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

RE: Comments of VNSNY on RIN 1235-AA05,
Proposed by the Department of Labor, Wage and Hour
Division, with respect to Application of the Fair Labor Standards Act

Dear Director Ziegler:

On behalf of Visiting Nurse Service of New York (VNSNY), I appreciate the opportunity to comment with respect to the Notice of Proposed Rulemaking (NPRM) regarding the "Application of Fair Labor Standards Act to Domestic Service" [RIN 1235-AA05], published in the Federal Register on December 27, 2011. VNSNY is the largest not-for-profit home health agency in the nation, with a staff of over 16,000 providing a wide array of home and community-based services to more than 30,000 individuals on any given day throughout the metropolitan New York City area. We employ almost 10,000 paraprofessional home health aides directly through our affiliate, Partners in Care, and contract for an additional 18,000 home health aides with many other Licensed Home Care Agencies (LHCSAs); we provide almost 13 million paraprofessional hours of home health aide service each year. Since 2005, VNSNY and its staff have received 60 regional and national honors from the American Public Health Association, the Visiting Nurse Associations of America, the National Association of Hispanic Nurses and many others. In 2011, VNSNY provided \$26.4 million in charitable care and community benefits, which included \$14.4 million to provide direct home care services to more than 4,500 underinsured and uninsured New Yorkers. We are known not only for the quality of our services, but for our creative community outreach programs, which are aligned with our mission to provide innovative services to enable people to function as independently as possible in the community.

VNSNY has a strong commitment to providing adequate wages and benefits to our workers, including home health aides, and has enjoyed a long history of working closely and collaboratively with employee organizations, including SEIU/1199, to ensure fair, equitable, and respectful treatment of our workers. We pay our aides above the minimum wage and pay

overtime for hours worked over 40 within a given week. Our aides undergo rigorous screening and are all trained many hours beyond State requirements. We are proud of our aides, and believe they take pride in being part of our organization. We have not experienced the kind of turnover that DOL cites in the NPRM as a reason for regulatory change – Partners in Care, the VNSNY licensed agency that employs our aides, has a turnover rate of 24.5%, not the “excessive” turnover rates, even approaching 100% annually, that DOL describes at 76 Federal Register 81231 (December 27, 2011).

I am submitting these comments for several reasons. First, our review of the proposed regulations suggests that for all its good intentions, the Department of Labor (DOL) has proposed changes to the existing regulations that would have far-reaching and unintended consequences that would be detrimental not only to agencies such as VNSNY, but to our patients and their families, to our workers, and to the world of home health care in general. Secondly, meeting the requirements of the proposed regulations would be financially challenging for VNSNY without additional reimbursement from Medicare, Medicaid and private pay clients, especially coupled with new Living Wage and Wage Parity mandates in New York State. For most licensed agencies in New York City, approximately 8 percent of total paraprofessional hours are overtime hours; it would be difficult to reduce that entirely. While we have not conducted any extensive study of financial impact, if we simply estimate the increase in the overtime we already pay if we were to be henceforth required to pay time and a half times actual wages rather than time and a half minimum wage, the proposed change in the companionship exemption would result in a yearly cost to our agency of \$9.5 million if there were no change in overtime utilization. We have made no attempt to calculate the additional costs of live-in recordkeeping, but we believe that the additional cost associated with the proposed deletion of the exemption for live-in services could exceed \$13 million on an annual basis.

In short, we believe that DOL has severely underestimated the cost burdens to providers; underestimated the burdens on the client and their family; underestimated burdens on aides and failed to consider the inevitable impact this will have on home health care generally.

For these reasons, more fully explained below, VNSNY respectfully urges rejection of the proposed regulations as published, and instead urges DOL to suspend these efforts until the agency and others have time to conduct adequate impact analyses. In particular, we urge DOL to consult with other federal agencies and to conduct more meetings such as the February 1 meeting held with the Small Business Administration -- there are many other agencies that could be helpful to consideration of these vital issues.

Proposed Regulatory Changes of Particular Concern

For purposes of preparing these written comments, we have focused on four proposed changes that are of particular concern to VNSNY. If given the opportunity, VNSNY representatives would be pleased and honored to contribute further to any dialogue with respect to these and the other proposed changes, and to the many specific and thought-provoking questions raised by DOL in the NPRM.

1. Changes in the Definition of Companionship Services

We are concerned by the changes in the proposed definition of Companionship Services that would limit all intimate personal care services to those incidental to companionship and would exclude all workers requiring training for medically related services. DOL proposes to delete the word "care" from the definition. This simply flies in the face of the intent of Congress in proposing the companionship exemption in the first place. The exemption is all about care, and keeping it affordable. "Care" is in the statute: the exemption was created "to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves" (29 U.S.C. 213(a)(15) (emphasis added)); "care" features prominently in the legislative history. *See* 118 Cong. Rec. 24715 (July 20, 1972) (statement of Senator Taft) (noting that certain domestic services are directed to caring for the elderly in their homes, thereby avoiding nursing home placement); 119 Cong. Rec. 24801 (July 19, 1973) (statement of Senator Burdick) (indicating the exemption relates to aged or infirm fathers and mothers who need someone "to take care of them.")

Whereas previously the 20% limitation on the exemption focused on general housekeeping services, the new limitation undertakes to restrict the very services that constitute the care needs of many elderly patients. Similarly, suggesting that any training could result in loss of the exemption means that to preserve the exemption, families will need to avoid aides with even minimal training.

2. Change in Scope of the Companionship Exemption

For all the reasons that were so convincingly articulated in the Department of Labor's Wage and Hour Advisory Memorandum No. 2005-1 (December 1, 2005), we believe that third-party agencies should not be barred from use of the companionship exemption, and dispute the implication manifest in the NPRM that agencies are somehow to be faulted for making use of the exemption in the past. The exemption was designed to keep costs down; it has done so, and to remove the exemption for any agency that has relied on it will have immediate consequences far beyond those estimated by DOL. Absent some grace period for compliance, accompanied by an increase in reimbursement from government programs, many agencies will be forced out of business, to the detriment of patients and families, workers, and home health care generally.

3. Change in Record-Keeping For Live-In Workers

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.

4. Change in Live-In Exemption

Termination of the live-in exemption for agencies means that a significant number of hours not previously considered billable at all will need to be paid in future by agencies at enhanced overtime rates. This change, especially when coupled with the revised record-keeping requirement, will make the provision of live-in care a particularly difficult service for agencies to provide.

Anticipated Impacts of Proposed Rules

As noted above, we believe that the proposed changes will have significant unintended consequences. For purposes of this comment, we have summarized the specific impacts we anticipate for workers, for patients, for agencies and finally, for home health care generally.

A. Impact on Workers

- Absent a grace period or some provision for reimbursement for the increase, the dramatic increase in costs for hours to be paid at an enhanced overtime rate, whether because of the loss of the live-in exemption or the companionship exemption, will force agencies to make drastic adjustments to the availability of overtime hours for their aides. Personal care workers typically want more hours, not less. The goal of avoiding overtime may actually reduce the work offered to these workers as agencies restrict working hours to control overtime costs.
- As the personal care employees seek work from multiple agencies to earn additional hours to overcome limits on work hours, they will potentially lose access to benefits that are tied to number of hours worked.
- Turnover rate will increase as workers are less satisfied with their work schedule.
- As workers become more discouraged by the loss of hours, they will consider using the skills they have learned on the “gray market”, where they will have none of the protections or benefits available to them as agency employees.
- In their efforts to reduce overtime costs, agencies may hire “new” workers. While this might be labeled as “job creation” by politicians, in reality it will be the same workers trying to make up the hours lost by working at several agencies. The burden on these workers will only be increased.

B. Impact on patients and their families

- The avoidance of increased costs by agencies will result in multiple caregivers assigned to each patient, requiring patients and their families to adjust to multiple caregivers and deal with inconsistent care. As caregivers are pulled from shifts when they reach the maximum hours for work below the overtime limit, turbulence and frustration will be

caused for patients. Patients with dementia and Alzheimer's in particular would become more confused. Loss of service continuity and exposure to staff who are "new", even if fully competent, will be unsettling to families as well as patients.

- If discouraged from agency use by its increasing cost and the disruptions described, more patients and their families will hire on the "gray market" referenced by DOL in the NPRM. If they do so, they will be foregoing the quality of staff (including background checks and training) an agency can provide, creating risk of elder abuse and mistreatment of people with disabilities.
- If a family uses private pay agencies, the costs will be passed on to elderly, infirm, and special needs clients/patients in private pay care. Clients/patients requiring companionship services are often the disabled and elderly on fixed incomes, and increased costs could limit access to services. In particular, agencies will likely limit live-in services. As fewer companion hours and live-in hours are offered and the type of services permitted are narrowed by the change in definition of companionship services, patients will be moved to assisted living facilities, nursing homes, or hospitals.
- The new regulation seems aimed at requiring families to hire several different people to care for an elderly person who wishes to remain at home. The cost and burden to these families will be multiplied, defeating the very reason Congress created the companionship exemption in the first place.

C. **Impact on Agencies**

- If the proposed regulations are implemented without a grace period and without any provision for an increase in reimbursement from government programs, agencies will be faced with a marked increase in costs that will not be funded by any government program. Indeed, it is not clear that any such increase would ever be reflected in Medicaid or Medicare reimbursement rates for services provided.
- In the face of such increases, agencies will have to reduce their overtime costs by reducing the availability of overtime hours. Caregivers will work reduced shifts as multiple caregivers are assigned to each patient.
- This reaction will breed its own costs such as (1) costs of recruitment and training of additional aides to cover the hours previously considered overtime; (2) costs of additional supervisors to support the increasingly complicated scheduling needed to coordinate new shifts of workers; (3) costs of additional staff to address patient and aide concerns about the scheduling changes and the lack of overtime hours.
- This reaction will also mean that the nurses who supervise the aides must make additional supervision visits. Given the current nursing shortage, this is a particularly costly aspect of these changes.

- Shortage of workers and nurses will make it difficult to serve all cases as previously.
- The new live-in recordkeeping requirement will create additional burdens. 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. Agencies will need to hire additional personnel, another increased cost.
- Incident to this recordkeeping requirement is the fact that agencies will have increased risk of DOL audits of these newly required records, resulting in the possibility of legal and administrative costs in addition to any back pay and penalties levied by the DOL.

D. Impact on Home Health Care

- As DOL notes, home health care has grown dramatically in recent years. Clearly, there is a need for these services, and this particular industry can continue to grow and thrive.
- The proposed regulations, despite their seemingly good intentions, will skew this developing industry away from utilization of agencies by patients and their families. This will increase utilization by families of the “gray market”, exposing families, patients and workers to unnecessary risk and encouraging a segment of the industry that is often non-compliant with DOL and state regulatory oversight and control as well as Social Security and taxation requirements.
- If families are understandably unwilling to pay the increased costs associated with agencies or risk the “gray market”, they will forego home care and will be forced to rely on nursing homes instead. Governmental programs faced with inadequate reimbursement will similarly turn to nursing homes.

Recommendations

1. Further impact analyses should be conducted and input sought from third party agencies such as VNSNY and from federal and state agencies that regulate and reimburse the provision of home health care services. A more comprehensive approach to such regulatory reform is needed.
2. If these proposed regulations are enacted, significant financial burdens will fall on agencies. Reimbursement for any services covered by federal and state programs will not automatically cover the increased costs. To give funding some chance to catch up, some grace period should be provided, with clarification that the regulations will apply prospectively only. Any lack of clarity with respect to the effective date will spawn class action suits similar to those commenced in the wake of the Second Circuit Coke decision, subsequently reversed by the Supreme Court.

3. If these proposed regulations are enacted, some consideration should be given at the very least to revising the change in the live-in exemption to mitigate its impact and to withdrawing the live-in recordkeeping requirement. It is not feasible to pay a worker for a full 24 hours, some at overtime, and it is not practical to require daily recordkeeping of live-in hours at the risk of audit and penalty. We understand that the live-in scenario is regulated and paid differently around the country. Some analysis of the options available is necessary.

Conclusion

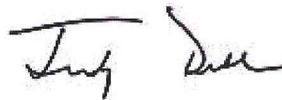
While we must be concerned by the financial burdens these proposed regulations pose for our own agency, we are concerned as well by the unintended consequences to our industry. These regulations pose a risk to the continued viability of home care services and will impede access to those services for millions of elderly Americans.

In Coke, the Supreme Court chose to uphold DOL regulations, based in large part upon its perception that “satisfactory answers” to questions posed about proper application of FLSA “may well turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the Department of Labor, possesses. . . .” 551 U.S. 158, 167-168 (2007). We urge DOL to consult further with the affected parties and otherwise enhance its knowledge of the home health care industry before finalizing these proposed regulations. Issuing them in their current form would be inconsistent not only with the expectations of the Coke Court, but would also be inconsistent with the efforts undertaken around the country by public agencies to comply with the Supreme Court’s decision in Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

If these proposed regulations are enacted, one result is certain: more of our senior citizens will be forced into more restrictive and usually more expensive nursing homes. It is wrong to force our elderly citizens into nursing homes when they are capable of living at home if affordable home care is available.

We thank you for the opportunity to present these comments and for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Judy Duhl".

Judy Duhl
VP Government Affairs