March 21, 2012

Submitted via www.regulations.gov

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

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

Dear Ms. Ziegler:

The National Employment Law Project (NELP) and the Center for Community Change (CCC) submit these comments on the proposed rulemaking regarding the companionship exemption to the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). The National Employment Law Project is a non-profit research 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 labor standards enforcement and access to good jobs for all workers. NELP has worked with state and local advocates 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. We have represented home health 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.

The Center for Community Change works with and provides support to community-based organizations around the country that organize home care workers and advocate for improvements in the wages and working conditions in the industry. The Center also works with and provides support to community-based organizations that organize and advocate for seniors and people with disabilities, for whom access to quality, affordable home care is a critical need. The Center and the groups with whom we work have a stake in and are strongly supportive of improvements in the pay standards for home care workers that are the subject of the proposed regulations.

NELP and CCC and their 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 invest in these services. The proposed rules changes come at a critical time for this growth industry, which is at a crossroads of increased demand and rising rates of worker turnover that can be alleviated by providing the basic minimum wage and overtime protections that other workers have depended on for decades.

We appreciate the opportunity to comment on the proposed regulations.

When assessing the scope of the companionship exemption, it is important to keep in mind that the Supreme Court has emphasized that the FLSA is intended to sweep broadly; this “breadth of coverage” is “vital to [its] mission” of establishing a national work week standard. *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950). The presumption is thus that all workers are covered, and statutory exemptions to the Act are to be narrowly construed. *Id.*

And the Department of Labor (“DOL” or “the Department”) is charged with defining and delimiting 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.¹ 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.

Our comments are divided into three primary areas. First, we describe the historical purposes of and intent behind the companionship exemption in the FLSA and the contemporaneous Department of Labor regulations defining the scope of the exemption. Since 1974, home care workers have been excluded from basic minimum wage and overtime protections as DOL regulations have converted what Congress intended to be a very limited exemption for workers providing certain “companionship” services into a wholesale exclusion of workers in the home care industry. We describe an industry that has changed and grown exponentially since the 1975 DOL rulemaking, creating an unintended professional exclusion for this crucial growth sector. The result has been to suppress wages for the home care workforce, consigning millions of caregivers—the overwhelming majority of them women, many of them immigrants and women of color—to working poverty. The resulting substandard working conditions have created very serious employee recruitment and retention problems, generating labor shortages that prevent us from meeting the nation’s rapidly growing need for home care.

Second, we provide specific comments to the proposed regulations and the explanatory language in the Notice of Proposed Rulemaking (NPRM). We support the proposed regulations fully, but have three suggestions to make the application of the revised definition of exempt companionship services clearer. One would revise the text of the proposed rule to require an initial assessment of the worker’s job, to make sure she was hired to provide and in fact does primarily provide fellowship and protection, so that the permissible incidental activities are

really those that are performed only occasionally, as the Department describes. The second suggestion is to clarify that the 20 percent cap on the incidental work be per employer, if the worker works for more than one older adult or person with disability per week. A final suggestion is to revise the list of permissible exempt duties to take out those that require physical strength and specialized training.

Third, we address common misperceptions and claims by certain small but vocal segments of the industry regarding the expected impacts of transitioning to minimum wage and overtime protections for the workers. The cost of transitioning to coverage for these workers is likely to be moderate and manageable for this already cost-effective segment of the long-term care system, in no large part because high overtime hours are rare, concentrated in only about 9% of home care cases nationwide. In addition, 21 states and the District of Columbia already provide some coverage of home care workers under state minimum wage and overtime laws. The experiences in those states shows the budgetary feasibility of coverage, and reduces the number of states, employers and workers who will be affected by an expansion of federal coverage.

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

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


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

Congress did not provide a detailed definition of companionship services, directing DOL to define and delimit 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”

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3 29 USC § 213(a)(15); 29 CFR §§ 552.6, 552.106, 552.109 (2010).
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 … .” 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. These activities correspond with what the current Labor Department regulation (discussed below) describes as providing “fellowship” and “protection” for older adults or persons with disabilities.

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 was to be strictly limited. 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.” People who will be employed in the excluded categories,” by contrast “are not regular breadwinners or responsible for their families’ support.” Sen. Burdick confirmed this understanding, stressing the exemption was not intended to exclude “the professional domestic who does this as a living.” Sen. Javits echoed that, explaining that coverage was meant to extend “to really those who make it a regular part of their occupation … .” 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

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5 Ibid. (statement of Sen. Burdick).
6 29 CFR § 552.6 (2010).
9 Ibid.
support their families.”

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. 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.

The Modern Home Care Workforce.

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

A large segment of today’s home care workforce is employed under the Medicaid program. 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.

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

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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 ….”).
role in our national economy. The industry’s revenues and number of establishments are today double or more their size in 2000.\textsuperscript{17} Home care industry profits have grown at an average rate of 9 percent per year from 2001-2009; total industry profit topped 84.1 billion in 2009.\textsuperscript{18} And its workforce is projected to grow by nearly 50 percent again by 2018.\textsuperscript{19} 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.\textsuperscript{20} Non-profit enterprises comprise 70 percent of enterprises providing non-medical home care services,\textsuperscript{21} while for-profit corporations dominate in other segments of the industry.\textsuperscript{22} 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. Senior care and home health care franchises’ corporate revenues increased by 11.6 percent per year from 2007-2009.\textsuperscript{23}

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 program.\textsuperscript{24} 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.\textsuperscript{25}

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

\begin{itemize}
\item \textsuperscript{17} U.S. Census Bureau, “2008 Service Annual Survey Data ”.
\item \textsuperscript{18} Id. at 2.
\item \textsuperscript{19} PHI, \textit{Occupational Projections for Direct-Care Workers 2008-2018} (Feb. 2010), \url{http://directcareclearinghouse.org/download/PHI%20FactSheet1Update_singles%20(2).pdf}.
\item \textsuperscript{20} University of California San Francisco, Center for California Health Workforce Studies, \textit{An Aging U.S. Population and the Healthcare Workforce: Factors Affecting the Need for Geriatric Care Workers} (Feb. 2006), 30.
\item \textsuperscript{22} U.S. Census Bureau, “2008 Service Annual Survey Data for Healthcare and Social Assistance,” \url{http://www.census.gov/services/sas_data.html}.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} PHI, \textit{Who Are Direct-Care Workers?}, 1-2.
\item \textsuperscript{25} Peggie R. Smith, \textit{The Publicization of Home-Based Care Work in State Labor Law}, 92 Minn. L. Rev. 1390 (2008).
\end{itemize}
livelihood.\textsuperscript{26}

B. 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. 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.\textsuperscript{27} This group includes states with some of the nation’s largest home care programs, including New York, Illinois and Pennsylvania.\textsuperscript{28} And in five more states and the District of Columbia, workers enjoy minimum wage protection, but not overtime.\textsuperscript{29} As discussed below, these states’ experiences illustrate the economic feasibility of providing basic protections to home care workers.\textsuperscript{30}

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,\textsuperscript{31} their exclusion from the minimum wage means that employers are not


\textsuperscript{27} See Which States Provide Coverage to Home Care Workers, available at http://nelp.3cdn.net/6e193991edf8bd0df9_o6m6i28s2.pdf. (State Coverage Overview).


\textsuperscript{30} 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.

\textsuperscript{31} 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
required to pay them for all of their work hours, including work time spent traveling from one client’s home to another. This failure to pay for travel time suppresses workers’ already low earnings and not infrequently drives their real hourly wages below the minimum wage. 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. Because some employers take advantage of this exclusion, a subset of workers work very long hours per week. Such long hours are grueling for workers, and may contribute to the higher than average incidence of work-related injuries among home care workers. But many workers are forced to seek them nonetheless because industry wages are so low. The annual income for a home care worker employed for 40 hours per week at the 2009 median wage of $9.34 an hour was just $20,283—far below a basic self-sufficiency income for a single adult, let alone someone supporting a family as many home care workers do.

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. And, as the 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

33 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).  
35 See supra note 28.  
remaining staffers.” Long hours can also result in worse care for patients, as caregivers working 60-hour or 70-hour weeks face fatigue and stress in performing what is a demanding job under any circumstances.

Studies have shown turnover rates among home care workers of between 44 and 65%. 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 to 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. Raising wages modestly could therefore result in an overall costs savings to Medicaid home care programs and state budgets.

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

Finally, experts estimate that one-third of the victims of labor trafficking are domestic workers (a category that includes companions, nannies and housekeepers). Their vulnerabilities stem both from the isolating conditions under which they work and from their exclusion from core labor protections that cover all other workers. These are matters not only of labor rights, but human rights.


38 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”).

39 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).

40 Dawson, S. L. and Surpin, R., Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care, Paraprofessional Healthcare Institute (PHI), January 2001
II. Comments on Specific Provisions in the NPRM.

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

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

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

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

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

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

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

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

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

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

In addition to our proposed two-step process above, which would clarify much of the potential problems associated with parsing the duties performed by the worker, we suggest that the Department modify the percentage cap on incidental activities across a workweek to one that prohibits more than 20 percent of the tasks a worker can perform per individual client per workweek.

3. **Permissible exempt duties at 552.6 (b) should not include those that require physical strength or specialized training.**

552.6 (b)(3) permits occasional toileting, assisting with transfers, mobility, positioning and changing diapers, among other related duties. 552.6 (b)(4) lists occasional driving, which can also by necessity include transfers and positioning duties to get the individual in and out of a car. Several of these duties require physical strength and specialized training to ensure safety for the individual and the worker, depending on the abilities of the individual needing care and services. It is noteworthy that the proposed new text of 552.6 (d) specifically lists “turning and repositioning” as an example of “medical care” that typically requires specialized training. These are the very duties listed as permissible if performed as part of occasional toileting and bathing in (c).
To avoid permitting tasks that have the potential for physical injury to the worker, we propose that the Department not list as a permissible exempt activity: toileting, bathing, accompanying an individual to an appointment or social event, or any driving that requires positioning or mobility transfer assistance.

We also suggest that the list of permissible duties be exclusive.

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

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

The Department should make clear that it is taking third-party agencies out of the exemption because the agency is exercising its delegated authority to define exempt companionship services to encompass only those workers intended to be included in the exemption when Congress passed the 1974 Amendments to the FLSA.

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

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

III. Misperceptions Regarding the Companionship Rules Change.

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

   - Fifteen states provide minimum wage AND overtime protection: CO, HI, IL, ME, MD, MA, MI, MN, MT, NV, NJ, NY, PE, WA, WI.\(^\text{41}\)

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\(^41\) State Coverage Overview, at [http://nelp.3cdn.net/6e193991edf8bd0df9_o6m6i28s2.pdf](http://nelp.3cdn.net/6e193991edf8bd0df9_o6m6i28s2.pdf)
21 states provide minimum wage protection: AZ, CA, CO, DC, HI, IL, ME, MD, MA, MI, MN, MT, NE, NV, NJ, NY, ND, OH, PA, SD, WA, WI.

In these states, including some with the nation’s largest Medicaid home care programs, 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 24-hour and live-in 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. In fact, most workers are employed part-time, and many would rather work full-time. Where workers are currently working more than 40 hours a week on multiple short-hours cases, employers can cap workweeks at 40 hours and divide cases more evenly among workers, limiting the amount of overtime paid to workers and simultaneously creating more full-time employment.

Federal law requires payment of overtime premium pay after 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.

Under the new rules, 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.

2. 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

43 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 assertions 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.
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); 29 CFR 785.23. Also, even under a revised companionship regulation, live-in home care workers employed solely by an individual would remain exempt from overtime due to the existing overtime exemption for live-in workers.

3. 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.

It is not a good model for anyone – the worker or the service or care recipient – to have one worker for 24/7 care, 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.

4. 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. Case studies of 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).44

Moreover, the home care industry can afford to pay a fair wage without raising costs to consumers. For-profit home care businesses make 30-40% profits in a 70 billion dollar industry. Subsidizing the system by denying these workers a fair wage is unnecessary. 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.\textsuperscript{45} 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.\textsuperscript{46}

Some for-profit franchise agencies that have publicly opposed a reform to the companionship exemption 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 – despite 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. We urge the Department to enact these rules in final form as soon as possible.

Very truly yours,

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\textsuperscript{45} PHI, \textit{Comparing the Cost of Personal Care Services and Caregiver Pay}, 3/7/12, available at \url{http://www.directcareclearinghouse.org/download/pcs-rates-and-worker-wages.pdf}

\textsuperscript{46} Id.