June 21, 2016—Comments of Thomas G. Collins, Esq., Buchanan Ingersoll & Rooney, PC, before the Joint Session of the Senate Appropriations and Labor & Industry Committees.

Thank you Chairwoman Baker, and esteemed Members of both the Appropriations and Labor & Industry Committees.

My name is Tom Collins. I am an attorney and shareholder with the law firm of Buchanan Ingersoll and Rooney, PC. I am a member of the Firm's Labor & Employment practice group working out of its Harrisburg Office. My practice is statewide in scope, however, with a particular emphasis on wage and hour compliance in the homecare industry.

I am also a member of the Pennsylvania Homecare Association ("PHA", or the "Association"), and our Firm has had the great opportunity and high privilege to represent the Association for more than two decades. I have personally worked with PHA and its member organizations for over 15-years. I have been asked to testify today on behalf of the Pennsylvania Homecare Association to explain and draw attention to the impact that recent Federal legislative initiatives and regulatory mandates have had and will continue to have on homecare providers throughout the Commonwealth.

I will endeavor to keep my comments short and substantively focused on the technical changes to Federal wage and hour law; specifically, the Fair Labor Standards Act ("FLSA"). I will also attempt to provide the Committee with

additional context for the changes to the FLSA given the cumulative nature of the mandates of the Patient Protection and Affordable Care Act (or the "ACA").

I am here today with Arthur G. Hoopes. Mr. Hoopes is the President of Capital Healthcare Solutions. Capital Healthcare Solutions is a prominent homecare provider in the greater Pittsburgh area. Mr. Hoopes will provide specific insight as to how these Federal mandates are impacting his homecare business.

After our collective comments, we would be happy to entertain any questions that the Committee Members may have for us. In advance of my comments, I would thank each of you for this opportunity to be heard on this issue of importance to our Commonwealth.

Moving to the issue at hand, just last month—on May 18, 2016—the United States Department of Labor (the "DOL") released new regulations governing the exemptions for "executives", "administrators" and "professionals" under the FLSA.[1] These exemptions are commonly referred to as the "white collar exemptions." The white collar exemptions apply to both the minimum wage and overtime requirements of the FLSA. As further background, in order to qualify for the white collar exemptions, the employee (1) must be paid a predetermined and fixed salary of a minimum specified amount (called the "salary level test"); and (2) the employee's job duties must primarily involve executive, administrative, or

[1] *See* 29 C.F.R. §§ 541.0-541.304.

professional duties as defined in regulations promulgated by the DOL (called the "duties test"). Both the "salary level test" and the "duties test" must be satisfied for the white collar exemptions to apply.[2]

In the context of the provision of homecare services, the white collar exemptions can be applicable to a variety of positions. By way of example, Office Managers, Schedulers and others with the requisite supervisory and decision making authority can be exempt "administrators"—provided that the "salary level test" is satisfied. Registered Nurses or "RNs"—working either in the field or in supervisory / case management capacities—can be exempt "professionals" if the "salary level test" is satisfied. Higher level managers and executives with the requisite decision making authority on behalf of the enterprise can also be exempt "executives"—again—provided the "salary level test" is satisfied.

Prior to May 18, 2016, the minimum salary level for the white collar exemptions under the FLSA was $23,660 per year—which equates to $455 per week.[3] As a result of the DOL's new regulations, the applicable salary level for the white collar exemptions will increase to $47,476 per year—which equates to $913 per week, or more than double the previous amount. This new required minimum salary—which more than doubles the salary previously required—becomes effective in less than six months on December 1, 2016.

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[2] *See* 29 C.F.R. §§ 541.600-541.606. Please note that the DOL's new heightened salary requirements have not yet been codified in the regulations.

[3] *Id*.

In sum, in order for Pennsylvania's homecare providers to continue to utilize the FLSA's white collar exemptions after December 1, 2016, they must either increase the salary they pay to their exempt employees to meet the $913 per week minimum threshold, or alter their compensation practices to pay such employees on an hourly rate basis. With the former approach, providers could be forced in certain scenarios to more than double the salary paid to such exempt individuals—from $455 per week to $913 per week. Adoption of the latter approach will require the payment of overtime at the rate of 1 and ½ times the employees "regular rate."[4] These employees often work long and unpredictable hours—which is why homecare providers have come to rely upon the white collar exemptions for their office and administrative staffing. To the extent that homecare providers in the Commonwealth are required to either double existing salaries, or move to an overtime based hourly rate model, their direct compensation costs will increase across all positions for which the white collar exemptions were previously utilized. Regardless of whether homecare providers attempt to maintain their employees' exemptions under the FLSA by increasing their salaries, or begin paying overtime, the result is the same—higher administrative and direct costs with no corresponding increase in revenue.

[4] *See, e.g.*, 29 C.F.R. § 778.108.

The impacts of the new FLSA guidelines should not be viewed in a vacuum. Homecare providers are still reeling in this regard from the recent impacts of the mandates of the Patient Protection and Affordable Care Act (the "ACA"). Beginning in 2015, the ACA required employers with 100 or more employees to provide health insurance coverage to full-time employees (30 hours or more) meeting certain minimum thresholds in regards to the benefits being provided—"minimum essential coverage"—and "affordability." Beginning this year—2016—this ACA mandate now applies to smaller employers with only 50 or more full-time employees. For employers to comply with the ACA's "affordable" coverage mandate, the employee's share of their health insurance premiums could not exceed 9.5% of the employee's annual household income. Due to the inherent difficulties in assessing "household income", employers are often forced to focus exclusively on the employee's income with the employer. In other words, the employer subject to the mandate is forced to pay for the remainder of the health insurance premium regardless of household income.[5]

As reported by the Kaiser Family Foundation and the Health Research & Educational Trust, in the first half of 2015, the average employer's share of the annual insurance premium for employer-sponsored health insurance reached

[5] *See, e.g.*, 26 C.F.R. § 601.105.

$5,180 per employee for single coverage.[6] Such an increased cost—without any corresponding increase in the Medicaid reimbursement rates applicable to homecare providers—has placed considerable financial pressures on homecare providers which had not previously existed. As a general rule, in my experience, the provision of the type of health insurance required by the ACA—"minimum essential coverage"—was unheard of in the homecare industry due to the considerable costs and slim margins associated with the provision of Medicaid services. It is worth reiterating here that these costs apply to each full-time homecare worker. Given the low threshold for full-time work (30 hours), the mandate is hitting large percentages of the overall homecare employee population. This means that, moving forward, homecare agencies must now assume this significant financial burden as part of their direct operating costs.

As you are all no doubt aware, homecare providers participating in the various Medicaid waiver and other reimbursement programs are not in a position to pass along this new financial burden to their clients, as the rates they charge are set by the Commonwealth. To make matters worse, annual health insurance premiums increased between 2015 and 2016, and are expected to increase significantly again next year. The ongoing costs and pressures associated with

[6] The Kaiser Family Foundation and Health Research & Educational Trust, *2015 Employer Health Benefits Survey; Summary of Findings*, pg 1, *et seq*. (Sept. 22, 2015).

ACA compliance will be exacerbated by the new FLSA guidelines mandating significant salary increases or overtime for the exempt employee population.

In conclusion, our homecare clients all have a similar story. They have never enjoyed the robust profit margins that some other industries enjoy. And in light of the recent unfunded mandates placed upon them by the Federal Government, their overhead and direct costs are growing—making it harder to stay profitable, while providing quality care to the Commonwealth's elderly and disabled.

Mr. Hoopes will now describe how these changes are impacting his business specifically. Again, thank you for the time and opportunity.