



March 21, 2012

Ms. 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

RE: RIN 1235-AA05 – Application of the Fair Labor Standards Act to Domestic Service

These comments are submitted for the record to the Wage and Hour Division of the Department of Labor (DOL) on behalf of the National Federation of Independent Business (NFIB) in response to the Notice of Proposed Rulemaking (NPRM) for Application of the Fair Labor Standards Act to Domestic Service published in the December 27, 2011, edition of the *Federal Register*.

NFIB is the nation's leading small-business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States, including more than 300 businesses that provide in-home care to individuals that require it.

NFIB believes that the DOL should keep the companionship exemption for minimum wage and overtime pay to covered workers. Simply put, this proposal is a solution in search of a problem. As our comments will explain, any change to the structure of the current exemption will have a profound negative effect on the small businesses that provide such services, as well as employees and clients.

Background

The DOL proposes to revise the current Fair Labor Standards Act (FLSA) regulations pertaining to the exemption for companionship services and live-in domestic services. Currently, the FLSA exempts from its minimum wage and overtime provisions domestic service employees employed "to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

The agency proposes to amend the regulations to revise the definitions of "domestic service employment" and "companionship services." The DOL also proposes to clarify the type of activities and duties that may be considered "incidental" to the provision of companionship services. In addition, the agency proposes to amend the recordkeeping requirements for live-in domestic workers. Finally, the DOL proposes to amend the regulation pertaining to employment by a third party of companions and live-in domestic workers. This change would deny all third party employers the use of such exemptions.

NFIB's concerns with the DOL's proposal

NFIB members in this industry have four major concerns with the NPRM. First, we believe that the agency has not sufficiently identified a market failure that warrants the rule being proposed. Second, the proposed rules will have a substantial negative impact on the marketplace that will close businesses, have unintended consequences on employees, and jeopardize the safety and quality of life of clients. Third, we believe that the DOL is severely underestimating the number of businesses (and thus employees and clients) that will be affected by this proposal. Fourth, if finalized, the proposal would create a significant paperwork and recordkeeping burden that will disproportionately affect small businesses. These concerns are explained further below.

The DOL has not identified a market failure in need of correction

NFIB believes that the DOL has not sufficiently shown that the market for in-home care fails any of the participants within it. Third-party employers are able to make modest profits and employ thousands of workers nationwide. These workers already earn wage rates at or above the minimum wage, as the preamble to the NPRM indicates. This fact is also supported by a study completed by IHS Global Insight for the International Franchise Association Education Foundation (IFA study), which found the average rate paid to employees of franchised small businesses was nearly \$10 per hour.¹ The employees also enjoy the stability of working for one employer at the home of one or two clients. Many that live in the home where they work also typically enjoy room and board in addition to their wage. Finally, the clients enjoy affordable care and the stability of having the same worker in their home every day – which can be imperative in cases of dementia and other cognitive diseases.

The DOL has not justified the need for action in this situation. The Mercatus Center at George Mason University, a research center that aims to apply “sound economics to offer solutions to society’s most pressing problems,” recently graded this NPRM as part of its Regulatory Report Card project². Mercatus looked at how well the DOL identified the problem in need of correction, the thoroughness of the Regulatory Impact Analysis (RIA), and other areas. In total, this NPRM scored just 24 points out of 60 possible.

In the area of “How well does the analysis identify and demonstrate the existence of a market failure or other systemic problem the regulation is supposed to solve?” the NPRM scored just one out of a possible five points. The Regulatory Report Card concludes “the RIA fails to identify the labor-market failure that necessitates the use of the minimum wage, overtime, and travel compensation regulations set forth in the DOL’s NPRM.” We strongly encourage the DOL to review this document.

NFIB strongly believes that the DOL’s inability to demonstrate a market failure in the in-home care market requires the agency to withdraw the proposal and maintain the current exemption.

Impact of the proposed rule on the marketplace

Given that there is no market failure in the in-home care industry, it is important to demonstrate the breadth of impact that the DOL’s interference will have on the marketplace.

Because virtually all employees make at or above minimum wage, it is safe to assume that negligible costs will be imposed on employers for this requirement. However, the requirement of overtime pay at time-and-a-half will have a significant effect on employers. These businesses have to make every effort to keep costs affordable to their clients. Adding overtime makes in-home care unaffordable for many clients. Therefore, third-party employers will alter work schedules to ensure that each worker’s time stays below the overtime threshold.

In order to have the staff available to fill the new shifts that result, companies will need to hire and train additional workers. The IFA study found that nearly 80 percent of respondents are at least somewhat likely to hire more workers. The cost of hiring and training a new employee for a small business (in this case, a business with 500 employees or fewer) is at least \$3,162, based on data from the Society for Human Resources Management – a figure that does not include the cost of background checks or other pre-employment screening. If a 100-employee company has to double its staff, that is an upfront cost of at least \$316,200, assuming the small business can find the employees needed to service its clients. If businesses are unable to meet the new costs or find the right amount of labor, many will have to close their doors hurting everyone in the market.

This potential uptick in hiring new workers, however, should not be mistaken as a creation of jobs as a result of this proposal. Because there are those businesses that will scale back their services, the IFA study found that the total projected number of jobs lost to be 2,630 – and this is just from the 158 respondents, not all companies nationwide. Expect job losses to be significantly higher.

By-and-large, employees like the present arrangement – and this NPRM would damage it. Employees enjoy making a decent wage for the hours they want to work. Workers also enjoy the ability to work in one location, with one client. They form a personal relationship with that client that goes beyond that of a simple service provider.

As an example, employees that enjoyed getting paid for working 60-hour weeks in the same work site will be greatly harmed. Because their hours will be cut – to say 40 hours – that worker will have to try to find another 20-hour weekly schedule with another in-home care company to make up the difference. This new work, if they are able to find it, will likely be in a different location than their first job, requiring travel time to get to the additional work site – which means they will have less time to spend with their families or to use how they would otherwise like to. Assuming the jobs pay the same wage rate, the worker is also no better off financially than under the current structure.

The DOL also needs to consider how the agency's interference will affect clients. Once overtime is introduced into the equation, care becomes much more difficult to afford. According to figures from California Association for Health Services at Home (CAHSAH), the annual cost to a client for live-in care is \$70,000-\$80,000 depending on the state. With overtime passed along to the client that cost escalates to \$140,000-\$185,000. The result is that many families, who want their loved one to live out their final years at home, will have to instead choose institutionalized care like a nursing home. Quality of life, and in many cases the length of life, is reduced.

Another option includes getting multiple workers to come in to the home to fill the needed shifts. However, clients prefer having one steady presence. In cases of dementia or other cognitive diseases it is not a preference but a necessity. Having multiple providers can have significant stress or safety concerns on these particular clients.

Furthermore, another safety issue is presented here. Third-party providers screen workers with background checks to help ensure that no malicious or devious persons are working in the home of a client. As costs increase, many in-home care clients may choose to hire a worker off the "gray market," which is essentially someone off the street with little or no training or professionalism. These workers can be paid below minimum wage and under-the-table, which is clearly counter to the goal DOL wishes to address with this NPRM. These workers also pose safety and theft risks to clients. Nearly 90 percent of IFA study respondents believe their clients are very likely to seek other care, such as underground providers.

The effects of DOL interference in this market will harm all actors in the market and benefit no one. NFIB believes the agency's lack of justification for interference requires the agency to abandon this proposal and maintain the exemption as is.

Underestimation of affected businesses

NFIB believes that the DOL erroneously focused its industry analysis on "home health care" organizations, which are funded in part by Medicare, and neglected the industry segment known as "home care aid" organizations, which are not paid for with public assistance in any way. While estimates on the number of firms in this category are hard to come by, one reliable figure has been furnished by CAHSAH. This organization published a report in 2009 that estimated there are 1,200 home care aid organizations in the state³. Since California has 12 percent of the U.S. population, one can reasonably assume that there are close to 10,000 home care aid organizations in America – all of which were left out by the DOL.

Furthermore, the IFA study found that 85 percent of respondent companies' revenue comes directly from the customer or client, which directly contradicts DOL's assertion that 75 percent of total payments in the affected industry come from Medicare and Medicaid.

Additionally, this misrepresentation of the industry has the potential to violate the Regulatory Flexibility Act, which requires a thorough analysis of a proposed rule's impact on the small businesses in an affected industry.

At a minimum, the study should trigger a complete reexamination of the affected number of businesses and the DOL should conduct a new impact analysis.

Disproportionate paperwork and recordkeeping burden on small businesses

The DOL has estimated that paperwork and recordkeeping associated with this proposed rule will cost in excess of \$22.5 million per year. This is a substantial burden that will disproportionately impact small businesses. Small businesses face unique difficulties in regulatory compliance. The SBA Office of Advocacy released a study in 2010 that showed the smallest businesses – those with fewer than 20 employees – spend 36 percent more per employee per year complying with federal regulations⁴.

The reason regulatory compliance costs are so disproportionate is because in a small business the task of compliance falls on the small-business owner, whereas in a larger business the task would fall on a specialized compliance expert. Not only is a small-business owner's time more valuable, but the complexity of regulatory compliance does not make it easy for a layperson to understand. Add in the fact that compliance must be done in addition to core business tasks like generating sales, taking inventory, and managing employees and it is easy to see how quickly the costs escalate for a small business.

This substantial paperwork burden can be avoided by maintaining the exemption for third-party home care providers.

Conclusion

NFIB believes that the DOL should withdraw this proposal and maintain the current exemption for in-home providers as is, including for third parties. The agency has not justified in any compelling way its need for action. Even worse, agency interference will significantly harm all actors in the market. Small businesses will be forced to try to absorb significant personnel and paperwork costs. Employees will have to work for multiple providers in multiple locations just to make the same wage they enjoy today. Clients

will be faced with terrible options – either moving to institutionalized care, multiple providers, or navigating the gray market. In addition, the agency has not come close to identifying the universe of businesses, workers, or clients affected by this rulemaking because it has ignored the private-pay market.

We appreciate the opportunity to comment on this NPRM. Should the DOL require additional information, please contact NFIB's manager of regulatory policy, Daniel Bosch, at 202-314-2052.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Eckerly", with a stylized, flowing script.

Susan Eckerly
Senior Vice President
Public Policy

¹ "Economic Impact of Eliminating the FLSA Exemption for Companionship Services," HIS Global Insight for the International Franchise Association Education Foundation," February 2012.

<http://emarket.franchise.org/CompanionCareReport.pdf>

² "Regulatory Report Card: Application of the Fair Labor Standards Act to Domestic Service," Mercatus Center at George Mason University, February 2012. <http://mercatus.org/reportcards/application-fair-labor-standards-act-domestic-service>

³ "How Large is California's Home Care Industry," California Association for Health Services at Home, December 2009.

⁴ "The Impact of Regulatory Costs on Small Firms," Crain and Crain for the SBA Office of Advocacy, September 2010. <http://archive.sba.gov/advo/research/rs371tot.pdf>