February 23, 2012

RE: Comments submitted at **http://www.regulations.gov**.

Mary Ziegler
Director, Division of Regulations,
Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Dear Director Ziegler:

I am writing on behalf of the Visiting Nurse Associations of America (VNAA) to comment on the proposed rule *Application of Fair Labor Standards Act to Domestic Service* [RIN 1235-AA05]. VNAA represents nonprofit, community-based home health agencies and hospices across the United States, many of which have provided services for over 100 years. VNAA members provide a wide range of services to vulnerable patients under Medicare, Medicaid, private insurance and self-pay.

At the outset, we want to support the principle reflected in the Department of Labor (DOL) rule: employees who provide supportive services that allow persons to be cared for in their own homes are entitled to fair and equitable compensation. We do however have serious concerns about the practical impact of certain aspects of this rule on patients, families, nonprofit organizations and employees. We appreciate the opportunity to describe our concerns and propose some changes to the rule to mitigate the potential unintended harm it could create.

Application of Regulations Should Be Not Be Retrospective

It is unclear whether or not regulations will be applied retrospectively. If regulations are applied retrospectively, then there will likely be wage and hour class actions against agencies and/or individuals, resulting in additional legal and administrative burdens, in addition to potential back pay, liquidated damages and attorney fees. The fear of such actions will decrease the number of providers who are willing to provide this kind of care.

<u>Key Recommendation:</u> The final rule should make clear that regulations are not to be applied retrospectively.

<u>Impact on Continuity of Care, Patient Satisfaction and Quality</u>

A primary concern for VNAA and its members is the quality and continuity of care for patients and their families. Provider experience indicates that full application of the rule as written will have a negative impact on continuity of care as well as patient satisfaction and engagement. It will also result in multiple transitions of care that may impact quality and outcomes.

Since Medicare and Medicaid payments do not allow for overtime, multiple caregivers will need to be assigned to care for patients that have extended needs. The emotional stress on patients and the burden on families to orient to new rotations of staff cannot be overstated. Clinicians recognize that the introduction of multiple caregivers into a home setting often causes patients to experience physical and emotional adjustment problems and can result in transitions of care that impact quality. The best practices of nonprofit agencies reflect sensitivity to these issues and aim to minimize the number of different staff that provide care in a home. We would implore DOL to also make this practice the standard.

It is important to note in this section that caregivers employed by VNAA members do not experience a turnover rate of caregivers as described in the regulations. This is because continuity matters to caregivers as well.

<u>Key Recommendation:</u> DOL should fully recognize issues noted above by ensuring that final regulations are sensitive to needs of patients and to the importance of limiting the need for multiple caregivers in the home setting.

<u>Impact on Quality and Increased Costs to Medicare and Medicaid</u>

VNAA and its members believe that full implementation of the rule will have two unintended outcomes for patients and families who do not have the resources to pay for overtime care for trained staff. First, patients (and their families) may reject needed care altogether. Second, other patients will turn to the “grey market” of untrained personnel.

Both unintended consequences will compromise the safety and quality of care. In addition, patients, because of safety concerns or a relapse, may be forced to move to a more intense level of care such as a nursing home at greater costs to patients and government payers.

The incentive to move care into the “grey market” is dangerous for the patient, bad for the government and inappropriate for the worker who would be paid under the table and have fewer protections. It results in large amounts of work being provided without any protection for the patients or workers and diverts dollars from taxation and government oversight. This impact alone should suggest that it be a priority for DOL and other

federal agencies to encourage rather than discourage the provision of care through legitimate third party providers of care.

Key Recommendation: DOL should fully recognize that burdensome and narrowly defined restrictions may result in unsafe care and increased costs to patients and government payers. A coordinated federal strategy is needed to encourage rather than discourage the care provided by legitimate third party providers.

Phase in the Rule to Allow for Orderly Addition of New Workers

We agree with DOL's assessment that most agencies will try to substitute workers who might earn overtime with newly hired workers and maintain all employee hours below 40 hours a week. This would be done not because agencies want to avoid paying overtime to experienced staff, but because third party payers (such as Medicare and Medicaid) do not pay overtime now and are highly unlikely to pay rates sufficient for overtime in the future.

It is important to note that caregivers employed by VNAA members regularly indicate that they want additional hours. With the application of a strict work week that avoids overtime, these workers will now need to take on extra part-time jobs to make ends meet.

While we agree that agencies will, by necessity, move to hiring new workers to avoid the additional use of overtime, the rule does not seem to reflect the transition time or significant costs needed to recruit, train and appropriately place new staff.

Key Recommendation: We strongly urge that the rule be phased in over at least 18 months to allow agencies to undertake an orderly process for adding new workers and that an accurate assessment of the costs involved be provided.

Reconsider Overtime Rules for Live-in or Overnight Workers

As noted above, since nonprofit licensed and certified agencies go to great lengths to train and monitor staff to assure safe and high quality care, we are concerned that this rule may unintentionally result in an expansion of the "grey market" for in-home support services. Our member agencies, who work on a daily basis with patients and family members, recognize that many of the vulnerable patients that they serve will be unable or unwilling to pay overtime and will instead hire unskilled workers directly and pay them "off the books" and not offer overtime and perhaps not even minimum wage.

This not only defeats the purpose of the rule but also exposes patients to the risks associated with untrained, unsupervised and potentially dangerous caregivers. We believe this situation is most likely to happen in the case of "sleep-over" or "live-in" caregivers. Often such employees spend a substantial proportion of their "work-time" simply standing by, sleeping or engaging in recreational activities.

We believe that employees in these working arrangements should not require overtime during periods when they are essentially "standing by" and not actively providing supportive services. We believe it would be fair and less disruptive to consider such hours as straight time and not pay or count them toward overtime hours for workers in a single home over eight hours.

Key Recommendation: We urge DOL to provide greater flexibility in the rule for paying overtime to live-in or sleep-over employees.

Request for Comment on Tasks Performed by Personal Care Aides and Those Not Requiring Training

We believe that this rule could easily be misinterpreted as superseding existing state practices and other guidelines on what constitutes personal care or home health aide services and what tasks fall outside such established state or local guidelines. It could create unnecessary confusion and further complicate the appropriate regulation of health care that has long been the responsibility of state and local governments. Since such regulation continues to evolve, the DOL could easily be put in the position of continuing to revise its rules to conform to such changes.

Key Recommendation: DOL should simply defer the definition of such specific tasks to existing state and local guidelines. If DOL feels compelled to provide such examples, they should be confined to the preamble, identified as current examples rather than guidance, and not include specific tasks in the official regulatory text.

Request for Comment on New Rule That Agency Employed Staff Are Never Subject to Companionship Exclusion

We do not find the rationale for disqualifying all agency-employed staffing from the companionship exemption to be compelling. While the legislative history certainly suggests that minimizing the burden on individuals was a factor in offering the exclusion, it seems more logical and equitable to base the exclusion on the nature of the services rather than the type of employer. Moreover, the intent to minimize the impact on families could just as reasonably be applied to small nonprofit employers that are already burdened with a wide range of regulatory compliance responsibilities.

We also believe that Medicaid and other initiatives to expand cost-effective home and community-based services could be compromised by this decision. Efforts to expand the use of consumer directed care have often stalled because patients and families lack the capacity to be solely responsible for the role of "employer." This has resulted in the need to use agency staffing alone or in joint employer relationships. It seems counterproductive for DOL to undermine these efforts with this blanket disqualification of agency staffing.

<u>Key Recommendation:</u> We urge that the blanket disqualification of agency-employed staffing be eliminated and instead base the application of the exclusion solely on the nature of the services themselves.

<u>Request for Comments on Accuracy of Burden Estimates</u>

We appreciate the challenge inherent in providing an economic impact analysis of a regulation where there are so many possible behavioral responses to the rule. In many cases, it seems that the estimates begin with data and then quickly move into speculation. As such, the economic impact could be much higher based on a different set of speculative assumptions.

Our concern is that some estimates in the rule are so transparently unrealistic that they suggest that the overall analysis is biased by the goal of minimizing the impact of the changes. For example, the rule estimates that each agency will need only two hours of a mid-level employee's time to read the entire rule, fully understand its complexity and then change agency procedural manuals and payroll systems accordingly.

In fact, agencies will need a substantial amount of time to understand the rule completely, evaluate it in terms of their specific practices and systems, engage system software experts to change computerized programs, change their own input forms and systems, train all relevant staff and successfully test and implement the changes.

We also believe that the estimates do not accurately represent the impact of either forcing more companion/personal care work into the "grey market" or the impact on continuity of care.

One very important issue is that the rule does not accurately reflect the significant costs related to recruiting, hiring and training new staff. This is a significant shortfall and we recommend that providers be consulted regarding realistic estimates of the cost of such activities.

Another area where the rule does not accurately reflect costs is recordkeeping. Specifically, the proposed rules require an agency to "make, keep and preserve a record showing the exact hours worked" by each employee. Previously, employers could maintain records based on an agreement with the employee. Now, employers will be required to keep records of exact hours, including non-compensable meal periods and sleep periods. Since the companions work largely unsupervised, the ability of the employer to monitor or audit time submitted for arrival, departure, meal and sleep periods is limited. Therefore, the recordkeeping responsibilities of third party agencies will increase dramatically to comply with this obligation.

<u>Key Recommendation:</u> We recommend that DOL: 1) provide more accurate burden estimates as noted above and 2) simplify the recordkeeping process so that is not overly burdensome to vulnerable patients and agencies that serve their needs.

Defer Publication Until a Stakeholder Meeting Is Held

We urge that DOL defer publication of a final rule until it convenes a meeting between stakeholders including the provider community, state Medicaid officials, family caregivers and other groups representing the aging and disabled populations. While we recognize that the Small Business Administration did hold a "listening session" we believe that a more meaningful dialogue is needed. The purpose of these meetings would be to find a better way to protect the interests of workers in a way that will not undermine efforts to make home-based care accessible.

Key Recommendation: DOL should convene a meeting as described above prior to publication of the final rule.

Conclusion

In addition to considering our specific comments, we would urge you to reconsider the overall thrust of this proposed rule in the larger context of the critical need to provide for the care of our country's rapidly growing aging population. This Administration has made a concerted effort to encourage the expansion of home and community-based services to be a dignified and cost-effective alternative to institutional care for this population. As we have pointed out, this rule, while obviously well intended, will add additional costs and administrative barriers to the expansion of needed home-based care beyond those projected in the impact statement.

About VNAA's Members

VNAA represents only nonprofit providers who serve Medicare, Medicaid and other patients with chronic and often life threatening conditions. We are especially involved in the provision of transitional care and chronic care management. Our members serve patients without regard to their profitability and provide charity services to the under-insured or uninsured as well as through community health and wellness initiatives.

If you have questions regarding these comments, please contact Kathleen Sheehan, VNAA's Vice President of Public Policy, at 202-384-1456 or ksheehan@vnaa.org .

Sincerely,

Andy Carter
President and CEO