



March 21, 2012

Submitted via 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

**Re: Comments to Proposed Revisions to the Companionship
Exemption Regulations, RIN 1235-AA05**

Dear Ms. Ziegler:

The National Council on Aging submits these comments on the proposed rulemaking regarding the companionship exemption to the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). The National Council on Aging strives to improve the lives of millions of older adults, especially those who are vulnerable and disadvantaged. The proposed regulations have implications for low-income older workers who are increasingly being employed as home care workers as well as seniors and individuals with disabilities who need home and community-based services and supports.

We have a strong interest in extending minimum wage and overtime protections to the two million-plus home care workers who perform the personal care and services that enable older adults and individuals with disabilities to remain in their homes and live independent lives. Because in-home care is more cost-effective than institutional care, we think it makes good sense to support the workers providing these services. The proposed rules changes come at a critical time for this growth industry, which is at a crossroads of increased demand and rising rates of worker turnover that can be alleviated by providing the basic minimum wage and overtime protections that other workers have depended on for decades.

We appreciate the opportunity to comment on the proposed regulations. Our comments are divided into two primary areas. First, we describe an industry that has changed and grown exponentially since the 1975 DOL rulemaking, creating an unintended professional exclusion for this crucial growth sector. The result has been to suppress wages for the home care workforce, consigning millions of caregivers—the overwhelming majority of them women, many of them immigrants and women of color—to working poverty. The substandard working conditions

have created very serious employee recruitment and retention problems, generating labor shortages that prevent us from meeting the nation's rapidly growing need for home care.

Second, we provide specific comments to the proposed regulations and the explanatory language in the Notice of Proposed Rulemaking (NPRM). We support the proposed regulations fully, but have three suggestions to make the application of the revised definition of exempt companionship services clearer. One would revise the text of the proposed rule to require an initial assessment of the worker's job, to make sure she was hired to provide, and in fact does primarily provide, fellowship and protection, so that the permissible incidental activities are really those that are performed only occasionally, as the Department describes. The second suggestion is to clarify that the 20 percent cap on the incidental work be per employer, if the worker works for more than one older adult or person with disability per week. A final suggestion is to revise the list of permissible exempt duties to take out those that require physical strength and specialized training.

I. History and Purposes of the Exemption and its Unintended Sweep in Modern Times.

The companionship exemption has its origins in a 1974 Congressional amendment that extended FLSA coverage to domestic workers for the first time. In the process, Congress carved out two narrow exemptions from both minimum wage and overtime protections. The first was for "casual" baby sitters, meaning persons who perform child care services on a non-regular basis. And the second was for workers who provide "companionship services" to the elderly or disabled, described by Congress as "elder sitters".¹

A. The Modern Home Care Workforce.

The type of services Congress intended to exempt—informal, limited to companionship, and not central to the national economy—bears little relationship to the work performed by today's home care workforce that is now under the companionship exemption as the result of the overly broad DOL regulations.

Far from the informal elder-sitting of which Congress spoke, the current home care industry is predominantly formal and, as one of the largest and fastest-growing sectors, plays a central role in our national economy. The industry's revenues and number of establishments are today double or more their size in 2000.² Home care

¹ For a more in-depth description of the history of the companionship rule, see National Employment Law Project, *Fair Pay for Home Care Workers: Reforming the U.S. Department of Labor's Companionship Regulations Under the Fair Labor Standards Act* (August 2011), available at <http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1>.

² U.S. Census Bureau, "2008 Service Annual Survey Data".

industry profits have grown at an average rate of 9 percent per year from 2001-2009; total industry profits topped 84.1 billion in 2009.³ Senior care and home health care franchises' corporate revenues increased by 11.6 percent per year from 2007-2009.⁴

The industry's workforce is projected to grow by nearly 50 percent again by 2018.⁵ Together with the rest of the healthcare sector, home care will thus increasingly be a major source of growth and jobs in the U.S. economy, adding a projected 1.3 million jobs by 2020.⁶

Approximately 70 percent of home care workers today are employed by home care agencies.⁷ For-profit corporations dominate in the industry.⁸ Many of the fastest-growing for-profit agency employers are highly profitable and have benefited from the overbroad exemption from minimum wage and overtime provisions.

Another segment of the market consists of workers who are employed directly by individual consumers,⁹ often referred to as "consumer directed" care. Several states have taken increased responsibility for recruiting and referring workers who can be employed by consumers in these programs, and a number of states have established public authorities to serve as employers of such home care workers; this has led to improved wages and job conditions for workers, and has served to further formalize the industry.¹⁰

While Congress aimed to exempt companions who "are not regular breadwinners or responsible for their families' support," the modern home care workforce consists predominantly of workers for whom home care is a primary vocation, and who rely on their earnings for their livelihood.¹¹

³ *Id.* at 2.

⁴ *Id.*

⁵ PHI, *Occupational Projections for Direct-Care Workers 2008-2018* (Feb. 2010), [http://directcareclearinghouse.org/download/PHI%20FactSheet1Update_singles%20\(2\).pdf](http://directcareclearinghouse.org/download/PHI%20FactSheet1Update_singles%20(2).pdf).

⁶ See, e.g., PHI, *Huge Growth Projected for Direct-Care Occupations, DOL Report Shows*, 3/1/12, available at <http://phinational.org/archives/huge-growth-projected-for-direct-care-occupations-dol-report-shows/>

⁷ University of California San Francisco, Center for California Health Workforce Studies, *An Aging U.S. Population and the Healthcare Workforce: Factors Affecting the Need for Geriatric Care Workers* (Feb. 2006), 30.

⁸ U.S. Census Bureau, "2008 Service Annual Survey Data for Healthcare and Social Assistance," http://www.census.gov/services/sas_data.html.

⁹ PHI, *Who Are Direct-Care Workers?*, 1-2.

¹⁰ Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390 (2008).

¹¹ One survey in New York City reported that 81 percent of home care workers served as the primary breadwinner for their family. Lenora Gilbert, "Home Care Workers: The

B. Working Conditions for Home Care Workers Today

While most home care workers are currently paid a dollar or two more than the federal minimum wage for hours that they work directly providing care,¹² their exclusion from the minimum wage means that employers are not required to pay them for all of their work hours, including work time spent traveling from one client's home to another.¹³ Nor are employers required to reimburse workers for gas or other transportation costs when they reduce workers' net pay to below the minimum wage.¹⁴ This failure to pay for travel time or reimburse travel costs suppresses workers' already low earnings and not infrequently drives their real hourly wages below the minimum wage.¹⁵

Also, exclusion from overtime protections means that when they work more than 40 hours a week, home care workers are not entitled to the time-and-half overtime pay that most other workers receive. Such long hours are grueling for workers, and may contribute to the higher than average incidence of work-related injuries among home care workers.¹⁶ But many workers are forced to seek longer hours

New York City Experience,” in *Encyclopedia of Occupational Safety and Health*, Vol. 3 (4th ed., International Labor Organization, 1998), http://books.google.com/books?id=nDhpLa1rl44C&pg=PT1055&lpg=PT1055&dq=home+care+workers+breadwinners&source=bl&ots=zKZiPSAzqY&sig=tHvo076GmvZjw2WxVtf5bfUWmi8&hl=en&ei=w6tcTPrQIIKB8gaMoaTVAg&sa=X&oi=book_result&ct=result&resnum=10&ved=0CEAQ6AEwCQ#v=onepage&q&f=false.

¹² In 2009, the national median hourly wages for home health aides and personal and home care aides in the “Home Health Services” industry were \$9.49 and \$8.55 respectively. Within the “Services for Elderly and Persons with Disabilities” industry group, the figures were \$9.36 for home health aides and \$9.78 for personal and home care aides. The weighted average for these groups of workers was \$9.34/\$9.35 an hour. “2009 BLS/OES Industry/Occupation Matrix Data,” prepared by PHI based on data available at http://www.bls.gov/oes/2009/may/naics4_621600.htm and http://www.bls.gov/oes/2009/may/naics5_624120.htm.

¹³ *Code of Federal Regulations* tit. 29, § 785.38 (2010).

¹⁴ *U.S. Code* 29 (2010), § 203(m).

¹⁵ See, for example, *Bayada Nurses Inc. v. Dep't of Labor & Industry*, 958 A.2d 1050 (Pa. Commw. 2008) (plaintiff home care workers netted less than the minimum wage once their travel time and travel costs were factored in).

¹⁶ Home care work is physically demanding and aides are vulnerable to workplace injuries, including back injury, infections and exposure to communicable disease. Home care workers experience a larger than average number of work-related injuries and illnesses. U.S. Department of Labor, Bureau of Labor Statistics, “Occupational Outlook Handbook, 2010-11 Edition,” <http://www.bls.gov/oco/ocos326.htm>. The rate of “days away from work” (work days missed due to on-the-job injuries) for nursing aides, orderlies and attendants was almost four times greater than the all-worker rate—449 per 10,000 full time workers as compared with 113 per 10,000 for all workers. U.S. Department of Labor, Bureau of Labor Statistics, *Press Release: Nonfatal Occupational*

nonetheless because industry wages are so low. The annual income for a home care worker employed for 40 hours per week at the 2009 median wage of \$9.34 an hour was just \$20,283¹⁷—far below a basic self-sufficiency income for a single adult, let alone someone supporting a family as many home care workers do.¹⁸

Not only do the low wages and long hours that the FLSA exclusion fuels harm this deserving workforce—they also undermine the quality of care for the consumers it serves. The poverty wages that typify the home care industry contribute to high employee turnover rates, which are “costly, threaten quality of care, and can increase workloads and lower morale among remaining staffers.”¹⁹ Long hours can also result in worse care for patients, as caregivers working 60-hour or 70-hour weeks face fatigue and stress in performing what is a demanding job under any circumstances.

Studies have shown turnover rates among home care workers of between 44 and 65 percent a year.²⁰ And a 2007 National Home Health Aide Survey found that 35 percent of home health aides intended to quit in the next year. The primary causes of high turnover rates are low wages, insufficient hours, and a lack of reimbursement for travel costs. High turnover imposes a significant financial burden to employers in the form of recruitment, retraining, and administrative costs.²¹ Additionally, because workers’ annual earnings are so low, many workers rely on public benefits programs – a huge financial burden on state budgets.²² Raising wages modestly could therefore result in an overall costs savings to Medicaid home care programs and state budgets.

Injuries and Illnesses Requiring Days Away From Work, 2008 (Nov. 24, 2009), http://www.bls.gov/news.release/archives/osh2_12042009.pdf. Injury rates for this occupation are higher than injury rates for construction laborers. *Ibid.*

¹⁷ See *supra* note 28.

¹⁸ Economic Policy Institute, “Basic Family Budget Calculator,” http://www.epi.org/content/budget_calculator/.

¹⁹ Linda Hiddemen Barondess, “Some Potential Solutions to High Direct-Care Staff Turnover Rates,” *Annals of Longterm Care* 15, issue 10 (Oct. 1, 2007), <http://www.annalsoflongtermcare.com/article/7860>.

²⁰ A survey of home care agency staff in Pennsylvania found a turnover rate of 44% (University of Pittsburgh (2007) *The State of the Homecare Industry in Pennsylvania*); a review of 13 state and 2 national studies of in-home care for persons with intellectual and developmental disabilities found an average turnover rate of 65% (Hewitt and Larson (2007); a study of agency-employed home care workers in Maine found a turnover rate of 46% (L. Morris (2009) “Quits and Job Changes Among Home Care Workers in Maine,” *The Gerontologist*, 49(5): 635-50).

²¹ Estimates show that the cost to employers of the turnover is \$1.3 to \$2 billion dollars annually. PHI, *The Cost of Frontline Turnover in Long-Term Care*, <http://www.directcareclearinghouse.org/download/TOCostReport.pdf>.

²² <http://phinational.org/policy/about-the-workforce/at-a-glance/>, showing 46% of home care workers live in households receiving public benefits.

Home care clients would also benefit from reduced turnover, increased stability and less burnout in the home care workforce, and the resulting improvement in quality of care.²³ Clients may also have an easier time finding workers if working conditions improve and more workers are attracted to and more likely to remain in the home care field.

II. Comments on Specific Provisions in the NPRM.

A. Revision to the definition of “companionship services” in § 552.6.

DOL is rightly concerned that the current regulations’ definition of companionship services allows for the exemption of workers who routinely perform general household work or provide medical care and who may also provide fellowship and protection as an incidental activity to the household work or medical care. Fed. Reg. at 81193. The new section 552.6 would clarify what duties may be considered exempt “companionship services,” what duties may be considered “incidental” to companionship services (and subject to a limitation that they make up a maximum 20 percent of the worker’s time), and would clarify that the exemption does not apply to medical care typically provided by personnel with specialized training.

The true duties of a companion—those that comprise the distinct components of fellowship (engaging the person in social, physical and mental activities) and protection (being present with the person in the home or outside the home to monitor the person’s safety and well-being) – should be the primary duties performed by the worker, as noted by the Department. Proposed section 552.6 (a) clearly denotes those primary duties.

1. Two-step assessment needed.

Section 552.6 (b) creates a potential point of confusion in the proposed regulations that should be corrected. The Department states at several points in the “Background” sections of the NPRM that the duties of a companion may include *occasional* incidental intimate personal care services, such as occasional assistance with dressing if something is spilled on the individual’s blouse, or assisting with removal of a sweater prior to taking a nap, or occasional grooming, such as cleansing a person’s hands or face following a meal, (Fed. Reg. at 81194). However, the text of the proposed regulations themselves appear to approve these duties as exempt even if they occurred as a regular part of the worker’s duties every week, as long as they did not exceed 20 percent of the worker’s time. 552.6(b). The regulation at 552.6(b)(7), for instance, permits “occasional bathing when exigent circumstances arise,” but the listed duties of toileting, dressing, and grooming do not specify in the regulation text that these are only permissible in exigent or unusual circumstances, despite language in the “Background” section that suggests the Department considers these duties permissible only when there is a spill, or an immediate exigent need. Without a clarification, the DOL’s statement that “the

²³Dawson, S. L. and Surpin, R., *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care*, Paraprofessional Healthcare Institute (PHI), January 2001

Department does not envision [these] task[s] as being a regular and recurring part of the companion's duties," (Fed. Reg. at 81194) will likely become permissible exempt activities.

We propose that the DOL amend its regulation at 552.6 (a) and (b) to require an initial assessment, at (a), as to whether the worker has been hired primarily to perform the duties of fellowship and protection, and whether she should be in fact primarily performing those duties. If not, then the subsequent listings of permissible exempt activities at (b) should not be considered.

If the worker is primarily hired to provide fellowship and protection and does in fact perform those duties as part of her regular job, then a second step is to review the listed services that DoL says *may* be included at (b) to determine whether they are performed *occasionally and incidental* to the provision of fellowship and protection, and not as a *regular* part of the duties performed.

Without this preliminary assessment, too many of the listed permissible duties could become a routine and regular part of a worker's job and would, when taken together, describe the work of a covered domestic worker whose "fellowship and protection is incidental to their employment as cooks... maids, housekeepers, nannies, nurses... home health aides, [and] personal care aides..." (Fed. Reg. at 81193). The lack of clarity in the approach to determining whether a worker is an exempt companion could result in further over-application of the exemption to domestic service workers and should be clarified to require the two-step assessment whenever an employer is claiming the exemption and whenever an exempt worker's duties change, as set forth above. This is because even with a 20 percent threshold limitation on the individual enumerated duties at (b), the worker's job would not primarily be that of someone hired to provide fellowship and protection, and should therefore not be considered exempt.

2. Twenty percent cap on incidental work is potentially difficult to administer as written.

Proposed section 552.6(b) lists possibly-permissible personal care services that are incidental to the fellowship and protection provided that, taken together, cannot exceed "20 percent of the total hours worked in the workweek." Fed. Reg. at 81193-81194; 81244. This cap is a good idea in theory, but as drafted in the proposed regulation would be ?difficult to implement.

Because many ?home care workers work for more than one older adult or person with a disability in a workweek, this cap is not very meaningful as written, as workers could perform exempt care for one individual, but non-exempt services and care for another in the same workweek. Under the current text, a worker with multiple clients would be in a position to know whether her total hours spent on the permissible incidental activities would take her above the 20 percent cap, but the individual clients would not be.

In addition to our proposed two-step process above, which would clarify much of the

potential problems associated with parsing the duties performed by the worker, we suggest that the Department modify the percentage cap on incidental activities across a workweek to one that prohibits more than 20 percent of the tasks a worker can perform per individual client per workweek.

3. Permissible exempt duties at 552.6 (b) should not include those that require specialized training, including training to avoid injury.

552.6 (b)(3) permits occasional toileting, assisting with transfers, mobility, positioning and changing diapers, among other related duties. 552.6 (b)(4) lists occasional driving, which can also by necessity include transfers and positioning duties to get the individual in and out of a car. Several of these duties require physical strength and specialized training to ensure safety for the individual and the worker, depending on the abilities of the individual needing care and services. It is noteworthy that the proposed new text of 552.6 (d) specifically lists “turning and repositioning” as an example of “medical care” that typically requires specialized training. These are the very duties listed as permissible if performed as part of occasional toileting and bathing in (c).

To avoid permitting tasks that have the potential for physical injury to the worker, a common problem in this job as noted above, we propose that the Department *not* list as a permissible exempt activity: toileting, bathing, accompanying an individual to an appointment or social event, or any driving that requires positioning or mobility transfer assistance.

B. Amendment to the rules regarding third-party employment.

We agree with the Department’s view that the sophistication and standardization of this growth industry that has taken place over the last three decades has created a skilled and qualified workforce. Home care workers employed by third party agencies should have the same minimum wage and overtime protections that other workers enjoy.

C. Amendment to recordkeeping requirements for live-in domestic workers.

We support the revised recordkeeping rules for employers of live-in domestic workers that would require the employer to keep a record of the actual hours worked by the worker. Under existing rules, the employer of a live-in domestic employer is exempt from normal FLSA record-keeping regulations. And, the rules allow an employer and employee to enter into an agreement that excludes the amount of sleeping time, meal time, and off-duty time from pay, and allows the employer to use this agreement in place of actual records. These lax recordkeeping rules have resulted in chronic underpayments for time worked for live-in workers, who are isolated and can face fear of retaliation if they complain. The modest revision to the existing rules would help workers in the event they do make a claim for unpaid wages, and are not burdensome to the employer.

We are concerned, however, about potential burdens being imposed on seniors and individuals with disability in some consumer-directed programs. Moreover, we

recommend that the Department consider potential implications of the proposed rule on the ability of individuals to hire family members.

Implementation

Finally, while supportive of the proposed regulations we are concerned about potential impacts on seniors and individuals with disabilities relying on Medicaid home and community-based services and supports. In particular, states continue to face significant budget shortfalls. Within this economic environment additional costs could lead to cutbacks in optional services such as Medicaid home and community-based services. Such cutbacks could adversely impact individuals and family caregivers as well as lead to placements in nursing homes and other institutions. Therefore, we urge that implementation of the proposed rule be done in close collaboration with CMS and the Department of Justice. Effective reporting and monitoring should occur to ensure that implementation does not result in *Olmstead* violations or negative impacts on beneficiaries.

Thank you for the opportunity to comment on the proposed regulations.

Respectfully Yours,

Joe Caldwell
Director of Long-Term Services and Supports Policy
National Council on Aging