

March 12, 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 Center on Wisconsin Strategy (COWS) 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). COWS is a research and policy center that supports high-road economic development premised upon shared prosperity, environmental sustainability, and capable democratic government. It has worked with labor, education, community, and business partners to improve access to living-wage employment and career advancement for low-wage workers, like those in home care, in the state and beyond. COWS produced a policy brief for the Direct Care Alliance specifically related to the livelihoods of home care workers, the desperate need to improve these jobs for workers and clients alike, and proposed alternative pathways to ensure that those who provide care and those who receive it can live their lives with dignity.¹

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 three primary areas. First, we describe an industry that has

¹ Dresser, Laura and Adrienne Pagac, *Direct Care Alliance Policy Brief No. 5: Better Jobs for In-Home Direct Care Workers*, Center on Wisconsin Strategy, October 2010, http://www.directcarealliance.org/_data/global/images/PolicyBrief5_InHome.pdf.

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.

Third, we address common misperceptions and claims by certain segments of the industry regarding the expected impacts of transitioning to minimum wage and overtime protections for the workers based on our experiences. The cost of transitioning to coverage for these workers is likely to be moderate and manageable for this already cost-effective segment of the long-term care system, because high overtime hours are rare, concentrated in only about 9 percent of home care cases nationwide. In addition, 21 states and the District of Columbia already provide some coverage of home care workers under state minimum wage and overtime laws, and we have workers in those states. This shows the budgetary feasibility of coverage, and reduces the number of states, employers and workers who will be affected by an expansion of federal coverage.

If the current scope of the companionship exemption remains intact and the millions of workers who come into our homes every day to care for and provide services for elderly and disabled individuals remain outside the basic wage protections of the FLSA, we will continue to face high turnover and difficulty recruiting and retaining workers for these critical services and care. This will exacerbate an impending crisis in care for this population and could lead to more worker shortages and fewer options for those who wish to remain in their homes.

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”.²

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, though that work remains under the companionship exemption as the result of the overly broad DOL regulations.

Far from the informal elder-sitting of which Congress spoke, the 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 2000.³ Home care industry profits have grown at an average rate of 9 percent per year from 2001-2009; total industry profit topped 84.1 billion in 2009.⁴ Senior care and home health care franchises’ corporate revenues increased by 11.6 percent per year from 2007-2009.⁵

And its workforce is projected to grow by nearly 50 percent again by 2018.⁶ 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 1.3 million jobs by 2020.⁷

Approximately 70 percent of home care workers today are employed by home care agencies.⁸ For-profit corporations dominate in the industry.⁹ 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 consists of workers who are employed directly by individual consumers.¹⁰ 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

² 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>.

³ U.S. Census Bureau, “2008 Service Annual Survey Data”.

⁴ *Id.* at 2.

⁵ *Id.*

⁶ 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).

⁷ 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/>

⁸ 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.

⁹ U.S. Census Bureau, “2008 Service Annual Survey Data for Healthcare and Social Assistance,” http://www.census.gov/services/sas_data.html.

¹⁰ PHI, *Who Are Direct-Care Workers?*, 1-2.

job conditions for workers, and has served to further formalize the industry.¹¹

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.¹²

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,¹³ 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.¹⁴ Nor are employers required to reimburse workers for gas or other transportation costs when they reduce workers’ net pay to below the minimum wage.¹⁵ 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.¹⁶

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-a-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.¹⁷ But many workers are

¹¹ Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390 (2008).

¹² 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 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=tHvo076GmvJzw2WxVtf5bfUWmi8&hl=en&ei=w6tcTPrQIIKB8gaMoaTVAg&sa=X&oi=book_result&ct=result&resnum=10&ved=0CEAQ6AEwCQ#v=onepage&q&f=false.

¹³ 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.

¹⁴ *Code of Federal Regulations* tit. 29, § 785.38 (2010).

¹⁵ *U.S. Code* 29 (2010), § 203(m).

¹⁶ 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).

¹⁷ 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 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.*

forced to seek them 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 \$20,283¹⁸—far below a basic self-sufficiency income for a single adult, let alone someone supporting a family as many home care workers do.¹⁹

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.”²⁰ 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.²¹ 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.²² Additionally, because workers’ annual earnings are so low, many workers rely on public benefits programs – a huge financial burden on state budgets.²³ Raising wages modestly could therefore result in an overall costs savings to Medicaid home care programs and state budgets.

Home care clients would benefit as well from reduced turnover, increased stability and less burnout in the home care workforce, and the resulting improvement in quality of care.²⁴ 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.

¹⁸ See *supra* note 28.

¹⁹ Economic Policy Institute, “Basic Family Budget Calculator,” http://www.epi.org/content/budget_calculator/.

²⁰ 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>.

²¹ 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).

²² 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>.

²³ <http://phinational.org/policy/about-the-workforce/at-a-glance/>, showing 46% of home care workers live in households receiving public benefits.

²⁴ Dawson, S. L. and Surpin, R., *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care*, Paraprofessional Healthcare Institute (PHI), January 2001.

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.

However, 552.6 (b) creates a potential point of confusion in the proposed regulations that should be corrected. While 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, 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), 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 Department does not envision [these] task[s] as being a regular and recurring part of the companion's duties," (Fed. Reg. at 81194) will in fact 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 is, 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 incidentally* 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 determine 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 claims 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 very difficult to implement.

Because many modern 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 employee is exempt from normal FLSA recordkeeping 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.

III. Misperceptions Regarding the Companionship Rules Change.

A. Employers and programs already have experience in those states with minimum wage and overtime protections, and the impacts have been manageable.

The exemption's impact is limited by the fact that a number of states already cover home care workers under their state minimum wage and overtime laws. Fifteen states extend state minimum wage and overtime protections to some or all home care workers (including Wisconsin).²⁵ This group includes states with some of the nation's largest home care programs, including New York, Illinois and Pennsylvania.²⁶ And in five more states and the District of Columbia, workers enjoy minimum wage protection, but not overtime.²⁷ As discussed below, these states' experiences illustrate the economic feasibility of providing basic protections to home care

²⁵ See *Which States Provide Coverage to Home Care Workers*, available at http://nelp.3cdn.net/6e193991edf8bd0df9_o6m6i28s2.pdf. (*State Coverage Overview*).

²⁶ PHI, "State-by-State Projected Demand for New Direct-Care Workers, 2006-16," <http://directcareclearinghouse.org/download/State%20by%20State%20DCW%20Demand%20Projections%202006-16%20FINAL%20rev.pdf>.

²⁷ *State Coverage Overview*.

workers. And, in these states, extension of the FLSA's coverage to home care workers will result in no or minimal change.

In those states that do not already have minimum wage and overtime protections, the costs of transitioning to coverage should be minimal and can be contained by more evenly balancing work among workers. Many concerns over the costs of companionship reform have centered on the impact of overtime costs in high hours cases. But 24-hour and live-in cases are rare, as mentioned above. Only about 9 percent of home care workers nationally report working more than 40 hours a week, and most of those work only slightly more than 40 hours.²⁸ In fact, most workers are employed part-time, and many would rather work full-time. Where workers are currently working more than 40 hours a week on multiple short-hours cases, employers can cap workweeks at 40 hours and divide cases more evenly among workers, limiting the amount of overtime paid to workers and simultaneously creating more full-time employment.

There is no data showing that states with minimum wage and overtime protections for home care workers have higher rates of institutionalization, suggesting that the remaining states should be similarly capable of making this shift without major disruptions to their long-term care systems.

COWS supports the proposed regulations, and also stands with allies who seek to ensure that publicly-funded programs implement any changes in a manner that does not trample the rights of individuals to receive supportive services in their communities.

Very truly yours,

A handwritten signature in black ink that reads "Laura Dresser". The signature is written in a cursive, flowing style.

Laura Dresser
Associate Director

²⁸ PHI analysis of the U.S. Census Bureau, Current Population Survey (CPS), 2010 Annual Social and Economic (ASEC) Supplement.