ARGENTUM
EXPANDING SENIOR LIVING

April 25, 2024

The Honorable Robert P. Casey
Chair
U.S. Senate Committee on Aging
393 Russell Senate Office Building
Washington, DC 20510

Dear Senator Casey:

Thank you for your invitation to comment on S. 4120, the "Long-Term Care Workforce Support Act." We appreciate the opportunity to share our views on these important matters.

By way of background, Argentum is the leading national association exclusively dedicated to supporting companies operating professionally managed, resident-centered senior living communities and the older adults and families they serve. Argentum member companies operate senior living communities offering assisted living, independent living, continuing care, and memory care services to older adults and their families. Since 1990, Argentum has advocated for choice, independence, dignity, and quality of life for all older adults.

At the outset, we share the goals embodied in your legislation of growing and supporting the direct care professional workforce. Prior to 2020, our communities already faced a dramatic staffing shortage. The COVID-19 pandemic only exacerbated these shortages and the challenges faced by communities. In that light, we applaud provisions in S. 4120 that would improve Medicaid reimbursement for direct care professionals and add support for long-term care services. We are also supportive of the bill's focus on improving training, recruitment, and support for direct care professionals and the care providers who employ them.

We are concerned, however, with a number of provisions in Title III of the bill relating to labor and employment matters. In a number of instances, we feel that the legislation includes provisions that are unnecessary insofar as federal, state, and local law already regulate these matters in great detail. We are likewise concerned that a number of items in this section will serve to worsen challenges in communities to the detriment of providers and the residents they serve. Our specific concerns are set forth below.

Written Agreements. In general, we have no objection to the bill's requirement that certain terms and conditions of employment be reduced to a written agreement. However, as discussed more fully under "Scheduling" below, we do not support the bill's requirement that scheduled work hours must be reduced to writing no less than 72 hours (three days) before a direct care worker is scheduled to work. First, as a practical matter, as operators of senior living communities, it is in both our best interest and that of our employees, including personal care providers, to establish fixed schedules as far in advance as is practicable. This ensure continuity of care and coverage for residents, while reflecting the need of care providers for some certainly in their own schedules. It is important to note however, that owing to the very nature of the services and care these providers give, it is necessary to maintain a certain amount of flexibility, due to the fact that a resident (or residents) may have changes of health conditions that require immediate attention or care from a provider with limited notice. We are concerned

the "written agreements" called for in this section would unduly limit this flexibility to the potential detriment of residents and residents. Moreover, to the extent the agreement would require that a provider's schedule for any workweek, including meal and rest breaks, time off, and the precise hours a provider is expected to work in any given week (which will often not be fixed from week-to-week), we predict a requirement that new agreements be generated on what is likely to be a weekly basis would be counterproductive and a misuse of limited resources.

We also would note our objection to those provisions of this section of the bill which would limit the use of pre-dispute arbitration agreements with respect to claims made by personal care workers. It has been our experience that the use of arbitration to resolve disputes is often highly preferable to both the company and a personal care worker. Arbitration is often, on average, a more cost-effective way to resolve disputes when compared to court proceedings. Arbitration is also likely to result in a quicker resolution, which benefits all parties. Finally, arbitration simplifies the dispute resolution process in a manner that is fair and equitable to both the company and the worker. We urge that you reconsider limiting their use in this context.

Misclassification of Workers. We appreciate the efforts made in section 302 of the bill to ensure that personal care workers are classified under the law as employees where appropriate. We also understand that the correct classification of workers as either exempt or non-exempt under federal wage and hour law is vital, insofar as non-exempt employees are entitled to be paid a minimum wage (the federal minimum wage, or, if a state has set a higher minimum wage, that increased rate), and entitled to overtime for hours worked in excess of forty in a work week (or as otherwise dictated by state law). We respectfully submit that with respect to personal care workers—particularly those who are employed in care facilities—the bill's concern with misclassification is misplaced. In our experience, and it is our understanding that throughout the country, personal care workers are almost always engaged as employees (rather than as independent contractors) and almost universally classified as non-exempt (and thus entitled to minimum wage and overtime). Considering these facts, we feel that the monies which would be allocated to "wage recovery grant programs" would be better used through expansion of other grant and training programs likely to benefit personal care workers directly.

Scheduling. As noted above, it is in the best interest of care providers, the communities in which they provide care, and ultimately, the residents in need of these critical services that scheduling is as consistent and comes with as much notice as is practicable. That said, the care of residents—who are often among the most health-vulnerable of populations—is paramount and must come first. Indeed, in a facility with hundreds of residents, any single resident—or any number of residents—can face a dramatic change in their medical condition (and the according need for care) at any moment. As a matter of ensuring the safe and consistent delivery of this care, communities must maintain a certain amount of scheduling flexibility with respect to their employees, particularly direct care providers. This is especially so given that our communities have historically had high turnover in staff, often with little notice, that may necessitate other providers covering schedules (if only temporarily) on an emergency basis. Put most simply, while a predictable and fixed schedule with as much notice as possible as to change is preferable, given the nature of our communities and the needs of our residents, it sometimes may simply not be possible. Finally, with respect to payment for hours that are

cancelled or limited after an employee reports to work, as with many of the other wage and hour matters discussed below, these are currently subject to comprehensive regulation on the state level. We submit that given this state regulation, the need for additional federal requirements is unnecessary.

Privacy. We have no objection to the limitations on employee monitoring. We would note for the record, however, that we are unaware of any practice in communities of monitoring personal care workers while they are using restroom or bathing facilities or otherwise engaged in personal grooming and similar activities. Indeed, we are unaware of a general practice of employee monitoring or surveillance except in those instances where strictly necessary to ensure resident care. We thus question the need for this limitation in the bill.

Meal and Rest Breaks. S. 4120 would require, for the first time as a matter of federal law, that covered facilities provide personal care workers with paid meal and rest breaks. As you are no doubt aware, the federal law governing wages and hours of work, the Fair Labor Standards Act, does not require employers to provide employees with such breaks. Rather, this has traditionally been left to the regulation of states and localities, which have regulated hours of work and required breaks as appropriate for workplaces in their states. We respectfully submit that insofar as these matters are presently subject to comprehensive regulation on the state and local level, creating new federal law to govern the same matters would be counter-productive and create potential inconsistencies and confusion for both employers and direct care providers.

Paid Sick Time. As with meal and rest breaks, paid time off for illness, an employee or family member's serious health condition, childcare, and numerous other reasons is comprehensively regulated under state and local law. In addition, the federal Family and Medical Leave Act provides for up to twelve weeks of unpaid leave annually for a number of specified reasons, and the Americans with Disabilities Act may also require employers to provide leave or time off for employees with a disability (as broadly defined under the law). Indeed, the current patchwork of state and local requirements—which vary widely in terms of which absences qualify for leave, the lengths of benefits and duration of leave, and the amount of leave that must be paid—has resulted in an administrative quagmire, particularly for those operators who operate facilities in numerous states. Moreover, while many of these programs are intended to ensure that employers who already provide paid leave—voluntarily as an employee benefit, through a collective bargaining agreement, or for other means—are in compliance with leave laws by way of their own programs, as a practical matter, the complexity and detailed requirements of this panoply of laws means that this is often not the case. Indeed, it is our understanding that because of these competing requirements, the Senate has formed a bipartisan working group to examine the issue of paid leave on a national basis, and ultimately make recommendations for a uniform national policy. We respectfully submit that creating a new and unprecedented federal paid leave law for a subset of specific employees in one specific industry would be premature and counterproductive to the stated goals of the working group, and that if and when the group puts forward recommendations for a broad national paid leave policy, this issue be taken up in that context.

Enforcement and DOL Authority. Finally, we respectfully submit that there has been little evidence put forward to suggest that the Department of Labor lacks sufficient investigative

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authority under current FLSA wage and hour laws to ensure that workers are classified properly and receive the wages to which they are entitled. Similarly, in each of the fifty states, various administrative agencies—and sometimes numerous agencies within a single state—are empowered to investigate and enforce laws relating to leave, wages, unemployment compensation, workers compensation, and employee benefits. In light of these facts, we would not support the expansion of such authority to the Department. In the same vein, both federal wage and hour laws, and countless state and local laws, provide for private rights of action where the law has been allegedly violated. Indeed, the existence of these laws—particularly those that allow for class and collective actions—have resulted in countless well-documented cases where employees who have allegedly been harmed by a violation receive pennies on the dollar, while plaintiffs' lawyers reap millions. We do not believe an expansion of these laws is warranted generally, and particularly not in an industry operating on the margins that the personal care industry does under current Medicaid reimbursement policies. We would urge you to remove any such provision should this legislation move forward.

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Once again, we thank you for the opportunity to share the benefit of our experience with you and the members of the Senate Aging Committee. Like you, we want to ensure that our rapidly aging senior population has access to affordable housing and quality care. We stand ready to work with you to develop policy that benefits direct care workers, communities, and, most importantly, the millions of residents who live in these communities across the country.

Sincerely,

James Balda
President & CEO
Argentum