover, the court held that the plaintiffs did not meet the criteria for exclusion from the exemption as individuals with medical training or workers performing normal housekeeping tasks. *Id.* at 1110–11. The majority recommended that the plaintiffs seek a legislative remedy. *Id.* The majority also expressed concern that home care clients would not be able to afford home care if they needed to pay minimum wages. *Id.* at 1110.

<sup>78</sup> See *Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559, 561 (10th Cir. 2000) (affirming the application of the companionship services exemption to the employees of a third-party home care agency).

<sup>79</sup> *Id.* at 562. The plaintiffs in *Johnston v. Volunteers of America, Inc.* worked for a third-party organization that provided supportive housing to developmentally disabled clients. *Id.* at 561. The plaintiffs sued to recover overtime pay, arguing that the companionship services exemption did not apply to them because they worked for their employer instead of their clients. *Id.* (referring to 29 C.F.R. § 552.3 (2015)). In 2000, in *Johnston*, the U.S. Court of Appeals for the Tenth Circuit held that the exemption could apply to home care workers employed by a third-party organization. *Id.* at 562. Despite this, the Tenth Circuit affirmed the lower court's denial of the employer's motion for summary judgment because it held that the plaintiffs did not work in individual residences. *Id.* at 566.

<sup>80</sup> See *id.* at 561 (holding that the companionship services exemption could apply to employees of third-party organizations); Smith, *supra* note 15, at 1865 (explaining that later decisions followed the same rationale that the Tenth Circuit relied upon in *Johnston*).

<sup>81</sup> *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 164 (2007). After an intricate appeals history, *Long Island Care Home, Ltd. v. Coke* reached the U.S. Supreme Court for the second time in 2007. *Id.* In 2003, the U.S. District Court for the Eastern District of New York initially found in favor of the home care agency on the basis of the plaintiff's complaint, but in 2004, the U.S. Court of Appeals for the Second Circuit held that the third-party provision was unenforceable and remanded the

*Island Care at Home v. Coke*, the Supreme Court held that the exemption could include third-party agency employees.<sup>82</sup> The plaintiff, a home care worker with an agency employer, sued to recover wages under the FLSA.<sup>83</sup> The Court held that the DOL had lawfully exercised its discretion when it applied the exemption to home care employees working for third-party agencies.<sup>84</sup>

Mounting concern over the exploitation of home care workers prompted the DOL to reassess its interpretation of the companionship services exemption and its application to third-party employers in 2011.<sup>85</sup> A revised DOL regulation prohibited third-party agencies from invoking the companionship services exemption.<sup>86</sup> This change extended FLSA protections to home care employees working for agencies, even when their clients functioned as joint employers.<sup>87</sup> Thus, the updated regulation permitted caregivers working for third-party agencies to enforce their rights to minimum and overtime wages.<sup>88</sup>

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case. *Id.* Then in 2006, the Supreme Court remanded the case to the Second Circuit following the release of a DOL memorandum supporting the application of the companionship exemption to domestic workers with third-party employers. *Id.* Finally, in 2007, the Supreme Court granted certiorari after the Second Circuit once again decided that the third-party employer provision was not enforceable. *Id.*

<sup>82</sup> *Coke*, 551 U.S. at 171. The Supreme Court affirmed the DOL's power to interpret the companionship services exemption and corresponding federal regulations. *Id.*

<sup>83</sup> *Id.* at 164. The plaintiff, Evelyn Coke, asserted that the defendant agency, Long Island Care at Home, Ltd., owed her money for failing to pay her overtime compensation and minimum wages under state and federal laws. *Id.* She argued that the regulations the DOL utilized to exclude home care workers from the FLSA's protections were not enforceable on multiple grounds. *Id.* at 166. The plaintiff contended that the regulations opposed congressional intent, contained contradictions, and lacked the force of law. *Id.* Moreover, she asserted that the DOL used a deficient process to promulgate these standards. *Id.*

<sup>84</sup> *Id.* at 171. The Supreme Court deferred to the DOL under a "plainly erroneous" standard of review. *Id.* The Court held that the regulations carried legal authority. *Id.* at 172. Furthermore, the Court reasoned that the DOL employed adequate procedures when it promulgated the disputed regulations. *Id.* at 174–76.

<sup>85</sup> See Klein & Boris, *supra* note 38, at 319 (indicating that the Obama administration wanted to shift the DOL's approach to the companionship services exemption). The DOL considered making changes to the companionship services exemption several times in the years leading up to the *Coke* decision. 551 U.S. at 163. Proponents of the change contended that Congress formulated the companionship services exemption for nonprofessional caregivers who had little in common with modern, professional home care workers. Noam Scheiber, *U.S. Court Reinstates Home Care Pay Rules*, N.Y. TIMES (Aug. 21, 2015), <https://www.nytimes.com/2015/08/22/business/us-court-reinstates-home-care-pay-rules.html> [<https://perma.cc/9BG4-E77P>]. The DOL defended its new interpretation of the exemption on these grounds. *Id.*

<sup>86</sup> See Third Party Employment, 29 C.F.R. § 552.109(a) (2020) (providing that third-party agencies cannot use the exemption to avoid paying their employees minimum and overtime wages). The amended regulation took effect on January 1, 2015. *Id.* (listing the amendment's effective date). The DOL also amended its regulations concerning live-in caregivers to ensure that arrangements between employers and live-in caregivers accurately reflect the time the latter spends working. *Id.* § 552.102(b). Live-in caregivers must receive minimum wages but are ineligible for overtime pay. *Id.* § 552.102(a).

<sup>87</sup> *Id.* § 552.109(a). Individual families that jointly employ home care workers can still claim the companionship services exemption. *Id.*

<sup>88</sup> See *id.* (excluding home care workers who work for third-party agencies from the companionship services exemption).

Home care agencies, however, opposed the DOL's decision to extend regulatory protections.<sup>89</sup> In 2015, in *Home Care Ass'n of America v. Weil*, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the DOL's ability to amend and interpret its own regulations.<sup>90</sup> The court took the same agency-deferential stance that the Supreme Court endorsed in *Coke* in 2007.<sup>91</sup> The court affirmed that home care agencies could not invoke the companionship services exemption to escape paying minimum wages and providing overtime compensation.<sup>92</sup> The Supreme Court denied the Home Care Association of America's petition for certiorari in 2016.<sup>93</sup>

This extension of FLSA coverage to home care providers working for third-party agencies created opportunities for these workers to seek redress for abuses.<sup>94</sup> Aggrieved employees have two avenues to compel FLSA compliance.<sup>95</sup> The first option permits workers to file complaints with the DOL's

<sup>89</sup> See *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084, 1090 (D.C. Cir. 2015) (presenting the Home Care Association of America's arguments against the revised language of the DOL's regulations).

<sup>90</sup> *Id.* The U.S. Court of Appeals for the District of Columbia Circuit handles many cases concerning the review of federal administrative agency actions. John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 388–89 (2006). Although plaintiffs can sue federal agencies in either the D.C. Circuit or the circuit where the litigant lives, practitioners are more likely to choose the D.C. Circuit due to its expertise in the area of administrative law. *Id.* at 389.

<sup>91</sup> *Weil*, 799 F.3d at 1090. In 2015, in *Home Care Ass'n of America v. Weil*, the U.S. Court of Appeals for the District of Columbia Circuit referred to the Supreme Court's opinion in *Coke*, noting that the FLSA did not contain language regarding the scope of the companionship services exemption with respect to third-party employees. *Id.* at 1091 (referring to *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 168 (2007)). The D.C. Circuit further explained that the head of the DOL possessed the authority to create a regulation that remedied an omission of this type. *Id.* The court recognized that the DOL possessed the power to change the exemption and provided an adequate reason for doing so. *Id.* at 1090, 1096–97 (holding that the DOL's rule fulfilled both parts of the test outlined in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

<sup>92</sup> See *id.* at 1090 (permitting the DOL to change its approach to the companionship services exemption to offer FLSA protections to employees of third-party home care agencies).

<sup>93</sup> See *Home Care Ass'n of Am. v. Weil*, 136 S. Ct. 2506, 2506 (2016) (denying certiorari).

<sup>94</sup> See *Hawkins v. Extended Life HomeCare Ltd.*, No. 2:18-CV-344, 2019 WL 952737, at \*1 (S.D. Ohio Feb. 17, 2019) (explaining the basis of a home care worker suit for unpaid overtime wages); *Williams v. Sweet Home Healthcare, LLC*, No. 16-2353, 2018 WL 5885453, at \*1 (E.D. Pa. Nov. 9, 2018) (incorporating the plaintiffs' contention that a home care agency misclassified its workers); *Clark v. Williamson*, No. 1:16cv1413, 2018 WL 1626305, at \*1 (M.D.N.C. Mar. 30, 2018) (detailing allegations that a home care agency misclassified its home care workers).

<sup>95</sup> See Hallett, *supra* note 10, at 105–06 (noting that workers can bring private lawsuits to seek damages for FLSA violations or notify a federal or state labor law enforcement agency about abuses); Weil & Pyles, *supra* note 10, at 59 (explaining that employees can file complaints with the DOL to trigger investigations). Scholars have suggested that strategic enforcement initiatives could alleviate problems with the complaint-centered model. DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 2–3 (2010), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/strategicEnforcement.pdf> [<https://perma.cc/3S8E-53BA>] (arguing for the DOL to adopt strategic enforcement programs to root out exploitation).

WHD to prompt an investigation and subsequent legal action.<sup>96</sup> The second option allows employees to privately litigate FLSA claims, individually or on behalf of a class of similarly situated employees through the FLSA's collective action provision.<sup>97</sup> Eligible employees may “opt-in” to private lawsuits as class members following preliminary class certification.<sup>98</sup>

Given that both options to pursue FLSA claims require active employee participation, fear of retaliation can prevent workers from coming forward about violations.<sup>99</sup> Employers may threaten to fire workers for filing com-

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Strategic enforcement refers to active investigations of target industries in the absence of complaints. *Id.*

<sup>96</sup> Weil & Pyles, *supra* note 10, at 59 (describing the importance of the complaint process for spurring DOL investigations into FLSA violations); *Filing a Complaint with the U.S. Department of Labor's Wage and Hour Division (WHD)*, WORKER.GOV, <https://www.worker.gov/actions/whd-claim/> [[https://perma.cc/\[https://perma.cc/3E9K-WXAA\]](https://perma.cc/[https://perma.cc/3E9K-WXAA])] (listing the steps workers must take to file a complaint with the WHD). Workers need to supply their contact information, details about their employer, and facts about the alleged violation to file a complaint. *Filing a Complaint with the U.S. Department of Labor's Wage and Hour Division (WHD)*, *supra*. After collecting this information, a worker can file the complaint online or over the phone. *Id.* The agency then transmits the complaint to a local branch of the WHD, and staff follow up with the worker to and determine whether an investigation is warranted. *Id.* In 2009, the U.S. Government Accountability Office conducted a study where-in researchers submitted faux complaints to the DOL's WHD. Hallett, *supra* note 10, at 106 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, DEPARTMENT OF LABOR: WAGE AND HOUR DIVISION'S COMPLAINT INTAKE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT 4 (2009), <https://www.gao.gov/assets/130/122107.pdf> [<https://perma.cc/D57R-KUGJ>]) (explaining that the DOL does not investigate a large proportion of the complaints it receives). The report noted that the DOL botched or completely disregarded 90% of the researchers' test complaints. *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, *supra*, at 4). These issues may stem in part from the agency's constricted resources. See WEIL, *supra* note 95, at 1 (listing monetary and personnel restrictions as factors that impede the DOL's ability to carry out its work).

<sup>97</sup> 29 U.S.C. § 216(b) (allowing plaintiffs to litigate their claims collectively); Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1, 16–17 (2013) (elaborating on the procedures governing FLSA collective action cases).

<sup>98</sup> Green Coleman, *supra* note 97, at 18–19. Courts utilize various evidentiary requirements and conceptions of “similarly situated” when deciding whether to certify a collective action. Scott A. Moss & Nantiya Ruan, *No Longer a Second-Class Class Action: Finding Common Ground in the Debate Over Wage Collective Actions with Best Practices for Litigation and Adjudication*, 11 FED. CTS. L. REV. 27, 35–36 (2019) (quoting 29 U.S.C. § 216(b)). To qualify as “similarly situated,” workers usually need to have experienced analogous violations and hold comparable positions to those of the plaintiffs. *Id.* at 35 (quoting 29 U.S.C. § 216(b)). Despite the widespread utilization of a two-step certification process with varied evidentiary requirements that an individual must meet to be a “similarly situated” worker, neither the FLSA nor Supreme Court caselaw dictate how courts should make these determinations. *Id.* at 41 (quoting 29 U.S.C. § 216(b)). That could change if the Supreme Court grants certiorari to review *Scott v. Chipotle Mexican Grill, Inc.*, wherein in 2020, the U.S. Court of Appeals for the Second Circuit rejected the use of regular class action criteria to determine whether workers in a FLSA collective action were “similarly situated.” 954 F.3d 502, 522 (2d Cir. 2020) (quoting 29 U.S.C. § 216(b)).

<sup>99</sup> Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 384–85 (2008). Some employers use intimidation to dissuade workers from alerting the DOL to labor law violations. Hallett, *supra* note 10, at 125.



plaints or participating in private lawsuits.<sup>100</sup> Additionally, workers who lack legal immigration status can put themselves at real or perceived risk of deportation by taking action against their employer.<sup>101</sup> This may encourage employers to hire undocumented workers—whom they can exploit by threatening to call immigration enforcement authorities.<sup>102</sup>

In addition to fears of termination and deportation, other barriers further hinder FLSA enforcement in the home care industry.<sup>103</sup> One of these challenges is the misclassification of workers as independent contractors rather than employees because the FLSA's coverage does not extend to independent contractors.<sup>104</sup> Although small business owners with specific abilities traditionally garner the independent contractor designation, employers push to include unskilled workers in this category as well.<sup>105</sup> Misclassification allows companies to save money by avoiding taxes and limiting their liability for discriminatory

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<sup>100</sup> Hallett, *supra* note 10, at 125; Ruckelshaus, *supra* note 99, at 384–85. The FLSA bars employers from engaging in retaliatory termination. 29 U.S.C. § 215(a)(3). Because both methods of addressing FLSA violations require workers to take proactive steps to enforce their rights, workers may worry that they will put their livelihoods at risk by taking these measures. Ruckelshaus, *supra* note 99, at 384–86. For example, the DOL recently sued a business in Texas that pressured a janitor to sign a statement that it had compensated him for unpaid earnings. Steven Greenhouse, *More Workers Are Claiming 'Wage Theft'*, N.Y. TIMES (Aug. 14, 2014), <https://www.nytimes.com/2014/09/01/business/more-workers-are-claiming-wage-theft.html> [<https://perma.cc/N48M-RH4F>]. When the janitor declined to sign the document because he had not received the money, the company terminated him. *Id.*

<sup>101</sup> Hallett, *supra* note 10, at 107, 132; Ruckelshaus, *supra* note 99, at 385. Prior to 2016, the U.S. Immigration and Customs Enforcement (ICE) infrequently followed up on calls concerning the legal status of workers cooperating with the DOL to address violations. Hallett, *supra* note 10, at 132. Since then, ICE has demonstrated willingness to detain undocumented individuals who are collaborating with the DOL. *Id.* DOL staff indicate that this threat is prompting those without legal status to decline to move forward with investigations. *Id.*

<sup>102</sup> See Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMPAR. LAB. L. & POL'Y J. 125, 140 (2009) (suggesting that companies profit by employing workers who are unlikely to report wage theft to the DOL); Hallett, *supra* note 10, at 125 (suggesting that enforcement agencies' reliance on worker complaints incentivizes businesses to use workers, such as immigrants with limited English proficiency, that are unlikely to come forward about abuses).

<sup>103</sup> See Hallett, *supra* note 10, at 105–07 (elaborating on the challenges that low-wage workers, particularly undocumented individuals, encounter when attempting to address wage theft).

<sup>104</sup> NELP: NAT'L EMP. L. PROJECT, *supra* note 13, at 1–2 (highlighting misclassification as a widespread problem in the home care industry); Hallett, *supra* note 10, at 98; John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 13 (2018) (explaining that FLSA protections only apply to employees because Congress considered them to be more susceptible to exploitation).

<sup>105</sup> Pearce & Silva, *supra* note 104, at 12–13 (describing the types of workers that traditionally qualified as independent contractors).

acts.<sup>106</sup> The home care industry is one of many fields experiencing frequent instances of misclassification.<sup>107</sup>

For the purposes of the FLSA, courts utilize a six-part economic realities test to determine whether a worker qualifies as an employee or an independent contractor.<sup>108</sup> The inquiry centers on the extent to which the worker operates as an independent enterprise.<sup>109</sup> A court will consider whether the worker's services are central to the hiring business's operations, the timeframe of the working relationship, and which party pays for tools or other materials.<sup>110</sup> The court will also weigh other factors, including the level of expertise the services demand, the amount of control the hiring enterprise has over the worker, and the extent to which the worker's choices determine their ability to turn a profit.<sup>111</sup> This analysis requires consideration of every factor, and a contractual agreement that designates the worker as an independent contractor does not settle the issue.<sup>112</sup>

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<sup>106</sup> See Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 54–55 (2015) (recounting the economic incentives for businesses to misclassify their employees as independent contractors, including dodging liability for discriminatory activities); Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 555, 562 (2007) (noting that enterprises that classify their workers as independent contractors do not need to furnish certain taxes).

<sup>107</sup> Pearce & Silva, *supra* note 104, at 13. Other fields experiencing high levels of misclassification include those that offer cleaning services and provide meals. *Id.* Worker misclassification has followed the expansion of the “fissured workplace,” which describes companies that outsource or contract with other firms to perform services that they once completed in-house. David Weil, *How to Make Employment Fair in an Age of Contracting and Temp Work*, HARV. BUS. REV. (Mar. 24, 2017), <https://hbr.org/2017/03/making-employment-a-fair-deal-in-the-age-of-contracting-subcontracting-and-temp-work> [<https://perma.cc/XY2P-QUCG>]. Moreover, businesses' ability to misclassify workers with impunity likely empowers this trend. See Deknatel & Hoff-Downing, *supra* note 106, at 55 (noting that a lack of oversight probably contributes to misclassification).

<sup>108</sup> See *Acosta v. Heart II Heart, LLC*, No. 2:17-cv-1242, 2019 WL 5197329, at \*5 (W.D. Pa. Oct. 15, 2019) (outlining the six-factor economic realities test that courts use to determine whether under the FLSA, a worker is an independent contractor or employee).

<sup>109</sup> *Id.* The economic realities test details factors that suggest that a worker functions as an independent contractor, including: possessing a high skill level for services provided, having flexibility to set one's own schedule, and purchasing a vehicle to visit clients. *Id.* In contrast, factors that weigh in favor of employee classification include: a contract of unlimited duration, supervision requirements, and an inability to serve clients outside of those that the hiring company provides. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* Unlike employees, independent contractors exercise considerable control over things like their rate of pay and the scheduling of their work. David Weil, *Lots of Employees Get Misclassified as Independent Contractors. Here's Why It Matters*, HARV. BUS. REV. (July. 5, 2017), <https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters> [<https://perma.cc/6YUP-VE78>]. The degree of autonomy independent contractors enjoy means that their decisions affect their ability to earn money. *Id.*

<sup>112</sup> *Acosta*, 2019 WL 5197329, at \*5. The economic realities test attempts to illustrate how financially reliant the worker is on the hiring entity. Griffin Toronjo Pivateau, *The Prism of Entrepreneurship: Creating a New Lens for Worker Classification*, 70 BAYLOR L. REV. 595, 612 (2018). Additionally, application of the economic realities test differs among circuit courts, and courts may consider

### C. Immigration Law and the Home Care Industry

Due to the high proportion of foreign-born individuals working in the home care industry, immigration law directly impacts the composition of the caregiving workforce.<sup>113</sup> Congress originally passed the Immigration and Nationality Act (INA) in 1952 to consolidate the country's immigration laws, including those that governed employment-based immigration.<sup>114</sup> Furthermore, the Immigration Reform and Control Act of 1986 (IRCA) prohibits the employment of individuals without legal work authorization.<sup>115</sup> Subsection 1 describes the INA and the visa programs that allow foreign nationals to permanently or temporarily secure work authorization and residency in the United States.<sup>116</sup> Subsection 2 discusses the IRCA and its effects on the home care industry.<sup>117</sup>

#### 1. Immigrant and Nonimmigrant Visas Linked to Employment Under the INA

None of the existing visa categories outlined in the INA provide a viable means for a significant number of prospective immigrants to enter the home care industry.<sup>118</sup> The United States issues only a small number of immigrant employment-based visas on an annual basis to allow noncitizens to obtain permanent residency.<sup>119</sup> The INA establishes a hierarchy of preference for applicants based on their specific skills and abilities.<sup>120</sup> Of the five groups, the highest priority attaches to remarkably educated individuals and those with exceptional talent.<sup>121</sup> This category, known as EB-1, is comprised of foreign-born individuals who exhibit "extraordinary ability."<sup>122</sup> The next group, EB-2,

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factors beyond those listed in the six-part test. *Id.* at 617–18. Historically, courts have generally construed the economic realities test to bring more workers under the FLSA's protections. *Id.* at 613.

<sup>113</sup> See Zallman et al., *supra* note 9, at 924–25 (highlighting the outside contribution that immigrants make to caring for U.S. citizens, and stressing that immigration policy dictates who can take these positions).

<sup>114</sup> Immigration and Nationality Act, 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.); Griffith, *supra* note 102, at 129.

<sup>115</sup> Immigration Control and Reform Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

<sup>116</sup> See *infra* notes 118–142 and accompanying text.

<sup>117</sup> See *infra* notes 144–158 and accompanying text.

<sup>118</sup> Rasalam, *supra* note 17, at 427.

<sup>119</sup> 8 U.S.C. § 1153. Many of the employment-based visa categories include statutory restrictions on the number of visas that the United States can issue each year. *Id.* § 1153(b). These caps may decrease in accordance with country-specific limitations found elsewhere in the code. *Id.* § 1152.

<sup>120</sup> *Id.* § 1153(b)(1)–(5) (introducing the five levels of preference for immigrant employment-based visas).

<sup>121</sup> *Id.* § 1153(b)(1); Scalzo, *supra* note 17, at 930–31 (explaining that the INA prioritizes visa allocation to individuals with special skills and outstanding educational accomplishments).

<sup>122</sup> 8 U.S.C. § 1153(b)(1); see Scalzo, *supra* note 17, at 931 (describing the rigorous criteria for EB-1 priority status).

demands a significant level of professional and educational achievement in a particular field.<sup>123</sup>

Home care workers fall into EB-3, the tier with the third highest level of preference.<sup>124</sup> This group encompasses individuals who perform skilled or unskilled work.<sup>125</sup> Within this category, applicants with specialized capabilities have an edge over those who lack specific skills.<sup>126</sup> The INA limits EB-3 visa allocation to 10,000 per year for unskilled applicants.<sup>127</sup> Because home care does not require a post-secondary degree or advanced training, most home care workers are considered unskilled workers for the purposes of the EB-3 visa.<sup>128</sup> The INA's strict cap on EB-3 visa allocation to unskilled workers makes it difficult for would-be caregivers to enter the United States with this type of visa.<sup>129</sup>

In addition to immigrant employment-based visas, the INA provides for the issuance of temporary nonimmigrant visas to workers.<sup>130</sup> The law refers to these individuals as “nonimmigrants.”<sup>131</sup> One program offers H-1B visas, which provide temporary work authorization to individuals with specialized skills, primarily in scientific and technological fields.<sup>132</sup> H-1B visas offer greater flexibility than many other temporary visas because they come with an opportunity to obtain citizenship.<sup>133</sup> Furthermore, once H-1B visa holders ar-

<sup>123</sup> 8 U.S.C. § 1153(b)(2)(A); Scalzo, *supra* note 17, at 933.

<sup>124</sup> See Scalzo, *supra* note 17, at 935 (noting that the EB-3 category includes unskilled workers, which would encompass home care workers).

<sup>125</sup> 8 U.S.C. § 1153(b)(3); Scalzo, *supra* note 17, at 934–35.

<sup>126</sup> 8 U.S.C. § 1153(b)(3)(B); see Scalzo, *supra* note 17, at 935 (remarking on the 10,000 visa cap on unskilled workers and lengthy wait times for applicants).

<sup>127</sup> 8 U.S.C. § 1153(b)(3)(B). This limitation has created an extensive waitlist, especially for applicants from certain countries. See *id.* § 1152(a)(2) (capping familial and employment-based visas available to applicants from any individual nation at 7% per year); Scalzo, *supra* note 17, at 935. Although two other categories of EB visas exist, both are highly specific and benefit fairly small numbers of immigrants. See 8 U.S.C. § 1153(b)(4)–(5) (outlining requirements for EB-4 and 4B-5 immigrant employment-based visas). EB-4 visas are available to very limited populations, including some religious workers and former employees of the Panama Canal Company. *Id.* § 1153(b)(4) (citing 8 U.S.C. § 1101(a)(27)). Foreign investors who meet certain criteria can apply for EB-5 visas. *Id.* § 1153(b)(5).

<sup>128</sup> 8 U.S.C. § 1153(b)(3) (grouping unskilled workers under the EB-3 visa program).

<sup>129</sup> Rasalam, *supra* note 17, at 427.

<sup>130</sup> 8 U.S.C. § 1184 (outlining the visa programs available to nonimmigrant applicants).

<sup>131</sup> *Id.* § 1101(a)(15) (distinguishing nonimmigrants from immigrants); Griffith, *supra* note 102, at 130.

<sup>132</sup> 8 U.S.C. § 1101(a)(15)(H)(i)(b); Special Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2(h) (2020); see Griffith, *supra* note 102, at 131 (defining the H-1B visa program and its selection criteria). An employer needs to apply on behalf of a nonimmigrant to receive this type of visa. Griffith, *supra* note 102, at 132. The statute caps H-1B visas at 65,000 per year. 8 U.S.C.A. § 1184(g)(1)(A) (Westlaw through Pub. L. No. 116-188). Limited exceptions, however, do exist for those working in higher education or for certain nonprofits, and for individuals with graduate degrees from U.S. universities. *Id.* § 1184(g)(5).

<sup>133</sup> See Griffith, *supra* note 102, at 131–32 (noting that the H-1B visa program permits adjustment of immigration status and employer portability). The government typically issues these visas for three

rive in the United States, they can switch employers while retaining their work authorization.<sup>134</sup> Home care workers are not eligible for H-1B visas because they do not meet the education or training criteria necessary to qualify.<sup>135</sup>

Additionally, the INA authorizes the H-2 visa program for nonimmigrants without specific capabilities or training.<sup>136</sup> Agricultural laborers may receive H-2A visas, and unskilled seasonal workers in other fields can obtain H-2B visas.<sup>137</sup> The duration of both H-2 visas is typically up to one year, and individuals can apply to extend their stay for a maximum of only three years.<sup>138</sup> H-2 visa holders cannot adjust their status to get permanent residency.<sup>139</sup> Furthermore, these individuals cannot change employers for the duration of their stay in the United States.<sup>140</sup> Although home care workers qualify as unskilled laborers, they do not meet the seasonal work requirement for H-2 visas.<sup>141</sup> Therefore, individuals who wish to work in the home care industry have few options under the INA.<sup>142</sup>

## 2. Prohibition on Hiring Undocumented Workers Under the IRCA

Given the paucity of legal avenues for unskilled workers to enter the United States, undocumented individuals tend to work as informal caregivers.<sup>143</sup> Fur-

years with the option to renew for an additional three years. 8 U.S.C.A. § 1184(g)(4); Griffith, *supra* note 102, at 131. Moreover, H-1B visa holders can adjust their status to become permanent residents with support from their employers. Griffith, *supra* note 102, at 132.

<sup>134</sup> Griffith, *supra* note 102, at 132. Although this feature allows for additional opportunities, some workers find it challenging to locate a new employer. *Id.*

<sup>135</sup> Rasalam, *supra* note 17, at 427 (explaining that no existing visa category presents a means for eldercare workers to legally work in the United States).

<sup>136</sup> Griffith, *supra* note 102, at 134.

<sup>137</sup> 8 C.F.R. § 214.2(h) (specifying which workers can receive H-2A and H-2B visas); Griffith, *supra* note 102, at 134. The statute does not institute a cap for H-2A visas, but the number of H-2B visas is limited to 66,000 each year. 8 U.S.C.A. § 1184(g)(1)(B); Griffith, *supra* note 114, at 135.

<sup>138</sup> Griffith, *supra* note 114, at 135. It tends to be difficult for workers with H-2 visas to prolong their stays in the United States. *See id.* (noting that the DOL rarely approves requests to extend H-2 visas).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> 8 C.F.R. § 214.2(h)(1)(i) (limiting H-2 visa allocation to those performing agricultural or short-term work); Rasalam, *supra* note 17, at 427.

<sup>142</sup> *See* Rasalam, *supra* note 17, at 427 (asserting that there are very few ways for unskilled workers from other countries to obtain employment-based visas). The INA authorizes other types of immigrant visas, including those that require applicants to have a citizen family member, gain asylum, or show that they were a victim of certain crimes. 8 U.S.C.A. §§ 1153, 1158, 1184. Another avenue for obtaining permanent residency is the Diversity Immigrant Visa Program, a program that awards a limited number of green cards to people from specific countries. 8 U.S.C. § 1153(c).

<sup>143</sup> *See* Immigration Control and Reform Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) (barring employers from hiring undocumented individuals); HESS & HENRICI, *supra* note 21, at 13 (suggesting that approximately one fifth of workers providing direct care services are undocumented and indicating that the proportion could be larg-

thermore, undocumented immigrants are less likely to enforce their rights under the FLSA due to fear of retribution or government scrutiny, which leaves them more vulnerable to exploitation than individuals with legal work authorization.<sup>144</sup> Recent estimates indicate that the total number of undocumented immigrants residing in the United States hovers somewhere between ten and twelve million.<sup>145</sup> It is challenging to gauge the size of the undocumented home care workforce because of the difficulties in measuring informal economic activity.<sup>146</sup> One recent study suggests that a little over four percent of direct care workers lack documentation.<sup>147</sup>

Immigration and labor law intertwined in 1986 when Congress sought to discourage illegal immigration by enacting the IRCA.<sup>148</sup> The law requires employers to verify that their employees possess legal authorization to work in the United States by filing an I-9 form or utilizing an e-verification database.<sup>149</sup> The IRCA imposes civil penalties, and in some cases criminal sanctions, on employers that knowingly hire individuals without proper documentation.<sup>150</sup>

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er); Span, *supra* note 50 (noting that more immigrants might work informally in the home care sector than estimates show).

<sup>144</sup> Griffith, *supra* note 102, at 140.

<sup>145</sup> See HESS & HENRICI, *supra* note 21, at 13 (indicating that there were eleven to twelve million undocumented people in the U.S. as of 2012); Jeffery S. Passel & D'Vera Cohn, *Mexicans Decline to Less Than Half the U.S. Unauthorized Immigrant Population for the First Time*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/> [<https://perma.cc/UY4K-MF45>] (estimating that there were 10.5 million unauthorized immigrants living in the United States in 2017). *But see* Mohammad M. Fazel-Zarandi et al., *The Number of Undocumented Immigrants in the United States: Estimates Based on Demographic Modeling with Data from 1990 to 2016*, PLOS ONE, Sept. 2018, at 1 (speculating that previous studies tended to underestimate the United States' undocumented population and positing that an accurate estimation is approximately 22.1 million people).

<sup>146</sup> HESS & HENRICI, *supra* note 21, at 13; Zallman et al., *supra* note 9, at 921. Gray market transactions occur outside of legal channels, which renders them hard to track. *See* Smith Nightingale & Wandner, *supra* note 46, at 4 (detailing the challenges of quantifying the informal economy). Additionally, undocumented individuals working in the United States may avoid participating in surveys to evade detection. Zallman et al., *supra* note 9, at 921.

<sup>147</sup> Zallman et al., *supra* note 9, at 924.

<sup>148</sup> Immigration Control and Reform Act of 1986, 100 Stat. 3359.

<sup>149</sup> 8 U.S.C. § 1324a. An employer must review official materials, such as a passport, that affirm an applicant's identity and work authorization status. *Id.* § 1324a(b). Additionally, employers need to sign a form to swear that the applicant can legally work in the United States. *Id.* States are now requiring more employers to use e-verification to confirm the status of their employees. Catalina Amuedo-Dorantes & Cynthia Bansak, *The Labor Market Impact of Mandated Employment Verification Systems*, 102 AM. ECON. REV.: PAPERS & PROC. 543, 543 (2012). This increased use of online tracking systems may compel more undocumented individuals, particularly women, to enter fields that are exempt from e-verification requirements. *Id.* at 546.

<sup>150</sup> 8 U.S.C. § 1324a; Griffith, *supra* note 102, at 139. Employers that repeatedly violate the Immigration Reform and Control Act of 1986 (IRCA) may need to pay a \$3,000 fine for each person for whom the employer committed an infraction and/or spend a maximum of six months in prison for their actions. 8 U.S.C. § 1324a(f)(1).

Although most IRCA penalties apply solely to employers, a 1990 amendment to the INA sanctioned undocumented workers who utilize falsified forms to obtain employment.<sup>151</sup> Foreign-born individuals who engage in fraud to get positions that fall within the IRCA's purview can be subject to civil fines and even criminal prosecution.<sup>152</sup> Nevertheless, the IRCA does not penalize undocumented individuals for searching for jobs or functioning as employees.<sup>153</sup> Moreover, the statute does not apply to workers designated as independent contractors.<sup>154</sup>

Given that the IRCA's coverage is limited to employees, its provisions do not apply to every person working in the home care industry.<sup>155</sup> There is no indication that families hiring home care workers through the gray market verify their work authorization status.<sup>156</sup> Additionally, the IRCA does not restrict home care agencies from engaging undocumented caregivers as independent contractors.<sup>157</sup> Therefore, the IRCA by design encourages undocumented individuals to remain in underregulated positions and avoid reporting abuses.<sup>158</sup>

## II. THE EXISTING LEGAL FRAMEWORK HARMS HOME CARE WORKERS AND DEMANDS A SOLUTION

The impending shortage of home care workers threatens to leave elderly and disabled individuals without the services they need to remain in their communities.<sup>159</sup> The mere extension of FLSA coverage to some home care

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<sup>151</sup> 8 U.S.C. § 1324c; Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.); Griffith, *supra* note 102, at 140.

<sup>152</sup> 8 U.S.C. § 1324c. Fines for violations of this statute range from \$250 to \$5,000 per document for repeat offenders. *Id.* § 1324c(d)(3). Criminal penalties may apply to individuals or entities that hide their involvement in creating fraudulent applications. *Id.* § 1324c(e).

<sup>153</sup> Griffith, *supra* note 102, at 140. An undocumented immigrant who has not engaged in fraudulent activity will not be subject to penalties under the IRCA solely for taking a job. *Id.*

<sup>154</sup> *See* 8 U.S.C. § 1324a (omitting any reference to independent contractors).

<sup>155</sup> *Id.* § 1324a; *see* Zallman et al., *supra* note 9, at 919–20 (suggesting that there are many individuals working in the informal sector as home care workers).

<sup>156</sup> *See* Dresser, *supra* note 31, at 119 (describing the lack of regulation that accompanies the “off the books” nature of informal home care work). Although in theory the IRCA applies to any person or entity that hires an employee, the gray market comprises informal arrangements wherein workers receive payment under-the-table. 8 U.S.C. § 1324a; Dresser, *supra* note 31, at 119. It is therefore improbable that employers would comply with these requirements. *See* Dresser, *supra* note 31, at 119 (indicating that informal home care employment operates outside the law).

<sup>157</sup> Griffith, *supra* note 102, at 140.

<sup>158</sup> *Id.* Scholars have speculated that the implementation of the IRCA helped entrench undocumented immigrants in the informal economy. *Id.* Furthermore, it provided employers with a powerful tool to prevent workers from complaining about labor law violations. *Id.*

<sup>159</sup> *See* Zallman et al., *supra* note 9, at 920 (citing NAT'L CTR. FOR HEALTH WORKFORCE ANALYSIS, *supra* note 45, at 1) (speculating that there will be a large shortfall of direct care workers if policies do not change). One recent report estimates that there will be 4.7 million jobs available in the home care industry within the next ten years. SCALES, *supra* note 6, at 17.

workers has not made their work more desirable.<sup>160</sup> Moreover, current visa programs put noncitizens who wish to work in the industry at a disadvantage.<sup>161</sup> Recognition of these problems has prompted various stakeholders to propose policy improvements for the home care industry.<sup>162</sup> Section A of this Part discusses how inadequate enforcement limits the reach of FLSA protections in the home care context.<sup>163</sup> Section B discusses the lack of avenues available to prospective immigrants who wish to obtain lawful employment as caregivers.<sup>164</sup> Section C surveys policy proposals that aim to address problems in the home care industry.<sup>165</sup>

### A. The Extension of FLSA Coverage to Home Care Workers Remains Limited

After the DOL changed its stance on the companionship services exemption in 2015, third-party home care agencies had to comply with the FLSA's wage and hour protections.<sup>166</sup> Nevertheless, if home care workers cannot successfully enforce their rights, the extension of FLSA coverage is unlikely to have a practical impact.<sup>167</sup> Similarly, ongoing efforts to raise the minimum wage at the federal and state levels will not assist home care workers if they cannot address labor violations and assert pay equity.<sup>168</sup> Subsection 1 of this

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<sup>160</sup> See SCALES, *supra* note 6, at 17 (describing the problems with high turnover in the field); Dresser, *supra* note 31, at 117–18 (describing low pay and demanding work as undesirable aspects of home care work).

<sup>161</sup> Rasalam, *supra* note 17, at 427 (articulating that visas linked to employment do not provide prospective home care workers with viable options).

<sup>162</sup> See generally Direct CARE Opportunity Act, S. 2521, 116th Cong. (2019) (illustrating a federal legislative approach to the crisis); HESS & HENRICI, *supra* note 21, at 21 (representing a policy organization's response to issues involved in caregiving); *Why It Matters?*, *supra* note 20 (exemplifying a union's efforts to organize home care providers).

<sup>163</sup> See *infra* notes 166–201 and accompanying text.

<sup>164</sup> See *infra* notes 202–219 and accompanying text.

<sup>165</sup> See *infra* notes 220–239 and accompanying text.

<sup>166</sup> See *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084, 1090 (D.C. Cir. 2015); *Companionship Services*, 29 C.F.R. § 552.109 (2020) (embodying the DOL's revised companionship services exemption).

<sup>167</sup> See Hallett, *supra* note 10, at 104–05 (explaining that the employee-driven complaint system prevents workers from asserting their rights, which leaves them vulnerable to continued exploitation); Ruckelshaus, *supra* note 99, at 386–87, 392 (elaborating on the challenges the FLSA's "opt-in" collective action mechanism has for low-wage and immigrant workers). Despite the DOL's increased use of proactive investigations to address FLSA violations, the agency still relied on complaints to initiate a large proportion of its investigations in 2017. Weil, *supra* note 11, at 5 (noting that the DOL initiated more than half of its investigations without receiving a worker complaint in 2017).

<sup>168</sup> See Ruckelshaus, *supra* note 99, at 375 (arguing that employers will not have incentives to change their conduct if they can violate labor laws without any consequences). If new laws require wages to increase without addressing weak legal mechanisms to compel enforcement, the mere existence of these laws will not help workers. See *id.* at 388–90 (illustrating the pervasiveness of wage theft under the existing system).



Section considers the failings of employee-driven enforcement mechanisms in the home care context.<sup>169</sup> Subsection 2 discusses how worker misclassification limits home care workers' ability to enforce their rights.<sup>170</sup>

### 1. Employee-Driven Enforcement Mechanisms

Unique features of the home care industry make it especially challenging for home care workers to report FLSA violations to the DOL's WHD or bring private lawsuits to recover unpaid wages.<sup>171</sup> These difficulties may contribute to frequent turnover and subpar conditions that plague the industry.<sup>172</sup> Although home care employees possess two avenues for litigating FLSA claims, the workforce's demography and socioeconomic status make these options ill-suited to root out labor law violations in the industry.<sup>173</sup>

The first FLSA enforcement mechanism requires employees to report violations directly to the DOL, posing several challenges for home care workers.<sup>174</sup> Initially, the complaint process demands disclosure of personal information.<sup>175</sup> This could be daunting for home care workers, many of whom come

<sup>169</sup> See *infra* notes 171–190 and accompanying text.

<sup>170</sup> See *infra* notes 191–201 and accompanying text.

<sup>171</sup> See Hallett, *supra* note 10, at 104–05 (outlining barriers low-income and immigrant workers face to filing complaints with the DOL or litigating FLSA claims); Ruckelshaus, *supra* note 99, at 385–86 (detailing why it is hard for workers to participate in FLSA collective action lawsuits).

<sup>172</sup> See SCALES, *supra* note 6, at 19 (linking retention problems in the home care industry to poor job quality).

<sup>173</sup> See Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 555 (2010) (highlighting the challenges that low-wage workers face under the current enforcement framework); Hallett, *supra* note 10, at 104–05 (explaining that most workers who experience wage theft do not file complaints with the DOL); *infra* notes 174–185 and accompanying text (discussing the two enforcement mechanisms available to workers entitled to FLSA protections). Some home care workers, including those properly classified as independent contractors and those working directly for their clients through the gray market, would still not enjoy protection under the FLSA. See *Companionship Services*, 29 C.F.R. § 552.109(a) (2020) (allowing individuals who directly employ home care workers to claim the companionship services exemption); Pearce & Silva, *supra* note 104, at 13 (explaining that independent contractors do not enjoy labor law protections). Given that home care workers tend to be immigrants and women of color who do not earn much money, enforcement mechanisms that depend on worker initiation are likely to be particularly problematic for this population. Zallman et al., *supra* note 9, at 922–23. (laying out the demographics of home care workers); see Hallett, *supra* note 10, at 99 (explaining that the majority of indigent laborers experience wage theft and noting that marginalized groups are most susceptible to it).

<sup>174</sup> Weil & Pyles, *supra* note 10, at 59. In 2017, the DOL conducted more than half of its investigations without a complaint, but still depended on complaints for a significant percentage of inquiries. Weil, *supra* note 11, at 5.

<sup>175</sup> See *supra* note 96 and accompanying text (noting that workers must provide their contact information and details about the alleged violations they have experienced to file a complaint with the DOL's WHD).

from marginalized communities, due to distrust.<sup>176</sup> Furthermore, few home care workers belong to unions that can support them during the complaint process.<sup>177</sup> Home care workers are also unlikely to have time to participate in the investigative process or in enforcement proceedings.<sup>178</sup> Lastly, home care workers might be completely unaware of their legal rights.<sup>179</sup>

The second enforcement mechanism permits home care workers to file private lawsuits against their employers, but this avenue for redress has similar problems.<sup>180</sup> The “opt-in” mechanism outlined in the FLSA’s collective action provision requires workers who join private lawsuits to actively participate in the litigation.<sup>181</sup> This means that a home care worker could easily disregard the notice to join a suit or misunderstand its meaning, thus losing an opportunity to assert their rights.<sup>182</sup> Moreover, home care workers may lack the financial resources to participate in litigation.<sup>183</sup> Many home care workers make so little money that they cannot afford to survive without government assistance, let

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<sup>176</sup> See Fine, *supra* note 12, at 152 (indicating that undocumented workers and people of color may be more hesitant to lodge complaints with governmental enforcement agencies); *supra* notes 63–65 and accompanying text (explaining that a majority of home care workers are women of color and immigrants).

<sup>177</sup> See Hallett, *supra* note 10, at 139 (identifying the low proportion of unionization in fields where violations often occur as a barrier to FLSA enforcement). In 2019, approximately 6% of workers in “[p]ersonal care and service occupations” and 7% of workers in “[h]ealthcare support occupations” claimed to be members of a union. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/cps/cpsaat42.htm> [<https://perma.cc/8P2X-MVFE>] (Jan. 22, 2020). Workers who are not union members are less likely to assert their rights under labor laws than those who are members. Ruckelshaus, *supra* note 99, at 384.

<sup>178</sup> See Hallett, *supra* note 10, at 107 (noting that workers who make little money are less likely to have room in their schedules to seek redress for reprisals); Lippitt, *supra* note 31, at 222 (highlighting the fact that many home care workers spend significant amounts of time working).

<sup>179</sup> See Hallett, *supra* note 10, at 105 (explaining that most low-wage workers do not know about their rights under state wage and hour laws). Workers who do not speak English experience more trouble accessing this information, which is of particular consequence for home care workers because a third of home care agency employees are immigrants. *Id.*; Zallman et al., *supra* note 9, at 924.

<sup>180</sup> 29 U.S.C. § 216(b); Griffith, *supra* note 102, at 147 (articulating that workers without legal work authorization can bring private lawsuits for FLSA claims); see Hallett, *supra* note 10, at 105–06 (describing the reasons why litigation is a challenging enforcement mechanism for laborers such as home care workers).

<sup>181</sup> See Coleman, *supra* note 97, at 18–19 (explaining that putative class members receive notice regarding the lawsuit and that they can choose not to participate in the class action).

<sup>182</sup> *Id.* at 19–20. Two reasons why a worker may not “opt-in” to a FLSA collective action include language barriers that preclude understanding the notice, and concerns that the suit notice is illegitimate. *Id.* The demographic composition of the home care work force suggests that these issues could be particularly problematic for professional caregivers. See Zallman et al., *supra* note 9, at 923–24 (illustrating the high proportion of immigrations and individuals from marginalized communities working in the home care industry). These issues might help explain why the “opt-out” system for traditional class action lawsuits tends to produce larger classes than the “opt-in” mechanism for the FLSA collective action. FED. R. CIV. P. 23(c)(2)(B); Coleman, *supra* note 97, at 19.

<sup>183</sup> See Hallett, *supra* note 10, at 105–06 (discussing the challenges low-wage workers face when suing to recover unpaid wages).

alone pay an attorney or take time off.<sup>184</sup> Although some nonprofits provide representation to low-wage workers free of charge, legal aid organizations that receive federal funding cannot assist undocumented immigrants under most circumstances.<sup>185</sup>

Moreover, citizen and noncitizen home care workers may fear retaliation from their employers if they complain to the DOL or file a lawsuit to address violations.<sup>186</sup> If an employer fires a home care worker for coming forward, the worker may lack the time or means to litigate a wrongful termination claim.<sup>187</sup> In addition to worrying about retaliatory firing, immigrant home care workers may fear that speaking up will result in deportation.<sup>188</sup> Undocumented workers are particularly vulnerable to threats that their employer will contact immigration authorities if they report FLSA violations.<sup>189</sup> Furthermore, concern about reprisal can prevent immigrant workers from opting into FLSA collective action lawsuits even when other employees initiated the litigation.<sup>190</sup>

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<sup>184</sup> See *id.* (explaining that many workers earn too little to pay for private counsel). Some attorneys will litigate FLSA claims on a contingency basis. *Id.* at 105. Still, indigent workers encounter difficulty retaining these lawyers because they are unlikely to win large damage awards in their cases. *Id.* This makes their cases unattractive to lawyers who would recover only part of the award as payment. See *id.* (indicating that lawyers are more likely to represent employees with high salaries).

<sup>185</sup> See Smith & Ruckelshaus, *supra* note 106, at 593 (noting that organizations that receive Legal Services Corporation funding from the federal government cannot assist undocumented individuals). Workers who have FLSA claims face the additional challenge of finding an organization that will take their case because most focus on issues like unemployment compensation as opposed to wage theft. Hallett, *supra* note 10, at 106.

<sup>186</sup> Hallett, *supra* note 10, at 107. A 2009 study found that over 40% workers who came forward about workplace violations experienced reprisals. *Id.*

<sup>187</sup> *Id.* (explaining that many low-wage workers who endure retaliation lack the time or resources to seek damages); *Occupational Employment and Wages, May 2019, supra* note 52 (illustrating that home care workers make less than \$15 per hour on average).

<sup>188</sup> Ruckelshaus, *supra* note 99, at 384–85 (describing the types of retaliation employers use to silence their workers and highlighting a situation where ICE targeted immigrant workers). One high profile example of employer retaliation came to light when the New York Attorney General's Office issued a press release concerning a home care agency's failure to pay 100 workers in accordance with state wage and hour laws in 2019. Press Release, Letitia James, N.Y. Att'y Gen., Attorney General James Secures \$450,000 for 100 Home Health Aides Threatened with Deportation (Sept. 13, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-secures-450000-100-home-health-aides-threatened> [<https://perma.cc/NJ3U-W8Z4>]. In addition to remedying wage theft, a portion of the \$450,000 payout compensated immigrants whom the agency intimidated by threatening to call immigration enforcement authorities. *Id.*

<sup>189</sup> See *supra* note 101 and accompanying text (describing ICE's recent move to target undocumented workers who report labor violations and suggesting that this made individuals without work authorization less likely to come forward about abuses).

<sup>190</sup> Coleman, *supra* note 97, at 19–20. Workers may worry that their employers will contact immigration enforcement authorities in response to undocumented employee involvement in a lawsuit. *Id.* Moreover, immigrants without legal status may be more hesitant to appear before a court and testify against their employers. See *id.* at 19 (suggesting that trepidation at the prospect of addressing violations in court might deter undocumented immigrants from opting into collective action classes).

## 2. Misclassification in the Home Care Industry

The escalation of worker misclassification by the home care industry presents an additional challenge to FLSA enforcement.<sup>191</sup> Home care workers designated as independent contractors do not enjoy any protections under the FLSA.<sup>192</sup> Even though home care work, which requires little to no formal training, does not fit into the traditional conceptualization of independent contractor status, some workers are classified as such.<sup>193</sup> Under the FLSA's six-factor economic realities test, many of the features that characterize caregiving in the home weigh in favor of employee status.<sup>194</sup> Still, some third-party agencies misclassify their home care workers as independent contractors to evade regulatory oversight.<sup>195</sup> Since 2015, the DOL and individual home care workers have taken legal action against agencies for failure to pay overtime and minimum wages due to misclassification.<sup>196</sup>

Worker misclassification could further exacerbate existing FLSA enforcement obstacles because misclassified home care workers are unlikely to understand their rights under the FLSA.<sup>197</sup> The FLSA does not require busi-

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<sup>191</sup> See Ruckelshaus, *supra* note 99, at 381 (listing the home care industry as one of the fields experiencing increased instances of worker misclassification).

<sup>192</sup> *Id.* at 380. Congress did not believe that independent contractors needed to be covered under labor laws when it enacted the FLSA in 1938. Pearce & Silva, *supra* note 104, at 13. Businesses started classifying unskilled workers, such as home care workers, as independent contractors in recent years. *Id.* Worker misclassification benefits companies because it reduces their labor expenses and tax burden. Deknatel & Hoff-Downing, *supra* note 106, at 55.

<sup>193</sup> Pearce & Silva, *supra* note 104, at 12–13 (stating that independent contractors are often small business operators with a high degree of skill). Nearly half of home care workers lack advanced degrees. Zallman et al., *supra* note 9, at 923. Although requirements vary by state and depend on a workers' duties, many home care workers do not need significant training to provide caregiving services. See Condition of Participation: Home Health Aide Services, 42 C.F.R. § 484.80 (2020) (requiring "home health aides" working for agencies funded through government-sponsored health insurance programs to receive seventy-five hours of training); *Personal Care Aide Training Requirements*, PHI, <https://phinational.org/advocacy/personal-care-aide-training-requirements/> [<https://web.archive.org/web/20201103034720/https://phinational.org/advocacy/personal-care-aide-training-requirements/>] (showing that most states either entirely lack or have contradictory requirements for "[p]ersonal [c]are [a]ides").

<sup>194</sup> See *Acosta v. Heart II Heart, LLC*, No. 2:17-cv-1242, 2019 WL 5197329, at \*5 (W.D. Pa. Oct. 15, 2019) (using the economic realities test to find that a home care agency misclassified its workers as independent contractors).

<sup>195</sup> NELP: NAT'L EMP. L. PROJECT, *supra* note 13, at 1–2; Ruckelshaus, *supra* note 99, at 381.

<sup>196</sup> See generally *Acosta v. At Home Pers. Care Servs. LLC*, No. 1:18-cv-549, 2019 WL 1601997, at \*1 (E.D. Va. Apr. 15, 2019) (stating that a home care agency misclassified its home care employees as independent contractors); *Hawkins v. Extended Life HomeCare Ltd.*, No. 2:18-CV-344, 2019 WL 952737, at \*1 (S.D. Ohio Feb. 17, 2019) (noting a home care worker alleged misclassification); *Williams v. Sweet Home Healthcare, LLC*, No. 16-2353, 2018 WL 5885453, at \*1 (E.D. Pa. Nov. 9, 2018) (incorporating home care workers' claims that a home care agency misclassified its worker); *Clark v. Williamson*, No. 1:16cv1413, 2018 WL 1626305, at \*1 (M.D.N.C. Mar. 30, 2018) (explaining an allegation of misclassification).

<sup>197</sup> See Hallett, *supra* note 10, at 128 (indicating that only employers need to post notices about FLSA protections). Even if workers can see it, a poster is unlikely to convey enough information to

nesses that classify their workers as independent contractors to disseminate information about labor protections.<sup>198</sup> Even when the FLSA requires an employer to post pertinent regulations in a workplace, the law does not require information in multiple languages under most circumstances.<sup>199</sup> Home care workers also spend significant time in their clients' homes, which may uniquely limit their access to know-your-rights materials.<sup>200</sup> Home care workers may not recognize that they are suffering from misclassification without assistance from a union, community organization, or legal representative.<sup>201</sup>

### *B. Immigration Laws Restrict Foreign-Born Individuals from Entering the Home Care Industry*

In addition to dealing with weak FLSA enforcement that contributes to high turnover and worker mistreatment, the home care industry is struggling to recruit foreign-born workers due to restrictive immigration laws.<sup>202</sup> Existing visa programs do not prioritize direct care workers.<sup>203</sup> Long wait times and high fees can render these programs inaccessible or unappealing to prospective caregivers.<sup>204</sup> Additionally, the IRCA's prohibition on hiring undocumented

demonstrate to employees whether they have been misclassified. *See id.* (suggesting that posters cannot adequately communicate concepts that workers need to comprehend to enforce their rights).

<sup>198</sup> *See* Hallett, *supra* note 10, at 128 (noting that only employers must post FLSA protections); Pearce & Silva, *supra* note 104, at 13 (stating that FLSA provisions apply solely to employment relationships).

<sup>199</sup> Hallett, *supra* note 10, at 128–29. Given the large proportion of immigrants working in home care, a lack of information in languages other than English could pose a significant challenge. *See* Zallman et al., *supra* note 9, at 923 (noting that a third of home care workers are immigrants). Moreover, the FLSA's regulatory scheme is complex. Hallett, *supra* note 10, at 128.

<sup>200</sup> *See* Dresser, *supra* note 31, at 121–22 (describing how home care workers become isolated because they work in their client's homes). The degree of isolation that home care workers experience varies due to many factors, including whether they live with their clients and whether they work directly for a family or individual. *Id.* Home care workers with fewer contacts may lack a support system. *Id.* at 121. Therefore, isolated home workers can be more vulnerable to labor violations. *Id.* at 122.

<sup>201</sup> *See* Hallett, *supra* note 10, at 105 (pointing to a study that showed almost 60% of laborers were unaware of certain wage and hour protections); Weil, *supra* note 11, at 9 (suggesting that workers are more likely to file complaints if they have an advocate helping them to navigate the process).

<sup>202</sup> *See* Rasalam, *supra* note 17, at 408 (pointing to limitations on immigration as a barrier to recruiting more workers to care for elderly and disabled individuals).

<sup>203</sup> *See* Zallman et al., *supra* note 9, at 925 (arguing that immigration restrictions limit the pool of potential direct care workers in the United States); Scalzo, *supra* note 17, at 931 (asserting that U.S. visa programs put unskilled workers at a disadvantage, compared to individuals with high education and professional status).

<sup>204</sup> *See* U.S. Dep't of State—Bureau of Consular Affs., *Fees for Visa Services*, TRAVEL.STATE.GOV <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/fees-visa-services.html> [<https://perma.cc/MT5Y-A72M>] (listing application fees in excess of \$300). Although the U.S. Citizenship and Immigration Services does not publish how many applicants are waiting for immigrant employment-based visa approval, its website warns that it can take a long time for unskilled workers to receive them. *Employment-Based Immigration: Third Preference EB-3*, U.S. CITIZENSHIP

workers probably incentivizes workers without legal immigration status to seek employment through the gray market, outside the protection of federal labor law.<sup>205</sup> Undocumented caregivers who work for home care agencies may also be less likely to report or litigate claims concerning FLSA violations due to fear of deportation.<sup>206</sup>

Prospective home care workers lack just and legal avenues to work in the United States.<sup>207</sup> The EB-3 visa, which is the only immigrant employment-based visa available to unskilled workers, is difficult for caregivers to obtain.<sup>208</sup> Even if all of the 10,000 EB-3 visas available for unskilled laborers went to home care workers each year, it would do little to alleviate the fundamental shortage.<sup>209</sup> Additionally, nonimmigrant visas, which enable workers to come to the United States on a temporary basis, are not open to home care workers.<sup>210</sup> The H-1B, H-2A, and H-2B visa programs do not target individuals who would perform long-term caregiving services.<sup>211</sup> Even if home care workers could easily obtain temporary visas, they would not have the opportunity to remain in the United States long-term.<sup>212</sup> Moreover, H-2 visas are an unattractive option given their association with human trafficking and other forms of exploitation.<sup>213</sup> Employers may abuse H-2 visa holders by encourag-

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& IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-third-preference-eb-3> [<https://perma.cc/XJ6R-XXRJ>] (Apr. 4, 2020). The United States limits visa allocation to applicants from certain countries. HESS & HENRICI, *supra* note 21, at 8. As a result, applicants from some countries may need to wait several years to receive an employment-based visa. *Id.*

<sup>205</sup> See Zallman et al., *supra* note 9, at 922–23 (indicating that immigrants and undocumented people are more likely than U.S. citizens to work as caregivers through informal arrangements).

<sup>206</sup> See Ruckelshaus, *supra* note 99, at 385 (stressing that undocumented individuals are less likely to report labor abuses due to worries about reprisal from their employers and immigration enforcement authorities).

<sup>207</sup> See *supra* notes 118–142 and accompanying text (describing immigrant and nonimmigrant visa programs linked to employment, which structurally disfavor home care workers).

<sup>208</sup> HESS & HENRICI, *supra* note 21, at 8.

<sup>209</sup> See Zallman et al., *supra* note 9, at 920 (predicting a caregiver shortage of over half a million workers within ten years); Scalzo, *supra* note 17, at 935 (noting that the visa system caps allocation to unskilled workers, which would include home care workers).

<sup>210</sup> See HESS & HENRICI, *supra* note 21, at 7 (explaining that home care workers do not fit neatly into the temporary worker visa categories).

<sup>211</sup> See *supra* notes 130–142 and accompanying text (outlining the H-1B, H-2A, and H-2B nonimmigrant visa programs, and then explaining why prospective caregivers would not qualify for them).

<sup>212</sup> See Griffith, *supra* note 102, at 131–32 (noting that the H-1B nonimmigrant visa is distinguishable from the H-2 programs because H-1B visa holders can obtain green cards whereas H-2 visa holders cannot).

<sup>213</sup> See Note, *Counteracting the Bias: The Department of Labor's Unique Opportunity to Combat Human Trafficking*, 126 HARV. L. REV. 1012, 1029–30 (2013) (discussing the use of temporary H-2 visa programs to traffic workers); Catherine DiSanto, Comment, *Beauty and the H-2Beast: How the Equality State Fails Its Female Guest Workers*, 18 WYO. L. REV. 321, 324–26 (2018) (detailing historical and current abuses related to temporary work visa programs).

ing workers to accumulate debt before entering the United States, taking workers' travel documents, and failing to pay their employees for their work.<sup>214</sup>

The lack of viable legal options for immigrants to enter the United States may encourage undocumented workers to enter the informal economy.<sup>215</sup> In the home care context, this means that undocumented workers contract directly with clients and their families through the gray market.<sup>216</sup> These types of informal agreements are not subject to FLSA protections.<sup>217</sup> Moreover, undocumented individuals working as caregivers remain at risk of detention and deportation at all times.<sup>218</sup> This not only endangers undocumented caregivers and their families, but also creates instability for the elderly and disabled individuals who rely on home care workers to survive.<sup>219</sup>

### C. Policy Proposals to Address the Home Care Crisis

Diverse stakeholders, including unions, academics, and legislators, are searching for policies that can help attract, retain, and empower home care workers.<sup>220</sup> Many initiatives focus on improving the quality of home care work.<sup>221</sup> These measures include increasing home care workers' wages and

<sup>214</sup> *Counteracting the Bias: The Department of Labor's Unique Opportunity to Combat Human Trafficking*, *supra* note 213, at 1029.

<sup>215</sup> See HESS & HENRICI, *supra* note 21, at 13 (noting that undocumented workers might be overrepresented among informal caregivers because individuals and families are less inclined to dig into whether they have work authorization); Smith Nightingale & Wandner, *supra* note 46, at 3–4 (suggesting that undocumented individuals engage in the informal economy because they lack the ability to accept legal employment).

<sup>216</sup> See Span, *supra* note 50 (offering an example of an undocumented home care worker who cares for a woman in her nineties).

<sup>217</sup> See Third Party Employment, 29 C.F.R. § 552.109(a) (2020) (allowing clients and families that directly employ home care workers to claim the companionship services exemption); HESS & HENRICI, *supra* note 21, at 13 (indicating that undocumented caregivers are at especially high risk of being underpaid).

<sup>218</sup> See Span, *supra* note 50 (profiling an elderly woman and her caregiver, both of whom worry that immigration enforcement authorities will detain and deport the woman's home care worker).

<sup>219</sup> Ina Jaffe, *U.S. Immigration Policy Threatens Shake-Up In Home Health Business*, MORNING EDITION (Mar. 5, 2018), <https://www.npr.org/sections/health-shots/2018/03/05/587691189/immigrants-who-staff-home-health-care-in-the-u-s-worry-about-deportation> [<https://perma.cc/DZX2-96BT>] (describing an undocumented caregiver's contingency plan to return to Mexico with her children if they need to leave the U.S.); Span, *supra* note 50. If an elderly or disabled person relies on a home care worker who is deported, the client may experience problems due to the sudden lack of a caregiver. Span, *supra*.

<sup>220</sup> See *supra* note 162 and accompanying text (explaining that legislators, think tanks, and unions are making efforts to reform the home care industry).

<sup>221</sup> See Direct CARE Opportunity Act, S. 2521, 116th Cong. (2019) (providing funding to improve training for home care workers); Domestic Workers Bill of Rights Act, S. 2112, 116th Cong. (2019) (requiring the expansion of benefits for domestic workers such as paid sick time and an abuse hotline); Raise the Wage Act, S. 150, 116th Cong. (2019) (increasing the federal minimum wage for all FLSA-covered employees).

promoting avenues for professional advancement.<sup>222</sup> Some scholars and interest groups are also calling for immigration policy reforms that would fill vacancies in the home care industry.<sup>223</sup> These proposals seek to mitigate the expected shortage of caregivers in the coming years.<sup>224</sup>

As a threshold matter, low compensation and measly benefits currently hinder the recruitment and retention of home care workers, but proponents of a livable wage for service work could bring more financial security to the industry.<sup>225</sup> In 2019, members of Congress introduced the Raise the Wage Act.<sup>226</sup> This bill would amend the FLSA to increase the federal minimum wage to fifteen dollars per hour.<sup>227</sup> Moreover, the Domestic Workers Bill of Rights Act, also introduced in 2019, would amend the FLSA to mandate certain benefits for domestic workers.<sup>228</sup> The bill would require covered domestic employers to provide their workers with earned sick leave, regular breaks, and temporary schedule changes.<sup>229</sup> If enacted, these bills could attract new home care workers and reduce turnover in the industry.<sup>230</sup>

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<sup>222</sup> See *supra* notes 20–22 and accompanying text (discussing the Service Employees International Union’s “Fight for \$15” campaign, scholars’ proposals for immigration reform that benefits home care workers, and congressional bills intended to improve home care jobs).

<sup>223</sup> HESS & HENRICI, *supra* note 21, at 21; Stone & Bryant, *supra* note 9, at 54–55; Rasalam, *supra* note 17, at 439. Some advocates would like to create a new visa program for noncitizen home care workers. HESS & HENRICI, *supra* note 21, at 15–17. Proponents of this approach typically fall into two camps: (1) advocates of a temporary visa that expires after a term of years, or (2) proponents of a provisional visa that allows caregivers a conditional path to permanent residency. See *id.* (describing temporary and provisional visas). Canada has a provisional visa program for live-in caregivers, which allows them to apply for permanent residency after working as care providers for two years within a set period. Stone & Bryant, *supra* note 9, at 55. In contrast, Israel issues temporary visas to noncitizen caregivers that expire after five years. *Id.*

<sup>224</sup> S. 2521; S. 2112; HESS & HENRICI, *supra* note 21, at 15–17, 21; Stone & Bryant, *supra* note 9, at 54–55; Rasalam, *supra* note 17, at 424.

<sup>225</sup> SCALES, *supra* note 6, at 19 (underscoring the importance of enhanced compensation to attract and keep more workers in the home care industry).

<sup>226</sup> Raise the Wage Act, H.R. 582, 116th Cong. (2019). The House of Representatives passed the bill, and it has been on the calendar for consideration in the Senate since the summer of 2019. *H.R. 582—Raise the Wage Act*, CONGRESS.GOV (2019–2020), <https://www.congress.gov/bill/116th-congress/house-bill/582/all-actions?q=%7B%22search%22%3A%5B%22H.R.+582%22%5D%7D&s=3&r=1> [<https://perma.cc/DPE6-SWF5>].

<sup>227</sup> 29 U.S.C. § 206 (establishing the federal minimum wage); Raise the Wage Act, S. 150, 116th Cong. § 2(a)(1) (2019) (outlining a schedule for increasing the federal minimum wage within five years of enacting the Raise the Wage Act).

<sup>228</sup> Domestic Workers Bill of Rights, H.R. 3760, 116th Cong. (2019); S. 2112.

<sup>229</sup> S. 2112 §§ 111, 112, 115. The Domestic Workers Bill of Rights Act would also provide resources to domestic workers who encounter sexual harassment and stalking. *Id.* § 121. The Act includes specific data collection provisions regarding home care workers to better understand turnover in the industry and increase reimbursement rates for care covered under Medicaid. *Id.* § 402.

<sup>230</sup> See SCALES, *supra* note 6, at 19 (stressing the need to improve retention and recruitment in the home care industry). A 2020 report about the home care industry indicated that approximately 20% of home care workers are searching for another job at any given time. *Id.* at 17.



Additionally, a lack of opportunity for job training and advancement may contribute to the home care industry's recruitment and retention problems.<sup>231</sup> The Direct CARE Opportunity Act, which members of Congress introduced in 2019, would attempt to mitigate staffing challenges by providing funding to organizations that train and mentor home care workers.<sup>232</sup> Some scholars further recommend that state legislators amend their scope of practice laws, which restrict the tasks that home care workers can do.<sup>233</sup> Proponents of these measures argue that home care workers will enjoy additional opportunities for career advancement and command higher wages if they can perform more services, such as administering medications.<sup>234</sup> These approaches seek to create sustainability in the provision of direct care.<sup>235</sup>

In addition to efforts to improve the quality of home care jobs, some experts believe that loosening immigration restrictions could proactively mitigate shortages in the home care industry.<sup>236</sup> This would mirror the approach that Japan, another country facing a dearth of direct care workers, has taken in re-

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<sup>231</sup> Direct CARE Opportunity Act, H.R. 4397, 116th Cong. (2019); Direct CARE Opportunity Act, S. 2521, 116th Cong. (2019). The findings section of the Direct CARE Opportunity Act claims that a lack of opportunities for advancement and training contribute to low compensation in the home care industry. S. 2521 § 2. The bill further notes that enhanced training could reduce retention problems in the field. *Id.* § 2(11).

<sup>232</sup> H.R. 4397; S. 2521 (establishing a grant program to provide funding to entities that train home care workers).

<sup>233</sup> Paul Osterman, *Improving Job Quality for Direct Care Workers*, 33 *ECON. DEV. Q.* 151, 152, 153 (2018) (championing scope of practice law reform to enable home care workers to take on increased responsibilities).

<sup>234</sup> JOANNE SPETZ, HEALTHFORCE CTR. UCSF, HOME HEALTH AIDES AND PERSONAL CARE ASSISTANTS: SCOPE OF PRACTICE REGULATIONS AND THEIR IMPACT ON CARE 8 (2019), <https://healthforce.ucsf.edu/sites/healthforce.ucsf.edu/files/publication-pdf/HomeCareAidesScopePracticeLaws.pdf> [<https://perma.cc/PS49-NNBJ>] (showing that only thirty-seven states allow home care workers to provide clients with medicine taken by mouth); Osterman, *supra* note 233, at 152–54. Other policies intended to make direct care work more desirable, including raising the minimum wage, have various drawbacks, namely feasibility issues. Osterman, *supra* note 233, at 153. Advocates hope that reform, coupled with educational programs designed to enhance home care workers' skillsets, could lead to increases in remuneration. *Id.* at 154. Moreover, expanding the scope-of-practice laws for home care workers could make meeting client's needs more efficient. *Id.*

<sup>235</sup> *See* S. 2521 § 2 (recognizing the value of caregivers' work and pointing to low wages, high turnover, and lack of opportunities for advancement as factors that exacerbate the shortage of professional caregivers in the United States). In addition to increasing compensation, reform efforts should also focus on celebrating caregivers and the crucial work they do. Molly Kinder, *Essential but Undervalued: Millions of Health Care Workers Aren't Getting the Pay or Respect They Deserve in the COVID-19 Pandemic*, BROOKINGS (May 28, 2020), <https://www.brookings.edu/research/essential-but-undervalued-millions-of-health-care-workers-arent-getting-the-pay-or-respect-they-deserve-in-the-covid-19-pandemic/> [<https://perma.cc/P2LF-MGZL>]. One home care worker remarked on the stark difference between the appreciation society has expressed for healthcare workers and the silence surrounding her own contributions. *Id.*

<sup>236</sup> HESS & HENRICI, *supra* note 21, at 21; Stone & Bryant, *supra* note 9, at 54–55; Zallman et al., *supra* note 9, at 925; Rasalam, *supra* note 17, at 424.

cent years.<sup>237</sup> Advocates of immigration reform argue that legislators should amend the INA to recruit more home care workers.<sup>238</sup> Although proposals differ, most would tweak existing programs or develop a new visa category specifically for caregivers.<sup>239</sup> The home care industry relies to a large extent on immigrants, and thus without such reforms the domestic labor pool is unlikely to meet the ballooning demand for long-term, direct care services.<sup>240</sup>

### III. PREVENTING EXPLOITATION IN THE HOME CARE INDUSTRY WHILE REMEDYING THE LOOMING CAREGIVER SHORTFALL

Any legislative solution that seeks to promote the home care industry must focus on improving conditions and pay for existing workers, as well as on attracting new caregivers.<sup>241</sup> Section A of this Part argues that Congress should pass the Wage Theft Prevention and Wage Recovery Act (WTPWRA) or similar legislation to formalize the DOL's strategic FLSA enforcement and community partnership initiatives.<sup>242</sup> Section B contends that Congress should reform immigrant employment-based visa programs to prioritize long-term caregivers and other essential workers.<sup>243</sup>

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<sup>237</sup> Motoko Rich, *Bucking a Global Trend, Japan Seeks More Immigrants. Ambivalently.*, N.Y. TIMES (Dec. 7, 2018), <https://www.nytimes.com/2018/12/07/world/asia/japan-parliament-foreign-workers.html> [<https://perma.cc/7D9J-6XP5>]. Japan's new visa program for unskilled workers went into effect in 2019. *Id.* It provides workers with temporary visas that are valid for a maximum of five years. *Id.*

<sup>238</sup> See *supra* note 223 and accompanying text (detailing policy proposals for temporary and provisional visas intended to increase opportunities for immigrants to work as caregivers). Congress could establish a new visa program for home care workers by amending the INA. Rasalam, *supra* note 17, at 439.

<sup>239</sup> See *supra* notes 223, 236–238 and accompanying text (providing examples of proposed plans that would create more opportunities for immigrants to fill vacancies in long-term care service industries). Congress neglected to set aside visas for direct care workers in a bill intended to increase the U.S. healthcare workforce in response to the COVID-19 pandemic. See Healthcare Workforce Resilience Act, S. 3599, 116th Cong. (2020) (recommending that the government allocate unused immigrant employment-based visas to noncitizen nurses and doctors).

<sup>240</sup> Stone & Bryant, *supra* note 9, at 52 (describing recruiting U.S. citizens to work in the home care industry as a challenge); Zallman et al., *supra* note 9, at 925 (suggesting that restricting immigration will exacerbate the shortfall of long-term direct care workers).

<sup>241</sup> See SCALES, *supra* note 6, at 19–21 (calling for policy changes to increase retention and recruitment in the home care industry). A recent report explained that experts believe that enhancing wages, improving benefits, and increasing professional opportunities are crucial ways to tackle the high rate of vacancies in the home care industry. *Id.*

<sup>242</sup> See *infra* notes 244–263 and accompanying text.

<sup>243</sup> See *infra* notes 264–287 and accompanying text.

### A. Reinforcing Strategic Enforcement and Community Partnership Efforts

To foster enforcement of FLSA protections in the home care industry, Congress should pass the WTPWRA or similar legislation.<sup>244</sup> The bill would establish the WTPWRA Grant Program, which would assist the WHD of the DOL to proactively investigate home care agencies by building partnerships with community organizations.<sup>245</sup> The Act would provide funding for initiatives like training staff to provide know-your-rights presentations at workers' centers.<sup>246</sup> The grant program would encourage community partners to direct the agency's constrained resources to fields where violations occur most frequently, such as the home care industry.<sup>247</sup>

Although the WTPWRA does not specifically mention the home care industry, its emphasis on strategic enforcement and community partnership initiatives is critically important for protecting caregivers.<sup>248</sup> Strategic enforcement is a strategy that directs the DOL's finite policing resources toward industries where FLSA violations are most likely to occur.<sup>249</sup> Moreover, community partnerships refer to collaborations between the WHD and organizations that support low-wage workers and immigrant populations.<sup>250</sup> Cooperative efforts help the WHD root out exploitative practices when workers are afraid to come for-

<sup>244</sup> Wage Theft Prevention and Wage Recovery Act, S. 2101, 116th Cong. (2019) (establishing tougher penalties on employers who commit wage theft and providing funding for community partnership enforcement activities).

<sup>245</sup> *See id.* § 302 (describing the structure of the grant program).

<sup>246</sup> *Id.* § 302(c)(1) (outlining authorized uses for funding allocated through the grant program). The types of programs eligible for funding include know-your-rights trainings, assistance for workers to report violations, and workplace visits with staff from the WHD and the community partner. *Id.* Beneficiaries could also use grant money to pay their employees, solicit volunteers, and distribute training materials. *Id.* In addition, the WTPWRA would allow the Secretary of Labor to expand the list of approved activities through administrative rulemaking. *Id.* § 302(c)(1)(L).

<sup>247</sup> *Id.* § 2(25) (suggesting that the insight of community partners would help enforcement officials target workplaces that are violating labor laws); *see* WEIL, *supra* note 95, at 2 (listing home care as an industry that demands strategic enforcement); Hallett, *supra* note 10, at 124 (contending that strategic enforcement is more efficient and effective than relying on complaints). By channeling resources into increased compliance efforts in industries with a high incidence of infractions, the WHD can reduce its reliance on worker complaints. Hallett, *supra* note 10, at 124.

<sup>248</sup> S. 2101 § 302 (solely referencing the need to focus the WHD's activities on industries with the most frequent violations).

<sup>249</sup> *Id.* § 301(7) (defining strategic enforcement under the WTPWRA).

<sup>250</sup> S. 210 § 301(3); Weil, *supra* note 11, at 9. Community partnerships encompass collaboration between the WHD and a range of worker advocacy groups. Weil, *supra* note 11, at 9. One example of a state-level community partnership was the Wage and Hour Watch, a collaboration between the New York State DOL and several community organizations. Fine & Gordon, *supra* note 173, at 568. The organizations agreed to partner with the New York State DOL for two years to distribute DOL materials to employers, administer know-your-rights trainings, and notify the agency about possible infractions. *Id.* at 569. The New York DOL office took on the responsibility of appointing a staff member to coordinate the effort. *Id.* Additionally, the agency provided the organizations with educational materials and agreed to keep them in the loop about its investigations when it was legally permissible. *Id.*

ward or do not know their rights.<sup>251</sup> Although the WHD started to focus on strategic enforcement and community partnership initiatives in 2014, the grant program would formalize and magnify these efforts at the federal level.<sup>252</sup>

These measures are well-suited to tackle FLSA violations in the home care industry.<sup>253</sup> The demographics of the home care workforce, coupled with the isolation of these workers within individual homes, decrease the likelihood that they will complain about violations.<sup>254</sup> Third-party agencies would be more likely to comply with FLSA provisions if the WHD conducted proactive investigations, educated home care workers about their rights, and guided workers through the complaint process.<sup>255</sup> Community partnerships would aid these efforts by building rapport between workers and the WHD.<sup>256</sup> Structural support could help overcome individual obstacles such as a lack of legal knowledge, high litigation costs, language barriers, and fears of retaliation.<sup>257</sup>

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<sup>251</sup> Weil, *supra* note 11, at 8–9; see Ruckelshaus, *supra* note 99, at 383–84 (noting that undocumented immigrants are unlikely to report FLSA violations due to concerns about retaliation).

<sup>252</sup> S. 2101 § 2(25)–(28) (identifying strategic enforcement initiatives involving community partnerships as an effective means to enforce wage and hour protections); Weil, *supra* note 11, at 2 (describing the implementation of strategic enforcement initiatives under the Obama administration). Formalization could create a more sustainable enforcement strategy. See Fine, *supra* note 12, at 157–58 (discussing the pros and cons of formal partnerships between enforcement agencies and community organizations). Advantages of formalizing community partnerships include enhanced clarity for government agencies and partner organizations, increased ability to withstand changes in the political landscape, and greater potential to empower workers. *Id.*

<sup>253</sup> See *infra* notes 254–259 and accompanying text (explaining why strategic enforcement and community partnership initiatives would mitigate the challenges home care workers face when attempting to enforce their rights).

<sup>254</sup> Dresser, *supra* note 31, at 121–22 (describing the effects of isolation on home care workers' ability to assert their rights); see Ruckelshaus, *supra* note 99, at 383–84 (explaining that undocumented immigrants are unlikely to enforce their rights under the FLSA due to concerns about deportation and getting fired); Zallman et al., *supra* note 9, at 923–24 (illustrating that the home care industry is reliant on immigrant labor).

<sup>255</sup> See S. 2101 § 2(25)–(28) (suggesting that strategic enforcement strategies are more effective than relying on worker complaints); WEIL, *supra* note 95, at 2 (noting that incentives for compliance are very low under a complaint-based system); Hallett, *supra* note 10, at 106 (articulating that the DOL sometimes mishandles or neglects to investigate complaints from workers).

<sup>256</sup> See Fine, *supra* note 12, at 145–46 (arguing that it is necessary to foster trust between workers and enforcement agencies to enforce labor laws). A community partner can act as a powerful go-between for workers and government agencies. *Id.* at 151. For example, in 2011, the National Guest-worker Alliance (NGA) alerted the Occupational Health and Safety Administration to the dangers that hundreds of student visa holders were facing while working in a factory that produced Hershey's candy. *Id.* at 158–60. NGA employees met with the students, gleaned information about the abuses, and formulated a plan to reveal the exploitation. *Id.* at 160–61. When investigators from the DOL's WHD arrived, the NGA utilized the connections that they forged with the students to facilitate worker participation in the WHD's investigation. *Id.* at 161.

<sup>257</sup> See Fine & Gordon, *supra* note 173, at 561–62 (describing how community partners could help low-wage laborers file complaints with enforcement agencies); Hallett, *supra* note 10, at 104–07 (elaborating on factors that hinder workers from submitting complaints or engaging in lawsuits to address FLSA violations). Community organizations and workers' centers can engage in know-your-rights trainings and provide culturally appropriate services to workers. Fine & Gordon, *supra* note

Moreover, collaboration between the WHD and community organizations is particularly powerful in the home care industry because few workers belong to unions that can help them enforce their rights.<sup>258</sup> Therefore, home care workers would benefit from robust strategic enforcement with the support of formal community partnership initiatives.<sup>259</sup>

The WTPWRA Grant Program would bolster the WHD's strategic enforcement efforts by reinforcing its commitment to community organization partnerships.<sup>260</sup> Effective community partner collaboration requires WHD employees to build trusting relationships with organizations as well as with individual workers.<sup>261</sup> The proposed grant program would provide these organizations with vital resources and the capacity to sustainably collaborate with the WHD.<sup>262</sup> Thus, the passage of the WTPWRA would help home care workers to systematically enforce their rights.<sup>263</sup>

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173, at 561. Activities aimed at helping workers to file complaints would help ensure that various barriers would not prevent laborers from coming forward. *Id.* at 555, 561. This model could also reduce immigrant workers' concerns about retribution. *See id.* at 561 (indicating that laborers might be more likely to address violations if a community organization can confirm that filing a complaint will not have immigration enforcement consequences).

<sup>258</sup> *See* Weil, *supra* note 11, at 9 (noting that workers are statistically more likely to enforce their rights with the help of a labor organization); *supra* note 177 and accompanying text (explaining that few home care workers belong to unions).

<sup>259</sup> *See* S. 2101 § 2(25)–(28) (suggesting that strategic enforcement can effectively address labor law violations in fields where labor law compliance is low); Fine, *supra* note 12, at 146 (arguing for the formalization of community partnerships); Fine & Gordon, *supra* note 173, at 561–62 (articulating why the community partnership model would prove effective for low-income and immigrant workers). Community partnerships allow the WHD to connect more easily with workers to find out where violations are happening. Fine & Gordon, *supra* note 173, at 561–62; Weil, *supra* note 11, at 8–9 (highlighting the importance of partnering with organizations to encourage workers to file complaints).

<sup>260</sup> *See* S. 2101 § 2(25)–(28) (stressing the importance of utilizing community partnerships to facilitate strategic enforcement); Fine, *supra* note 12, at 172 (indicating that the formalization of community partnerships would result in more robust collaboration between the government and organizations).

<sup>261</sup> Fine & Gordon, *supra* note 173, at 560–61; Weil, *supra* note 11, at 8 (noting that laborers are afraid to work with government agencies due to concerns about retaliation). If a community organization attests that a government enforcement agency is trustworthy, workers may be more likely to come forward about workplace abuses. Fine, *supra* note 12, at 151.

<sup>262</sup> S. 2101 § 302; *see* Fine & Gordon, *supra* note 173, at 561 (indicating that measures to formalize the community partnership model would increase FLSA enforcement in low-wage industries). The grant program would provide community partners with funding for hosting information sessions with WHD employees, visiting workplaces with WHD officials, and helping workers file complaints with the DOL. S. 2101 § 302(c)(1) (listing initiatives that would meet the grant program's criteria). Moreover, the WTPWRA would permit grantees to utilize the funds for hiring and volunteer recruitment. *Id.* § 302(c)(1)(J).

<sup>263</sup> *See* S. 2101 § 302 (providing funding to support the creation of community partnerships to enhance the WHD's strategic enforcement initiatives).

### *B. Increasing Immigration Opportunities for Prospective Home Care Workers*

In addition to bolstering enforcement initiatives to make it easier for home care workers to assert their rights under the FLSA, Congress should enact immigration reforms that make it easier for noncitizens to enter the home care industry.<sup>264</sup> Even if legislative changes render home care jobs more desirable, with higher wages and attractive benefit packages, it is unlikely that the existing labor pool can meet the growing demand for caregivers.<sup>265</sup> Giving home care workers without legal status the means to obtain citizenship and increasing opportunities for noncitizens to emigrate to the United States could help alleviate the projected shortfall of direct care workers.<sup>266</sup>

First, Congress should amend the INA to provide undocumented immigrants living in the United States with a path to citizenship.<sup>267</sup> This would allow caregivers currently relegated to under-the-table work to enter regulated parts of the industry and alleviate their concerns about deportation.<sup>268</sup> This policy could bring more home care workers under FLSA coverage, thereby reduc-

<sup>264</sup> HESS & HENRICI, *supra* note 21, at 21 (supporting the creation of a visa program for prospective home care workers); see Zallman et al., *supra* note 9, at 925 (estimating that restrictive immigration policies will contribute to the projected shortfall of home care workers in the United States); Rasalam, *supra* note 17, at 439 (arguing that Congress should amend the INA in order to create a new visa program for caregivers).

<sup>265</sup> See HESS & HENRICI, *supra* note 21, at 3 (indicating that it will continue to be difficult to attract U.S. citizen caregivers); SCALES, *supra* note 6, at 21 (advocating for policies that facilitate the recruitment of immigrant workers); Rasalam, *supra* note 17, at 424 (suggesting that immigration reform is needed to remedy the shortage of direct care workers in the United States). Measures to recruit more home care workers from the domestic population could, however, include efforts to attract more men and young people to the profession. SCALES, *supra* note 6, at 20. There is also an initiative to encourage healthy retirees to enter the field. *Id.*

<sup>266</sup> HESS & HENRICI, *supra* note 21, at 15 (describing a proposal that would grant amnesty to undocumented workers already engaged in home care); Zallman et al., *supra* note 9, at 925 (indicating that restrictive immigration policies will exacerbate the expected shortfall of caregivers); Rasalam, *supra* note 17, at 439 (proposing the creation of a special visa program for home care workers).

<sup>267</sup> HESS & HENRICI, *supra* note 21, at 15 (discussing a reform that would allow undocumented home care workers to gain legal work authorization and become permanent residents); Friedersdorf, *supra* note 26 (supporting amnesty for all undocumented immigrants as a policy that would help individual families as well as the country as a whole). Surveys suggest that most people in the U.S. support offering conditional amnesty to undocumented individuals. Friedersdorf, *supra* note 26.

<sup>268</sup> HESS & HENRICI, *supra* note 21, at 15 (outlining a plan for undocumented home care workers to attain conditional amnesty, which would help stabilize the caregiving workforce); Smith Nightingale & Wandner, *supra* note 46, at 3–4 (indicating that undocumented individuals have no option but to work outside of the scope of legal employment); Span, *supra* note 50 (describing the anxiety that clients and undocumented home care providers feel due to immigration law enforcement efforts). Millions of undocumented immigrants have provided essential services during the COVID-19 pandemic, despite having few labor rights or avenues for relief. See Lissandra Villa, 'We're Ignored Completely.' *Amid the Pandemic, Undocumented Immigrants Are Essential but Exposed*, TIME (Apr. 17, 2020), <https://time.com/5823491/undocumented-immigrants-essential-coronavirus/> [<https://perma.cc/TZ35-R9W3>].

ing exploitation in the industry.<sup>269</sup> Moreover, an amnesty program would encourage newly documented home care workers to form lasting bonds with their clients and the United States.<sup>270</sup> Caregivers would not need to worry that immigration enforcement authorities could detain them at any moment, which would improve the stability of their relationships with clients as well as the consistency of the care they provide.<sup>271</sup>

Moreover, Congress should amend the INA to reform the preference system for immigrant employment-based visas.<sup>272</sup> Instead of prioritizing only applicants with extraordinary abilities, legislators should give higher preference to individuals who would qualify as essential workers.<sup>273</sup> Although federal agencies and state governments categorize such workers in different ways, home care workers often make the list.<sup>274</sup> Congress should also increase the number and proportion of the employment-based visas available to essential workers, regardless of their skill level, in specific industries that cannot meet demand with native workers.<sup>275</sup> The COVID-19 pandemic has underscored the

<sup>269</sup> See HESS & HENRICI, *supra* note 21, at 15 (suggesting that a policy that enables undocumented caregivers to attain legal immigration status could result in better working conditions for formally undocumented immigrants). A plan that provides legal status to undocumented home care workers could result in more opportunities for them to engage with society, including the freedom to accept work in the formal economy. *Id.*

<sup>270</sup> See Span, *supra* note 50 (profiling an elderly woman and her caregiver, both of whom fear that immigration enforcement authorities will detain and deport the woman's caregiver).

<sup>271</sup> See *id.* (exemplifying the strain that concerns about immigration enforcement place on relationships between home care clients and caregivers).

<sup>272</sup> See Scalzo, *supra* note 17, at 945 (advocating for the reallocation of immigrant employment-based visas in accordance with the number of applicants applying in each category).

<sup>273</sup> See *COVID-19: Essential Workers in the States*, NCSL: NAT'L CONF. OF STATE LEGISLATURE (May 21, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx> [<https://perma.cc/3MX4-FMAK>] (defining essential workers as individuals whose activities are necessary for society to keep functioning); Scalzo, *supra* note 17, at 945 (indicating that Congress can adjust the immigrant employment-based visa system to increase the number of visas available to unskilled workers). The current employment-based visa preference structure reserves close to one third of visas for individuals with extraordinary abilities, despite the fact that people who are eligible for this category make up less than 10% of applicants. Scalzo, *supra* note 17, at 945.

<sup>274</sup> See Advisory Memorandum from Christopher C. Krebs, Cybersecurity and Infrastructure Sec. Agency Dir., U.S. Dep't of Homeland Sec., on Ensuring Essential Critical Infrastructure Workers Ability to Work During the Covid-19 Response 7 (Aug. 18, 2020), [https://www.cisa.gov/sites/default/files/publications/Version\\_4.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_FINAL%20AUG%2018v3.pdf](https://www.cisa.gov/sites/default/files/publications/Version_4.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_FINAL%20AUG%2018v3.pdf) [<https://perma.cc/RRV4-LU4F>] (including home care workers under the umbrella of essential workers); *COVID-19: Essential Workers in the States*, *supra* note 273 (noting that twenty of the forty-two states that issued guidelines for classifying essential workers relied on the Department of Homeland Security's classifications).

<sup>275</sup> See 8 U.S.C. § 1153(b)(3)(B) (capping the number of immigrant employment-based visas available to unskilled workers at 10,000); Joel Gunter, *What Is the Einstein Visa? And How Did Melania Trump Get One?*, BBC NEWS (Mar. 2, 2018), <https://www.bbc.com/news/world-us-canada-43256318> [<https://perma.cc/D8PN-5G56>] (indicating that individuals with shrewd lawyers and personal connections can obtain EB-1 visas regardless of whether their work is actually extraordinary);

contributions of essential workers, and future legislative reform should reflect our renewed collective understanding of their value to society.<sup>276</sup>

This new visa preference and allocation system would reduce barriers that prevent home care workers from legally immigrating to the United States.<sup>277</sup> First, it would offer a sustainable path to permanent residency for noncitizen home care workers.<sup>278</sup> This would provide an extra enticement for noncitizens to consider entering the field.<sup>279</sup> Additionally, immigrant employment-based visas would allow noncitizen home care workers to foster deeper connections with their clients and report labor violations without fear of deportation.<sup>280</sup> This could help cut down on turnover and exploitation in the industry.<sup>281</sup>

Any attempt to provide more opportunities for noncitizens to reside permanently in the United States is likely to provoke staunch opposition.<sup>282</sup> Some will argue that an influx of noncitizen home care and other essential workers

Kinder, *supra* note 235 (calling for legislative and cultural changes that valorize essential workers' contributions to society); Scalzo, *supra* note 17, at 945 (suggesting that it is possible to reform the preference system for immigrant employment-based visas). The COVID-19 pandemic has highlighted the work that matters, so reforms should reflect that reality. Kinder, *supra* note 235.

<sup>276</sup> See Kinder, *supra* note 235 (advocating for legislation that will raise essential workers' wages, provide them with protective equipment, and demonstrate appreciation for the vital role that they play in society).

<sup>277</sup> See *supra* notes 207–214 and accompanying text (explaining that none of the existing visa programs linked to employment are viable options for prospective home care workers).

<sup>278</sup> See HESS & HENRICI, *supra* note 21, at 13 (demonstrating the importance of providing immigrant home care workers with the resources that they need to do their jobs effectively and avoid exploitation); Rasalam, *supra* note 17, at 439 (supporting the formation of a visa program that gives immigrant home care workers the opportunity to remain in the United States on a permanent basis). Immigration reform could also increase diversity in the field, which could prove beneficial as more immigrants and people of color require long-term care. See SCALES, *supra* note 6, at 10 (suggesting that the percentage of elderly immigrants and people of color will grow in the coming years, and that greater diversity in the workforce could help meet these populations' unique needs).

<sup>279</sup> Rasalam, *supra* note 17, at 439.

<sup>280</sup> See 8 U.S.C. § 1154 (permitting employment-based visa holders to apply for green cards); Ruckelshaus, *supra* note 99, at 385 (noting that undocumented people are especially fearful of filing complaints about labor violations); Span, *supra* note 50 (implying that the current status of undocumented home care workers fosters uncertainty for immigrants and their clients).

<sup>281</sup> See *supra* notes 277–280 and accompanying text (discussing why a visa program that offers home care workers the opportunity to apply for green cards would benefit workers as well as their clients).

<sup>282</sup> See Kamarck & Stenglein, *supra* note 23 (recounting the failure of Congress to pass extensive immigration reform measures since 1986); see also SCALES, *supra* note 6, at 20–21 (highlighting the anti-immigrant policies enacted since 2016). President Donald J. Trump used xenophobic language and promoted policies that adversely impact immigrants, including individuals working as professional caregivers. See Span, *supra* note 50 (discussing how President Trump's decision to end temporary protected status for individuals from several countries, implement travel bans, and terminate the Deferred Action for Childhood Arrivals program could harm the home care industry). Anti-immigrant sentiment and political strife surrounding immigration reform, however, predate the Trump presidency. Kamarck & Stenglein, *supra* note 23. Proposals to grant amnesty to undocumented immigrants collapsed during President George Bush's time in office, and more recent attempts at reform have failed to pass both houses of Congress. *Id.*



could displace Americans working in these industries.<sup>283</sup> Fear of competition for jobs is unwarranted, however, as experts predict the shortfall of direct care workers will be so severe that local workforces will not be able to meet the demand.<sup>284</sup> Congress could responsively calibrate the proportion of available visas to match vacancies in home care and fill other essential positions.<sup>285</sup> Furthermore, a retooled immigrant employment-based visa program that provides a pathway for unskilled workers to legally work in the United States may reduce illegal immigration, and bring the home care gray market within regulatory oversight.<sup>286</sup> If adopted in conjunction with other policies to improve the professional status of home care, visa reform could help attract immigrant home care workers without hindering the recruitment of U.S. citizens.<sup>287</sup>

### CONCLUSION

The people who care for the United States' growing elderly and disabled population perform an invaluable service to society. Despite this, labor and immigration laws render this field undesirable, inaccessible, and unprotected. Home care workers deserve respect, compassion, and living wages. With this in mind, Congress should support meaningful labor law enforcement mechanisms and reform the immigrant employment-based visa program to attract additional home care workers. The FLSA's protections do not serve home care workers. Instead of relying on workers to proactively dismantle their own exploitation, Congress should prioritize strategic workplace enforcement and strengthen community partnerships to disseminate know-your-rights information and encourage employee reporting. Congress should also grant amnesty to undocumented workers, and reconfigure and expand the employment-based visa program to recruit and retain caregivers by offering them a viable path to citizenship. Although these policies will not alleviate all the challenges

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<sup>283</sup> Rasalam, *supra* note 17, at 430 (highlighting concerns about the impact of immigration on homegrown workers). Immigration can promote economic growth. See Frederick Treyz & Peter Evangelakis, *Immigration and United States Economic Growth*, 53 BUS. ECON. 134, 134 (2018) (indicating that the national economy would suffer if net immigration stopped). Studies concerning the impact of an influx of unskilled immigrant workers on the wages of U.S. citizens working in low-wage sectors are not decisive. Eric D. Gould, *Explaining the Unexplained: Residual Wage Inequality, Manufacturing Decline and Low-Skilled Immigration*, 129 ECON. J. 1281, 1285–86 (2019).

<sup>284</sup> See *supra* notes 238–240 and accompanying text (prompting the U.S. government to expand opportunities for immigrants to mitigate the looming shortage of direct care workers).

<sup>285</sup> See Rasalam, *supra* note 17, at 441 (suggesting that a new visa program could be limited in scope in order to cover vacancies that U.S. citizens cannot fill).

<sup>286</sup> See *id.* at 431 (arguing that immigrants will have less incentivize to enter the United States without work authorization if there are more avenues to access legally-sanctioned, regulated work).

<sup>287</sup> See HESS & HENRICI, *supra* note 21, at 21 (stressing the need for immigration reform to occur in tandem with policies to improve the quality of home care jobs); Zallman et al., *supra* note 9, at 925 (implying that immigrants will be instrumental to meeting increasing demand for long-term care services).

home care workers and their clients face, they will help foster conditions that allow both groups to flourish.

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