



National Employment  
Law Project

Testimony of  
Catherine K. Ruckelshaus  
National Employment Law Project

Hearing Before the  
United States Congress  
House Committee on Education & The Workforce  
Subcommittee on Workforce Protections

*Ensuring Regulations Protect Access to Affordable and Quality  
Companion Care*

March 20, 2012

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March 7, 2012

Chairman Walberg, Ranking Member Woolsey and members of the Committee: thank you for this opportunity to testify today on the important subject of access to affordable and quality care by home care companions and the proposed revised regulations by the U.S. Department of Labor (“DOL” or “the Department”).

My name is Cathy Ruckelshaus, and I am the Legal Co-Director of the National Employment Law Project (NELP), a non-profit research, public education 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 promoting labor standards enforcement and access to good jobs for all workers. NELP has collaborated with state and local allies 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.

My colleagues and I at NELP have worked to ensure that *all* workers receive the basic workplace protections guaranteed in our nation’s labor and employment laws; this work has given us the opportunity to learn up close about job conditions in a wide variety of industries, including the home care field. We have represented home 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.

This background in the industry and its workers informs my testimony today.

Today, I will describe the working conditions of the home care workers I have represented and met, and the impacts the low pay has on their lives and the families they support. These workers struggle to make ends meet while providing the critical and loving care and services to older adults and persons with disabilities in their homes. My testimony will then briefly trace the history of the companionship exemption, describe the unintended sweep of the exemption that has occurred as the industry has boomed, and end with the reasons why NELP and many other organizations support the Department’s

proposed rules and think the transition to minimum wage and overtime coverage will be manageable.

NELP and our 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 support the workforce and quality of 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.

In my practice, I have met home care workers who were underpaid. Here are a few examples:

- Josefina Montero is a home care worker from New York who cares for older adults and people with disabilities in the New York City region. She was paid the minimum wage (\$7.25/ hour) but not overtime for her sometimes- 60-hour workweeks. NELP represents her and a class of her co-workers in a lawsuit against the for-profit agency that placed her in the individuals' homes.
- Anna Thomas, Tracey Dennis, Renee Johnson and Marilyn Jackson are all home care workers who worked in the Philadelphia area for years, taking care of older individuals in their homes. These workers were paid \$5.15/ hour (the then minimum wage) for direct care hours, but not for the time they spent traveling by bus or car between different client homes. Because they were not paid for their travel time, their per-hour pay dropped below the minimum wage. NELP and the Service Employees International Union represented them in a lawsuit against their for-profit agency employer and recovered their unpaid wages.
- Another group of home care workers in Pennsylvania were hired as employees by a home health care agency to place them in individual homes, where they cared for elderly and disabled people. The employees were not paid overtime or for their time spent traveling from household to household during their workdays, and they brought a lawsuit with our help to claim their unpaid wages. Several months after the lawsuit was filed, the home care agency told each of these employees that they had to sign an agreement calling them "independent contractors" if they wanted to keep their jobs. Nearly all of the workers did so to keep their jobs, even though none of the other aspects of their job conditions, pay, or assignment and direction changed, and none was running an independent business.<sup>1</sup> This case is still pending.

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<sup>1</sup> *Lee's Industries, Inc. and Lee's Home Health Services, Inc. and Bernice Brown*, Case No. 4-CA-36904 (Decision by National Labor Relations Board Division of Judges), 2/25/10.

None of these workers had jobs that paid well, and several of them were on public assistance due to the low wages and long hours they worked. They have had difficulty making ends meet for their families, and some have taken other jobs to supplement their meager earnings.

### **I. Companions Were Exempted in the Extension of Coverage to Domestic Workers in 1974.**

The companionship exemption has its origins in a 1974 amendment that extended FLSA coverage to domestic workers for the first time.<sup>2</sup> 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.<sup>3</sup>

Congress did not provide a detailed definition of companionship services, directing DOL to define 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” 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 . . . .”<sup>4</sup> 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.<sup>5</sup> These activities correspond with what a current Labor Department regulation describes as providing “fellowship” and “protection” for older adults or persons with disabilities.<sup>6</sup>

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

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<sup>2</sup> See *Fair Labor Standards Amendments of 1974*, Public Law 93-259, *U.S. Statutes at Large* 88 (1974): 55, codified at *U.S. Code* 29, §§ 201-219.

<sup>3</sup> *U.S. Code* 29 (2010), § 213(a)(15); *Code of Federal Regulations* tit. 29, §§ 552.6, 552.106, 552.109 (2010).

<sup>4</sup> *Congressional Record* 119 (1973): 24,801 (statement of Sen. Williams).

<sup>5</sup> *Ibid.* (statement of Sen. Burdick).

<sup>6</sup> *Code of Federal Regulations*, tit. 29, § 552.6 (2010).

was to be strictly limited.<sup>7</sup> 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.”<sup>8</sup> People who will be employed in the excluded categories,” by contrast “are not regular breadwinners or responsible for their families’ support.”<sup>9</sup> Sen. Burdick confirmed this understanding, stressing the exemption was not intended to exclude “the professional domestic who does this as a living.”<sup>10</sup> Sen. Javits echoed that, explaining that coverage was meant to extend “to really those who make it a regular part of their occupation . . .”<sup>11</sup> 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 support their families.”<sup>12</sup>

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.<sup>13</sup> 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.

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<sup>7</sup> *Congressional Record* 119 (1973): 24,801 (statement of Sen. Williams); *ibid.* (statement of Sen. Burdick).

<sup>8</sup> U.S. Senate, Report No. 93-690 (1974), 20.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Congressional Record* 119 (1973): 24,801 (statement of Sen. Burdick).

<sup>11</sup> *Congressional Record* 120 (1974): 4,708 (comments of Sen. Javits).

<sup>12</sup> *Congressional Record* 119 (1973): 30,267 (comments of Rep. Chisolm).

<sup>13</sup> 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 . . .”).

## II. The Department of Labor’s Proposed Rules.

The Department of Labor is charged with defining 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.<sup>14</sup> 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.

The Department’s proposed rules would make four primary changes: (1) modernize the definition of what constitutes covered “domestic service employment” to add some additional job titles and take out some more outdated ones; (2) narrow the definition of exempted “companionship services” to mean “fellowship” and “protection,” aligning it more closely to what Congress intended in 1974; (3) eliminate the ability of third-party employers such as home care agencies to claim the exemption, and (4) change the record-keeping requirements for employers of live-in domestic workers to more closely align them with what other employers currently do.

## III. The Modern Home Care Workforce.

Home care occupations are projected to be the first and second fastest-growing occupations nationally in the next decade.<sup>15</sup> The Department of Labor’s projections for 2010-2020 show that home care jobs are projected to increase in number by nearly 1.3 million.<sup>16</sup> Adding this growth to the 2.5 million current workforce brings the total to 3.8 million workers who will provide care and services to older individuals and persons with disabilities wishing to remain in the home.

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.<sup>17</sup>

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<sup>14</sup> *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167 (2007).

<sup>15</sup> [http://www.bls.gov/emp/ep\\_table\\_103.htm](http://www.bls.gov/emp/ep_table_103.htm)

<sup>16</sup> See, e.g., PHI, *Huge Growth Projected for Direct-Care Occupations, DOL Report Shows*, 3/1/12, available at <http://phinational.org/archives/huge-growth-projected-for-direct-care-occupations-dol-report-shows/>

<sup>17</sup> For a more in-depth description of the policy and impacts of the companionship rule, see 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* (August 2011), available at <http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1>.

A large segment of today's home care workforce is employed under the Medicaid program.<sup>18</sup> 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.<sup>19</sup>

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 role in our national economy. The industry's revenues and number of establishments are today double or more their sizes in 2000.<sup>20</sup> And its workforce is projected to grow by nearly 50 percent again by 2018.<sup>21</sup> 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.<sup>22</sup> Much of this care is financed under the Medicaid program. For-profit corporations dominate the industry.<sup>23</sup> The number of establishments grew astronomically from 2001-2010, at a rate of 20 percent a year, due to increasing demand and low barriers to entry.<sup>24</sup> 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 as described below.

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

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<sup>18</sup> Allen J. Leblanc, M. Christine Tonner, and Charlene Harrington, “State Medicaid Programs Offering Personal Care Services,” *Healthcare Financing Review* 22, no. 4 (Summer 2001): 156.

<sup>19</sup> U.S. Department of Health & Human Services, Office of the Assistant Secretary for Planning & Evaluation, *Understanding Medicaid Home and Community Services: A Primer* (Nov. 2000), 61, <http://aspe.hhs.gov/daltcp/reports/primer.pdf>.

<sup>20</sup> U.S. Census Bureau, “2008 Service Annual Survey Data ”.

<sup>21</sup> PHI, *Occupational Projections for Direct-Care Workers 2008-2018* (Feb. 2010), [http://directcareclearinghouse.org/download/PHI%20FactSheet1Update\\_singles%20\(2\).pdf](http://directcareclearinghouse.org/download/PHI%20FactSheet1Update_singles%20(2).pdf).

<sup>22</sup> 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* (Feb. 2006), 30.

<sup>23</sup> U.S. Census Bureau, “2008 Service Annual Survey Data for Healthcare and Social Assistance,” [http://www.census.gov/services/sas\\_data.html](http://www.census.gov/services/sas_data.html).

<sup>24</sup> PHI, *Growing Home Care Industry Can Afford Basic Labor Protections for Workers*, (2012) p. 2, available at: <http://phinational.org/policy/wp-content/uploads/phi-value-the-care-05.pdf>.

program.<sup>25</sup> 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.<sup>26</sup>

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 livelihood.<sup>27</sup>

### **A. 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. 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,<sup>28</sup> their exclusion from the minimum wage means that employers are not required to pay them for all of their work hours, including work time spent traveling from one client’s home to another.<sup>29</sup> Other covered workers are paid for this work time.

Nor are employers of companions required to reimburse workers for gas or other transportation costs when they reduce workers’ net pay to below the minimum wage,

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<sup>25</sup> PHI, *Who Are Direct-Care Workers?*, (2011) p. 1-2, available at <http://www.directcareclearinghouse.org/download/NCDCW%20Fact%20Sheet-1.pdf>.

<sup>26</sup> Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390 (2008).

<sup>27</sup> One survey in New York City reported that 81 percent of home care workers served as the primary breadwinner for their family. Lenora Gilbert, “Home Care Workers: The New York City Experience,” in *Encyclopedia of Occupational Safety and Health*, Vol. 3 (4th ed., International Labor Organization, 1998), [http://books.google.com/books?id=nDhpLa1r144C&pg=PT1055&lpg=PT1055&dq=home+care+workers+breadwinners&source=bl&ots=zKZiPSAzqY&sig=tHvo076GmvZjw2WxVtf5bfUWmi8&hl=en&ei=w6tcTPrQIIKB8gaMoaTVAg&sa=X&oi=book\\_result&ct=result&resnum=10&ved=0CEAQ6AEwCQ#v=onepage&q&f=false](http://books.google.com/books?id=nDhpLa1r144C&pg=PT1055&lpg=PT1055&dq=home+care+workers+breadwinners&source=bl&ots=zKZiPSAzqY&sig=tHvo076GmvZjw2WxVtf5bfUWmi8&hl=en&ei=w6tcTPrQIIKB8gaMoaTVAg&sa=X&oi=book_result&ct=result&resnum=10&ved=0CEAQ6AEwCQ#v=onepage&q&f=false).

<sup>28</sup> 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 [http://www.bls.gov/oes/2009/may/naics4\\_621600.htm](http://www.bls.gov/oes/2009/may/naics4_621600.htm) and [http://www.bls.gov/oes/2009/may/naics5\\_624120.htm](http://www.bls.gov/oes/2009/may/naics5_624120.htm).

<sup>29</sup> *Code of Federal Regulations* tit. 29, § 785.38 (2010).

unlike other employers.<sup>30</sup> This failure to pay for travel time or reimburse travel costs suppresses workers' already low earnings and not infrequently drives their real hourly wages below the minimum wage.<sup>31</sup>

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. This lack of ordinary overtime coverage has likely been one of the factors that has encouraged the use of a high-hours staffing approach by some employers when serving the very small proportion of home care consumers who receive seven-day-a-week care.

Such long hours are grueling for workers, and may contribute to the higher than average incidence of work-related injuries among home care workers.<sup>32</sup> But many workers are forced to submit to long hours 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 for the industry was just \$20,283<sup>33</sup>—far below a basic self-sufficiency income for a single adult, let alone someone supporting a family as many home care workers do.<sup>34</sup>

In addition, 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.<sup>35</sup> And, as the

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<sup>30</sup> *U.S. Code* 29 (2010), § 203(m).

<sup>31</sup> 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).

<sup>32</sup> Home care work is physically demanding and aides are vulnerable to workplace injuries, including back injury, infections and exposure to communicable disease. Home care workers experience a larger than average number of work-related injuries and illnesses. U.S. Department of Labor, Bureau of Labor Statistics, "Occupational Outlook Handbook, 2010-11 Edition," <http://www.bls.gov/oco/ocos326.htm>. The rate of "days away from work" (work days missed due to on-the-job injuries) for nursing aides, orderlies and attendants was almost four times greater than the all-worker rate—449 per 10,000 full time workers as compared with 113 per 10,000 for all workers. U.S. Department of Labor, Bureau of Labor Statistics, *Press Release: Nonfatal Occupational Injuries and Illnesses Requiring Days Away From Work, 2008* (Nov. 24, 2009), [http://www.bls.gov/news.release/archives/osh2\\_12042009.pdf](http://www.bls.gov/news.release/archives/osh2_12042009.pdf). Injury rates for this occupation are higher than injury rates for construction laborers. *Ibid.*

<sup>33</sup> See *supra* note 28.

<sup>34</sup> Economic Policy Institute, "Basic Family Budget Calculator," [http://www.epi.org/content/budget\\_calculator/](http://www.epi.org/content/budget_calculator/).

<sup>35</sup> *Fair Pay for Home Care Workers: Reforming the U.S. Department of Labor's Companionship Regulations Under the Fair Labor Standards Act* (August 2011), p. 20. available at <http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1>.

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 remaining staffers.”<sup>36</sup> 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.<sup>37</sup>

Studies have shown turnover rates among home care workers of between 44 and 65% per year.<sup>38</sup> 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 on 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.<sup>39</sup> 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

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<sup>36</sup> Linda Hiddemen Barondess, “Some Potential Solutions to High Direct-Care Staff Turnover Rates,” *Annals of Longterm Care* 15, issue 10 (Oct. 1, 2007), <http://www.annalsoflongtermcare.com/article/7860>.

<sup>37</sup> Studies have linked excessive work hours in the medical field to failures of attention and medical errors. See, for example, C.P. Ladriagan 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”).

<sup>38</sup> 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).

<sup>39</sup> PHI, *Who Are Direct Care Workers?* (2011), <http://www.directcareclearinghouse.org/download/NCDCW%20Fact%20Sheet-1.pdf>.

care.<sup>40</sup> 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.

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

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.<sup>41</sup> This group includes states with some of the nation's largest home care programs, including New York, Illinois and Pennsylvania.<sup>42</sup> And in five more states and the District of Columbia, workers enjoy minimum wage protection, but not overtime.<sup>43</sup> As discussed below, these states' experiences illustrate the economic feasibility of providing basic protections to home care workers.<sup>44</sup>

In these states, 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 these 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.<sup>45</sup> 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

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<sup>40</sup>Dawson, S. L. and Surpin, R., *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care*, Paraprofessional Healthcare Institute (PHI), January 2001

<sup>41</sup> CO, HI, IL, ME, MD, MA, MI, MN, MT, NV, NJ, NY, PE, WA, WI. See *Which States Provide Coverage to Home Care Workers*, available at [http://nelp.3cdn.net/6e193991edf8bd0df9\\_o6m6i28s2.pdf](http://nelp.3cdn.net/6e193991edf8bd0df9_o6m6i28s2.pdf). (*State Coverage Overview*).

<sup>42</sup> PHI, "State-by-State Projected Demand for New Direct-Care Workers, 2006-16," <http://directcareclearinghouse.org/download/State%20by%20State%20DCW%20Demand%20Projections%202006-16%20FINAL%20rev.pdf>.

<sup>43</sup> *State Coverage Overview*.

<sup>44</sup> 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.

<sup>45</sup> PHI analysis of the U.S. Census Bureau, Current Population Survey (CPS), 2010 Annual Social and Economic (ASEC) Supplement.

more evenly among workers, limiting the amount of overtime paid to workers and simultaneously creating more full-time employment.

There is no data showing that states with minimum wage and overtime protections for home care workers have higher rates of institutionalization, suggesting that the remaining states should be similarly capable of making this shift without major disruptions to their long-term care systems.

Federal law requires payment of overtime premium pay 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<sup>46</sup>.

Under the new rules, individual 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<sup>47</sup>.

**A. 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 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).

Also, even under a revised companionship regulation, live-in home care workers employed solely by an individual where no agency employer is present would remain

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<sup>46</sup> 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 situations 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.

<sup>47</sup> The Department's proposed rule would retain an exemption for individual householders who employ companions without the use of an agency employer, as long as the worker is performing companionship duties.

exempt from overtime due to the existing overtime exemption for live-in workers that extends to individuals.

### **B. 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.

Some advocates and employers argue that the only way an individual can get continuity of care is to have only one worker for all needed hours. Requiring one worker for 24/7 care is not a good model for anyone – the worker or the service or care recipient -- 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*.

### **C. 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.

Addus HomeCare, one of the nation's largest for-profit home care providers, for example, has curbed overtime usage and costs through close monitoring of employee workloads and by spreading hours more evenly among its staff. Case studies of other 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).<sup>48</sup>

Moreover, the home care industry can afford to pay a fair wage without raising costs to consumers. Home care industry profits have grown at an average rate of 9 percent per

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<sup>48</sup> PHI, *Can Homecare Companies Manage Overtime? Three Successful Models*, (2012), available at: <http://phinational.org/archives/home-care-companies-keep-overtime-costs-to-a-minimum-phi-study-finds/>.

year from 2001-2009; total industry profit topped 84.1 billion in 2009.<sup>49</sup> For-profit franchises Home Instead and Comfort Keepers are among the top three largest franchises, employing over 90,000 home care workers nationwide based in over 1,200 franchise locations across the country.<sup>50</sup> Senior care and home health care franchises' corporate revenues increased by 11.6 percent per year from 2007-2009.<sup>51</sup> These agencies have benefitted from the minimum wage and overtime exemption, which acts to keep wages low. 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.<sup>52</sup> 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.<sup>53</sup>

Some for-profit agencies that have publicly opposed a reform to the companionship exemption, such as Home Instead and Comfort Keepers, 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 – notwithstanding 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.

Thank you for the opportunity to testify today.

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<sup>49</sup> *Id.* at 2.

<sup>50</sup> *Id.* at 3.

<sup>51</sup> *Id.*

<sup>52</sup> PHI, *Comparing the Cost of Personal Care Services and Caregiver Pay*, 3/7/12, available at <http://www.directcareclearinghouse.org/download/pcs-rates-and-worker-wages.pdf>

<sup>53</sup> *Id.*