EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOME CARE ASSOCIATION OF AMERICA, et al., Plaintiffs,	)	
v.	)	Case No. 1:14-cv-00967
DAVID WEIL, et al., Defendants.	)	

DECLARATION OF MICHAEL HANCOCK IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION

I, Michael Hancock, am the Assistant Administrator for Policy of the Wage and Hour Division, United States Department of Labor. I possess personal knowledge of the matters set forth in this declaration, am competent to testify to the same, and if called to testify my testimony would be as stated in this declaration. I declare pursuant to 28 U.S.C. § 1746 under penalty of perjury that the following is true and correct:

The Secretary of the United States Department of Labor is responsible for administering and enforcing the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 et seq. ("FLSA" or " Act"). The Secretary has delegated these responsibilities to the Administrator of the Wage and Hour Division, to whom I report.

I have been in a career-appointed position in the Wage and Hour Division of the U.S. Department of Labor for nearly 20 years, since 1995. From 1995 to 2000, I served as the Farm Labor Branch Chief for the Wage and Hour Division; from 2000-2003, I was a Senior Labor Advisor to USAID; from 2003-2009, I served as the Interpretations Branch Chief; and from

2009-2010, I was the Director of the Division of Interpretation and Regulatory Analysis. As the branch chief and Director of the Interpretations Division, I was responsible for the issuance of opinion letters and other guidance regarding compliance with the statutes the Wage and Hour Division administers and enforces.

I am currently the Assistant Administrator for Policy of the Wage and Hour Division, a position I have held since 2010. In that capacity, I supervised the Wage and Hour Division team that conducted the rulemaking that culminated in the Home Care Final Rule, published on October 1, 2013. I have also been an integral part of the working group of senior Department officials responsible for the implementation of the rule.

Home Care Rulemaking

1. The Home Care Final Rule revised the Department's domestic service employment regulations, which had been essentially unchanged since 1975, to correct the exclusion of many home care workers from the FLSA's minimum wage and overtime protections. As a key member of the rulemaking team, I have learned a great deal about the home care industry. I provide some of this context below in order to fully illustrate the potential deleterious effects that would be caused by a further stay of the "companionship services" regulation.

2. Most home care workers are professional caregivers, who work for agencies that are businesses, whether for-profit or not-for-profit. Furthermore, as explained in the Final Rule, a significant factor in the development of the home care industry has been the availability of public funding for these services; as Medicaid has evolved to provide in-home rather than solely institutional care and thereby become a primary funding source for home care services, the nature of the work and the workforce also evolved. Of course, for arrangements that are still

aligned with what Congress envisioned when enacting the exemption—i.e., workers performing elder sitting—the exemption is still available.

3. Throughout my two decades with the Wage and Hour Division, I have worked on projects involving a broad range of industries and workforces. The home care workforce is a low-wage workforce, with average wages below $10 per hour; in 2009, approximately half of home care workers lived in households that received public benefits (such as food stamps or Medicaid). I have reviewed multiple sources that explain that the industry is plagued with extremely high turnover rates.

4. The Notice of Proposed Rulemaking (NPRM), which included a proposed revised definition of "companionship services," was announced on December 27, 2011. The regulated community, including the plaintiffs and other home care agencies and their representatives, submitted 26,000 comments and attended outreach sessions during which they made their views known. The Department took the industry perspective into account in revising, among other things, the proposed definition of "companionship services" (for example, to refer to "Activities of Daily Living" and "Incidental Activities of Daily Living"). The regulated community has thus known for approximately three years that the Department would be updating the definition of "companionship services."

5. In promulgating the Home Care Final Rule, the Department included an unprecedented 15-month delay in the effective date. The Rule was issued on October 1, 2013, and was not to become effective until January 1, 2015. In the approximately 75 years the FLSA has been in existence, minimum wage updates made by Congress or changes to FLSA regulations that affect wages and that apply to state and federal governments as well as private employers (such as this one), have routinely been implemented within 30 to 60 days, the shortest permissible time

periods under applicable law. The Department departed from this practice in promulgating the Home Care Final Rule because of its recognition of the importance to seniors and individuals with disabilities who rely on those services to remain in their homes, as well as its recognition of the time necessary for adjustments to be made to the state Medicaid programs that fund so many of those services.

6. The Department has used the long interval between the promulgation of the rule and the effective date to assist states and private employers in preparing to comply with the FLSA.

The Wage and Hour Division's Implementation Efforts

7. The Department has emphasized to all stakeholders throughout the implementation process that our efforts in implementing the Home Care Final Rule have been guided by twin principles: protecting worker rights while ensuring that seniors and individuals with disabilities, many of whom receive services through public funding, are able to remain in their homes and communities without incurring cuts in the level or quality of home care services received.

8. Since the Home Care Rule was published on October 1, 2013, the Department has engaged in an intensive outreach and technical assistance program, which it has viewed as an essential component of the implementation process. The Department created a dedicated website with extensive information about the rule and the application of the FLSA in the home care context; provided a number of pieces of sub-regulatory guidance (including fact sheets on various topics, frequently asked questions, and two detailed Administrator's Interpretations developed in direct response to questions from the regulated community); and conducted over 200 webinars and outreach phone calls, meetings, and in-person presentations and trainings around the country. The Department directly reached thousands of people by engaging states, associations of directors of Medicaid as well as other relevant agencies, consumers,

disability and senior citizens' advocates, veterans' organizations, worker representatives, and private industry groups, among others. The Department has devoted such a large number of hours and resources to this implementation effort in order to ensure that the industry was adequately prepared for this transition.

9. The Department has undertaken a particularly exhaustive outreach campaign to state governments. We have held conference calls with representatives of all 50 states, including high-level officials who run the state agencies that administer Medicaid-funded home care programs and often also including labor commissioners, budget officials, and Governors' office staff. We spoke to representatives of many states more than once; overall, we participated in more than 100 calls with states over the last nine months alone.

10. The Department's outreach efforts have also included targeted outreach to the disability community. I have personally traveled to multiple conferences and meetings, and made presentations, to provide information and technical assistance to organizations such as National Resource Center for Participant-Directed Services (November 2013), TASH (December 2013 and 2014), ANCOR (May 2014), the National Council on Independent Living (NCIL) (July 2014), and ADAPT (November 2014). Additionally, the Department has held six webinars to provide information to the membership of organizations in the disability community (TASH, ANCOR, NRCPDS, Easter Seals, The Arc of Florida, Arkansas Waiver Association) and engaged with dozens of disability community organizations in over 50 meetings and calls.

11. The Department has further reached out to private sector employers. For example, I traveled to Troy, New York to attend a meeting of the Consumer Directed Personal Assistance Association of New York State (CDPAANYS), a group of providers of consumer-directed home care services. Most recently, I traveled to Orlando, Florida in October 2014 to make a

presentation at the national conference of the Private Care Association, a group of private home care agency representatives, and to New York, NY in November 2014 to address the Executives' Association of New York City.

12. The Department's efforts have also included working with other Federal agencies whose functions and areas of expertise are central to the provision of home care services with Medicaid funding. Specifically, we have partnered closely with the U.S. Department of Health and Human Services and the U.S. Department of Justice throughout the rulemaking and implementation process. Of particular note, these agencies have issued guidance to states regarding the Home Care Final Rule. *See* http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf (Informational Bulletin explaining how Medicaid programs that fund home care can pay for the costs of overtime and time workers spend traveling between recipients of services, if necessary); http://www.ada.gov/olmstead/documents/doj_hhs_letter.pdf ("Dear Colleague" letter cautioning that in putting policies in place in response to the Home Care Final Rule, states are required to consider whether reasonable modifications, which could include exceptions to overtime limits under certain circumstances, are necessary to avoid placing individuals who receive home care services at serious risk of institutionalization or segregation). Additionally, the Government Accountability Office published a report this month, available at http://www.gao.gov/products/GAO-15-12, concerning the Home Care Final Rule at the request of members of Congress. The report recognized many of the industry changes that had motivated the rulemaking, and also repeatedly noted the extensive outreach efforts undertaken by the Department during the implementation process.

Status of Implementation

13. Through our extensive outreach efforts, we have become well informed about the implementation efforts of certain employers. We do not believe that the dire circumstances some opponents of the rule predict will actually take place, due in part to the extended amount of time employers have been given to comply with these basic labor protections (with which many employers are already required to comply for other employees such as visiting nurses). Additionally, many employers are already required under state law to provide minimum wage and overtime compensation to at least some home care workers.

14. We know that many private home care agencies are preparing to comply with the FLSA. Some have sought out our technical assistance and have attended informational presentations regarding the rule and the FLSA. Others, such as providers who facilitate home care arrangements in which the home care worker and the recipient of services live together (called "shared living" arrangements), as well as providers who facilitate home care arrangements in which the person receiving services, rather than a home care agency, has extensive control over the work (called "consumer-directed" or "self-directed" services), have worked diligently to determine how to apply the FLSA principles.

15. We also know that many states were poised to comply with the FLSA as required by the Final Rule on January 1, and stand ready to comply on January 15, but are waiting to know the outcome of this lawsuit. As noted, we had conversations with officials from all 50 states. Some states, prior to this regulation, already limited the hours of home care services an individual can receive or a worker can provide, either by statute or policy; those states therefore needed minimal or no adjustments to come into FLSA compliance. Others were more

significantly affected by the rule but have taken steps in response, ranging from making budgetary adjustments to fund overtime hours worked to limiting workers' hours.

For example, California, which employs more than 400,000 workers through one of its home care programs (accounting for more than half of all home care workers in Medicaid-funded, consumer-directed programs nationwide), has taken steps to fund most overtime hours or limit overtime hours in rare instances to comply with the new requirements under the FLSA. In June 2014, the Governor and state legislature agreed to a budget allocation that would cover additional overtime hours, up to 66 hours per week, when the federal Home Care Final Rule takes effect January 1. The relevant Senate bill, as passed, is available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB855. Because under Section 76(*l*) of the Bill, the funding allocation is tied to the effective date of the Department's Final Rule, workers would be denied an increase in wages if the Rule's effective date is stayed. More information about California's plan for compliance with the Final Rule may be found at: http://www.disabilityrightsca.org/pubs/555401.pdf. After the temporary restraining order (TRO) was issued on December 31, however, California announced that it would not implement this budget allocation, and thus would not begin to pay home care workers overtime until this court rules on the preliminary injunction.

16. New York, another large state with a substantial number of consumers receiving Medicaid-funded home care services, has allocated funds to cover the costs of compliance with the FLSA in light of the Home Care Final Rule. Pending further studies during the first six months of 2015, the state is not requiring that employers make any adjustments to the hours home care workers provide services; the state is willing to fund overtime costs while maintaining current services. The state has set up an application system for fiscal intermediaries, which are

the private agencies that administer consumer-directed home care programs in New York, to request these funds. The application requires that the fiscal intermediary provide data to the state so that the state can assess the long-term costs of FLSA compliance in home care programs going forward. An explanation of the state's decision and plan is available at http://www.health.ny.gov/health_care/medicaid/redesign/docs/cdpas_flsa_aplication_cover.pdf. Following the court's December 31 TRO, however, the New York State Department of Health informed stakeholders via an email (that was subsequently forwarded to me) that the recent court ruling puts the status of the Final Rule, and the pool of money set aside to pay for overtime costs, in an "undetermined state" and that "this funding may be adjusted or taken back depending on the final outcome of the litigation."

17. In Oregon, the state has made adjustments to certain home care programs to limit costs resulting from FLSA compliance, and the Governor has included additional funding in his proposed budget to cover increased costs. The document explains that "a recent U.S. Department of Labor rule change regarding application of the Fair Labor Standards Act will increase the cost of the state's home and community based care system and result in some program changes. This budget anticipates managing those costs and changes delivery in a way that lowers state financial exposure while preserving program quality and treating workers fairly." The proposal is available at http://www.oregon.gov/gov/priorities/Documents/2015-17_gb.pdf.

Time-Limited Non-Enforcement Policy

18. Despite the unprecedented 15-month period between the publication of the Final Rule and the effective date, the Secretary received many requests to delay the effective date of the rule to allow additional time for employers to make the changes necessary to implement the rule.

When the requests to delay the rule were made public by the entities requesting more time, the Secretary received many requests asking that the January 1, 2015 effective date be maintained so that covered home care workers would finally receive FLSA protections. In response to these competing requests regarding whether the effective date of the Home Care Final Rule should be delayed, on October 7, 2014, the Wage and Hour Division published in the Federal Register an announcement of a time-limited non-enforcement policy of that rule. The notice explained that the Department was deliberately not extending the rule's effective date; the FLSA obligations that result from the regulatory changes were to become effective on January 1, 2015, as scheduled. But in recognition of the efforts necessary to adjust Medicaid-funded home care programs, the Department would temporarily focus its resources exclusively on continuing its intensive outreach and technical assistance efforts. Indeed, a number of outreach and technical assistance events are already scheduled during this non-enforcement period.

19. The non-enforcement policy provides that for six months, from January 1 to June 30, 2015, the Department will not bring enforcement actions against any employer as to violations of FLSA obligations resulting from the amended regulations. For the following six months, from July 1 to December 31, 2015, the Department will exercise prosecutorial discretion in determining whether to bring enforcement actions, making determinations on a case-by-case basis, giving strong consideration to an employer's efforts to make any adjustments necessary to implement the Final Rule, and in particular a state's efforts to bring its publicly funded home care programs into FLSA compliance. This policy reflects the Department's commitment to helping stakeholders understand their obligations and options in complying with the FLSA and to facilitating assistance from other Federal agencies in helping stakeholders to understand their obligations and options under other Federal laws.

20. However, the non-enforcement policy is not a grace period for non-compliance. The rule's effective date has three important effects: (1) the legal obligation to pay home care workers begins on that date; (2) a private right of action to recover wages still exists during the non-enforcement period, pursuant to Section 16(b) of the Act, 29 U.S.C. 216(b), permitting individual plaintiffs to recover wages due; and (3) the Department retains the ability to collect back wages accrued during the period of the non-enforcement policy at a later time.

Harmful Effects of a Stay of the Rule

21. Because the Court stayed the revised definition of "companionship services" from going into effect on January 1, 2015, nearly two million home care workers did not become entitled to minimum wage and overtime protections. Workers who do not receive the minimum wage protections of the Act are necessarily vulnerable to exploitation, and there is simply no avenue available to them to recover back wages for hours worked without the protection of the Act. While many home care workers currently receive wages at or above the minimum wage, not all do. Based on our conversations with stakeholders, we understand that some of these workers receive daily or overnight shift payments that are not equivalent to minimum wage for each hour in the shift. In Kansas, for example, workers receive between $22.44 and $30.65 total for shifts of up to 12 hours for "sleep cycle support," which can involve regularly turning clients in their beds and emptying catheter bags overnight, which works out to an hourly wage that could potentially be as low as $1.87 per hour. *See, e.g.*, Kansas Medical Assistance Program: Provider Manual, HCBS-FE Sleep Cycle Support, p. 8-2, *available at* https://www.kmap-state-ks.us/Documents/Content/Provider%20Manuals/HCBS%20FE%20SLEEP%20CYCLE%20SUPPORT%2002082010_10019.pdf. Through my conversations with stakeholders, I have heard of other workers not being paid for all hours worked (such as time spent "engaged to wait" or

traveling between worksites), bringing wages below the minimum wage. Moreover, when employers are not under a legal obligation to pay minimum wage, workers are left utterly vulnerable – without any recourse to recover *any* back wages.

22. Furthermore, because of the stay of the effective date, these workers were also deprived of overtime compensation. Many home care workers live in poverty. Additional wages help workers pay rent, feed their families, and pay for other necessities. To the extent that employers choose to limit home care workers' hours to avoid overtime costs, that decision also fulfills a purpose of the Act: spreading work to more people. Part-time employees who are assigned more hours or new employees benefit from those decisions.

23. Additional delay of the implementation of FLSA protections in the home care industry would also hurt recipients of services. The low wages paid to home care workers causes high turnover rates across the industry. Once workers are guaranteed the minimum wage for all hours worked and receive overtime compensation for all hours over 40 in a workweek, they will be less likely to leave their jobs. Lower turnover in the workforce benefits recipients of services both by improving continuity of care and by increasing the percentage of the workforce with training and experience in providing those services. *See, e.g.*, Caring in America: A Comprehensive Analysis of the Nation's Fastest-Growing Jobs, PHI, December 2011, available at http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf; Fair Labor Standards Act: Extending Protections to Home Care Workers, U.S. Government Accountability Office, Report to Congressional Requesters, December 2014, available at http://www.gao.gov/products/GAO-15-12.

24. Furthermore, further delaying the effective date of the revised definition of companionship services would create confusion in the regulated community and interfere with

the progress made toward compliance with the FLSA. We have worked diligently with states to help them understand the implications of the Final Rule and to prepare for FLSA compliance. As we noted in explaining our decision to allow 15 months between promulgation and the rule's effective date as well as in announcing our non-enforcement policy, many states need to make changes to their home care programs and budgets to give effect to the rule. Those processes take time, resources, and political will. We have had numerous conversations with various states about budgetary and programmatic decisions and it is apparent that this complex process could be derailed if there is any indication that the rule will not go into effect on January 1, 2015. Since the TRO was issued on December 31, the Wage and Hour Division has fielded hundreds of phone calls from state agencies, workers, employers, consumers, and other stakeholders who were confused about their rights and obligations, and unsure how to best proceed. In particular, for entities such as state agencies that have many levels of decision-making, significant time and resources must be expended in order to understand and respond appropriately to any sudden changes in the law, and it is challenging for any entity to have to initiate, cease, and then reinitiate processes. Interfering with the movement towards compliance by adding another layer of confusion at this late date would not be beneficial to states, home care programs, workers, or the individuals who rely on home care. This problem is especially significant in regard to budgetary adjustments, because states operate on annual or biannual budget cycles, and most budget decisions for the next one or two years will be made in the early part of 2015. Given the Department's high likelihood of success on the merits (in view of the Department's clear statutory authority to define the term "companionship services"), a short-term stay could potentially have deleterious effects on state budgetary and legislative processes and state agencies that are poised to comply.

I declare pursuant to 28 U.S.C. § 1746 under penalty of perjury that the foregoing is true and correct. Executed on this 5th day of January, 2015.

Washington, D.C.

Michael Hancock
Assistant Administrator for Policy
Wage and Hour Division, U.S. Department of Labor