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October 31, 2013

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretary Perez:

On October 1, the U.S. Department of Labor published a final rule making significant changes to the long-standing minimum wage and overtime exemption for companionship services under the *Fair Labor Standards Act* (FLSA).¹ When this regulation takes effect, on January 1, 2015, it will create a new definition for what constitutes companionship services—limiting the duties and tasks allowable under the exemption. It will also draw a distinct and unnecessary line between caregivers by making those who provide service through a third-party subject to the FLSA's requirements, while leaving the status of those hired through an individual or family member unchanged.² These significant changes will undoubtedly impose new costs and mandates on companion care providers, reducing the availability of in-home care for seniors, the infirm, and individuals with disabilities. Given the likely harm of this rulemaking, we request detailed information from the department to better understand and assess its consequences.

Since October 2011, the Committee on Education and the Workforce has engaged in oversight of the department's efforts to change the companionship exemption. Specifically, we wrote to the department on October 7, 2011, requesting information on the rulemaking.³ Given the rule's novel and complicated issues, on February 10, 2012, we requested a 60 day extension for the

¹ Regulatory Information Number 1235-AA05, 78 *Fed. Reg.* 60453 ("Companionship Exemption rule") (Oct. 1, 2013). Available at: <https://federalregister.gov/a/2013-22799> (Accessed on Oct. 24, 2013)

² *Id.*

³ Letter from the Hon. John Kline, Chairman, H. Comm. on Education and the Workforce, and the Hon. Tim Walberg, Chairman, Subcomm. on Workforce Protections, to the Hon. Hilda L. Solis, Sec'y, U.S. Dep't of Labor (Oct. 7, 2011) Available at: <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=265320>.

public comment period.⁴ We were disappointed the department failed to provide the extension, instead granting piece-meal extensions amounting to only 23 days.⁵

On March 20, 2012, the Workforce Protections Subcommittee held a hearing with Ms. Nancy Leppink, then-acting administrator of the Wage and Hour Division.⁶ Witness testimony highlighted the potential negative consequences of this rulemaking, including fewer hours of work for employees, higher costs, and concerns that seniors and individuals with disabilities must give up their independence and move into institutional care.⁷ Further informed by this testimony, Subcommittee Chairman Tim Walberg wrote again to seek information on July 7, 2012.⁸ Unfortunately, the department's responses were incomplete and insufficient. Despite promises to keep the committee informed, the department did not even provide notice of the final rule's publication.

According to estimates included in the final rule's economic impact statement, approximately 1.3 million exempt caregivers will be covered by the FLSA for the first time.⁹ Ultimately, increased costs under FLSA will be paid by the consumer, whether as recipients of care, family members, or taxpayers. Despite this rulemaking's significant consequences for the economy, the department allowed stakeholders fewer than three months to voice their concerns.¹⁰

The committee remains concerned that in the department's haste to regulate it failed to seek input from stakeholders and did not fully consider the consequences of increased costs on seniors and the infirm, and access of individuals with disabilities' to home care services. On March 11, 2013, we wrote to the Government Accountability Office (GAO) requesting an analysis of the department's rulemaking process and a review of the regulatory analysis developed by the department in support of the rule.¹¹ Our work with GAO is ongoing, but with the department's

⁴ Letter from the Hon. John Kline, Chairman, H. Comm. on Education and the Workforce, and the Hon. Tim Walberg, Chairman, Subcomm. on Workforce Protections, to the Hon. Hilda L. Solis, Sec'y, U.S. Dep't of Labor (Feb. 10, 2012) *Available at*: <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=279998>.

⁵ On Feb. 24, 2012, the U.S. Dep't of Labor published notice in the *Fed. Reg.* that the period for public comment would be extended for an additional 14 days. *Available at*: <http://www.gpo.gov/fdsys/pkg/FR-2012-02-24/pdf/2012-4147.pdf#page=1>. On Mar. 13, 2012, the U.S. Dep't of Labor published notice in the *Fed. Reg.* that the period for public comment would be extended for an additional 9 days. *Available at*:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-13/pdf/2012-6136.pdf#page=1>

⁶ H. Comm. on Education and the Workforce Subcomm. on Workplace Protections hearing entitled: "Ensuring Regulations Protect Access to Affordable Quality Companion Care" (Mar. 20, 2012). *Available at*: <http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=282445>

⁷ *Id.*

⁸ Letter from the Hon. Tim Walberg, Chairman, Subcomm. on Workforce Protections, to the Hon. Hilda L. Solis, Sec'y, U.S. Dep't of Labor (July 7, 2012) (on file with the Comm.)

⁹ See Companionship Exemption rule, *supra* 1, at 60527.

¹⁰ The period for public comment began on Dec. 27, 2011 and ended on Mar. 21, 2012, totaling 86 days for public comment.

¹¹ Letter from the Hon. John Kline, Chairman, H. Comm. on Education and the Workforce, and the Hon. Tim Walberg, Chairman, Subcomm. on Workforce Protections, to the Hon. Gene Dodaro, Comptroller Gen. of the U.S., U.S. Gov't Accountability Office (Mar. 11, 2013) (on file with the Comm.)

recent finalization of this rulemaking, we again ask the department to provide the following **no later than November 15, 2013**:

1. All documents and communications between the department and the Office of Management and Budget relating to the NPRM and final regulatory changes to Regulatory Information Number (RIN) 1235-AA05;
2. All documents and communications between the department and the Small Business Administration relating to the NPRM and final regulatory changes to RIN 1235-AA05; and,
3. Identity of all stakeholders who requested in-person meetings with administration personnel concerning RIN 1235-AA05, including the identification of the stakeholders who received meetings and the basis for which stakeholders who did not receive meetings were denied.

If you are unable to provide the requested information by the date specified, please inform the committee in writing why you cannot meet the deadline, and the date by which you will provide the requested information. If you have additional questions or comments, please contact Joe Wheeler or Molly Salmi of the committee staff at (202) 225-7101.

Sincerely,



JOHN KLINE
Chairman
Committee on Education and the Workforce



TIM WALBERG
Chairman
Subcommittee on Workforce Protections

Enclosure

CC: The Honorable George Miller, Senior Democratic Member, Committee on Education and the Workforce