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before the

Subcommittee on Workforce Protections
Education and the Workforce Committee
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Redefining Companion Care: Jeopardizing Access to Affordable Care for Seniors and Individuals with Disabilities

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Chairman Walberg, Ranking Member Courtney, and Members of the Subcommittee, thank you for the opportunity to participate in today's hearing. I am honored to appear before you today.

By way of background, I am an attorney in the Washington, DC office of Seyfarth Shaw LLP. My testimony today is solely my own and I do not represent my firm, its clients, or any other person or organization.

In my practice, I spend approximately 95% of my time on wage and hour issues. The majority of that time is spent counseling employers with respect to issues arising under the Fair Labor Standards Act, the Service Contract Act, the Davis-Bacon and Related Acts, and state laws related to the payment of minimum or prevailing wages and overtime. I have been working on wage and hour issues since entering private practice in the Fall of 1997.

In 2005, I joined the leadership team of the U.S. Department of Labor's Wage & Hour Division (WHD). In 2006, I was appointed Deputy Administrator of WHD and, in 2007, I became the Acting Administrator. President George W. Bush nominated me to serve as the

Administrator in March 2008, but the U.S. Senate never voted on my nomination. I left WHD in 2009 and returned to private practice.

In my testimony today, I will be discussing some of the compliance difficulties likely to face employers -- particularly individuals and families -- under the Department of Labor's (DOL's or Department's) newly-issued regulations regarding the application of the Fair Labor Standards Act (FLSA) to domestic service employment. In particular, my testimony will focus on the challenges that American families will face as a result of the Department's recent final rule regarding the companionship services exemption.

As the subcommittee is aware, the FLSA generally requires covered employers to pay nonexempt employees a minimum wage for all hours worked and an overtime premium of one and one-half times an employee's regular rate of pay for all hours worked in excess of 40 hours in a workweek. In most circumstances, the determination of whether an employee is subject to the FLSA involves consideration of whether the employee is "engaged in commerce or in the production of goods for commerce" or whether the employee is "employed in an enterprise engaged in commerce or in the production of goods for commerce."

In 1974, Congress included "domestic services" within the scope of the FLSA's coverage, finding that "the employment of persons in domestic service in households affects commerce," and extending the FLSA's minimum wage and overtime requirements to "domestic service" employees. At the same time, Congress exempted employees providing "companionship services" to the elderly or infirm. The exemption applies to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves . . . ." 29 U.S.C. 213(a)(15).

Jumping straight to the question of domestic service employee coverage and the companionship services exemption, however, puts the cart before the horse. The threshold question -- as it is in all FLSA matters -- is whether the individual performing the work is an "employee" under the FLSA. If the worker is not an "employee," then neither the minimum wage nor overtime requirements of the FLSA would apply. Only if the individual is an employee does an exemption need to be considered.

Somewhat curiously for an agency that has been focused on the issue of employment relationship, neither the rule nor WHD's guidance documents address the critical issue of employment status in this context.[1] WHD provides no meaningful assistance to American families on how to determine whether a particular individual is an "employee" under the FLSA. The determination of whether an individual is an "employee" is critically important because the Department's analysis related to what tasks a "companion" may or may not perform is premised on a statement by Senator Burdick as set forth in the Congressional record and quoted in the preamble to the proposed rule: "We have another category of people who might have an aged father, an aged mother, an infirm father, an infirm mother, and a neighbor comes in and sits with them."

Applying the companionship services exemption in these cases would be extraordinary. The American people already have a name for a neighbor who sits with an aged or infirm parent: "friend." Yet, this is the concept upon which the Department's proposal and analysis was premised: a neighbor who sits with a sick parent ceases to be a friend and has become a regulated entity. The examples of "permissible" activities identified by the Department in its final rule make clear that friendship is covered by its rulemaking: "Examples of activities that

[1] The Department does include a discussion on whether family members or members of the household are employees under the FLSA if they are paid for their services (they are).

fall within fellowship and protection may include: watching television together; visiting with friends and neighbors; taking walks; playing cards, or engaging in hobbies."

These are the activities that the Department has determined to be "exempt"; as I noted previously, however, the exemption is only necessary once there has been a finding of employment. Every day across America the activities described by the Department are shared between friends, none of whom consider for a moment that they may be entitled to compensation as domestic service employees. Yet, notwithstanding the Department's recent focus on attempting to find the existence of an employment relationship in a wide variety of unpaid contexts -- including volunteers and interns -- DOL does not address this critical, threshold issue. It simply provides no guidance to American families; indeed, the self-assessment tool on WHD's website ("Am I required to pay minimum wage and overtime pay?", found at http://www.dol.gov/whd/homecare/checklist.htm) jumps right into the application of the exemption, without a single question designed to assess employment.

It is easy to dismiss this concern with some variation of the statement "Of course the law does not require friends to be paid minimum wage and overtime." DOL, however, provides no guidance at all on how to distinguish when "fellowship and protection" activities are performed by a non-employee and when they are performed by an employee subject to the FLSA.

Similarly, it is easy to dismiss the concern with a statement that these "fellowship and protection" activities are exempt activities. DOL's rule, however, requires that families pay attention to whether a friend has somehow "become" a domestic services employee. Once the individual has crossed that barrier, families will need to track with incredible precision the amount of time their neighbor spends helping with laundry, assisting with dressing, driving to appointments, or cooking meals that may be eaten outside of their presence. This is due to the

fact that the exemption is lost when the employee spends more than 20% of his or her time providing "care."

Examples of activities that can result in loss of the exemption include:

- assistance in putting on a coat;
- assistance in brushing hair;
- assistance with using the restroom;
- driving to the recreation center;
- making a peanut-butter-and-jelly sandwich to be eaten later in the day; and
- folding a t-shirt.

The Department limits these tasks (and many, many others) to an aggregate amount of 20% of the employee's time -- which is just over 1.5 hours of an eight-hour day. It certainly is not difficult to imagine someone spending more than that amount of time on these tasks. Moreover, in one of its Fact Sheets on these issues, the Department notes that "[h]ousehold work that primarily benefits other members of the household, such as making dinner for the entire family or doing laundry for another member of the household, results in a loss of the exemption, and the employee is entitled to minimum wage and overtime for that workweek."

Given the increased importance of the threshold question of whether someone is an "employee," it is incumbent upon the Department to provide comprehensive guidance to American families who will be struggling to make these decisions. In addition, because the Department is now converting friendship into employment, it likewise should provide guidance on other areas of "domestic service." For example:

- Does the Department believe that a neighbor who sits with someone's family member is an "employee" for the purposes of the FLSA? What factors go into the determination of whether someone is an employee?

- Is remuneration a factor? In which cases should remuneration be considered in the employment analysis? If a companion is included in someone's will as "compensation" for their companionship, is that sufficient "remuneration" to trigger an employment relationship? What if there is simply a promise to be included in a will that was unfulfilled? Or what if the intention of providing the companionship was based on an expectation of some future consideration?

- If a neighbor sitting with a family member is a "companion" subject to the FLSA, does the same analysis apply to a neighbor who drives someone's children to school? Is that person a "chauffer" for FLSA purposes? What factors would go into a determination that your friend has become your chauffer, and thus, a domestic services employee under the FLSA?

- If a neighbor sitting with a family member is a "companion" subject to the FLSA, if colleagues assist someone with an overhaul of the yard, does that make them "gardeners" for the purposes of the FLSA?

- In each of these assessments, what evidence will the Department rely upon to determine an individual's employment status? Should families begin providing their neighbors with stipulations that the friendship they provide is charitable in nature to protect the family from a future claim under the FLSA and/or investigation by the Department into whether someone's companionship was grounded in friendship or whether it was part of employment?

The examples above logically follow the Department's foundational reliance upon the statement by Sen. Burdick to support its reading of the exemption. If the Department's position is that a neighbor sitting with a sick family member is an employee, then the Department must provide families sufficient regulatory guidance to address the critical issue of employment status. This position will undoubtedly take most -- if not all -- families considering it by surprise. [2]

The burden on American families is further compounded by the Department's elimination of the companionship services exemption for third-party employers, although it has

[2] The only guidance that remotely addresses the issue is section 6(f) of the FLSA, which limits application of the minimum wage requirements to someone who is employed for more than eight hours in domestic services employment. *See* 29 USC 206(f). It is not difficult to exceed the eight-hour mark with a dinner and some carpooling (for example, in the weeks in which a mother to a newborn infant gets assistance from her friends); moreover, no ordinary person would ever keep records of the activities of friends to determine whether they in fact exceeded the eight-hour threshold.

been retained for individuals and families . After nearly 40 years, the Department reversed its position on this issue in its final rule. According to the Department, under the existing regulations, 98% of employees covered by the companionship exemption were employed by third-party employers. As noted in the government's brief in the U.S. Supreme Court case of *Long Island Care At Home Ltd. v. Coke*, "[i]f the companionship services exemption to the FLSA was narrowed to only those employees hired directly by a family member or the head of household, then the exemption would encompass only 2% of employees providing companionship services in private homes. "

Absent a dramatic restructuring of the industry, with the regulation scheduled to take effect in January 2015, 98% of the employees performing companionship services in private homes will be entitled to overtime compensation. In other words, the overwhelming majority of families who use companionship services must decide, before January 1, 2015, whether to continue using third-party providers (and incurring additional costs due to the overtime premiums that must be paid) or directly employing companions in an effort to eliminate the overtime payment requirements.

The elimination of the third-party exemption is a dramatic change. It had been unchanged for 38 years despite review by the U.S. Supreme Court and numerous amendments to the FLSA by Congress. Although the Department claims that there have been changes in the home care industry in the last 38 years, it identifies no real changes that have taken place since 2007. This is significant because the key reasons for leaving the regulation unchanged were articulated by the Department in connection with the U.S. Supreme Court's review. In 2007, the Department believed that eliminating the companionship services exemption for third-party employers would cause catastrophic results for the industry and for the American care system. It

believed that placing the primary FLSA compliance burden directly on the person receiving care was not in the best interests of employers or employees. Yet, in 2013, its rule does precisely that, creating a financial incentive that will drive companionship services employees to employment directly by American families, who will be largely unfamiliar with the requirements of the FLSA, or any of the many other laws that govern the employment relationship. Alternatively, cost-conscious citizens may find themselves reliant upon unscrupulous agencies who disregard these laws. Honest third-party employers -- with the most capability for ensuring employment standards -- may simply be priced out of the market.

It is ironic that at a time when the Department is focused on enterprise-wide enforcement and is spending significant resources attempting to determine how best to defeat "fissured" industries, it has also issued a regulation that potentially fissures the companionship services industry and may inhibit any effort by the Department to conduct enterprise-wide enforcement. If the increased costs associated with third-party employment do, in fact, drive employment of companions to American families directly, the Department will be responsible for creating its own enforcement nightmare: individual-by-individual, family-by-family investigations that necessarily require a detailed analysis of "what happened, when" in the family home.

The Department's apparent effort to calm the fears of American families by stating that individuals, families, and households may assert the exemption even when they jointly employ the employee with a third-party (which, of course, may not assert the exemption) will have little impact in practical application. In fact, it may actually result in families finding themselves worse off.

The exemption is not available to the third-party employer agencies, and, as a result, they have little incentive to limit the tasks that defeat the exemption; regardless of whether the

employee performs the tasks, the third-party agency must meet the minimum wage and overtime requirements. The individual, family, or household, however, will lose their ability to claim the exemption if the prohibited tasks go above 20% of the employee's time, a condition about which they may not even be aware if they have decided to use a third-party employer agency. Thus, if the primary employer is not keeping track of such information, the family may find itself without protection from overtime liability. This would be especially true -- and particularly consequential -- if the reason the family was being investigated by the Department (or sued by a plaintiff's attorney) is because the primary third-party employer ceased to operate.

As a result of these changes -- in particular, the elimination of the exemption for employees of third parties -- the cost of employing a companion employed by a third-party will increase. At a time where controlling the costs of care is critical to American families, this rule will push those families away from third-party employers, and towards direct employment. As a result, American families will now have to navigate a complex web of regulations to determine whether they are in compliance with their minimum wage, overtime, federal and state tax, workers compensation, and unemployment insurance obligations.