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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: RIN No. 1235-AA05
Comments in Support of the Wage and Hour Division’s proposed changes to the companionship and live-in worker regulations under the Fair Labor Standards Act (FLSA)

Dear Ms. Ziegler:

On behalf of the American Civil Liberties Union (ACLU), over half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to comment in support of the Department of Labor’s Wage and Hour Division’s proposed changes to the companionship and live-in worker regulations under the Fair Labor Standards Act (FLSA), and to recommend that the Department amend the proposed regulations to place a lower limit on non-companionship work.

Introduction
The ACLU strongly supports the right of every worker in America to earn fair pay, and advocates elimination of enduring disparities in the opportunities available and compensation paid to historically-disfavored groups. Throughout our history we have advocated passage and robust enforcement of laws that mandate equal treatment in the workplace and equal pay, including the Equal Pay Act, Title VII of Civil Rights Act of 1964, the Lilly Ledbetter Fair Pay Act, and the Paycheck Fairness Act. We have also led litigation and public education efforts to illuminate the persistence, causes of, and solutions to discriminatory pay.

The ACLU has long been concerned about the exclusion of companionship work from wage and hour protections because the policy disproportionately harms workers – particularly immigrant women and women of color – and perpetuates inequality on gender, racial, ethnic, and national origin grounds. We joined an amicus brief to the Supreme Court describing this problem in
Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007). Since that decision, the ACLU has engaged in advocacy aimed at expanding the protections of the FLSA to include home care workers.

The ACLU’s recommendations concerning domestic worker protections and pay equity stem from our advocacy and litigation on behalf of low-wage women workers of color under the FLSA and laws prohibiting sex discrimination. Most recently, we have been working to update, strengthen and close loopholes in the FLSA protections under the Equal Pay Act, through passage of the Paycheck Fairness Act. In addition, in 2011, we successfully settled litigation brought under the FLSA and discrimination laws on behalf of migrant workers from Mexico who work in North Carolina’s seafood processing industry. In addition, the ACLU has conducted advocacy and litigation on behalf of domestic workers. Most recently, Indian domestic workers represented by the ACLU, who accused Kuwaiti diplomats of human trafficking and abuse, settled their case against the Kuwaiti government.

I. The Proposed Regulations Are Necessary To Accurately Reflect Congressional Intent and To Further Gender And Racial Equality.

The ACLU concurs with the Department of Labor’s explanation of the need for proposed rulemaking in order to carry out Congressional intent at the time of passage of the FLSA amendments applicable to domestic service workers. As the Department has described, Congress wished to extend FLSA protections when it passed the 1974 amendments, on which the Department based the regulations now at issue. This intention was clearly stated in the Senate’s report on the bill: “The goal of the Amendments embodied in the committee bill is…to continue the task initiated in 1961 — and further implemented in 1966 and 1972 — to extend the basic protection of the Fair Labor Standards Act to additional workers and to reduce to the extent practicable at this time the remaining exemptions.”

The final 1975 regulations implementing this legislation, however, contravened Congress’ stated intentions by revoking the FLSA protection some workers had previously enjoyed. Although prior to 1974, employees – including companions and other household workers –

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who worked for a placement agency, which qualified as an enterprise subject to the FLSA, were covered by minimum wage and overtime rules, they have not enjoyed this benefit since 1975. Further, the 1975 regulations have been interpreted to exempt some classes of workers that members of Congress explicitly felt important to cover under the FLSA. In its 1974 FLSA Amendments legislation and explanatory reports, Congress mandated FLSA coverage of workers, such as cooks, maids, housekeepers, nurses, and laundresses, whose primary duties are performing household work and providing hygienic and medical care. Many workers with regular and significant responsibility for such home maintenance and personal care work – like Evelyn Coke, the woman whose challenge to the 1975 regulations went to the Supreme Court – have since been classified as exempt “companions,” in spite of the seemingly non-exempt nature of their work.

The amended regulations proposed by the Department will better reflect Congressional intent, advance sound public policy because they contribute to the continued dismantling of racism and sexism in labor law, and promise greater income protections and stability for low-wage workers. At the time of the passage of the landmark New Deal legislation, including the FLSA, proponents made calculated compromises to ensure support of Southern segregationists. As a result, agricultural and domestic service workers – the occupations of a majority of African Americans in the 1930s and ‘40s – were excluded not only from receiving minimum wage and overtime pay under the FLSA, but also from coverage under the National Labor Relations Act and the Social Security Act. These exclusions were intended to preserve the Southern economy built up around slavery and sustained through Jim Crow laws.

The exclusion of domestic workers from federal labor protections also reflected and accommodated prevailing stereotypes about “women’s” work. That is, employment within a household caring for others was not as productive or demanding as was “men’s” work, because supposedly women did not work to support families, so they did not need to be

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5 See originally-proposed revised 29 C.F.R. § 552.109, 39 Fed. Reg. 35382, 35385 (Oct. 1, 1974): “Employees who are engaged in providing babysitting and companionship services...are not exempt under section 13(a)(15) of the Act if the third party employer is a covered enterprise meeting the tests of sections 3(r) and 3(s)(1) of the Act. This results from the fact that their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act’s protection to previously covered domestic service employees.”; see also Deborah J. Vagins & Ariela Migdal, Protections for Home Care Workers: Ending An Unjust Legacy, A.C.L.U. Blog of Rights, http://www.aclu.org/blog/womens-rights/protections-home-care-workers-ending-unjust-legacy (12/20/12) (last visited Mar. 21, 2012).

6 See 29 C.F.R. § 552.109(a) (2012).


compensated as well as men.\textsuperscript{11} The broadly-conceived exemption of home care workers from FLSA protections continues to this day to disproportionately affect the politically disempowered populations who perform the lion’s share of companionship work.\textsuperscript{12}

Wherever possible, rules that perpetuate such stark, historically rooted inequities must be amended – and were in fact intended to be amended by the 1974 FLSA Amendments.\textsuperscript{13} This is particularly true in light of our changing workforce. Women are increasingly taking on the role of primary breadwinner in their households, and home care workers may be even more likely than other working women to be their families’ principle source of income: one survey in New York City, for example, found that 81\% of these workers were the primary earner in their families.\textsuperscript{14}

By bringing more home care and domestic workers within FLSA’s purview, the Department will enhance the self-sufficiency of a vulnerable, and growing,\textsuperscript{15} group of people by making their hard work pay fairly. Personal care assistance is characterized as a “low-wage, low-fringe benefits job” in which workers with many years of experience do not earn much more than virtual beginners.\textsuperscript{16} Because of substandard rates of pay and because many are compensated only for part-time or variable work, personal and home care aides have median annual earnings of only $12,300.\textsuperscript{17} Not surprisingly, approximately half of these workers live in households that rely on public benefits.\textsuperscript{18} By way of comparison,


\textsuperscript{12} The Department of Health and Human Services stated in a recent publication that home health aides – one of the groups of workers who have fallen under the regulatory companionship exemption – are 95\% female, 34.9\% African American, and 14.5\% immigrants. See GALINA KHATUTSKY ET AL., U.S. DEPT. OF HEALTH & HUM. SERVS. UNDERSTANDING DIRECT CARE WORKERS: A SNAPSHOT OF TWO OF AMERICA’S MOST IMPORTANT JOBS 4-8 (2011), available at http://aspe.hhs.gov/daltcp/reports/2011/CNAchart.htm. The U.S. population, by comparison, is 50.8\% female, 12.9\% African American, and 12.9\% immigrant. See American Community Survey, Table DP-1: Profile of General Population and Housing Characteristics: 2010 (includes numbers on gender and race); see also American Community Survey, Table S0201, Selected Population Profile in the United States: 2010 American Community Survey 1-Year Estimates (includes numbers on immigrant population).

\textsuperscript{13} See, e.g., 119 Cong. Rec. 24,799 (1973) (Remarks of Sen. Harrison Williams, co-sponsor of the 1974 FLSA Amendments), stating that many people “view the coverage of domestics as an effort to remedy racial and sexual discrimination…Many domestics are treated just as they were 150 years ago – that is, as slaves. Two-thirds of all household workers are black and of the remaining one-third, many are Chicanos, American Indians, or members of other minority groups.”).


\textsuperscript{18} Id.
figures from calendar year 2011 showed 1.4-1.5% of the population received welfare (TANF)\textsuperscript{19} at any given time, and about 15% received food stamps (SNAP).\textsuperscript{20}

Personal and home care aides cite pay and benefits as two of the top three factors that make their work more difficult and less satisfying.\textsuperscript{21} For all of these reasons, there is a very high rate of turnover in the home care industry.\textsuperscript{22} In turn, “high rates of turnover destabilize any provider’s ability to ensure high-quality services.”\textsuperscript{23} The higher income that would be associated with minimum wage and overtime protections would reduce reliance by personal care workers and their families on public benefits. It would also reduce likely work to reduce turnover to the benefit of workers and consumers of their services.

II. The Amendments Proposed to 29 C.F.R. §§ 552.3, 552.6, 552.102 and 552.109 Will Achieve Public Policy Goals.

The ACLU supports the Department’s proposals to amend regulatory definitions of “domestic service employee” and “companionship services,” to clarify that minimum wage and overtime rules apply to caregivers employed by third parties, and to require records to be made of live-in employees’ work time.

A. Definition of “domestic service employee” in 29 C.F.R. § 552.3

The Department proposes to update the list of FLSA-covered domestic service occupations in 29 C.F.R. § 552.3 to include home health aides, personal care aides, and nannies, and to clarify that domestic service employees need not work in the home of their employer. These changes implement the broad coverage Congress intended for people whose profession is domestic work, whether performed in the home of a person who has directly engaged the worker or contracted with the worker’s agency, or the home of a person whose absent family members have hired the worker.

Protections are intended to extend to “all employees whose vocation is domestic service,” meaning that they serve in a dwelling that is a private home, as distinguished from a building that the person who hires the employee rents out to strangers.\textsuperscript{24} The only narrow exceptions to coverage of any person who works in a private home are for babysitters and

\textsuperscript{21} KHATUTSKY, supra note 12, at 40, available at \url{http://aspe.hhs.gov/daltcp/reports/2011/CNAdv.crt.htm#figure5-8}.
\textsuperscript{22} Id. at 41-47; DORIE SEAVEY & ABBY MARQUAND, PHI (PARAPROFESSIONAL HEALTHCARE INST.), CARING IN AMERICA: A COMPREHENSIVE ANALYSIS OF THE NATION’S FASTEST-GROWING JOBS: HOME HEALTH AND PERSONAL CARE AIDES 70 (2011), available at \url{http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf} (annual turnover rates average 50-60% in the home care industry).
\textsuperscript{23} PHI (PARAPROFESSIONAL HEALTHCARE INST.), WORKFORCE STRATEGIES No.2 at 1 (2003), \url{http://www.directcareclearinghouse.org/download/WorkforceStrategies2.pdf}.
\textsuperscript{24} H.R. REP. NO. 93-313 at 2845 (1974).
companions who are untrained and not regular breadwinners, and for live-in employees, who need not be paid overtime premiums.

In order to continue to guarantee broad coverage to trained, professional domestic service workers, the FLSA Amendments’ implementing regulations must be updated to reflect the dramatic growth in number of people employed as home health and personal care aides and nannies, and the distinct possibility that such workers will be employed to care for someone by a responsible third party who lives elsewhere.

B. Definition of “companionship services” in 29 C.F.R. § 552.6

The Department’s proposal to refine the definition of “companionship services” in 29 C.F.R. § 552.6 is critically important because the present regulatory language has enabled the questionable exempt classification of workers who are more like trained, professional domestic employees, than non-breadwinning casual companions. As noted, members of Congress specified that the limited exemption to FLSA protection they carved out for certain babysitters and companions was not intended to encompass “trained personnel,” nor “regular bread-winners or [people] responsible for their families’ support.”

We know that personal care workers and home health aides have frequently been classified as exempt companions, in part because their earnings can and do fall below minimum wage level. However, these workers are trained and skilled: for example, certification by the National Association for Home Care and Hospice requires 75 hours of training, and even if employees in the field do not attain this degree of qualification, according to the Bureau of Labor Statistics they are usually trained in cooking, diet and nutrition, housekeeping tasks and sanitation, infection control, safety in emergencies, and more. Primary responsibility for performing housework and actively caring for impaired persons – particularly those who have medical needs and require skilled assistance – is not within the ambit of what Congress meant by exempt “companionship,” and the amendment proposed to § 552.6 prohibits any such misclassification going forward.

C. Protections for employees of third party agencies under 29 C.F.R. § 552.109

Current 29 C.F.R. § 552.109’s FLSA exemption of babysitters and companions employed by third parties – e.g., home care agencies – undermined Congressional, because it withdrew coverage from persons who had benefitted from FLSA protections prior to 1975, and it shrank the universe of protected employees. Observers note that many home care employees, who do not receive minimum wage and overtime guarantees, work for

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25 Growth is reflected in Bureau of Labor Statistics data, compiled and reprinted by the NAHC. Figure 5 shows the total number of home health aides growing from 667,200 in 1996 to more than 1 million in 2009. NAT’L ASS’N FOR HOME CARE & HOSPICE, BASIC STATISTICS ABOUT HOME CARE 11 (2010) available at http://www.nahc.org/facts/10HC_Stats.pdf.

26 As one indicator of the likelihood that the family member engaging an independent care worker might not live in the same home as the client receiving care, the incidence of Americans 65 and older living with adult children has declined from 24.4% in 1960 to 14.5% by 2000. Steven Ruggles, The Decline of Intergenerational Coresidence in the United States, 1850 to 2000, 72 AM. SOC. REV. 964, 979 (Table 1) available at http://www.hist.umn.edu/~ruggles/Articles/ASR-2007.pdf.


28 BUREAU OF LABOR STATISTICS, supra note 15 at 3 (lowest-paid 10% of home health and personal care aides earned less than $6.84 per hour).

29 Id.
businesses that are FLSA-covered enterprises, which must offer their other employees, such as office administrators, minimum wage and overtime pay. In view of the settled determination that FLSA exemptions “are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit,” the Department acts consistent with sound public policy and the purpose of the FLSA in ensuring that all domestic service workers in the employ of a company benefit from basic labor protections.

D. Record-keeping requirements for employers of live-in workers under 29 C.F.R. § 552.102

The Department addresses a key weakness in the protection it presently guarantees to domestic service workers, by requiring the keeping of records of actual time worked by live-in employees. Live-in workers work longer hours and more overtime than their counterparts who do not live in the homes of clients. It is common that live-in workers are required to work more than the hours they have contracted to perform. The case of Vilma Serralta, a former live-in housekeeper and nanny who often worked 14 hours a day, 6-7 days per week, is representative. Ms. Serralta was paid a monthly salary that equated to only $3-4 per hour because of the extended hours she worked. Ms. Serralta sued her employers, and proceedings in her case brought to light her employers’ method of concealing underpayment: they did not keep any records “that indicated when Plaintiff began and ended each work period, her meal periods, her total daily hours worked, her total hours worked in the payroll period, and applicable rates of pay.” The modest requirement that employers of live-in workers record their actual hours of work adds another layer of protection of the minimum wage rights of workers who are among the most vulnerable to pay-related abuses.

III. The Proposed Amendments Will Not Impair the Provision or Affordability of Companionship and Home Care Services, Nor Expenditures by Medicare, Medicaid, and Private Payors.

The Department has also requested comments from stakeholders concerning the prospective effects of the proposed regulations on availability and cost of home care services, and on expenditures by Medicare, Medicaid, and private payors. While we feel strongly that cost considerations cannot justify the denial of critical labor rights to vulnerable workers, the ACLU also anticipates that the proposals will not impair the supply or affordability of personal care in the home, but will instead improve the quality of care by professionalizing the workforce providing it. We concur with the Senators who in 1996 wrote, “The Fair Labor Standards Act has proven through the years that its basic concept is sound. Despite

the warnings of some critics who predicted the act would produce economic disaster, we have seen our economy emerge stronger than ever.”

The economic impact of amending the contours of the companionship exemption must be evaluated in light of the fact that many workers who have been classified “companions” are nonetheless protected by state and local labor standards, or are voluntarily paid in accordance with FLSA floors. Wages will not be affected in the sixteen states that guarantee minimum wage and overtime pay for most home care workers, and will only be slightly impacted in the five more, plus the District of Columbia, that require minimum wage (but not overtime). Home health and personal care workers in these 22 jurisdictions constitute a majority – 57% – of all such workers in the U.S.

Where the average hourly wage of all home health aides stands at $10.46, and personal care workers are paid on average $9.82 per hour, it is evident that some additional employers who are not required to do so by law, are in fact paying “companion” employees more than minimum wage, and also will not be necessarily impacted by the proposed changes. Employers can avoid paying overtime premiums with careful scheduling, and many effectively do so already – home health aides reported working an average of 31.3 hours per week in a study commissioned by the Department of Health and Human Services (HHS).

For employees who are not currently paid minimum wage and work more than forty hours a week without overtime pay, the proposed regulations will supply incentive to stay on the job, build strong skills, and provide higher-quality care to the benefit of both employers and clients. As noted, workers who have been classified as “companions” are among the lowest-paid American workers and have high turnover rates, with nearly half of respondents in surveys studied by HHS reporting having two or more jobs in the past two years. Turnover and high vacancy rates hurt all stakeholders. Qualitative research indicates that “problems with attracting and retaining direct care workers may translate into poorer quality and/or unsafe care, major disruptions in the continuity of care, and reduced access to care,” as one expert has put it. Turnover costs employers both time and money. A now 20 year old article estimated that a home care agency’s costs associated with losing an employee and hiring a new one ran to $3,362 per person. A 2004 article noted that 25% of annual compensation was a common conservative estimate of employee

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36 Id. at 81,214 (Table 3–1- Summary of Wages by State Minimum Wage and Overtime Coverage for HHAS and PCAS).
40 Id. at 41-42.
replacement costs, and that at that rate, hiring a new home care worker would cost $4,200-$5,200.43

It is true that some employers may see payroll costs rise in the short-term if the changes proposed by the Department are implemented. However, in light of the cost and inconvenience associated with paying unreasonably low wages and losing employees at an accelerated rate, the ACLU does not expect a significant net loss to employers or a necessary increase in the cost to consumers of home care services. The Department calculates that additional wages owed to workers will most likely equal between $43 and $112 million in the first year of implementation of the proposed regulations, depending upon how many new employees are added to the workforce to avoid overtime assignments.44 That total pales in comparison to the present expense to employers of replacing home care workers: an estimated $1.3 to $2 billion annually.45 Extra spending on minimum wages may well pay for itself by reducing annual worker turnover.

The dramatic growth expected in the field, noted above, is attributed to America’s growing elderly population,46 an ascendant preference for in-home over institutionalized care,47 and the decline in the number of homemakers without outside work who can provide unpaid care.48 These factors and others have led to an increase in demand, which has affected supply: for example, Medicare-certified home care organizations have increased from 5,983 in 198549 to 11,633 as of April 2011.50 There is no reason to expect supply to stop

44 76 Fed. Reg. 81,220 (Table 3-4).
46 The Department of Health and Human Services’ Administration on Aging notes, for example, that “[s]ince 1900, the percentage of Americans 65+ has more than tripled (from 4.1% in 1900 to 12.9% in 2009), and the number has increased almost thirteen times (from 3.1 million to 39.6 million). The older population itself is increasingly older. In 2008, the 65-74 age group (20.8 million) was 9.5 times larger than in 1900. In contrast, the 75-84 group (13.1 million) was 17 times larger and the 85+ group (5.6 million) was 46 times larger.” S. DEPT. OF HEALTH & HUM. SERVS., ADMIN. ON AGING, A PROFILE OF OLDER AMERICANS: 2010, http://www.aoa.gov/AoARoot/Aging_Statistics/Profile/2010/5.aspx (last visited Mar. 20, 2012). By 2050, Americans older than 65 are expected to constitute 20.2% of the population. Older Population As a Percentage of the Total Population, Department of Health and Human Services, Administration on Aging, Projected Future Growth of the Older Population, http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/future_growth.aspx#age (last visited Mar. 20, 2012).
47 BUREAU OF LABOR STATISTICS, supra note 15 at 2-3 (“Inpatient care in hospitals and nursing homes can be extremely expensive, so more patients return to their homes from these facilities as quickly as possible in order to contain costs. Patients who need assistance with everyday tasks and household chores rather than medical care can reduce medical expenses by returning to their homes. Furthermore, most patients—particularly the elderly—prefer care in their homes rather than in nursing homes or other in-patient facilities.”).
48 One indicator of the shift away from unpaid homemaking is the steady rise in women’s employment rate outside the home. In 1970, 43.3% of women aged 16 and older were in the workforce, and by 2009 this percentage had risen to 59.2%. U.S. DEPT. OF LABOR, U.S. BUREAU OF LABOR STAT., WOMEN IN THE LABOR FORCE: A DATA BOOK 11 (2010) (Table 2) available at http://www.bls.gov/cps/wlf-databook-2010.pdf.
following demand in this arena. Home care agencies and workers have no incentive to respond to increased payroll costs by reducing staffing and availability of care and companionship services.

A rising tide that improves the lot of workers does not have a deleterious effect on the availability or price of goods and services those workers produce. Evidence can be found in the impact of the extension of FLSA protections to certain farmworkers. The 1966 FLSA Amendments required, for the first time, the payment of minimum wages to farmworkers at larger farms.\(^{51}\) Wage increases did not, however, result in less food production,\(^{52}\) because demand for food remained steady (comparable to the current inelastic demand for home care for adults); nor did prices increase significantly. In 1960-61, by the Bureau of Labor Statistics’ calculation, food accounted for an average 24.3% of a household’s expenditures;\(^{53}\) by 1972-73, food purchases had declined to 19.3% of average family spending.\(^{54}\)

By way of analogy, numerous studies have been conducted in recent years on the economic effects of raises in minimum wage and local living wage ordinances, and they have shown that the devastating increases in consumer costs predicted by opponents have not materialized. In fact, cities have overestimated resulting increased costs by 30-52%.\(^{55}\) In 1994, the city of Baltimore, MD passed a law requiring businesses contracting with the city to pay living wages pegged to changes in poverty-level income.\(^{56}\) Researchers examined 26 contracts in effect before and after passage of the ordinance, and found that the aggregate cost increase in contracts was only 1.2%, which was less than the inflation rate. This meant that in real terms, the city’s contract costs actually declined somewhat even as workers’ wages rose.\(^{57}\) Similar declines in the locality-adjusted real cost of contracts following living wage ordinance implementation have also been seen in Boston, MA, New Haven, CT, Dane County, WI, and San Francisco, CA.\(^{58}\) In sum, although experiences have varied somewhat from city to city and individual contract to contract, “the preponderance of

Department of Labor notes, public funding sources pay for nearly 75% of home health services, 76 Fed. Reg. 81210, and this public finance helps ensure robust, sustained high demand for the services, 76 Fed. Reg. 81202, 81224 (“the demand for services...is likely to be highly inelastic, and the purchase of these services is dependent primarily on need and eligibility rather than price” because of the relatively broad availability of public funding).


\(^{54}\) Id. at 34.


\(^{56}\) Balt. Code art. 5 subtit. 25 (1994).


evidence indicates that living wage ordinances are unlikely to cause large increases in city contract costs,” according to economics experts.

One reason that consumer cost increases have not materialized as predicted in response to rising wages is very likely the association – discussed above – between higher wages and decreasing turnover. Studies of the effects of San Francisco’s living wage law have concluded, for example, that turnover fell as much as 80% in certain low-wage jobs at San Francisco International Airport, and by 20% among covered home care workers in the city. Empirically-proven savings reaped from turnover reduction ease the financial burden of paying higher wages.

IV. The Department Should Amend The Proposed Regulations To Place A Lower Limit On Non-Companionship Work.

The Department has also requested comments from stakeholders regarding its proposal to exempt companions from FLSA coverage if they spend no more than 20% of a work week performing non-exempt household or care work incidental to their companionship duties. Even though this definition of “companionship” work will secure FLSA coverage of many additional domestic service employees, and we applaud the extension of coverage proposed by this rule, the ACLU remains concerned that it will still leave some workers – who are professionals and breadwinners – unprotected by federal labor standards.

In particular, under this proposal, the wages of some companions, who remain exempt from minimum wage and overtime rules, may be supported in part or entirely by Medicaid and other programs that distribute federal dollars. In other words, federal funds may still be used to pay unconscionably low wages. It is clear from the intentionally broad FLSA coverage of all federal, state, and local government employees that policymakers feel the government should not offer substandard pay. The Department should ensure against federal payment of sub-minimum wages by clarifying that workers assigned non-exempt household and care duties are not “companions,” and by reducing the 20% limit on non-exempt work.

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59 Id. at 22.
63 Federal programs that pay for home care and companionship include, in addition to Medicare and Medicaid, the Older Americans Act’s Title III, the U.S. Department of Veterans Affairs’ Housebound and Aid and Attendance Allowance Program, Title XX Social Security Block Grants, and the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS).
64 The impact of federal funding is significant, too: one commentator notes that, “[Medicare and Medicaid] reimbursement policies play a substantial role in determining [home care] workers’ wages, benefits, and training opportunities.” Robyn Stone, The Direct Care Worker: The Third Rail of Home Care Policy, 25 Ann. Rev. Public Health 521, 526-27 (2004). It is also worth noting that since 1997, home care has claimed a steadily-growing percentage of all Medicaid expenditures, from 9.8% in 1997 to 23% in 2008. NAT’L ASS’N FOR HOME CARE & HOSPICE, supra note 25, at app. A 5 (Figure 4).
65 E.g. 29 U.S.C. §§ 203(s)(1)(C); 203(x); 206(a); 207(a).
Though strict companionship, consisting only of fellowship and protection, is not covered by Medicare or Medicaid as a personal care service, public health insurance will pay the wages of companionship providers whose duties also include assistance with activities of daily living and instrumental activities of daily living, such as eating, toileting, grooming, managing finances, maintaining the home and handling transportation and shopping.\(^\text{66}\) If 20% of exempt companions’ work time could be spent on personal care and household management tasks like these, the Department’s proposed regulations would potentially preserve a category of work that is both eligible for federal payment and unprotected by the FLSA.

For example, a family might hire a personal care attendant to sit with and protect an impaired person, such as someone suffering from Alzheimer’s disease. Incidental to his or her protection mandate, the attendant might spend a modest portion of work time cooking (to ensure the client doesn’t leave the oven gas on and cause an explosion; to ensure that the client avoids any dangerous foods), assisting the client with dressing (to ensure proper choices taking weather into account), and performing other such care and household functions. Many states would pay for such an attendant for a Medicaid-eligible patient,\(^\text{67}\) but because the aide is responsible for the safety of the individual, she or he can also likely be classified as an FLSA-exempt companion so long as time spent on cooking, dressing, and related tasks does not predominate in her or his workday.\(^\text{68}\) Unless more explicit limitations on exempt companionship work are delineated, the government risks contributing to the inequities it has committed publicly to eliminating.

The ACLU urges the Department to give further thought to how distinctions may be drawn such that Medicare, Medicaid, and other federal programs do not underwrite FLSA-exempt companionship services.\(^\text{69}\) Where a “companion” is explicitly assigned household, personal

\(^{66}\) JANET O’KEEFE ET AL., U.S. DEP’T OF HEALTH & HUMAN SERV., UNDERSTANDING MEDICAID HOME AND COMMUNITY SERVICES: A PRIMER, 2010 EDITION 25 (2010), available at http://aspe.hhs.gov/daltcp/reports/2010/primer10.pdf. (“Companionship or custodial observation of an individual, absent hands-on or cueing assistance that is necessary and directly related to ADLs or IADLS, is not a Medicaid personal care service.”).


\(^{68}\) Many such scenarios are possible. Kansas, for example, allows Medicaid payments to personal care attendants for “sleep cycle support” – to be present and able to help out if needed overnight. KANSAS DEP’T. OF HEALTH & ENV’T., Kansas Medical Assistance Program: Provider Manual 8-17 (2011), available at https://www.kmap-state-k.s.us/Documents/Content/Provider%20Manuals/HCBS%20MRDD%2009302011_11117.pdf. It is highly likely that a sleep cycle support companion would not spend more than a small fraction of his or her time on task actually helping with non-exempt household and care work, and thus would not be entitled to minimum wage; he or she would, however, be paid with federal funds.

\(^{69}\) Note that appropriate solutions will depend upon the mechanisms utilized by particular federal funding programs. Older Americans Act funds, for example, pass through State agencies on aging – these State agencies and their subdivisions must in turn grant funds to “community service provider agencies and organizations.” 45 C.F.R. § 1321.63(b). Such agencies and organizations, as third-party employers of providers of supportive and in-home services to the elderly, should generally be required to pay FLSA-compliant minimum wages and overtime premiums to their employees, including “companions,” under the revised regulations proposed by the Department.
care, and/or other FLSA-covered tasks requiring skill and training, and she or he “routinely perform[s]” such work, that individual should not be denied overtime and minimum wage protections.\textsuperscript{70}

Final regulations should clarify that domestic service workers whose official and regular responsibilities include tasks like cleaning, cooking, delivering medical care or assistance, helping with grooming, and driving are not “companions,” and thus are not exempt from FLSA coverage. Further, the ACLU believes a number smaller than 20% would be a more accurate and appropriate threshold for distinguishing between covered and non-covered employees. A true companion whose mandate does not include assisting with household and care work would only perform such tasks occasionally, as the need arises, and such episodic needs should not consume more than a small fraction of work time.

V. Corrective Federal Legislation Is Still Needed To Fully Protect Domestic Workers Supporting Families.

The ACLU supports the Department’s initiative to extend FLSA protections to more workers. In spite of this significant step forward, full protection of domestic workers who support themselves and their families will not be fully realized until Congress enacts a modest set of changes to the FLSA. We suggest that Congress amend the FLSA to:

\begin{itemize}
  \item Define “employment on a casual basis” as employment that is irregular or intermittent, not performed for a third-party employer, and not performed for more than 20 hours per week;
  \item Clarify that, as is true of babysitters, only those companionship workers who are employed on a casual basis are exempted from minimum wage rules; and
  \item Eliminate the language that withdraws live-in domestic workers’ rights to overtime premiums, at 29 U.S.C. § 213(b)(21).
\end{itemize}

Conclusion
The ACLU supports the Department’s proposed rule. As discussed above, we urge the Department, however, to consider amending its description of companionship work and allowance for 20% of exempt companions’ time to be spent on FLSA-covered home maintenance and care work.

Further, we urge the Department to conduct targeted outreach to households that directly employ workers who will be newly protected by the FLSA under the proposed regulations. Families and individuals who employ only a small number of domestic workers generally do not pay for advice on labor and employment law, so we urge the Department to not only

\textsuperscript{70} The ACLU concurs with the Department’s finding that someone who routinely performs household work covered by the FLSA, such as housekeeping, cooking, nursing, etc., is not, but has been frequently been mislabeled, an exempt companion. See 76 Fed. Reg. 81,190, 81,193 (Dec. 27, 2011). “The Department is concerned that the current regulatory definition of “companionship services” allows for the denial of minimum wage and overtime pay protection to workers who work in private homes and 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.” Id.
provide information to corporate employers, but make provisions to educate non-corporate employers on the new rules.

Please feel free to contact Deborah J. Vagins, ACLU Senior Legislative Counsel, at dvagins@dcaclu.org or (202) 675-2335 with any questions.

Sincerely,

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