

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA HOMECARE :  
ASSOCIATION, UNITED CEREBRAL : NO.  
PALSY OF PENNSYLVANIA, :  
PENNSYLVANIA PROVIDERS COALITION :  
ASSOCIATION, KEITH WILLIAMS AND :  
STACIE BILLINGS, :

Petitioners

v.

GOVERNOR EDWARD G. RENDELL and :  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF PUBLIC WELFARE, :  
OFFICE OF LONG TERM LIVING, :

Respondents

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OF PENNSYLVANIA  
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**PETITION FOR REVIEW**  
**(in the Nature of a Complaint for Declaratory Judgment)**

Petitioners, Pennsylvania Homecare Association (“PHA”), United Cerebral Palsy of Pennsylvania (“UCP of Pennsylvania”), Pennsylvania Providers Coalition Association (“PA PCA”), Keith Williams and Stacie Billings (collectively, “Petitioners”), by and through their attorneys, Buchanan Ingersoll & Rooney PC, file this Petition for Review in the Nature of a Complaint for Declaratory Judgment and, in support thereof, allege the following:

## I. JURISDICTIONAL STATEMENT

1. This Court has original jurisdiction over this Petition for Review pursuant to the Judicial Code.<sup>1</sup> This Petition for Review is addressed to the Court's original jurisdiction and is in the nature of a complaint for declaratory judgment.

2. Under the Declaratory Judgments Act<sup>2</sup>, this Court has the authority, *inter alia*:

a. "[T]o declare rights, status, and other legal relations whether or not further relief is or could be claimed ... . The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree"<sup>3</sup>; and

b. "Any person ... whose rights, status, or other legal relations are affected by statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder."<sup>4</sup>

3. "The prime purpose of the Declaratory Judgments Act is to speedily determine issues that 'would . . . be delayed, to the possible injury of those interested if they were compelled to wait the ordinary course of judicial proceedings'."<sup>5</sup>

4. Executive orders issued by the governor are subject to review under the Declaratory Judgments Act where it is alleged that the governor acted in absence of either legislative mandate or constitutional authority.<sup>6</sup> "In no event [...] may any executive order be contrary to any constitutional or statutory provision, nor may it reverse, countermand, interfere

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<sup>1</sup> 42 Pa. C.S. § 761(a).

<sup>2</sup> 42 Pa. C.S. §§ 7531-7541.

<sup>3</sup> 42 Pa. C.S. § 7532.

<sup>4</sup> 42 Pa. C.S. § 7533.

<sup>5</sup> *Osram Sylvania Prods., Inc. v. Comsup Commodities, Inc.*, 845 A.2d 846, 849 (Pa. Super. 2004) (quoting *Grambo v. Southside Bank & Trust Co.*, 14 A.2d 925, 927 (Pa. Super. 1940)).

<sup>6</sup> *National Solid Wastes Management Association v. Robert P. Casey*, 580 A.2d 893 (Pa. Cmwlth. 1990).

with, or be contrary to any final decision or order of any Court. The Governor's power is to execute the laws and not to create or interpret them."<sup>7</sup>

## II. THE PARTIES

5. Petitioner PHA is a Pennsylvania nonprofit membership corporation with offices located at 20 Erford Road, Suite 115, Lemoyne, Pennsylvania. PHA's membership includes Pennsylvania homecare providers who employ personal care attendants and home health aides throughout the Commonwealth of Pennsylvania (the "Commonwealth"). PHA members further provide homecare and financial management services ("FMS") through the Attendant Care Services Act 150 Program (the "Act 150 Attendant Care Program"), the Medicaid Waiver for Attendant Care Services Program (the "Attendant Care Waiver"), the Pennsylvania Aging 60+ Waiver (the "Aging Waiver") and the Pennsylvania Options Program (the "Options Program"), all discussed in greater detail below.

6. Petitioner UCP of Pennsylvania is a Pennsylvania nonprofit membership corporation with offices located at 200 North Third Street, Eighth Floor, P. O. Box 678, Harrisburg, Pennsylvania. UCP of Pennsylvania members are Pennsylvania home care providers who employ personal care attendants and home health aides throughout the Commonwealth. UCP of Pennsylvania's members further provide homecare and FMS through the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program.

7. Petitioner PA PCA is a Pennsylvania nonprofit membership corporation with offices located at 908 North Second Street, Harrisburg, Pennsylvania. PA PCA's membership includes Pennsylvania home care providers who employ personal care attendants and home health aides throughout the Commonwealth. PA PCA members further provide homecare and

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<sup>7</sup> *Shapp v. Butera*, 348 A.2d 910, 914 (Pa. Cmwlth. 1975).

FMS through the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program.

8. Members of Petitioners PHA, UCP of Pennsylvania and PA PCA will be directly impacted by the Executive Order in that it impermissibly interferes with the FMS provided by Petitioners' members through the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program.

9. Petitioner Keith Williams is an adult individual residing at 401 Venard Road, Clarks Green, Pennsylvania. Petitioner Keith Williams is a consumer of home care services, a taxpayer residing within the Commonwealth, and an employer of record under the Act 150 Attendant Care Program ("Consumer-Employer").

10. Petitioner Keith Williams will be immediately and negatively impacted by the Executive Order in that it seeks to unionize direct care workers who do not have organizational rights under the Pennsylvania Labor Relations Act ("PLRA").<sup>8, 9</sup>

11. Petitioner Stacie Billings is the employee of Keith Williams and provides attendant care services to Keith Williams under the Act 150 Attendant Care Program ("Attendant-Employee"). She is also a taxpayer residing in the Commonwealth at 192 1/2 West Parker Street, Scranton, Pennsylvania.

12. Petitioner Stacie Billings will be immediately and negatively impacted by the Executive Order in that it seeks to unionize direct care workers, such as herself, who do not have organizational rights under the PLRA.<sup>10, 11</sup>

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<sup>8</sup> 43 P.S. § 211.1 *et seq.*

<sup>9</sup> A violation of statute constitutes irreparable harm per se. *Chipman v. Avon Grove Sch. Dist.*, 841 A.2d 1098, 1105 (Pa. Cmwlth. 2004); *Keller v. Casey*, 595 A.2d 670, 674 (Pa. Cmwlth. 1991).

<sup>10</sup> 43 P.S. § 211.1 *et seq.*

<sup>11</sup> A violation of statute constitutes irreparable harm per se. *Chipman v. Avon Grove Sch. Dist.*, 841 A.2d 1098, 1105 (Pa. Cmwlth. 2004); *Keller v. Casey*, 595 A.2d 670, 674 (Pa. Cmwlth. 1991).

13. Respondent, Governor Edward G. Rendell, in his official capacity as Governor of the Commonwealth of Pennsylvania, is an executive agency of the Commonwealth<sup>12</sup> and is the agent charged with promulgating executive orders under the authority of this Commonwealth.<sup>13</sup>

14. Respondent, Commonwealth of Pennsylvania, Department of Public Welfare (the “Department”), Office of Long Term Living (the “Department’s OLTL”) is the office within the Department administering the Act 150 Attendant Care Program, the Attendant Care Waiver and the Aging Waiver within the Commonwealth.

### III. DETERMINATION SOUGHT TO BE REVIEWED

15. On September 14, 2010, Governor Rendell issued Executive Order Number 2010-04 on the subject of “Consumer-Directed Home Care Providers” (the “Executive Order”). (A true and correct copy of the Executive Order is attached hereto as Exhibit “A.”)<sup>14</sup>

16. The Executive Order establishes a Consumer Workforce Council (“CWC”) to “advise the Office of Long-Term Living or the joint designee of the Secretaries of Aging and Public Welfare designee with respect to any issues or concerns related to this Executive Order.”<sup>15</sup>

17. The Executive Order also directs that the Commonwealth “shall recognize a labor organization as the exclusive representative for individual providers”<sup>16</sup> and establishes an

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<sup>12</sup> 2 Pa. C.S. § 101.

<sup>13</sup> 45 Pa. C.S. § 501.

<sup>14</sup> Petitioners note that, pursuant to 45 Pa. C.S.A. § 725(a)(1), executive orders of the Governor having the force of law are required to be published in the Pennsylvania Bulletin. Pursuant to 45 Pa. C.S.A. § 903, an otherwise valid executive order that is not published in the Pennsylvania Bulletin is not effected. The effective date shall be the issue date of the Pennsylvania Bulletin. To date, the Executive Order at issue in this Petition has not been published in the Pennsylvania Bulletin. Petitioners anticipate, however, that the Executive Order will be published imminently. To the extent that it is not the Governor’s intention to publish the Executive Order in the Pennsylvania Bulletin, it is invalid and should be enjoined on this additional ground.

<sup>15</sup> Executive Order, at ¶ 4.b. A copy of the Executive Order is attached hereto as Exhibit “A.” For ease of reference, it will be cited to herein simply as the “Executive Order.” A copy of the Executive Order is also attached to Petitioners’ Appendix at Tab “A.”

<sup>16</sup> Executive Order, at ¶ 1 (emphasis added).

election process for domestic service workers—individuals whom the PLRA specifically excludes from its definition of employees with organizational rights.<sup>17</sup>

18. Even assuming, *arguendo*, domestic service workers had the right to organize under the PLRA, the Executive Order provides an election process which is inconsistent with the PLRA.<sup>18, 19</sup>

19. The Executive Order further impermissibly interferes with the Consumer-Employer Model under the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program by mandating a union and directing that the Department negotiate terms and conditions of employment on behalf of Consumer-Employers, while expressly disclaiming that the impacted Attendant-Employees have “the status of commonwealth employees.”<sup>20</sup>

#### **IV. GENERAL STATEMENT OF MATERIAL FACTS**

##### **A. Governor Rendell’s Executive Order**

20. The Executive Order, in pertinent part, establishes the CWC to serve as the “unified voice” and representative for all consumers of attendant care services who directly employ their providers (“Consumer-Employers”) for purposes of any and all dialogue with the Department regarding the common concerns of Consumer-Employers and their employees (“Attendant-Employees”) covered by the Executive Order, or any Consumer-Employer specific concerns about the rights of consumers related to the Executive Order.<sup>21</sup>

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<sup>17</sup> 43 P.S. § 211.3(d)

<sup>18</sup> 43 P.S. §§ 211.1 *et seq.*

<sup>19</sup> Executive Order, at ¶ 1.

<sup>20</sup> Executive Order, at ¶¶ 6, 7.

<sup>21</sup> Executive Order, at ¶ 4.

21. Disturbingly, the Executive Order directs that “the commonwealth shall recognize a labor organization as the exclusive representative for individual providers...”<sup>22</sup>

22. The Executive Order, in pertinent part, further directs that the Department create a list of Attendant-Employees who will constitute “eligible voters” for the purpose of voting upon a labor organization to act as the exclusive representative for all Attendant-Employees.<sup>23</sup>

23. The Executive Order is silent as to what exactly will be done with this list of “eligible voters.” Petitioners believe, however, and hereby aver that it will be shared with labor organizations interested in organizing the Attendant-Employees.

24. The Executive Order further directs an election to be held if a labor organization demonstrates “to the satisfaction of the Secretary of Labor and Industry, by either authorization cards or petition that at least 10 percent of the [Attendant-Employees] on the eligible voter list request an election.”<sup>24</sup>

25. The Executive Order then empowers the Secretary of Labor and Industry to “designate the American Arbitration Association or another organization with experience in conducting representation elections as election monitor for purposes of showing of interest and conducting the election should such interest occur.”<sup>25</sup>

26. The Executive Order states that “[a]ny other labor organization seeking to intervene or appear on the ballot must demonstrate a 10 percent showing of interest” of the Attendant-Employees on the eligible voter list.<sup>26</sup>

27. Pursuant to the terms of the Executive Order, after a labor organization has received at least a majority of the votes cast and such results are certified, the Department will

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<sup>22</sup> Executive Order, at ¶ 1 (emphasis added).

<sup>23</sup> Executive Order, at ¶ 1.b.

<sup>24</sup> Executive Order, at ¶ 1.c. (emphasis added).

<sup>25</sup> Executive Order, at ¶ 1.c. (emphasis added).

<sup>26</sup> Executive Order, at ¶ 1.c. (emphasis added).

recognize such labor organization as “the exclusive representative of all [Attendant-Employees] covered under this Executive Order working with the [C]ommonwealth, for the purpose of negotiation of matters over which the [C]ommonwealth has control” (the, “Provider Representative”).<sup>27</sup>

28. The Executive Order next empowers such Provider Representative to engage in negotiations with the Department, or a joint designee of the Secretaries of the Departments of Aging and Public Welfare, concerning terms and conditions affecting all Attendant-Employees within the Commonwealth’s control, including “the maximum unit rate paid for services, minimum portion of [C]ommonwealth payments passed through to [Attendant-Employees], training standards and requirements, health care, payroll deductions such as dues and co-premiums, and the creation of a voluntary registry.”<sup>28</sup>

29. Notwithstanding the direction that the Commonwealth recognize and negotiate with the Provider Representative over terms and conditions of employment for Attendant-Employees, the Executive Order expressly disclaims any employment relationship between the Commonwealth and the Attendant-Employees. Paragraphs 6 and 7 of the Executive Order expressly provide as follows in this regard:

**6. The Relationship Between Provider and Consumer Will Not Change.** This Executive Order in no way alters the unique relationship between the individual provider and individual consumer. Consumers retain the absolute right to select, hire, terminate and supervise their providers.

**7. The Relationship Between Provider and the Commonwealth Will Not Change.** Nothing in this Executive Order is intended to grant providers the status of commonwealth employees.<sup>29</sup>

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<sup>27</sup> Executive Order, at ¶ 1.d. (emphasis added).

<sup>28</sup> Executive Order, at ¶ 2.

<sup>29</sup> Executive Order, at ¶¶ 6, 7 (emphasis added).

30. The Department will, thus, negotiate terms and conditions of employment for the Attendant-Employees on behalf of the Consumer-Employers.

**B. The Act 150 Attendant Care Program**

31. The Act 150 Attendant Care Program was created pursuant to the Attendant Care Services Act (“Act 150”), which took effect July 1, 1987.<sup>30</sup>

32. Act 150 provides for basic and ancillary attendant care services that enable eligible consumers to remain in their homes and communities rather than in an institution and to carry out the functions of daily living, self-care and mobility.<sup>31</sup>

33. Basic attendant care services under Act 150 include:

- assistance with getting in and out of a bed, wheelchair and/or automobile;
- assistance with routine bodily functions such as health maintenance activities, bathing and personal hygiene, dressing and grooming; and
- food preparation, feeding and cleanup.<sup>32</sup>

34. Persons needing at least one basic attendant care services under Act 150 are also eligible to receive the following services if they are ancillary to the basic attendant care services:

- homemaker-type services such as shopping, laundry, cleaning and seasonal chores;
- companion services such as transportation, escort, assistance with mail; and
- assistance with cognitive tasks such as managing finances, planning activities and making decisions.<sup>33</sup>

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<sup>30</sup> 62 P.S. § 3051 *et seq.*

<sup>31</sup> 62 P.S. § 3053.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

35. An Act 150 eligible person is any physically disabled but mentally alert person ages 18 through 59 who meets all of the following requirements:

- experiences any medically determinable physical impairment which can be expected to last for a continuous period of at least 12 months;
- is capable of selecting, supervising and, if needed, firing an attendant;
- is capable of managing his or her own financial and legal affairs; and
- because of physical impairment, requires assistance to complete functions of daily living, self-care and mobility, including, but not limited to, those functions included in the definition of attendant care services.<sup>34</sup>

36. Consumers of the Act 150 Attendant Care Program, or Consumer-Employers, have the express right to make decisions about, direct the provision of and control their attendant care services. This includes, but is not limited to, hiring, training, managing, paying and firing an attendant<sup>35</sup> (the “Consumer-Employer Model”).

37. In sum, the Consumer-Employer and not the Commonwealth is the employer of record under the Act 150 Attendant Care Program.<sup>36</sup> Each Consumer-Employer has his or her own federal employer identification number (“FEIN”), workers compensation policy, unemployment compensation account and pays all applicable federal, state and local taxes.

38. Pursuant to Act 150, the above-referenced attendant care services are only available to the extent that the Act 150 Attendant Care Program is funded through annual appropriation of state funds.<sup>37</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> 62 P.S. § 3052(3) (emphasis added).

<sup>36</sup> Executive Order, at ¶¶ 6, 7.

<sup>37</sup> 62 P.S. § 3055(e).

39. From the effective date of Act 150 in 1987 until 1995, the Act 150 Attendant Care Program was funded through state appropriations and through the Social Services Block Grant.<sup>38</sup>

40. The Act 150 Attendant Care Program is administered by the Department's OLTL.

41. Effective September 17, 1996, the Commonwealth limited eligibility in the Act 150 Attendant Care Program to consumers who did not meet the eligibility requirements for the Attendant Care Waiver (see below).

### C. The Attendant Care Waiver

42. On August 7, 1995, the Commonwealth implemented the Attendant Care Waiver to provide attendant care services to Medicaid eligible consumers who meet other requirements than those under Act 150.

43. The Attendant Care Waiver is funded through federal funds under Title XIX of the Social Security Act.<sup>39</sup>

44. The attendant care services provided under the Attendant Care Waiver are identical to the services provided under the Act 150 Attendant Care Program.

45. The main differences between the Act 150 Attendant Care Program and the Attendant Care Waiver are driven by certain administrative requirements under Title XIX of the Social Security Act governing the Attendant Care Waiver, including heightened participant level of care requirements, as well as a requirement to enroll all eligible and willing providers.<sup>40</sup>

46. The Attendant Care Waiver in the Commonwealth is administered pursuant to and consistent with the Department's Application for a § 1915(c) Home and Community-Based Services Waiver (the "Attendant Care Waiver Application"), which the Department submitted to the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid

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<sup>38</sup> See 42 U.S.C. §§ 300w *et seq.*

<sup>39</sup> See 42 U.S.C. §§ 1396-1 *et seq.*

<sup>40</sup> *Id.*

Services, for review and approval effective July 1, 2008, and amended effective July 1, 2009, to add a Services My Way pilot program in twenty-one (21) Pennsylvania counties.<sup>41</sup>

47. The Attendant Care Waiver Application is the governing document for the Waiver Program.

48. The Attendant Care Waiver is administered by the Department's OLTL, acting as the single state Medicaid Agency responsible for ensuring that the Attendant Care Waiver operates in accordance with applicable federal regulations and the Attendant Care Waiver Application.<sup>42</sup>

49. Pursuant to the Attendant Care Waiver Application and similar to Act 150, participants may select and manage staff to perform services, which approach is referred to as the Consumer-Employer Model.<sup>43</sup>

50. The Attendant Care Waiver Application requires participants in the Consumer-Employer Model to retain employer authority over providers; thus, they are the employer of record and must hire, train, supervise, schedule and, when necessary, fire their Attendant-Employees.<sup>44</sup>

51. The Attendant Care Waiver Application requires a separate FMS entity, and not the Consumer-Employer, to perform the fiscal agent tasks of payroll generation, related tax filings, as well as certain administrative tasks, because Medicaid eligibility requirements prohibit consumers from receiving Medicaid program funds directly.<sup>45</sup>

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<sup>41</sup> Petitioners have filed a separate Appendix of Exhibits concurrently with the instant Petition ("Petitioner's Appendix"). A copy of the Attendant Care Waiver Application is set forth in the Appendix at Tab "B."

<sup>42</sup> *Id.* at pps. 4-5.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 51.

52. FMS entities now provide financial, payroll, bill-payer services, orientation and skills training and related functions for Consumer-Employers under the Consumer Employer Model of the Attendant Care Waiver and the Act 150 Attendant Care Program.<sup>46</sup>

53. More specifically, the FMS entity completes the following necessary financial services as an agent and on behalf of the Consumer-Employer, who remains the employer of record:

- Enroll the Consumer-Employer in FMS and apply for and receive approval from IRS to act as agent of the Consumer-Employer;
- Provide orientation and training to Consumer-Employers on the required documentation for all Attendant-Employees, including completion of: federal and state forms and timesheets, good hiring and firing practices, effective management of workplace injuries, workers compensation, effective management and supervision practices;
- Conduct criminal background checks and child abuse clearances;
- Distribute, collect and process support worker timesheets as verified by the Consumer-Employer;
- Prepare and issue payroll;
- Withhold, file and deposit federal, state and local income taxes in accordance with federal IRS and state Department of Revenue rules and regulations; and
- Prepare and disburse IRS Form W-2s and/or 1099s, wage and tax statements and related documentation annually.<sup>47</sup>

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<sup>46</sup> *Id.*

54. Since the FMS entities collect this information about Attendant-Employees, FMS entities are required by the relevant governing Waiver Applications to “establish, maintain and process records for all participants and support workers with confidentiality, accuracy and appropriate safeguards.”<sup>48</sup>

55. From the Consumer-Employer’s budget, the FMS entity receives a separate fee-for-service rate for the amount of time the Attendant-Employees spend in the Consumer-Employers’ homes, in order to pay the Attendant-Employees’ salaries, applicable taxes and workers compensation.

56. For providing these services as the agent of the Consumer-Employer, and pursuant to the Department’s approved Individual Support Plan, the FMS entity receives a separate, fee schedule, fee-for-service rate reimbursement for the costs of services provided by the Attendant-Employees to the Consumer-Employers in and about the Consumer Employers’ homes, including, but not limited to the Attendant-Employees’ salaries, applicable taxes and workers compensation.<sup>49</sup>

57. In the Attendant Care Waiver, the Consumer-Employer directs and develops their own budget based on the types and amounts of services that are authorized pursuant to the Consumer-Employer’s Individual Support Plan.

58. In sum, the Consumer-Employer and not the Commonwealth is the employer of record under the Attendant Care Waiver.<sup>50</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *See*, July 3, 2007 Memorandum to Area Agency on Aging Directors and, *see also*, September 13, 2007 Letter to FMS Providers, both in Petitioners’ Appendix at Tab “C.”

<sup>50</sup> Executive Order, at ¶¶ 6, 7.

59. As noted, the Executive Order itself recognizes that the Attendant-Employees at issue are not Commonwealth employees under the Consumer-Employer Model.<sup>51</sup>

**D. The Aging Waiver**

60. The Pennsylvania Aging 60+ Waiver (the “Aging Waiver”) provides home and community-based attendant care services to eligible individuals age 60 or older who require a nursing facility level of care.<sup>52</sup>

61. Like the Attendant Care Waiver, the Aging Waiver is governed by the Application for a § 1915(c) Home and Community-Based Services Waiver (the “Aging Waiver Application”), which was separately amended on July 1, 2009 to add the Aging Waiver provisions.<sup>53</sup> The Aging Waiver is funded through federal funds under Title XIX of the Social Security Act.<sup>54</sup>

62. Also, like the Attendant Care Waiver, the Aging Waiver is administered by the Department’s OLTL, acting as the single state Medicaid Agency responsible for ensuring that the Aging Waiver operates in accordance with applicable federal regulations and the Aging Waiver Application.<sup>55</sup>

63. Similar to the Consumer-Employer Model recognized under both the Act 150 Attendant Care Program and the Attendant Care Waiver, the Aging Waiver offers consumers self-direction autonomy under the Personal Assistance Services (“PAS”) option. PAS offers consumers the employer authority to recruit, interview, hire, manage and dismiss personal assistance workers directly.<sup>56</sup> Participants in the PAS option serve as the common law

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<sup>51</sup> Executive Order, at ¶¶ 6, 7.

<sup>52</sup> A copy of the Aging Waiver Application is set forth in Petitioners’ Appendix at Tab “D.”

<sup>53</sup> *Id.*

<sup>54</sup> *See* 42 U.S.C. §§ 1396-1 *et seq.*

<sup>55</sup> Aging Waiver Application, Petitioners’ Appendix at Tab “D,” p. 4.

<sup>56</sup> *Id.* at p. 102.

employers of record (thus, they are also “Consumer-Employers”), and they too are required to select a FMS entity to serve as their fiscal agent.<sup>57</sup>

64. Similar to the Act 150 Attendant Care Program and the Attendant Care Waiver, the Consumer-Employer is the employer of the providers under the PAS option of the Aging Waiver and not the Commonwealth.

#### E. The Options Program

65. The Options Program is a Pennsylvania Department of Aging Program that offers a plan of managed care that assesses the long term care needs of people and attempts to direct them to the most appropriate and least restrictive level of care.<sup>58</sup>

66. The Options Program is administered by the fifty-two (52) Area Agencies on Aging (“AAA”).<sup>59</sup>

67. Consumers who receive services pursuant to the Options Program are normally sixty (60) years of age or older and experience some degree of frailty in their physical or mental health status. They range in functional need from being clinically eligible for services in a nursing facility to needing basic personal care services such as assistance with activities of daily living.<sup>60</sup>

68. The AAA works with consumers to assess their needs and eligibility for the various home and community based waiver services such as those provided pursuant to the Attendant Care Waiver and the Aging Waiver.<sup>61</sup>

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<sup>57</sup> See complete discussion of FMS services under IV.C. of this Petition, Attendant Care Waiver facts.

<sup>58</sup> [www.co.berks.pa.us/aging/cwp/view.asp?a=1820&q=470676](http://www.co.berks.pa.us/aging/cwp/view.asp?a=1820&q=470676).

<sup>59</sup> *Id.*

<sup>60</sup> [www.portal.state.pa.us/portal/server.pt?open=514&objID=616683&mode=2](http://www.portal.state.pa.us/portal/server.pt?open=514&objID=616683&mode=2)

<sup>61</sup> *Id.*

69. After an AAA assessment has been provided, consumers may be eligible for an array of in-home services such as, in pertinent part, home health services and personal assistance services.<sup>62</sup>

70. Some of these AAA programs provide the consumer a choice regarding the management of their service provider. The consumer can choose to “hire, fire and supervise the provider” if they opt to receive consumer-directed services.<sup>63</sup> If they choose to participate in these waiver programs, pursuant to the Consumer-Employer or PAS options, they are required to select a FMS entity to serve as their fiscal agent<sup>64</sup>

#### F. PLRA

71. The Commonwealth enacted the PLRA<sup>65</sup> in 1937.

72. The PLRA provides procedures by which private and public employees may organize and by which representation elections may be conducted.<sup>66</sup>

73. The PLRA specifically excludes “any individual employed . . . in the domestic service of any person in the home of such person” from its definition of “employee.”<sup>67</sup>

74. For employees with the right to organize, the PLRA created the Pennsylvania Labor Relations Board (“PLRB”) and conferred upon it exclusive power to conduct elections, conduct hearings, and certify representatives for purposes of collective bargaining.<sup>68</sup>

75. Under the PLRA, elections may take place upon a showing of interest of at least thirty (30) percent of employees in an appropriate bargaining unit.<sup>69</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See complete discussion of FMS services under IV.C. of this Petition, Attendant Care Waiver Facts.

<sup>65</sup> 43 P.S. § 211.1 *et seq.*

<sup>66</sup> 43 P.S. § 211.7; 34 Pa. Code §§ 93.18 & 95.51.

<sup>67</sup> 43 P.S. § 211.3(d); *see also* *PLRB v. Local 1201, Int’l Brotherhood of Firemen and Oilers, AFL-CIO*, 14 PPER 14251 (1983).

<sup>68</sup> 43 P.S. §§ 211.4, 211.7 & 211.10 (emphasis added).

<sup>69</sup> 43 P.S. § 211.7(c).

76. The PLRA and its accompanying regulations provide that elections will take place by secret ballot “at times, places and in the manner the Board or the Board Representative may direct, and will be conducted by a designated agent of the Board ...”<sup>70</sup>

77. In matters subject to the PLRA, the PLRB has exclusive jurisdiction with respect to the holding of elections and certification of the bargaining representative.

## V.   GROUNDS FOR RELIEF

### COUNT I

**By directing that the Commonwealth recognize a union and negotiate the terms and conditions of employment for Attendant-Employees, the Executive Order inappropriately interferes with the Consumer-Employer Model established in the various programs at issue.**

78. Petitioners incorporate by reference paragraphs 1 through 77 above as if set forth fully herein.

79. Under Act 150, Consumer-Employers have been granted the right to make decisions about, direct the provision of and control their attendant care services, “including but not limited to, hiring, training, managing, paying and firing.”<sup>71</sup>

80. In addition, the Attendant Care Waiver Application governs the administration of the Attendant Care Waiver in the Commonwealth and requires Consumer-Employers who opt to participate in the Consumer-Employer Model of the Attendant Care Waiver to “hire, train, supervise, schedule and when necessary, fire” their Attendant-Employees.<sup>72</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> 62 P.S. § 3052(3).

<sup>72</sup> Attendant Care Waiver Application, Petitioners’ Appendix at Tab “B,” p. 4.

81. The Aging Waiver Application governs the administration on the Aging Waiver in the Commonwealth and also requires Consumer-Employers participating in the PAS option to recruit, interview, hire, manage and dismiss their own Attendant-Employees.<sup>73</sup>

82. Thus, under the Act 150 Attendant Care Program, the Attendant Care Waiver and the Aging Waiver, the Consumer-Employer is the employer of record of the Attendant-Employee.

83. The Executive Order provides that the Department's OLTL or the joint designee of the Secretaries of the Departments of Aging and Public Welfare shall engage in negotiations with the Provider Representative (the chosen union representing Attendant-Employees) to negotiate key terms and conditions which directly impact Attendant-Employees, including, in relevant part, payment rates, training standards, benefits and payroll deductions.<sup>74</sup>

84. The Executive Order elevates a Governor-appointed CWC to advise the Department's OLTL, an office of an agency of the Commonwealth, so that the OLTL may then negotiate with the Provider Representative (the union representative of the Attendant-Employees), regarding decisions and rights pertaining to hiring, training and paying Attendant-Employees, all of which rights were clearly granted exclusively to Consumer-Employers by Act 150, the Attendant Care Waiver Application and the Aging Waiver Application.

85. Again, the Executive Order itself expressly recognizes that the Attendant-Employees are not employed by the Commonwealth.<sup>75</sup>

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<sup>73</sup> Aging Waiver Application, Petitioners' Appendix at Tab"D," p. 131.

<sup>74</sup> Executive Order, at ¶ 1.

<sup>75</sup> Executive Order, at ¶¶ 6, 7.

86. An executive order is enforceable only if it is consistent with already existing law.<sup>76</sup>

87. In sum, under current law, Attendant-Employees are employed by the Consumer-Employers. Under the Executive Order, the Department will become the *de facto* employer impermissibly interfering in the employment relationship between the Attendant-Employees and Consumer-Employers by negotiating terms and conditions of employment on behalf of the Consumer-Employers.

88. Because the Executive Order here clearly conflicts with the provisions of Act 150, the Attendant Care Waiver Application and the Aging Waiver Application, all of which clearly rest employer of record authority to make decisions including, but not limited to, hiring, training, managing, paying and firing Attendant-Employees, squarely with the Consumer-Employers, the Executive Order cannot stand and should be enjoined.

## COUNT II

**The Executive Order further violates the privacy interests of Attendant-Employees and the confidentiality obligations of the FMS providers by creating a list of Attendant-Employees which will be provided to labor organizations in violation of the terms of the various programs at issue.**

89. Petitioners incorporate by reference paragraphs 1 through 88 above as if set forth fully herein.

90. The Executive Order further directs that the “commonwealth shall create a list of providers who will constitute eligible voters for the purpose of determining a showing of interest justifying an election and for the election should such showing of interest occur.”<sup>77</sup> “The list

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<sup>76</sup> *Shapp v. Butera*, 348 A.2d 910, 914 (Pa. Cmwlth. 1975) (“In no event ... may any executive order be contrary to any constitutional or statutory provisions ...”); *Cutler v. State Civil Serv. Comm’n*, 924 A.2d 706, 712 (Pa. Cmwlth. 2007).

<sup>77</sup> Executive Order, at ¶ 1.b.

shall be comprised of providers [Attendant-Employees] reimbursed for services from the most recent three month period available.”<sup>78</sup>

91. Petitioner Stacie Billings, as an Attendant-Employee, has been reimbursed for services in such “recent three month period” and, presumably, would be included on the list to be prepared by the Commonwealth.

92. Again, the Executive Order is silent on what will be done with the list of Attendant-Employees to be created for “the purpose of determining a showing of interest” in union representation.<sup>79</sup> However, the only logical use is disclosure to labor unions interested in engaging in organizing efforts with respect to the Attendant-Employees.

93. Petitioners aver, upon information and belief, that the list will in fact be shared with various labor unions which express an interest in organizing the Attendant-Employees.

94. Petitioner Stacie Billings and other Attendant-Employees have a privacy interest in not having their personal contact and other private information disclosed by the Commonwealth to such labor unions without their consent.

95. Petitioners PHA, UCP of Pennsylvania and PA PCA member organizations are in possession of the contact information for the Attendant-Employees for which they provide FMS to Consumer-Employers.

96. Upon information and belief, such FMS providers will be asked to produce contact information for the Attendant-Employees by the Department, or other representatives of the Commonwealth, pursuant to the Executive Order, and for the purpose of disclosure to various labor unions.

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<sup>78</sup> *Id.*

<sup>79</sup> Executive Order, at ¶ 1.b.

97. The Attendant Care Waiver Application and the Aging Waiver Application both require FMS providers to maintain confidentiality with respect to Attendant-Employees and Consumer-Employers records.<sup>80</sup>

98. Petitioners PHA, UCP of Pennsylvania and PA PCA member organizations should not be forced to disclose the identity of Attendant-Employees and/or Consumer-Employers for the purpose of preparing a list for disclosure to various third party labor organizations without the consent of the impacted Attendant-Employees and Consumer-Employers.

99. To the extent that the Executive Order contemplates the preparation of a list of Attendant-Employees to be disclosed to various third party labor organizations for the purpose of organizational efforts, the Executive Order conflicts with the confidentiality provisions of the Attendant Care Waiver and the Aging Waiver.<sup>81</sup>

100. Because the Executive Order conflicts with the confidentiality provisions of the Attendant Care Waiver and the Aging Waiver<sup>82</sup> and interferes with the privacy interests of the Attendant-Employees, the Executive Order conflicts with existing law and should be enjoined.

### **COUNT III**

**The Governor additionally lacks authority to issue the Executive Order because it seeks to create organizational rights for Attendant-Employees which are presently not recognized under state law.**

101. Petitioners incorporate by reference paragraphs 1 through 100 above as if set forth fully herein.

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<sup>80</sup> Attendant Care Waiver Application, Petitioners' Appendix at Tab "B," p. 51. Aging Waiver Application, Petitioners' Appendix at Tab "D," p 103.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

102. The Executive Order is invalid because it in effect creates a new law under which Attendant-Employees—who are domestic service workers—can organize and the Governor does not have legislative authority for such action.

103. The National Labor Relations Act (“NLRA”) provides “employees” with the right to organize.<sup>83</sup> However, the NLRA specifically excludes domestic service workers from its coverage.<sup>84</sup>

104. Workers in Pennsylvania who do not have the right to organize under the NLRA must look to relevant state law for a procedure by which to organize—the Pennsylvania Labor Relations Act (“PLRA”). However, domestic service workers do not have the right to organize under the PLRA, as the PLRA specifically excludes domestic service workers from its coverage.<sup>85</sup>

105. The Executive Order creates new law by providing organizational rights to individuals—domestic service workers—whom the legislature has determined do not have such rights. The Governor does not have authority to create law—his power is to execute already existing laws.<sup>86</sup>

106. Only Executive Orders authorized by the Constitution or promulgated pursuant to statute have the force of law.<sup>87</sup> Neither the Constitution nor the PLRA provide the Governor with authority to issue executive orders with regard to workers’ organizational rights.

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<sup>83</sup> 29 U.S.C.A. § 157.

<sup>84</sup> 29 U.S.C.A. § 152(3).

<sup>85</sup> 43 P.S. § 211.3(d); *see also* *PLRB v. Local 1201, Int’l Brotherhood of Firemen and Oilers, AFL-CIO*, 14 PPER 14251 (1983).

<sup>86</sup> *Shapp v. Butera*, 348 A.2d 910, 914 (Pa. Cmwlth. 1975) (“The Governor’s power is to execute the laws and not to create or interpret them. The Legislative Branch of government creates laws, and the Judicial Branch interprets them.”).

<sup>87</sup> *Pagano v. PA State Horse Racing Comm’n*, 413 A.2d 44, 45-46 (Pa. Cmwlth. 1980).

107. Even assuming, *arguendo*, that Attendant-Employees are not domestic service workers, which Petitioners deny, the Executive Order is still invalid because it conflicts directly with the PLRA.<sup>88</sup>

108. It is well established that an Executive Order cannot stand if it conflicts with already existing law.<sup>89</sup>

109. The Executive Order conflicts with the PLRA in three (3) material respects: (1) it provides for an election upon a showing of interest by ten percent (10%) of employees; (2) it designates the American Arbitration Association as the election monitor with the Secretary of Labor and Industry certifying election results; and (3) it mandates that the election exclusively take place by mail ballot.<sup>90</sup>

110. The PLRA provides for an election upon a showing of interest by thirty percent (30%) of employees.<sup>91</sup> The Executive Order conflicts with the PLRA by setting a less restrictive threshold than the statute provides.

111. The Pennsylvania Labor Relations Board (“PLRB”) has exclusive jurisdiction to conduct representation elections and certify the authorized representative under the PLRA.<sup>92</sup>

112. The Executive Order conflicts with the PLRA by designating the American Arbitration Association as the election monitor and granting to the Secretary of Labor and Industry the right to certify the union.<sup>93</sup>

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<sup>88</sup> 43 P.S. § 211.1, *et seq.*

<sup>89</sup> *Shapp*, 348 A.2d at 914 (“In no event . . . may any executive order be contrary to any constitutional or statutory provision . . .”).

<sup>90</sup> Executive Order, at ¶ 1 (emphasis added).

<sup>91</sup> 43 P.S. § 211.7(c).

<sup>92</sup> 43 P.S. § 211.7(b).

<sup>93</sup> Executive Order, ¶ 1.c.

113. The PLRA provides that elections will take place by secret ballot “at times, places and in the manner the [PLRB] may direct . . .”<sup>94</sup> The Executive Order conflicts with the PLRA by mandating that an election take place exclusively by mail ballot.

114. An Executive Order is enforceable only if it is consistent with already existing law.<sup>95</sup> Because the Executive Order here was clearly enacted in the absence of legislative authority and it conflicts with the provisions of the PLRA, it cannot stand and should be enjoined.

**In the alternative and to the extent applicable, the Executive Order further conflicts with the Pennsylvania Employee Relations Act.**

115. The Executive Order expressly provides: “Nothing in this Executive Order is intended to grant providers the status of [C]ommonwealth employees.”<sup>96</sup> The Executive Order, however, inserts the Commonwealth directly into the employment relationship by directing that the Department negotiate terms and conditions of employment for the Attendant-Employees.

116. Unlike the NLRA and the PLRA, the Public Employee Relations Act (“PERA”)<sup>97</sup>, which provides a procedure by which Commonwealth employees may organize, does not contain a coverage exclusion for domestic service workers. However, because the Attendant-Employees are not Commonwealth employees, Attendant-Employees may not organize under the PERA.

117. In the alternative, and only to the extent that Attendant-Employees could be construed to be employees of the Commonwealth under a joint-employer or other theory, which Petitioners dispute, the Executive Order would still be invalid because the provisions of the PERA track those of the PLRA.

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<sup>94</sup> 43 P.S. § 211.7(c) (emphasis added).

<sup>95</sup> *Shapp*, 348 A.2d at 914; *Cutler v. State Civil Serv. Comm’n*, 924 A.2d 706, 712 (Pa. Cmwlth. 2007).

<sup>96</sup> Executive Order, at ¶ 7.

<sup>97</sup> 43 P.S. §§ 1101.101 *et seq.*

118. The Executive Order thus conflicts directly with the provisions of the PERA in three (3) material ways: (1) it provides for an election upon a showing of interest by ten percent (10%) of employees; (2) it designates the American Arbitration Association as the election monitor with the Secretary of Labor and Industry certifying election results; and (3) it mandates that the election exclusively take place by mail ballot.<sup>98</sup>

119. The PERA provides for an election upon a showing of interest by thirty percent (30%) of public employees.<sup>99</sup> The Executive Order conflicts with the PERA by setting a less restrictive threshold than the statute provides.

120. The PLRB has exclusive jurisdiction to conduct representation elections and certify the authorized representative under the PERA.<sup>100</sup> The Executive Order conflicts with the PERA by designating the American Arbitration Association as the election monitor and granting to the Secretary of Labor and Industry the right to certify the union.<sup>101</sup>

121. The PERA provides that elections “shall be conducted by secret ballot at such times and places selected by the [PLRB] . . . .”<sup>102</sup> The Executive Order conflicts with the PERA by mandating that an election take place exclusively by mail ballot.

122. An Executive Order is enforceable only if it is consistent with already existing law.<sup>103</sup> Even assuming the Attendant-Employees are employees of the Commonwealth, which Petitioners dispute, the Executive Order clearly conflicts with the PERA. Therefore, it cannot stand and should be enjoined.

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<sup>98</sup> Executive Order, at ¶ 1.

<sup>99</sup> 43 P.S. § 1101.603(a).

<sup>100</sup> 43 P.S. §§ 1101.501-1101.503 & 1101.602-1101.604.

<sup>101</sup> Executive Order, at ¶ 1.c.

<sup>102</sup> 43 P.S. §§ 1101.605.

<sup>103</sup> *Shapp*, 348 A.2d at 914; *Cutler v. State Civil Serv. Comm'n*, 924 A.2d 706, 712 (Pa. Cmwlth. 2007).

#### COUNT IV

**This Court should grant relief to Petitioners in the form of Declaratory Judgment under the Declaratory Judgments Act, 42 PA. C.S. §§ 7531-7541.**

123. Petitioners incorporate by reference paragraphs 1 through 122 above as if set forth fully herein.

124. Under the Declaratory Judgments Act, this Court has the authority, *inter alia*, “to declare rights, status, and other legal relations whether or not further relief is or could be claimed . . . . The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree.”<sup>104</sup>

**A. The Executive Order is contrary to existing law.**

125. As set forth above, as the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program clearly rest the authority to make decisions including, but not limited to, hiring, training, managing, paying and firing Attendant-Employees squarely within the province of Consumer-Employers, the Executive Order is contrary to the Consumer-Employer Model established by existing law.

126. As set forth above, as the Attendant Care Waiver Application and the Aging Waiver Application both require FMS entities to protect and provide appropriate safeguards for the records of all Consumer-Employers and Attendant-Employees, the Executive Order’s mandate that the Commonwealth collect and create lists of this private information, and presumably share it with labor organizations without Attendant-Employees’ consent is contrary to existing law.

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<sup>104</sup> 42 Pa. C.S. § 7532.

127. The Executive Order also creates new law by providing organizational rights to domestic service workers—Attendant-Employees—who expressly do not have such rights under the PLRA.

128. The Executive Order further conflicts with the PLRA in that: (1) it provides for an election upon a showing of interest by ten percent (10%) of employees; (2) it designates the American Arbitration Association as the election monitor with the Secretary of Labor and Industry certifying election results, and (3) it mandates that the election take place by mail ballot.

129. To allow Governor Rendell to, in effect, legislate through the Executive Order would deprive Consumer-Employers of their rights under the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program and would further deprive Consumer-Employers of their rights pursuant to the PLRA.

130. The Executive Order further denies Attendant-Employees their rights under the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program and would further deprive Attendant-Employees of their rights pursuant to the PLRA.

131. Moreover, the Executive Order would require FMS entities to violate their confidentiality obligations pursuant to the Attendant Care Waiver Application and the Aging Waiver Application, the governing documents for the Commonwealth's Attendant Care Waiver and Aging Waiver, respectively.

**B. Petitioners are entitled to a Declaratory Judgment.**

132. Petitioners are entitled to a declaratory judgment on at least the following grounds:

- a.) The Commonwealth does not employ the Attendant-Employees and can not negotiate terms and conditions of their employment consistent with

the Consumer-Directed Model established in the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program.

b.) The Executive Order far exceeds Governor Rendell's authority because it provides domestic service workers with organizational rights contrary to the PLRA.

c.) Petitioner Stacie Billings, an Attendant-Employee, will be immediately and irreparably harmed if the Commonwealth discloses her name and confidential information to labor organizations without her consent.

d.) Petitioner Keith Williams, a Consumer-Employer, and Stacie Billings, an Attendant-Employee, will be irreparably and immediately harmed if the Department is permitted to pursue unionization of Attendant-Employees and engage in negotiations with such Attendant-Employees over terms and conditions of employment, where the Department is not the employer pursuant to the Consumer-Employer Model utilized in each of the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program. Such conduct by the Department unlawfully interferes with the relationship between Consumer-Employers and Attendant-Employees in a manner inconsistent with the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program.

e.) Petitioner Keith Williams, a Consumer-Employer, will be irreparably and immediately harmed if the Department is permitted to pursue unionization of Attendant-Employees and engage in negotiations with the selected

Provider Representative pursuant to a process which is inconsistent with the PLRA.

f.) Petitioner Keith Williams, a Consumer-Employer, will be irreparably and immediately harmed if the Department is permitted to pursue unionization of Attendant-Employees and engage in negotiations with the selected Provider Representative pursuant to a process which is inconsistent on its face with the express terms of the PLRA and PERA, to the extent applicable.

g.) Petitioner Stacie Billings, an Attendant-Employee, will be irreparably and immediately harmed if the Department is permitted to pursue unionization of Attendant-Employees and engage in negotiations with the selected Provider Representative pursuant to a process which is inconsistent on its face with the express terms of the PLRA and PERA, to the extent applicable.

h.) In sum, the organizational process and contemplated negotiations unlawfully interfere with the relationship between the Consumer-Employers and Attendant-Employees and should not be permitted to proceed where the organizational process contemplated in the Executive Order clearly contravenes existing law.

i.) Further, Petitioners PHA, UCP of Pennsylvania and PA PCA members serve as FMS entities providing financial, payroll, bill-payer services, orientation and skills training and related functions for Consumer-Employers under the Consumer-Employer Model of the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program.

j.) Petitioners PHA, UCP of Pennsylvania and PA PCA members, as FMS entities, are required, pursuant to the Attendant Care Waiver Application and the Aging Waiver Application, to protect and safeguard the confidentiality of information regarding the Attendant-Employees for whom it holds and processes records pursuant to the Consumer-Directed Model of the Act 150 Attendant Care Program, Attendant Care Waiver and the Aging Waiver.

k.) Petitioners, PHA, UCP of Pennsylvania and PA PCA, as FMS entities, will be immediately and irreparably harmed if the Department forces these Petitioners to turn over the names of Attendant-Employees, where the Department is not the employer and has no right to disclose such confidential information.

l.) Petitioners PHA, UCP of Pennsylvania and PA PCA members, as FMS entities, will be irreparably and immediately harmed if the Department is permitted to pursue unionization of Attendant-Employees and engage in negotiations with such Attendant-Employees over terms and conditions of employment, where the Department is not the employer pursuant to the Consumer-Employer Model utilized in each of the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program. Such conduct by the Department unlawfully interferes with the relationship between Consumer-Employers and Attendant-Employees, as administered by such FMS entities, in a manner inconsistent with the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program.

m.) Petitioners PHA, UCP of Pennsylvania and PA PCA members, as FMS entities, will be irreparably and immediately harmed if the Department is permitted to pursue unionization of Attendant-Employees and engage in negotiations with the selected Provider Representative pursuant to a process which is inconsistent on its face with the express terms of the PLRA and PERA, to the extent applicable.

**WHEREFORE**, Petitioners respectfully request that the Court enter a declaratory judgment in its favor and against Respondents.

### COUNT V

**This Court should grant injunctive relief to the Petitioners.**

133. Petitioners incorporate by reference paragraphs 1 through 132 above as if set forth fully herein.

134. Petitioners have a clear right to the relief requested herein, as set forth above, and as follows:

a.) The Commonwealth does not employ the Attendant-Employees and can not negotiate terms and conditions of their employment consistent with the Consumer-Employer Model established in the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program.

b.) The Executive Order far exceeds Governor Rendell's authority because it provides domestic service workers with organizational rights contrary to the PLRA.

c.) If the Executive Order is implemented, Petitioners' member organizations, comprised of FMS entities, will be forced to turn over the names of Attendant-Employees in violation of the terms of the Attendant Care Waiver and

the Aging Waiver and will also be left without an adequate administrative or legal remedy to correct the excessive authority granted to the CWC and the Department's OLTL.

d.) If the Executive Order is implemented, Petitioner Stacie Billings, an Attendant-Employee will have her confidential information disclosed to labor organizations without her consent and then will be forced to recognize a bargaining representative selected in a manner inconsistent with the express provisions of the PLRA and PERA, to the extent applicable.

e.) Petitioner Keith Williams, a Consumer-Employer, and Stacie Billings, an Attendant-Employee, will be irreparably and immediately harmed if the Department is permitted to pursue unionization of Attendant-Employees and engage in negotiations with such Attendant-Employees over terms and conditions of employment, where the Department is not the employer pursuant to the Consumer-Employer Model utilized in each of the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program. Such conduct by the Department unlawfully interferes with the relationship between Consumer-Employers and Attendant-Employees in a manner inconsistent with the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program.

f.) Petitioners will be irreparably harmed if the Commonwealth is allowed to implement Governor Rendell's Executive Order.<sup>105</sup>

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<sup>105</sup> See, e.g., *Keller v. Casey*, 595 A.2d 670, 674 (Pa. Cmwlth. 1991) (violation of express statutory provisions constitutes irreparable harm *per se*).

g.) Petitioner Keith Williams, a Consumer-Employer, will be irreparably and immediately harmed if the Department is permitted to pursue unionization of Attendant-Employees and engage in negotiations with the selected Provider Representative pursuant to a process which is inconsistent on its face with the express terms of the PLRA and PERA, to the extent applicable.

h.) Petitioner Stacie Billings, an Attendant-Employee, will be irreparably and immediately harmed if the Department is permitted to pursue unionization of Attendant-Employees and engage in negotiations with the selected Provider Representative pursuant to a process which is inconsistent on its face with the express terms of the PLRA and PERA, to the extent applicable.

i.) In sum, the organizational process and contemplated negotiations in the Executive Order unlawfully interfere with the relationship between the Consumer-Employers and Attendant-Employees and should not be permitted to proceed where such process and negotiations clearly contravene existing law including the PLRA.

j.) Further, Petitioners PHA, UCP of Pennsylvania and PA PCA members serve as FMS entities providing financial, payroll, bill-payer services, orientation and skills training and related functions for Consumer-Employers under the Consumer-Employer Model of the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program.

k.) Petitioners PHA, UCP of Pennsylvania and PA PCA members, as FMS entities, will be irreparably and immediately harmed if the Department forces them to disclose confidential names and information of Attendant-

Employees in violation of their obligations pursuant to the Attendant Care Waiver and the Aging Waiver.

l.) Petitioners PHA, UCP of Pennsylvania and PA PCA members, as FMS entities, will be irreparably and immediately harmed if the Department is permitted to pursue unionization of Attendant-Employees and engage in negotiations with such Attendant-Employees over terms and conditions of employment, where the Department is not the employer pursuant to the Consumer-Employer Model utilized in each of the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program. Such conduct by the Department unlawfully interferes with the relationship between Consumer-Employers and Attendant-Employees, as administered by such FMS entities, in a manner inconsistent with the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program.

m.) Petitioners PHA, UCP of Pennsylvania and PA PCA members, as FMS entities, will be irreparably and immediately harmed if the Department is permitted to pursue unionization of Attendant-Employees and engage in negotiations with the selected Provider Representative pursuant to a process which is inconsistent on its face with the express terms of the PLRA and PERA, to the extent applicable.

135. There is an urgent necessity to stop and prevent injury – namely, the violations of Petitioners’ statutory rights – which cannot be compensated by damages.

136. Accordingly, Petitioners are entitled to a permanent injunction to stop and prevent the injuries set forth herein.<sup>106</sup>

**WHEREFORE**, Petitioners respectfully request that the Court enter a permanent injunction in its favor and against the Respondents.

**VI. NOTICE TO PLEAD**

Respondents are hereby notified to plead to this Petition for Review within thirty (30) days from service hereof or a default judgment may be entered against them.

**VII. RELIEF SOUGHT**

**WHEREFORE**, Petitioners pray the Court to enter judgment against Respondents Governor Rendell and the Department.

- (a) declaring that the Executive Order is inconsistent with Act 150 and the Act 150 Attendant Care Program, the Attendant Care Waiver, the Aging Waiver and the Options Program;
- (b) declaring that the Executive Order is unenforceable as an unauthorized exercise of legislative power;
- (c) declaring that the Executive Order directly conflicts and is contrary to the PLRA; and
- (d) granting a permanent injunction in Petitioners' favor and against Governor Rendell prohibiting any action by Governor Rendell, or any executive

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<sup>106</sup> *Coghlen v. Bor. of Darby*, 844 A.2d 624 (Pa. Cmwlth. 2004) (citing *P.J.S.V. v. Pennsylvania State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996)).

agency or department under his jurisdiction, in furtherance of the  
Executive Order.

BUCHANAN INGERSOLL & ROONEY PC

By: 

Thomas G. Collins

I.D. No. 75896

Nicole M. Lehman

I.D. No. 79135

BUCHANAN INGERSOLL & ROONEY PC

213 Market Street, 3<sup>rd</sup> Floor

Harrisburg, PA 17101

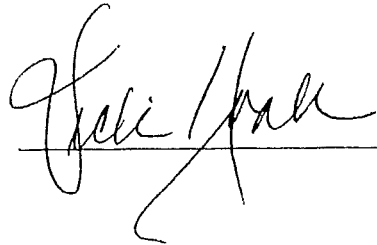
(717) 237-4800

DATE: September 29, 2010

VERIFICATION

I verify that the statements made in the foregoing Petition for Review, of which I have first-hand knowledge, are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904, relating to unsworn falsification to authorities.

9.29.10  
Date



VERIFICATION

I verify that the statements made in the foregoing Petition for Review, of which I have first-hand knowledge, are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904, relating to unsworn falsification to authorities.

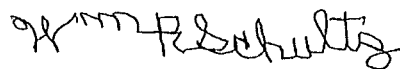
9/24/2010

Date

*Christine Seidel*

**VERIFICATION**

I VERIFY THAT THE STATEMENTS MADE IN THE FOREGOING Petition for Review, of which I have first-hand knowledge, are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904, relating to unsworn falsification to authorities.



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Date

**VERIFICATION**

I verify that the statements made in the foregoing Petition for Review, of which I have first-hand knowledge, are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904, relating to unsworn falsification to authorities.

9.24.10

Date

KEITH R. MILLER

VERIFICATION

I verify that the statements made in the foregoing Petition for Review, of which I have first-hand knowledge, are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904, relating to unsworn falsification to authorities.

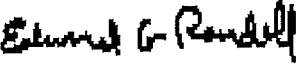
9-24-10

Date

Steve Ballinger

# EXHIBIT “A”

**Executive Order**  
**Commonwealth of Pennsylvania**  
**Governor's Office**

<b>Subject:</b> Consumer-Directed Home Care Providers	<b>Number:</b> 2010-04
 <b>By Direction of: Edward G. Rendell, Governor</b>	<b>DATE:</b> September 14, 2010

- WHEREAS, the commonwealth is committed to ensuring Pennsylvania residents have access to high quality home care services; and
- WHEREAS, the commonwealth, through its Office of Long-Term Living, presently administers various home and community based services, including the Attendant Care Waiver, the Attendant Care Services Act 150 Program, Options and the Aging Waiver; and
- WHEREAS, under these home and community based waiver programs, consumers of home care services have the ability to self-direct their own care and to employ individual providers (providers) through the use of Financial Management Services agencies retained by the commonwealth and selected by consumers to assist them with payroll and other supportive services; and
- WHEREAS, there is a continuing workforce shortage in recruiting and retaining providers who support Pennsylvania citizens in their homes and the community; and
- WHEREAS, successful home care programs for seniors and persons with disabilities require efforts and strategies to recruit and retain a qualified and trained workforce; and
- WHEREAS, Pennsylvania is rebalancing its long-term living to increase the opportunities for seniors and persons with disabilities to live independently for as long as their health permits them to do so; and
- WHEREAS, the commonwealth, through its Office of Long-Term Living, is in the process of establishing a statewide rate structure for the payment of certain home and community based services; and

WHEREAS, consumers of home care services who desire to self-direct and employ providers are best served by an experienced, well-trained, stable provider workforce; and

WHEREAS, providers work throughout the commonwealth in the homes of consumers and therefore without representation have no effective means of voicing their collective concerns about the terms of their provision of services; and

WHEREAS, the commonwealth has a substantial public interest in protecting the rights of workers to join, form and assist organizations to negotiate on their behalf; and

WHEREAS, it is essential for the commonwealth to hear the common concerns of consumers and providers employed by consumers in order to effectively and efficiently administer its home and community based waiver programs and to achieve its goals of rebalancing the system of long-term living and improving access to quality home care; and

WHEREAS, the commonwealth is committed to developing a strategy that will address these concerns without interfering with a consumer's right to select, hire, schedule, supervise and terminate an individual provider employed by the consumer.

NOW, THEREFORE, I, Edward G. Rendell, Governor of the Commonwealth of Pennsylvania, by virtue of the authority vested in me by the Constitution of the Commonwealth of Pennsylvania and other laws, do hereby direct the following:

**1. Selection of a Provider Representative.** In order to assist the commonwealth in addressing the concerns and interests of individual providers, the commonwealth shall recognize a labor organization as the exclusive representative for individual providers, designated in the manner as follows:

**a. Providers Defined.** For the purpose of this Executive Order, providers are defined as those providers who are consumer-directed and not employed by a private agency and who provide, under the jurisdiction of the Office of Long-Term Living, ongoing Medicaid or commonwealth reimbursed non-medical, direct care services to older Pennsylvanians and Pennsylvanians with disabilities, including but not limited to the Attendant Care Waiver, the Attendant Care Services Act 150 Program, Options and the Aging Waiver.

**b. Eligible Voters.** The commonwealth shall create a list of providers who will constitute eligible voters for the purpose of determining a showing of interest justifying an election and for the election should such showing of interest occur. The list shall be composed of providers reimbursed for services from the most recent three month period available.

**c. Showing of Interest Justifying an Election.** In order for an election to occur, a labor organization must demonstrate to the satisfaction of the Secretary of Labor and Industry, by either authorization cards or petition, that at least 10 percent of the providers on the eligible voter list request an election. The Secretary of Labor and Industry shall designate the American Arbitration Association or another organization with experience in conducting representation elections as election monitor for purposes of showing of interest and conducting the election should such showing of interest occur. The election shall be conducted by secret mail ballot and shall commence no later than 30 calendar days from the determination that a showing of interest has been demonstrated. Any other labor organization seeking to intervene or appear on the ballot must demonstrate a 10 percent showing of interest.

**d. Majority Vote Required.** In order for any labor organization to be recognized as the Provider Representative of the providers, it must receive at least a majority of the votes cast. After such results are certified, the commonwealth will recognize the labor organization as the exclusive representative of all consumer-directed providers covered under this Executive Order working within the commonwealth, for the purpose of negotiation of matters over which the commonwealth has control.

**e. Decertification or Selection of Different Provider Representative.** A petition to decertify an existing exclusive representative or select a different Provider Representative may be filed by providers in the same manner as a petition for election, provided the petition is no sooner than 12 months after the representative election has been conducted. In the event a valid agreement is reached that, by its terms, does not exceed three years in duration, a decertification petition may be filed by providers in the same manner as a petition for election during the period from 90 calendar days until 60 calendar days immediately preceding the expiration of such Agreement.

**2. Meeting with the Provider Representative.** The commonwealth, acting through the Office of Long-Term Living or joint designee of the Secretaries of Aging and Public Welfare, shall engage in negotiations with the Provider Representative concerning terms and conditions which directly impact providers and which are within the commonwealth's control, including the maximum unit rate paid for services, minimum portion of commonwealth payments passed through to providers, training standards and requirements, health care, payroll deductions such as dues and co-premiums, and the creation of a voluntary registry. Such negotiation shall begin within 30 calendar days after certification of the provider representative. The negotiation shall not intrude upon or interfere with a consumer's right to select, hire, directly train, schedule, supervise and terminate any individual provider employed by the consumer.

- 3. Agreement Memorialized.** When agreement is reached, it shall be memorialized in writing. Agreement shall be signed by the Governor, or his representative, and by the Provider Representative. The terms of the agreement which require state and federal regulatory or legislative action shall be contingent upon the successful completion of such action. To the extent practical, if any provisions of the agreement require legislative action or the appropriation of funds, the parties will jointly seek the enactment of such legislative or regulatory action.
- 4. The Consumer Workforce Council.** The Consumer Workforce Council (CWC) is established as the unified voice for consumer-employers for the purpose of engaging in discussions regarding common concerns of consumers and providers covered by this Executive Order.
- a. Selection and Terms of the CWC.** The CWC shall consist of 18 members, diverse by geography and age, selected by the Governor. The Pennsylvania Council for Independent Living, Centers for Independent Living, AARP, and the P4A (representing the Area Agencies on Aging) are invited to submit regionally diverse nominations. Each member shall be appointed for a two-year term, renewable for two additional terms if nominated by the Governor. The Chair will serve at the pleasure of the Governor and, other than the first chair, must have served for at least one year prior to selection as the chair. Other than the first chair, the CWC shall provide its recommendations to the Governor regarding selection of the chair.
- b. The Role of the CWC.** In order to ensure a strong voice for the rights of consumers, the CWC shall advise the Office of Long-Term Living or the joint designee of the Secretaries of Aging and Public Welfare designee with respect to any issues or concerns related to this Executive Order.
- 5. Procedure if the Parties Fail to Reach Agreements.** Nothing in this Executive Order shall permit providers to engage in a strike or collective cessation of the delivery of services. In the event the parties in the judgment of the Secretary of Labor and Industry reach impasse during negotiations, they shall employ the services of a third-party neutral who will make a non-binding recommendation as to contract provisions. The costs for the services of the arbitrator will be shared equally by the parties.
- 6. The Relationship Between Provider and Consumer Will Not Change.** This Executive Order in no way alters the unique relationship between the individual provider and individual consumer. Consumers retain the absolute right to select, hire, terminate and supervise their providers.
- 7. The Relationship Between Provider and the Commonwealth Will Not Change.** Nothing in this Executive Order is intended to grant providers the status of commonwealth employees.

- 8. State Action Exemption.** In affording providers the right to select an exclusive representative, engage in negotiations with the commonwealth pursuant to the terms of this Executive Order, the commonwealth intends that the "State Action" exemption to federal anti-trust laws be fully available to the commonwealth, to the providers, their Provider Representative, and to the CWC. The exempt conduct shall be actively supervised by the Department of Labor and Industry.
- 9. Cooperation by State Agencies.** All agencies under the Governor's jurisdiction shall take whatever steps necessary to implement the provisions of this Order.
- 10. Term.** This Executive Order shall be effective immediately and shall remain in effect until rescinded by the Governor.

**CERTIFICATE OF SERVICE**

I hereby certify that I am this day serving the foregoing document upon the persons which service satisfies the requirements of Pa. R. App. P. 121(c) as follows:

***VIA HAND DELIVERY***

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DATE: September 29, 2010