



NOT ALL HOME CARE IS CREATED EQUAL

Referral agencies can turn consumers into accidental employers

By **J. MARTIN ACEVEDO**

Custodial in-home care (i.e., companionship, homemaker services, assistance with activities of daily living) continue to grow in popularity as an alternative to costly institutionalization. Once considered of a service exclusive to the elder consumer, custodial home care services also can be beneficial to those with terminal illnesses (end of life care) and individuals undergoing lengthy recuperation from an accident or illness.

Even state and federal governments have begun to recognize the critical role that custodial home care plays in health care reform and social services policy.

Given the increasing popularity of in-home care services, it is no surprise that a large number of new home care agencies have surfaced in the last few years. Effective Oct. 1, 2006, agencies have been subject to a registration requirement imposed

Unfortunately, many consumers often go for the cheapest alternative, without fully understanding the implications of their choice.

Not all these home care agencies, however, are created equal. Unbeknownst to the consumer, some of these lower priced agencies may not actually employ their caregivers. Instead, they “refer” the caregiver to the consumer. These referral agencies, also known as “registries,” do not directly employ or supervise their caregivers but merely “place” them in the home of the consumer. As such, these agencies typically do not withhold payroll taxes from the worker’s wages.

Some consumers also choose to hire help privately, instead of using the services of an employment-based (i.e., non-registry type) home care agency. Both choices can trigger a series of obligations and liabilities upon the consumer, the most prominent of which will be reviewed here.

dards. With the establishment of an employer-employee relationship, the consumer is responsible for, amongst other things, payment of local, state and federal taxes.



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Withholding Taxes

Save for situations involving services furnished by individuals who traditionally meet the definition of independent contractor, a consumer who (knowingly or accidentally) becomes an employer generally is responsible for withholding of taxes due the government. In the event of nonpayment of taxes, the government may institute legal action against the consumer or her estate for back taxes, interest and penalties, including criminal penalties. Given the often prolonged nature of home care services, the figure due the government over time can be substantial.

Similarly, the consumer-turned-private-employer may end up on the receiving end of a claim for unpaid unemployment taxes or an action to recoup any unemployment benefits paid to the worker.

Like the tax issue, another area of concern involves workplace injuries. Under Connecticut law, employers are required to carry workers’ compensation insurance for the protection of employees. In the case of a consumer who pays for the services of a worker “referred” by a registry (or who is hired privately by the consumer), that consumer would be held liable for job-related injuries suffered by the caregiver, including

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by Connecticut statute. The law requires agencies to register with the Department of Consumer Protection before conducting business. As of this writing, there are approximately 314 homemaker-companion agencies registered with the Department of Consumer Protection.

As more consumers opt to purchase home care services, the public is confronted with a wide array of choices and options.

Hiring caregivers through a registry or independent contractor referral agency generally will result in the creation of a private employer-employee relationship between the consumer and the caregiver. The same is true where the consumer hires the caregiver privately to provide services, as these workers do not typically meet the criteria for independent contractor status under IRS and Department of Labor stan-



applicable medical expenses and disability payments. Financial exposure could be significant, even for wealthy individuals.

Consumers often are under the mistaken impression that any injury suffered by a caregiver during the course of employment would be covered by homeowner's insurance. That is not the case. On the contrary, policies usually exempt coverage for such accidents.

Liability for unpaid taxes and on the job injuries are perhaps the two greater problems vexing consumers who wind up becoming the employer of record of a worker providing care in the home. As noted, consumers may accidentally become an employer when choosing to hire a worker through a registry or similar type of agency. There is a concern that these agencies often do not make full disclosure of the potential liabilities a client may face in such situations. The problem is compounded by a general lack of awareness of these issues amongst the public at large, including professionals such as attorneys, accountants, and other fiduciaries.

Confirm In Writing

To minimize the risk of becoming an accidental employer, the following minimum

steps should be taken when hiring a caregiver through an agency:

- Confirm the agency is duly registered with the Department of Consumer Protection.
- Have the agency confirm in writing which party is responsible for withholding all payroll taxes from the worker's paycheck, including social security, Medicare, unemployment, federal and state payroll taxes—watch for answers such as “you don't have to worry about taxes,” “the worker is responsible for taxes,” or “we 1099 the worker.”
- Have the agency confirm in writing that it carries workers' compensation insurance to cover caregivers (not just the agency staff) for job-related injuries occurring in the home of the consumer—feel free to request a copy of the agency's certificate of insurance evidencing such coverage.
- Under Section 20-670-3(b)(1) of the Regulations of Connecticut State Agencies, a homemaker-companion agency's written contract or “service plan” given to the consumer must include “a clear

definition of the employee, provider and client employment relationship.” Ask the agency for a copy of their standard contract or service plan and review the agency's statement in compliance with this section. It should contain, in clear and unambiguous terms, the nature of the relationship between the consumer, the agency and its caregivers.

At the end of the day, consumers should retain the ability to obtain whatever care meets their unique needs. Clients who choose to hire their own help privately certainly have the right to do so, but they should educate themselves in the myriad duties and responsibilities and the legal and tax implications of becoming a worker's employer of record.

Consumers who purchase services through an agency must understand that not all agencies are created equal, and that the choice of one particular agency over another should not be based upon cost alone. Rather, it should be based upon careful consideration of a variety of factors, including, most significantly, the agency's worker employment model. ■

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