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ENSURING REGULATIONS PROTECT ACCESS TO AFFORDABLE AND QUALITY COMPANION CARE

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

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ENSURING REGULATIONS PROTECT ACCESS TO AFFORDABLE AND QUALITY COMPANION CARE

Tuesday, March 20, 2012
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:02 a.m., in Room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Goodlatte, Woolsey, and Kucinich.

Staff present: Katherine Bathgate, Press Assistant/New Media Coordinator; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Ryan Kearney, Legislative Assistant; Donald McIntosh, Professional Staff Member; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Joseph Wheeler, Professional Staff Member; Kate Ahlgren, Minority Investigative Counsel; Aaron Albright, Minority Communications Director for Labor; Tylease Alli, Minority Clerk; John D'Elia, Minority Staff Assistant; Celine McNicholas, Minority Labor Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Julie Peller, Minority Deputy Staff Director; Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director; and Michael Zola, Minority Senior Counsel.

Chairman WALBERG. Good morning. It is time to get started here, and I would like to welcome our guests and thank our witnesses for being with us today.

It is good to see you again, Deputy Administrator Leppink. We appreciate your participation in this hearing and the department's willingness to extend the comment period through tomorrow to accommodate our desire to submit relevant materials from this hearing into the rulemaking record.

Before we begin today I would like to take a moment to express my sadness over the loss of one of our colleagues. For more than 20 years Congressman Donald Payne was a passionate and tireless advocate on behalf of the people of New Jersey's 10th congressional

district. His presence on this committee, and in this body, and certainly in this—his district will be missed in Congress and on this committee, as well.

I extend my heartfelt condolences to his family, his friends, his staff, as they mourn his passing and reflect on the achievements of his distinguished public service record. I would ask that we all honor his memory by observing a moment of silence at this time.

Now we move to the issue before the subcommittee this morning. As they say, life goes on and challenges that are involved still continue, and so does our purpose to continue today in honor of our colleague, but also in honor of the service that we are called to perform.

Today we will examine the Department of Labor's effort to narrow the long-standing companionship services exemption under the Fair Labor Standards Act. As we all know, the FLSA continues to serve as the foundation of federal wage and hour standards.

Today's discussion is not about whether we stand by this important law more than 70 years after its enactment. The question before the subcommittee is whether the rules and regulations intended to enforce the law adequately reflect the policy decisions made by the people's elected representatives.

Nearly 4 decades ago Congress amended the FLSA to extend its overtime and minimum wage requirements to domestic workers. However, policymakers recognized then the importance of ensuring seniors and individuals with disabilities have access to affordable in-home care. This support can often help a senior spend more years in the comfort of their own home or allow an individual with a disability to enjoy the independence afforded a life outside institutional care.

Due to the vital role of in-home care in the lives of these individuals, in 1974 Congress created an exemption under FLSA for companion care workers. Through public rulemaking the department has since held the exemption extends to all companion care workers regardless of how they are employed, and this reasonable regulatory approach was unanimously upheld by the U.S. Supreme Court less than 5 years ago.

Unfortunately, access to this critical support is threatened by a regulatory initiative introduced last December. Under the Labor Department's proposal only employees who follow a rigid set of arbitrary standards would qualify for an exemption. The proposed regulation would also eliminate the existing exemption for companion care workers employed by a third party as well as exemption for workers jointly employed by a third party and the individual receiving the care.

The department's proposed regulation essentially overturns decades of companionship care policy. These changes run contrary to what Congress intended when it first established this important exemption nearly 4 decades ago. While I recognize the delivery of services has evolved over the years, the need to maintain access to affordable in-home care has not.

As a result of this dramatic regulatory shift higher costs would inevitably ensue. In fact, the Labor Department estimates this proposal would increase the cost of in-home companion care from any-

where between $420 million to upwards of $2.3 billion over the first 10 years alone.

And there is a great concern that this estimate is just the tip of the iceberg. A survey of companion care franchise businesses determined the department understated the extent of overtime work performed by employees and based a number of its underlying assumptions on incomplete data. The report finds, and I quote—"The Department of Labor has significantly understated some of the economic impacts that will result from the proposed changes in regulations."

Without objection, I would like to insert this survey conducted on behalf of the International Franchise Association Educational Foundation into the record. And I hear no objection.

[The survey, "Economic Impact of Eliminating the FLSA Exemption for Companionship Services," dated Feb. 21, 2012, may be accessed at the following Internet address:]

http://franchise.org/uploadedFiles/Franchise_Industry/Resources/Education_Foundation/IHSGlobalInsightCompanionCareReport.pdf

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Chairman WALBERG. Understanding the true cost of a regulatory proposal that already carries a price tag of up to $2.3 billion is startling. Some have said the costs will simply be transferred from the employer to the worker and have no impact on the demand for services.

Such a flawed understanding of basic economics ignores the reality that these costs will ultimately be paid by the consumer, whether senior citizen, taxpayer, family member, or individual with a disability. A cost rise, those who receive in-home care will be forced—excuse me—as costs rise, those who receive in-home care will be forced to confront difficult choices, such as accepting a diminished quality of care or relying upon institutional services outside the home.

I have had an opportunity to hear the concerns of providers who reside in my congressional district as well as others located across the country. In fact, Michigan is already dealing with the consequences of these changes and I look forward to having one of my constituents give the committee a firsthand account of how the people of my home state are faring under this policy.

The act of making responsible public policy often involves finding a balance between competing interests. Current policies that govern delivery of in-home companion care have served our nation well for nearly 40 years. The administration has a responsibility to provide a clear and compelling reason why that important balance must now be upset and a greater burden must be placed on some of our most vulnerable citizens.

With that, I will now recognize the senior Democrat member of the subcommittee, Ms. Woolsey, from California, for her opening remarks?

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

Good morning. I would like to welcome our guests and thank our witnesses for being with us today. It is good to see you again, Deputy Administrator Leppink. We

appreciate your participation in this hearing and the Department's willingness to extend the comment period through tomorrow to accommodate our desire to submit relevant materials from the hearing into the rulemaking record.

Before we begin, I would like to take a moment to express my sadness over the loss of one of our colleagues. For more than twenty years, Donald Payne was a passionate and tireless advocate on behalf of the people of New Jersey's 10th congressional district. His presence will be missed in Congress and on the committee as well. I extend my heartfelt condolences to his family, friends, and staff as they mourn his passing and reflect on the achievements of a distinguished public servant. I would ask that we all honor his memory by observing a moment of silence.

[Moment of silence.]

Thank you. Now, we move to the issue before the subcommittee this morning.

Today, we will examine the Department of Labor's effort to narrow the longstanding companionship services exemption under the Fair Labor Standards Act. As we all know, the FLSA continues to serve as the foundation of federal wage and hour standards. Today's discussion is not about whether we stand by this important law more than 70 years after its enactment. The question before the subcommittee is whether the rules and regulations intended to enforce the law adequately reflect the policy decisions made by the people's elected representatives.

Nearly four decades ago, Congress amended the FLSA to extend its overtime and minimum wage requirements to domestic workers. However, policymakers recognized then the importance of ensuring seniors and individuals with disabilities have access to affordable in-home care. This support can often help a senior spend more years in the comfort of their own home, or allow an individual with a disability to enjoy the independence afforded a life outside institutional care.

Due to the vital role of in-home care in the lives of these individuals, in 1974 Congress created an exemption under FLSA for companion care workers. Through public rulemaking, the department has since held the exemption extends to all companion care workers, regardless of how they are employed, and this reasonable regulatory approach was unanimously upheld by the U.S. Supreme Court less than five years ago.

Unfortunately, access to this critical support is threatened by a regulatory initiative introduced last December. Under the Labor Department's proposal, only employees who follow a rigid set of arbitrary standards would qualify for an exemption. The proposed regulation would also eliminate the existing exemption for companion care workers employed by a third-party, as well as the exemption for workers jointly employed by a third-party and the individual receiving care.

The department's proposed regulation essentially overturns decades of companionship care policy. These changes run contrary to what Congress intended when it first established this important exemption nearly four decades ago. While I recognize the delivery of services has evolved over the years, the need to maintain access to affordable in-home care has not.

As a result of this dramatic regulatory shift, higher costs would inevitably ensue. In fact, the Labor Department estimates this proposal would increase the cost of in-home companion care from anywhere between $420 million to upwards of $2.3 billion, over the first 10 years alone.

And there is great concern that this estimate is just the tip of the iceberg. A survey of companion care franchise businesses determined the department understated the extent of overtime work performed by employees and based a number of its underlying assumptions on incomplete data. The report finds, "The Department of Labor has significantly understated some of the economic impacts that will result from the proposed changes in regulations."

Without objection, I would like to insert this survey conducted on behalf of the International Franchise Association Educational Foundation into the record.

Understating the true cost of a regulatory proposal that already carries a price tag of up to $2.3 billion is startling. Some have said the costs will simply be "transferred" from the employer to the worker and have no impact on the demand for services. Such a flawed understanding of basic economics ignores the reality that these costs will ultimately be paid by the consumer, whether a senior citizen, taxpayer, family member, or individual with a disability. As costs rise, those who receive in-home care will be forced to confront difficult choices, such as accepting a diminished quality of care or relying upon institutional services outside the home.

I have had an opportunity to hear the concerns of providers who reside in my congressional district, as well as others located across the country. In fact, Michigan is already dealing with the consequences of these changes, and I look forward to having one of my constituents give the committee a firsthand account of how the people of my home state are faring under this policy.

The act of making responsible public policy often involves finding a balance between competing interests. Current policies that govern the delivery of in-home companion care have served our nation well for nearly forty years. The administration has a responsibility to provide a clear and compelling reason why that important balance must now be upset and a greater burden must be placed on some of our most vulnerable citizens.

With that, I will now recognize the senior Democrat member of the subcommittee, Ms. Woolsey, for her opening remarks.

Ms. WOOLSEY. Well, Mr. Chairman, with the passing of Donald Payne I have personally lost a man that I loved and respected, a friend for life and a mentor. When I came to Congress I couldn't have asked for a better mentor—a public schoolteacher from New Jersey, someone kind and smart to help me be the best member of Congress I could be.

I served on Congressman Payne's Africa Subcommittee; he served on my Workforce Protections Subcommittee. On both panels I benefitted from his wisdom, his advice, and his expertise and experience.

This is a man who knew public service and knew what it was all about. He was, as he described himself, a well—a mild-mannered man, but he was also tenacious and he was dedicated.

No one has worked harder to bring peace, democracy, and human rights to Africa. He almost gave his life for the cause a few years ago when his plane was shot by rebels as he prepared to come home after a Somalia mission that the State Department had warned him against—in fact, they told him not to go.

As change continues, Mr. Chairman, in our world and in our own country I hope we will all remember the role that Donald Payne played in fearlessly protecting workers' rights and making education accessible and affordable for all. A true friend of working families and children, his death leaves an indescribable void.

Donald Payne had a huge heart and a keen mind. I will miss both.

And too, Mr. Chairman, will the nation's nearly 2 million home care workers, the overwhelming majority of whom are women and minorities who are currently excluded from federal minimum wage and overtime protections under the Fair Labor Standards Act. Home care workers help patients live in their homes and assist them with eating, dressing, bathing, preparing meals, medication management, light travel, and other services that are absolutely necessary to live independently. They are a productive workforce for a booming, profitable industry and deserve the basic minimum wage and overtime protections of the FLSA.

The modern home care workforce performs a wide range of functions far exceeding the fellowship and protection services that Congress envisioned when this exemption was first created. The home care industry, on the other hand, makes profits of 30 to 40 percent in a $70 billion-a-year industry. However, the median annual wage for home care workers is under $20,000 a year, which has led to high turnover rates and increased employer costs that also affect the quality of care the client receives.

To address this issue, the Department of Labor issued a proposed rule to extend minimum wage and overtime protections under the FLSA, providing basic wage and hour protections to a growing sec-

tor of the workforce and would put more money in the pockets of low-wage workers, which would in turn spur economic growth. This proposal discourages excessive overtime, which often leads to workplace injuries, illnesses, and fatigue.

It would also likely result in a reduced reliance on public benefits because 40 percent of the workers affected by the proposed rule rely on programs like Medicaid and Food Stamps so that in reality the taxpayers make up the difference so the business owners can profit. Think about that: pay low, taxpayers make up the difference, businesses profit.

Let's be clear: Nothing in this proposal requires an increase in the cost of providing home care services. What this proposal requires is that the individuals providing care be compensated fairly.

I know that there are some who say that if we pay home health care workers a decent wage the elderly and disabled will not be able to afford in-home care. However, the issue threatening affordable quality home care is not paying minimum wage to home health workers providing care; it is promoting a business model that allows for the generation of $70 billion in annual profit on the backs of its workers, as many as 50 percent of whom rely on some form of public assistance to make ends meet.

DOL analyzed the impact of this proposal on Medicare and Medicaid and found that it would have no direct effect on federal spending. Twenty-one states already provide some coverage under state minimum wage and overtime laws. These states demonstrate that it is possible to extend these critical protections in an economically responsible manner without disastrous consequences.

In fact, Mr. Chairman, as you just said, your home state of Michigan already has minimum wage and overtime coverage for home care workers and has not—well, you didn't say this. You said they are not covered; I am saying not—have not seen an increase in the cost of these services nor any widespread unwanted institutionalization of elderly or disabled individuals.

I am certain that by convening this hearing we are not suggesting that workers in your state be stripped of their current protection under Michigan law, so I hope that we can look forward to learning from the positive Michigan experience and hearing from today's witnesses. Thank you, Mr. Chairman.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn C. Woolsey, Ranking Member, Subcommittee on Workforce Protections

Mr. Chairman, the nation's nearly 2 million home care workers, the overwhelming majority of whom are women and minorities, are currently excluded from federal minimum wage and overtime protections under the Fair Labor Standards Act (FLSA).

Home care workers help patients live in their homes and assist them with eating, dressing, bathing, preparing meals, medication management, light travel and other services. They are a productive workforce for a booming, profitable industry and deserve the basic minimum wage and overtime protections of the FLSA.

The modern home care workforce performs a wide range of functions far exceeding the fellowship and protection services that Congress envisioned when this exemption was first created.

The home care industry on the other hand makes profits of 30 to 40 percent in a $70 billion a year industry. However, the median annual wage for home care workers is under $20,000 a year, which has led to high turnover rates and increased employers' costs that also affect the quality of care the client receives.

To address this issue, the Department of Labor issued a proposed rule to extend minimum wage and overtime protections under the FLSA, providing basic wage and hour protections to a growing sector of the workforce and would put more money in the pockets of low-wage workers which would spur economic growth.

This proposal discourages excessive overtime which often leads to workplace injuries, illnesses and fatigue. It would also likely result in a reduced reliance on public benefits—-40 percent of the workers affected by the proposed rule rely on programs like Medicaid and food stamps so in reality, the taxpayers make up the difference so the business owners can profit.

Let's be clear, nothing in this proposal requires an increase in the cost of providing home care services. What this proposal requires is that the individuals providing care be compensated fairly. I know that there are some who say that if we pay home health care workers a decent wage, the elderly and disabled will not be able to afford in-home care. However, the issue threatening affordable, quality home care is not paying minimum wage to home health workers providing care, it is promoting a business model that allows for the generation of billions of dollars in profit on the backs of its workers, as many as 40 percent of whom rely on some form of public assistance to make ends meet.

DOL analyzed the impact of this proposal on Medicare and Medicaid and found that it would not have a direct effect on federal spending. 21 states already provide some coverage under state minimum wage and overtime laws. These states demonstrate that it is possible to extend these critical protections in an economically responsible manner without disastrous consequence.

In fact, Mr. Chairman, your home state of Michigan already has minimum wage and overtime coverage for home care workers and has not seen an increase in the cost of these services nor has there been widespread unwanted institutionalization of elderly or disabled individuals. I'm certain that by convening this hearing, you are not suggesting that workers in your state be stripped of their current protections under Michigan State law, so I look forward to learning from the positive Michigan experience and hearing from today's witnesses.

Closing

I regret that the Committee chose to hold a hearing today questioning whether an industry that generates billions of dollars in profit each year can afford to provide basic wage and hour protections to its workforce. These workers enable our loved ones to remain in their homes and preserve their dignity and quality of life. These workers deserve basic minimum wage and overtime protections so that they can provide for their families with the same dignity and self-sufficiency they provide their clients.

As Senator Kennedy said when discussing FLSA protections, "no one who works for a living should have to live in poverty." Today we heard compelling testimony from Ms. Ruckelshaus clearly demonstrating the need for the Department of Labor's proposed regulation. All workers deserve a fair day's pay for a fair day's work. The home care workforce is no different. These workers, primarily women and minorities, do valuable work and deserve just compensation. It is essential that we extend FLSA protections to home health care workers.

I would ask unanimous consent to submit for the record, a letter signed by 86 organizations in support of DOL's proposed rule and I'd also ask unanimous consent to submit a statement for the record from the American Federation of State, County and Municipal Employees. Thank you.

Chairman WALBERG. I thank the gentlelady for clarifying, and we will have opportunity to hear who is right. [Laughter.]

Ms. WOOLSEY. Well, you are right; I am left. [Laughter.]

Chairman WALBERG. That is true. That is true. And very quick for you to remember that.

Well, that is why we have these hearings, and it is a personal thing to me, as well, having a mother who was able to stay on our farm for 3 additional years because of companionship care that was given. And thankfully my wife and I were—I should say my wife, especially, was capable of organizing that, but not all are, and so this is a key issue.

My mother is 96 and now in a nursing home, and many more tax dollars are being used—it could be argued much of which she and

my father put in the system for many systems for helping to pay for her. But it was our desire, certainly, to keep her at home as long as possible, and we are appreciative of companions who assisted in doing that.

Pursuant to committee rule 7(C) all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow questions for the record, statements, and extraneous material referenced during the hearing to be submitted for the official hearing record.

We have two distinguished panels of witnesses today, and I would like to begin by introducing the first solitary panel: Deputy Administrator of Wage and Hour Division, Nancy Leppink, who is not unfamiliar to this committee, and we appreciate you being here again today in front of our committee. You don't need any instruction on the lighting system, and we certainly want to hear your testimony and then have opportunity for myself and Ms. Woolsey to question you, as well as any other committee members that may show up.

One of your colleagues, Steven Chu, is just down the hallway here testifying before a committee that a number of us sit on as well. But we are intensely interested in what you have to say, so thank you for joining us and you may begin your testimony.

STATEMENT OF NANCY J. LEPPINK, DEPUTY ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR

Ms. LEPPINK. Thank you, Chairman.

Good morning, Chairman Walberg, Ranking Member Woolsey, and members of the subcommittee. Thank you for the invitation to testify today about the department's notice of proposed rulemaking on the application of the Fair Labor Standards Act to domestic service.

Under the department's current regulation federal minimum wage and overtime protections are denied to many of the almost 2 million in-home care workers, 92 percent of whom are women, 30 percent of whom are African American, and nearly 12 percent Hispanic. This fact received significant attention a few years ago when Evelyn Coke challenged the department's regulation all the way to the Supreme Court.

Ms. Coke was the sole wage-earner and single mother of five. She had been an in-home care worker for over 20 years. She had bathed, fed, and cared for the elderly clients of her employer, working up to 70 hours per week with no overtime pay. The Supreme Court ruled against her, concluding that Congress delegated to the department the authority to define companionship services and to determine whether the companionship service exemption could be claimed by her third party employer.

Given the changes and the growth in the in-home care service industry over the last 36 years since the department issued its rules, the persistently low wages of in-home care workers, and the critical importance of the work that they do, the department believes it appropriate to consider, under its current regulations, whether they are out of date and whether the application of the companionship services exemption is overly broad.

The importance of this rulemaking is reflected by the thousands of comments we have received from workers, from employers, from individuals and families receiving in-home care services, from members of Congress, and many others.

In 1974 Congress extended the act's minimum wage and overtime protections to domestic service workers employed by private households. It was Congress' intent that by extending the FLSA's economic protections to these workers those protections would raise not only their wages but would also raise the status of the work they performed.

These amendments carved out a limited exemption for casual babysitters and individuals providing companionship. At the time, providing companionship to the elderly or infirm was commonly understood to be an avocation engaged in by family, friends, and neighbors, and the companions were not their family's breadwinners and, consequently, were not in need of the FLSA's protections.

Since the department issued its regulations the demand for in-home care services has grown significantly due to a number of factors, including the increase in our aging population, the rising cost of traditional institutional care, the desire of individuals and their families to receive needed care in their homes, and the availability of funding under Medicare and Medicaid. As the industry has grown, and has continued to grow even in these difficult economic times, the employment of in-home care workers has also increased.

This growth, however, has not translated into increased earnings for these workers. The earnings of employees working as home health and personal care aides remains among the lowest in the service industry. Further, demanding work coupled with low wages and irregular hours has resulted in high turnover, which means fewer experienced workers and a lack of continuity of care.

In contrast to the companions Congress had in mind in 1974, workers who now care for our family members are employed in well recognized occupations and are often the sole wage-earners supporting their families. In-home care employees engage in difficult physical and emotionally taxing work, yet nearly 40 percent rely on Food Stamps or other forms of public assistance.

Included among the ranks of these professionals were the in-home care workers who, at the announcement of the proposed rule, expressed their commitment to the work they perform but also expressed how difficult it is to support their families and how they would feel more economically secure with minimum wage and overtime protections—the security of a fair day's pay for a fair day's work.

We are seeking to accomplish two important objectives by proposing amendments to our current rules: first, to more clearly define the services that may be performed by an exempt companion. The proposed rules would limit an exempt companion's services to fellowship and protection. It would continue to allow for certain incidental intimate personal care, such as occasional dressing and grooming, and activities such as driving to appointments, provided those services are attendant to the provision of companionship and do not exceed 20 percent of the total hours worked in a work week.

The proposal would make clear that companionship services do not include medically related duties for which training is typically required. The proposed changes would ensure that companionship services only applies to those workers who are truly providing companionship.

The proposed rules would also limit the exemption to companions employed by individuals or households using the companionship services—using the companionship services. Third party employers, such as in-home care service companies or staffing agencies, would no longer be permitted to claim the companionship services exemption.

Protecting more in-home care service workers under the FLSA's minimum wage and overtime provision would align the companionship services exemption—beg your pardon to finish—exemption with its original statutory purpose and would be an important step in ensuring that in-home care service industry attract and retains qualified workers. Evelyn Coke did not live to see the publication of this proposed rule, but it is with her and other hardworking in-home care service workers in mind the department is proposing these changes to ensure the FLSA is implemented as intended.

I appreciate the opportunity to appear before this committee today. I value your input and the input of thousands—the thousands who have submitted comments, and when the comment period is closed we will carefully consider the comments that have been submitted, and I am glad to respond to any questions that you, Chairman, or the members of the committee have.

[The statement of Ms. Leppink follows:]

TESTIMONY OF
NANCY J. LEPPINK, DEPUTY ADMINISTRATOR
WAGE AND HOUR DIVISION
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

March 20, 2012

Good morning Chairman Walberg, Ranking Member Woolsey, and Members of the Subcommittee. Thank you for the invitation to testify at this hearing about the Department's Notice of Proposed Rulemaking ("proposed rule") on the Application of the Fair Labor Standards Act (FLSA) to Domestic Service, a critical update to the FLSA's regulations that would amend and clarify the application of the companionship services exemption to those workers who provide in-home care services for the elderly and infirm.

The fact that the FLSA's minimum wage and overtime protections do not currently apply to many of our nation's almost 2 million in-home care workers – of whom 92 percent are women, nearly 30 percent are African American, and 12 percent are Hispanic – received significant attention a few years ago when one in-home care worker, Evelyn Coke, challenged the Department's current regulations and took her case all the way to the Supreme Court. A single mother of five, she had been an in-home care worker for over 20 years. She bathed, fed, and otherwise cared for the elderly and infirm, working up to 70 hours per week with no overtime pay. The Supreme Court ruled against her, concluding that Congress delegated to the Department the authority to define "domestic service" and "companionship services" and fill-in other statutory gaps, and that the Department's definitions and interpretations promulgated

through notice-and-comment rulemaking are entitled to controlling deference. Given the extensive changes in the home care industry in the 36 years since issuance of the current rules, and the low earnings of these care-givers and the importance of their work, the Department believes it appropriate to consider whether the regulations are out of date and the scope of the exemption too broad.[1] I believe that the importance of this rulemaking is reflected in the thousands of comments we have already received from workers, employers, the individuals they serve, members of Congress, and many others. As you know, the Department initially extended the public comment period until March 12, and then again until March 21, and we hope to benefit from a wide range of views on the proposal, including those from this Subcommittee and from other interested members of Congress.

Background

Since it was passed in 1938, the FLSA has established minimum wage, overtime compensation, recordkeeping, and child labor standards. Congress recognized the need for these minimum economic protections to ensure that workers are fairly compensated for their labor, especially when working long hours for their employer. Congress also knew that the overtime compensation requirements would create the incentive for employers to spread available employment opportunities by encouraging employers to hire more employees instead of working a few employees long hours. For almost 40 years after its passage, Congress from time to time

[1] The proposed rule is expected to impact home health aides and personal care aides, which are employed in the home health care services industry (NAICS code 6216) and services for elderly and persons with disabilities (NAICS code 62412). *See* 76 Fed. Reg. 81208 and 81211. For the purposes of this testimony, the Department will refer to this collectively as the "home care" industry.

expanded the scope of the FLSA's coverage until the vast majority of workers employed outside of the household received its protections.

It was not until 1974, however, that Congress extended the economic protections of the FLSA to "domestic service" workers who were not previously covered – those workers employed by families, households or small businesses to perform services of a household nature in and about private homes, such as cooks, butlers, valets, maids, housekeepers, janitors, chauffeurs, and gardeners.[2] Congressional committee reports describe the reasons for extending the FLSA's protections to these domestic service employees as "so compelling and generally recognized as to make it hardly necessary to cite them."[3] These workers' wages were low, their work hours were highly irregular, and they received few non-wage benefits. It was Congress's expectation that, by extending these fundamental economic protections to workers in domestic service, they would raise not only their wages but would also help to raise the status of the work they performed.[4]

When extending the FLSA's economic protections to domestic service workers employed by private households, the 1974 Amendments carved out a limited exemption for casual babysitters and individuals "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves."[5] As

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[2] Prior to 1974, employees who had worked for a covered enterprise, but were assigned to work in someone's home were covered by the FLSA. 39 Fed. Reg. 35385 (October 1, 1974).
[3] Senate Report No. 93-690, 93rd Cong., 2d Sess., p. 18 (1974).
[4] House Report No. 93-913, 93rd Cong., 2d Sess., pp. 33-34 (1974).
[5] The 1974 Amendments also created a more limited exemption from the overtime pay requirement for domestic service employees who reside in the household where they work. *See* 29 U.S.C. 213(b)(21).

explained by the legislative history, although the FLSA's protections are now intended to apply to all employees whose vocation is domestic service, they are not meant to apply to those individuals who are essentially "elder sitters," who watch over elderly or infirm individuals in the same manner as a casual babysitter watches over children.[6] At the time, providing companionship to the elderly or infirm was understood to be an avocation and, unlike employment in other categories of domestic service, those who did such work were not thought to be the "breadwinners" responsible for their own families' support.[7]

The 1974 Amendments provided express rulemaking authority for the Department to "define and delimit" the companionship exemption. When it rejected Evelyn Coke's challenge to the Department's current regulations with respect to the applicability of the exemption to third party employers, the Supreme Court confirmed this statutory authority, noting that Congress "expressly instruct[ed] the [Department] to work out the details of those broad definitions" related to "domestic service employment."[8] In 1975, the Department issued implementing regulations defining "companionship services" as meaning "those services which provide fellowship, care, and protection for a person who because of advanced age or physical or mental infirmity cannot care for his or her own needs."[9] This 1975 regulatory definition further provided that the companionship services exemption was not limited to employment by a private household but also applied to employees of a third party employer or agency.[10]

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[6] *See* 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973).
[7] House Report No. 93-913, p. 36. *See also* 76 Fed. Reg. 81193.
[8] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167 (2007).
[9] *See* 29 C.F.R. 552.6.
[10] *See* 29 C.F.R. 552.106.

Since 1975, the Department has sought public comment on proposed changes to the regulations on several occasions. None of these efforts has led to a new final rule, other than a final rule that the Department published in 1995 to incorporate technical and other minor changes.[11] Most recently, in 2002, the Department withdrew a notice of proposed rulemaking it had issued in early 2001.[12] The 2001 proposal sought to revise the definition of "companionship services" to more closely mirror Congress's intent that the FLSA apply to all employees whose vocation is domestic service,[13] and sought comment on whether the exemption should continue to apply to those individuals employed by third party employers or agencies.

Since the Department issued the implementing regulations in 1975, the home care industry has undergone a dramatic transformation and expansion. The demand for in-home care has grown significantly due to a number of factors, including the increase in our aging population, the rising cost of traditional institutional care, and the availability of funding assistance for in-home care under Medicare and Medicaid. In response, the home care industry has grown significantly, and has continued to grow even in these difficult economic times. The number of Medicare-certified home health care agencies has increased (with some ups and downs) from 2,242 in 1975 to over 10,000 by the end of 2009.[14] The number of for-profit agencies not associated with a hospital, rehabilitation facility, or skilled nursing facility has increased more than any other category of agency from 47 in 1975 to 6,585 in 2009, and now represents the greatest percentage of

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[11] *See* U.S. Dep't of Labor, Wage & Hour Div., "Application of the Fair Labor Standards Act to Domestic Service," 60 FR 46766 (Sept. 8, 1995).
[12] *See* U.S. Dep't of Labor, Wage & Hour Div., "Application of the Fair Labor Standards Act to Domestic Service," 67 FR 16668 (withdrawal of NPRM published at 66 FR 5481).
[13] House Report No. 93-913, p. 36. *See also* 119 Cong. Record at S24801.
[14] *See* National Association of Home Care & Hospice, "Basic Statistics About Home Care" (2010 Update), found at http://www.nahc.org/facts/home.html.

Medicare-certified agencies.[15] Public health agencies, which constituted over one-half of the certified agencies in 1975, now represent only approximately 14 percent. As the industry has grown with demand, there has been a similar increase in the employment of home health aides and personal care aides to provide care in the private homes of individuals in need of assistance with basic daily living or health maintenance activities. The number of employees in these jobs tripled during the decade between 1988 and 1998, and doubled in the following decade so that, by 2010, there were 982,840 workers employed as home health aides and 686,030 personal care aides.[16]

The growth in the home care industry and in the number of workers has not translated into a growth in earnings for in-home care workers. The earnings of employees working as home health aides and as personal care aides remain among the lowest in the service industry. However, in contrast to the "companions" envisioned by Congress in 1974, today's in-home care workers are not neighbors performing "elder sitting" in the same manner that a babysitter watches over children. Instead, the workers caring for our family members and friends are employed, many on a full time basis, in a well-recognized health service occupation and are often solely responsible for their families' support.[17] In other words, they are engaged in precisely the type of work Congress had in mind when it expanded the FLSA to cover domestic service workers, with the reasons for expansion "so compelling and generally recognized as to make it hardly necessary to cite them."

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[15] *Id.*
[16] http://www.bls.gov/news.release/pdf/ocwage.pdf
[17] *See Understanding Direct Care Workers: A Snapshot of Two of America's Most Important Jobs*, Department of Health and Human Services (2011), found at http://aspe.hhs.gov/daltcp/reports/2011/CNAchart.htm . *See also* 76 Fed. Reg. at 81213.

Rulemaking Process

In light of the Department's judgment that it is appropriate to consider whether the scope of the current regulations is now too broad and may no longer be in harmony with Congressional intent, the Department first notified the public that it was considering updating the companionship regulations when it included the item in its Spring 2010 Regulatory Agenda, almost 2 years ago. During the development of the proposed rule, the Department sought input from stakeholders in a variety of forums. The proposed regulation was discussed during three web chats hosted by the Wage and Hour Division on its Regulatory Agenda. The Department also met with staff from the Centers for Medicare and Medicaid Services (CMS) to learn how any changes to the companionship services exemption might affect those programs.

The Department conducted a number of stakeholder meetings and calls from March 2010 through October 2011, to allow a full airing of issues related to the companionship services exemption. These sessions included a broad and comprehensive array of interested parties: academics studying this issue; advocates for the individuals who need home care services; for-profit companies providing companionship services; labor unions; associations representing companions; and representatives of the disability community. At all sessions, the Department encouraged the participants to provide written information that might help the Department to better understand the issues and better inform it of the options available.

President Obama publically announced the proposed rule on December 15, 2011, at which point the Department posted the Notice of Proposed Rulemaking online – complete with background information, economic impact analyses, and proposed regulatory text – so that the public could begin reviewing it 12 days ahead of its formal publication in the *Federal Register*. Since publication on December 27, 2011, the Department has received thousands of comments from stakeholders, including members of Congress. In January, I met with Chairman Walberg on the proposed rule, and the Department's staff has met with this Committee's staff as well as staff of the Senate's Committee on Health, Education, Labor, and Pensions, the Committee on Finance, and the Special Committee on Aging. My staff also attended a roundtable hosted by the Small Business Administration, and representatives from the Department have also met with disability rights advocates. On February 24, 2012, the Department published a notice in the Federal Register that it was extending the comment period to March 12, 2012. We are currently in the process of carefully reviewing and considering all of the comments we received.

Proposed Rule

As more fully set forth in the Department's Notice of Proposed Rulemaking, the Department's proposed rule seeks to accomplish two important objectives with respect to the companionship services exemption, both of which are intended to ensure that the exemption is consistent with FLSA and with the intent of Congress.[18] First, the proposed rule would more clearly define the tasks that may be performed by an exempt companion. The proposed regulations limit an

[18] The proposed regulations would also revise the recordkeeping requirements for all live-in domestic workers. Under the proposal, employers would be required to maintain an accurate record of hours worked by such workers, just as other covered employees must keep such records.

exempt companion's duties to fellowship and protection, such as playing cards, watching television together, visiting with friends and neighbors, taking walks, or engaging in hobbies. There would still be some allowance for certain incidental intimate personal care services, such as occasional dressing, grooming, and driving to appointments, provided that the work is attendant to the companionship, does not exceed 20 percent of the total hours worked by the companion in the workweek, and does not benefit other members of the household. The proposal would also clarify that "companionship services" do not include the performance of medically-related tasks for which training is typically a prerequisite. If finalized with these changes, the FLSA's minimum wage and overtime exemption would only be available to those whose duties are truly limited to companionship.

Second, the proposed regulations would limit the applicability of the exemption to companions employed by the family or household using the companion's services. Even if the employee were performing companionship services, third party employers, such as health care and other staffing agencies, would not be permitted to claim the exemption. This would remain true even if the household itself may claim the exemption, such as in cases where there is joint employment between the household and the third party employer or agency. This change is reflective of one of the reasons behind the original "carve out" of companionship services from the extension of the FLSA to domestic services employment: the recognition that companions, as understood in 1974, were typically friends, neighbors, or fellow parishioners of the individual receiving the companionship services, performing the services in those roles and not as employees engaged in a vocation.

In the proposed rule's economic analysis, the Department estimated that Medicare, Medicaid, and other government spending account for about 75 percent of the total payments for home health care services.[19] The economic analysis in the proposed rule estimates the cost to the industry to implement the proposed regulation will be less than one-fourth of one percent of the industry's annual revenues. The cost impact is lessened in part due to the fact that 16 states already require both minimum wage and overtime for companionship services – and another 5 require the minimum wage. Of these 21, twelve states have set a higher required minimum wage than required by the FLSA. These states offer practical evidence that successful home-care businesses can and do comply with minimum wage and overtime requirements. We will continue to examine any available data, including any data received from commenters, to determine the impact of this rule on the affordability and accessibility of home care services and the financial impacts on Medicare, Medicaid, and private payers.

Many of the implementation costs associated with the rule will actually be in the form of "transfers" from employers to those employees who work hard to provide in-home care services. Unlike the casual "elder sitter" to which the exemption was intended to apply, these employees are frequently their family's primary means of support, relying on their employment as in-home

[19] *See* 76 Fed. Reg. at 81225 (noting that, if these payments continue, roughly $31.1 million to $169.5 million in costs might be incurred by these government programs, which composes 0.06 to 0.29 percent of total HHS and state outlays for home health care programs). *See also* Congressional Research Service (CRS) Report, *Extending Federal Minimum Wage and Overtime Protections to Home Care Workers under the Fair Labor Standards Act: Impact on Medicare and Medicaid*, at p. 3 (February 21, 2012) (estimating that "[t]he majority of home care in the U.S. (89%) is paid by public payers, which include Medicare, Medicaid, and other public programs, such as the Veterans Health Administration, the State Children's Health Insurance Programs (CHIP), and other state and local programs").

care workers to be able to feed, clothe, and provide shelter to their own families.[20] They work hard to take care of our families and neighbors, yet nearly 40% of in-home care workers have to rely on food stamps or other forms of public assistance in order to make ends meet.[21] The proposed changes to these regulations are intended to ensure that the law treats in-home care workers as it does other domestic service workers by recognizing them as the professionals they are. These professionals include, for example, the in-home worker who told us at the announcement of the proposed rule about how important it is to provide for her clients but also how hard she works to support her family and how she would feel more economically secure if she had minimum wage and overtime protections, and the in-home care worker who told us of the necessity of fair wages for fair work.

In the course of better effectuating congressional intent, ensuring that workers who provide in-home care receive the protections of the FLSA also will be good for our national economy. Health care is currently one of the fastest growing sources of new jobs in the U.S., a trend that will continue for years to come.[22] The elderly population is growing rapidly and the demand for high-quality in-home care services is rising, reflecting the need to care for that population. The growth in the elderly population will result in more work for home care workers and more job opportunities for unemployed Americans. The Department believes that, with minimum wage

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[20] *See Understanding Direct Care Workers: A Snapshot of Two of America's Most Important Jobs*, Department of Health and Human Services (2011), found at http://aspe.hhs.gov/daltcp/reports/2011/CNAchart.htm.

[21] *See* PHI PolicyWorks, *Caring in America, A Comprehensive Analysis of the Nation's Fastest-Growing Jobs: Home Health and Personal Care Aides*, found at http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf. 76 Fed. Reg. 81213.

[22] *See* The Bureau of Labor Statistics' Occupational Outlook Handbook, 2010-11 Edition, found at http://www.bls.gov/oco/cg/cgs035.htm.

and overtime protections, these workers will be able to earn enough to purchase the goods and services necessary to support themselves and their families. Furthermore, this proposed rule is intended to result in better care for our families. The combination of a demanding job with low wages and erratic hours has resulted in high worker turnover in the in-home care industry, which means fewer experienced workers and less continuity of care for our family members.[23] With increased wages, more Americans will be drawn to the profession and fewer workers will leave for higher paying jobs. Having more experienced and qualified in-home care workers means that our family members will receive better and more consistent care. Many in-home care providers and staffing agencies already recognize that an increased wage can contribute to higher quality care services.

Conclusion

Protecting more in-home care workers under the FLSA's minimum wage and overtime provisions would align the companionship exemption with the original statutory purpose and would be an important step in ensuring that the home care industry attracts and retains qualified workers that the industry will need in the future. Evelyn Coke did not live to see the publication of this proposed rule but it is with her and other hard-working in-home care providers in mind that the Department is proposing these important changes to ensure that FLSA is implemented as intended.

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[23] *See* PHI PolicyWorks, *Caring in America, A Comprehensive Analysis of the Nation's Fastest-Growing Jobs: Home Health and Personal Care Aides*, found at http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf. *See also* 76 Fed. Reg. 81228 – 81229 and 81231.

Again, I appreciate the opportunity to appear before you today and value your views and the views of the thousands who submitted comments on the proposed rule changes and of those who are planning to do so. When the comment period closes we will review the submissions and carefully consider them.

I would be glad to respond to any questions that the Chairman and the members of the Subcommittee may have.

Chairman WALBERG. Thank you, Ms. Leppink. And thank you for your testimony. And thank you, again, for extending the comment period to deal with our schedule here, as well.

Some of us were intrigued last year when our president expressed an interest in bringing balance to our regulatory system by closely weighing the costs of regulations and ensuring regulations are smart and don't discourage the production of jobs. I know that the president personally supports this rule on companion care. I understand that.

But the costs and burdens of the rule appear to go in the other direction from what he was calling for just last year. So I would

ask of you, why is the administration proposing this costly and highly prescriptive rule, given the president's desire for more affordable and less intrusive regulations?

Ms. LEPPINK. Chairman Walberg, first of all, the intent of this regulation is to extend the most basic economic protections to this workforce—the minimum wage and overtime protections. Contrary to your opening statement, the department estimates that the average analyzed costs to employers to familiarize themselves with the regulation would total about $4.7 million over 10 years; and that the increase or transfer of—of transfers to home—of wages to home health care workers in the form of increased minimum wage protections would be approximately $16.1 million; the payment for time spent traveling between patients, approximately $34.7 million; and the payment of overtime premium for hours worked over 40 hour—40 hours in a work week would range between $0 and $180 million per year, on average.

So consequently, the impact of this regulation is not $2.8 billion; it is actually rather modest—a modest proposal to extend significant economic protections to this workforce.

Chairman WALBERG. Well, I appreciate that, though I would suggest that there are other figures on that, as well, that we are concerned about, and I certainly am concerned about the cost of the rule. As you know, the need for care is expected to grow to unprecedented levels in just the next few years. Being part of the early onslaught of the baby boomers generation myself, that gives me a bit of pause about the increase in the usage.

Over that same period the department estimates the rule would increase the cost of care by billions of dollars. Remarkably, however, the department anticipates and I quote—"The proposed rule will have relatively little effect on the provision of companionship services." Now, how did the department arrive at that position?

Ms. LEPPINK. Well, first of all, households who employ home care workers are still able to take advantage of the companionship service exemption and the overtime exemption for live-in domestic workers.

Chairman WALBERG. But just for limited portions of that, compared to what it is right now for the majority of states.

Ms. LEPPINK. For 50 percent this regulation would—because of the fact that 16 states already provide for overtime and minimum wage protections, five states provide for minimum wage protections—50 percent of the workers in this workforce are already protected by minimum wage and overtime. So consequently, the potential cost is based on the cost of the protections of the other 50 percent of the workforce that does not currently have those protections.

Chairman WALBERG. But, you know, a basic understanding of economics says that if you increase the cost of a service or a program, ultimately you get less coverage for that program and less incentive for people to use it.

Ms. LEPPINK. Well, let's not presume that an increase in wages necessarily translates into an increase in costs—particularly an increase in costs that must be absorbed by the consumer or by funding sources such as Medicare and Medicaid.

Chairman WALBERG. Well, certainly both would see increased costs, the consumer—the recipient, as well, if they are the consumer, and Medicare or Medicaid.

Ms. LEPPINK. Well, let's talk about that. First of all, an—currently the costs that are charged by the industry to the consumer and the cost that is reimbursed by Medicare and Medicaid is approximately 50 percent of what these workers are actually paid. So cost of companionship care charged to a consumer, $18 and change; cost of wages for that worker per hour, $9 or less. So consequently, we are looking at—if you spread the cost of this regulation over all workers in this industry you are talking about a four-and-a-half-cent increase in overall wages for these workers.

So consequently, as I said before, an increase in wages does not necessarily translate into an increase in costs to be borne by the consumer or by Medicaid or Medicaid funding.

Chairman WALBERG. Well, my time is expired so I can't continue that at this point, but I do find it hard to understand that increased costs don't mean increased costs.

I now turn the time—recognize the ranking member for her questioning?

Ms. WOOLSEY. Thank you, Mr. Chairman.

Well, let's go just a little bit further on this increased cost. There have been several reports by the Professional Health Institute and others that indicate that third party employers are billing clients at a rate that is double the rate paid the workers themselves. So we know—and we have—we know there are huge profits in this $70 billion a year industry.

I am not against private industry making a profit—I have got to be clear about this—but isn't that where the increased cost, if there was increased cost, should come from? I mean, the bottom line of the business, billing twice what the worker receives, and that worker, in turn, needing Food Stamps and Medicaid in order to survive, why would that increased cost not be the burden of the employer, the business that is making a grand profit—30, 40 percent? Now, if it was 2 percent or 3 percent we would understand that.

Ms. LEPPINK. I mean, certainly employers have many options in this industry about how to respond to this proposed regulation. Since the majority of the cost of the proposed regulation is overtime the rule makes clear that that will—the employers have options when it comes to how to deal with overtime costs. The data indicates that the vast majority of these workers are underemployed—they are employed less than 40 hours in a work week.

And so consequently, employers have the option of engaging in more sophisticated scheduling allowing for the full utilization of their current workforce to spread the overtime cost, consequently reducing the ultimate cost to them.

The employers also have the option of adding additional employees. The intent of overtime compensation provision in the law was to prevent the overwork of workers and to spread employment across the workforce——

Ms. WOOLSEY. So where does sleep time come into that, okay? I mean, we are talking about 24-hour care.

Ms. LEPPINK. Sure. Let's talk about sleep time. So the primary—what undergirds the minimum wage and overtime law is that people are paid for the hours that they work. So consequently, when you are dealing with a situation where employees are employed during hours where typically people sleep there is a need to address sleep time.

Under the current regulations, of which this proposed regulation would have no impact—it has no impact on the law as it applies to sleep time—if an individual works a 24-hour shift or less they have to be paid for all hours worked, which would include a potential for sleep time. If they work more than 24 hours than the employer and the employee can enter into an agreement that deals with things like sleep time and to reach an agreement as to the amount of time that the employee would be given the opportunity to sleep. And so consequently, when you are looking at 24-hour care, for the most part employees are only going to need to be paid for the hours that they are working, not hours that they are not.

Ms. WOOLSEY. When they are sleeping?

Ms. LEPPINK. For example, when they are sleeping.

Ms. WOOLSEY. Okay. So, what will the department do should these rules become final? What will the department do to ensure that the regulated community knows of their obligation and would know how to transition into that obligation in the——

Ms. LEPPINK. The Department of Labor, and in particular, the Wage and Hour Division, has many strategies for ensuring that employers and workers understand their rights and responsibilities under the law. With the Internet, obviously, there are many opportunities to provide guidance, to provide facts sheets, to provide various information to workers and to employees. However, this department has 52 district offices nationwide and in any one of those offices I have staff who would be prepared to work with any worker and any employer to help them navigate these new regulations to ensure that they are in compliance with the law.

Ms. WOOLSEY. So will they be given fair warning, would they—if they actually didn't know or—could they get a second chance?

Ms. LEPPINK. Well, certainly the——

Ms. WOOLSEY [continuing]. Wasn't repetitive.

Ms. LEPPINK. Well, certainly the intent of the department will be to give as much guidance as quickly as possible to employers and to workers regarding what their new responsibilities or their new rights would be under the law. And obviously our primary objective when we are going into workplaces will be to ensure that employers understand their responsibility under the law and that they understand what they need to do to correctly pay their workers the minimum wage and overtime. So consequently, our primary effort initially will be to be certain that employers get the assistance that they need to fulfill their obligations under the law.

Ms. WOOLSEY. Thank you, Mr. Chairman.

Chairman WALBERG. Without objection, I think we will—in lieu of the fact that we control the meeting here, let's do a second round.

Let me continue the questioning here, Ms. Leppink, with respect to the impact on Medicare and Medicaid.

Ms. LEPPINK. Sure.

Chairman WALBERG. Here is what the department found in the proposal, and I quote—"An unknown percentage of the costs might be reimbursed by Medicare and Medicaid." What does that mean?

Ms. LEPPINK. Well, what that means is that, as I indicated before, depending on how particularly employers but also consumers respond to the change in these regulations, there will be a variant—you know, potential difference in how much cost or increased cost results. Being that overtime is the primary cost driver here—or the potential for overtime—how consumers respond to whether they choose to employ their own care providers, thus being able to continue to take advantage of the companionship exemption and the overtime for live-in domestics and, furthermore, how employers deal with overtime, whether they more effectively schedule their currently—workers that work less than 40 hours in a work week or whether they choose to employ a different—additional workers, the consequence of the overtime cost may vary from, based on the estimates of the department, from potentially $0 to $141 million per year.

So consequently, then, to the extent, as I have indicated already, that those costs then are transferred to these funding sources, again, with the understanding that currently the reimbursement rate under Medicaid is double what these workers are being paid, so therefore, the potential, again, that increases in wages do not necessarily translate into increase in costs both to the consumer and to Medicare because the employer is choosing to not do that, then that is why it is difficult to estimate exactly what the impact would be on Medicare and Medicaid. But even based on the department's efforts to estimate, we have concluded that would—it would be less than one-third of 1 percent of the total cost of by Medicare and Medicaid for home care services.

Chairman WALBERG. I find that hard to understand. I mean, it is a large, gaping hole potential there that directly relates to continuity of care, and the ability of two approaches to pay or even determine what they are going to pay—the individual payer, who ultimately, if there is increased required costs, there will be increased costs, and if that then comes under Medicare and Medicaid there will be increased cost there that ultimately makes it more difficult for the system to pay for the needs that are increasing and will be increasing rapidly, as well.

Ms. LEPPINK. But as I have indicated, based on the department's economic analysis, the—even if the full cost of this rule were shifted to the—to Medicare and Medicaid funding, that would only result in an increase of less than one-third of 1 percent in the total cost of home care provided and funded by Medicare and Medicaid.

Chairman WALBERG. Well, let me move on to something else then. Economics just don't work that way. That is a wish and by golly that it will happen, and we are dealing with real live people in various needy situations, whether it be my mother with dementia—well, let's—let's move on.

I have a question about the impact of the rule on caregivers. In your written testimony you stated, quote—"With increased wages, more Americans will be drawn to the profession and fewer workers will leave for higher paying jobs." However, in the proposal you have found that the new costs would cause, quote—"disemployment

impacts ranging from 172 to 938 workers per year." You also found that many caregivers would have their schedules adjusted to reduce or even eliminate current hours.

This means the rule would actually result in employment losses and less work for caregivers. So how would the rule benefit caregivers if it eliminates jobs and cuts hours?

Ms. LEPPINK. The protections of the minimum wage and overtime are basically set the floor for workers as—below which wages cannot fall. So consequently, to the extent that we have a significant portion of this workforce that is either not being paid minimum wage or overtime, the consequence of that will be that they—their wages will increase.

Now, the choice of employers to reduce the number of hours that employees work could temporarily result in workers not—you know, working fewer hours. But the intent of this is to ensure that they have the protections of the minimum wage and that they have protections of overtime once they work 40 hours or more in a work week.

Chairman WALBERG. Well, my time is expired. This could go on and on.

But appreciate the response, and I now recognize the ranking member for her 5 minutes?

Ms. WOOLSEY. So, Ms. Leppink, as I stated earlier, the home health care workforce is overwhelmingly made up of women and minorities, and I am concerned about these workers, that they have the basic minimum wage and the overtime protections that they need and deserve. So let's talk—why don't you go a little further about what is this workforce? Who are they? What is the demographics? What will happen to turnover if they actually have better protections? And what does turnover do, actually, to the quality of care? Just go with it.

Ms. LEPPINK. First of all, thank you for bringing up the issue of turnover. Turnover is a cost the employers frequently underestimate for their workforce. In fact, one of the primary reasons that CMS is interested in this regulation is because of their significant concern regarding the cost of turnover, both to employers but also to Medicaid and Medicare, and also the implications of that turnover for quality of care and continuity of care.

So consequently, based on the—based on the research that has been done in this area, turnover is primarily related to low wages, underemployment, and the fact that workers are not being paid for travel time. Of course, this regulation would be responsive to all of those issues.

And so consequently, the expectation is that this regulation—or proposed regulation—would make these the first step in working to stabilize and professionalize this workforce, and as a consequence, improve the quality of care and improve the continuity of care for the individuals who need that care.

Now, the demographics of this workforce: As we have already indicated, 90 percent of these workers are women in their mid-40s, many with a high school diploma or less in education—however, that varies by region; 50 percent are minorities; 40 percent rely on public benefits, such as Medicaid and Food Stamps. As I have indicated, 85 percent of in-home care aides work less than 40 hours per

week—on average, 31 hours for home health aides and 35 hours for personal care aides.

Ms. WOOLSEY. Who makes up that difference? Who pays the difference between the low wages and the Medicaid and the Food Stamps? The taxpayers?

Ms. LEPPINK. Presumably the taxpayer does, Congresswoman.

Ms. WOOLSEY. That is right.

Don't forget that, Mr. Chairman. That is the void that gets—somebody is going to provide the difference, and it is the taxpayers. So they either pay taxes so that the companies can have profits or they—the company pays a prevailing wage—a wage people can afford to live on—and the taxpayers, when they are in need of care, have good caretakers—caregivers.

So, okay, tell me if there is any existing data that shows higher rates of institutionalization in the states that already provide minimum wage and overtime protection to home care workers. Is——

Ms. LEPPINK. I am not aware of any data that would indicate that there is an increase or a movement from home care to institutionalized care, and I would imagine that is true because the cost differential is so significant that even a—even the—the increase that would potentially occur with this rule would nowhere near come close to the cost of institutionalized care. And so consequently, people will continue to choose in-home care over moving their loved one into an institutionalized setting.

Ms. WOOLSEY. Thank you.

And thank——

Oh, thank you, again, for changing your schedule to be here so that we could accommodate what we needed to do because of Congressman Payne's death. Thank you.

Ms. LEPPINK. Absolutely, Congresswoman.

Ms. WOOLSEY. Thank you.

Ms. LEPPINK. Thank you.

Chairman WALBERG. I want to thank you, Ms. Leppink, for your time and valuable testimony. You may now step down and we will ask the second panel to come forward and take their seats at this time.

It is now my pleasure to introduce our second panel of distinguished witnesses. Joining us this morning is Wynn Esterline, owner of Home Instead Senior Care in East Lansing, Michigan.

Must admit, I have known you and your family for quite a few years—your family as educators before, and now involved in—in—in this endeavor, as well. Welcome.

Marie Woodard, joining us from Annandale, Virginia.

We welcome you.

Cathy Ruckelshaus—or Ruckelshaus—I should read the phonetics here.

Was that right? We will talk to the staff about that. Forgive me for correcting myself.

Legal co-director, National Employment Law Project. And William Dombi, vice president for law, National Association for Home Care & Hospice.

Thank you all for being here.

Let me quickly explain the lighting system. I think it is fairly self-explanatory, like a stoplight at an intersection. The green says

keep on going; the yellow says start to slow down, don't look for pink; and red says wrap up as quickly as you can your 5 minutes of testimony. And we will try to do the same during our time of testing—testimony questioning, as well—not time of testing.

And so with that, let me recognize Mr. Esterline for your 5 minutes of testimony?

STATEMENT OF WYNN ESTERLINE, FRANCHISE OWNER, HOME INSTEAD SENIOR CARE

Mr. ESTERLINE. Good morning, Congressman Walberg, Ranking Member Woolsey, and other members of the committee. My name is Wynn Esterline and I own a Home Instead Senior Care franchise in Adrian, Michigan, as well as East Lansing.

I would like to thank the committee for the invitation to share with you my views on the Department of Labor's proposed rule change for the formal companionship exemption. I am speaking on behalf of my Home Instead Senior Care franchise business as well as the 568 other franchise businesses across the United States.

I started my business in October of 2000. We were operating with the overtime exemption until Michigan's legislature changed the minimum wage law in 2006. We lost the overly—or the hourly overtime exemption; however, the live-in exemption still exists.

I share with you three areas that I have strong concerns: the effects that it has had on my caregivers, the effects that it has had on my seniors, and also the Department of Labor's lack of understanding of the non-medical companionship home care industry.

I would like to personalize it for you with a couple real-life experiences. I would like to share with you about Doris, who is one of the most caring people that you will meet. She began her employment with me in 2003 and is still currently working with me.

When that law change took place in 2006, the 8 months prior to she was averaging about 54 hours per week. Her gross income was approximately $432. The 8 months immediately following that change in that law she averaged 29 hours per week, reducing her gross income to $232.

She has had to go and get a second employer. She now has two supervisors, two schedules to maintain, and she struggles to maintain the income that she was bringing in in 2005.

This has absolutely negatively impacted Doris. I spoke with her 3 weeks ago and asked her permission to share her story. By the end of the conversation she was thanking me for fighting for her and the thousands of caregivers across the country.

The other aspect that is really—I don't think is addressed very well is the impact on the seniors. John and Ruth, who are both in their eighties—John in relatively good health and Ruth has dementia and we believe to have—believe to have Alzheimer's, and as he began to have difficulty caring for her he called on Home Instead and as her care began to increase they depended on us 24 hours a day, 7 days a week.

Now, because I had to manage that 40 hours to keep my people underneath, and as—as well as to manage their other jobs, I had, on average, seven to 10 caregivers in working with this family. If you have had experiences with individuals with dementia and Alzheimer's, having fewer caregivers, more consistency and routine

adds to their quality of life. Having seven to 10 caregivers in and out of that home in a week does not add to that quality of life.

John and Ruth, since then, have chosen institutional care—John because he wants to be near his wife.

I ask, is Doris better off in 2005 or is she better off today? Is John and Ruth better off in 2005 or are they better off today? I think we know the answer to that question.

The other area that I really want to discuss is the Department of Labor—and I don't believe they truly understand this business or this industry. They are basing a lot of their data on Medicare and Medicaid numbers, and I—there was a recent study by the International Franchise Association that was conducted by the IHS Global Insight, and the numbers that came back was 85 percent of the funding for the companionship services is paid for by the senior and/or the family member, and only 5—I think—believe it was 5.2 percent is covered by Medicare and Medicaid. So they are not looking at the true data that is going to impact Doris and John and Ruth.

So I urge you to talk with the Department of Labor and really have them use accurate information if they are going to make a rule change that is going to drastically impact my caregivers and my senior clients.

Thank you for letting me testify.

[The statement of Mr. Esterline follows:]

Prepared Statement of Wynn Esterline, Owner, franchise owner, Home Instead Senior Care

Good morning, Chairman Walberg, Ranking Member Woolsey, and other Members of the Committee. My name is Wynn Esterline, and I am the owner of an in-home non-medical companionship care business in Adrian, Michigan. We are a Home Instead Senior Care(r) franchise. I appreciate the Committee's invitation to present my views on the Department of Labor's proposed changes to the federal companionship exemption. I speak today on behalf of my Home Instead Senior Care franchise, as well as our network of 568 franchise businesses across the United States.

I started my business in 2000. In 2006, the Michigan legislature passed a new law that required employees providing companionship services to be paid minimum wage and overtime. The only exemption for this type of work that remained was for live-in situations.

This new Michigan law drastically changed my business, negatively affecting my caregivers and the seniors we serve. No one is better off than they were before this change went into effect, not me, not my clients, and certainly not my employees. I firmly believe that the rest of the country is headed for the edge of this same cliff, and I urge you to consider our experience as you consider the Department's proposed changes to the companionship exemption.

In reviewing the Notice of Proposed Rulemaking, it is clear to me that the Department of Labor does not understand the companionship industry, the work our employees perform, or who is paying for these services. We are not a "home health care" provider. Over and over, the Department cites to Medicare and Medicaid figures on "home health" as support for its conclusions. For my business, and for the industry as a whole, government programs, including Medicaid and Medicare, only account for a very small portion of the payments for companionship services. In fact, Medicaid and Medicare only account for 5.2% of the payments to our industry.[1] Overwhelmingly, payments for our services are by the elderly and their families—85%.[2] Their ability to pay, and consequently the market for companionship services, is extremely sensitive to its cost.

The Department's fundamental misunderstanding of our industry results in incorrect conclusions regarding the effect these proposed changes will have.

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[1] "Economic Impact of Eliminating the FLSA Exemption for Companionship Services," IHS Global Insight, February 21, 2012.

[2] *Id.*

I understand that the main goal in making these changes is to increase wages for those who work as companions to the elderly and disabled. To be sure, I understand the importance and the quality of the work our caregivers perform. My employees are professional, hardworking, caring, good people who pour their hearts into their jobs and will do all they can to protect and care for their seniors. I do, and think we all should, have a great deal of respect for my caregivers and the thousands of workers like them across this country.

However, our experience in Michigan has shown that these proposed changes will not increase employee wages. My caregivers are not better off now than they were in 2005 before our state law changes went into effect. Their wages have not increased. If anything, their wages have decreased because I have been forced to cut their hours down to 40 or below each week, to do ail I can to keep the services affordable so that the seniors we serve can continue to be our clients.

Frankly, in my estimation, these proposed changes accomplish nothing of what they propose to do. I'm sure if these changes go forward that we'll hear how the Department of Labor has stood up for these hard-working caregivers, protected them, and bettered their situation by making sure they are compensated more fairly. But after the cheering dies down and all these companions go back to work, they will find, as did companions in Michigan, that the harsh reality is that the only difference the Department will have made for them is that they will need to work for multiple agencies, and probably for more hours each workweek, in order to earn the same amount of money they were making before the exemption went into effect.[3]

Doris

As an example, I'd like to talk about one of my best caregivers, Doris. Doris has been my employee since 2003, and is as professional, hardworking, and caring an individual as you could ever find. Any of us would be lucky to have a Doris to care for us in our later years, or to care for one of our family members.

My staff and I had to begin to alter our scheduling in September of 2006 to ready ourselves for the coming change in state law. Prior to that, from January through August of 2006, Doris was working an average of 54 hours per week for my business, mostly on overnight shifts which included a great deal of downtime and sleeping time. During those eight months right before the change in state law went into effect, she was earning approximately $432.00 per week in gross earnings. In contrast, during the first week of October 2006 when the change officially went into effect, Doris' gross wages immediately decreased to $320.00 as we limited her hours to 40. In the eight months after this change to Michigan state law, Doris worked an average of 29 hours per week and earned approximately $232.00 per week—just a little more than half the average hours and earnings she had with us before the law changed. Doris asked us for more hours, and I sincerely wanted to put her on more shifts, but I couldn't do so and still control her overtime and my clients' costs. Eventually, Doris had to start working for another agency to make up the difference.

Doris' work/life situation is drastically different now than it was before October of 2006. At this point in time, she is working for two different businesses, including mine. She has two different sets of supervisors, two different schedules to coordinate, and even with all that she is still unable to secure the same number of hours she used to work for Home Instead alone—so she makes much less money than she used to. During all of 2011, she worked less than 10 hours of overtime for my business. Six years after the exemption was taken away from us in Michigan, Doris will tell you that she is much worse off than she was before. And Doris' situation is not at all unique, among my caregivers or those of other companionship companies in Michigan.

For my office staff and myself, where we used to be able to spend the majority of our time focused on meeting the needs of our caregivers and seniors, now we spend the majority of our time analyzing the potential overtime impact of every assignment we make. Where we used to be able to find out from a caregiver what hours and schedule he or she wanted to work, and follow that pretty closely, now we cannot. I haven't been able to hire additional staff to take on this burden—they too have to work harder for the same or less money than they did before this change. I know that the Notice of Proposed Rulemaking says that care will improve,

[3] As a matter of fact, Michigan state lawmakers are poised to introduce legislation to reverse the 2006 change to our state law, and to fully reinstate the "companionship exemption" there. These proposed changes to the federal exemption have stalled that effort. However, if the changes we are discussing today do not move forward, we believe the groundswell of dissatisfaction with the 2006 state law change will result in Michigan restoring the companionship exemption.

and there will be more training, but that has not been our experience in Michigan. We simply do not have the time to devote to new training programs because we're spending too much time trying to keep our services affordable and our business alive.

Ruth and John[4]

As difficult as this situation has been for Doris, the circumstances my clients have been left to cope with have been even more heartbreaking. Most would do anything to stay in their homes and avoid institutionalized care—but there is a definite limit on what they can afford. All of my clients in need of care for more than forty hours per week have had to forego necessary care they used to get in order to cut costs, or they have had to accept a greater number of rotating caregivers into their homes.

Unfortunately, our seniors who need the most care are usually those with Alzheimer's or dementia, and they are least likely to be able to comprehend or handle a parade of different people into their homes over a week—like my client, Ruth, who lived at home with her husband John. Both are in their 80's and Ruth started receiving care from us when her health began to fail significantly. John was in good health and did not need service for himself, but could not care for Ruth all on his own. Ruth has Alzheimer's and like most people with that or similar conditions, continuity of care is extremely important for her. In January of this year, despite our best efforts, we had to place an average of ten caregivers in their home each week in order to juggle schedules around overtime, and the strain became too much for Ruth. She and John couldn't afford to pay overtime and so we couldn't reduce the number of caregivers we sent to them. Finally, John called me to say they'd had enough, he and Ruth couldn't cope with the strain the additional caregivers brought any longer. Now, both of them are in a nursing home—Ruth because she couldn't handle having so many caregivers, and John to be near her.

Tell me how these proposed changes will make a positive difference for couples like Ruth and John in these other states. How is it that they are better off in an institution, rather than together in their own home—where they desperately wanted to be, and could be before this change in the law? How is society better because they've been forced into a nursing home, which is care that is paid for by mostly government sources, where without these changes they would have been able to manage using only their own finances at home.[5]

Frankly, even if there was no third party employer prohibition included in these changes, the removal of "care" from the duties a caregiver can perform renders the exemption meaningless. It will be absolutely impossible for the elderly in need of care to accomplish all the tasks the Department has defined (eating, bathing, dressing, going to appointments, toileting) in less than 20% of their time. If these changes go forward, there will not only not be a companionship exemption for third party agencies—there will be no exemption for the elderly and their families who choose to employ companions on their own, either. How is it in anyone's best interest to tell these vulnerable adults who cannot care for themselves that they are only allowed to use the toilet "occasionally," only dress "occasionally," only bathe "occasionally," and only eat "occasionally," or they will be forced by higher costs to succumb to institutionalized care?

Michigan's Live In Exemption

Finally, I believe it is important to consider the impact that this proposed change will have on other businesses in my state that have live-in companions. I do not employ live-in's, but many businesses in the state do, including some based solely on live-in care. Our state law in Michigan exempts live-in's from minimum wage and overtime to keep care affordable for at least these most fragile seniors. My neighbors who base their businesses on live-in care will struggle to survive the blow the loss of this exemption will bring—if they can survive at all. Their employees will lose their jobs. The elderly they serve will turn to "grey market" caregivers and violate the law, or they will end up in nursing homes, as have many of my clients already.

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[4] These names have been changed to protect the individuals' privacy interests.

[5] Nursing home costs are borne by the following sources of payment: Medicaid: 49.3%, Medicare: 12.5%, Other Government: 5.6%, Private Insurance: 7.5%, Out of Pocket: 25.1%. In other words, the government through one source or another pays 67.4% of the costs of nursing home care. 2005 Statistical Abstract of the United States: Nursing Home Costs by Source of Payment, 2002.

International Franchise Association (IFA) Study Data

I would like to share with Committee Members the key findings of a recent study conducted by IHS Global Insight for the International Franchise Association (IFA).[6] The study examines the impact of the proposed rule changes on companion care businesses that operate as franchises. The study includes an analysis of the Department of Labor's impact analysis and the results of a survey of 542 franchise businesses. The conclusions the study reaches provide a picture of the fallout we can expect from these proposed regulatory changes on a national scale, similar to what we have experienced in Michigan since 2006.

These are the key findings—quoting from their report:

• "The Department of Labor's economic impact analysis of the proposed rule changes substantially understated the extent of overtime work among companion care workers, at least among those working for franchise-operated companion care businesses. The average amount of overtime worked is three times greater than estimated in the Department of Labor analysis."

• "Other costs of the proposed rule change may also be understated * * * including management costs of adding staff to avoid the cost of overtime pay (assumed zero) and the cost of travel time for employees travel between work sites."

• "We believe the Department of Labor's assumption about the sensitivity of the demand for companion care services to price increases (the demand price elasticity) is based on incomplete data on the source of payment for these services and is, therefore, significantly understated."

• "As a result of the underestimation of costs and the price elasticity, the Department of Labor has significantly understated some of the economic impacts * * * that will result from the proposed changes in regulations."

• "The impact of the proposed rule changes on employment is less clear. Businesses that responded to our survey indicate a strong intention to avoid paying higher overtime costs, which may lead to sufficient hiring of additional employees to offset job loss due to reduced demand. To the extent this occurs, the effect of the proposed Department of Labor regulations may be to create a certain number of additional (primarily low-wage) jobs, while at the same time reducing the earnings of a substantial number of workers who are already low-wage workers."

The 542 franchise business owners who supplied the survey data operate 706 locations in 47 states, representing a very broad cross-section of businesses. In general, these are small businesses—more than half reported revenue of less than $1 million and only 5 percent had revenue of more than $4 million. The typical—average—agency employs 75 to 85 employees. It is also important to note that about 80 percent of the agencies receive more than half of their revenue from companion care services. In addition, these agencies report that more than 83% of their employees are engaged in providing companion care services.

The survey revealed a few other key findings:

• These business owners say that higher rates of overtime pay, increased numbers of workers, and larger administrative costs will force them to raise client fees by 20 percent or more.

• Ninety percent of these business owners say that higher fees will cause some of their clients—approximately 1 in 5 of their clients—to seek care from "underground" or "grey market", unregulated care givers.

• Ninety-five percent of the business owners operating in states without overtime regulations say they will eliminate all scheduled overtime—which will result in less income for thousands of low-wage companion care workers.

Lastly, this survey report represents only those franchise businesses that are members of the International Franchise Association, and therefore, it may not be representative of the entire industry. In the IFA membership, there are 27 franchise companies in this sector, with an estimated 4,193 franchisees. The greatest impact of the Department of Labor's proposed rule changes would be on approximately 2,500 of these businesses, which are located in states that currently do not require overtime pay to companion care workers. These businesses operate approximately 3,200 establishments (locations), with approximately 200,000 employees, including 168,000 companion care workers.

When considering just this one segment of the companion care industry, the franchising sector, it is very apparent that the Department of Labor analysis has "substantially understated" the negative impact of the proposed rule changes on our businesses, on our clients, and on our employees.

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[6] "Economic Impact of Eliminating the FLSA Exemption for Companionship Services," IHS Global Insight, February 21, 2012.

Conclusion

I firmly believe that in-home companionship care should not be a luxury afforded only to those who are willing to violate the law in the unsafe "grey market" or the very wealthy who can afford to pay the increased cost that will result from these proposed changes.

I hope that you will consider urging the Department of Labor to withdraw these proposed regulations. Thank you for giving me this opportunity to present my views. I would be happy to answer any questions you might have.

Chairman WALBERG. Thank you, Mr. Esterline.

Ms. Woodard, welcome.

STATEMENT OF MARIE WOODARD

Ms. WOODARD. Chairman Walberg, Ranking Member Woolsey, and—members of the subcommittee, thank you. Thank you for giving me the opportunity to speak.

My name is Marie Woodard and I am speaking on behalf of my parents, who received home care from 2004 to 2011 here in Virginia. We started aides with my father back in 2004 couple days a week to help him with bathing, showering—gradually increased to 10 hours a day. My mother had a heart attack in May of 2005 and we started with 24-hour care because she could no longer care for Dad. Our two main aides worked 5 to 6 days a week, 8 a.m. to 8 p.m., 8 p.m. to 8 a.m., so there were two shift changes a day and then on the weekends we had coverage aides.

Dad died in March of 2008, and within 24 hours my mother was in intensive care unit dying so we just sent the aides that were with Dad the day before, "Go now to the hospital and sit with Mom." So we had continuous care for all of that time.

My primary concerns with the care of my parents was really the quality of the care and the consistency of the care. My father had Parkinson's disease, which caused him difficulty in swallowing, so the consistency of the aide being there to feed my father was so important because she was familiar with him, she knew him, she was not afraid to feed him because he would choke and cough. So the exact feeding regime had to be followed, where his liquids had to be thickened, his foods had to be pureed, he had to eat in a sitting up position. All of this was very, very important, and my father became very anxious if he knew another aide was going to feed him because he was afraid of choking, too.

Another concern with my mother—my mother had heart failure. Again, we needed someone consistently to watch my mother for those subtle changes that come with heart failure.

With heart failure you are on a fine line. If you give them too much fluid it overloads the heart and they go into heart failure; if you give them too little their blood pressure drops, they get dehydrated, and they faint and they fall. So we were on that fine line every day as my mother managed it herself while she was well, now the aide would remind her, "Weigh yourself every day; take your blood pressure," and I would call every day and get those results and kind of weigh what we would do with Mom that day as far as her fluid pills and whether we needed to call the doctor to keep her out of the emergency room. With the heart failure there was also very subtle changes that you needed to watch with my mother, where if she would cough that wouldn't mean anything,

but with my mom it could mean that fluid was building up in her lungs and we needed to act on that cough right away and start looking at her fluid buildup.

So the consistency of the aide really kept both my parents out of the hospital, kept my father from developing aspiration pneumonia from choking on his food, and kept my mother from developing severe heart failure, which would cause her to be hospitalized.

Another primary concern was the emotional issues. It is very hard to have someone to come in and care for you in your home. It is a very personal thing.

My mother and father would become anxious about an hour to an hour-and-a-half before shift change: Who was coming? Did they know her? If they didn't know her, did she know what she was doing? They became afraid to the point where they would either hang onto me if I was there or to the aide that was there begging us not to leave, and don't leave us with that person.

My mother even, at one night, snuck off to the phone at 3 o'clock in the morning and dialed 911 that the aide did not know about and told the police there was a stranger in her house and to hurry over and help her quickly. When the police knocked on the door, of course they found the aide that I had hired and called me at 3 o'clock in the morning and I said yes, indeed I did hire her. So the consistencies of the aides really allowed my parents to be calm and have a trust and a bonding relationship with these aides.

The financial aspect of it, it was—over the 7 years it cost my family and my parents over $1 million to provide this care. None of this care was covered by Medicare, Medicaid, or long-term care insurance; this was totally out-of-pocket. Of course, they had Medicare but it couldn't be covered by Medicare because it is not skilled care, it was custodial care.

Our family was really fortunate to be able to give our parents exactly what I think everybody in this room would want for your parents, would want for ourselves when we get sick—the ability to stay in your own home as long as possible, to stay with your family, to stay with your spouse, not to be separated from your spouse, to stay out of the hospital, to be able to have care in your home, have somebody to assist your family in your home, to know that the caregiver—you can trust them, they are familiar with you, they know you, and that they are there to care for you. And to die in your own bed. Every one of—you know, wish that they have the opportunity to be in your own home, to be in your own bed at the time of death. And also, for this care to be affordable.

If we had had to pay overtime to our aides with the 12 hours a day our family would have had to make hard choices. Were we willing to pay that additional cost? Could we financially pay that additional cost? What would the impact be on my parents having aides come for three shifts a day?

So just the—yes.

Chairman WALBERG. Wrap up your comments quickly here.

Ms. WOODARD. Okay.

Chairman WALBERG. Time is expired.

Ms. WOODARD. Okay.

So I just would like you to consider the consumer and the family member in any decisions that you make. Thank you.

[The statement of Ms. Woodard follows:]

Prepared Statement of Marie Woodard, on Behalf of Her Parents, Walter and Margaret Esselman

Mr. Chairman and Members of the Subcommittee, thank you for allowing me to testify today. My name is Marie Woodard and I am testifying on behalf of my family and my parents who received personal care from aides in their home from 2004 to 2011.

My parents were both healthy and active until their mid eighties. My father had Parkinson's disease and Alzheimer's and required home care starting in 2004. We started with having a privately hired aide come 3 days a week to his home for bathing and dressing. As the needs changed, the care progressed to daily aide care 10 hours a day and we hired aides through a private duty agency. In May 2005 my mother had a heart attack and was hospitalized and my father could not be left home alone. We started 24 hour home aide care services in May 2005. My father required 24 hour care until his death in March 2008. Within 24 hours of my father's death my mother was in ICU with pneumonia and not expected to live. Our family was in turmoil arranging for my father's funeral while our mother was dying. We were blessed to have our mother survive this illness but the recovery was extensive and lengthy. We continued to have aides provide one on one care to my mother as she progressed from the hospital to the nursing home then back to her home. We were so fortunate to have the same aides who had cared for Dad now caring for Mom. My mother developed dementia during this illness in addition to her severe heart failure and she required 24 hour care from March 2008 until her death October 2011. I was one of four children, but I was the only child living in Virginia and was very involved in the care of my parents. My parents had consistent aides who worked 12 hours a day for anywhere from 5 to 6 days a week. The aides changed shifts at 8am and 8pm. The day aide, Memunah, worked 6 days a week 12 hours a day from 8am to 8pm. Night care was provided by Harriet, who worked 5 days a week from 8pm to 8am. Their days off were on the weekend and were covered by other aides.

During these seven years I had three major concerns coordinating and supervising the care of my parents. These concerns were the quality of the care my parents received, their comfort level with the aides providing care, and that emotionally my parents could adjust to having the aides with them 24 hours a day. As we began the care in 2004 on a part-time basis the cost of the care was a concern but we had no idea that this care would continue for the next seven years and our out of pocket expenses for this care would be a million dollars.

Consistency of aides was so important for the quality of care provided my parents.

A new aide assigned would require a great deal of teaching and intervention by me to assure that my parent was well cared for. I needed to instruct each aide with the individualized needs of each parent. My parents had unique needs due to their diseases, levels of confusion and anxiety as well as the day to day needs—medication reminders, fall prevention, choking risks related to the Parkinson's Disease, emergency actions to take for medical emergencies that occurred during that 7 years—injuries related to falls, kidney failure, chest pains, heart attacks, episodes of aspiration pneumonia and difficulty breathing. The consistent care provided by the aide and their constant supervision of my parents prevented many hospitalizations and emergencies room visits. My father had Parkinson's disease that caused difficulty in swallowing. To prevent my father from choking, he had to be carefully fed to prevent him from aspirating and developing pneumonia. His feeding regime was very detailed and needed to be strictly followed. It was required that all his food and liquids be thickened, that all food have the right consistency, that he be fed slowly, be closely observed and that he be sitting up and was to never feed himself. I spent hours teaching the aides to properly feed my father. Having the same aide feeding my father most of the time assured that my father would not choke and develop pneumonia. The weekday aides were very skilled in feeding my father due to their familiarity with him and his illness. With my mother's severe heart failure I taught the aides to observe carefully for signs of impending heart failure crisis—the aides took my mother's blood pressure and weight every day and observed her difficulty breathing, shortness of breath, coughing and swelling of the legs and lower back. This was reported to me daily and with this information I and her doctor managed her heart failure on a daily basis to prevent hospitalizations. This required a level of skill on the aide's part, my trust in the aide, and the aide being

with my mother on a daily basis to note subtle changes. My trust in the aides and their consistency relieved my anxiety knowing that the aide caring for my parent was familiar with them and knew how to care for both of them and to manage their medical needs.

The consistency of the aides allowed my parents to become comfortable with them.

It was very difficult for my parents to accept care in their home. My mother wanted to be the sole caregiver of my father and was very resistant to "outside" help. Emotionally for both my parents they saw the need for an aide as the loss of their vitality, lifestyle and independence. Both my parents had a great deal of trouble adjusting to the aides and I would estimate that adjustment period took over 12 months as they progressed from aides short term during the week to 24 hour care. The realization that the 24 hour care was permanent was devastating to them both as they accepted their frail health. As they got to know the aides they relaxed a little, but at each shift change my mother became anxious asking who was coming and begging the current aide on duty to stay and not leave her or my father. This anxiety was heightened greatly when an aide was coming that she did not know. If a new aide was assigned I called to discuss the care plan with them as well as went over to see my parents—as much to ease my mother's anxiety and my own anxiety having an unknown aide. We were fortunate that the shift change was only twice a day so the care was consistent and my parents developed a level of trust with the aides. I strongly believe that without the consistency of the aides working 12 hour shifts and knowing my parents and their illnesses so well that they would have died years earlier. Both weekday aides worked with my parents for many years, Harriet the night aide cared for my parents for over 6 years.

The financial cost of the care provided to my parents was a burden to my parents and the family.

The average costs for long-term care in the United States (in 2010) are:

- $205 per day or $6,235 per month for a semi-private room in a nursing home
- $229 per day or $6,965 per month for a private room in a nursing home
- $3,293 per month for care in an assisted living facility (for a one-bedroom unit)
- $21 per hour for a home health aide
- $19 per hour for homemaker services
- $67 per day for services in an adult day health care center

Source: *www.longtermcare.gov/LTC/Main_Site/index.aspx.* National Clearinghouse for Long-Term Care Information website. The U.S. Department of Health and Human Services. Example: $21.00 per hour for a home health aide is $504.00 per day for 24 hour care or $183,960 per year.

Since we started home care in 2004 the cost per hour was less but still our family paid over $1 million dollars for the care provided to our parents from 2004 to 2011. This was totally out of pocket expenses since Medicare does not cover this type of care and my parents did not have Long Term Care Insurance. The additional cost of overtime pay would have caused an additional financial burden to my parents and our family.

The majority of Americans want to age at home and to stay at home rather than go into a facility. It is important to keep this home care affordable and to ensure consistency of care. When the cost of overtime pay is passed onto the consumer it will force the patient and their family to compromise the quality of care and have multiple aides in their home as well as multiple shift changes per day. The multiple shift changes per day would be very disruptive—I can imagine my parents refusing to go to bed until 11pm to let the night aide into the house. The increased cost may force families to choose care in a facility rather than providing the care in the home. My family was fortunate to be able to abide by my parents wishes to receive excellent care, stay in their own home, to be cared for by caregivers who cared for them as if they were their own mother and father, and to be able to die in their home. It was heart wrenching to watch my parents as they aged and became ill, I can only imagine how hard our lives would have been if we were forced to place them in a nursing home. Having the same aides care for my parents allowed the family the comfort of knowing that our parents were well cared for and when both my parents died at home they were treated with dignity and respect by their beloved aides. The aides were so close to my parents that they also grieved with us as if they had lost their own mother and father.

Chairman WALBERG. Thank you, Ms. Woodard.

Ms. Ruckelshaus?

STATEMENT OF CATHY RUCKELSHAUS, LEGAL CO–DIRECTOR, NATIONAL EMPLOYMENT LAW PROJECT

Ms. RUCKELSHAUS. Yes. Chairman Walberg, Ranking Member Woolsey, and members of the committee, thank you for this opportunity to testify today. My name is Cathy Ruckelshaus and I am the legal co-director of the National Employment Law Project, a nonprofit based in New York that seeks to ensure good jobs and economic security for our nation's workers.

My remarks will highlight two primary areas from my written testimony but I am, of course, happy to answer any questions based on what I have submitted. First, I will briefly describe the working conditions of workers who provide the care and services to the older adults and persons with disabilities.

Because the jobs are so low-paying turnover is high, creating dangerous shortages during a time of increasing demand. These are the workers I have represented or advocated for and come to know over the years. And I will end by touching briefly on the experiences we know about in the states where there is a wage floor for these jobs.

The workers in my practice—I have met many home care workers who care for elderly and disabled individuals. I have also had the opportunity to meet some here at the hearing today.

I am going to just give you two examples. Josefina Montero is a client of mine who is a home care worker who cares for adults and people with disabilities in the New York City region. She was paid the minimum wage, now $7.25 an hour, but not overtime by her agency. She takes care of all of her patients needs, including changing their diapers, feeding them, helping them take their medications, and accompanying them to appointments.

Another set of former clients include Anna Thomas, Tracey Dennis, Renee Johnson, and Marilyn Jackson, all from the Philadelphia area who worked in home care. They bathed, fed, dressed, and cleaned for their clients. They assisted with catheter care and transfers and they administered medications. These workers were paid $5.15 an hour, the then minimum wage, but were not paid for the time they spent traveling between their clients by bus or by car. Their pay dropped below the minimum wage.

Kara Glenn is another worker I have encountered. She makes $8.45 an hour after 30 years in the industry. She said, "I stayed working because of the clients. I liked them and they liked me. We made our own little family and that meant more to me than the money. As long as they were getting good care that was really what mattered to me. When you are taking care of somebody you want to do your best and you don't want to leave them but sometimes you have got to because you need money to survive. You can't escape that."

None of these workers have jobs that pay enough to support them. They have had difficulty making ends meet for their families. They are eligible for Welfare and many have taken jobs to supplement their earnings.

And they are typical. The average national wage of $9.34 an hour, which is $18,000 a year, means that one in five lives below the poverty line. In 29 states the average hourly wages are low enough to qualify them for Welfare.

These jobs are paid for by Medicaid, Medicare, and other public sources, which fund approximately 89 percent of the care. Many of these jobs require the same training as certified nurse's aides who work in nursing homes. The only difference between the two sets of workers is that those in nursing homes do get minimum wage and overtime and those providing care and services in the homes do not.

What do we know about how this might play out were these rules to be implemented? It is not a zero sum game where consumers win or the workers win. The states where there is coverage have seen that the programs have thrived and the quality of care has not dropped.

As we have heard this morning, 15 states already extend minimum wage and overtime protections to some or all home care workers. This includes Michigan, New Jersey, Minnesota, and states with some of the nation's largest home care programs, including New York, Illinois, and Pennsylvania. These states' experiences illustrate the economic feasibility of providing basic protections to home care workers.

Some advocates and employers argue that the only way an individual can get continuity of care is to have only one worker for all needed hours. Requiring one worker for 24/7 care is not a good model for anyone. The worker at these low wages cannot sustain this kind of work, and that has related to—that has resulted in high turnover, which does not support continuity of care for anybody.

And I just wanted to mention what Secretary Leppink mentioned. There are a couple of myths out there that I am happy to address in questions.

Live-in arrangements will not be drastically altered under the proposed federal rule. The employers of live-in workers are still permitted to enter into agreements with their workers to not pay for sleep time.

And finally, these proposed changes come at a critical time. Over the next 2 decades the population over 65 will grow to more than 70 million. An estimated 27 million Americans will need direct care by 2050. If recruitment and retention problems grow due to the low wages labor shortages could fail to meet the growing need.

Thank you for inviting me to testify, and I look forward to any questions.

[The statement of Ms. Ruckelshaus follows:]

Testimony of
Catherine K. Ruckelshaus
National Employment Law Project

Hearing Before the
United States Congress
House Committee on Education & The Workforce
Subcommittee on Workforce Protections

Ensuring Regulations Protect Access to Affordable and Quality Companion Care

March 20, 2012

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Testimony of Catherine K. Ruckelshaus
of the National Employment Law Project

Before the United States Congress
House Committee on Education & The Workforce
Subcommittee on Workforce Protections

Ensuring Regulations Protect Access to
Affordable and Quality Companion Care

March 7, 2012

Chairman Walberg, Ranking Member Woolsey and members of the Committee: thank you for this opportunity to testify today on the important subject of access to affordable and quality care by home care companions and the proposed revised regulations by the U.S. Department of Labor ("DOL" or "the Department").

My name is Cathy Ruckelshaus, and I am the Legal Co-Director of the National Employment Law Project (NELP), a non-profit research, public education and advocacy organization that works to ensure good jobs and economic security for our nation's workers. For over 40 years, NELP has specialized in promoting labor standards enforcement and access to good jobs for all workers. NELP has collaborated with state and local allies around the country, including legal services offices, community groups, and labor organizations to achieve strong workplace protections and access to government systems of support for low-wage workers and the unemployed.

My colleagues and I at NELP have worked to ensure that *all* workers receive the basic workplace protections guaranteed in our nation's labor and employment laws; this work has given us the opportunity to learn up close about job conditions in a wide variety of industries, including the home care field. We have represented home care workers in wage and hour enforcement matters in several states and advocate at the state and federal level for better working conditions for this vital workforce.

This background in the industry and its workers informs my testimony today.

Today, I will describe the working conditions of the home care workers I have represented and met, and the impacts the low pay has on their lives and the families they support. These workers struggle to make ends meet while providing the critical and loving care and services to older adults and persons with disabilities in their homes. My testimony will then briefly trace the history of the companionship exemption, describe the unintended sweep of the exemption that has occurred as the industry has boomed, and end with the reasons why NELP and many other organizations support the Department's

proposed rules and think the transition to minimum wage and overtime coverage will be manageable.

NELP and our constituents have a direct and sustained 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 workforce and quality of 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.

In my practice, I have met home care workers who were underpaid. Here are a few examples:

- Josefina Montero is a home care worker from New York who cares for older adults and people with disabilities in the New York City region. She was paid the minimum wage ($7.25/ hour) but not overtime for her sometimes- 60-hour workweeks. NELP represents her and a class of her co-workers in a lawsuit against the for-profit agency that placed her in the individuals' homes.

- Anna Thomas, Tracey Dennis, Renee Johnson and Marilyn Jackson are all home care workers who worked in the Philadelphia area for years, taking care of older individuals in their homes. These workers were paid $5.15/ hour (the then minimum wage) for direct care hours, but not for the time they spent traveling by bus or car between different client homes. Because they were not paid for their travel time, their per-hour pay dropped below the minimum wage. NELP and the Service Employees International Union represented them in a lawsuit against their for-profit agency employer and recovered their unpaid wages.

- Another group of home care workers in Pennsylvania were hired as employees by a home health care agency to place them in individual homes, where they cared for elderly and disabled people. The employees were not paid overtime or for their time spent traveling from household to household during their workdays, and they brought a lawsuit with our help to claim their unpaid wages. Several months after the lawsuit was filed, the home care agency told each of these employees that they had to sign an agreement calling them "independent contractors" if they wanted to keep their jobs. Nearly all of the workers did so to keep their jobs, even though none of the other aspects of their job conditions, pay, or assignment and direction changed, and none was running an independent business.[1] This case is still pending.

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[1] *Lee's Industries, Inc. and Lee's Home Health Services, Inc. and Bernice Brown*, Case No. 4-CA-36904 (Decision by National Labor Relations Board Division of Judges), 2/25/10.

None of these workers had jobs that paid well, and several of them were on public assistance due to the low wages and long hours they worked. They have had difficulty making ends meet for their families, and some have taken other jobs to supplement their meager earnings.

I. Companions Were Exempted in the Extension of Coverage to Domestic Workers in 1974.

The companionship exemption has its origins in a 1974 amendment that extended FLSA coverage to domestic workers for the first time.[2] 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.[3]

Congress did not provide a detailed definition of companionship services, directing DOL to define the scope of the exemption. However, discussions of the exemption found in the *Congressional Record* and committee reports provide important guidance on what services and workers Congress did and did not intend to exempt.

First, the amendment's sponsors made clear that the use of the phrase "companionship services" was precise and narrow—corresponding to work whose essence was providing company (i.e., "companionship") for older adults or persons with disabilities and, through the presence of the "companion," looking out for their safety. For example, Sen. Harrison Williams described companionship workers as "elder sitters," whose main purpose of employment is "to be there and watch over an elderly or infirm person … ."[4] Similarly, Sen. Quentin Burdick gave as an example of an exempted companion the "neighbor [who] comes in and sits with" an aged or infirm parent.[5] These activities correspond with what a current Labor Department regulation describes as providing "fellowship" and "protection" for older adults or persons with disabilities.[6]

The sponsors consistently contrasted such exempt "companionship" work with household services, such as cooking and cleaning, which the amendment's expanded coverage was clearly intended to include. They noted that exempted work could include a very limited amount of covered household duties when those services were minimal and incidental to the "companionship services," but the extent of such household tasks within exempt work

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[2] See *Fair Labor Standards Amendments of 1974*, Public Law 93-259, *U.S. Statutes at Large* 88 (1974): 55, codified at *U.S. Code* 29, §§ 201-219.
[3] *U.S. Code* 29 (2010), § 213(a)(15); *Code of Federal Regulations* tit. 29, §§ 552.6, 552.106, 552.109 (2010).
[4] *Congressional Record* 119 (1973): 24,801 (statement of Sen. Williams).
[5] Ibid. (statement of Sen. Burdick).
[6] *Code of Federal Regulations*, tit. 29, § 552.6 (2010).

was to be strictly limited.[7] Not only did Congress make clear that the companionship exemption did not include jobs involving substantial household work duties but nowhere in the record did the legislative sponsors suggest that physically demanding personal care services, such as assistance with bathing and toileting, or services relating to medical care (all of which are typically essential parts of home care work) should ever be exempt.

Second, although Congress did not use the term "casual" in the statutory language defining companionship services, it is clear from the legislative history that the types of services that lawmakers had in mind were informal and were performed by persons for whom the work was not their means of making a living. Senate and House committee reports explained the 1974 amendments aimed "to include within the coverage of the Act all employees whose *vocation* is domestic service.[8] People who will be employed in the excluded categories," by contrast "are not regular breadwinners or responsible for their families' support."[9] Sen. Burdick confirmed this understanding, stressing the exemption was not intended to exclude "the professional domestic who does this as a living."[10] Sen. Javits echoed that, explaining that coverage was meant to extend "to really those who make it a regular part of their occupation … "[11] Thus, the amendments were premised on the understanding that expanded coverage was needed to raise incomes for the broad class of workers who depended on domestic work to make a "daily living"—the workforce that Rep. Shirley Chisholm described as the "thousands of ladies who have the sole responsibility for taking care of their families and will not be able to adequately support their families."[12]

Third, prior to 1974, home care workers (like other household service workers) who were employed by commercial agencies with more than $250,000 in annual revenue were, in fact, already covered by the FLSA's minimum wage and overtime requirements under the act's "enterprise coverage" provisions.[13] Nothing in the legislative history of the 1974 amendments suggests any Congressional intent to withdraw minimum wage or overtime coverage from any categories of employers or workers who, prior to 1974, were already covered by the FLSA.

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[7] *Congressional Record* 119 (1973): 24,801 (statement of Sen. Williams); ibid. (statement of Sen. Burdick).
[8] U.S.Senate, Report No. 93-690 (1974), 20.
[9] Ibid.
[10] *Congressional Record* 119 (1973): 24,801 (statement of Sen. Burdick).
[11] *Congressional Re*cord 120 (1974): 4,708 (comments of Sen. Javits).
[12] *Congressional Record* 119 (1973): 30,267 (comments of Rep. Chisolm).
[13] In 1974, an enterprise engaged in commerce included any enterprise "which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which … is an enterprise whose annual gross volume of sales made or business done is not less than $250,000." U.S. Code 29 (1974), § 203(s)(1). *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167 (2007) ("[T]he FLSA in 1974 already covered some of the third-party paid workers ….").

II. The Department of Labor's Proposed Rules.

The Department of Labor is charged with defining the companionship exemption. In 2007 the U.S. Supreme Court ruled in the case of *Long Island Care at Home, Ltd. v. Coke* that the 1974 amendments vested the DOL with broad policymaking discretion to "work out the details" of the amendment's definition of companionship services through regulations.[14] While the Supreme Court declined to invalidate an existing regulation, it made clear the Labor Department had the authority to determine the scope of the exemption.

The Department's proposed rules would make four primary changes: (1) modernize the definition of what constitutes covered "domestic service employment" to add some additional job titles and take out some more outdated ones; (2) narrow the definition of exempted "companionship services" to mean "fellowship" and "protection," aligning it more closely to what Congress intended in 1974; (3) eliminate the ability of third-party employers such as home care agencies to claim the exemption, and (4) change the record-keeping requirements for employers of live-in domestic workers to more closely align them with what other employers currently do.

III. The Modern Home Care Workforce.

Home care occupations are projected to be the first and second fastest-growing occupations nationally in the next decade.[15] The Department of Labor's projections for 2010-2020 show that home care jobs are projected to increase in number by nearly 1.3 million.[16] Adding this growth to the 2.5 million current workforce brings the total to 3.8 million workers who will provide care and services to older individuals and persons with disabilities wishing to remain in the home.

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.[17]

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[14] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167 (2007).

[15] http://www.bls.gov/emp/ep_table_103.htm

[16] *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/

[17] For a more in-depth description of the policy and impacts 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.

A large segment of today's home care workforce is employed under the Medicaid program.[18] The purpose of Medicaid has not been to provide beneficiaries with "companionship;" rather, the U.S. Department of Health and Human Services guidance for Medicaid instructs that assistance with the activities of daily living and the instrumental activities of daily living is the core focus of home care services provided under Medicaid.[19]

In addition, 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 sizes in 2000.[20] And its workforce is projected to grow by nearly 50 percent again by 2018.[21] 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.

Approximately 70 percent of home care workers today are employed by home care agencies.[22] Much of this care is financed under the Medicaid program. For-profit corporations dominate the industry.[23] The number of establishments grew astronomically from 2001-2010, at a rate of 20 percent a year, due to increasing demand and low barriers to entry.[24] 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 as described below.

Another segment consists of workers who are employed directly by individual consumers. These workers work in state "consumer directed" home care programs under which consumers recruit and employ workers, who are then paid through the Medicaid

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[18] Allen J. Leblanc, M. Christine Tonner, and Charlene Harrington, "State Medicaid Programs Offering Personal Care Services," *Healthcare Financing Review* 22, no. 4 (Summer 2001): 156.

[19] U.S. Department of Health & Human Services, Office of the Assistant Secretary for Planning & Evaluation, *Understanding Medicaid Home and Community Services: A Primer* (Nov. 2000), 61, http://aspe.hhs.gov/daltcp/reports/primer.pdf.

[20] U.S. Census Bureau, "2008 Service Annual Survey Data ".

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

[22] 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.

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

[24] PHI, *Growing Home Care Industry Can Afford Basic Labor Protections for Workers*, (2012) p. 2, available at: http://phinational.org/policy/wp-content/uploads/phi-value-the-care-05.pdf.

program.[25] 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.[26]

Finally, 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.[27]

A. Working Conditions for Home Care Workers Today.

Under the current companionship regulations, as many as 2.5 million home care workers are excluded from federal minimum wage and overtime protections under the FLSA. There are two chief ways in which the FLSA companionship exclusion harms home care workers and undermines the overall policies of the FLSA. First, 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,[28] 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.[29] Other covered workers are paid for this work time.

Nor are employers of companions required to reimburse workers for gas or other transportation costs when they reduce workers' net pay to below the minimum wage.

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[25] PHI, *Who Are Direct-Care Workers?*, (2011) p. 1-2, available at http://www.directcareclearinghouse.org/download/NCDCW%20Fact%20Sheet-1.pdf .
[26] Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390 (2008).
[27] 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=tHvo076GmvZjw2WxVt5bfUWmi8&hl=en&ei=w6tcTPrQiIKB8gaMoa1VAg&sa=X&oi=book_result&ct=result&resnum=10&ved=0CEAQ6AEwCQ#v=onepage&q&f=false.
[28] 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.
[29] *Code of Federal Regulations* tit. 29, § 785.38 (2010).

unlike other employers.[30] 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.[31]

Second, 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. This lack of ordinary overtime coverage has likely been one of the factors that has encouraged the use of a high-hours staffing approach by some employers when serving the very small proportion of home care consumers who receive seven-day-a-week care.

Such long hours are grueling for workers, and may contribute to the higher than average incidence of work-related injuries among home care workers.[32] But many workers are forced to submit to long hours 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 for the industry was just $20,283[33]—far below a basic self-sufficiency income for a single adult, let alone someone supporting a family as many home care workers do.[34]

In addition, worker shortages are likely to grow given that the population growth among women aged 20 to 54—the group of workers that typically provides home care services—is not keeping pace with the skyrocketing demand for such care.[35] And, as the

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[30] *U.S. Code* 29 (2010), § 203(m).

[31] 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).

[32] 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.*

[33] *See supra* note 28.

[34] Economic Policy Institute, "Basic Family Budget Calculator," http://www.epi.org/content/budget_calculator/.

[35] *Fair Pay for Home Care Workers: Reforming the U.S. Department of Labor's Companionship Regulations Under the Fair Labor Standards Act* (August 2011), p. 20, available at http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1.

worker population ages and begins to have physical and other disabilities, recruiting a younger workforce is difficult with the poor working conditions these jobs offer.

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."[36] 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.[37]

Studies have shown turnover rates among home care workers of between 44 and 65% per year.[38] And a 2007 National Home Health Aide Survey found that 35% 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 on employers in the form of recruitment, retraining, and administrative costs. Additionally, because workers' annual earnings are so low, many workers rely on public benefits programs – a huge financial burden on state budgets. [39] 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

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[36] 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.

[37] Studies have linked excessive work hours in the medical field to failures of attention and medical errors. See, for example, C.P. Ladrigan et al., "Effect of Reducing Intern's Weekly Work Hours on Sleep and Attentional Failures," *New England Journal of Medicine* 351 (2004): 1838-1848. Recognizing that excessive hours threaten both patient care and workers' well-being, more than fifteen states have passed legislation restricting mandatory overtime for healthcare personnel. See, for example, *N.J. Stat. Ann.* § 34:11-56a31 et seq. (West 2010) (prohibiting healthcare facilities from assigning mandatory overtime to employees involved in direct patient care activities "in order to safeguard their health, efficiency, and general well-being as well as the health and general well-being of the persons to whom these employees provide services").

[38] 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).

[39] PHI, *Who Are Direct Care Workers?* (2011), http://www.directcareclearinghouse.org/download/NCDCW%20Fact%20Sheet-1.pdf.

care.[40] 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.

IV. 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.[41] This group includes states with some of the nation's largest home care programs, including New York, Illinois and Pennsylvania.[42] And in five more states and the District of Columbia, workers enjoy minimum wage protection, but not overtime.[43] As discussed below, these states' experiences illustrate the economic feasibility of providing basic protections to home care workers.[44]

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

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 a companionship reform have centered on the impact of overtime costs, especially for high hours cases. But these cases are rare. Only about 9% of home care workers nationally report working more than 40 hours a week, and most of those work only slightly more than 40 hours.[45] 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

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

[41] CO, HI, IL, ME, MD, MA, MI, MN, MT, NV, NJ, NY, PE, WA, WI. *See Which States Provide Coverage to Home Care Workers*, available at http://nelp.3cdn.net/6e193991edf8bd0df9_o6m6i28s2.pdf. (*State Coverage Overview*).

[42] 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.

[43] *State Coverage Overview*.

[44] The rest of the states do not extend such protections. Note that in many cases this absence of state protection does not reflect a deliberate policy choice to carve out home care workers. Five states still do not have state minimum wage or overtime laws for any workers, and other states have simply mirrored most or all federal coverage definitions.

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

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.

Federal law requires payment of overtime premium pay for any hours worked over 40 in a workweek. Many commenters and groups with whom we have spoken mistakenly assume that overtime pay is due after a certain threshold of hours in a day, or a shorter threshold of hours in a week. This is an important consideration when reviewing comments of those portending economic doom for the home care systems[46].

Under the new rules, individual employers who currently employ one worker for more than 40 hours a week will have the option of employing an additional worker (or workers) for hours in excess of 40, which may in turn help ensure coverage in the event that one worker becomes sick or has an emergency. Alternatively, employers may choose to pay time-and-a-half when a worker works more than 40 hours in a week, subject to the Department's proposed exemption that would remain for individual household employers[47].

A. Live-in arrangements need not be drastically altered under the federal change.

Even if home care workers gain minimum wage and overtime protections, they will still be subject to federal rules that allow sleeping and on-call time to be treated as non-compensable under certain circumstances. Live-in domestic service employees and their employers are permitted to come to an agreement to exclude the amount of sleep time, time spent on meal and rest breaks, and other periods of "complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits." 29 CFR 552.102 (a).

Also, even under a revised companionship regulation, live-in home care workers employed solely by an individual where no agency employer is present would remain

[46] Many concerns raised by those we have met and in the comments posted to the Department's comments are based on fears of generalized hypothetical situations that do not comport with realities in the programs on the ground. When pressed for details, many with whom we have spoken have come to understand that the existing rules either already cover the scenario they are concerned about, or that the proposed rules would not affect their more detailed concern.

[47] The Department's proposed rule would retain an exemption for individual householders who employ companions without the use of an agency employer, as long as the worker is performing companionship duties.

exempt from overtime due to the existing overtime exemption for live-in workers that extends to individuals.

B. Narrowing the companionship exemption will not hurt continuity of care.

The industry's staggeringly high turnover rates are the greatest threat to continuity of care. Establishing a minimum wage floor will help reduce turnover and improve continuity of care. As mentioned above, turnover rates can be as high as 50-60% in the home care industry, and cost the industry billions each year due to increased costs for recruitment, training, and other administrative expenses. Families that require direct care for more than 40 hours/week can avoid paying overtime by employing multiple workers – and simultaneously gain more security in the inevitable event that a caregiver needs time off for an illness or personal or family emergency.

Some advocates and employers argue that the only way an individual can get continuity of care is to have only one worker for all needed hours. Requiring one worker for 24/7 care is not a good model for anyone – the worker or the service or care recipient -- and most high-hours recipients work with and develop close and personal relationships over time with more than one worker per week. Continuity of care means continuity of *services*, not the continuity of one *worker*.

C. How will home care agencies respond to extended coverage?

We don't know exactly how home care agencies will respond to the extension of minimum wage and overtime rules to their workers, but we do know that they *are capable of* managing the transition without raising costs or cutting care. First, as explained above, agencies can manage overtime costs by more evenly distributing work among their workers. Some of the nation's largest home care employers already follow minimum wage and overtime rules, even in states where coverage is not required.

Addus HomeCare, one of the nation's largest for-profit home care providers, for example, has curbed overtime usage and costs through close monitoring of employee workloads and by spreading hours more evenly among its staff. Case studies of other large home care employers demonstrate how they have managed overtime costs through the adoption of modern scheduling programs, by developing systems for staffing high-hours cases with primary and secondary aides, and by maintaining pools of substitute workers (and engaging in sufficient recruitment and training needed to maintain those pools).[48]

Moreover, the home care industry can afford to pay a fair wage without raising costs to consumers. Home care industry profits have grown at an average rate of 9 percent per

[48] PHI, *Can Homecare Companies Manage Overtime? Three Successful Models*, (2012), available at: http://phinational.org/archives/home-care-companies-keep-overtime-costs-to-a-minimum-phi-study-finds/.

year from 2001-2009; total industry profit topped 84.1 billion in 2009.[49] For-profit franchises Home Instead and Comfort Keepers are among the top three largest franchises, employing over 90,000 home care workers nationwide based in over 1,200 franchise locations across the country.[50] Senior care and home health care franchises' corporate revenues increased by 11.6 percent per year from 2007-2009.[51] These agencies have benefitted from the minimum wage and overtime exemption, which acts to keep wages low. Furthermore, the agencies charge consumers approximately twice the hourly rate paid to caregivers; in 2009, the national average cost of companionship services was $18.75 an hour, while the starting pay for companions was just $8.92 per hour.[52] For Medicaid agency-provided personal care services, the workers also received approximately half of the amounts received by the agencies per hour: the 2010 rate paid to agencies was $17.73, and the workers received an average of $9.40 per hour.[53]

Some for-profit agencies that have publicly opposed a reform to the companionship exemption, such as Home Instead and Comfort Keepers, operate in states that already provide minimum wage and/or overtime protections to workers. Presumably these agencies have been able to cover their operating costs and even make a profit despite being subject to minimum wage and overtime requirements – notwithstanding their claims that coverage is not feasible.

Home care is one of the top five fastest growing jobs in the nation and demand continues to rise. We cannot outsource these jobs. The current shortage of home care workers is expected to become more acute in the years to come. Denying workers a fair wage makes it harder to attract and keep the workers we need.

Thank you for the opportunity to testify today.

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[49] *Id.* at 2.
[50] *Id.* at 3.
[51] *Id.*
[52] PHI, *Comparing the Cost of Personal Care Services and Caregiver Pay*, 3/7/12, available at http://www.directcareclearinghouse.org/download/pcs-rates-and-worker-wages.pdf
[53] *Id.*

Chairman WALBERG. Now we will move to Mr. Dombi? Is your microphone on?

STATEMENT OF WILLIAM A DOMBI, NATIONAL ASSOCIATION FOR HOME CARE AND HOSPICE

Mr. DOMBI. Good morning, Chairman Walberg, Ranking Member Woolsey, and members of the Subcommittee on Worker Protection. Thanks for the opportunity to testify at today's hearing.

The subject of the hearing is of crucial importance to the provision of home care to our nation's elderly and people with disabilities. The U.S. Department of Labor has proposed changes in over-

time compensation exemptions that would effectively eliminate the application of those exemptions for home care services.

There has been no change in the law mandating these revisions. In fact, the rules that are subject to change have been in effect for nearly 40 years.

The proposed rule raises several legal and factual concerns. First, the proposed redefinition of "companionship services" is in direct conflict with the language of the Fair Labor Standards Act as well as its legislative history. Specifically, the FLSA applies the exemption to employees providing companionship services for individuals who, because of age or infirmity, are unable to care for themselves. This exemption relates to care, not fellowship, which is the proposal from the department, a term which is not referenced anywhere in the law.

In 1973 Senator Taft noted that the services are directed to caring for the elderly in their homes to avoid nursing home placement. Senator Burdick further noted that the exemption applies for services to the aged and infirm that needs someone to take care of them. Fellowship is not care and does little or nothing to keep people out of nursing homes.

Second, excluding employees of third party employers from the application of the exemption is in direct contradiction to the language of the FLSA as well as the position advanced by the Department of Labor at the U.S. Supreme Court. The law applies the exemption to any employer.

The department relied on this language in defending its current regulations before the Supreme Court in 2007. The exemption is not limited to the infirm that have the wherewithal and financial capabilities to take on the difficult tasks required of employers.

Third, the proposed rules have existed essentially in this same form since 1975's original rulemaking. Congress has had many opportunities to change the law in line with the defendant's—the department's proposal. Where Congress does not find sufficient reason to change the law over 36 years, the legal validity of the current proposal is called into serious question.

Finally and perhaps most importantly, the analysis by the Department of Labor regarding the likely impact of the proposed rules falls far short of the analysis required under the Small Business Regulatory Flexibility Act and other federal law. While the department offers a very lengthy impact report it has several major failings at its core. Given the potential impact of the proposal, the department should be held to a very high standard of accuracy and completeness in its impact analysis.

The analysis misses completely one of the most significant forms of home care—privately purchased personal care. Estimates fall short of 5 to 7 percent from the department's analysis, yet our own analysis shows that several million elderly people with disabilities as well, as well as those non-elderly with disabilities receive such care through over 20,000 companies across the country with an estimated $30 billion in annual expenditures.

The impact analysis is also devoid of any evaluation of live-in services. This unique segment of home care is virtually all on a private pay basis. The impact on live-in care and caregivers cannot

simply be assumed by using Medicare data or even the limited but unrelated data from Medicaid home care.

The major weakness in the department's analysis is also its great reliance on Medicare data, which funds virtually none of the companion services at issue in this rule. Less than 6 percent of Medicare home health spending applies to home health aides, most of whom don't even qualify for the companionship services exemption.

Medicaid, a much larger public purchaser of personal care, has no uniform data even to conduct the analysis to understand impact. We have conducted our own study of the impact of the proposal and we have looked at private pay as well as public programs, and the conclusions are that there will be moderate to significant increases in care costs; restrictions in overtime hours to the detriment of workers' overall compensation; loss of service quality and continuity; and increased costs passed on to patients and public programs that would result in the decreased service utilization, increase use of unregulated grey market services where quality of care is in jeopardy, and increased institutional care utilization rather than absorbing and covering the higher cost of care.

Further, an additional analysis by Navigant Economics confirms that the department fell far short of the depth and accuracy needed to produce the mandated impact analysis to protect the public from harmful policy changes. We are prepared to share all of that analysis with this committee and we will be doing so with the Department of Labor, as well.

I would close with one remark: The Department of Labor essentially qualified the proposed rule as inconsequential financially, at the same time characterizing the rule as so important to the workforce and so important to the elderly consumer of the services that it had to be done now. I think the department really needs to go back to the drawing board and examine true impact, and they have that opportunity—a rare opportunity. Given the 16 states that have overtime compensation, they can do a thorough review of what the impact has been in those 16 states as the transition occurred to determine much better than the assumptions and speculation that they used to determine the impact of this proposed rule just by looking at raw data.

Thank you for the opportunity to testify, and I would take any questions that you might have.

[The statement of Mr. Dombi follows:]

Prepared Statement of William A. Dombi, Vice President for Law, National Association for Home Care & Hospice

Good morning Chairman Walberg, Ranking Member Woolsey, and members of the Subcommittee on Worker Protections. I am William A. Dombi, Vice President for Law at the National Association for Home Care & Hospice. Thank you for the opportunity to testify at today's hearing.

The subject of today's hearing is of crucial importance to the provision of home care to our nation's elderly and people with disabilities. The U.S. Department of Labor has proposed changes in overtime compensation exemptions that would effectively eliminate the application of the exemptions for home care services. Specifically, the proposed rule would redefine "companionship services" to limit the application of the exemption to primarily "fellowship." Also, the proposed rule would eliminate any application of the companionship services and live-in exemptions where the worker is employed by a third party. There has been no change in the law mandating these revisions. Further, these rules have been in effect for nearly 40 years.

The proposed rule raises several legal and factual concerns.

First, the proposed redefinition of "companionship services" is in direct conflict with the language of the Fair Labor Standards Act as well as its legislative history. Specifically, the FLSA applies the exemption to employees providing "companionship services for individuals who (because of age or infirmity) are unable to care for themselves." This exemption relates to care, not "fellowship" a term never referenced in the law.

In 1973, Senator Taft noted that the services are directed to caring for the elderly in their homes to avoid nursing home placement. Senator Burdick further noted that the exemption applies for services to the aged and infirm that needs someone to take care of them. "Fellowship" is not care and does little or nothing to keep people out of nursing homes.

Second, excluding employees of third-party employers from the application of the exemption is in direct contradiction to the language of the FLSA and the position advanced by the Department of Labor at the US Supreme Court in Long Island Care at Home v. Coke. The law applies the exemption to "any employee." The Department relied on this language in defending its current regulations at the Supreme Court in 2007. The exemption is not limited to the infirm that have the wherewithal and financial capabilities to take on the difficult tasks required of employers.

Third, the proposed rules have existed essentially with identical standards since the original rulemaking proceeding in 1975. Congress has had many opportunities to change the law in line with the Department's proposal. Where Congress does not find sufficient reason to change the law over 36 years, the legal validity of the current proposal is called into serious question.

Finally, the analysis by the Department of Labor regarding the likely impact of the proposed rules falls very far short of the analysis required under the Small Business Regulatory Flexibility Act, the Paperwork Reduction Act, and Executive Orders 12886 and 13563. While the Department offers a lengthy impact report, it has several major failings at its core. Given the potential impact of the proposal, the Department should be held to a very high standard of accuracy and completeness in its impact analysis.

The analysis misses completely one of the most significant forms of home care—privately purchased personal care. It is estimated that several million elderly and persons with disabilities use such care through 20,000 companies with an estimated $25-30 billion in annual expenditures.

The Department's impact analysis is also devoid of any evaluation of live-in services. This unique segment of home care is virtually all on a private pay basis. The impact on live-in care and caregivers cannot be simply assumed by using Medicare data or even the limited, but unrelated data on Medicaid home care services. It is a service that is wholly different from any public program home care.

The major weakness in the Department's impact analysis is the great reliance on Medicare data on home health services and other public reports on such care. However, only 6% of Medicare home health spending is on home health aides, the closest service to companionship care.

Medicaid is a much larger public purchaser of personal care services through a variety of state specific programs. However, Medicaid data on the actual hours of care provided by personal care workers is virtually unavailable making an assessment of impact unreliable when using public data reports.

NAHC has conducted a study of the impact of the proposal. This nationwide survey, including private pay home care and live-in services providers, indicates the following adverse impacts:

1. Moderate to significant increases in care costs
2. Restrictions in overtime hours to the detriment of the workers overall compensation
3. Loss of service quality and continuity
4. Increased costs passed on to the patients and public programs that would decrease service utilization, increase unregulated "grey market" care purchases, and increase institutional care utilization rather than absorbing and covering the higher cost of care.

Further, an analysis by Navigant Economics confirms that the Department fell far short of the depth and accuracy needed to produce the mandated impact analysis sufficient to protect the public from harmful policy changes. Navigant Economics uncovered essential flaws and weakness in the Department's analysis, indicating that it would be prudent to re-initiate a comprehensive review before proceeding further with the proposed rule change.

In conclusion, the Department of Labor's proposed rule significantly changes its longstanding policy. This proposal is in conflict with the language of the law and

its legislative history. Also, the proposal fails to comply with requirements that the Department undertake a comprehensive and reliable impact analysis before issuing the proposal. Consumers, workers, small businesses, and public health care financing programs such as Medicaid all would be adversely affected by the proposal.

Chairman WALBERG. Mr. Dombi, I thank you and each member of the panel. I appreciate your comments.

I also want to take an opportunity as I see a number of caregivers in in attendance today, as well as administrators of caregiving organizations, and I would—having experienced some of that myself in caring for my mother, I want to say thank you. You are special people for what you do and the care you provide. Regardless of our discussions here related to law and how it goes on, we appreciate your services.

Delighted to have the gentleman from Virginia, Mr. Goodlatte, here.

I know that it is a scheduling issue and I would like to extend the opportunity now to recognize you for questioning.

Mr. GOODLATTE. Well, Mr. Chairman, thank you very much, and thank you for holding this hearing. And I also want to join you in thanking all of the caregivers and individuals who operate businesses that afford people the opportunity to hire good workers so they can keep family members at home and live at home.

I also want to take the opportunity to recognize two of those folks who are here from my district, one of whom is a member of the Virginia General Assembly, and that is Delegate Chris Head and his wife Betsy, who are both here, and I thank them for the interest they have taken in today's hearing.

I want to first direct my questions to Mr. Dombi and ask you if you could elaborate on your testimony that the department's rule directly conflicts with the language in the Fair Labor Standards Act and its legislative history. Can you explain your understanding of Congress' intent in enacting the companionship exemption, and can you please elaborate on how this rule conflicts with that intent and the language of the act?

Mr. DOMBI. Certainly. Start with the fact that the proposed rule redefines companionship services in a way that pretty much limits it to a concept called fellowship, which in this modern day and age sounds like Facebook, and eliminates, effectively, the definition as it relates to providing care to the elderly and infirm; whereas, the language in the law itself refers to care of the elderly and infirm, not fellowship, a concept which is not addressed—even referenced—in the legislative history or the statutory language.

And in terms of any ambiguity regarding that, the legislative history, as I referenced in my testimony, from two of the proponents of the companionship services exemption, Senators Taft and Burdick, focused-in on caring for individuals to keep them out of the nursing home. So to take the proposed regulation, which effectively says no more than 20 percent of the time can be spent providing personal care to an individual, apply it to the elderly and infirm, who frankly aren't looking for a friend to watch TV with them, they are looking for assistance with activities of daily living, looking at the statutory language which focuses in on care not on fellowship,

and the rule essentially guts the companionship exemption as intended by Congress back in 1974.

The second part of it is relating to the application of the rule to third party employers, companies that provide the services. Most elderly and disabled really aren't going to be looking on Craigslist for finding caregivers; it is a dangerous effort in many respects, as well.

Instead, they turn to third party agencies who do background screening and place people there who can competently meet needs. The statute itself regarding the exemptions references very specifically that it applies to any employee engaged in that type of service. The Department of Labor, at the Supreme Court in the Long Island Care at Home v. Coke case, very specifically argued that "any employee" means third party employers as well as people directly engaged in employment within the household.

Mr. GOODLATTE. I want to interrupt you because I want to direct one of the points you just made over to Mr. Esterline. I wasn't here for the testimony of the deputy administrator, but I understand that one of the questions from the gentlewoman from California related to the fact that the amount that is billed to someone who hires one of these companies is greater than the amount paid to the caregiver.

And so, Mr. Esterline, as the operator of one of these businesses can you describe the costs of operating a business outside of the payroll—outside the amount of money that you have to pay in wages to the direct caregivers?

Mr. ESTERLINE. So for clarification, Congressman, you were wondering what the overall operating expenses, administrative expenses——

Mr. GOODLATTE. Right.

Mr. ESTERLINE [continuing]. Or my business?

Mr. GOODLATTE. Exactly.

Mr. ESTERLINE. Certainly. Thank you for the question.

I would like to start by referencing—Congresswoman Woolsey was referencing the profits of these businesses of 30 to 40 percent. I have been doing this for 11 years and, boy, it would be nice to have 30 or 40 percent profit but the reality is is it is not. Not even close.

But to answer your direct question, Congressman, there is a—for the caregiver expense we have got the gross payroll dollars; we then have to match all the employer taxes; we also have to carry workman's comp insurance, putting us well over 50 percent out the door. Then we have got the administrative costs for the administrative people that are doing the hiring, the training, the scheduling, the marketing of our services——

Mr. GOODLATTE. You also bear the risk, too, don't——

Mr. ESTERLINE. We absolutely bear the risk.

Mr. GOODLATTE. If an individual wants to save money and, as Mr. Dombi suggested, go to Craigslist or call a neighbor or call a friend, find somebody that way, they certainly can do that and it might be—may be less expensive for them to do that. But when they do that they don't—and something goes wrong and that individual causes some harm that individual is likely not going to be able to make things right financially, whereas your company has

the insurance, has the wherewithal to make things right if something does go wrong. Is that not——

Mr. ESTERLINE. That is absolutely correct—general liability, professional liability to cover all of our caregivers and to protect our clients.

Mr. GOODLATTE. And do you have competitors?

Mr. ESTERLINE. Do I have competitors?

Mr. GOODLATTE. Do you have other businesses in your area that offer similar services?

Mr. ESTERLINE. That are opening every single day, Congressman.

Mr. GOODLATTE. Yes. And so if they are choosing to pay more to their workers or charge less to the people hiring the service, you have got to be aware of that, you have got to compete with that along with competing with people who decide they are going to simply directly go to the newspaper, or Craigslist, or a referral from a friend or neighbor.

Mr. ESTERLINE. Yes. And I think that, really the point is, I am here defending my caregivers. I am really here advocating for them, and I have lived it every single day——

Mr. GOODLATTE. You take the time to screen them, to train them, to make sure they are going to do a good job so that your company has a good reputation and people will want to continue to do business with you.

Mr. ESTERLINE. Absolutely. And——

Chairman WALBERG. The gentleman's time is expired.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Chairman WALBERG. Thank you for your questioning.

I recognize the ranking member, Ms. Woolsey?

Ms. WOOLSEY. Thank you, Mr. Chairman.

Ms. Ruckelshaus, in Mr. Dombi's testimony he says that the proposed rule is in direct conflict with the legislative history of the Fair Labor Standards Act. I would like to give you some more time to talk about what you—how you believe this proposed rule and the intent of the framers in this companionship exemption. And I would like you to expand into—this is the 21st century. This is no longer 1974.

Ms. RUCKELSHAUS. Sure. Yes. Thank you for the question. And Mr. Dombi and I were on opposite sides in the Coke case in the Supreme Court, so we—we see the case differently.

In 1974, when the Congress decided to extend the Fair Labor Standards Act to domestic service workers for the first time, it carved out two narrow exemptions. One was for casual babysitters and one was for companions.

It did not define what companions—"companionship services" meant and it explicitly left it to the Department of Labor to define what "companionship services" meant. The Department of Labor did that in 1975 and it defined companionship services in such a way that the modern home care workforce is now completely swept into what was intended to be a very narrow exception for casual babysitters and companions.

The legislative history shows that what the Congresspeople were talking about were elder-sitters—people where were not, as a vocation, doing the things that these workers here today are doing—catheter care, caring for patients with Alzheimer's, with very tech-

nical experience. The Congresspeople intended to exempt the casual babysitters and the companions who were more like elder-sitters whose vocation was not taking care of—as a profession.

Ms. WOOLSEY. Thank you very much. So critics of the rule—I am staying with you on this—have argued that continuity of care will be harmed if this rule is in effect. Talk about the effect of low wages on the current home care industry and the turnover rates, and how that affects care.

Ms. RUCKELSHAUS. The problem with the continuity of care arguments that are sometimes made is first, the opponents are suggesting that 24/7 care can only be performed by one worker, and that is just not a workable scenario for anybody. My own grandmother who had three aides who were taking care of her at the end in her home and she loved all of them; she knew them; they were with her for a long time. There was continuity of care and it was the same three workers for a long time.

The high turnover, which is estimated to be as high as 65 percent per year, does more damage to the continuity of the workforce than any raise in—from $7 an hour to $9 an hour could ever do. The high turnover not only costs the agencies but it means that the workers leave because they have to leave and there is no continuity of care for the consumers and recipients of the services.

Ms. WOOLSEY. Thank you.

Mr. Esterline—yes, thank you—I am so confused about how $8 an hour for 54 hours a week versus $8 for 29 hours a week, in your best judgment, ends up in being better for the worker. How does that work?

Mr. ESTERLINE. It is absolutely not better for the worker.

Ms. WOOLSEY. Well why would you make that happen?

Mr. ESTERLINE. Well, my——

Ms. WOOLSEY. What happened to 40 hours a week?

Mr. ESTERLINE. Well, I will tell you exactly, Congresswoman. We referenced in testimony earlier about our scheduling software programs and how we can manage and we can do these things. Absolutely we can.

In the state of Michigan I have been—we have been successful in doing that. But the issue is is that we are not being—we are—we are giving our caregivers the hours that they want because we have to cap them at 40. Because if not I have got to pass the costs on to my senior clients that are already struggling to pay for the services themselves.

Ms. WOOLSEY. So then why did poor Rosie—I think it was Rosie—only get 29 hours? I mean Doris—Doris. I am sorry.

Mr. ESTERLINE. Doris. Yes, it was Doris.

Ms. WOOLSEY. Thank you. I mean, what happened to 40?

Mr. ESTERLINE. Well, I would love to give her 40, and anyone of us—anyone of us in this room would love to have Doris for 40-plus hours or the 54 she was averaging before, but it is based on need, and—and as our customers come and go because of various situations that they may be in I can't openly just schedule her; I have to analyze that information daily and weekly in limiting them in their hours, ultimately decreasing their income. It is unfair to them, and this—and this is taking—this is taking money out of their pockets and they have to get a second job. It is not fair.

Ms. WOOLSEY. Okay.

Thank you, Mr. Chairman.

Chairman WALBERG. I recognize myself for my 5 minutes of questioning.

Ms. Woodard—Woodard, excuse me—Ms. Woodard, your testimony noted that your father—father's care started with a privately hired caregiver.

Ms. WOODARD. Yes.

Chairman WALBERG. However, as your father's—as I remember it—your father's needs changed you hired a caregiver through an agency.

Ms. WOODARD. Correct.

Chairman WALBERG. Can you explain why you made the switch to a caregiver hired through an agency?

Ms. WOODARD. I think that what I did is I made the mistake that a lot of people do and think, "I know what I am doing; I know this person through church, or they worked at somewhere else and they just retired," so I hired somebody to care for my dad, and I knew her so I didn't have to do a background check, I didn't have to make sure she had her license, make sure she, you know, had her papers to work.

But then as you start thinking through her being with your father, what if my father fell on her? What if she got injured on the job? Whose responsibility would it be to pay for her back injury or her workman's compensation because she had no workman's compensation? She wasn't licensed or bonded. I had no protection as a consumer.

So what I did was actually I called up her homeowner's insurance and I asked him was I at risk, and he said yes, you are at great risk and I would suggest increasing your parents' policy to $1 million because if she does indeed fall, if something happens to her while she is in my house, even if it is involved in being with my father, we were responsible.

Chairman WALBERG. Okay. Thank you.

Mr. Esterline, the notice of proposed rulemaking claims that Medicare and Medicaid figures on home health to support its conclusion that a great deal of the cost would be picked up by Medicare and Medicaid. Let me ask you, how is the companionship industry different from home health?

Mr. ESTERLINE. It is different from home health because my caregivers are placed in the homes to care for our clients. They are to be there for them to potentially supervise and make sure that they are safe in their home environment.

Secondary services are going to be the assistance to the restroom, or the housekeeping, or the meal preparation, where your home health is going to be going in and per visit—not for an hourly length of time—to go in and assist with a bath—a bath visit, so they are in and out for no length of time, and it is not even scheduled for the time that the—that the senior would like. A lot of times it is like calling Sears: "We will be there between 1 and 5 for that bath visit."

So what is different is that we are there to provide the care much more than just a bath visit.

Chairman WALBERG. How has the Department of Labor's notice of proposed rulemaking altered the services that you are able to provide?

Mr. ESTERLINE. I am sorry. Can you say that again?

Chairman WALBERG. How has the Department of Labor's notice of proposed rulemaking altered the services you are able to provide, if they have?

Mr. ESTERLINE. Well, I can tell you exactly. Prior to the rule—or, excuse me, the law change in Michigan in 2006 my staff and I focused 100 percent on consistency in scheduling the caregivers to the hours that they—the designated hours that they wanted to work and making sure that it matched the needs of our clients, and it was 100 percent based on the care being provided.

And since the change in the law the third component now is—Doris is a perfect caregiver but we can only put her in there for one night because she has already got so many hours. So what has happened is that she has—it has disrupted the continuity and the consistency of care.

Chairman WALBERG. Generally speaking, how much does your business—your industry—rely on Medicare and Medicaid payments?

Mr. ESTERLINE. As I stated in my written testimony, based on the numbers from the IFA study, it is 85 percent privately paid by the senior or the family member and 5 percent by Medicare and Medicaid. My business is very close to similar to those numbers.

Chairman WALBERG. How much does your business rely on—typically—on health insurance?

Mr. ESTERLINE. Your traditional health insurance, like Medicare, your Blue Cross Blue Shield, zero. Not one penny is—the companionship services——

Chairman WALBERG. Zero.

Mr. ESTERLINE. Zero.

Chairman WALBERG. So should this rule be enacted, who would pay for the services your business—your industry provides?

Mr. ESTERLINE. Well, me personally, it doesn't change one bit for me. I am already living under those—the—those regulations.

Chairman WALBERG. In Michigan.

Mr. ESTERLINE. In Michigan. So I am here to share—and to explain that don't follow Michigan down this road. It is a bad deal for the—for our caregivers and a bad deal for our clients.

Chairman WALBERG. Do your employees in Michigan make more money now, after the change?

Mr. ESTERLINE. No. They are not making more. They are struggling to make the same. And a lot of times the caregivers like Doris—she is not an isolated incident or an isolated situation—we have to cap the caregivers to make it affordable for our—for our seniors, and so it is limiting the income that they are actually going to—they are actually making.

I have caregivers that will say to me at any given time, "Wynn, don't pay me overtime. Let me just care for Mr. and Ms. So-and-so."

And I say, "I am sorry. I have to abide by the law. It is not worth going to jail over."

Chairman WALBERG. Well, thank you, each of the panel members. I appreciate your time with us.

At this point in time I would ask the ranking member if she has any closing remarks to make.

Ms. WOOLSEY. Thank you, Mr. Chairman. Thank you for this hearing.

I believe it was Mr. Dombi that asked, why haven't the rules been changed since 1974, and I think the answer is clear. It is because we have not had a Department of Labor willing to step up to this issue and to bring forth rules that bring this industry into the 21st century, and I thank our current Department of Labor for being willing to do this.

Today's hearing questions whether an industry that generated billions of dollars of profit each year can afford to provide basic wage and hour protections for its workforce. These workers enable our loved ones to remain in their homes and preserve their dignity and quality of life. These workers deserve basic minimum wage and overtime protections so that they can provide for their families with the same dignity and self-sufficiency they provide for their clients.

As Senator Kennedy said when discussing Fair Labor Standards Act protections, and I quote him—"No one who works for a living should have to live in poverty."

Today, Mr. Chairman, we heard compelling testimony from Ms. Ruckelshaus clearly demonstrating the need for the Department of Labor's proposed regulation. All workers deserve a fair day's pay for a fair day's work.

The home care workforce is no different. These workers, primarily women and minorities, do valuable work and they deserve just as—they deserve just compensation. It is essential that we extend FLSA protections to home health care workers.

With that, Mr. Chairman, I would like to ask unanimous consent to submit for the record a letter signed by 86 organizations in support of the Department of Labor's proposed rule and I would like to ask unanimous consent to submit a statement for the record from the American Federation of State, County, and Municipal Employees. And I thank you.

[The information follows:]

March 6, 2012.

Hon. TIM WALBERG, *Chairman;* Hon. LYNN WOOLSEY, *Ranking Member,*
Subcommittee on Workforce Protections, Committee on Education and the Workforce, Washington, DC 20515.

DEAR CHAIRMAN WALBERG AND RANKING MEMBER WOOLSEY: The undersigned organizations support the Department of Labor (DOL) for revising the rules (RIN 1235-AA05) on the "companionship exemption" under the Fair Labor Standards Act (FLSA), which currently denies the direct care workforce basic federal wage-and-hour protections.

This workforce provides daily supports and services to older Americans and individuals with disabilities who need assistance with personal care and activities of daily living. The work that home care workers and personal care attendants do is vitally important to the health, independence, and dignity of consumers who rely on paid services in their homes. Unfortunately, because of the current DOL regulations, over 1.7 million home care workers are not ensured minimum wage or overtime pay. As a result, wages for this workforce are depressed, earning them low compensation, often for long hours of work. The current federal minimum wage is $7.25 per hour but one quarter of personal care aides earn less than $6.59 per hour and one quarter of home health aides earn less than $7.21 per hour. Nationwide,

one out of every 12 low-wage workers is a direct care worker, and typical of a low-wage workforce, these home care workers are more likely to be uninsured, and nearly half receive public benefits such as Medicaid or food stamps.

During this economic recovery, we need to implement federal regulatory policies that fight poverty and promote access to quality care and the growth of quality jobs. The current DOL regulations broadly exempt this whole workforce. Such a sweeping policy is unsound, unfair, and undermines the economic recovery and our nation's goals for quality long-term care. Extending basic minimum wage and overtime protections to most home care workers will improve the stability of our home care workforce and encourage growth in jobs that cannot be outsourced. Reducing turnover in this workforce will improve access to and quality of these much-needed services.

The work done by these home care workers and personal care attendants affirms the values of dignity and respect we have for our aging citizens and individuals with disabilities. It is time that we value this workforce, too. Now is not the time to delay regulations that would provide them with a small measure of respect—the protection of federal wage-and-hour rules.

We oppose efforts to delay issuing the final rule and we support increasing resources to expand in-home supports and services. Our nation faces many challenges to allow consumers and home care workers to live with dignity, respect and independence but the solution to providing these needed services is not to deny paid caregivers federal minimum wage and overtime protections.

9to5, National Association of Working Women
Advocacy for Patients with Chronic Illness, Inc.
AFL-CIO
AFSCME
Alliance for a Just Society
Alliance for Retired American
American Association of University Women (AAUW)
American Civil Liberties Union
American Federation of Government Employees (AFGE)
American Federation of Teachers (AFT)
American Rights at Work
American Society on Aging
Asian Law Caucus, Member of Asian American Center for Advancing Justice
Asian Pacific American Legal Center, a member of the Asian American Center for Advancing Justice
Association of University Centers on Disabilities (AUCD)
Campaign for Community Change
Caring Across Generations
Center for Law and Social Policy (CLASP)
Chicago Jobs Council
Coalition of Labor Union Women
Coalition on Human Needs
Communications Workers of America (CWA)
Community Action Partnership
Cooperative Care
D.C. Employment Justice Center
Demos
Direct Care Alliance
Direct Care Workers of Color, Inc.
Disciples Justice Action Network
Equality State Policy Center
Excluded Workers Congress
Families USA
Food Chain Workers Alliance
Friends Committee on National Legislation
Gray Panthers
Health Care for America Now
Indiana Care Givers Association
Institute for Policy Studies
Interfaith Worker Justice
International Brotherhood of Teamsters
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW
Jobs With Justice
Lawyers' Committee for Civil Rights Under Law

League of United Latin American Citizens
Legal Aid of Marin
Legal Momentum
MataHari: Eye of the Day
MomsRising
National Academy of Elder Law Attorneys, Inc. (NAELA)
National Alliance for Direct Support Professionals
National Consumer Voice for Quality Long-Term Care
National Council of Jewish Women
National Council of La Raza (NCLR)
National Council of Negro Women (NCNW)
National Council of Women's Organizations
National Domestic Workers Alliance
National Employment Law Project (NELP)
National Employment Lawyers Association (NELA)
National Gay and Lesbian Task Force Action
National Hispanic Council on Aging
National Partnership for Women & Families
National Women's Law Center
National Women's Health Network
National Workrights Institute
NCB Capital Impact
NETWORK, A National Catholic Social Justice Lobby
OWL-The Voice of Midlife and Older Women
Paraprofessional Healthcare Institute (PHI)
Partnership for Working Families
Provincial Council of the Clerics of St. Viator (Viatorians)
Raising Women's Voices for the Health Care We Need
Sargent Shriver National Center on Poverty Law
Service Employees International Union (SEIU)
Sugar Law Center for Economic and Social Justice
The Brazilian Immigrant Center
The Iowa Statewide Independent Living Council (SILC)
The Leadership Conference on Civil and Human Rights
United Steelworkers (USW)
Universal Health Care Action Network (UHCAN)
USAction
Virginia Poverty Law Center
Voices for America's Children
Voices for Progress
Washington Community Action Network
Wider Opportunities for Women
Women Employed
Working America

Prepared Statement of the American Federation of State, County and Municipal Employees (AFSCME)

Mr. Chairman and members of the Subcommittee, on behalf of the 1.6 million members of the American Federation of State, County and Municipal Employees (AFSCME), including approximately 125,000 home care providers, please include the following statement in the hearing record for "Ensuring Regulations Protect Access to Affordable and Quality Companion Care."

The home care providers represented by AFSCME are a lifeline to independence and dignity for the consumers to whom they provide support services. These home care workers assist individuals who have functional limitations—due to age, chronic condition, illness or injuries—with mobility, personal hygiene, toileting, dressing, eating, transportation, cleaning and cooking, and other daily activities of living which many of us take for granted. The support and services home care workers provide enable consumers to continue to live in the comfort of their own homes and remain active and part of their families and communities. The job home care workers do is demanding and intensely personal in nature. It requires an exceptional emotional connection and is frequently draining. Our members find the work worthwhile because they know they make a difference in someone's quality of life every hour they work. For some older Americans receiving home care services, these paid caregivers may be the only person they see regularly beside their physician.

The work is highly valued by consumers and their families but compensation has been suppressed due to the overly broad Department of Labor regulations that exempt the whole home care industry, including home care agencies, from having to plan for and comply with basic federal wage and hour protections. The federal minimum wage is $7.25. One quarter of personal care aides earn less than $6.59 per hour, and one quarter of home health aides earn less than $7.21 per hour.[i] Moreover, the real hourly rates are lower because these hourly rates are usually for direct care hours only, as workers typically are not paid for travel time between clients or reimbursed for travel costs.

These suppressed wages hurt workers, employers and our economy, and keep home care workers and their families nearly impoverished. Two out of five home care workers employed by a home care agency lack health insurance. Due to high injury rates, home care workers are especially vulnerable without adequate insurance coverage. Nearly one out of two home care workers are in households relying on public assistance, such as Medicaid and food stamps, to meet their basic needs.

For employers it means costly high turnover. The national price tag for high turnover in this industry is roughly on the order of $4.1 billion.[ii] Small businesses that want to pay workers better wages are put at an unfair disadvantage because there is no federal minimum wage that applies to home care providers to level the competitive playing field.

The U.S. Department of Labor projects that at least another third of a million new home health aides will be needed by 2014 to meet the home health care needs of an aging population that is expected to more than double, from 13 million in 2000 to 27 million in 2050. Because this demand for these services will increase as our nation ages, the low wages of these jobs undermine economic growth and increase worker shortages.

Our members are committed to those they serve. They are acutely aware of how the low wages and high industry turnover destabilize the workforce, reducing access to services and undermining the delivery of quality services that truly satisfy the needs of elders and persons with disabilities. The absence of federal wage and hour protections for home care workers puts the individuals who need their services at risk since an individual's quality of life and safety may depend on the reliability and the skill of their home care worker. Low wages will continue to deprive individuals with functional limitations access to needed services as low wages drive more workers out of these jobs at a time when the demand is growing.

The significant disparity between what home care agencies charge and are paid versus the hourly wages of home care workers suggests that the industry can afford to comply with basic federal wage and hour rules. The average rate paid by state Medicaid programs to agencies providing personal care services was $17.73 per hour in 2010. In comparison, to the median wage received by home care workers generally (under both private and public-pay arrangements) who work in the overall home care industry (both private and public-pay) was $9.40.[iii] According to the National Private Duty Association, the national average charge to families for personal care services is $19.82 per hour, compared to the $9.69 per hour paid to the worker. Accordingly, many for-profit agencies charge consumers approximately twice the hourly rate paid to caregivers. This data suggest the 30% to 40% profit margins that for-profit franchises report receiving for delivering personal care services are being underwritten by the low wages paid to caregivers.

It is time to be fair to those who care. It is time to end the broad exemption from federal wage and hour rules for a whole industry. Those who rely on home care services to remain independent need increased access to in-home supports and services—and so do their families. The (mostly) older women whose compassionate hearts and steady hands provide those services should be valued and respected. We are long overdue to provide home care workers with basic federal wage and hour protections.

Chairman WALBERG. I have no objection.

Ms. WOOLSEY. With that, I yield.

Chairman WALBERG. I was waiting for the last word.

Well again, I thank my ranking member, a good friend from California, for her statement, for the concern, and we certainly, in this hearing, want to make sure that issues are addressed that, number

[i] *http://www.carseyinstitute.unh.edu/publications/IB-Smith-Home-Care-Workers.pdf*
[ii] *http://www.directcareclearinghouse.org/download/TOCostReport.pdf*
[iii] *http://www.directcareclearinghouse.org/download/pcs-rates-and-worker-wages.pdf*

one, meet the needs of the clients, of the patients, of those that are requiring assistance of caregivers that I have stated earlier on. I frankly almost see it as unbelievable the type of work that they are willing to do and the care and commitment they make to people even like my mother, that supported my wife and myself in providing an additional 3 years on top of 10 prior years of making sure she could stay at—with us. The only reason that that changed was it became—even with those caregivers supplementing my wife and myself—it became dangerous for her to live at home, and so now we are thankful we have nursing care that provides for her.

But that doesn't change the needs of many, many people, and a growing number of us, as the age increases, that need care, hopefully in home, in settings that are familiar, that are loving, that are friendly and caring, and provide opportunities for them to live with dignity in the remaining years of their life.

On the other side of the ledger, we want to make sure that those that provide that care, starting with the caregiver that comes directly to the home and to the patient—the client—have incentive to do the job that they are uniquely qualified to do and have the abilities, the emotions, the sensitivity, and the desire to provide that care in loving, careful, and consistent ways. And that in turn, they have the ability to know that they are appreciated, that they have an income that meets their needs or approaches very carefully meeting their needs, as well. In turn, we have a great amount of appreciation for the caregiving organizations that provide in-home care, supervise, train, administer, and send out to those settings people who will—who would care for the clients.

We understand that in order to do that, and having experience in organizing that for just one person—my mother—it is a challenge. Then when you add to that the liabilities, the cost factors, the additional component parts to make sure that the businesses stays in business and we don't find another business that goes out and now a loss of caregivers, that their needs are met, as well.

For those purposes, today we held this hearing. For those purposes, today we will make sure that the remarks given from all perspectives are part of the comment for the Department of Labor that would expand their ability to make the proper decision in putting forth rules, that they also understand that this Congress, over the course of years, has decided the best approaches to take in dealing with that and to author that without careful and due consideration in time of economic upheaval, and challenge, and expanding need, and to do that without caring for the full picture would be an extreme problem—human problem, not just a political economic problem, but a human problem, as well.

So I am trusting that this hearing will provide insights in unique and special ways to allow us to expand the opportunities to give care, expand the opportunities to be employed in this most important field, expand the opportunities to know that I will be cared for at some point in time, if necessary in my life——

Ms. WOOLSEY. Me first.

Chairman WALBERG. You first? Well, you are tenacious enough probably to outlive me. But both of us, that we would have that opportunity, and our constituents, as well, in a—in the greatest country on the earth, have the greatest care possible, as well.

So I appreciate the hearing today and look forward to good things coming from it. And having no other questions or comments, the committee is adjourned.

[Additional submission of Mr. Walberg follows:]

Prepared Statement of the National Federation of Independent Business (NFIB)

Thank you Chairman Walberg, Ranking Member Woolsey, and Members of the Subcommittee for holding this hearing. The National Federation of Independent Business (NFIB) appreciates the Subcommittee on Workforce Protections focusing on the effects the U.S. Department of Labor's proposed changes to the companionship exemption will have on all stakeholders in the companionship care industry. We are thankful for the opportunity to offer the following statement on how the proposed rule will affect small businesses in the industry.

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.

The U.S. Department of Labor (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. The most important proposed change eliminates the use of this exemption by third-party employers of companion care workers.

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. 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.

NFIB members in this industry have four major concerns with the proposed rule. 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.

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.[i] 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

[i] "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*

NPRM as part of its Regulatory Report Card project.[ii] 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.

[ii] "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*

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 figured has been furnished by CAHSAH. This organization published a report in 2009 that estimated there are 1,200 home care aid organizations in the state.[iii] 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 regulations.[iv]

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.

In 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—

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

[iv] "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*

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.

NFIB appreciates the opportunity to submit comments for the hearing record, and appreciates the Subcommittee's work on this important issue.

[Additional submissions of Ms. Woolsey follow:]

March 6, 2012.

Hon. TIM WALBERG, *Chairman;* Hon. LYNN WOOLSEY, *Ranking Member,*
Subcommittee on Workforce Protections, Committee on Education and the Workforce, Washington, DC 20515.

DEAR CHAIRMAN WALBERG AND RANKING MEMBER WOOLSEY: Caring Across Generations (CAG) supports the Department of Labor (DOL)'s rulemaking (RIN 1235AA05) to revise the "companionship exemption" regulations under the Fair Labor Standards Act (FLSA). The current regulations deny minimum wage and overtime protection to direct care workers. The proposed regulations would narrow the companionship exemption and provide fundamental labor protections to most direct care workers.

CAG is a campaign to transform long term care in the United States for individuals who rely on long term services and supports, for the workers who provide home care, and for the individuals and families who struggle to find and afford these services. Finalizing the proposed regulation would be an important recognition of the importance of the work that caregivers perform and would represent an important step towards ensuring both that these vital workers are treated with dignity and respect and that seniors and people with disabilities receive the support that they need to live independently in their homes and communities.

Direct care workers provide daily supports and services to older Americans and individuals with disabilities who need assistance with personal care and activities of daily living.Nearly 70% of people turning 65 today will need, at some point in their lives, help with activities of daily living, such as bathing, feeding, and dressing. The work that home care workers and personal care attendants do is vitally important to the health, independence, and dignity of consumers who rely on paid services in their homes. Unfortunately, because of the current DOL regulations, over 1.7 million home care workers are not ensured minimum wage or overtime pay. As a result, wages for this workforce are depressed.

During this economic recovery, we need to implement federal regulatory policies that fight poverty, create jobs, and promote access to quality long term care. The current DOL regulations broadly exempt the direct care workforce from fundamental labor protections. Such a sweeping policy is unsound, unfair, and undermines our economic recovery and our nation's goal of promoting quality long-term care. Extending basic minimum wage and overtime protections to most home care workers will improve the stability of our home care workforce and encourage growth in jobs that cannot be outsourced. Reducing turnover in this workforce will improve access to and quality of these vital services.

Home care workers and personal care attendants provide critical support to enable seniors and people with disabilities to live independently in their homes and remain a vital force in their communities. It is time that we value the workers and affirm the value of the support they provide. Now is not the time to delay regulations that would provide them with a small measure of respect—the protection of federal wage-and-hour rules.

We oppose efforts to delay issuing the final rule, and we support increasing resources to expand in-home supports and services. Our nation faces many challenges to allow consumers and home care workers to live with dignity, respect and independence, but the solution to providing these critical services is not to deny paid caregivers federal minimum wage and overtime protections.

Sincerely,

AI-JEN POO, *Co-Director,*
On Behalf of the Caring Across Generations Campaign.

March 19, 2012.

Hon. TIM WALBERG, *Chairman;* Hon. LYNN WOOLSEY, *Ranking Member,*
Subcommittee on Workforce Protections, Committee on Education and the Workforce, Washington, DC 20515.

DEAR CHAIRMAN WALBERG AND RANKING MEMBER WOOLSEY: As communities of faith united by our common religious traditions and values of justice and compassion, we urge you to support the Department of Labor's (DOL) revised rules (RIN 1235-AA05) on the "companionship exemption" under the Fair Labor Standards Act (FLSA), which currently denies the direct care workforce basic federal wage-and-hour protections. Further, we urge you to oppose any delay in the implementation of these long-overdue rules

The work done by our nation's more than 1.7 million direct care workers is a daily testament to our values as a compassionate society. Those who provide support and services to individuals who would otherwise be unable to perform basic activities of daily living deserve—at a minimum—a just and fair wage.

Direct care workers provide the gentle touch to help lift a frail person from their bed in the morning. They provide the steady hand to feed an individual with disabilities. They offer the deep kindness necessary to bathe a person who can no longer bathe herself, but wants to remain in the comfort of her own home. Because of the challenging and intense work done by this workforce, millions of individuals are able to live at home with dignity and remain active members of their families and communities.

Though their work is of priceless value to the families they serve, home care workers and personal care attendants earn low-wages for long hours. Approximately 45 percent of direct-care workers live in households below 200 percent of the federal poverty level; nearly half of all direct-care workers live in households that receive one or more public benefits such as Medicaid or the Supplemental Nutrition Assistance Program (SNAP).

It is an injustice that home care workers have thus far been denied basic protections afforded to all other hourly workers under the FLSA. We urge you to support the DOL's efforts to address this problem by backing the revised rules that would provide this growing workforce with basic wage-and-hour protections and opposing any delays.

Respectfully,

CENTER OF CONCERN,
CHURCH WOMEN UNITED,
DISCIPLES JUSTICE ACTION NETWORK,
THE EPISCOPAL CHURCH,
EPISCOPAL WOMEN'S CAUCUS,
FAITH IN PUBLIC LIFE,
FRIENDS COMMITTEE ON NATIONAL LEGISLATION,
INTERFAITH WORKER JUSTICE,
JEWISH COMMUNITY ACTION, ST. PAUL, MN,
JEWISH WOMEN INTERNATIONAL,
JEWS UNITED FOR JUSTICE,
NATIONAL ADVOCACY CENTER OF THE SISTERS OF THE GOOD SHEPHERD,
NATIONAL COUNCIL OF CATHOLIC WOMEN,
NATIONAL COUNCIL OF JEWISH WOMEN,
NATIONAL COUNCIL OF THE CHURCHES OF CHRIST, USA,
NETWORK, A NATIONAL CATHOLIC SOCIAL JUSTICE LOBBY,
PRESBYTERIAN CHURCH (U.S.A.) OFFICE OF PUBLIC WITNESS,
PROGRESSIVE JEWISH ALLIANCE & JEWISH FUNDS FOR JUSTICE,
UNION FOR REFORM JUDAISM,
UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS,
UNITED CHURCH OF CHRIST, JUSTICE AND WITNESS MINISTRIES,
THE UNITED METHODIST CHURCH—GENERAL BOARD OF CHURCH AND SOCIETY.

March 20, 2012.

Hon. TIM WALBERG, *Chairman;* Hon. LYNN WOOLSEY, *Ranking Member,*
Subcommittee on Workforce Protections, Committee on Education and the Workforce, Washington, DC 20515.

DEAR CHAIRMAN WALBERG AND RANKING MEMBER WOOLSEY: As home care employers, we are writing in support of the Department of Labor's proposed rule (RIN) 1235-AA05 that would narrow the current exemption of home care workers from the minimum wage and overtime protections under the Fair Labor Standards Act.

We own or run agencies that vary in size from 4 employees to over 200. We operate in states that have minimum wage and overtime protections and in those that don't. We are employers that receive public funds from Medicare and Medicaid, those with public and private revenues, and those who rely on private pay only.

We value the work our employees do and have always treated our workers with respect—and that includes fair compensation. We believe strongly that our employees deserve the same federal minimum wage and overtime protections that are granted to other American workers, including nursing assistants who do similar work in different settings. Many of our clients have high-hour needs, and as a business we can manage those cases without excessive overtime.

Our workers provide a wide range of services, including personal care, household assistance, medication reminders, meal preparation and companionship. This work requires skill and compassion. It is by no means equivalent to Friday-night babysitting. It is a career that allows our employees to give back to their communities while helping to provide for their families.

One of the challenges we face as a business is recruiting and retaining a qualified workforce. We believe that providing a compensation floor will help to attract more workers to the field and reduce turnover, which adds unnecessary costs to our business ledger and undermines continuity of care.

The proposed rule shows that home care is a "real" job, deserving of respect and fair pay. Without this action, we will struggle to provide quality care to an exploding population of seniors.

Signed,

BRING CARE HOME,
(Massachusetts—347 employees).

BUFFALO RIVER SERVICES,
(Tennessee—180 employees).

CATALINA IN-HOME SERVICES,
(Arizona—85 employees).

COOPERATIVE HOME CARE,
(Wisconsin—50 employees).

COOPERATIVE HOME CARE ASSOCIATES,
(New York—1,800 employees).

FROM THE HEART,
(Pennsylvania—100 employees).

GRAHAM BEHAVIORAL SERVICES,
(Maine—111 employees).

HALCYON HOME CARE,
(Maine—4 employees).

HOME CARE ASSOCIATES,
(Pennsylvania—175 employees).

HOME CARE PARTNERS,
(Washington, DC—210 employees).

IN-HOME SUPPORTIVE SERVICES CONSORTIUM,
(California—450 employees).

LUTHERAN SOCIAL SERVICES IN-HOME CARE,
(New Hampshire and Connecticut—475 employees).

NORTH SHORE COMMUNITY ACTION PROGRAMS,
(Massachusetts—50 employees).

PARADISE HOME CARE COOPERATIVE,
(Hawaii—25 employees).

Prepared Statement of the Paraprofessional Healthcare Institute (PHI)

Chairman Walberg, Ranking Member Woolsey, and members of the Subcommittee, on behalf of PHI, the nation's leading expert on the direct-care workforce, please include the following statement in the hearing record for "Ensuring Regulations Protect Access to Affordable and Quality Companion Care."

PHI strongly supports the Department of Labor's (DOL) proposal to extend federal minimum wage and overtime protections to nearly 2.5 million home care workers. This extension of basic labor protections to home care workers will strengthen the infrastructure for home and community-based services, assuring access to affordable, quality care.

Home care is the nation's fastest-growing occupation, expected to grow to over 3 million workers by 2020. Yet these workers, who are 90 percent female with a median age of 45, continue to be treated in the same fashion as teenage babysitters. Home care, however, is a true vocation, and should be treated as such under the law.

Home care aides are essential to the continued independence of millions of elders and people with disabilities, assisting them to remain healthy, at home, and engaged in their communities. They provide skilled personal care services, ensuring that people with functional limitations are able to get out of bed, bathe, dress, eat, manage their medication, and so on.

The work is physically and emotionally demanding; rates of injury are higher than for the construction trades. Nevertheless, home care workers earn $9.40 per hour on average, and one in three has no health insurance coverage. More than half work part-time (often involuntarily), resulting in average annual earnings of $16,600. As a result of this poor compensation, about half of home care workers live in households that rely on public assistance to make ends meet.

The DOL's proposed rule would help to improve the quality of home care jobs. It brings our nation's treatment of these workers in line with changes in the provision of home care services over the last four decades. In particular, it recognizes the formalization of the industry and the professionalization of the workforce. The millions of women who provide these services are no different from those who work in similar jobs in nursing homes and assisted living facilities. There is absolutely no justification for continuing to treat these workers as casual companions, exempting them from basic labor protections that most American workers have enjoyed for over 70 years.

In establishing FLSA in 1938, and in broadening coverage in subsequent years, the federal government clearly articulated its policy goals: to provide low-income workers with higher wages, better working conditions, and more leisure time; to discourage excessive working hours and promote full employment; and to stabilize our economy by boosting consumer spending.

These goals are as relevant today for the home care workforce.

- FLSA protections will help to improve wages and working conditions across the industry, affecting as many as 3 million workers by the end of this decade.
- Better wages for millions of home care workers will boost consumer spending.
- Applying overtime rules to home care agencies will encourage efforts to spread work more evenly, reducing overwork and providing more hours for workers who desperately need them.

In addition, FLSA protections will help to stabilize and grow the workforce by making home care jobs more competitive. This regulatory change will also help to address the industry's high turnover rates—currently 50 to 60 percent annually—which undermine continuity and quality of care and cost the system billions in recruitment and replacement expenses.

We believe that recent industry studies suggesting that the proposed regulations will have a negative impact on businesses, consumers, and workers are seriously flawed (see www.phinational.org/fairpay/ for a full critique). Our analysis of nationally representative survey data aligns with the conclusions of the DOL—the economic impact of the proposed changes would be relatively small and would have little impact on the affordability of services for consumers.

Despite a deep recession, home care industry revenues have doubled to $84 billion since 2001 (though workers' wages have remained stagnant). Our analysis shows that less than 10 percent of the workforce reports working overtime, making it unlikely that overtime costs will significantly increase costs for businesses or the clients they serve. Moreover, we know that in the 15 states that already require agencies to pay minimum wage and time and a half for overtime, home care agencies remain successful enterprises.

The companionship exemption was never intended to provide a means for agency employers to save on labor costs. Today's workers are not "companions," who sit with elders to provide fellowship and protection. These are skilled caregivers who provide personal care, medical-related assistance, and social supports to millions of elders and people with disabilities who want to live independently. As workers vital to our health and aging services, they deserve better. It is time to provide them with the most basic wage and hour protections that most other American workers enjoy.

For more information, contact Carol Regan, PHI Government Affairs Director, at cregan@PHInational.org or 202-223-8355. All data cited can be found at www.PHInational.org/homecarefacts

March 20, 2012.

Hon. TIM WALBERG, *Chairman;* Hon. LYNN WOOLSEY, *Ranking Member,*
Subcommittee on Workforce Protections, Committee on Education and the Workforce, Washington, DC 20515.

DEAR CHAIRMAN WALBERG AND RANKING MEMBER WOOLSEY: Guided by our Jewish values of justice and compassion, we urge you to support the Department of Labor's (DOL) revised rules (RIN 1235-AA05) on the "companionship exemption" under the Fair Labor Standards Act (FLSA), which currently denies the direct care workforce basic federal wage-and-hour protections. Further, we urge you to oppose any delay in the implementation of these long-overdue rules

While the number of elderly Americans who need home care is exploding, the number of elderly Jews is proportionally even here—with at least 19 percent of American Jews now over 65 or older, as compared with 12% of the general population. Families and individuals struggle greatly to care for the elderly or disabled loved one at home, and frequently must hire a home care worker to assist a fragile family member with their most intimate needs, such as walking, bathing, eating, dressing, and ensuring that medications are taken properly. As we visit and care for elderly and home-bound members of our communities and families, we see the vital role that home care workers play.

The future of home care is a top concern for the Jewish community, and a critical problem we must address is that half of all home care workers leave the job each year due to low pay and difficult working conditions. This extraordinary turnover has obvious implications for both the quality of care and for whether there will be enough workers to fill the need in the long run.

The Fair Labor Standards Act (FLSA) was passed by Congress in 1938 with the goals of fighting poverty by raising workers' wages, and stimulating economic growth—goals as important today as they were back then—but America's 1.7 million home care workers are excluded from the FLSA and, in 29 states, have no minimum wage protections. This exclusion is a vestige of a long history of devaluing the work of women and African Americans under federal labor laws. In December President Obama proposed a rule change to include home care workers in FLSA protections.

Our tradition teaches the importance of caring for our elders and treating workers fairly. Supporting this rule change is one way we can bring these values to life, right now. Please join us and our many partners in showing the Obama Administration that the Jewish community supports basic rights for the workers who care for the most vulnerable members of our families.

It is an injustice that home care workers have thus far been denied basic protections afforded to all other hourly workers under the FLSA. We urge you to support the DOL's efforts to address this problem by backing the revised rules that would provide this growing workforce with basic wage-and-hour protections and opposing any delays.

Respectfully,

JEWISH COMMUNITY ACTION,
JEWISH COUNCIL ON URBAN AFFAIRS,
JEWS FOR RACIAL AND ECONOMIC JUSTICE,
JEWS UNITED FOR JUSTICE,
NATIONAL COUNCIL OF JEWISH WOMEN,
PROGRESSIVE JEWISH ALLIANCE & JEWISH FUNDS FOR JUSTICE,
UNION FOR REFORM JUDAISM,
URI L'TZEDEK.

Why Are Jews Speaking Out on Behalf of Home Care Workers?

While the number of elderly Americans who need home care is exploding, the number of elderly Jews is proportionally even higher—with at least 19 percent of American Jews now 65 or older, as compared with 12 percent of the general population. As many of us hear in our own congregations and communities, families struggle greatly to care for their elderly or disabled loved ones at home, and frequently must hire a home care worker to assist a fragile family member with their most intimate needs, such as walking, bathing, eating, dressing, and ensuring that medications are taken properly. As we visit and care for elderly and home-bound members of our communities and families, we see the vital role that home care workers play.

The future of home care is a top concern for the Jewish community, and a critical problem we must address is that half of all home care workers leave the job each year due to low pay and difficult working conditions. This extraordinary turnover has obvious implications for both the quality of care and for whether there will be enough workers to fill the need in the long run.

The Fair Labor Standards Act (FLSA) was passed by Congress in 1938 with the goals of fighting poverty by raising workers' wages, and stimulating economic growth—goals as important today as they were back then—but America's 1.7 million home care workers are excluded from the FLSA and, in 29 states, have no minimum wage protections. This exclusion is a vestige of a long history of devaluing the work of women and African Americans under federal labor laws. In December President Obama proposed a rule change to include home care workers in FLSA protections, and now we have a chance to make sure this happens by participating in the public comment period, which ends on February 27.

Our tradition teaches the importance of caring for our elders and treating workers fairly. Supporting this rule change is one way we can bring these values to life, right now. Please join us and our many partners in showing the Obama Administration that the Jewish community supports basic rights for the workers who care for the most vulnerable members of our families.

The public comment period ends on February 27.

You can join us by adding your support at www.jewishjustice.org/DOL

pja Progressive Jewish Alliance + Jewish Funds for Justice = One Organization. One Vision for the Future.

PJA & JFJ engages American Jews in creating economic opportunity and expanding basic rights from coast to coast. By acting on our values and our experiences we believe that the Jewish community can and must help hold America to its promise. Learn more at www.jewishjustice.org

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Rabbi Ruth Abusch-Magder *San Francisco, CA*
Rabbi Morris Allen *Mendota Heights, MN*
Rabbi Julia Andelman *Teaneck, NJ*
Rabbi Melanie Aron *Los Gatos, CA*
Rabbi Rachel Barenblat *Lanesboro, MA*
Rabbi Lewis M. Barth *New York, NY*
Rabbi Donald R. Berlin *Baltimore, MD*
Rabbi Joseph Berman *Revere, MA*
Rabbi Phyllis Berman *Philadelphia, PA*
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Rabbi Eliav Bock *Denver, CO*
Rabbi Neal I. Borovitz *River Edge, NJ*
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Rabbi Steven Chester *Oakland, CA*
Rabbi Aryeh Cohen *Los Angeles, CA*
Rabbi Ayelet S. Cohen *New York, NY*
Rabbi Debrah Cohen *Cherry Hill, NJ*
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Rabbi Howard Cohen *Chapel Hill, NC*
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Rabbi Neil Comess-Daniels *Santa Monica, CA*
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Rabbi Michelle Dardashti *New York, NY*
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Cantor Ellen Dreskin *Ardsley, NY*
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Rabbi Bruce Elder *Glencoe, IL*
Rabbi Michael E. Feinberg *New York, NY*
Rabbi Nancy Flam *New York, NY*
Rabbi Jeff Foust *Newton, MA*
Rabbi Ronne Friedman *Boston, MA*
Rabbi Dara Frimmer *Los Angeles, CA*
Rabbi Rachel Gartner *Washington, DC*
Rabbi David Gelfand *New York, NY*
Rabbi Laura Geller *Beverly Hills, CA*
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Rabbi Ilan Glazer *North Bergen, NJ*
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Rabbi Dan Goldblatt *Danville, CA*
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Rabbi Donald Goor *Tarzana, CA*
Rabbi Andrew Gordon *Scarsdale, NY*
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Rabbi Sid Schwarz *New York, NY*
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Rabbi Melissa B. Simon *Minneapolis, MN*
Rabbi Suzanne Singer *Riverside, CA*
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Rabbi Joel Soffin *New York, NY*
Rabbi Felicia Sol *New York, NY*
Rabbi Eric Solomon *Raleigh, NC*
Rabbi Gershon Steinberg *Oakland, CA*
Rabbi Ron Symons *Pittsburgh, PA*
Rabbi Elliott Tepperman *Montclair, NJ*
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Rabbi Martin Weiner *San Francisco, CA*
Rabbi Ari Weiss *New York, NY*
Rabbi Bridget Wynne *Albany, CA*
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Rabbi Michael Zedek *Chicago, IL*
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Rabbi Shawn Zevit *Cleveland, OH*
Rabbi Noah Zvi Farkas *Los Angeles, CA*

Private-Duty Industry Association Studies of DOL's Proposal to Revise FLSA's Companionship Exemption: What Do They Tell Us?

Dorie Seavey, Ph.D.
Director of Policy Research

During the past two months, private duty trade associations have produced three different studies designed to bolster their position that narrowing the companionship services exemption of the Fair Labor Standards Act would have serious negative consequences for home care companies, clients, and workers. Each of these studies presents serious flaws. This document describes the three studies—two surveys and an economic analysis—and provides an assessment of their contributions to the national conversation currently underway regarding the U.S. Department of Labor's proposal to revise the companionship services exemption.

Survey Analyses of Private-Duty and Franchise Trade Associations

Two of the three reports present results from surveys of trade associations representing for-profit home care companies that deliver non-medical services and supports. In December 2011, the **Private Duty Homecare Association** (PDHA), an affiliate of the National Association for Homecare and Hospice, and the **National Private Duty Association** (NPDA) sponsored a survey of their members to determine the potential impacts of the U.S. Department of Labor proposal to modify the companionship services and live-in exemptions ("PDHA/NPDA survey"). **Home Care Pulse**, a consulting firm closely affiliated with these associations, administered the survey and collected the response data. In late January 2012, a study was released—***Companionship Services Exemption Survey***[1]—using the survey findings to underscore the position that

[1] Home Care Pulse (January 2012) *Companionship Services Exemption Survey*, Sponsored by the Private Duty Homecare Association and the National Private Duty Association. Available at: http://www.privatedutybenchmarking.com/companionship-exemption-2012.

eliminating the overtime exemption would have serious negative consequences for workers, clients/patients, and home care companies.

The second study surveyed franchise businesses that provide home care services ("franchise survey"). The survey was conducted by **IHS Global Insight** and paid for by the **International Franchise Association** (IFA). The resulting report, **Economic Impact of Eliminating the FLSA Exemption for Companionship Services**, was released on February 21, 2012.[2] IFA's mission is to protect, enhance and promote franchising by, among other things, preserving and enhancing the legislative and regulatory climate for the growth of franchising.[3] IFA's attention to the proposed companionship services regulatory changes is not surprising, given that non-medical home care franchising, with gross margins on the order of 30 to 40 percent, has zoomed to the top of the lists of most profitable and fastest-growing franchises in the United States.[4]

Flawed sampling methodology

Both surveys were limited to the associations' members, and within that universe, respondents were self-selecting. Both Home Care Pulse and IHS Global Insight fielded what is known as a non-probability convenience sample. This kind of sample is not nationally representative or statistically valid, and there is no statistical basis for extrapolating these survey findings to the entire home care industry or even to the private-duty segment of the industry. At best, the sample can be considered representative of the companies that actually completed the survey.

IFA selected nine of its 27 franchise home care companies to participate in the survey.[5] These nine companies in turn represent 3,259 franchisees of which only 17 percent actually participated in the survey, for a total of 554 franchisees—a very poor response rate. IHS Global Insight, the firm responsible for fielding the survey and writing the final report, acknowledges the probable bias in its convenience sample when it notes that "[t]he sample of businesses that agreed to participate in our survey may also

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[2] IHS Global Insight (February 2012) *Economic Impact of Eliminating the FLSA Exemption for Companionship Services*, Prepared for the International Franchise Association, Washington, DC: IHS, p. 2. Available at: http://www.franchise.org/uploadedFiles/Franchise_Industry/Resources/Education_Foundation/IHSGlobalInsightCompanionCareReport.pdf

[3] See http://www.franchise.org

[4] See Franchise Business Review (December 2010) *Senior Care and Home Healthcare Franchises*, Special Report. Available at: http://www.franchisebusinessreview.com/content/files/FBR_Senior_Care_Report2010.pdf. Also PHI (January 2012) Value the Care!, No. 5. Available at: http://phinational.org/policy/wp-content/uploads/phi-value-the-care-05.pdf

[5] According to the franchise report, "[t]here are a total of 27 companies (franchisors) in the companion care industry, which have an estimated 4,193 franchisees." See IHS Global Insight, *op. cit.*, p. 2.

include a disproportionate share of businesses that expect to be most significantly affected."[6]

According to the PDHA/NPDA report, 1,428 home care agencies "participated in the survey" yet the report does not indicate the size of the total universe of private-duty home care companies that could have participated. As a result, the response rate is unknown, leaving in question the sample's validity even as a convenience sample.[7]

Problematic survey instruments

The complete PDHA/NPDA survey instrument was publicly available at the website of the National Association of Home Care and Hospice during part of December 2012. A review of this survey makes clear that it was not designed to obtain data on the incidence and extent of overtime in the respondent companies nor any information about the home care workers they employ. Instead, it largely reflects an opinion polling effort that relied heavily on leading questions.

IHS Global's final report did not include a copy of the survey that was fielded to the franchisees of the nine selected franchise brands.[8] Therefore, the content of the actual survey can only be inferred from the findings found in the final report. These findings suggest that the franchise survey did include a number of questions that gathered basic quantitative information about the respondent companies including: total revenue (categorical); number of employees (support staff and aides); average hourly wage rate of aides; information on the incidence and extent of overtime worked by aides; information on the type of care required by customers;[9] and whether travel time is paid

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[6] IHS Global Insight, *op. cit.,* p. 15.

[7] A more technical problem with the PDHA/NPDA survey (and perhaps also the franchise survey—which is not available for public review) is that it should have used a stratified sampling approach since one of the goals of this survey was to be able to compare three groups of respondents: companies already obligated to pay overtime under state law, those who voluntarily pay overtime, and those who are not already obligated to pay overtime. To reliably achieve these comparisons, the survey instrument should have been designed to divide the respondents into three separate groups as they entered the survey. Instead, the identical instrument was fielded to all respondents and several of the questions have extremely low face validity depending on which of the three groups the respondent answering belonged to (*e.g.,* the question "Do you expect that paying overtime wages would impact your business costs?" is likely to be a confusing question for a respondent who is already paying overtime wages).

[8] The final report states that "[s]urvey data were collected during the first two weeks of February 2012 using an on-line survey process." IHS Global Insight, *op. cit.,* p. 4.

[9] Type of care was presented in three categories: a) receive live-in 24-hour services; b) do not receive live-in service but require care more than 40 hours per week; and c) require 40 hours or less care per week. IHS Global Insight, *op. cit.,* Table 9.

for between job sites. However, it is unclear whether all these questions were asked of all respondents.[10]

While the franchise survey attempted to gather far more quantitative data than the PDHA/NPHA survey, it left out questions that, if included, would have allowed for a much fuller picture of current overtime hours and staffing capacity at the respondent companies. For example, assessing the importance of overtime hours to a company's financial situation requires information about overtime hours as a percent of total service hours and/or as a percent of the total wage bill. To understand staffing capacity, data is needed on the average number of hours worked per week by aides, the percentages of aides who work part-time and full-time, and also aide turnover.

Both surveys emphasize "loaded" opinion questions—that is, questions phrased either to lead the respondent to answer "yes" to a particular question or that lead the respondent to a confined set of responses that exclude or omit reasonable alternatives. Here are some examples from the PDHA/NPDA survey:

- In response to the question "What impact on the communities you serve would you expect from paying overtime wages for companionship services?" the respondent could choose: "fewer clients/patients able to afford care," "less work available for employees who provide companionship services," "no impact," or "other." Notice that these possible responses omit any positive impacts of narrowing the companionship exemption such as "a larger and more stable home care workforce."
- In response to the question "What business adjustments have you made in response to paying overtime wages to employees who provide companionship services?" possible responses are confined to a set of negative consequences such as increased billing rates to clients and scaling back companionship services, excluding the possibility of an adjustment that redistributed work hours to part-time workers who desire more hours.

Misleading and incomplete survey analysis

Qualitative Findings. Both reports handpick and highlight responses that align with the associations' predetermined message that the revisions proposed by DOL will increase business costs, raise the fees charged to clients, and thereby lead clients to seek institutional care or "underground" providers. This allows for misleading and alarmist conclusions to be drawn such as that businesses will be forced to raise client fees by 20

[10] At least one question appears to have been asked only of respondents who currently pay a time-and-half premium for overtime work (a question on hours of overtime worked). IHS Global Insight, *op. cit.,* p. 12.

percent or more or that 90 percent of business owners say that higher fees will cause some of their clients to seek care from "underground" caregivers or be forced into institutions.

What's most misleading about these inferences is that they are derived from *ceteris paribus* responses (*i.e.,* all other things being equal). That is, they indicate what companies say would happen *before* they actually adjust to the new overtime or travel time incentives. The authors of the franchise report rightly note this important nuance when they write: "[t]he company responses we received may reflect the impact of the new proposed regulations before the agencies take action to reduce costs."[11]

Here's an example from the PDHA/NPDA report. The report concludes that: "[o]ver 90% of all agencies surveyed reported that paying overtime wages increases or is expected to increase business costs" (p. 18).[12] At face value, this finding seems obvious and self-evident: if the price of an input (*e.g.,* labor) increases, then all other things equal, business costs will go up. The survey could have as well asked: Do you expect that paying higher postage costs would impact your business costs? A critical area that the two survey reports unfortunately don't explore is the capacity that home care companies might have for minimizing the impact of an increase in overtime costs by better managing staffing.[13]

A further problem with the PDHA/NPDA analysis is that it often conflates responses from agencies already paying overtime wages with those that are not, creating misleading statements. In one of the few instances where the report *does* break out the differences between the responses of agencies paying overtime and those that are not, the results are *dramatically* different but yet go unexplained. For instance, when asked how much of an impact paying overtime wages would have on business costs, 76.2 percent of agencies not already paying overtime reported that they expected a significant cost. The actual experiences of the agencies that already pay overtime wages was markedly different, with only 34 - 40 percent reporting significant impact. This discontinuity across respondent subgroups held for several other questions, with the "fear" of impact of the proposed changes being nearly twice as significant as the actual

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[11] IHS Global Insight, *op. cit.,* p. 15.

[12] Note: To construct this statistic, the authors of the report first add up responses across the three possible ranges—minimal, moderate, and significant increase. So even companies that reported that paying overtime wages would only minimally increase their business costs are lumped into the aggregate statistic, rendering it essentially meaningless.

[13] D. Seavey and A. Olins (2012) *Can Home Care Companies Manage Overtime Hours? Three Successful Models*, Bronx, NY: PHI. Available at: http://www.directcareclearinghouse.org/download/overtime-casestudies-20120209.pdf

experiences of agencies already paying additional wages for overtime hours. The report, however, does not explain this phenomenon.

The qualitative findings of the franchise study are difficult to follow because they don't make sense when considered together. For example, the study reports that 75 percent of respondents say they will increase their fees if the proposed DOL rules are adopted, with an industry-wide average expected fee increase of 20 percent. However, the study also reports that 95 percent of respondents operating in states where there are no overtime regulations say they would eliminate all scheduled overtime hours and 50 percent of respondents state that it was very likely that they would hire additional aides. If overtime hours are eliminated and/or more aides are hired, then one would presume that the need for fee increases would be obviated. These inconsistent and contradictory findings raise serious questions about the design of the survey effort itself.

Quantitative Findings. While the PDHA/NPDA survey did not include many quantitative questions, the survey report neglects to report on some of the numbers questions that were found in the survey. For example, survey respondents were asked the following three questions but the report does not mention them:

- What percentage of your workforce provides companionship services?
- What percentage of your employees that provide companionship services provide live-in services?
- What percentage of your employees who provide companionship services work overtime?

The franchise study tells us that respondent companies report that 27 percent of their aides "usually work more than 40 hours per week" with average overtime worked of 8.2 hours per week.[14] However, respondent companies from states that don't require minimum wage and overtime protection report lower overtime hours per week (6.8) than companies in states that do require these protections (9.1). This curious anomaly is not addressed in the report, and these findings on overtime are called into further question by this statement in the report: "the question on hours of overtime worked in our survey was asked only of respondents who currently pay a time-and-a-half premium for overtime work."[15]

[14] IHS Global Insight, *op. cit.*, Table 11.
[15] IHS Global Insight, *op. cit.*, p. 12.

In any case, the franchise report doesn't provide the findings needed to assess the financial implications of current levels of overtime worked in respondent companies. As noted above, to do that requires information on average hours worked per week by aides, overtime hours as a proportion of total hours, and information about the percentile distribution of hours worked by aides (part-time, full-time, etc.). It would also be important to know what proportion of the overtime hours were for scheduled overtime as opposed to incidental overtime.

Economic Analysis by Navigant Economics

The Navigant Economics study is a different kettle of fish from the other two studies: it takes an unabashed theoretical rather than applied approach. Paid for by the same private-duty associations that financed the first survey, this study was conducted by two economists at Navigant Economics who are newcomers to the field of home care labor market analysis.[16] The main emphasis of the study is to underscore the data limitations of the economic analysis provided by the Department of Labor as part of the Notice of Proposed Rule Making—limitations that DOL fully notes in its own report. It should be remembered that the DOL analysis confined its data sources to publicly available, national representative, and statistically valid data sets.

The Navigant analysis asserts that the costs of the proposed regulations would be "substantial" and that the proposed regulations "would likely create substantial disruptions in the market for home health care."[17] But for all its criticisms of the DOL analysis, it does not provide its own estimate of the costs.

Furthermore, the Navigant economists fail to build into their methodological critique any provision for addressing two real-world challenges confronting any serious attempt to address the likely costs of the proposed regulatory revisions: a) allowing for the differential costs of alternative adjustment scenarios for home care companies since total estimated transfers are in large part a function of the response of employers to the regulatory changes, and b) parsing out the adjustment costs for companies in states that do and do not already extend wage and hour protections to home care workers. The DOL analysis addressed the former by considering three scenarios of possible market

[16] J.A. Eisenach and K.W. Caves (March 2012) *Estimating the Economic Impact of Repealing the FLSA Companion Care Exemption*, Washington, DC: Navigant Economics. Abstract available at: http://ssrn.com/abstract=2017109.
[17] Eisenach and Caves, *op. cit.*, p. 52.

response to the requirement to pay overtime hours at the time-and-a-half rate.[18] It addressed the latter by distinguishing between three groups of states: states that do not include home care aides in their minimum wage and overtime provisions; states that extend both minimum wage and overtime coverage; and finally states that extend minimum wage but not overtime coverage.

The study's most self-promoted achievement is an estimation of the decrease in demand for "companion care labor" caused by an increase in wages, known in economic theory as the "elasticity of demand." Whether or not Navigant has produced a superior elasticity to the one used by the DOL is a subject for economists to consider and discuss.[19] However, the Navigant report arguably overemphasizes the role of this elasticity in assessing the impact of proposed regulations by failing to acknowledge that the costs of the regulatory change will be driven more by how those agencies not already extending overtime protections to their aides respond to new payment requirements. As DOL notes, "those employers who adjust schedules and redistribute hours can be expected to decrease overtime costs significantly."[20]

Probably the most bizarre inference made in the Navigant study is that, since millions of employees, such as administrators, fishermen, movie theatre employees, and criminal investigators, are also exempt from minimum wage and overtime protection, continuing to exempt home care workers shouldn't be regarded as unusual or aberrant. What the report fails to point out is that the vast majority of occupations that are exempt from FLSA fall under the "executive," "administrative" and "professional" employee exemptions. Of these workers, those classified by the SOC Code for Management Occupations alone constitute more than 6 million workers, with mean annual salaries of more than $105,000.[21] These professional workers have very little in

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[18] The three scenarios that DOL considered are: a) firms do not adjust their staffing and the additional overtime is worked and paid; b) firms make a partial adjustment to their staffing and reduce overtime by 50 percent; and c) firms adjust their staffing so no additional overtime is worked and paid.

[19] It is likely that the price elasticity of demand for home care purchased out-of-pocket is different than that for services purchased through public programs. The Navigant report discusses this possibility but then estimates an overall labor demand function using state expenditures on Medicaid home health as a proxy for public spending on personal care services. Since federal regulations require that home health services include a range of services that go far beyond home health aide services—such as nursing, medical supplies, medical equipment, and appliances suitable for use in the home, it may be that other measures of Medicaid spending on personal care services would be better proxies.

[20] U.S. Department of Labor, Wage and Hour Division, Economic Impact Analysis, Application of the Fair Labor Standards Act to Domestic Services, December 2011, p. 100. Available at: http://www.dol.gov/whd/flsa/EconomicAnalysis.pdf

[21] Bureau of Labor Statistics, Occupational Employment Survey, May 2010. Employment and mean annual salary figures for SOC Code 11-0000, Management Occupations.

common with home care workers: management occupations usually require a college degree and are paid on a salary basis, as compared to home care occupations, which often allow for less than a high school degree and are paid on an hourly basis, typically at less than $10 an hour and with few employment benefits.

The other exempt occupations cited in the Navigant report amount to very few workers by comparison: for example, the BLS Occupational and Employment Survey counts only 700 people employed as fishermen in 2010.[22] Most importantly, the attempted conflation of home care workers with other exempt occupations is clearly out of touch with the reality that home care occupations top the list of the country's fastest-growing jobs and constitute one of the largest workforces ever produced by our economy.[23]

Conclusions

1. The three studies provided by trade associations representing private-duty and franchise businesses are advocacy tools, not serious research studies.

The two survey-based studies unfortunately missed the opportunity they had to provide credible information on the private-duty part of the home care industry and instead relied on flawed survey instruments and very small samples that are biased towards businesses that expect to be most significantly affected. These biased samples are not statistically representative of the part of the industry they allegedly are meant to represent and they are not statistically valid.

While perhaps useful advocacy tools in support of the associations' opposition to the proposed rule, there are serious grounds for questioning the credibility of the two surveys and resulting reports. In particular, three serious problems merit attention: flawed sampling methodology; problematic survey instruments; and misleading and incomplete analyses of the survey results.

2. The size of the private duty/franchise segment of the home care industry should be kept in perspective.

Even if the two surveys were representative of the private duty and franchise segment of the industry, it's important to remember that the home care industry is a wide and broad sector, composed of a number of distinguishable and sometimes overlapping

[22] Bureau of Labor Statistics, Occupational Employment Survey, May 2010. Employment number for SOC Code: 45-3011, Fishers and Related Fishing Workers.
[23] http://phinational.org/archives/huge-growth-projected-for-direct-care-occupations-dol-report-shows

components.[24] According to the **U.S. Bureau of Labor Statistics**, in 2010 there were 55,929 establishments operating in "Services for the Elderly and Persons with Disabilities," the industry that encompasses the vast majority of home care companies specializing in the provision of non-medical home care services, and **approximately 70 percent of these companies were non-profit organizations.**[25] This means that the for-profit segment of the industry represented by the three trade associations sponsoring the studies constitutes only one component of the overall industry and a minority segment at that.

3. The industry association surveys provide considerable unintentional support for DOL's conclusion of small adjustment costs.

The most remarkable empirical finding of the two survey-based studies is inadvertent and not mentioned in either report: both surveys report that fully 40 percent of respondents already extend minimum wage and overtime to home care workers. Why? Because the companies are located in states that already extend protections or because they voluntarily elect to meet these basic standards. It's hard to imagine stronger evidence in support of the Department of Labor's conclusion that the economic impact on the home care industry of the proposed revisions to the companionship services exemption is likely to be small.

Furthermore, the franchise report, in its summary statistics on **ALL** franchise home care businesses (not just survey respondents), shows that 40 percent this entire segment of the home care sector is already operating in a post-companionship exemption world.

That four in ten franchise businesses and possibly a similar number of non-franchise private duty companies already operate in environments that don't allow use of the companionship exemption raises the question: If providing these labor protections is so cost-prohibitive to the industry, then how do these businesses continue to operate and even thrive?

Additional findings that provide unintentional support include:

- **No evidence that paying minimum wage will be a burden**. The franchise study reports that the respondent companies pay aides an average wage of $9.12, well above the federal minimum wage. Additionally, of respondents from states that

[24] D. Seavey and A. Marquand (December 2011) *Caring in America*, Bronx, NY: Paraprofessional Healthcare Institute, Sections 3 and 4. Available at: http://phinational.org/policy/guide-to-americas-home-care-workforce/

[25] Seavey and Marquand, *op. cit.,* pp. 19 and 21.

do not extend minimum wage protection to home care aides, none report paying an average hourly wage that is less than the federal minimum wage.

- **Travel time is already paid by roughly 40 percent of respondents** in states that do not extend wage and hour protection to home care workers.

4. Two of the studies mislabel the industry, the services it provides, and the workers thereby diminishing the significance of home care work.

The franchise survey and Navigant report do a tremendous disservice by mislabeling the industry, the work, and the workers as "companion care" industry/work/workers. "Companion care" connotes a buddy/babysitter sitting next to the consumer on the couch, perhaps watching TV. This terminology is doublespeak—it misdirects us from the reality that, *in addition to companionship*, aides must provide *concrete* services—with great skill and competence such as helping their clients get out of bed, dress, and eat. Today's workers are not "companions," who sit with elders to provide fellowship and protection. Rather these are skilled caregivers who provide personal care, medical-related assistance, and social supports to millions of elders and people with disabilities who want to live independently.

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For additional information or questions, please contact Dr. Dorie Seavey at dseavey@phinational.org or visit our website, www.phinational.org/fairpay.

[Additional submissions of Mr. Dombi follow:]

March 21, 2012.

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: Application of the Fair Labor Standards Act to Domestic Services; 76 Fed. Reg. 81190 (December 27, 2011)

DEAR MS. ZIEGLER: Thank you for the opportunity to provide comment on the proposed rule: Application of the Fair Labor Standards Act to Domestic Services; 76

Fed. Reg. 81190 (December 27, 2011). This proposal will have significant impact on access to home care services for millions of elderly and infirm, the workers who provide home care, the businesses that deliver such services, and the public programs that often pay for the care. We urge the Department of Labor to proceed very cautiously on its proposal. Specifically, we recommend that the Department withdraw the current proposal, initiate a comprehensive and focused study of the actual and expected impact of the proposal on all affected parties, and consider the wide range of alternatives to the current proposal before moving forward.

There are very strong indications that the Department did not accurately or sufficiently evaluate the impact of the proposal as it: (1) relied upon data from programs that do not fund "companionship services," (2) failed to develop the basic and essential information necessary to understand the proposal's impact on privately purchased care, (3) fell far short of a reliable analysis of the proposal's impact on Medicaid and other public program spending, (4) provided no analysis of impact on the wholly distinct services of live-in caregivers, and (5) failed to take advantage of the opportunity to evaluate actual impact occurring in the states where the "companionship services" exemption from overtime compensation has already been eliminated or modified rather than acting on pure assumptions. Additionally, the Department's proposal rests on a very shaky legal foundation of alleged authority to modify the 37 year-old definition of companionship services and the application of the exemptions to third-party employed caregivers.

The National Association for Home Care & Hospice (NAHC), along with its affiliate the Private Duty Home Care Association of America, represent the interests of the thousands of companies that provide home care services to nearly 12 million people of all ages annually. These businesses employ over 2 million dedicated caregivers that support the millions of spouses, parents, children, relatives, friends and neighbors that often are the primary caregivers to the home care patients and clients. It is well recognized that home care provides significant dynamic value by offering high quality care at substantially less cost than institutional care while also helping to prevent costly complications that lead to hospitalizations and other costly medical services.

NAHC and the caregivers we represent share the Department's goal to provide fair and reasonable compensation to home care aides and personal care attendants. The jobs that they take on are essential, particularly as our society ages with millions of "baby boomers." Also, the work that they do is hard and can only be done by dedicated individuals who understand its importance and appreciate the privilege of caring for vulnerable elderly and infirm.

Specifically, NAHC does not oppose overtime compensation. However, we do not support the Department's proposal that would institute a national requirement for overtime compensation as an isolated and non-integrated element in the delivery system of home care, thereby disregarding the impact on publicly funded services, services purchased by the elderly who have limited incomes, and the workers who will experience depressed base wages and restricted working hours because employers will be unable to cover the cost of overtime with shrinking Medicaid payment rates and the inability of private purchasers to afford the care.

The Department must recognize that a strategy directed at overtime compensation alone will not help home care workers. Any compensation strategy must consider and incorporate other elements as well including base wage rates, career growth opportunities, health insurance and other fringe benefits, increased payment rates from public programs such as Medicaid, and support for the elderly and infirm who cannot afford higher care rates. To push overtime compensation alone in the face of the other forces at play in this marketplace will only lead to compromised wages and restricted working hours for hardworking caregivers. This is directly evidenced by existing data, the Department's own analysis and the comments of those purporting to represent the interests of the worker.

There is no need to rush the proposal to a final rule. If the Department's analysis is correct, very few workers would qualify for overtime and many of those will end up with restricted working hours as the employers respond to the new requirement by avoiding scheduling workers for more than 40 hours in a week. In terms of opening up new job opportunities, there are many current openings for home care workers and the Bureau of Labor Statistics forecast continued growth in demand. However, if the Department's view of limited impact is wrong, home care consumers, workers and public programs are put a great risk of negative consequences. Accordingly, NAHC strongly recommends that the Department initiate the necessary comprehensive research and study to determine the real impact of any changes with far less reliance on seemingly endless assumptions before proceeding.

Aside from the many assumptions employed by the Department in its analysis, there are crucial undisputed facts that are relevant and material to appropriate policy relative to the companionship services and live-in exemptions:

1. All stakeholders in this matter, along with the Department itself, agree that the proposal will increase the cost of care for direct consumers as well as public programs. The disagreement on this matter is how much cost will increase.

2. All stakeholders also agree that the primary result of the imposition of an overtime compensation obligation for home care workers will be an employer's restriction in working hours to eliminate or limit the risk of an overtime cost.

3. The Department did not evaluate, through use of any specific data or analysis with targeted information, the impact of the proposals on access to and cost of live-in services for the elderly and disabled who need personal care supports for activities of daily living. Instead, the Department simply applied its analysis of hourly, part-time personal care services to full time live-in caregivers.

4. The Department focused its attention on certain public programs such as Medicare and Medicaid to the near exclusion of consideration of privately purchased home care by assuming that such services were a mere incidental part of home care.

The undisputed facts and findings are combined with a series of very important, but unsubstantiated assumptions:

1. Public programs such as Medicaid will modify payment rates to ensure any increased costs triggered by the overtime compensation obligation are fully reimbursed on a timely basis.

2. The change in the overtime compensation obligation will reduce turnover of workers providing home care.

3. There will be no adverse impact on the quality of care.

4. Any restriction on work hours to control overtime costs will create new job openings that will help the nation's economy.

5. Currently overworked workers will have an improved quality of life leading to better job performance in service to the elderly and person's with disabilities.

When the undisputed facts are combined with these assumptions, only one logical conclusion results: the Department must be very sure about the bona fides of the underlying rationale for its proposal and be reasonably certain about the likely impact of the rule change before proceeding. The facts alone would dictate that the rule be withdrawn or significantly redrawn. However, if the Department is also wrong in its assumptions, the consequences to workers, consumers, and public programs could be disastrous.

In fact, it is the workers that are at greatest risk. NAHC strongly believes that the Department's assumptions are not well founded. First, public programs such as Medicaid are already in financial jeopardy across the country. One prime example is California where the governor has sought significant reductions in payment rates to providers of home care, both home care agencies as well as to hundreds of thousands of individual caregivers. California is far from alone with reductions in the payment rates and scope of home care benefits occurring in such other states as North Carolina and New York.

Second, the Department is aware that there is a great risk of higher worker turnover as an impact of the proposed rule. At a recent "Roundtable" held by the Small Business Administration, the Department learned first hand from a home care agency executive that the shift to an overtime compensation obligation in Michigan in 2006 significantly increased staff turnover. Such consequence is intuitively logical when combined with the recognition that employers will restrict working hours to avoid overtime costs. Workers facing lower overall compensation will seek other employment. As such, consumers suffer because of the loss of experienced caregivers, businesses experience higher staff recruitment and training costs, and workers either lose income or the opportunity to work in home care.

Third, while there is no study of the impact of an overtime obligation on quality of care, it is far from safe to assume that it will improve care. Instead, it is more likely that the increase in staff turnover will negatively impact care quality as inexperienced workers take over for departing caregivers and the assignment of multiple caregivers with restricted work hours naturally leads to deterioration in care consistency.

Fourth, it is very likely that the assumption that the rule change would create new job openings is accurate. However, is that really a good impact? Currently, home care is already struggling with increasing demand for caregivers, not an oversupply of individuals looking for such jobs. The Bureau of Labor Statistics also notes that the demand for such workers will be rising exponentially as the nation ages. The shortage of workers for these jobs is not a creature of the lack of overtime compensation, it is because the work is hard and only certain people fit the demands

of caregiving. These jobs pay well in excess of minimum wage, yet have more openings than jobs that pay at the minimum.

Fifth, there is no data or factual support for the contention that workers are overworked and that restriction in working hours will improve quality. Unlike the experiences in hospitals and institutional care settings where nurses and other workers have been subjected to "forced overtime", there is no such activity ongoing in home care. A large segment of home care workers are employed on a part-time basis and employers in home care are noted for offering very flexible working hours. In fact, home care companies routinely report that it is the workers who seek more hours, not the employers demanding that the employees work more.

The perfect opportunity exists for the department to test their assumptions and gain a real understanding of the impact of the proposed rule to a level of accuracy generally not available. That opportunity lies in those states that have eliminated the application of the companionship services exemption already. In fact, two states that recently did so through legislation or regulatory interpretation, Michigan and Pennsylvania respectively, would be perfect testing grounds allowing for a near contemporaneous review of the "before and after." A thorough review of the consequences of the changes in those states would better inform the analysis and debate on this matter than the impact analysis undertaken to date by the department. Accordingly, NAHC recommends that the Department initiate such an analysis before proceeding. It is the best way to avoid the potentially dire consequences to all stakeholders as discussed above.

Concerns on the legal validity of the proposal

The substance of the proposed rule raises several important concerns about its legal validity. NAHC participated in the case, Long Island Care at Home v. Coke before the U.S, Supreme Court and the positions taken by the Department in this proposed rule change are in direct contradiction to its position advanced to the Court. Further, the proposed rule is at odds with the unambiguous language of the FLSA. Finally, the Department's initial impact analysis falls far short of requirements under the Small Business Regulatory Flexibility Act. These matters must be addressed by the Department before it can move forward with any proposal to change these rules in issue.

First, the proposed redefinition of "companionship services" is in direct conflict with the language of the Fair Labor Standards Act as well as its legislative history. Specifically, the FLSA applies the exemption to employees providing "companionship services for individuals who (because of age or infirmity) are unable to care for themselves." This exemption relates to care, not "fellowship" a term never referenced in the law.

Specifically, 29 U.S.C. 213(a)(15) applies the exemption from overtime compensation to:

> "any employee employed in domestic services employment 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 operative word defining "companionship services" is "care" and the focus of the care is the elderly and infirm. However, the Department proposes to minimize the "care" aspect of companionship services and shift the definition fully towards the concept of "fellowship." In doing so, the proposal directly offends the mandate in section 213(a)(15) of the FLSA and effectively guts the usefulness of the exemption for the elderly and infirm. Fellowship is something that is not generally purchased thereby making concerns about worker compensation irrelevant. Fellowship comes by way of ones friends, family, church, clubs, fraternity or sorority, or by using Facebook. While it may be possible that a person "buys" a friend, it is highly unlikely that there would be an overtime need for one.

More importantly, "fellowship" is not what elderly or infirm persons who cannot care for themselves need, it is actual care. The current rule recognizes such and has done so effectively since 1975. The proposal is in direct conflict with the statutory mandate that the Secretary define and delimit the companionship services exemption within the parameters of workers providing care to the elderly and inform, not fellowship.

The legislative history fully supports the companionship services definition currently in force. By focusing on caring for the infirm and elderly in enacting the companionship services exemption, Congress targeted our nation's most vulnerable population. Improving the opportunities for the elderly and person's with disabilities to remain in their own homes, with families, avoiding more costly institutional care is the central purpose behind the exemption. 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 and preventing 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).

Fellowship does not include the care needed to keep someone from being forced to be admitted in a nursing home. One can have 24/7 fellowship and require nursing home placement to receive the care needed to meet activities of daily living (ADLs) and instrumental; activities of daily living (IADLs). The type of companionship services that provide the opportunities to avoid institutional care are the caregiving services that have been defined as companionship services since the exemption was enacted in 1974. The passage of time and the changes in the business of providing such care have not changed those needs for care.

Second, excluding employees of third-party employers from the application of the exemption is in direct contradiction to the language of the FLSA and the position advanced by the Department of Labor at the US Supreme Court in Long Island Care at Home v. Coke. The law applies the exemption to "any employee." Specifically, 29 USC 213(a)(15)uses the phrase "any employee employed in domestic services" without any qualification as to the identity of the employer.

In 1974 when the FLSA companionship services exemption was enacted, Congress well understood what legislative language was needed to exclude application of the exemption to third-party employment. In fact, Congress expressed clear awareness of a recently enacted provision in the Social Security Act that contained such language when deliberating the companionship services exemption. S. Rep. No. 93-690, 93rd Congress, 2d Session at 18. (This bill would bring under minimum wage and overtime provisions of the Act all employees in private household domestic service earning "wages" ($50 per quarter) for purposes of the Social Security Act, but retains a minimum wage and overtime exemption for * * * companions * * *").

Under Public Law 92-5 (March 17, 1971), Congress expanded the application of the Social Security program to domestic services, but specifically excluded taxing wages from a certain subclass of domestic services. Specifically excluded is:

> "(6)(A) Remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;
>
> (B) Cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in section 3121(x) of the Internal Revenue Code of 1986) for such year;
>
> (C) Cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than $100. As used in this paragraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in section 210(f)(5); * * *." 42 U.S.C. § 209(a)(6). (Emphasis added.)

Consistent with this statutory language, implementing regulations distinguish the nature of domestic services from the identity of the employer. Under 42 C.F.R. § 404.1057(b), domestic services "is work of a household nature" including such services as those performed by cooks, waiters, butlers, maids, and housekeepers. It does not include "services performed as a private secretary, tutor, or librarian, even though performed in the employer's home." 42 C.F.R. § 404.1057(b).

The Congressional awareness of language necessary to limit application of provisions of law related to domestic services in the home of the employer is further found in the Internal Revenue Code. The tax code is replete with references to "domestic service in a private home of the employer" as distinguished from the more general concept of "domestic services." See, e.g., 26 U.S.C. §§ 3510(c); 3121; 3306; 3401; and 3102. Unlike the tax code, the FLSA contains no comparable qualification.

It is apparent that Congress understood the concept of "domestic services" to relate solely to the nature of the employee's activities. Further qualifications such as location ("in a private home") and the identity of the employer ("* * * of the employer") are necessary to establish intended limitations. The Department's proposal to include and limit the identity of the employer in the application of the companionship services exemption overextends the reach of the concept of "domestic services" under 29 U.S.C. § 213(a)(15). It would be wholly illogical and inconsistent for Congress to intend different definitions of the same employment category, "domestic services," under the Fair Labor Standards Act, the Social Security Act, and the In-

ternal Revenue Code. Barnhart v. Walton, 535 US 212, 221 (2002) (The same statutory words should not be interpreted differently in closely related contexts); citing, Department of Revenue of Oregon v. ACF Industries, Inc., 510 US 332 (1994). It is plain that Congress was aware of the language needed to qualify and limit the category of employer for the companionship services exemption in 1974. Congress did not so limit its application to a distinct set of employers under the FLSA. The Department's proposal to end application of the companionship exemption to third-party employed workers violates the FLSA unambiguous mandate.

The Department relied on this language in defending its current regulations at the Supreme Court in 2007. In its amicus brief in Long Island Care at Home, Ltd., et al v. Coke, the Department stated that:

"The statutory exemption applies to "any employee employed in domestic service employment to provide companionship services." 29 U.S.C. 213(a)(15) (emphasis added). Congress's use of the encompassing term "any" is a natural read to include all employees providing such services, regardless of who employs them * * *

If Congress had wanted to exclude employees of third-party employers from the exemption, it easily could have done so by expressly including a limitation based on employer status, as it has done with other FLSA exemptions * * *

[The third-party employer rule] also is consistent with Congress's intent in enacting the exemption for companionship services in the first place, and it avoids the disruption to the provision of companionship services to aged and disabled individuals that would result if the regulation were invalidated * * *

Allowing the exemption for all employees providing companionship services, regardless of the identity of their employer, is consistent with Congress's intent to keep such services affordable. See 119 Cong. Rec. 24,797 (1973) (statement of Sen. Dominick); id. at 24,798 (statement of Sen. Johnston); id. At 24,801 (statement of Sen. Burdick); Welding, 353 F.3d at 1217 ("Congress created the companionship services exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them.") (internal quotation marks and citations omitted). This affordability concern applies regardless of whether a person needing care employs a companion directly or uses a third-party agency to obtain such services."

The Department's only explanation for its change in position is the allegation that the businesses providing personal care and home care aide services to the elderly and persons with disabilities have grown in numbers and size. However, the businesses changes have nothing to do with the purpose behind the exemption—to keep people out of nursing homes and make home care an affordable alternative. In fact, with the growing population of people needing such services, the importance of the exemption applied as it has since 1975 has grown as well.

There is no indication in 213(a)(15) that Congress intended the companionship services exemption to apply only to the elderly and infirm that have the wherewithal and financial capabilities to take on the difficult tasks required of employers. However, that is the direct consequence of the Department's proposal. Those using companionship services who do not want the cost of overtime compensation must take on the complex role of an employer with all of its administrative obligations and financial liabilities. In doing so, the person gains the benefit of the exemption but also loses the benefits of state-designed consumer protections that address everything from worker background checks and competencies to professional oversight. The Department's proposal sacrifices the option of a third-party agency model of care for consumers to bring the illusion of higher compensation to workers. Congress stuck a conscious balance between the consumers and the workers and did not authorize the Department's proposal to restrict the exemption to direct employees of the consumer.

Third, the proposed rules have existed essentially with identical standards since the original rulemaking proceeding in 1975. Congress has had many opportunities to change the law in line with the Department's proposal. Where Congress does not find sufficient reason to change the law over 36 years, the legal validity of the current proposal is called into serious question. Since the ruling of the U.S. Supreme Court in Coke, Congress has had several opportunities to enact legislation that would achieve the changes that the Department now proposes in a regulation. See, Fair Home Health Care Act, H.R.3582; Fair Home Health Care Act of 2007, S.2061; Direct Care Job Quality Improvement Act of 2011, S.1273; Direct Care Job Quality Improvement Act of 2011, H.R.2341; Direct Care Workforce Empowerment Act S.3696; Direct Care Workforce Empowerment Act, H.R.5902.

Each of these efforts were attempts to modify 213(a)(15) in a manner virtually identical to the Department's proposed rule change. Each would have eliminated the longstanding application of the companionship services exemption to third-party employed workers. Each would have eliminated the application of the exemption to any

worker who was employed on more than a casual basis. These legislative efforts never cleared the respective house of Congress let alone the Congress overall. In fact, each had only a small numbers of cosponsors with S. 2061 getting the high-water mark in the Senate at 11 and HR 2341 garnering 35 in the House.

The Department's complete turnaround in its interpretation of the law as proposed has doubtful validity. It's very clear previous legal position on the FLSA companionship services exemption is totally inconsistent with the present proposal. Also, Congress's clear unwillingness to change the 37 year-old rule defining and delimiting the Department's exemption is a strong indicator of the validity of the existing FLSA interpretation and application. Most importantly, the fact that the Department's rationale for keeping the rule as is in 2007 still exists today—keeping the elderly and persons with disabilities out of institutional care and in their own homes.

Finally, the analysis by the Department of Labor regarding the likely impact of the proposed rules falls very far short of the analysis required under the Small Business Regulatory Flexibility Act, the Paperwork Reduction Act, and Executive Orders 12886 and 13563. While the Department offers a lengthy impact report, it has several major failings at its core. Given the potential impact of the proposal, the Department should be held to a very high standard of accuracy and completeness in its impact analysis.

The analysis misses completely one of the most significant forms of home care—privately purchased personal care. It is estimated that several million elderly and persons with disabilities use such care through 20,000 companies with an estimated $25-30 billion in annual expenditures.

The Department and others contend that Medicare and Medicaid make up 89% of total spending on personal care services. However, Medicare spending on personal care services, as part of a skilled care home health benefit, is less than $1 billion annually. Medicare requires that the patient be homebound and in need of intermittent care. 42 U.S.C. 1395f(a)(C). If qualified, the person can receive part-time care from a home health aide, 42 U.S.C. 1395m. That care can include some personal care, but also includes assistance with medication, non-complex wound care, and therapy exercises from a certified home health aide in contrast to a personal care attendant. Medicare home health aides are subject to detailed training and competency testing requirements. 42 CFR 484.32. Personal care is only one part of their functions. As such, the application of the $19 billion in total Medicare home health spending to the analysis of the impact of the Department's proposal is wholly misplaced.

Medicaid spending on personal care and home care aides is approximately $25 billion. However, it is difficult to determine exactly how much of such care fits within the current "companionship services" definition. Assuming that all of such Medicaid spending is on care that could be classified as "companionship services (an assumption that is a very generous one in this matter), it becomes apparent that the Department examined the wrong business in its impact evaluation. It should have looked mostly at private pay personal care and Medicaid while ignoring Medicare data.

All told, it is estimated that private pay personal are services represent nearly half of all spending on care that could be classified as "companionship services" under the current rule. Most of the remaining comes from public programs such as Medicaid and the Older American's Act. Only an incidental portion comes by way of Medicare. A compliant impact review would necessitate a thorough examination of private pay home care.

The Department's impact analysis is also devoid of any evaluation of live-in services. This unique segment of home care is virtually all on a private pay basis. Medicaid is a payer of some live-in care, but most states do not provide such a level of coverage. The impact on live-in care and caregivers cannot be simply assumed by using Medicare data or even the limited, but unrelated data on Medicaid home care services. It is a service that is wholly different from most public program home care.

Live-in care has elements that make for obvious distinctions in terms of its nature and its "compensation" to workers. The live-in worker generally has significant free time and is not actually working 24/7. Also, the live-in has a wide variety of responsibilities, often including personal care when working as a caregiver rather than a maid or housekeeper. Another significant factor is that the live-in worker gets housing and even meals in some instances as part of their compensation—-elements that are not calculated into the determination of wage levels in the Department's proposal. That means that the wages and the value of housing and meals combined far exceed minimum wage levels.

The Medicaid beneficiaries that receive covered live-in services are quite varied and unique in their needs and circumstances. With the Department's proposal, these individuals are at serious risk of losing all care in the community setting. These individuals include college students with Medicaid paid "roommates" who also attend college. They include individuals who work and take their caregivers to work with them. They are individuals who can have their needs met during the day, but need an overnight live-in to address intermittent needs. The Department's impact analysis indicates clearly that these consumers, the workers who care for them, and the programs that support them were not examined or reviewed with any specificity.

The utter absence of sufficient evaluation of the proposal's impact on live-in services warrants an immediate withdrawal of the proposal. If the Department wishes to proceed with its live-in rule change, it should start at "square one" and comprehensively analyze the employment circumstances and the effect that any change will have on all stakeholders. Simply applying an analysis that is inadequate in relation to hourly care to the highly distinct live-in care is not acceptable or compliant with the Department's obligation.

NAHC, along with the National Private Duty Home Care Association, conducted a study (Appendix 1) of the impact of the Department's proposal. This nationwide survey, including private pay home care and live-in services providers, indicates the following adverse impacts:

1. Moderate to significant increases in care costs
2. Restrictions in overtime hours to the detriment of the workers overall compensation
3. Loss of service quality and continuity
4. Increased costs passed on to the patients and public programs that would decrease service utilization, increase unregulated "grey market" care purchases, and increase institutional care utilization rather than absorbing and covering the higher cost of care.

The survey protocols began with the identification of the universe of survey targets. NAHC and NPDA did not limit the survey universe. Instead, through various communications from both NAHC and NPDA, as well as industry publications and state home care associations, the survey was open to all interested home care companies.

For your reference, the survey questions are in Appendix 2. As you will note in reviewing the survey questions, the survey was intended to elicit responses covering the broad range of potential answers as well as leaving an open input opportunity for the respondents to include narratives in the event that the respondent had an answer that was not on the listed options or wished to elaborate on his/her answer. For example, with respect to the question on the impact of overtime pay on quality of care, response options included: no impact; minimal deterioration; moderate deterioration; significant deterioration; minimal improvement; moderate improvement; significant improvement; and unsure. This is a very typical survey method wherein respondents have the full range of response options to avoid any survey bias.

For further reference, the entire survey response results are found in Appendix 3. These results are unedited and raw, without any analysis or editorial review. The results raise serious questions about the Department's impact analysis and findings. In fact, these survey results depict an entirely different industry that the one displayed in the NPRM impact analysis. The main reason for the differences is that the NPRM analysis focused primarily on Medicare, Medicaid and other public programs to the near exclusion of the private pay side of home care services—a large and important segment of "companionship services" and live-in care. Another reason for the differences is that the survey study is real time and not reliant on the vagaries of non-uniform publicly reported data. Instead, it focused on impact directly, going to the first-line source of the most pertinent information—the employers of caregivers. In addition, it provides information about the actual, rather than forecasted impact from the states where overtime compensation is already a requirement. This information is extraordinarily useful in forecasting the impact of the Department's proposal.

The study demonstrates that the potential adverse impact on patients, workers, public programs, and the business that employ caregivers is real and significant. While we do not take the position that the study is the "be all" of impact analyses, the insights gained from this study demonstrate that the Department's data sources and analytic methodology fall short of the comprehensive and accurate review of the potential impact of the proposed rule. Further, those insights depict consequences that warrant additional review and evaluation prior to the advancement of any changes in the longstanding standards under the companionship services exemption. These consequences are intuitively sound and reasonably foreseeable given the overall market context of home care. In addition, the proposal would adversely affect too

many stakeholders in home care to ignore and move on to a final rule at this point. Higher care costs, restricted working hours for caregivers, reduced quality of care, and increased demands on financially fragile public programs should not be the intended results of a rule change.

Further, an analysis by Navigant Economics confirms that the Department fell far short of the depth and accuracy needed to produce the mandated impact analysis sufficient to protect the public from harmful policy changes. Navigant Economics uncovered essential flaws and weaknesses in the Department's analysis, indicating that it would be prudent to re-initiate a comprehensive review before proceeding further with the proposed rule change. The report, "Estimating the Economic Impact of Repealing the FLSA Companion Care Exemption," by Jeffrey A. Eisenbach, PhD. And Kevin W. Caves, PhD., (hereinafter "Navigant Report") is a significant contribution to the dialogue on the companionship services and live-in issues. The report can be found at: PhD., (hereinafter "Navigant Report") is a significant contribution to the dialogue on the companionship services and live-in issues. The report can be found at: PhD., (hereinafter "Navigant Report") is a significant contribution to the dialogue on the companionship services and live-in issues. The report can be found at:

While we suggest that the Department carefully review the entire Navigant Economics report, several highlights are worthy of note. Navigant concludes that the Department's impact analysis:

1. "systemically understates the costs of the proposed rules while overstating potential benefits. Navigant Report at 12.
2. "assumes away or understates several important types of compliance costs." Navigant Report at 15.
3. "understates deadweight loss (a) by assuming, explicitly and incorrectly, that elasticity of demand for companionship labor is extremely low; and (b) by implicitly and incorrectly assuming that elasticity of demand for companionship services is zero (perfectly inelastic). Navigant Report at 15-16.
4. fails "to distinguish between live-in care and hourly care [causing] it to underestimate the overtime cost burden for the live-in industry by roughly a factor of eighteen." (footnote omitted) Navigant Report at 20.
5. ignores real and significant quasi-fixed costs, regulatory familiarization and recordkeeping costs, and added travel costs Navigant Report at 23-28.
6. "ignores altogether the disproportionate impact of the repeal on the market for live-in care." Navigant Report at 28-31.
7. fails to recognize that the home care industry "is far more responsive to changes in Labor costs than the PRIA assumes * * * the demand for companionship care workers is found to be elastic, implying that a one percent increase in labor costs causes employment to decline by more than one percent, causing aggregate worker compensation to decline." Navigant Report at 43.
8. "dismisses concerns about continuity of care based on little more than speculation based on studies showing the impact of long hours on medical error rates." Navigant Report at 48-49.
9. fails to recognize that, "It is certain [with the proposed rule changes] that the demand for institutional care will increase, perhaps substantially." Navigant Report at 49.
10. fails to consider viable alternatives such as continuing to allow individual states to regulate minimum wage and overtime provisions in relation to companionship services and fails to gather the necessary data to demonstrate the value of the proposed changes as required under OMB Circular A-4. Navigant Report at 51-53.

The Navigant Report adds to the body of evidence demonstrating that changes to the longstanding FLSA rules on companionship services and live-in care are not ripe for action. The layers of assumptions and impact speculation offered by the Department fall far short of the reliability level sufficient to justify this significant policy change. There is too much at risk to act hastily particular when those risks are shared by workers, consumers, and payers alike. It is even of greater concern when the consumers are the most vulnerable of our citizens, the workers already have compensation concerns, and the public programs financing the care are obviously very fragile.

While the Navigant Report highlights major weaknesses in the PRIA as it relates to companionship care, the surprising changes regarding live-in services deserve special notice. Unlike the companionship services exemption, the separate live-in exemption has not had over a decade of attention by the Department or the stakeholders. The data on companionship services is weak at best and it is necessary that there be original, ground up granular research to determine if changes are necessary and warranted with its rule. However, the live-in care impact review falls very far short of the companionship rule analysis. The reason is obvious: the De-

partment did not look at live-in services beyond assuming that the impact is negligible. If it had it would quickly realize that there is no public data to determine impact. The proposal on the live-in rule should be withdrawn until the Department has sufficient information to understand that separate industry and the potential impact on consumers and workers.

Reports of high profit margins are wholly erroneous

At a March 20, 2012 hearing before the House Subcommittee on Worker Protections, the Department's witness, Nancy C. Leppink, Deputy Administrator, Wage and Hour Division, and the Ranking Member of the subcommittee, Hon. Lynn Woolsey, indicated that home care companies can absorb any costs associated with the proposed rule, including overtime costs, because the companies have generally high profit margins of 30-40%. It appears that such figure came from the December 2010 Franchise Business Review article entitled, "Senior Care and Home Healthcare Franchises. However, that article referenced "gross Profit Margins" not net profit margins. The concepts are entirely distinct with net margins being the metric that sets out profit after all costs. Gross margins look only at direct costs and exclude many of the natural and necessary costs of running any business. It is clear that the net profit margins of home care companies are nowhere near the claimed levels.

There are five public companies providing home care services that encompass to varying degrees the personal care services that potentially could be classified as companionship services under the existing rule. They include Addus, Almost Family, Amedisys, Gentiva, and LHC Group. Those companies' net margins as of March 19, 2012 range from 1.02 to 7.11 percent. *http://biz.yahoo.com/p/526qpmd.html. In addition, the company that is presented by some proponents of the proposed rule change, Addus, reported a December 31, 2011 net profit margin of 3.64 percent. http://ycharts.com/companies/ADUS/profit—margin.*

It should be noted that these five companies represent just a small slice of the overall home care providers. However, their financial performance fits within the range of the rest of the industry. NAHC maintains a database on cost reports submitted to Medicare annually by home health agencies across the country. These cost reports include data on both Medicare and non-Medicare revenues. These cost reports do not include what is known as hospital-based home health agencies as their filings do not allow for home care specific analysis on overall home care margins. With 6604 cost reports encompassing 2010 filings, the overall profit margin average is 3.15%. This margin represents a total of $48,644,977,360 in revenues with more than $34 billion of that from non-Medicare sources.

These data do not evidence a provider group with exorbitant profit margins sufficient to absorb added costs of providing care. The 30-40% margin reference expressed by the Department comes from Gross Margins which have nothing in common with Net Margins.

The Medicaid payment rates for personal care services further tell the real story on the ability of providers to bear the additional costs of overtime or alternative costs of hiring and training additional workers if care hours are restricted to avoid overtime costs. For example, in Texas, the state pays $10.41-11.56 per hour depending with providers obligated to pay attendants 90% of the designated labor portion which ranges from $8.34-9.49 per hour. In Georgia, the personal care service rate is $9.00 per hour. South Carolina offers $11.40 per hour with neighboring North Carolina at $13.80. Ohio provides $17.12 per hour, but rates were decreased by 3% in July 2011, an example of a national trend.

These payment rates are far lower than the Department has understood and certainly do not support any claim of high profit margins for the businesses that provide the care to elderly and infirm citizens. Nor do these rates and the state trends downward on rates support a contention that additional costs can be absorbed without adverse consequences to workers and clients alike.

Simply put, the Department's numbers are wrong and actual margins in home care fall far short of permitting additional costs to be absorbed without adverse consequences to patients/clients, workers, public funding programs, and overall business viability.

Recommendations/alternatives

NAHC recommends that the Department of Labor consider the following alternatives to the proposed rule.

1. Withdraw the NPRM and initiate original and focused research on the impact of any changes to the companionship services and live-in exemption rules before proceeding further.

2. Allow individual states to determine what changes fit best for their individual home care market in order to best fit the employment marketplace, the state-specific

structures regulating the quality of home care services, and the state's Medicaid program as the primary public payer of personal care services.

3. Separate the companionship services exemption policy change proposal from the live-in exemption proposal, withdrawing the live-in proposal and proceed with separate and comprehensive analysis on live-in impact.

4. Develop a home care specific minimum wage and overtime compensation policy that addresses the unique working hour arrangements such as shift care, hourly service visit-oriented care, intermittent work days, and "work weeks" that are not a standard 7 days. This is similar to the approach taken in other health care sectors such as hospitals and nursing homes.

5. Examine state-specific approaches to overtime compensation in home care that can achieve a reasonable balance between the interests of consumers and workers. This would include overtime triggered after a certain point in the day (MN) and overtime connected to minimum wage levels rather than actual hourly wages (NY).

6. Allow daily compensation arrangements, without hourly time/function logs as proposed, between live-in workers and their clients to take into consideration issues of sleep time, breaks, meal time and the cost of such to the client and value to the worker.

7. Withhold issuance of any final rule that requires overtime compensation to companions (as currently defined) until states revise Medicaid payment models to address the increase in costs to assure that workers are allowed to work into overtime to qualify for the added compensation.

8. Ensure even application of any changes in the companionship services and live-in exemption rules to all workers providing personal care services to the elderly and disabled including agency workers, individual providers working in consumer directed care programs under Medicaid where the employer's identity is unclear, and workers directly employed by consumers and their families. This will prevent a shift to "grey market" unregulated providers of care.

9. Provide sufficient lead time to adjust to the new obligations. Employers of home care aides will require at least one year to address the myriad of issues presented by the proposed rule if care disruptions are to be avoided. The companies will need to modify staff scheduling, hire and train additional staff, and work with Medicaid rate setters to attempt to secure payment rate adjustments.

10. Maintain an exemption from overtime compensation while requiring payment of minimum wages.

Conclusion

Thank for the opportunity to submit these comments. NAHC stands ready to work with the Department and all other stakeholders to devise a reasonable strategy on worker protections for those that take on the essential task of caring for our most vulnerable citizens.

Very truly yours,

WILLIAM A. DOMBI,
Vice President for Law.

APPENDIX 1

COMPANIONSHIP SERVICES EXEMPTION SURVEY

January 23, 2012

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INTRODUCTION

- The survey was conducted by the
  - **Private Duty Homecare Association,** an affiliate of the **National Association for Home Care & Hospice**
  - **National Private Duty Association**
- This survey was conducted for home care agencies to determine the potential impacts of a U.S. Department of Labor proposal to modify the companionship services and live-in exemptions from minimum wage and overtime compensation. **Home Care Pulse,** an independent third-party research firm, administered the survey and collected the response data.
- The study compares the reported impacts among agencies that are currently required by state law to pay overtime, agencies that voluntarily pay overtime without a requirement and agencies that do not pay overtime compensation to determine whether projected impacts are valid.
- The study results support the contention that the U.S. Department of Labor's efforts should be suspended until the agency and others have time to conduct adequate impact analyses on modifying the current companionship services exemption. In addition, the companionship services exemption should be maintained at the state and federal level until a comprehensive plan can be implemented that addresses service funding, worker health insurance, and career development. A comprehensive rather than a piecemeal approach to worker compensation and working conditions is necessary if access to high quality of care and continuity of services is to be achieved.

3

BACKGROUND

- The federal **Fair Labor Standards Act** exempts certain types of workers from minimum wage and overtime compensation. The exemptions include workers providing "companionship services for individuals who (because of age or infirmity) are unable to care for themselves", 29 USC 213(a)(15), and an employee providing "domestic service in a household and who resides in the household," 29 USC 213 (a)(21).
- The **U.S. Department of Labor issued a proposed rule** that would significantly alter longstanding existing regulations defining "companionship services" effectively eliminating the application of the exemption for typical home care aide/personal care attendant services. The proposed rule would also eliminate application of the so-called "live-in" exemption for caregivers employed by a third-party employer. 76 FR 81190 (December 27, 2011).

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FINDINGS

- **Moderate to significant increases in business costs** have occurred or would occur under the proposed rule. The business cost impact responses of companies currently subject to overtime requirements mirrored the responses of those that would be subject to overtime requirements under the proposed rule.
- Agencies consistently referenced **restricting or expecting to restrict overtime hours** for employees that provide companionship services throughout the survey.
- Quality of care impact is reported by all respondents including **loss of service continuity**, weakened staff competencies, and a shift of clients to unregulated gray market caregivers.
- **Costs would be passed on to elderly, infirm and special needs clients/patients** in private pay care.
- **Current reimbursement for services covered by federal and state programs does not cover overtime.**

5

AGENCY DEMOGRAPHICS

- 1428 home care agencies participated in the survey representing all 50 states, the District of Columbia, Virgin Islands and Northern Mariana Islands.
- Most agencies surveyed are small businesses. 85.7% of the respondents had annual revenues of less than $5 million. The remaining respondents included businesses with revenues up to over $20 million annually.
  - 40.2% of agencies surveyed reported annual revenue for their company as being under $1 million.
  - 45.0% of agencies surveyed reported annual revenue for their company as being between $1-5 million.
- 67.7% of home care agencies surveyed reported that over half of their annual revenue comes from personal care and home health aide services. Over 72% of agencies with annual revenue under $5 million reported that the majority of annual revenue comes from personal care and home health aide services.

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DEMOGRAPHICS

- Nearly 70% of home care agencies reported that the majority of their companionship services are paid for privately by the individual client/patient, family or through a commercial insurance plan.
- Over 50% of agencies reported that they provide companionship services that are covered for payment under a public program, such as Medicare, Medicaid or the Veteran's Administration.
- 64% of agencies reported that they provide live-in caregiver services.
- 54.2% of surveyed agencies do not pay overtime wages to employees that provide companionship services.
- 25.1% of surveyed agencies reported they are required to pay overtime wages for companionship services.
- 15.1% reported that they voluntarily pay overtime wages.

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Section I

WORKER IMPACT

Employed caregivers would lose income under the proposed rule: Companies restrict working hours to control overtime costs

Home care agencies were given the option to choose various business adjustments they may have implemented or expect to make in order to accommodate overtime pay. Regardless of the type of agency, the same primary business adjustments to avoid or control the added costs of overtime compensation:

- **Restrict overtime hours**
- **Assign additional employees for each client/patient**

Agency Type	Restrict OT hours	Assign more employees per client/patient
Does not pay overtime*	86.2%	77.9%
Required to pay overtime	62.6%	62.1%
Voluntarily pay overtime	60%	58.7%

**Agencies that do not provide overtime pay were asked about expected business adjustments. Agencies that pay overtime wages were asked about their actual business adjustments.*

9

Employed caregiver income and hour restrictions continued

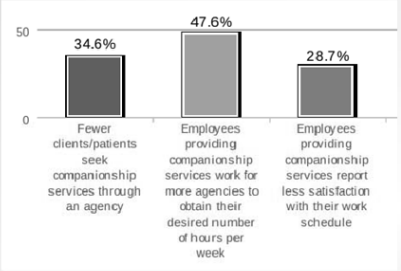
Many survey participants used the "Other" category to elaborate on how they limit or intend to limit worker.

- "We don't have our employees work overtime."
  – Respondent, required to pay overtime
- "Several caregivers had to quit as caregivers when I reduced their hours to 40 per week if they provided home care for elderly in a "non-private home" environment because they could not work enough hours to sustain a standard of living…"
  – Respondent, required to pay overtime
- "Negative impact to employees who would and could work more hours and make MORE money but we restrict them in order to be able to afford to deliver care."
  – Respondent, required to pay overtime
- "We cannot afford to pay overtime. It would put us out of business with the living wage laws that are in place. Patients and workers are not going to be happy with the restrictions we will impose and ultimately patient care will suffer."
  – Respondent, does not currently pay overtime

10

Agencies required to pay overtime wages report that employees work for multiple agencies to earn additional hours to overcome limits on work hours

Agencies that pay overtime wages were asked about various market impacts they have observed since their agency has had to pay overtime, whether voluntary or required. The chart below presents the three highest rated market impacts.



11

Section II

CLIENT/PATIENT IMPACT

Continuity of care and client/patient preference for fewer employed caregivers are placed at risk by overtime requirements.

Home care agencies provided a mixed review of the impact of overtime pay for companionship services on the quality of care provided to clients/patients. However, agencies consistently wrote in various comments sections that patients risk less continuity of care if assigned more than one companionship employee. In addition, agencies explained that they receive requests from their clients/patients to have fewer caregivers.

- "Everyone would be unhappy including the client for lack of continuity, the caregiver for reduced hours of work and the home care company for added staffing difficulty."
  – Respondent, required to pay overtime
- "Caregivers get pulled from shifts if we need to pay overtime. Client finds this frustrating."
  – Respondent, required to pay overtime
- "Clients want a single companion."
  – Respondent, voluntarily pays overtime
- "We would have to rotate more caregivers at a clients to keep overtime down so they can afford our services. Clients with Dementia and Alzheimer's would become more confused and the continuity of care would go down."
  – Respondent, does not pay overtime
- "More patients will try to hire their own staff and will not have the quality of staff an agency can provide nor the benefit of protection of the agencies general/professional liability and other insurance coverage."
  – Respondent, required to pay overtime

13

Clients/patients have seen or are expected to see rising costs and less availability of live-in services

Agencies reported that they have or expect to **increase billing costs to the client/patient as a result of paying overtime.** Clients/patients requiring companionship services are often the disabled and elderly on fixed incomes, and increased costs could limit access to services. Agencies also explained throughout the survey that they have or will likely limit live-in services.

Agency Type	Increased billing costs to the client/patient	Scale back offering companionship services
Does not pay overtime*	81.8%	23.7%
Required to pay overtime	45.2%	10.4%
Voluntarily pay overtime	47.1%	10.7%

**Agencies that do not provide overtime pay were asked about expected business adjustments. Agencies that pay overtime wages were asked about their actual business adjustments.*

14

Client/patient costs and services impact continued

Agencies consistently reported that clients/patients risk not being able to afford the rise in companionship services costs. Some comments include:

- "The economy is tough on private care right now—this will just drive up costs for which families can not afford."
  - Respondent, voluntarily pays overtime
- "Clients cannot afford overtime."
  - Respondent, required to pay overtime
- "Clients will not be able to afford my services and will find other resources, such as nursing homes, driving me out of business and forcing my clients to move from their homes!"
  - Respondent, does not pay overtime
- "Much more turbulence for clients due to switching caregivers when they reach the maximum hours for work below the overtime limit. The clients cost would have to rise to pay for the overtime wages. We refuse to charge our clients (who are already struggling to pay for care) more for overtime. The only option is to switch caregivers. This increases stress on the clients, reduces wages for the caregivers and reduces quality of care for the family."
  - Respondent, does not pay overtime

15

Agencies believe the greatest impact on the communities they serve will be that fewer clients/patients will be able to afford companionship services

- 86.4% of agencies that do not pay over-time wages reported that the greatest impact on the communities they serve is **fewer clients/patients will be able to afford companionship services.**

Agencies also provided additional comments on other community impacts:

- Increases in the number of independent and potentially unregulated caregivers
- Limited availability of live-in services for clients/patients
- **Clients/patients who are unable to afford companionship services will seek care in nursing homes**
- Employed caregivers with capped hours will likely leave the field or work for multiple agencies

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Section III

BUSINESS IMPACT

Home care agencies have to make difficult choices to address the impact of overtime pay on business costs

Over 90% of all agencies surveyed reported that paying overtime wages increases or is expected to increase business costs. While a greater percentage of agencies that do not pay overtime reported they expect significant increases in business costs, the majority of agencies that currently pay overtime similarly reported that there is either a significant or moderate increase in business costs. 67.8% of companies currently required to pay overtime report a moderate to significant increase in costs thereby validating the concerns expressed by the 93.6% of companies that expect moderate or significant cost increases under the proposed rule.

Agency Type	Significant Increase	Moderate Increase	Minimal Increase	Total
Does not pay overtime*	76.3%	17.3%	2.9%	96.5%
Required to pay overtime	40.0%	27.8%	24.2%	92.0%
Voluntarily pay overtime	34.0%	34.9%	24.1%	93.0%

**Agencies that do not provide overtime pay were asked about expected impact on business costs. Agencies that pay overtime wages were asked about the actual impact.*

Agencies see increases in various types of business costs

Home care agencies reported they would see increases in certain types of business costs particularly surrounding the desire by the agency to hire additional employees to reduce the need for employees to work overtime. **Staff training costs and human resources costs were the larger cost items agencies reported.** Some agencies listed additional costs resulting from hiring additional employees such as paying for additional drug screenings, background checks and increased supervisory hours.

Agency Type	Increases in human resources costs	Increase staff training costs
Does not pay overtime*	67.4%	67.9%
Required to pay overtime	38.2%	38.3%
Voluntarily pay overtime	38.7%	31.6%

**Agencies that do not provide overtime pay were asked about expected business adjustments. Agencies that pay overtime wages were asked about their actual business adjustments.*

19

Agencies make or expect to make a variety of business adjustments to the services provided to clients/patients and to employee working conditions

Home care agencies were given the opportunity to provide comments in an "Other" category when describing business adjustments they have or expect to make in order to provide overtime compensation. Some agencies provided additional business adjustments from those provided in a list of potential options.

Some additional adjustments include:

- **Cutbacks on employee benefits and pay increases**
- **Consider withdrawing from Medicaid**
- **Stop offering live-in services**
- **Change the shifts offered to employees**
- **Reduce the current pay rate for employees providing companionship services**

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RECAP

Recap

- Moderate to **significant increases in business costs** have occurred or would occur under the proposed rule.
- Agencies consistently referenced **restricting or expecting to restrict overtime hours** for employees that provide companionship services throughout the survey.
- Quality of care impact is reported by all respondents including **loss of service continuity, and weakened staff competencies.**
- **Costs would be passed on to elderly, infirm, and special needs clients/patients** in private pay care.
- **Current reimbursement for services covered by federal and state programs does not cover overtime.**
- Clients/patients will seek out services from the **underground economy** through **untrained, unsupervised and unskilled workers creating risk of elder abuse and mistreatment of people with disabilities**.

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Contact for More Information

Private Duty Homecare Association (PDHCA), an affiliate of the
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Access online at http://www.privatedutybenchmarking.com/companionship-exemption-2012

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APPENDIX 2

This is a survey on the impact or potential impact of requiring payment of overtime compensation to personal care attendants and home care aides. Under the federal Fair Labor Standards Act, "companionship services" are exempt from minimum wage and overtime pay requirements. In many circumstances, the work done by personal care attendants and home care aides is considered "companionship services" under this law. States can drop the exemption and nearly half the states have done so.

Presently, the US Department of Labor has developed proposed changes in the existing rule defining companionship services and its application to companies that employ workers providing home care. It is expected that the proposal would significantly alter the long-standing definitions in a manner that would mean that the exemption is no longer applicable to home care employees.

As used in this survey, "companionship services" includes personal care to the elderly and disabled. Housekeeping and chore services are included as companionship services provided that those services are less than 20% of the total time worked by the employee. "Companionship services" may be provided by personnel operating under various labels such as personal care attendant, home care aide, home health aide and others. For purposes of the overtime exemption, it is the functions of the worker that matter, not the job label.

1. In which state(s) does your company provide home care? List all states applicable

2. Please list all the types of services provided by your company a. Private pay personal care

b. Medicaid personal care services
c. Medicaid home and community-based waiver services
d. Older Americans Act personal care (Area Agencies on Aging services)
e. Medicare/Medicaid home health services
f. Medicare/Medicaid hospice
g. Commercial insurance paid services
h. Veteran's Administration paid home care

3. What is the annual home care revenue for your company? a. Under $1M
b. $1-5M
c. $5-10M
d. $10-20M

e. Over $20M

4. What percentage of your revenue comes from personal care services and home health aide services regardless of payment source?

a. None
b. 0-20
c. 21-40
d. 41-60
e. Above 60
f. Unsure

5. Are companionship services exempt from overtime wages in your state?

a. Yes
b. No
c. Unsure

6. What percentage of your workforce provides companionship services?

a. None
b. 0-20
c. 21-40
d. 41-60
e. Above 60
f. Unsure

7. What percentage of your employees that provide companionship services provide live-in services?

a. None
b. 0-20
c. 21-40
d. 41-60
e. Above 60
f. Unsure

8. What percentage of your companionship services are covered for payment under a public program, such as Medicare, Medicaid, the Veteran's Administration, or Older Americans Act? a. None
b. 0-20
c. 21-40
d. 41-60
e. Above 60
f. Unsure

9. What percentage of your companionship services are paid for privately, by the individual client/patient, family or through a commercial insurance plan?

a. None
b. 0-20
c. 21-40
d. 41-60
e. Above 60
f. Unsure

10. What percentage of your employees who provide companionship services work over-time?

a. None
b. 0-20
c. 21-40
d. 41-60
e. Above 60
f. Unsure

11. Do you pay overtime wages to employees that provide companionship service whether required or voluntary?

a. Yes—required (proceed to 12)
b. Yes—-voluntary (proceed to12)
c. No (proceed to 21)
d. Unsure (END of SURVEY)

12. Do you pay employees that provide live-in companionship services wages for sleep hours?

a. Yes
b. No (proceed to 14)
c. Unsure (proceed to 14)

13. Do you factor in sleep time hours for employees that provide live-in companionship services when determining whether overtime wages are paid?

a. Yes
b. No
c. c. Unsure

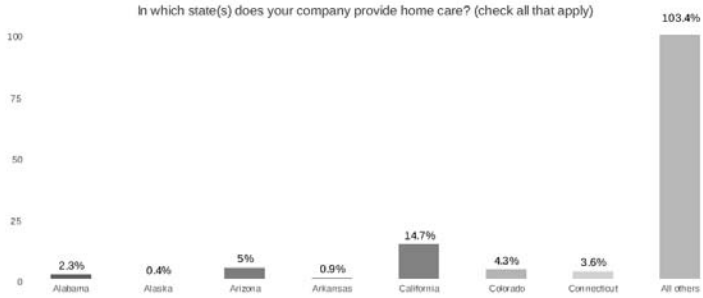
14. Does paying overtime wages impact your business costs?
a. Yes (proceed to 15)
b. No (proceed to 16)
c. Unsure (proceed to 16)
15. How much of an impact does paying overtime for companionship services have on your agency's business costs?
a. No change in business costs
b. Minimal increase
c. Moderate increase
d. Significant increase
e. Decrease costs
f. Unsure
16. Does paying overtime wages adversely impact the quality of care your agency provides to the clients/patients you serve?
a. Yes (proceed to 17)
b. No (proceed to 19)
c. Unsure
17. How much of an impact does overtime pay for companionship services have on the quality of care to the clients/patients you serve?
a. No impact
b. Minimal deterioration
c. Moderate deterioration
d. Significant deterioration
e. Minimal improvement
f. Moderate improvement
g. Significant improvement
h. Unsure
18. What impact does paying overtime wages have on the quality of your services? (check all that apply)
a. lower staff retention
b. higher staff retention
c. poorer staff competencies
d. better staff competencies
e. lower staff educational levels
f. higher staff educational levels
g. poorer consistency and continuity of care
h. improved consistency and continuity of care
i. Other
19. What business adjustments have you made in response to paying overtime wages to employees who provide companionship services? (check all that apply)
a. Increased billing rates to clients/patients
b. Hired additional employees to provide companionship services to reduce or eliminate need for overtime hours
c. Reduced the number of hours for employees providing companionship services to avoid the payment of overtime
d. Scale back offering companionship services
e. Assign additional employees to individual clients/patients receiving companionship services
f. Increased human resources costs due to a greater need for staff
g. Increased staff training costs
h. No adjustments made
i. Other (please explain):
20. What changes have you observed in your market since the payment of overtime for companionship services was implemented?
a. Fewer clients/patients seek companionship services through an agency
b. Employees providing companionship services work for more agencies to obtain their desired number of hours per week
c. Employees providing companionship services report less satisfaction with their work schedule
d. No change
e. More clients/patients seek companionship services through an agency
f. Employees providing companionship services work for fewer agencies to obtain their desired number of hours per week
g. Employees providing companionship services report more satisfaction with their work schedule
h. I don't remember a time when the payment of overtime for companionship services wasn't required
If you answered Q 19 and 20 this is the end of the survey.

21. Do you pay employees that provide live-in companionship services wages for sleep hours?
a. Yes
b. No
c. Unsure
22. Do you expect that paying overtime wages would impact your business costs?
a. Yes (proceed to 22)
b. No (proceed to 23)
c. Unsure
23. How much of an impact would paying overtime wages for companionship services have on your agency's business costs?
a. No change in business costs
b. Minimal increase
c. Moderate increase
d. Significant increase
e. Decrease costs
f. Unsure
24. Do you expect that paying overtime wages would impact the quality of care your agency provides to the clients/patients you serve?
a. Yes (proceed to 25)
b. No (proceed to question 26)
c. Unsure
25. How much of an impact would you expect overtime pay for companionship services would have on the quality of care to the clients/patients you serve?
a. No impact
b. Minimal deterioration
c. Moderate deterioration
d. Significant deterioration
e. Minimal improvement
f. Moderate improvement
g. Significant improvement
h. Unsure
26. What impact would you expect paying overtime wages would have on the quality of your services? (check all that apply)
a. lower staff retention
b. poorer staff competencies
c. lower staff educational levels
d. poorer consistency and continuity of care
e. higher staff retention
b. better staff competencies
c. higher staff educational levels
d. improved consistency and continuity of care
e. Other
27. What business adjustments would you expect to make in response to paying overtime wages to employees who provide companionship services? (check all that apply)
a. Increased billing rates to clients/patients
b. Hire additional employees to provide companionship services to reduce or eliminate need for overtime hours
c. Restrict overtime hours for employees providing companionship services
d. Scale back offering companionship services
e. Assign additional employees to individual clients/patients receiving companionship services
f. Increase human resources costs due to due to a need for additional employees
g.
h. Increase staff training costs due to a need for additional employees
i. No adjustments made
j. Other (please explain):
28. What impact on the communities you serve would you expect from paying overtime wages for companionship services?
a. Fewer clients/patients able to afford care
b. Less work available for employees who provide companionship services
c. No Impact

APPENDIX 3

Companionship Exemption Summary Report - Complete

Survey: Companionship Survey

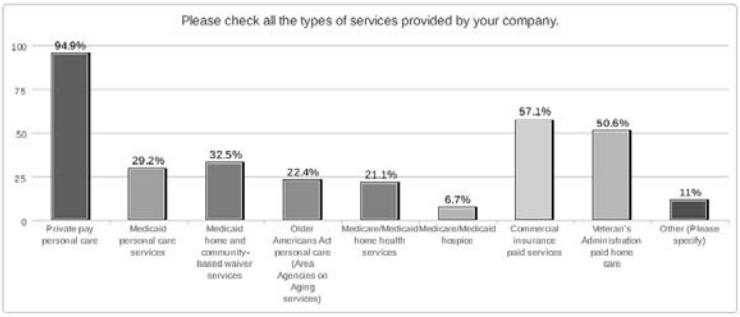


1. In which state(s) does your company provide home care? (check all that apply)

Value	Count	Percent %
Alabama	33	2.3%
Alaska	6	0.4%
Arizona	72	5%
Arkansas	13	0.9%
California	210	14.7%
Colorado	61	4.3%
Connecticut	52	3.6%
Delaware	13	0.9%
District of Columbia	8	0.6%
Florida	89	6.2%
Georgia	63	4.4%
Hawaii	3	0.2%
Idaho	17	1.2%
Illinois	73	5.1%
Indiana	61	4.3%
Iowa	24	1.7%
Kansas	28	2%
Kentucky	32	2.2%
Louisiana	17	1.2%
Maine	10	0.7%
Maryland	26	1.8%
Massachusetts	36	2.5%
Michigan	47	3.3%
Minnesota	37	2.6%
Mississippi	11	0.8%
Missouri	57	4%
Montana	4	0.3%
Nebraska	28	2%

Statistics	
Total Responses	1,428

Nevada	18	1.3%
New Hampshire	25	1.8%
New Jersey	56	3.9%
New Mexico	20	1.4%
New York	36	2.5%
North Carolina	65	4.6%
North Dakota	3	0.2%
Northern Mariana Islands	1	0.1%
Ohio	67	4.7%
Oklahoma	17	1.2%
Oregon	18	1.3%
Pennsylvania	55	3.9%
Rhode Island	17	1.2%
South Carolina	40	2.8%
South Dakota	6	0.4%
Tennessee	52	3.6%
Texas	130	9.1%
Utah	12	0.8%
Vermont	6	0.4%
Virgin Islands	1	0.1%
Virginia	62	4.3%
Washington	42	2.9%
West Virginia	10	0.7%
Wisconsin	30	2.1%
Wyoming	1	0.1%

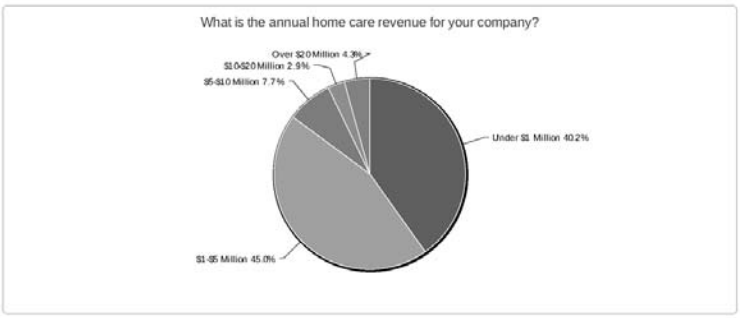


2. Please check all the types of services provided by your company.

Value	Count	Percent %
Private pay personal care	1325	94.9%
Medicaid personal care services	408	29.2%
Medicaid home and community-based waiver services	454	32.5%
Older Americans Act personal care (Area Agencies on Aging services)	313	22.4%
Medicare/Medicaid home health services	295	21.1%
Medicare/Medicaid hospice	94	6.7%
Commercial insurance paid services	797	57.1%

Statistics	
Total Responses	1,396

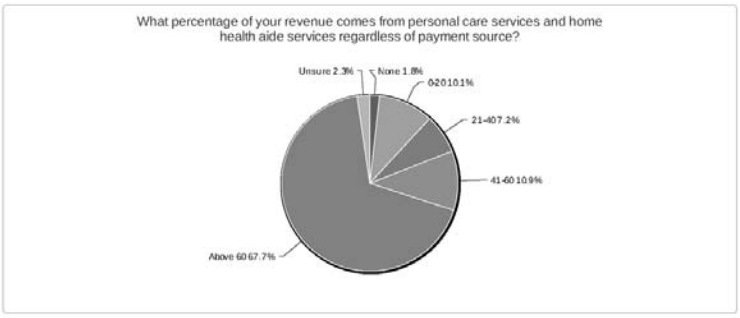
Veteran's Administration paid home care	707	50.6%
Other (Please specify)	154	11%



3. What is the annual home care revenue for your company?

Value	Count	Percent %
Under $1 Million	563	40.2%
$1-$5 Million	631	45%
$5-$10 Million	108	7.7%
$10-$20 Million	40	2.9%
Over $20 Million	60	4.3%

Statistics	
Total Responses	1,402



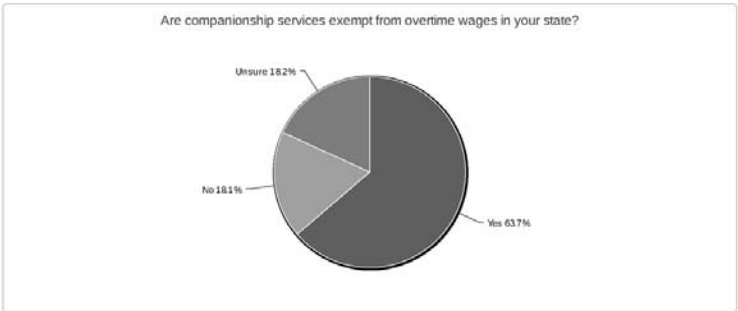
4. What percentage of your revenue comes from personal care services and home health aide services regardless of payment source?

Value	Count	Percent %
None	25	1.8%
0-20	143	10.1%
21-40	102	7.2%
41-60	154	10.9%

Statistics	
Total Responses	1,416
Sum	8,456.0
Average	33.0

Above 60	959	67.7%
Unsure	33	2.3%

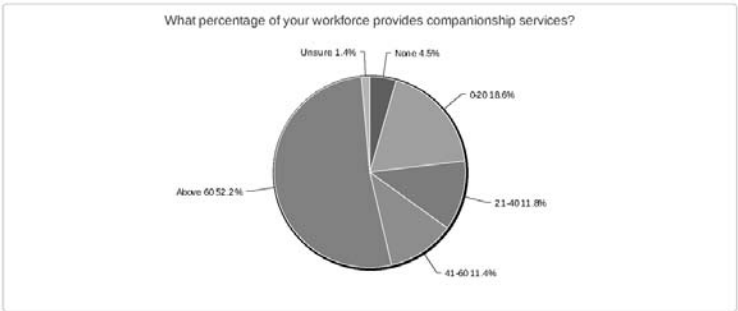
StdDev	9.79
Max	41.0



5. Are companionship services exempt from overtime wages in your state?

Value	Count	Percent %
Yes	894	63.7%
No	254	18.1%
Unsure	255	18.2%

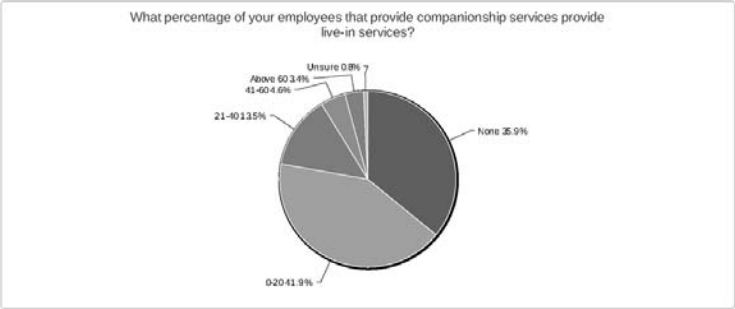
Statistics	
Total Responses	1,403



6. What percentage of your workforce provides companionship services?

Value	Count	Percent %
None	63	4.5%
0-20	263	18.6%
21-40	167	11.8%
41-60	161	11.4%
Above 60	737	52.2%
Unsure	20	1.4%

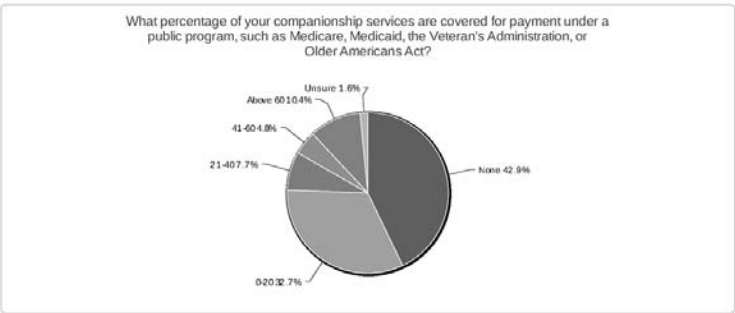
Statistics	
Total Responses	1,411
Sum	10,108.0
Average	30.8
StdDev	10.00
Max	41.0



7. What percentage of your employees that provide companionship services provide live-in services?

Value	Count	Percent %
None	507	35.9%
0-20	591	41.9%
21-40	190	13.5%
41-60	65	4.6%
Above 60	48	3.4%
Unsure	11	0.8%

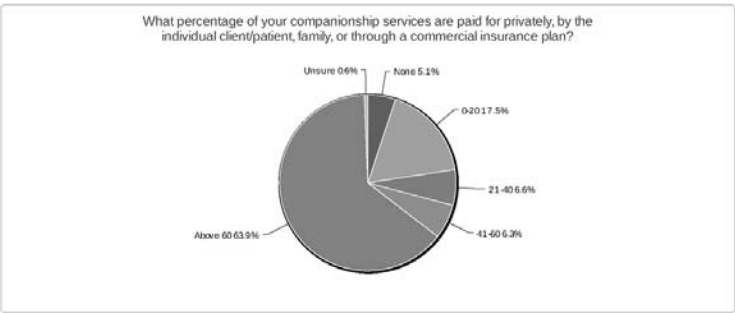
Statistics	
Total Responses	1,412
Sum	6,655.0
Average	26.1
StdDev	8.72
Max	41.0



8. What percentage of your companionship services are covered for payment under a public program, such as Medicare, Medicaid, the Veteran's Administration, or Older Americans Act?

Value	Count	Percent %
None	608	42.9%
0-20	464	32.7%
21-40	109	7.7%
41-60	68	4.8%
Above 60	147	10.4%
Unsure	22	1.6%

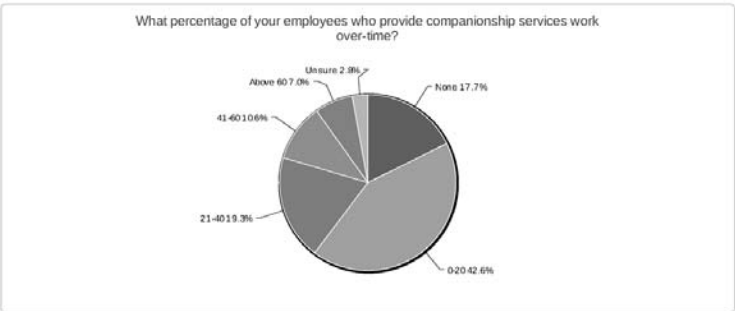
Statistics	
Total Responses	1,418
Sum	5,077.0
Average	28.7
StdDev	9.73
Max	41.0



9. What percentage of your companionship services are paid for privately, by the individual client/patient, family, or through a commercial insurance plan?

Value	Count	Percent %
None	72	5.1%
0-20	247	17.5%
21-40	93	6.6%
41-60	89	6.3%
Above 60	903	63.9%
Unsure	9	0.6%

Statistics	
Total Responses	1,413
Sum	5,602.0
Average	30.8
StdDev	10.00
Max	41.0



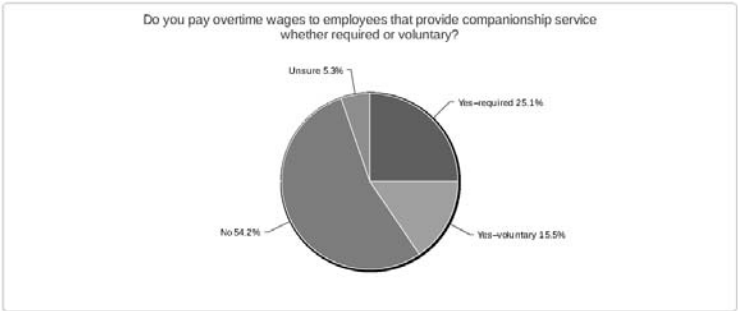
10. What percentage of your employees who provide companionship services work over-time?

Value	Count	Percent %
None	249	17.7%
0-20	601	42.6%
21-40	272	19.3%
41-60	149	10.6%
Above 60	99	7%

Statistics	
Total Responses	1,410
Sum	11,821.0
Average	28.1
StdDev	9.56

Unsure	40	2.8%

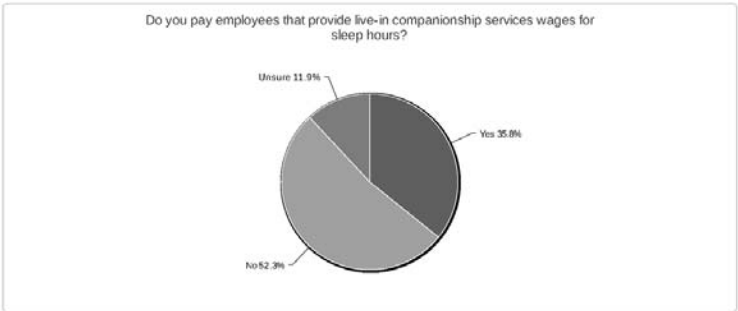
Max	41.0



11. Do you pay overtime wages to employees that provide companionship service whether required or voluntary?

Value	Count	Percent %
Yes--required	355	25.1%
Yes--voluntary	219	15.5%
No	768	54.2%
Unsure	75	5.3%

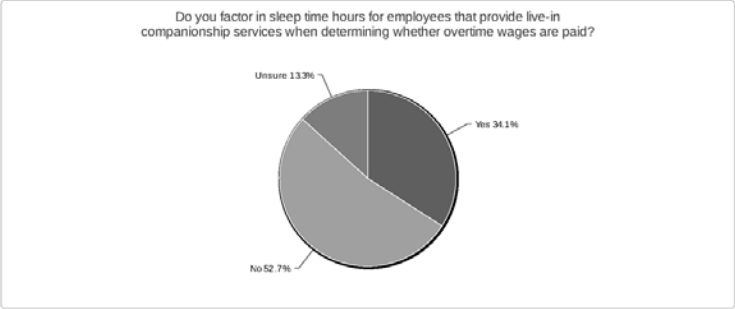
Statistics	
Total Responses	1,417



12. Do you pay employees that provide live-in companionship services wages for sleep hours?

Value	Count	Percent %
Yes	279	35.8%
No	408	52.3%
Unsure	93	11.9%

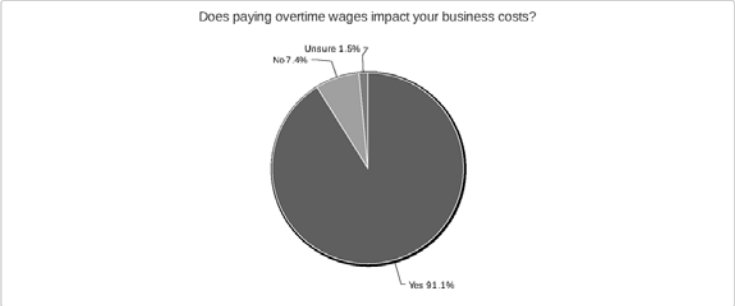
Statistics	
Total Responses	780



13. Do you factor in sleep time hours for employees that provide live-in companionship services when determining whether overtime wages are paid?

Value	Count	Percent %
Yes	262	34.1%
No	405	52.7%
Unsure	102	13.3%

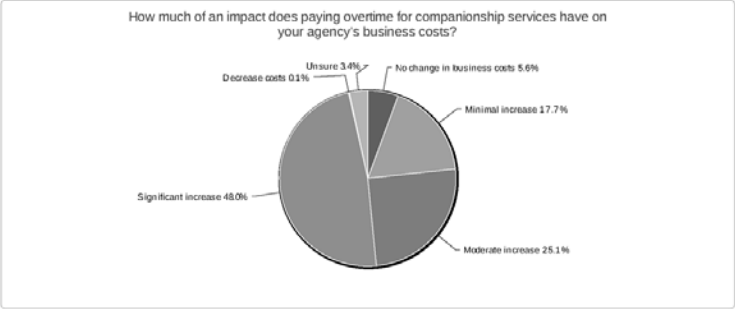
Statistics	
Total Responses	769



14. Does paying overtime wages impact your business costs?

Value	Count	Percent %
Yes	737	91.1%
No	60	7.4%
Unsure	12	1.5%

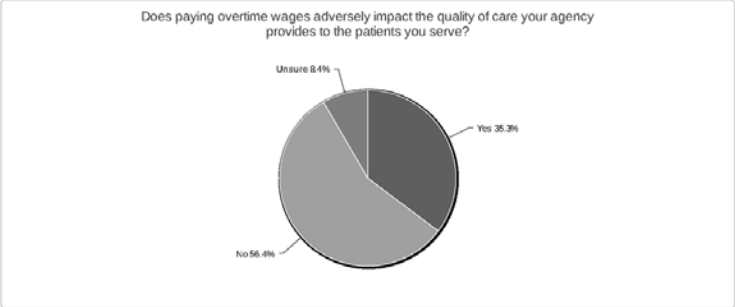
Statistics	
Total Responses	809



15. How much of an impact does paying overtime for companionship services have on your agency's business costs?

Value	Count	Percent %
No change in business costs	43	5.6%
Minimal increase	136	17.7%
Moderate increase	193	25.1%
Significant increase	369	48%
Decrease costs	1	0.1%
Unsure	26	3.4%

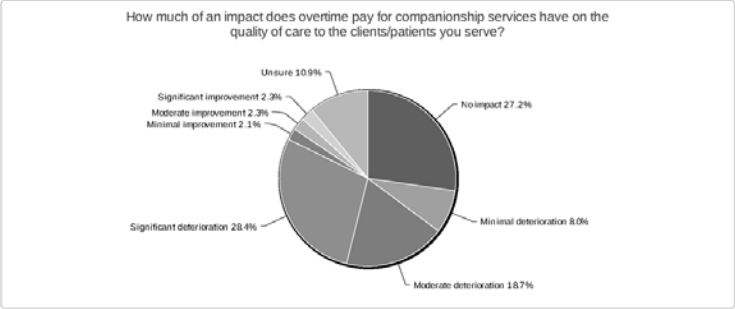
Statistics	
Total Responses	768



16. Does paying overtime wages adversely impact the quality of care your agency provides to the patients you serve?

Value	Count	Percent %
Yes	282	35.3%
No	451	56.4%
Unsure	67	8.4%

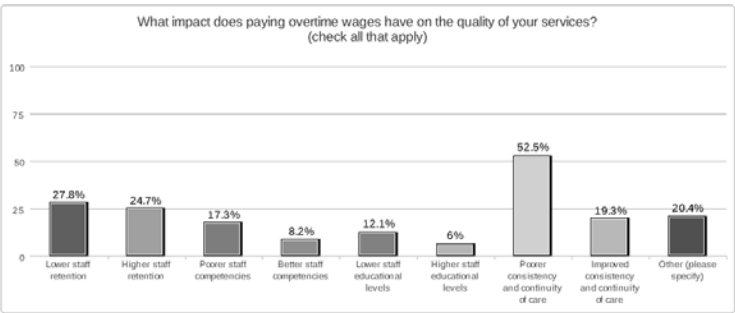
Statistics	
Total Responses	800



17. How much of an impact does overtime pay for companionship services have on the quality of care to the clients/patients you serve?

Value	Count	Percent %
No impact	140	27.2%
Minimal deterioration	41	8%
Moderate deterioration	96	18.7%
Significant deterioration	146	28.4%
Minimal improvement	11	2.1%
Moderate improvement	12	2.3%
Significant improvement	12	2.3%
Unsure	56	10.9%

Statistics	
Total Responses	514

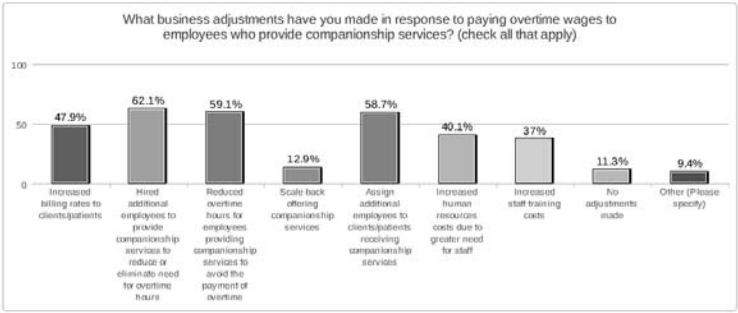


18. What impact does paying overtime wages have on the quality of your services? (check all that apply)

Value	Count	Percent %
Lower staff retention	135	27.8%
Higher staff retention	120	24.7%
Poorer staff competencies	84	17.3%
Better staff competencies	40	8.2%

Statistics	
Total Responses	486

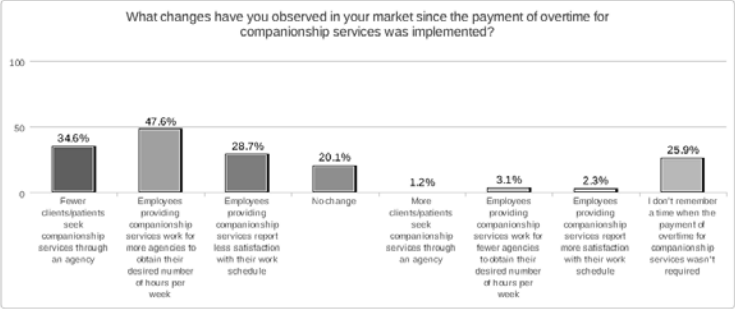
Lower staff educational levels	59	12.1%
Higher staff educational levels	29	6%
Poorer consistency and continuity of care	255	52.5%
Improved consistency and continuity of care	94	19.3%
Other (please specify)	99	20.4%



19. What business adjustments have you made in response to paying overtime wages to employees who provide companionship services? (check all that apply)

Value	Count	Percent %
Increased billing rates to clients/patients	383	47.9%
Hired additional employees to provide companionship services to reduce or eliminate need for overtime hours	496	62.1%
Reduced overtime hours for employees providing companionship services to avoid the payment of overtime	472	59.1%
Scale back offering companionship services	103	12.9%
Assign additional employees to clients/patients receiving companionship services	469	58.7%
Increased human resources costs due to greater need for staff	320	40.1%
Increased staff training costs	296	37%
No adjustments made	90	11.3%
Other (Please specify)	75	9.4%

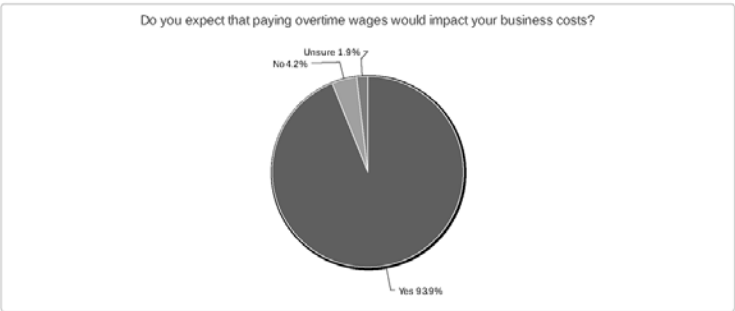
Statistics	
Total Responses	799



20. What changes have you observed in your market since the payment of overtime for companionship services was implemented?

Value	Count	Percent %
Fewer clients/patients seek companionship services through an agency	255	34.6%
Employees providing companionship services work for more agencies to obtain their desired number of hours per week	351	47.6%
Employees providing companionship services report less satisfaction with their work schedule	212	28.7%
No change	148	20.1%
More clients/patients seek companionship services through an agency	9	1.2%
Employees providing companionship services work for fewer agencies to obtain their desired number of hours per week	23	3.1%
Employees providing companionship services report more satisfaction with their work schedule	17	2.3%
I don't remember a time when the payment of overtime for companionship services wasn't required	191	25.9%

Statistics	
Total Responses	738

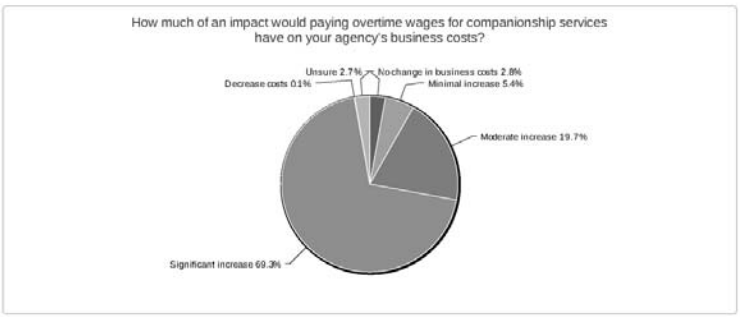


21. Do you expect that paying overtime wages would impact your business costs?

Value	Count	Percent %
Yes	956	93.9%

Statistics	
Total Responses	1,018

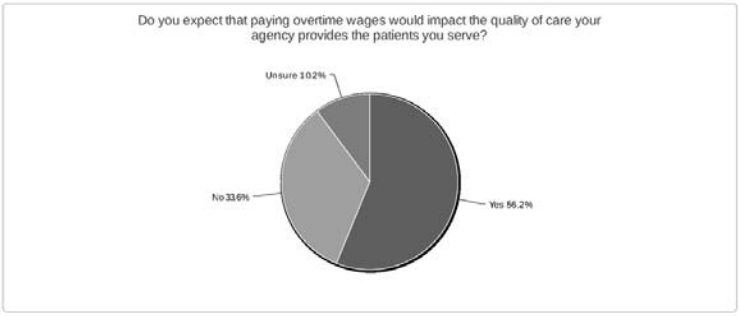
No	43	4.2%
Unsure	19	1.9%



22. How much of an impact would paying overtime wages for companionship services have on your agency's business costs?

Value	Count	Percent %
No change in business costs	28	2.8%
Minimal increase	53	5.4%
Moderate increase	194	19.7%
Significant increase	683	69.3%
Decrease costs	1	0.1%
Unsure	27	2.7%

Statistics	
Total Responses	986

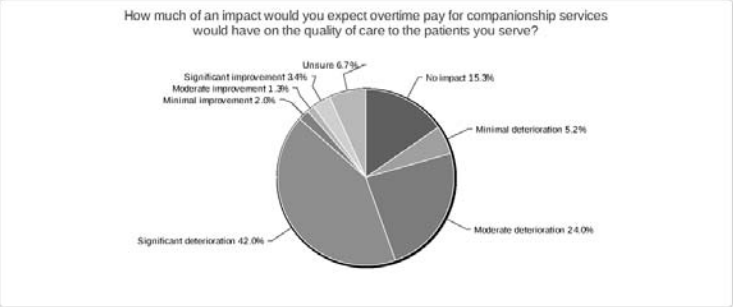


23. Do you expect that paying overtime wages would impact the quality of care your agency provides the patients you serve?

Value	Count	Percent %
Yes	568	56.2%
No	340	33.6%

Statistics	
Total Responses	1,011

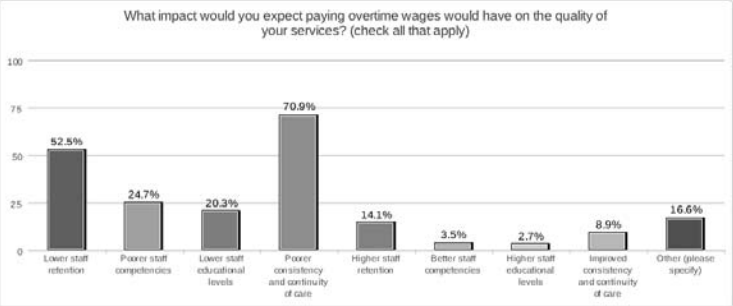
Unsure	103	10.2%



24. How much of an impact would you expect overtime pay for companionship services would have on the quality of care to the patients you serve?

Value	Count	Percent %
No impact	114	15.3%
Minimal deterioration	39	5.2%
Moderate deterioration	178	24%
Significant deterioration	312	42%
Minimal improvement	15	2%
Moderate improvement	10	1.3%
Significant improvement	25	3.4%
Unsure	50	6.7%

Statistics	
Total Responses	743

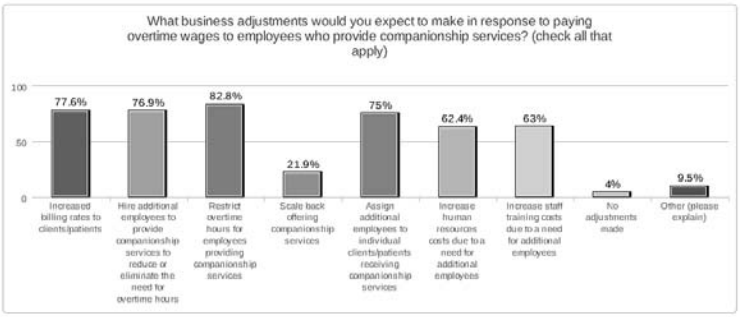


25. What impact would you expect paying overtime wages would have on the quality of your services? (check all that apply)

Value	Count	Percent %
Lower staff retention	372	52.5%

Statistics	
Total Responses	709

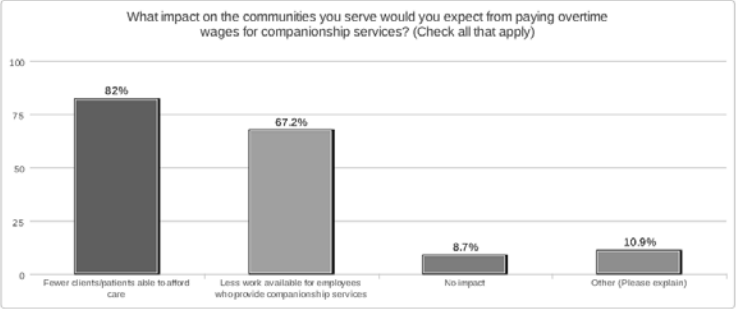
Poorer staff competencies	175	24.7%
Lower staff educational levels	144	20.3%
Poorer consistency and continuity of care	503	70.9%
Higher staff retention	100	14.1%
Better staff competencies	25	3.5%
Higher staff educational levels	19	2.7%
Improved consistency and continuity of care	63	8.9%
Other (please specify)	118	16.6%



26. What business adjustments would you expect to make in response to paying overtime wages to employees who provide companionship services? (check all that apply)

Value	Count	Percent %
Increased billing rates to clients/patients	781	77.6%
Hire additional employees to provide companionship services to reduce or eliminate the need for overtime hours	774	76.9%
Restrict overtime hours for employees providing companionship services	834	82.8%
Scale back offering companionship services	221	21.9%
Assign additional employees to individual clients/patients receiving companionship services	755	75%
Increase human resources costs due to a need for additional employees	628	62.4%
Increase staff training costs due to a need for additional employees	634	63%
No adjustments made	40	4%
Other (please explain)	96	9.5%

Statistics	
Total Responses	1,007



27. What impact on the communities you serve would you expect from paying overtime wages for companionship services? (Check all that apply)

Value	Count	Percent %
Fewer clients/patients able to afford care	824	82%
Less work available for employees who provide companionship services	675	67.2%
No impact	87	8.7%
Other (Please explain)	110	10.9%

Statistics	
Total Responses	1,005

URL Variable: utm_campaign

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81	88099

URL Variable: utm_medium

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81	Email

URL Variable: utm_source

Count	Response
81	ExactTarget

[Whereupon, at 11:40 a.m., the subcommittee was adjourned.]

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