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and the importance of their work, the Department believes it appropriate to consider whether the regulations are out of date and the scope of the exemption too broad.[1] I believe that the importance of this rulemaking is reflected in the thousands of comments we have already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

[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]

[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

[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."

---

[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

---

[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.

[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.