

February 9, 2012

Mary Ziegler, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW.
Washington, DC 20210

RE: Proposed Rulemaking, Application of the Fair Labor Standards Act to Domestic Service Rule (RIN 1232-AA05)

Dear Ms. Ziegler,

The National Women's Law Center (Center) is pleased to submit the following comments in strong support of the rule proposed by the Department of Labor (Department) to amend the Fair Labor Standards Act (FLSA) regulations to extend basic labor protections – minimum wage and overtime premium pay – to nearly 1.8 million low-wage home care workers.¹ Since 1972, the Center has worked to protect and advance the progress of women and their families in core aspects of their lives, with an emphasis on the needs of low-income women. This proposed rule will advance economic security and fair pay for women, especially women of color.

More than nine out of ten workers in the rapidly growing home care industry are women, disproportionately women of color.² Many of these women are primary income earners for their families³ who struggle to survive on median annual wages of less than \$21,000 for full-time work⁴ – less than the Federal Poverty Guideline for a family of four.⁵ Home care workers provide a lifeline for the elderly and people with disabilities – yet for decades, their stressful and physically demanding jobs have come without the basic protections of the federal minimum wage and overtime laws. Extending the protections of the FLSA to a field heavily dominated by women will help these women lift their families out of poverty and reduce ongoing pay disparities between women and men.

The proposed rule also better reflects the intent of Congress when it passed the 1974 FLSA amendments to expand coverage for domestic service employees. The goal was to provide fair treatment for the low-income women and minorities who comprised the majority of workers in the field,⁶ exempting only casual companions who primarily provide fellowship and protection, and not professional caregivers, from the protections of the FLSA.⁷ Since 1974, home care has grown into a major industry; with thousands of third party agencies now employing roughly 70 percent of workers in the field,⁸ the proposed rule's extension of FLSA protections to home care workers employed by third parties is vitally important.

While cost considerations would not justify the continued denial of legal rights to home care workers, we note that the cost of extending FLSA protections to home care workers is

manageable. Sixteen states – including New York, which has one of the nation’s largest Medicaid home care programs – already require both minimum wage and overtime pay for most home health workers who would otherwise be excluded under current regulations.⁹ Addus HealthCare, one of the country’s largest home care employers, has demonstrated that wage and hour protections are economically realistic for the industry by paying overtime and travel time to all of its caregivers, regardless of whether the practice is required by state law.¹⁰ The national cost of the proposed change is estimated to amount to less than one-tenth of one percent of the home care industry’s \$84 billion in annual revenue.¹¹

Moreover, providing wage and hour protections to home care workers will have benefits for the industry and consumers as well as for the workers themselves. There is a high rate of turnover in the home care industry, mainly caused by low wages, insufficient hours, and lack of reimbursement for travel costs.¹² High turnover disrupts continuity and quality of care for customers and places great financial burdens on agencies and state and federal governments.¹³ By increasing wages, encouraging more even distribution of work hours, and requiring reimbursement for travel costs, the proposed rule will reduce turnover and promote better outcomes for both home care workers and the individuals and families they serve.

We applaud the Department for proposing regulations that will finally extend basic legal protections to home care workers who for too long have been underpaid and undervalued. We address each section of the proposed rule below.

29 CFR Section 552.3 – Domestic Service Employment.

We support the Department’s proposed changes to Section 552.3. The removal of language specifying that the domestic service work be performed in or about the home “of the person by whom he or she is employed” will prevent confusion that could lead to narrower coverage of domestic service employees under the FLSA. This is particularly important given the high percentage of home care workers employed by third parties or agencies.

29 CFR Section 552.6 – Companionship services for the aged or infirm.

We support the Department’s proposed changes to Section 552.6. The revised regulation better reflects congressional intent that the companionship exemption be limited to “elder-sitters” whose primary purpose is to provide fellowship and protection.¹⁴ By providing a more detailed definition of the activities that constitute fellowship and protection, identifying the categories of personal care services that may accompany the provision of fellowship or protection on an incidental basis, and clarifying that general household tasks benefiting other members of the household and medical care that is typically provided by personnel with specialized training do not qualify as companionship services, the proposed rule appropriately narrows the potential application of the companionship exemption to exclude professional home care workers from its scope.

29 CFR Section 552.109 – Third Party Employment.

We support the Department’s revision of Section 552.109, which will restore FLSA protections to home care workers employed by third party employers many of whose employees were already covered by the FLSA before the 1974 amendments – and ironically lost those protections under the regulation implementing a statute intended to extend coverage to domestic workers.

Although the current third-party employment provision was upheld by the Supreme Court's decision in *Long Island Care at Home, Ltd., et al. v. Coke*,¹⁵ the Court viewed the current third party employment regulation as reasonable gap-filling by the agency and explicitly recognized that the Department may change its position over time.¹⁶

In addition, as noted above, providing minimum wage and overtime protection to home care workers will not be cost prohibitive for third party agencies and will in fact benefit employers – as well as workers and the homes they serve – by making the industry more attractive to qualified professionals and reducing turnover.

Live-in Domestic Service Employees: 29 CFR Sections 552.102 and 552.110.

We support the Department's proposed changes to Sections 552.102 and 552.110. The revised regulations will more effectively ensure that hours are properly recorded and that workers receive minimum wage for all hours worked. By allowing employers to create and maintain records in the manner best fitting their situation and making available resources for achieving compliance,¹⁷ the Department has minimized the burden on household employers while protecting the rights of live-in domestic workers to be compensated fairly and fully.

The Center greatly appreciates the opportunity to comment in support of this proposed rule to secure essential wage and hour protections for home care workers.

Sincerely,



Joan Entmacher
Vice President, Family Economic Security



Julie G. Vogtman
Senior Counsel, Family Economic Security

¹ See 76 Fed. Reg. 81190, 81212 (Dec. 27, 2011) (estimating 1.79 million caregivers might be affected by the proposed rule).

² See Press Release, The White House, Office of the Press Secretary, We Can't Wait: President Obama Will Announce Administrative Action to Provide Minimum Wage and Overtime Protections for Nearly 2 Million In-Home Care Workers (Dec. 15, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/15/we-cant-wait-president-obama-will-announce-administrative-action-provid> [hereinafter White House Press Release] (noting that of the 1.59 million home care workers employed by staffing agencies, over 92 percent are women, nearly 30 percent are African American, 12 percent are Hispanic).

³ For example, one survey in New York City reported that 81 percent of home-care workers served as the primary income earner for their family. 76 Fed. Reg. 81190, 81197 (Dec. 27, 2011) (citing Lenora Gilbert, *Home Care Workers: The New York City Experience*, Encyclopedia of Occupational Safety and Health, vol. 3 (4th ed. International Labor Organization, 1998)).

⁴ See U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment & Wages, May 2010, 31-1011: Home Health Aides, <http://www.bls.gov/oes/current/oes311011.htm> (reporting median annual wages of \$20,560),

and 39-9021: Personal Care Aides, <http://www.bls.gov/oes/current/oes399021.htm> (reporting median annual wages of \$19,640).

⁵ See U.S. Dep't of Health & Human Services, 2010 Federal Poverty Guidelines, *available at* <http://aspe.hhs.gov/poverty/10poverty.shtml>.

⁶ See 119 Cong. Rec. S24,799 (1974) (statement of Senator Williams) (“the plain fact is that private household domestic workers are overwhelmingly female and members of minority groups, [and] in failing to cover domestics under our basic wage and hour law we would be turning our backs on these people.”).

⁷ See House Report No. 93-913, at 30 (1974) (“People who will be employed in the excluded categories are not regular bread-winners or responsible for their families’ support.”).

⁸ 76 Fed. Reg. 81190, 81196 (Dec. 27, 2011) (citing University of California San Francisco, Center for California Health Workforce Studies, *An Aging U.S. Population and the Healthcare Workforce: Factors Affecting the Need for Geriatric Care Workers* 30 (Feb. 2006)).

⁹ Paul K. Sonn, Catherine K. Ruckelhaus & Sarah Leberstein, National Employment Law Project, *Fair Pay for Home Care Workers: Reforming the U.S. Department of Labor’s Companionship Regulations Under the Fair Labor Standards Act 17* (2011), *available at* <http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1>.

¹⁰ *Id.* at 18.

¹¹ See Paraprofessional Healthcare Institute (PHI), *Value the Care! Min. Wage & Overtime for Home Care Aides, No. 4, Fixing the “Companionship Exemption”*: Myths & Facts (2012), <http://phinational.org/policy/wp-content/uploads/phi-value-the-care-04.pdf>.

¹² Dorie Seavey & Abby Marquand, PHI, *Caring in America: A Comprehensive Analysis of the Nation’s Fastest-Growing Jobs: Home Health and Personal Care Aides 70* (2011), *available at* <http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf>.

¹³ *Id.* at 68; *see also* PHI, *Value the Care! Min. Wage & Overtime for Home Care Aides, No. 3, Fixing the “Companionship Exemption” Will Not Make Care Too Expensive* (2012), <http://phinational.org/policy/wp-content/uploads/phi-value-the-care-03.pdf> (estimating that turnover costs employers between \$1.3 billion and \$2 billion annually).

¹⁴ See 119 Cong. Rec. S24,801 (1974) (Senator Burdick describes an exempt companion as an elder-sitter).

¹⁵ *Long Island Care at Home, Ltd., et al. v. Coke*, 551 U.S. 158, 168 (2007).

¹⁶ *Id.* at 170-71.

¹⁷ 76 Fed. Reg. 81190, 81236 (Dec. 27, 2011).