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LABOR ORGANIZING BY EXECUTIVE ORDER: GOVERNOR SPITZER AND THE UNIONIZATION OF HOME-BASED CHILD DAY-CARE PROVIDERS

David L. Gregory*

I. INTRODUCTION

On May 8, 2007, New York Governor Eliot Spitzer issued Executive Order No. 12, opening the door for the unionization of 60,000 persons paid directly or indirectly, in whole or in part, by state funds, to provide home-based day-care for the children of working parents.¹

The Governor's action was dramatic, stark, and extraordinarily significant. Rather than wait for the New York State Assembly and Senate to reenact legislation previously vetoed by former Governor Pataki in 2006, Governor Spitzer used the prerogative of the executive order to cut through many Gordian knots.²

Meanwhile, powerful unions have carved up the organizing turf: the United Federation of Teachers ("UFT") is successfully organizing home-based providers in New York City, and the Civil Service Employees Association ("CSEA") will organize those providers throughout the rest of the state.³

Critics of the Governor's initiative vociferously contend that it is a blatant legal fiction to characterize these providers as employees. This legal fiction, however, is certainly more enlightened than the

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1. See Steven Greenhouse, *Child Care Workers in New York City Vote to Unionize*, N.Y. TIMES, Oct. 24, 2007, at B4, [hereinafter Greenhouse, *Vote to Unionize*] available at <http://www.nytimes.com/2007/10/24/nyregion/24childcare.htm>.

2. N.Y. Exec. Order No. 12, N.Y. COMP. CODES R. & REGS. tit. 9, § 6.12 (2007), [hereinafter N.Y. Exec. Order No. 12] available at http://www.ny.gov/governor/executive_orders/xeorders/12.pdf.

3. See Greenhouse, *Vote to Unionize*, *supra* note 1.

perpetuation of the long-standing arrangement that relegates these providers to the economic margins.⁴

The child-care industry has more workers with earnings falling below the poverty line than any other industry, with over fifty percent of providers earning at the poverty level.⁵ They are also overwhelmingly women of color.⁶ Meanwhile, these providers of day care for children furnish an indispensable service to the working-parent cornerstone of the economy. In addition, “from 1947 to 2004, the labor force participation rate of mothers with children between six and seventeen years climbed from roughly twenty-five percent to more than seventy-seven percent.”⁷

By some economic measures, these essential service providers are very much employees.⁸ But, employees of whom? Are the

4. Home-based day-care providers in New York City earn less than \$20,000 annually. See Steven Greenhouse, *Providers of Child Care May Now Vote on Unionizing*, N.Y. TIMES, Aug. 2, 2007, at B4 [hereinafter Greenhouse, *Providers May Vote*]; see also Alair Townsend, *Cost of Unionized Babysitters Is High*, CRAIN'S N.Y. BUS., May 28, 2007, at 13.

5. In some cities, providers earn as little as \$2.39 per hour. See Peggie R. Smith, *Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers*, 55 U. KAN. L. REV. 321, 333, 338 (2007) [hereinafter Smith, *Family Child Care Providers*]; see also Peggie R. Smith, *Caring for Paid Caregivers: Linking Quality Child Care with Improved Working Conditions*, 73 U. CIN. L. REV. 399, 405-06 (2004) [hereinafter Smith, *Quality Child Care*].

6. See Smith, *Quality Child Care*, *supra* note 5, at 401. Professor Smith's leading articles present a critical analysis of feminist and racial issues arising from the legal regime that had summarily denied these poor women of color the protections of the labor and employment laws.

7. Smith, *Family Child Care Providers*, *supra* note 5, at 325.

8. Courts have developed different tests to determine whether an individual is an employee or an independent contractor. The predominant tests are the common law agency test, the economic realities test, and a test that combines the common law standard with the economic realities test, known as the hybrid test. The Supreme Court described the common law agency test in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992): “[I]n determining whether a hired party is an employee, [the Court considers] the hiring party's right to control the manner and means by which the product is accomplished is considered” The Court looks at various factors that are relevant to this inquiry, such as the skill required, the source of instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the general business of the hiring party, whether the hiring party is in business, the provision of employee benefits, and the tax treatment of the hired party. The economic reality test examines the employer-employee relationship based on employee dependence on the business to which he or she renders services. Courts look at a number of factors to determine if the worker is in fact an employee under this test. Such factors are: the nature and degree of control, the alleged employee's opportunity for profit or loss, the alleged employee's investment in equipment or materials required for the task, the degree of skill required to per-

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parents and guardians of the children consigned to the care of these providers their employers? No. Rather, by operation of Executive Order No. 12, it is the State—but the State as employer in very important, and yet very limited, ways.⁹

At the federal level, the past term of the United States Supreme Court was decidedly adverse to the interests of low-wage workers.¹⁰ In *Long Island Care at Home v. Coke*, the Court unanimously ruled that domestic workers, including the home health workers employed by third parties, were not protected by the federal minimum wage law, the Fair Labor Standards Act, and thus had no federal claim for overtime pay at a premium rate.¹¹ At the same time, 2007 witnessed the dawn of significant promise for an important component of workers on the economic margins in New York.¹² At least in part, these initiatives may represent a response to the erosion of labor protections or the lack of hope in improving labor rights at the federal level.

This Article discusses Governor Spitzer's May 8, 2007 executive order as well as earlier legislative and executive initiatives in New York and other states to provide organizing rights to groups of workers paid through state funds. In particular, it looks at California's analogous initiative via legislation, Governor Pataki's veto of similar legislation in 2006, executive orders of Illinois, Oregon, Iowa, and New Jersey governors, organizing initiatives by major unions, their likely consequences, and some implications for future innovations in organizing.

form the task, the degree of permanency and duration of the working relationship, and the extent to which the service rendered is an integral part of the alleged employer's business. The hybrid test combines elements of both the common law agency test and the economic reality test. Courts have yet to completely agree upon a fixed test. Courts continue to exercise discretion in combining elements from both tests and applying the test to fit the situation at hand. For a recent outstanding overview of these various tests, see Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 161-70 (2006). I previously analyzed these tests in David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 233-37 (1998); David L. Gregory & William T. Leder, *Employee or Independent Contractor? Vizcaino v. Microsoft Corporation*, 47 LAB. L.J. 749 (1996).

9. See N.Y. Exec. Order No. 12, *supra* note 2.

10. See *Long Island Care at Home v. Coke*, 127 S. Ct. 2339, 2351-52 (2007).

11. See *id.*

12. See N.Y. Exec. Order No. 12, *supra* note 2.

II. UNIONIZATION OF HOME-CARE AND CHILD-CARE WORKERS IN OTHER STATES

A. The California Precursor

One of the most significant gains in union membership in fifty years occurred in 1999, when over 70,000 home-care workers voted to join the Service Employees International Union (“SEIU”) in Los Angeles.¹³ This successful organizational drive had its genesis in the 1980s, when SEIU and the American Federation of State, County, and Municipal Employees (“AFSCME”) began attempts to organize these home-care workers,¹⁴ with Los Angeles as the epicenter for particularly intense grassroots organizing.¹⁵

The core legal problem confronting the home-care workers was their ambiguous and problematic employment status. California used a state agency, the In-Home Supportive Services (“IHSS”), to administer state monies for home care.¹⁶ California argued that the workers are independent contractors, employed by the elderly and the disabled,¹⁷ even though the state paid “the workers’ wages and unemployment and disability insurance.”¹⁸ Without an employer, there was no employer entity with whom the union could purport to effectively negotiate.¹⁹

In April 1988, workers demanded recognition of their SEIU Local 434, and sought Los Angeles County’s acknowledgement of its status as their official employer.²⁰ The SEIU began negotiating with the Los Angeles county government, but in January 1989, California refused to recognize a collective bargaining agreement that had been reached by Los Angeles County and SEIU Local 434.²¹ The union filed suit in California state court, demanding enforce-

13. Nancy Cleeland, *Home-care Workers’ Vote for Union a Landmark for Labor*, L.A. TIMES, Feb. 26, 1999, at 1; Steven Greenhouse, *In Biggest Drive Since 1937, Union Gains a Victory*, N.Y. TIMES, Feb. 26, 1999, at A1 [hereinafter Greenhouse, *Union Gains a Victory*].

14. Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUD. J. 1, 5 (2002).

15. *Id.* at 6.

16. *Id.* at 3.

17. See Harry Bernstein, *Home Care Providers’ Hurdle: Pinning Down Employers*, L.A. TIMES, Dec. 22, 1987, at 4.

18. *Id.*

19. See *id.*

20. Bob Pool, *Faithful Rally Across the U.S. to Keep Dream Alive*, L.A. TIMES, Apr. 5, 1988, at 1.

21. *Serv. Employees Int’l Union Local 434 v. County of L.A.*, 275 Cal. Rptr. 508, 510 (Cal. Ct. App. 1990).

ment of the agreement.²² In February 1989, the court ruled against the union,²³ and the California Court of Appeal upheld the ruling on appeal.²⁴ Restating the decision of the trial court, the Court found that because the county exercised little control over the home-care workers they could not be considered public employees.²⁵ As a result, the SEIU's initial legal attempt to force the county to bargain with them was judicially roadblocked.²⁶

Nevertheless, the union continued to endeavor to organize home-care workers throughout California. Lobbying led to the passage of bills that authorized the creation of county level public authorities.²⁷ These public authorities acted as employers of record with whom the unions could negotiate.²⁸ Section 12302.25 of the California Welfare & Institutions Code mandated that the counties act as, or establish, employer entities, subject to state labor laws by 2003, and expressly stated that the employer established by the county could collectively bargain with the home-care workers.²⁹

Over the course of the 1990s, the California counties created such authorities, enabling the home-care workers to collectively bargain and secure labor contracts, which culminated in the successful unionization of over 70,000 Los Angeles home-care workers in early 1999.³⁰

Meanwhile, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") was splintered by the formation of the Change to Win coalition led by SEIU President Andy Stern, spurring intense organizational rivalry between the AFL's AFSCME and Change to Win's SEIU.³¹ A developing

22. *See id.*

23. *Id.* at 511.

24. *Id.* at 515.

25. *See id.*

26. *See id.*

27. *See* CAL. WELF. & INST. CODE §§ 12301.6, 12302, 12302.25 (West 2007); Delp & Quan, *supra* note 14, at 9; *see also* Candace Howes, *Upgrading California's Home Care Workforce: The Impact of Political Action and Unionization*, in THE STATE OF CALIFORNIA LABOR 75 (Univ. of Cal. Inst. for Labor & Employment 2004), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1039&context=ile>.

28. *See* Delp & Quan, *supra* note 14, at 9; *see also* Howes, *supra* note 27.

29. CAL. WELF. & INST. CODE § 12302.25(b) and CAL. GOV'T CODE § 3507 are the state labor laws to which home-care workers are subject, including a ban on the right to strike.

30. *See* Delp & Quan, *supra* note 14, at 11.

31. *See* Stephen Franklin, *Service Workers Union Wins Child-care Organizing Rights*, CHI. TRIB., May 26, 2005, at C1 (discussing the SEIU's securing of the right to organize child-care workers over AFSCME in Illinois); Barbara Rose, *AFL-CIO Rift Turns Allies Into Enemies*, CHI. TRIB., Aug. 14, 2005, at C1 (describing the raiding,

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AFSCME-SEIU conflict was resolved in September 2005, which led to the creation of the Pennsylvania and California-based United Child Care Union (“UCCU”).³² The UCCU supported California legislation that would permit all child-care workers to unionize and collectively bargain,³³ as section 12302.25 of the California Welfare & Institutions Code granted collective bargaining rights to home health-care workers, but did not provide similar rights to child-care workers.³⁴ Governor Schwarzenegger, however, vetoed the legislation supported by the UCCU in September 2006 claiming that unionization and collective bargaining would strain the state budget and “make child-care too costly for low-income families that are not receiving child-care subsidies.”³⁵ Assembly Bill 1164 would allow child-care providers to choose union representation.³⁶ This bill is currently before Governor Schwarzenegger, having passed the California Assembly and Senate in early September 2007.³⁷

B. Earlier Executive Orders

Before Governor Spitzer signed Executive Order No. 12, five other governors signed analogous orders permitting the unionization or organization of child-care workers. The first among these was Illinois Governor Rod Blagojevich who issued Executive Order 2005-1 on February 18, 2005.³⁸ The executive order permitted 49,000 child-care providers to bargain with the state through a

propaganda, and intense campaigning between the SEIU and AFSCME in California over home care and in Illinois over child-care workers).

32. See DEBORAH CHALFIE ET AL., *GETTING ORGANIZED: UNIONIZING HOME-BASED CHILD CARE PROVIDERS 22* (Nat’l Women’s Law Ctr. 2007), available at <http://www.nwlc.org/pdf/GettingOrganized2007.pdf>; see also United Child Care Union, <http://www.uccunion.org/> (last visited on Jan. 18, 2008).

33. See Press Release, Assemb. Kevin de León, Assistant Majority Leader Kevin de León’s Legislation to Extend Organizing Rights to Child Care Workers Passes Out of Policy Committee (Apr. 18, 2007), <http://democrats.assembly.ca.gov/members/a45/pdf/20070418AD45PR02.pdf>.

34. See CAL. WELF. & INST. CODE § 12302.25 (West 2007).

35. Letter from Gov. Schwarzenegger to Members of the Cal. State Senate, Veto Message of S.B. 697 (Sept. 29, 2006), available at http://gov.ca.gov/pdf/press/sb_697_veto.pdf.

36. See Complete Bill History, A.B. No. 1164, http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1151-1200/ab_1164_bill_20080114_history.html (last visited on Jan. 18, 2008); see also Concurrence in Senate Amendments, A.B. 1164, http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1151-1200/ab_1164_cfa_20070912_150325_asm_floor.html (last visited Jan. 18, 2008).

37. See Complete Bill History, *supra* note 36.

38. Ill. Exec. Order 2005-1 (Feb. 18, 2005), available at www.illinois.gov/gov/pdf/docs/execorder2005-1.pdf.

union.³⁹ Six months after Blagojevich issued the order, legislation was passed that made subsidized child-care providers public employees of the state, but solely for the purpose of collective bargaining.⁴⁰

A brewing conflict between the SEIU and the AFSCME finally erupted after the governor's executive order. The SEIU maintained that it worked to organize Illinois' child-care providers for nine years prior to Blagojevich's executive order.⁴¹ It alleged that AFSCME entered into the scene much more recently, and in essence was attempting to hijack the SEIU's organizing campaign.⁴² During the election where the workers chose between the unions, the AFL-CIO resolved the dispute by ordering AFSCME to shut down its campaign.⁴³ Following this decision, the SEIU announced that it won the campaign, stating that it received 82% of the vote.⁴⁴

In December 2005, the SEIU reached an agreement with the state on its first contract.⁴⁵ The contract was a thirty-nine month deal that increased pay by 35%, and represented the first rate increase in seven years for child-care workers in Illinois.⁴⁶ Before the negotiation, approximately 75% of the workers received reimbursement rates of \$9.48 per child per day.⁴⁷ Under the contract, the reimbursement rate was raised to \$10.48 starting on April 1, 2006, and will be raised again to \$12.75 in July 2008.⁴⁸ Additionally, some of the workers will gain health-care benefits in the third year of the contract, which will be paid out of a \$27 million trust set up by the state.⁴⁹ The contract is estimated to cost Illinois approximately \$250 million.⁵⁰ The cost was estimated to fall within the state's budget targets for the first fifteen months.⁵¹

Following the lead of Illinois, Oregon Governor Ted Kulongoski signed two separate executive orders allowing for the organization

39. SEIU, Illinois Child Care Victory, http://www.seiu.org/public/child_care/il_providers_unite.cfm (last visited Jan. 18, 2008) [hereinafter Child Care Victory].

40. See CHALFIE ET AL., *supra* note 32, at 13.

41. Francine Knowles, *Child-care Union Ruling Comes Before Vote Count*, CHI. SUN-TIMES, Mar. 28, 2005, at 65.

42. See *id.*

43. *Id.*

44. See Child Care Victory, *supra* note 39.

45. See Francine Knowles, *Tentative First Contract Reached for Home Child Care Workers*, CHI. SUN-TIMES, Dec. 14, 2005, at 91.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

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of child-care workers.⁵² The first order, issued in October 2005, applied to approximately 4500 workers, and the second order, issued in February 2006, applied to approximately 6000 child-care workers, though the latter applied only to unregulated subsidized workers.⁵³ The two executive orders determine bargaining units by regulatory status.⁵⁴ AFSCME represented the first group of workers, and the SEIU represented the latter group.⁵⁵

AFSCME secured a contract with the state for the child-care workers on September 30, 2006.⁵⁶ The contract provided for an increase in subsidy payments, incorporated a grievance procedure, and also included a seventeen-point “Providers Bill of Rights.”⁵⁷ Similarly, in February 2007, the SEIU signed a contract that provided for increased subsidy rates for its workers.⁵⁸

In Iowa, Governor Tom Vilsack issued two executive orders in January 2006, the first ordering the state’s Department of Human Services (“DHS”) to meet with a representative of 6000 regulated child-care workers, and the second ordering the agency to meet with the representative of 7000 unregulated subsidized workers.⁵⁹ Neither of the two orders established the workers as state employees, and both required the DHS to meet and confer with their representatives to discuss issues such as reimbursement rates and healthcare benefits.⁶⁰

In August 2006, New Jersey Governor Jon Corzine also signed an executive order granting collective bargaining rights to child-care workers.⁶¹ The order granted formal recognition to the Child Care Workers Union, a partnership between CWA and AFSCME.⁶² Unlike Iowa’s executive order that was silent on the workers’ employee status, the New Jersey order explicitly stated that the child-care workers were not state employees.⁶³

Finally, in the most recent instance before Governor Spitzer’s Executive Order No. 12, Wisconsin Governor James Doyle issued

52. See CHALFIE ET AL., *supra* note 32, at 16.

53. *Id.*

54. *Id.*

55. *See id.*

56. See *Oregon Child Care Providers Achieve Landmark Contract*, AFSCME WORKS ONLINE XTRAS, Oct. 10, 2006, www.afscme.org/publications/12393.cfm.

57. *Id.*

58. *Id.*

59. See CHALFIE ET AL., *supra* note 32, at 18.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See id.*

an executive order in October 2006 that allowed subsidized and unsubsidized child-care workers to unionize and negotiate with the state.⁶⁴ Shortly thereafter, AFSCME was certified to represent the workers.⁶⁵ Like Corzine's executive order in New Jersey, Doyle's order made clear that it did not create an employer-employee relationship between the state and the child-care workers.⁶⁶

The organizing campaigns associated with the five executive orders demonstrate that unions are willing to commit a wealth of resources toward organizing this vast field of potential members. The commitment evinced by AFSCME and SEIU in organizing child-care workers in these states illustrates the importance they attach to this new constituency. For example, the SEIU dedicated a significant amount of time, effort, and resources in attempting to change the political climate in Illinois and convince Governor Rod Blagojevich to issue an executive order that enabled SEIU to organize and represent tens of thousands of child-care providers in the state.⁶⁷ Each successful attempt yielded valuable new members, and while the additions vary from just a few thousand new members up to 49,000 in Illinois, the unions have clearly found the additions worth the expenditure of a significant amount of resources.⁶⁸

The manner in which child-care workers gained collective bargaining rights in these states also illustrates a trend in their path toward unionization. In each of the five states, a grassroots campaign culminated in the issuance of an executive order. While there was some significant variation in provisions of the five executive orders, such as New Jersey's explicit wording that child-care workers were not state employees compared to Iowa's silence on the issue, each order achieved the overall goal of granting collective bargaining rights to child-care workers.⁶⁹

Executive orders by state governors have proven an effective means of granting significant improvements to the nation's subsidized child-care workers, especially when analogous legislation

64. *Id.* at 19.

65. *Id.*

66. *Id.*

67. See Jeff Crosby, *Can Anything Good Come from This?*, NEW LAB. F., Apr. 1, 2006, at 29 ("SEIU contributed more than \$800,000 to the campaign of Democrat Rod Blagojevich, which helped convince Governor Blagojevich to issue an executive order allowing SEIU to represent tens of thousands of home child care providers in collective bargaining with the state."). Earlier, the SEIU used a similar strategy in California to gain the right to represent 70,000 home care workers. *Id.*

68. See Knowles, *supra* note 45.

69. See CHALFIE ET AL., *supra* note 32, at 18.

often runs into a formidable share of obstacles. These orders have given a traditionally underrepresented labor segment a voice in determining the course of their profession and demonstrated that it is possible for a group of workers who had faced almost insuperable obstacles to unionize and secure significant improvements in their wages, terms, and conditions of employment.

As discussed in the next Section, this success encouraged the current New York state administration to use the executive order approach after unsuccessful legislative attempts to secure the unionization of child-care providers.

III. UNIONIZATION OF CHILD-CARE PROVIDERS IN NEW YORK

A. Governor Pataki's 2006 Veto of Legislation Recognizing Home Day-care Providers as Employees Able to Unionize

On February 15, 2006, New York State Senator Nicholas A. Spano, a Yonkers republican, introduced Senate Bill 6758,⁷⁰ entitled, "An act to amend the civil service law and the labor law, in relation to the inclusion of certain home day care providers as employees covered by the Public Employees' Fair Employment Act and the New York State Labor Relations Act." The purpose of the bill was to categorize and include home day-care providers as employees within the meaning of these statutes.⁷¹

The bill would have amended the Civil Service Law to deem home-based child day-care providers who are paid from funds of the City of New York, any county, or by the State, to be employees "solely of the State of New York."⁷² Such home day-care providers would be considered public employees solely for purposes of the Public Employees' Fair Employment Act ("Taylor Law"), which would permit them to organize and be represented for collective bargaining purposes.⁷³ Furthermore, the bill would have amended the Taylor Law and the State Labor Relations Act to ensure that "these providers would be part of a single, separate negotiating unit when determining representation status."⁷⁴ The bill would have afforded such employees the same statutory right currently

70. S.B. 6758, 229th Leg., Reg. Sess. (N.Y. 2006).

71. See Sen. Nick Spano, Introducer's Memorandum in Support, N.Y. Bill Jacket, 2006 S.B. 6758 (June 7, 2006) [hereinafter Introducer's Memorandum].

72. Governor of N.Y., Veto No. 215, N.Y. Bill Jacket, 2006 S.B. 6758 (June 7, 2006) [hereinafter N.Y. Veto No. 215].

73. *Id.*

74. *Id.*

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provided to public employees to organize and be represented by a union, and to collectively negotiate terms of employment with the State.

The purpose of the bill was to provide a legal mechanism for family day-care providers, both licensed and license-exempt, to be represented by organized labor.⁷⁵ This would give family day-care providers a collective voice and representation in the State's child-care assistance program, help ensure quality care, facilitate higher standards for the children and families served, and improve the delivery of services.⁷⁶ Organized labor would help day-care providers comply with state agency rules and regulations and assist them in carrying out their child-care responsibilities.⁷⁷

On March 28, 2006, the Senate unanimously passed the bill.⁷⁸ On April 26, 2006, the Assembly passed the bill by a vote of 100 to 33.⁷⁹ On June 7, 2006, however, Governor Pataki vetoed the legislation.⁸⁰

His veto letter to the Senate opined that the legislation would inappropriately create an artificial framework, whereby such home-care providers "are deemed to be State employees, despite the fact that the State is not their employer, has no direct relationship with them, and does not establish or supervise the terms and conditions of employment."⁸¹

The Governor argued that the use of collective bargaining to regulate child day-care subsidy payments is "inconsistent with federal requirements governing New York's receipt of approximately \$315 million in federal Child Care and Development Block Grant Funding."⁸² Both the Office of Children and Family Services and the New York Public Welfare Association urged disapproval of the legislation for this reason.⁸³ Governor Pataki claimed that the legislation would jeopardize the vitally needed federal funds.⁸⁴

Although Governor Pataki did not explicitly mention the Division of the Budget Recommendation on the legislation, he seem-

75. See Introducer's Memorandum, *supra* note 71.

76. *Id.*

77. *Id.*

78. Sen. Nick Spano, N.Y. Bill Tracking, N.Y.S.B. 6758 (2006) [hereinafter Spano, Bill Tracking].

79. *Id.*

80. See N.Y. Veto No. 215, *supra* note 72.

81. *Id.*

82. *Id.*

83. Division of the Budget Recommendation on S.B. 6758, N.Y. Bill Jacket, 2006 S.B. 6758 (June 7, 2006) [hereinafter Division of the Budget Recommendation].

84. See N.Y. Veto No. 215, *supra* note 72.

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ingly relied heavily on the information the Division of the Budget provided to him. The Division of the Budget also reminded Governor Pataki that the Public Employee Relations Board had raised concerns about the bill, the Office of Children and Family Services strongly opposed the legislation,⁸⁵ and The New York State Association of Counties also opposed the bill.⁸⁶

According to Governor Pataki, the bill was “an extreme expansion of the definition of public employee under the Taylor Law.”⁸⁷ Under the bill, home day-care providers would be considered employees of New York State for collective bargaining purposes only, despite the fact that “such individuals are in no way State employees, as the State has no direct relationship with these providers.”⁸⁸ The State’s “role as the regulator of child-care and as administrator of the State’s Child Care Block Grant (“CCBG”) is limited to allocating Federal and State funding to local social services districts through the CCBG.”⁸⁹ Pataki also argued that the State of New York has no influence regarding the hours or days a provider chooses to work, the fees the provider chooses to charge, or the employees the provider chooses to hire.”⁹⁰ As such, any existing employment relationship would be between the home day care provider and the parent of the child.⁹¹

The Governor also argued that the bill would produce considerable unbudgeted costs, and could lead to less availability of child-care to both subsidized and non-subsidized families.⁹² Since the bill would provide nearly 85,000⁹³ home day-care providers with

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* The Division of the Budget Recommendation emphasized that the Rhode Island Superior Court had ruled that Rhode Island’s family day-care providers were not state employees, pointing out that the state does not hire the providers, and distinguished between the state’s regulatory authority for public health and safety reasons and the type of control required to create an employer-employee relationship. *See State ex rel. Dept. of Human Servs. v. State Labor Relations Bd.*, No. C.A. 04-1899, 2005 WL 3059297, at *7 (R.I. Super. Ct. Nov. 14, 2005).

91. *See* N.Y. Veto No. 215, *supra* note 72.

92. *Id.*

93. *See* Division of the Budget Recommendation, *supra* note 83. The total number of child-care providers that would have been affected by the proposed legislation appeared questionable. Opponents of the bill cited numbers that ranged from 54,000 to 85,000. *Id.* (estimating the number of potentially affected child-care providers to be around 85,000); *see also* Letter from Mark Alesse, State Director of The Voice of Small Business®, to Richard Platkin, Counsel to the Governor, in opposition to S.B. 6758, N.Y. Bill Jacket, 2006 S.B. 6758 (June 1, 2006) (“By signing this law, Governor

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union representation, the potential subsequent pressure to increase subsidy payments to this population could compel local service districts to take on additional unfunded costs.⁹⁴ The Governor contended that “[s]tate and [f]ederal funding are provided to localities as a block grant;” therefore, “an increase in subsidy payments would result in either increased local cost, or a decreased number of children served.”⁹⁵ At the time the legislation was vetoed, “\$400 million [was] paid to in-home providers in the form of child-care subsidies.”⁹⁶ The Governor also argued that if a 3% increase in the costs was assumed, an additional \$12 million would be needed to cover the costs of publicly funded child-care in the first year alone.⁹⁷ In addition, supposing that these providers would eventually receive benefits comparable to other state employees, the bill could eventually cost the State over \$100 million per annum.⁹⁸

Further, Governor Pataki argued that “[n]egotiating child day care subsidy payments through collective bargaining [was] inconsistent with federal requirements and could jeopardize approximately \$315 million in federal funding allocated to New York State.”⁹⁹ Additionally, the bill could endanger the State’s use of federal Temporary Assistance to Needy Families (“TANF”) dollars for child-care, as such use cannot conflict with federal rules.¹⁰⁰

The Governor also questioned why the bill treated regulated and unregulated providers differently upstate than they are treated in New York City.¹⁰¹ Furthermore, the Governor noted that “regulated upstate providers are only included in the amendments to the Labor Law section of the bill,” while “[t]he other providers are included in the amendments to the Civil Service Law.”¹⁰² Governor Pataki also expressed concern about who would be deemed the employer for the regulated upstate providers, as the Taylor Law would not pertain to them.¹⁰³

The Governor also relied on the arguments outlined in a letter that The Business Council of New York State, Inc., sent to Richard

Pataki would, by statute, automatically make some 54,000 workers full-time state employees . . .”).

94. See N.Y. Veto No. 215, *supra* note 72.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

Platkin, the Counsel to the Governor, where the Council noted that New York already has more public employees, relative to the population, than most other states.¹⁰⁴ The letter even called the bill an example of a syndrome persistent in New York where the State's political culture often "serves the interests of those who get paid to provide public services, more than it does the people who are the ostensible beneficiaries of such services."¹⁰⁵ Across upstate New York, "high numbers of public-sector jobs and above-average compensation for those jobs cost taxpayers an extra \$4 billion each year, compared to the cost in a normal state."¹⁰⁶ Additionally, the letter emphasized that the bill was sponsored by an influential public-employee union, the United Federation of Teachers ("UFT"),¹⁰⁷ and claimed that the proposed legislation would benefit the union by increasing the amount of UFT dues-payers by over 52,000 individuals.¹⁰⁸

Similarly, the New York State Office of Children and Family Services ("OCFS") also sent Richard Platkin a letter that urged Governor Pataki to veto the bill and included arguments listed in the Division of the Budget's recommendation.¹⁰⁹ The OCFS was concerned that by establishing an employer-employee relationship between the State and the providers, the State also might be considered liable for "the safety of the home, the providers and the children."¹¹⁰ This could dramatically increase the potential fiscal liability of the State.¹¹¹

According to OCFS, the bill does not account for how the State would meet the requirements of the Public Employees' Fair Employment Act, which call for the State to collect membership dues deductions in accordance with section 208 of the Civil Service Law and pay the collected funds to the employee organization.¹¹² The

104. Letter from The Business Council of New York State, Inc., to Richard Platkin, Counsel to the Governor, N.Y. Bill Jacket, 2006 S.B. 6758 (June 7, 2006).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Letter from N.Y. State Office of Children and Family Services to Richard Platkin, Counsel to the Governor, N.Y. Bill Jacket, 2006 S.B. 6758 (June 7, 2006) [hereinafter OCFS Letter to the Governor]. It appears that the Division of the Budget's recommendations relied heavily on the OCFS letter to the governor, or one sent directly to them by OCFS, since the language used is exactly the same and much more detailed than the Division of the Budget. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

State simply did not have any mechanism in place to fulfill these requirements.¹¹³

The OCFS letter also noted that making certain regulated home day-care providers State employees under section 201 of the Civil Service Law would be problematic when the State sought to police the regulated providers for failing to abide by regulatory provisions that apply to all regulated programs, not merely those that care for children receiving subsidies.¹¹⁴ Questions would likely arise as to “whether the enforcement action for these providers, as State employees, would be subject to the rules on employee grievances and the settling of labor disputes,” rather than the “usual day care enforcement proceedings.”¹¹⁵ Furthermore, the OCFS letter pointed to the fact that section 2 under rule 6.2 of the bill would amend section 701(3) of the Labor Law by adding a new paragraph (c) which would provide “that regulated home day care providers serving children whose care is funded by localities outside of the City of New York are deemed to be in a single, separate negotiating unit. Section 701 of the Labor Law governs whom the State Labor Relations Act covers.”¹¹⁶ The OCFS letter, however, noted that section 715 of the Labor Law “provides that the State Labor Relations Act does not apply to employees of the State or to any political or civil subdivision of the State. Therefore, it is unclear who would be considered the employer of upstate regulated home day care providers under the State Labor Relations Act, since it could not be the State or a county” under section 715 of the Labor Law.¹¹⁷

Obviously, many labor unions, including the New York State United Teachers (“NYSUT”), CSEA, the New York State AFL-CIO, AFSCME, and the UFT, filed letters in support of the legislation.¹¹⁸ The most compelling and extensive letter in support was that submitted by NYSUT.

NYSUT’s letter stated that over forty years of research “demonstrated that quality early childhood education results in greater academic achievement throughout ones [sic] educational

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. See N.Y. Bill Jacket, 2006 S.B. 6758 (June 7, 2006). These letters for the unions appeared to be not as extensive as the letters from the groups that opposed the bill.

experiences.”¹¹⁹ The earlier one starts an educational experience, the greater the participation as model citizens in the community.¹²⁰ Thus, “investment in the quality and stability of early childcare workers correlates with better social and academic outcomes for children.”¹²¹ The NYSUT letter also emphasizes that the bill would ensure that those who take care of the youngest, and often poorest and neediest children are finally treated with dignity and respect.¹²²

Nevertheless, Governor Pataki vetoed the bill on June 7, 2006. On June 23, 2006, the Senate overwhelmingly overrode his veto, 57 to 4.¹²³ The Assembly, however, never voted on whether to override Governor Pataki’s veto.¹²⁴

As discussed in the next Section, the new administration decided to bypass the legislative process and implement the reform through Governor Spitzer’s executive order.

B. Governor Spitzer’s Executive Order

On May 8, 2007, the newly elected Democrat, Governor Eliot Spitzer, signed Executive Order No. 12.¹²⁵ The executive order essentially does what the bill vetoed a year earlier by Governor Pataki sought to accomplish.¹²⁶ Before introducing the executive order, Governor Spitzer noted that “child-care providers should be

119. Letter from NYSUT to Governor George E. Pataki, N.Y. Bill Jacket, 2006 S.B. 6758 (June 7, 2006).

120. *Id.*

121. *Id.*

122. *Id.*

123. Danny Hakim, *Albany Ready to Give Union Rights to 52,000 Day Care Workers*, N.Y. TIMES, June 28, 2006, at B1; see also Spano, Bill Tracking, *supra* note 78.

124. See Spano, Bill Tracking, *supra* note 78; see also *Hearing on A.B. 1164 Before the Cal. Assemb. Comm. on Labor and Employment*, 2007-2008 Assembly 11 (N.Y. 2007), available at http://info.sen.ca.gov/pub/07-08/bill/asm/ab_1151-1200/ab_1164_cfa_20070417_101101_asm_comm.html.

125. See N.Y. Exec. Order No. 12, *supra* note 2.

126. The reasons why the Governor did not await legislation are probably woven into the complex relationship between the leadership of the legislature and Governor Spitzer. See Nicholas Confessore, *Spitzer Accused of Bruno Insult*, N.Y. TIMES, July 8, 2007, at A24 (“Mr. Bruno and Mr. Spitzer, 48, have been on poor terms since the end of the legislative session in June, with each blaming the other for a list of unfinished bills, including some of the governor’s top priorities.”); see also Nicholas Confessore, *A Mellow Spitzer Emerges, Playing Down Bruno Feud*, N.Y. TIMES, July 11, 2007, at B3; Clyde Haberman, *Memo to Spitzer: No One Likes a Bully*, N.Y. TIMES, July 10, 2007, at B1; Danny Hakim & Nicholas Confessore, *Spitzer Aides Cited for Use of Police to Tarnish Bruno*, N.Y. TIMES, July 24, 2007, at A1. Incidentally, a year earlier, when Spitzer was not governor but Attorney General of the State of New York, he declined to officially comment to the Counsel to Governor on the earlier legislation; according to then-Attorney General Spitzer, the legislation did not relate

given the option to organize themselves and select representatives for the purpose of discussing with the State the conditions of their employment, the stability, funding and operation of child-care programs, and the expansion of quality child care.”¹²⁷

Executive Order No. 12 divides the child-care providers,

into four representation units: (1) all child care providers in New York City who are paid from funds administered by New York City pursuant to Social Service Law § 410-u; (2) all registered or licensed child care providers in New York City who are not paid from funds administered by New York City pursuant to Social Service Law § 410-u; (3) all registered or licensed child care providers outside New York City; and (4) all child care providers outside New York City who provide child care in a residence to one or more children who are receiving child care assistance under Title 5-C of the Social Service Law under circumstances where the provider to be licensed or registered under Social Service Law § 390.¹²⁸

The executive order also provides that “New York State shall recognize as the representative of the child care providers . . . such representative as is designated by a majority of providers in the unit.”¹²⁹ Furthermore, it states that “any prospective representative may demonstrate majority designation by submitting authorization cards approving representation, signed within twelve months of their submission by the majority of providers comprising the unit, to the State Employment Relations Board or any successor agency.”¹³⁰ The State Employment Relations Board (“SERB”) will then review the cards and, if it determines that they constitute at least 51% of the providers in the unit at issue, it shall then “certify the party making the application as the designated representative of that unit.”¹³¹ If SERB determines, however, that the cards constitute at least 30% but not 50% of the providers in that unit, “it shall conduct an election in a manner directed by SERB, consistent with its standard election procedures, to determine if the majority of members designate the prospective representative.”¹³²

to the functions of the Department of Law. See Office of the Attorney General Comment on S.B. 6758, N.Y. Bill Jacket, 2006 S.B. 6758 (June 7, 2006).

127. N.Y. Exec. Order No. 12, *supra* note 2.

128. *Id.* ¶ 2.

129. *Id.* ¶ 3.

130. *Id.* ¶ 4.

131. *Id.*

132. *Id.*

The executive order expressly states that nothing in the order permits “the child care providers collectively to engage in any strike or work action to secure any right or privilege from the State.”¹³³ The executive order does not render the child-care providers state officers or employees.¹³⁴ Moreover, it does not imply that there exists “any employer-employee relationship between the child care operator and the State . . . for any purpose, including but not limited to any public retirement system, membership in any public health insurance program, unemployment insurance, workers’ compensation, disability coverage, New York Civil Service Law, or indemnification under New York Public Officers Law.”¹³⁵ Furthermore, the executive order provides that it in no way interferes “with the existing relationship between consumers and the child care providers, including the existing rights of parents or guardians to choose their own provider, or to terminate that provider’s services at any time.”¹³⁶ It also disavows that it creates “any contractual rights or obligations.”¹³⁷

Governor Spitzer’s executive order is comparable, though not identical, to the analogous executive orders in Illinois, Oregon, Iowa, New Jersey, and Wisconsin. At the same time, all five executive orders differ in terms of what rights they grant child-care workers, how they categorize the workers, and whether the state deems the workers to be state employees.¹³⁸

One of the most profound differentiations of Executive Order No. 12 from prior orders is that New York delineates that the child-care workers are not state employees. While some prior orders took similar stances, such as Illinois’s order that deemed workers state employees solely for purposes of collective bargaining,¹³⁹ others, such as Governor Corzine’s order in New Jersey, were more stringent in stating that the workers were in no way state employees.¹⁴⁰

Similarly, Governor Spitzer’s order categorizes child-care providers in a different manner from prior executive orders. New

133. *Id.* ¶ 11(a).

134. *Id.* ¶ 11(b).

135. *Id.*

136. *Id.* ¶ 11(d).

137. *Id.* ¶ 11(f).

138. See CHALFIE ET AL., *supra* note 32, at 13-14, 16-19 (summarizing and comparing new rights created by the five governor-issued executive orders pertaining to home-based child-care providers).

139. *Id.* at 13.

140. *Id.* at 18.

York's order divides the workers into "four representation units."¹⁴¹ These divisions take into account both regulatory status and the location of the workers. Other executive orders, such as that of Oregon Governor Ted Kulongoski, divide the child-care workers into segments for bargaining and union representation based solely on regulatory status.¹⁴²

In its introduction, the New York executive order recites a litany of justifying reasons, using language very similar to that employed by the major labor unions when they unsuccessfully lobbied Governor Pataki to sign the earlier legislation.¹⁴³ For example, Governor Spitzer's executive order states that child-care providers "perform an essential service for working parents and guardians in this state by creating a safe, enjoyable and educational home-like environment for their children."¹⁴⁴ According to Governor Spitzer, it is important to empower child-care providers to participate in the decision-making on issues that impact the manner in which they deliver their services since child-care workers receive compensation and benefits that are not "commensurate with the value of the work they perform."¹⁴⁵ This, in turn, will create a "framework for child-care providers to secure representation [that] can help improve the environment in which they work, their benefits, and the funding that they receive."¹⁴⁶

As discussed in the next Section, Governor Spitzer's executive order will certainly result in a large-scale unionization of home-based child-care workers throughout New York.¹⁴⁷

C. Labor Turf Truces, Coalitions, and Organizing Initiatives Before and After Executive Order No. 12

Organizing drives have been underway in New York for some years, antedating both the legislation vetoed by Governor Pataki in 2006, and Governor Spitzer's executive order in 2007.¹⁴⁸ Grass-

141. N.Y. Exec. Order No. 12, *supra* note 2, ¶ 2.

142. CHALFIE ET AL., *supra* note 32, at 16.

143. See N.Y. Exec. Order No. 12, *supra* note 2, at 1-2.

144. *Id.*

145. *Id.*

146. *Id.*

147. Steven Greenhouse, *Child Care Workers Get Right to Unionize*, N.Y. TIMES, May 12, 2007, at A1, [hereinafter Greenhouse, *Right to Unionize*] available at <http://www.nytimes.com/2007/05/12/nyregion/12childcare.html>; *Spitzer Signs Executive Order Giving Union Rights to Home-Based Child-Care Providers*, UFT, May 11, 2007, www.uft.org/news/child-care/.

148. VOICE, CSEA, http://www.voicecsea.org/what_is_voice.php (last visited Jan. 18, 2008); UFT, http://www.uftproviders.org/about_us (last visited Jan. 18, 2008).

roots organizing and coalition building have persistently pressured the New York legislature to pass legislation facilitating child-care worker organization.¹⁴⁹ In New York City, the Association of Community Organizations for Reform Now (“ACORN”) and the UFT have been allies in the struggle to organize New York City’s child-care workers.¹⁵⁰ The CSEA’s child-care worker component, Voice of Organized Child-care Educators (VOICE), was formed by a group of Schenectady child-care workers in 2002, who joined the CSEA in order to organize.¹⁵¹ In the spring of 2005, UFT/ACORN officially launched their organizing campaign in New York City.¹⁵²

After Governor Pataki vetoed the legislation, the interested unions and their coalitions urged the legislature to override the veto, which never materialized.¹⁵³

Governor Spitzer, keeping a campaign promise, signed the executive order, clearing the legal path for unionization.¹⁵⁴ Meanwhile, however, the grassroots organizing campaigns had not been dormant. UFT/ACORN organized rallies and marches, and engaged in door to door organizing to solicit card signatures from child-care workers.¹⁵⁵ With the overwhelming vote of New York City child-care providers in favor of unionization, the teachers’ union will now have formal authorization to act as the bargaining representative for all 28,000 providers in New York City.¹⁵⁶

149. See Natalie Bell, *Let’s Get Organized*, UFT PROVIDERS, Nov. 16, 2006, http://www.uftproviders.org/news/let_s_get_organized; Diedre McFadyen, *Home Daycare Workers to Governor: Sign the Bill!*, UFT PROVIDERS, http://www.uftproviders.org/news/home_daycare_workers_to_governor (last visited Jan. 18, 2008).

150. See, e.g., *New York ACORN and UFT Organize Childcare Providers*, ACORN NEWS, Aug. 22, 2005, <http://www.acorn.org/index.php?id=9646>; Zero to Three, *New York Gives Home-based Child-care Providers the Right to Unionize*, BABY MONITOR, June 11, 2007, http://www.zerotothree.org/site/PageServer?pagename=ter_pub_BM_06_11_07.

151. See Press Release, CSEA Local 1000, CSEA Wants Union Representation for Day Care Workers (June 6, 2006), http://www.csealocal1000.org/2006press.php#jun_6_06; see also VOICE, *supra* note 148; UFT, *supra* note 148.

152. See VOICE, *supra* note 148; see also Diedre McFadyen, *Birth of a Union*, UFT, Sept. 8, 2005 (on file with author).

153. See, e.g., Press Release, CSEA Local 1000, CSEA, NYSUT Urge Veto Override on Union Representation Bill for Child-Care Workers (June 14, 2006), http://www.csealocal1000.org/2006press.php#jun_14_06.

154. See, e.g., Greenhouse, *Vote to Unionize*, *supra* note 1; *A Marriage of Missions*, UFT, May 24, 2007, www.uft.org/news/teacher/president/a_marriage_of_missions/print.html.

155. UFT Providers, *Door-to-Door Union Drive Exceeds Goal*, http://www.uftproviders.org/news/door_to_door_union_drive_exceeds_goal (last visited Jan. 18, 2008).

156. See Greenhouse, *Vote to Unionize*, *supra* note 1.

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One labor scholar attributes this successful cross-state, inter-union cooperation to the AFL's New Alliance Strategy.¹⁵⁷ Under the New Alliance, first unveiled in 1999, local labor unions were to be reorganized to allow central management by Central Labor Committees.¹⁵⁸ The goals were to improve the communication and the efficiency of organizational drives and leverage political power more effectively.¹⁵⁹ New York was the first state to implement the New Alliance in 2001.¹⁶⁰

The disaffiliation of the Change to Win Coalition member unions in 2005 and 2006 changed the landscape of organized labor, and temporarily caused a potentially fratricidal conflict over home and child-care workers.¹⁶¹ There was no evidence, however, of any Change to Win encroachment into the New York child-care arena.¹⁶² Local 1199, the SEIU's and the nation's largest local union, rejoined the NYC Central Labor Council in late 2005.¹⁶³ Local 1199 organized New York City's home-care workers, so it was a potential contender for the right to represent the City's child-care workers as well.¹⁶⁴

157. Jeff Grabelsky, *A New Alliance in New York State: A Progress Report on the Labor Movement's Restructuring, Capacity Building, and Programmatic Work*, 10 WORKINGUSA: J. LAB. & SOC'Y 9, 19-20 (Mar. 2007), available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1743-4580.2006.00137.x>.

158. *Id.* at 13.

159. *Id.* at 17-20.

160. Harry Kelber, *Union Leader of 2.2 Million Tells Why 'New Alliance' Is Essential*, INSIDE THE AFL-CIO, June 5, 2001, <http://www.laboreducator.org/inside12.htm>

161. In 2005 the Change to Win group splintered off from the AFL-CIO, and promised more aggressive unionizing. See Thomas B. Edsall, *Two Top Unions Split from AFL-CIO*, WASH. POST, July 26, 2005, at A01.

162. See generally Greenhouse, *Providers May Vote*, *supra* note 4; Greenhouse, *Vote to Unionize*, *supra* note 1; Townsend, *supra* note 4.

163. See Posting of Doug Cunningham to Workers Independent News, <http://www.laborradio.org/node/1767> (Oct. 25, 2005, 18:31 EST).

164. See, e.g., 1199SEIU, Homecare Workers, <http://www.1199seiu.org/members/occupations/homecare/index.cfm> (last visited Jan. 18, 2008). It is worth noting that Local 1199's acrimonious relationship with the Spitzer administration suggests that the Governor's executive order was signed with the Governor's knowledge that 1199 was not planning on playing a part in the organizing of child-care providers. See, e.g., Steven Greenhouse, *Long Climb for New President of Health Care Workers' Union*, N.Y. TIMES, June 28, 2007, at B2; Danny Hakim, *Firing Off Another Round Over Health Care Budget Cuts*, N.Y. TIMES, Mar. 5, 2007, available at http://www.nytimes.com/2007/03/05/nyregion/05empire.html?_r=1&oref=slogin. If 1199 did attempt to capitalize on the new executive order, it would probably create massive political fallout with the Governor and with the UFT. In the interests of labor peace, it would be foolhardy for 1199, or any other major Change to Win affiliate, to directly challenge the apparently solid agreement between CSEA and UFT without risking a repeat of the AFSCME-SEIU raiding wars. See Posting of Cunningham, *supra* note 163 and accompanying text.

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In early August 2007, the New York State Employment Relations Board approved plans for the United Federation of Teachers to organize 28,000 home-based child-care providers in New York City.¹⁶⁵ Working in alliance with the UFT, ACORN collected 12,000 signatures from the 28,000 home child-care providers in the City, supporting unionization, well above the 30% affirmative showing necessary to begin the unionization process. From September 5 through October 18, the child-care providers mailed in ballots to the New York State Employment Relations Board.¹⁶⁶ From the 28,000 providers eligible to vote, 8382 voted to unionize, while only 96 voted against unionizing.¹⁶⁷ Because the majority of those who voted were in favor of unionization, the vote was binding upon all 28,000 child-care workers in New York City.¹⁶⁸

In late October 2007, “in the largest successful organizing drive in New York City in half a century, 28,000 child-care providers . . . join[ed] the city’s teachers’ union This was the largest successful unionization campaign in the city since 1960, when 45,000 teachers joined the United Federation of Teachers.”¹⁶⁹

Meanwhile, CSEA plans to organize the additional 32,000 home child-care providers in the State outside New York City in what can become one of the most significant expansions of union membership in the past half a century.¹⁷⁰

At the announcement of Governor Spitzer’s executive order, one child-care provider claimed that hearing the order was “like a hundred birthday parties all at the same time.”¹⁷¹ As discussed in the next Section, such enthusiasm, while warranted, does not fully reflect all possible implications of the executive order.

D. Likely Ramifications of Executive Order No. 12

Unless and until there are accurate assessments of the costs and benefits of the New York experience, it is unlikely that other governors will emulate Governor Spitzer’s executive order. The record demonstrates that home-care providers’ minima earnings are completely disproportionate to the valuable services they provide

165. See Greenhouse, *Vote to Unionize*, *supra* note 1.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Dan Gursky, *New York Order Gives Green Light to Child Care Union Drive*, AFT, May 14, 2007, <http://www.aft.org/news/2007/ny-earlychild.htm>.

to working parents.¹⁷² If the inexorable cost increases begin to approach the crisis level forecasted by the opponents of the Governor's initiative, state and local spending will increase dramatically for those children whose care the government subsidizes. This in turn will result in yet another increase in already high New York state and local taxes. The Bloomberg administration has estimated that the unionization of the home child-care providers in New York City will cost the city an additional \$100 million annually in increased wages and benefits.¹⁷³

The equally grim alternative is to reduce the number of subsidized slots. Many working parents may not be able to afford cost increases when the home child-care providers' compensation and benefits go up, if their children's home care is not subsidized by the government. If child-care costs become too high, many parents may conclude that it simply does not pay to work and will choose to stay home.

There could well be an economic and social gridlock looming just over the horizon. New York State, with its high taxes, is not an ideal model for the future, especially in the economically challenged upstate counties. There are, no doubt, thousands of other low-wage workers and service providers living on the economic margins, and their prospective unions, especially, watching with great interest, as these events vis-à-vis the home child-care providers unfold.

The implications of Governor Spitzer's executive order are apparent, particularly for the home-based child day-care providers, their charges, and the labor movement. Other ramifications may be more subtle, such as unionization possibilities for the broader class of child-care providers. The executive order will change the quality of child care in New York; whether for better or worse is an open question.

In 2004, Professor Peggie Smith, a leading academic authority on the broader dynamic of all family-care providers, described what she viewed as a "child-care crisis," resulting from a steady movement of women with children into the workforce.¹⁷⁴ This situation led to increased demand for child-care services, combined with an inadequate supply of affordable, quality care.¹⁷⁵ She contended that studies demonstrated that family child care was "mediocre"

172. Cf. *supra* note 6 and accompanying text.

173. See Greenhouse, *Vote to Unionize*, *supra* note 1.

174. See Smith, *Quality Child Care*, *supra* note 5, at 399.

175. *Id.*

throughout the nation.¹⁷⁶ She put forth several solutions, one of which was the unionization of day-care providers for children.¹⁷⁷ Smith stated that unionization stood to benefit the children being cared for, citing studies that suggested when child-care workers are treated with the respect and dignity she believed would come from unionization, “they are more likely to provide quality care and to remain in their jobs.”¹⁷⁸

There are countervailing factors, however, that forecast a significantly different, and bleak, picture for the change in the quality of child care in New York resulting from the executive order. In particular, while the order may increase the quality of care provided by child-care providers, the number of potential recipients of such care could be severely diminished.¹⁷⁹

Analogously, parents forced out of utilizing a subsidized child-care provider due to financial restraints as a result of the executive order will have to find other methods of child care. For example, they may resort to unlicensed, unregistered child-care providers who do not accept government subsidies. Since these may be child-care providers who, while legally subject to regulation, avoid the regulatory system and “work as part of an underground economy,” they may provide a diminished quality of care.¹⁸⁰ The consequence is that more parents are forced into the unpalatable position of employing such diminished, potentially dangerous, marginal child-care providers.

An additional potential consequence of Governor Spitzer’s executive order is that the state’s consent to the unionization of child-care providers may encourage them to begin advocating for coverage by the state pension system with full pension benefits.¹⁸¹ Furthermore, the employees might contend that they are also covered by the disciplinary and job protection provisions applicable to public employees under Article IV (Titles B and C) of the Civil Service Law and are entitled to defense and indemnification under the

176. See Smith, *Family Child Care Providers*, *supra* note 5, at 330.

177. See Smith, *Quality Child Care*, *supra* note 5, at 402.

178. See *id.*

179. The day after Governor Spitzer signed the executive order, sources in New York City Mayor Michael Bloomberg’s administration expressed concerns about the likely adverse impact upon the City and warned that 15,000 child-care spots were put at risk as a result of the executive order, despite Mayor Bloomberg’s plan to increase the number of available spots. See Greenhouse, *Right to Unionize*, *supra* note 147; Kenneth Lovett, *Gov Gives Day-care Workers Union Label*, N.Y. POST, May 12, 2007.

180. See Smith, *Family Child Care Providers*, *supra* note 5, at 332.

181. See Division of the Budget Recommendation, *supra* note 83.

Public Officers Law.¹⁸² Lastly, “the State may also be responsible for other employment issues such as withholding taxes, unemployment insurance, workers’ compensation, pension, social security and disability coverage.”¹⁸³

The validity of such apprehensions is bolstered by looking at the five executive orders that preceded New York’s, and noting how they too acknowledged similar consequences. Governor Corzine clearly understood the risks of an employee-employer relationship between the child-care workers and the state, and explicitly stated that under his executive order, child-care workers were in no way state employees.¹⁸⁴ Similarly, Wisconsin Governor James Doyle also made it clear in his order that he was not creating an employee-employer relationship between the workers and the state.¹⁸⁵ Both of these actions indicate that these states anticipated the same consequences as those indicated in the Division of the Budget’s report to Pataki regarding Senate Bill 6758.¹⁸⁶

Further, allowing the unionization of child-care providers could have a domino effect, not only for the child-care providers, but also for other situations where localities or individuals purchase services from independent contractors in whole or in part with funds provided by the state. Some believe “health care providers who treat Medicaid patients, and landlords who rent to tenants who receive rent subsidies or housing allowances, could advance similar demands.”¹⁸⁷ In sum, “administration of Medicaid or housing subsidy funds by localities should not result in the State being deemed the employer of the health care providers or the landlords.”¹⁸⁸

The validity of a potential domino effect may again be derived from observing the trends in those states that already embarked on the path of granting collective bargaining rights by executive order. In Illinois, unionization of child-care providers came after the unionization of state subsidized home-care workers.¹⁸⁹ The grant of collective bargaining rights to child-care providers may be a logical step in the process that began with the unionization of subsi-

182. *Id.*

183. *Id.*

184. See CHALFIE ET AL., *supra* note 32, at 18.

185. Wis. Exec. Order No. 172 (2006), available at http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=2359 (last visited Jan. 18, 2008).

186. Division of the Budget Recommendation, *supra* note 83.

187. *Id.*

188. *Id.*

189. See CHALFIE ET AL., *supra* note 32, at 7.

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dized home-care providers several years ago.¹⁹⁰ It is a possibility that this effect will spread to other fields, such as providers who treat Medicaid patients, as more states continue to grant bargaining rights to subsidized employees such as child-care providers.

Governor Spitzer's executive order may lead to equal protection issues since "there are numerous home child day care providers whose clients pay the total cost of day care without any subsidized assistance, and who would not be covered by this legislation."¹⁹¹ Thus, the executive order will more likely benefit providers that serve subsidized children than those that do not.¹⁹² At the same time, the bill may "drive up the cost of child day care for all consumers if the provision of employment benefits to self-employed day care providers becomes the standard."¹⁹³

An evident result of the Governor's executive order is that with collective bargaining power, the remaining providers clearly will improve their financial position. This, however, will not necessarily lead to radical changes for child-care providers. Low wages are not the only issue they face. The executive order deliberately is not an omnibus solution to the numerous problems plaguing the nation's child-care workers. Governor Spitzer's executive order, for example, does not provide them with health-care benefits.¹⁹⁴ Of the few workers who have access to an employer's health-care plan, even fewer can actually afford the associated premiums.¹⁹⁵ Although the unionization, under the auspices of the executive order, likely will not completely bridge the gap between the services provided by child-care workers and their compensation, it is certainly the first major step in that direction.

In the short term, as a practical matter of enhanced union political power and an influx of additional union dues, the political lobbying activities of the CSEA and UFT may more closely reflect the new membership body's interest. The unions and their coalition allies may push for political action from Albany, not preempted by the federal government, which would, in turn, better protect immi-

190. See, e.g., Greenhouse, *Union Gains a Victory*, *supra* note 13 ("[After w]inning the biggest unionization drive in more than half a century, the Service Employees International Union gained the right today to represent 74,000 Los Angeles County home-care workers who feed, bathe and clean for the elderly and disabled.").

191. OCFS Letter to the Governor, *supra* note 109.

192. *Id.*

193. *Id.*

194. Peggie R. Smith, *Laboring for Child Care: A Consideration of New Approaches to Represent Low-Income Service Workers*, 8 U. PA. J. LAB. & EMP. L. 583, 590 (2006).

195. *Id.*

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grant and minority working women.¹⁹⁶ Strict enforcement of wage and overtime statutes regardless of immigration status, ensuring open access to health care, and passage and enforcement of anti-discrimination legislation are examples of some issues that the unions may more militantly advocate, enriched by the perspectives of these newly-unionized women of color.

As a practical matter, the political and economic conditions in New York may serve to complicate funding the wage increases that the newly unionized child-care providers may see. While Spitzer's executive order does not guarantee salary increases, unlike Senate Bill 6758, wage increases are clearly the most imminent goal of the newly unionized workers.¹⁹⁷

Child-care subsidies in New York "already consume \$900 million in federal, state and local funds."¹⁹⁸ While Spitzer's executive order does not address the funding of the eventual wage hikes for child-care providers, estimates can be derived from analyses on Senate Bill 6758. The Division of the Budget Recommendation estimated an annual additional cost of approximately \$100 million each year.¹⁹⁹ Similarly, the Bloomberg administration predicted that Senate Bill 6758 would have cost New York City alone "\$55 million to \$100 million a year."²⁰⁰ In both cases, the sheer cost of Spitzer's executive order will result in a significant increase to a budget that is already viewed as massive. His justifications of such a dramatic increase may fall upon deaf ears when viewed in light of the already significant allocation of funding that goes toward subsidized child care.

Additionally, Spitzer's executive order followed a "first-year budget that increased spending at more than three times the inflation rate."²⁰¹ His critics have mounted charges against him that he is unable, so far, to control the cost of running the government of New York.²⁰² His announcement of the executive order, and its immediately apparent financial ramifications, only further mounted criticism against the Governor.²⁰³ When funds eventually are allocated to cover the increase in wages for child-care provid-

196. See *supra* note 6 and accompanying text.

197. See Lovett, *supra* note 179.

198. E.J. McMahon, *Babying Unions: Spitzer's Day Care Disaster*, N.Y. Post, May 15, 2007.

199. See Division of the Budget Recommendation, *supra* note 83.

200. See McMahon, *supra* note 198.

201. *Id.*

202. *Id.*

203. *Id.*

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ers, this charged political climate may prove to be a significant impediment for the already embattled governor.

On a strategic level, national ramifications of the executive order upon the movement of child-care providers to unionize are much more difficult to preliminarily assess. It is one of the most important questions facing organized labor and public law. Only in New Jersey, Iowa, Illinois, Washington, Michigan, Oregon, and Wisconsin do home-based child-care providers have the right to unionize.²⁰⁴ In all these states except Michigan the right to organize involved the issuance of an executive order by the governor.²⁰⁵ However, these recent successes for organized labor in several states, including New York, do not necessarily indicate that there will be unionization across the nation for child-care providers.

Concurrently, a collision may be brewing among various labor unions' organizing dynamics, public state-level prerogatives, and antitrust law. As a general principle, federal antitrust law prohibits independent contractors from engaging in collective bargaining, absent state action providing immunity to the prohibition.²⁰⁶ The continuing argument over whether child-care providers are employees of the state or are—in fact if not in law—independent contractors, and the default assumption that they are independent contractors, brings this antitrust law factor prominently into the legal and policy equations. In the case of child-care providers, the use of various tests to distinguish an employee from independent contractor is too unpredictable to assure a favorable outcome for child-care providers.²⁰⁷ While the state-action doctrine expressed in *Parker v. Brown*²⁰⁸ allows a state to carve out immunities, losses suffered by child-care workers, such as those in Rhode Island,

204. Press Release, National Women's Law Center, Home-based Child Care Providers Finding Strength in Unions (Mar. 6, 2007), <http://www.nwlc.org/details.cfm?id=2987§ion=newsroom>.

205. See CHALFIE ET AL., *supra* note 32, at 18.

206. See *Parker v. Brown*, 317 U.S. 341, 362-63 (1943) (finding that anticompetitive activities may be entitled to state-action immunity if the state clearly articulated policy to allow anti-competitive conduct and provides active supervision of such conduct undertaken by private parties).

207. See *supra* note 8 and accompanying text.

208. 317 U.S. at 350-51.

[N]othing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

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show that providers should not assume this alternative would always turn out in their favor.²⁰⁹

IV. CONCLUSION

Although the result of the possible conflict between Governor Spitzer's executive order and federal antitrust laws is difficult to predict, overall, Governor Spitzer's order will certainly increase the political clout of organized labor and enable New York child-care providers to demand fair pay for their services. At the same time, it is far less certain whether this development will lead to improvements in the quality of child-care services predicted by the proponents of the reform. Moreover, there are reasons to expect that state and local governments will be unable to maintain affordable child-care services for working families at the current level. Regardless of the outcome, however, the burden on the state taxpayers will increase.

Id. There is an understandable proliferation of law review articles on the ramifications of the state-action doctrine expressed in *Parker v. Brown*. See generally Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries*, 2006 UTAH L. REV. 761 (2006); Michal Dlouhy, *Judicial Review as Midcal Active Supervision: Immunizing Private Parties from Antitrust Liability*, 57 FORDHAM L. REV. 403 (1988); John F. Hart, 'Sovereign' State Policy and State Action Antitrust Immunity, 56 FORDHAM L. REV. 535 (1988); John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REG. 269 (2003); Richard Squire, *Antitrust and the Supremacy Clause*, 59 STAN. L. REV. 77 (2006); Elizabeth Trujillo, *State Action Antitrust Exemption Collides with Deregulation: Rehabilitating The Foreseeability Doctrine*, 11 FORDHAM J. CORP. & FIN. L. 349 (2006).

209. See *State ex rel. Dept. of Human Servs. v. State Labor Relations Bd.*, No. C.A. 04-1899, 2005 WL 3059297, at *8 (R.I. Super. Ct. Nov. 14, 2005) (holding that child-care workers were independent contractors, not employees).

