

Testimony and Statement for the Record of

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Hearing on

**Redefining Companion Care:  
Jeopardizing Access to Affordable Care for Seniors and  
Individuals with Disabilities**

House Committee on Education and the Workforce Committee  
Subcommittee on Workforce Protections

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Chairman Walberg, Ranking Member Courtney and Members of the Subcommittee, thank you for the opportunity to testify today on the far-reaching – and adverse – consequences that will result from the implementation of final regulations (“the “Final Regulations”) the U.S. Department of Labor recently issued that modify the companionship exemption<sup>1</sup> under the Fair Labor Standards Act (“FLSA”).<sup>2</sup> My name is Joseph Bensmihen and I am President and CEO of United Elder Care, Inc. a licensed nurse registry<sup>3</sup> operating in the State of Florida.

I have been the President and CEO of a caregiver referral service since 2000. I am somewhat unique in this regard in that I not only operate a referral service that facilitates the delivery of home-care services, I personally need assistance with Activities of Daily Living, commonly referred to in the industry as ADL’s. Thus, every day, I personally experience what it is like to need this type of assistance.

I am not alone in this regard, however. There also are current and former Members of Congress who need personal care workers to be able to work and be productive members of society.

The Final Regulations do not take into consideration the impact these rules will have on those of us who actually rely on caregivers to be able to function day-to-day as productive citizens. Inherent in these arrangements is a need for more than 40 hours of care per week. The Final Regulations will cause these individuals to either start paying substantially more for the care they need, or learn to live with multiple caregivers to avoid an overtime liability that few can afford. These are not attractive options.

## **I. The DOL’s Final Regulations Will Not Result in Home-Care Providers Receiving Overtime**

A principal justification for the Final Regulations is that caregivers deserve overtime. The problem is that this change will not result in caregivers receiving overtime. I say this because my clients tell me they cannot afford to pay overtime.

Furthermore, based on my personal experience and my experience in the home-care industry, I have found that the individuals who require help at home to maximize their independence – whether disabled or elderly – most often live on a fixed income. Example: Mrs. Jones is being discharged from the hospital and she is warned by her physician, “Mrs. Jones, this

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<sup>1</sup> 29 U.S.C. §213(a)(15).

<sup>2</sup> *Application of the Fair Labor Standards Act to Domestic Service*, 78 Fed. Reg. 60454 (Oct. 1, 2013) (to be codified at 29 CFR Part 552).

<sup>3</sup> Chapter 400 of the Florida Statutes Annotated (“FSA”), section 400.462(15), defines a *nurse registry* as:

Any person that procures, offers, promises, or attempts to secure health-care-related contracts for registered nurses, licensed practical nurses, certified nursing assistants, home health aides, companions, or homemakers, who are compensated by fees as independent contractors, including, but not limited to, contracts for the provision of services to patients and contracts to provide private duty or staffing services to health care facilities licensed under chapter 395 or this chapter or other business entities. (Emphasis added).

is your third fall, one more fall and you will need to go into an ALF<sup>4</sup> or a nursing home unless you get additional home care.” The doctor doesn’t say, “I’m going to pay for it.” And, in most cases, Medicare doesn’t cover the cost of this type of care. The cost of the care will be an out-of-pocket expense for Mrs. Jones. For most of my clients, this is a very large expense for the family. To expect these individuals to start paying time and a half for hours worked in excess of 40 each week is not realistic.

Similarly, when a loved one is receiving care at home and experiences a change in condition, which requires the consumer to be hospitalized – where the companionship exemption does not apply – family members currently say “No” to paying time and a half in facilities. In this context, the need for caregivers to work more than 40 hours per week is entirely discretionary, because the family knows that their loved one will be having their needs met by the facility’s own staff. That situation cannot be compared to when a patient is at home. The only help a consumer has while at home is the help that the consumer hires. If consumers do not have the help they need, they will fall and they’re going to get hurt. And, they will return to the hospital.

In our business, approximately 60% of clients pay for their home care with long-term insurance; approximately 40% pay with their own private funds; and less than one percent pay for their home care with Medicaid funding or some other government program.

Long-term insurance benefits generally consist of a capped payment per day or week. This benefit will not automatically increase to accommodate the new overtime requirement. These clients will have difficult decisions to make when the new rules go into effect.

Those who pay with private funds are in a similar situation. Many of these clients are struggling to pay for their home care under current law. When the overtime requirement becomes effective, they, too, will need to make tough choices.

Finally, those who receive government-funded benefits might be most severely affected, because those benefits already pay at a below-market rate. These reimbursement rates include no cushion to absorb overtime.

Under all of these payment sources, the prospects of a caregiver being paid overtime for hours worked in excess of 40 per week are very low. The fact is that there is no money to pay the overtime.

## **II. The Final Regulations Will Make Continuity of Care a Luxury only Few Can Afford**

The most likely alternative for most of my clients, aside from moving into a facility, will be to rotate caregivers, to ensure that no caregiver works more than 40 hours in any given week. This means that one of the most cherished benefits of home care among the elderly and the disabled – namely, continuity of care – will be lost. Under the Final Regulations, continuity of care will become a luxury item that only the very wealthy can afford.

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<sup>4</sup> Assisted Living Facility.

In this regard, consumers with Alzheimer's or dementia will be especially harmed. In a typical case, the patient is resistant to having someone new in the house to care for him or her. Ultimately, the family members will be able to convince the individual to accept help. We have multiple clients like this. We have been able to match these individuals with the perfect caregiver and they have bonded and established a relationship that the individual can accept. Under the Final Regulations, this relationship will be destroyed. Once the Final Regulations go into effect, every three days the patient will need to work with a different caregiver, in order for the family to avoid paying time and a half. For the patient, this will be traumatic. The introduction of new caregivers to these individuals is extremely difficult – for both the individual and the caregiver.

The companionship exemption in its current form eliminates this dilemma by enabling individuals of all income levels to enjoy continuity of care, by permitting the same caregiver to remain for an entire week without triggering an overtime liability. The Final Regulations will create a new aspect of life that differentiates between the very wealthy and everyone else. The vulnerable individuals who do not happen to be very wealthy will be subjected to never-ending trauma, as caregivers constantly rotate in and out of their lives.

### **III. Home-Care Providers Will be Adversely Affected by the Final Regulations**

This is not a very good outcome for caregivers, either. The caregivers who are registered with my business tell me that they would prefer to remain with only one client during a week. The prospect of having to move from client to client, in order for their clients to avoid having to pay overtime, is not very attractive to them.

The caregivers who ostensibly are the intended beneficiaries under the Final Regulations will be worse off. Not only will they not receive the overtime they are expecting, they will find their lives thrown into turmoil, by having to pack up and move from client to client during the week.

Furthermore, because third-party employers will also try to avoid their overtime exposure, caregivers will need to obtain relationships with multiple third-party employers if they want to work more than 40 hours per week. And, caregivers might well find it difficult to obtain work opportunities that are available at the specific hours that they are available to work. For example, if a caregiver whose twelve-hour shifts for a client are cut in half, so the caregiver works for the client six hours per day Monday through Friday, the caregiver will need to find another client that needs weekend hours only; or that needs six-hour shifts Monday through Friday that do not conflict with the six-hour shifts the caregiver is currently working.

Based on my experience, I believe this will be a significant challenge to caregivers. I believe the more likely outcome is that caregivers will work fewer hours delivering home care than they currently work. The net impact on caregivers will be lower overall earnings from home care. We might see caregivers picking up the additional hours they need by working at jobs outside of home care.

#### **IV. The New Definition of Companionship Services Conflicts with the Statutory Definition**

Some might argue that the new rules do not completely eliminate the companionship exemption for the family, because the new rules only eliminate the exemption relative to third-party employers. The details of the Final Regulations make clear that this viewpoint is mistaken.

The new definition of companionship services restricts the amount of “care” an individual can receive to no more than 20 percent of the total hours worked per person and per workweek. This is tragic. To my knowledge, none of my clients currently receive a type of home care that would meet this new definition.

The new definition of companionship services under the Final Regulations is at best counterintuitive. The FLSA defines the class of individuals who are eligible for the exemption as those “individuals who (because of age or infirmity) are unable to care for themselves.” The principal delimiting characteristic of this class of covered individuals is that they are unable to “care” for themselves. It seems incomprehensible that the Final Regulations would treat “care” as something that a caregiver cannot provide, except for a *de minimis* percentage. This is analogous to a program designed to feed the hungry, which defines the covered class as those who are unable to obtain food for their family, and then defines the benefit provided to these families as dishes, silverware and tablecloths, but no more than 20% food!

The practical implication of this revised definition is to deny the companionship exemption in virtually all cases, regardless of whether a third-party employer is involved.

#### **V. Final Regulations Create Unique Problem for Caregiver Registries**

Finally, because I operate a caregiver registry, I need to explain how the new rules create a unique problem for the type of business I operate. As previously noted, I operate a licensed nurse registry in the State of Florida. My business refers self-employed caregivers to families that seek home care. This type of business facilitates what is known in the industry as “consumer-directed care,” where the consumer self-manages the consumer’s own home-care arrangement.<sup>5</sup>

As a registry, my business conducts a rigorous background screen and credential verification for each caregiver, before adding the caregiver to our registry. We then inform the caregivers who pass our vetting process about client opportunities – which they can accept or decline at their discretion. The clients determine the number of hours a caregiver will work for the client and the amount the client will pay the caregiver for that work.

The unique problem the Final Regulations create for my segment of the home-care industry is that a caregiver registry could be determined to be an employer or a joint employer,

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<sup>5</sup> This model of home care, as well as the other home-care model, called the “agency directed care” model is described in detail in the following article written by university professors. Benjamin, Mathias and Franke, *Comparing Consumer-directed and Agency Models for Providing Supportive Services at Home*, Vol. 35 Part II, *Health Services Research No. 1 Selected Papers From the Association for Health Services Research Annual Meeting* (April 2000) at 351, et seq.

for purposes of the FLSA, of the caregivers it refers to clients. Because a registry has no ability to control the number of hours a caregiver works for a client – or for multiple clients – or the amount that is paid to a caregiver, a registry faces an existential financial risk under the FLSA with no meaningful ability to manage the risk. This is because a caregiver registry cannot limit the number of hours a caregiver will work or require the payment of overtime.

While the Preamble to the Final Regulations<sup>6</sup> contains an example that appears intended to clarify the circumstances in which a caregiver registry would not be considered a “third-party employer” of a caregiver, the conclusion given by the example is that under the stated facts the registry is “likely not” the employer of the caregiver. The example is helpful, but it does not provide the degree of certainty that my industry needs.

What my industry needs is clear guidance on how a registry can operate with confidence that it is not an employer or joint employer of a caregiver it refers.

## **VI. Caregivers Have Access to Overtime Under Current Law**

A little-discussed fact under current law is that caregivers are already entitled to overtime, at time and a half, for hours worked in excess of 40 during a week. They can obtain this entitlement by working anywhere other than in a care recipient’s home. Examples include working in a hospital, nursing home or any other type of facility. This is because the companionship exemption only applies to caregivers who provide their home-care services in the care recipient’s home. Under current law, caregivers have a clear choice. If the caregiver wants overtime, the caregiver need only work at a location other than the care recipient’s home.

The effect of the Final Regulations is to dramatically change a delicate balance that the U.S. Congress struck when it enacted the companionship exemption. When balancing the needs of the vulnerable care-recipient population, consisting of those who because of advanced age or disability are unable to care for themselves, against the needs of able-bodied caregivers to earn overtime, the Congress protected the vulnerable individuals. But the Congress also granted caregivers the right to overtime pay in all other contexts. The Final Regulations effectively repeal the companionship exemption and strip away the overtime and minimum-wage protections that the Congress enacted for these vulnerable individuals.

## **VII. Conclusion**

I am fortunate I was born with a disability. I am not an individual who was born able bodied and then became disabled. When people who have been able bodied their entire lives begin to decline due to age, infirmity or disability, they tend to hold on to their pride and the notion that “I can do it myself.” In aging, the attitude becomes more so because aging is viewed by some as a “sign of weakness.” Another scenario is you are a healthy husband and father in your early 30’s who becomes disabled due to a car accident. Everyday able bodied individuals join the disabled club. Successful actor, Michael J. Fox, pointedly admits in his book “Always Looking Up” he never gave it a second thought how hard it is for those of us who have a

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<sup>6</sup> Id. at pp. 60484 - 485.

debilitating illness to get dressed in the morning or have the use of limited motor skills. Without human help we cannot maximize our independence.

Since 1974, the companionship exemption has operated to enable those of us who need many hours of assistance each week, in order to be productive members of society, to afford that assistance. The Final Regulations effectively repeal that protection. As I understand the separation of powers under the U.S. Constitution, the decision to repeal the companionship exemption is a decision to be made by the U.S. Congress. I urge the Congress to consider legislation that will restore the companionship exemption it enacted in 1974 – but this time with explicit statutory language that will better protect the exemption against an administrative repeal.