

U.S. Department of Labor

Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210



October 31, 2011

The Honorable John Kline
Chairman
Committee on Education and the Workforce

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections

U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Kline and Chairman Walberg:

I am writing in response to your October 7, 2011, letter to Secretary Hilda L. Solis, regarding an item included in the Spring 2011 Department of Labor (DOL) Regulatory Agenda entitled "Application of the Fair Labor Standards Act to Domestic Service."

You note in your letter that the Department "has not provided further information regarding the anticipated rulemaking" and cite a letter from me to the Chairman dated May 5, 2011. My May 5 letter, however, was a cover letter transmitting the Department's responses to the Committee's Questions for the Record (QFRs) arising out of the Secretary's appearance before the Committee on February 16, 2011. In the QFRs, there was one question related to this initiative. The Department answered that question in the document attached to my May 5 letter, a copy of which was reprinted in the Committee's hearing report. H. Comm. on Education & the Workforce, *Policies and Priorities at the U.S. Department of Labor*, Hearing, Feb. 16, 2011 (Serial 112-6) at 81 (available online at <<http://s.dol.gov/J5>>). Nonetheless, I am pleased to provide an update and additional background on this initiative.

The Department first included reference to the companionship regulatory item in the Spring 2010 Regulatory Agenda, describing the initiative as follows:

Fair Labor Standards Act (FLSA) section 13(a)(15) provides an exemption from minimum wage and overtime compensation for domestic employees engaged in providing companionship services. FLSA section 13(b)(21) provides an exemption from overtime compensation for live-in domestic employees. In light of significant changes in the home care industry, the DOL is proposing to update regulations at 29 CFR part 552, Application of the FLSA to Domestic

Service, including examining the definition of “companionship services,” the criteria used to judge whether employees qualify as trained personnel who are not exempt companions, and the applicability of the exemption to third party employers.

Dep’t of Labor, “Application of the Fair Labor Standards Act to Domestic Service,” Agency Rule List, *Spring 2010 Unified Agenda of Federal Regulatory and Deregulatory Actions* (Apr. 26, 2010), available online at <<http://s.dol.gov/J6>>. This item has appeared with this description on each regulatory agenda that has followed. See Dep’t of Labor, “Application of the Fair Labor Standards Act to Domestic Service,” Agency Rule List, *Fall 2010 Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions* (Nov. 29, 2010), available online at <<http://s.dol.gov/J7>>; Dep’t of Labor, “Application of the Fair Labor Standards Act to Domestic Service,” Agency Rule List, *Spring 2011 Unified Agenda of Federal Regulatory and Deregulatory Actions* (June 1, 2011), available online at <<http://s.dol.gov/J8>> (“Spring 2011 Rule Abstract”).

Background on the Treatment of Domestic Service under the Fair Labor Standards Act

In 1974, Congress amended the FLSA to provide coverage to “domestic service” workers employed by a household. *Fair Labor Standards Act Amendments of 1974*, Pub. L. No. 93–259, 88 Stat. 55 (Apr. 8, 1974) (the “1974 Amendments”). In the 1974 Amendments, Congress extended minimum wage and overtime compensation protections to employees performing services of a household nature in or about a private home. 29 U.S.C. 202(a), 206(f) & 207(l). FLSA protections for domestic service workers had previously been limited to workers employed by a covered enterprise and did not extend to workers who were employed by a private household. Congress created limited exemptions to the newly expanded protections for workers employed as casual “babysitters” and “in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).” 29 U.S.C. 213(a)(15). As part of the 1974 Amendments, Congress also created a more limited exemption from the overtime pay requirement for domestic service employees who reside in the household where they work. 29 U.S.C. 213(b)(21).

On February 20, 1975, the Department promulgated final regulations to implement the domestic service employment provisions. U.S. Dep’t of Labor, Wage & Hour Div., “Extension to Domestic Service Employees,” 40 FR 7404, 7405-06 (adding 29 CFR 216.34 and part 552). Subpart A of the rule defines the phrases: “domestic service employee,” “employee employed on a casual basis in domestic service employment to provide babysitting services,” and “employment to provide companionship services to individuals who (because of age or infirmity) are unable to care for themselves.” *Id.*

Since the implementing regulations were promulgated in 1975, the Department has sought public comment on proposed changes to the regulations on several occasions. None of these efforts has led to a new final rule, other than a final rule that the Department published in

1995 to incorporate changes required by the *Social Security Domestic Employment Reform Act of 1994*, Pub. L. No. 103-387, 108 Stat 4071 (Oct. 22, 1994) and to make other minor changes. See U.S. Dep't of Labor, Wage & Hour Div., "Application of the Fair Labor Standards Act to Domestic Service," 60 FR 46766 (Sept. 8, 1995). Most recently, in 2002, the Department withdrew a Notice of Proposed Rulemaking ("NPRM") it had issued on January 19, 2001. See U.S. Dep't of Labor, Wage & Hour Div., "Application of the Fair Labor Standards Act to Domestic Service," 67 FR 16668 (withdrawing the NPRM published at 66 FR 5481).

On June 11, 2007, the Supreme Court confirmed the Department's statutory authority to construe its policies and rules that determine the scope of the "companionship" exemption. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). The court noted that Congress in the 1974 Amendments "expressly instructs the agency to work out the details of those broad definitions" related to "domestic service employment." *Id.* at 167.

Changes in the Home Care Industry Since the 1974 Amendments

The home care industry has undergone a dramatic transformation since the Department published the implementing regulations in 1975. In response to the growing demand for long-term in-home care, the home health care services industry has had significant and sustained growth. According to the National Association of Home Care (NAHC) publication, *Basic Statistics About Home Care* (March 2000), data from the Department of Health and Human Services' Health Care Financing Administration (HCFA) showed that the number of Medicare-certified home care agencies increased from 2,242 in 1975 to 7,747 in 1999. The NAHC 2008 update shows that this number increased to 9,284 by the end of 2007.

There has been a similar increase in the employment of home health aides and personal care aides in the private homes of individuals in need of assistance with basic daily living or health maintenance activities. The Bureau of Labor Statistics' (BLS) national occupational employment and wage estimates from the Occupational Employment Statistics (OES) survey show that the number of workers in these jobs tripled during the decade between 1988 and 1998, and by 1998 there were 430,440 workers employed as home health aides and 255,960 workers employed as personal care aides. BLS, *Occupational Employment and Wages* (May 2010) (available online at <<http://s.dol.gov/J9>>). The combined occupations of personal care and home health aides constitute a rapidly growing occupational group. BLS statistics demonstrate that between 1998 and 2008, this occupational group has more than doubled, with home health aides increasing to 955,220 and personal care aides increasing to 630,740. *Id.*

The growth in demand for in-home care and in the home health care services industry has not resulted in a growth in earnings for workers providing in-home care. The earnings of employees in the home health aide and personal care aide categories remain among the lowest in the service industry. Studies have shown that the low income of direct care workers, including home care workers, continues to impede efforts to improve both jobs and care. See,

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e.g., Diane Brannon, et al., "Job Perceptions and Intent to Leave Among Direct Care Workers: Evidence From the Better Jobs Better Care Demonstrations" 47 *The Gerontologist* 820 (December 2007).

The Department's Regulatory Efforts

In contrast to the "companions" envisioned by the Congress in 1974, today's home care workers are not neighbors performing casual elder sitting in the same manner that a babysitter watches over children. These workers are employed, many on a full time basis, in a well-recognized occupation and often are solely responsible for their families' support. In view of the dramatic changes in employment in the home care industry in the 36 years since these regulations were first promulgated, the Department believes it is appropriate to consider whether the scope of the regulations is now too broad.

After the publication of each of the three semi-annual Regulatory Agendas in which this initiative has appeared, the Department's Wage and Hour Division (WHD) hosted a web chat during which this proposed regulation was discussed; on April 28, 2010 <<http://s.dol.gov/JA>>, on January 6, 2011 <<http://s.dol.gov/JB>>, and on July 11, 2011 <<http://s.dol.gov/JC>>.

To further its consideration, the Department conducted a number of stakeholder meetings and calls from March 2010 through September 2011, to allow a full airing of related issues. The largest listening sessions occurred on July 25 and 27, 2011. These sessions included a broad and comprehensive array of interested parties, from academics studying this issue, to advocates for the individuals who need home care services, such as the AARP; from companies providing companionship services, such as Home Instead Senior Care; to labor unions, such as SEIU and AFSCME, and to associations representing companions, such as Direct Care Alliance. On October 24, 2011, the Department hosted another listening session on the rulemaking with representatives of the disability community. In addition, the Department encouraged the participants at these sessions to provide written information that might help the Department to better understand the issues and better inform it of the options available. With this letter, I am enclosing the materials the Department received from stakeholders as a result of the Department's listening sessions and outreach efforts with respect to this initiative, except the web chats discussed above (which remain available online) and correspondence from or forwarded by Members of Congress.

The Department no longer expects to issue an NPRM in the timeframe contemplated in the Spring 2011 Regulatory Agenda. The Department plans to include a revised timetable in the Fall 2011 Regulatory Agenda expected to be published before the end of the year. Further, the Department plans to submit a draft of this proposed rule this week to the Office of Information and Regulatory Affairs within the Office of Management and Budget for review in accordance with the *Paperwork Reduction Act*, Executive Orders 12291, 12866, and 13563, and other relevant authorities.

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If you or your staff have any questions about this response, please contact Patrick Findlay in the Department's Office of Congressional and Intergovernmental Affairs. He may be reached at (202) 693-4600.

Sincerely,



Brian V. Kennedy

Enclosure: One disc containing documents Bates stamped DOL E&W WHD CSHIP
00001-479 in PDF.

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

The Honorable Lynn Woolsey
Senior Democratic Member, Subcommittee on Workforce Protections