Statement for the Record

By
Private Care Association, Inc.

Hearing on Caring for Aging Americans

Before the
Committee on Ways and Means
U.S. House of Representatives

November 14, 2019

The Private Care Association ("PCA")[1] appreciates the opportunity to submit this Statement for the Record concerning a November 14, 2019, hearing before the Committee on Ways and Means of the U.S. House of Representatives, titled *Caring for Aging Americans.*

Committee Chairman Richard Neal, in his opening statement, described the long-term care system as "enormously expensive – even unaffordable." He estimates that "round-the-clock, in-home care costs $180,000 per year." PCA applauds the leadership of the Committee in holding this hearing to solicit ideas on how to address this growing problem.

While hearing witnesses and Committee Members discussed several possible ideas for improving the affordability of long-term care, one notable idea that was not mentioned is reinstating the companionship-services exemption[2] to the Fair Labor Standards Act of 1938 ("FLSA").

Congress enacted the companionship-services exemption during 1974, when it expanded the FLSA to cover domestic workers. The U.S. Department of Labor ("DOL") promptly issued regulations[3] in 1975 to implement this exemption and make clear that it applied to covered services, regardless of whether the caregiver provides the care pursuant to an agreement with the care recipient or with a third party.

The companionship-services exemption reflects a trade-off Congress struck at the time that balanced the interests of expanding FLSA coverage to domestic workers against the interests of ensuring that working families can continue to afford home care for an elderly or disabled family member. The balance struck consisted of exempting families from having to pay FLSA wages to caregivers who care for their elderly or disabled family members.

Nearly four decades later, the U.S. Department of Labor ("DOL") issued regulations[4] during 2013 that accomplished a *de facto* repeal of the companionship-services exemption. This action represents a complete policy reversal of the promise Congress made to working families when it enacted the companionship-services exemption, as the 2013 regulations now require families to pay FLSA wages to caregivers who care for their elderly or disabled family members.

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[1] PCA, www.privatecare.org, is a national association representing caregiver registries.
[2] 29 U.S.C. §213(a)(15).
[3] *Application of the Fair labor Standards Act to Domestic Service*, 40 Fed. Reg. 7404 (Feb. 20, 1975) (amending 29 C.F.R. Part 552).
[4] *Application of the Fair labor Standards Act to Domestic Service*, 78 Fed. Reg. 60,453 (Oct. 1, 2013) (amending 29 C.F.R. Part 552).

An immediate action that could be taken to improve the affordability of long-term care is to reinstate the companionship services exemption that Congress enacted. This could be accomplished by Congress enacting a law to codify the 1975 regulations, or by DOL opening a new rulemaking project to rescind the 2013 regulations and reinstate the 1975 regulations. Enclosed as **Exhibit 1** is a letter signed by 11 Members of Congress expressing their support for the DOL taking action to rescind the 2013 regulations. PCA respectfully urges the Committee to encourage DOL to rescind the 2013 regulations.

The following discusses this issue in additional detail.

I. The 1974 Compromise Congress Enacted

During 1974, Congress amended the FLSA to expand its overtime and minimum-wage requirements to include all domestic service workers. At the same time, Congress created an exemption from that expansion for direct care workers who provide companionship services for the elderly and disabled. In 1975, DOL promulgated regulations implementing these changes.

DOL explained the compromise Congress struck when enacting the companionship-services exemption in 1974 (the "1974 Compromise") in WAGE AND HOUR ADVISORY MEMORANDUM No. 2005-1 (Dec. 1, 2005), titled *Application of Section 13(a)(15) to Third Party Employers* (the "2005 DOL Advisory Opinion"):

> Soon after the [1975] regulations were promulgated, the Department explained that Congress was mindful of the special problems of working fathers and mothers who need a person to care for an elderly invalid in their home. Opinion Letter from Wage & Hour Div., Dep't of Labor, WH-368, 1975 WL 40991 (Nov. 25, 1975). In particular, legislators were concerned that working people could not afford to pay for companionship services if they had to pay FLSA wages. See 119 Cong. Rec. 24,797 (statement of Sen. Dominick, discussing letter from Hilda R. Poppell); id. at 24,798 (statement of Sen. Johnston); id. at 24,801 (statement of Sen. Burdick). That cost concern applies whether the working person obtains the companionship services by directly hiring an employee or by obtaining the services through a third party… As explained above, Congress created the exemption to ensure that working families in need of companionship services would be able to obtain them….

(Emphasis added).

The foregoing recounting by DOL of the policy objectives Congress sought to accomplish through the companionship-services exemption reflects a compromise between the two conflicting interests of expanding FLSA coverage to domestic workers and ensuring that working families can continue to afford to care for an elderly or disabled family member.

II. Certain Groups Disagreed with the '1974 Compromise,' but After Failing to Convince Congress and Failing to Convince the Courts, Obtained the Change through Regulation

Certain groups disagreed with the compromise that Congress struck in the 1974 Compromise. These groups urged Congress to revisit the issue and amend the FLSA to reflect a different compromise: one that would expand the FLSA's overtime and minimum-wage coverage to include all direct care workers, including those who were exempted by the companionship-services exemption. Such a policy change would eliminate the statutory protection Congress granted working families to keep the cost of caring for an elderly or disabled family member affordable.

Bills were introduced to accomplish such a change and nullify the policy tradeoff the Congress enacted in 1974, e.g., *Direct Care Job Quality Improvement Act of 2011*, H.R. 2341, and S. 1273, 112th Cong. (2011), *Direct Care Workforce Empowerment Act,* H.R. 5902 and S. 3696, 111th Cong. (2010); *Fair Home Health Care Act of 2007*, H.R. 3582 and S. 2061, 110th Cong. (2007). But none of these bills was passed by either chamber of the Congress.

The groups who disagreed with the 1974 Compromise also supported a legal challenge to the 1975 regulations that implemented the companionship-services exemption. But this, too, failed, by a *unanimous* decision by the U.S. Supreme Court in *Long Island Care at Home, LTD v. Coke*, 551 U.S. 158 (2007).

The modification to the 1974 Compromise such groups were seeking was finally accomplished through DOL's issuance of the 2013 regulations. The 2013 regulations narrowed the definition of "companionship services"[5] and denied the exemption to all "third party employers." As to the treatment of "third party employers," DOL acknowledged as recently as 2005 that Congress intended for the companionship services exemption to apply with respect to a specific type of care, without regard to whether the provider of the care is an employee of the care recipient, the family or of a third party.[6] Thus, the 2013 regulations' denial of the companionship-services

[5] DOL explains at 78 Fed. Reg. at 60455, that "the term 'companionship services' also includes the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20% of the total hours worked per person and per work week. It defines "care" as assistance with activities of daily living and instrumental activities of daily living." This limitation subverts the very purpose of the statutory exemption. The statutory exemption defines the covered population as that portion of the elderly and disabled who "are unable to care for themselves." It necessarily follows from this definition that the exempted direct care workers are those who provide the care that the protected population is unable to provide, but which they need to remain independent. The 2013 regulations limit the amount of such care that qualifies for the exemption to 20%. This means that in order for a direct care worker to be exempt, at least 80% of the services the worker provides must be dedicated to something other than the care such individuals need to remain independent.

[6] In its 2005 DOL Advisory Opinion, DOL explains that:

> The text of the FLSA makes the applicability of the companionship exemption dependent upon the nature of an employee's activities and the place of their performance, without regard to the identity of the employer…. The statute does not draw any distinction between companions who are employed by the owners of the homes in which they are working and companions who are instead employed by third party employers…. Congress created the exemption to ensure that working families in need of companionship services would be able to obtain them, a concern that has nothing to do with the source of the companions' employment. Thus, it is unsurprising that the text of the statute focuses exclusively on the nature of the activities that companions perform and does not even hint that the source of a

exemption to third-party employers contravenes DOL's 1975 regulations and DOL's own interpretation of Congressional intent with respect to the exemption that DOL expressed in 2005.

The home-care industry instituted a legal challenge to the 2013 regulations and the U.S. District Court for the District of Columbia invalidated them.[7] DOL appealed that decision, and the U.S. Court of Appeals for the District of Columbia reversed, holding the regulations valid.[8] U.S. District Court Judge Richard J. Leon, in his decision holding the 2013 regulations invalid, characterized the DOL's actions in issuing the regulations as follows:

> Undaunted by the Supreme Court's decision in *Coke*, and the utter lack of Congressional support to withdraw this exemption, the Department of Labor amazingly decided to try to do administratively what others had failed to achieve in either the Judiciary or the Congress.[9]

III. The 2013 Regulations Reverse the Policy Choice Congress Enacted

In stark terms, DOL acknowledges in its Preamble accompanying the 2013 regulations (the "Preamble") that "[t]he primary effect [of the 2013 regulations] … is the transfer of income from home care agency (and payers because a portion of costs likely will be passed through via price increases) to direct care workers, due to more workers being protected under the FLSA…"[10] In what DOL characterizes as its "medium impact scenario," it projects an average annualized increased cost for direct care workers of $321.8 million.[11]

This flatly contravenes the economic protection that Congress sought to provide the working families of elderly and disabled individuals by enacting the 1974 Compromise – by more than $300 million per year!

IV. The 2013 Regulations Are Predicated on Government Appropriating Additional Funding for Home Care

DOL also asserts in the Preamble that "[p]ublic funds pay the overwhelming majority of the cost for providing home care services"[12] and that most such care is now funded by Medicare, Medicaid and other government programs.[13]Moreover, the adverse impact on "entities that administer a Medicaid funded or other publicly funded programs that would, under the Final Rule, be subject to the provisions relating to third-party employers because they qualify as employers

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companion's employment is a relevant factor. Presumably, if Congress had wanted to limit the companionship exemption to employees of a particular employer, it would have said so expressly, as it has done with other FLSA exemptions.

[7] *Home Care Ass'n of Am. v. Weil*, 76 F. Supp. 3d 138 (D.D.C. 2014).
[8] *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084 (D.C. Cir., 2015).
[9] *Home Care Ass'n of Am.* 76 F. Supp. 3d at 142.
[10] 78 Fed. Reg. 60454, 60456 (Oct 1, 2013) (emphasis added).
[11] 78 Fed. Reg. at 60456.
[12] 78 Fed. Reg. at 60458, note 2.
[13] *Id*.

under the FLSA's economic realities test …."[14] is undeniable.

To address this new hardship, DOL explains that "in the short run, continuation of direct care workers' current work schedules that exceed 40 hours per week may be infeasible for such entities, thus potentially resulting in reduced continuity of care for high-needs consumers. Other effects may also result from this Final Rule. Such consequences may be avoidable in the long run if Medicaid and other relevant programs adapt to allow overtime billing."[15]

Thus, DOL recognizes that the 2013 regulations will effectively prohibit direct care workers from working more than 40 hours per week under government-funded programs and that "high need consumers" will be denied continuity of care. The only solution DOL proposes to this new hardship is for government-funded programs to "allow overtime billing."

But in order for a government program to "allow overtime billing" the program will need to be restructured and additional funding for the program needs to be appropriated. Whether the federal budget can afford to increase funding for home-care programs – in lieu of other pressing demands for federal funding and in light of the current budget deficit – is uncertain. Thus far, Congress has not appropriated additional funding to enable the payment of overtime wages for government funded home care.

Finally, even if Congress were to appropriate additional funding for government-funded programs, this would not help those working families who prudently saved their money to pay for the care with their own funds.

V. Both Families and Caregivers are Worse Off Following the 2013 Regulations

In response to the admitted adverse impact its 2013 regulations will have on continuity of care for elderly and disabled individuals whom DOL characterizes as "high need," DOL remarked that "[m]odifying work patterns to increase the number of direct care workers (and therefore reduce the need for overtime compensation) does not preclude the industry from offering consumers the option to pay a higher rate in return for fewer direct care workers."[16] Of course, protecting working families against having to pay this "higher rate" is precisely what Congress sought to accomplish by enacting the companionship-services exemption.

As to the impact on direct care workers, DOL "acknowledges the potential costs to direct care workers who may receive fewer hours from their home care agency employers and therefore will have to search for and coordinate multiple jobs for an increased number of consumers."[17]

To allay this hardship, DOL "expects direct care workers who lose hours at one agency will readily be able to find an opening at another agency."[18] But such an expectation is not realistic. It does not take into account the reality that, in order for a direct care worker who is working specified hours for one client to obtain additional hours from a different client, the worker needs

[14] 78 Fed. Reg. at 60507.
[15] *Id*. (emphasis added).
[16] 78 Fed. Reg. at 60503 (emphasis added).
[17] 78 Fed. Reg. at 60507 (emphasis added).
[18] *Id*.

to find a different client who needs home care during the specific times that the current client does not. For example, for a direct care worker who provides home care for one family from 9:00 a.m. to 3:00 p.m. Monday through Friday to obtain additional hours of work from another client, the worker needs to find another client who seeks care before 9:00 a.m. and after 3:00 p.m. or only on weekends.

Not surprisingly, more than 1,000 direct care workers have signed a Petition attesting to the fact that they are now worse off than before the 2013 regulations became effective. Enclosed as **Exhibit 2** is a copy of the Petition that those direct care workers signed, to describe how the 2013 regulations affected them individually. Also, recorded testimonials of direct care workers explaining how their lives have been affected by the 2013 regulations are available at https://youtu.be/0MGE5wZN9Ys.

VI. Conclusion

PCA submits that the 2013 companionship-services regulations have harmed the working families Congress sought to protect when it enacted the 1974 Compromise, by making in-home care unaffordable. As noted, the DOL acknowledges that the cost of care is expected to increase by more than $300 million per year as a result of the 2013 regulations. And this policy change even harmed the direct care workers for whose benefit the change was ostensibly accomplished. Finally, the 2013 regulations have created new financial pressures on the already financially challenged Medicaid programs, by requiring these programs to pay FLSA wages to providers of home care to the elderly or disabled.

PCA submits that one action that would bring immediate relief to working families (and to Medicaid programs) struggling to pay for home care for the elderly or disabled is to restore the companionship-services exemption. To this end, PCA respectfully requests this Committee to encourage DOL to open a new rulemaking project to rescind the 2013 companionship services regulations and reinstate the 1975 regulations, and thereby honor the commitment Congress made to working families of elderly and disabled individuals to keep the cost of home care affordable.

Respectfully,

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Attachments

Exhibit 1

FRANCIS ROONEY
19TH DISTRICT, FLORIDA
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July 26, 2019

The Honorable Patrick Pizzella
Acting Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., NW
S-2521
Washington, DC 20210

Dear Acting Secretary Pizzella:

In 2013, during the previous Administration, the Department of Labor (DOL) issued regulations that effectively repealed the companionship-services exemption to the Fair Labor Standards Act (FLSA). We write to urge you to rescind the 2013 regulations that effectively repealed this exemption and which negatively impact the livelihoods of home health care workers and care recipients.

In 1974, Congress sought to increase the earnings of domestic workers by expanding the FLSA to include them, but at the same time sought to ensure that home care for the vulnerable population of elderly and disabled individuals, provided by "direct care" workers, remained affordable for working families. DOL finalized regulations implementing these changes in 1975. Implemented in 2015, the 2013 regulations narrowed the definition of "companionship services" and denied the exemption to third-party employers. This expanded the FLSA's overtime and minimum-wage requirements to include a large swath of "direct care" workers.

There was a legal challenge to the 2013 regulations and the U.S. District Court for the District of Columbia initially invalidated them. However DOL appealed that decision, and the U.S. Court of Appeals for the District of Columbia reversed, upholding the regulations as valid. U.S. District Court Judge Richard J. Leon, in his decision to hold the 2013 regulations invalid, characterized the DOL's actions in issuing the regulations as follows:

> Undaunted by the Supreme Court's decision in *Coke*, and the utter lack of Congressional support to withdraw this exemption, the Department of Labor amazingly decided to try to do administratively what others had failed to achieve in either the Judiciary or the Congress.[1]

[1] *Home Care Ass'n of Am. v. Weil*, 76 F. Supp. 3d 138, 142 (D.D.C. 2014).
[2] 78 Fed. Reg. at 60456

Our constituents have been directly impacted by the 2013 regulations. In what DOL characterizes as its "medium impact scenario," it projects an average annualized increase in the cost of home care of $321.8 million.[2] This increased cost will be borne by the working families who pay for the care of their loved ones, which undermines the economic protection Congress assured these working families in 1974.

As to the impact on direct care workers, DOL acknowledged "the potential costs to direct care workers who may receive fewer hours from their home care agency employers and therefore will have to search for and coordinate multiple jobs for an increased number of consumers."[3] To allay this hardship, DOL "expects direct care workers who lose hours at one agency will readily be able to find an opening at another agency."[4] Such an expectation is not realistic. It assumes that the specific times that one client needs care will directly match the times that another client does *not* need care.

DOL also acknowledged the adverse consequences on government-funded programs, such as Medicaid. DOL recognized that such programs, which already suffer under financial strain, generally do not reimburse at overtime rates,[5] but it characterized this problem as only a short-term concern, explaining that "such consequences may be avoidable in the long run if Medicaid and other relevant programs adapt to allow overtime billing."[6] "Overtime billing" is possible, however, only if additional government funding is provided to pay the overtime rates being billed – which generally has not occurred. Instead, employers have had no choice but to restrict working hours to avoid the unreimbursed costs of overtime or raise charges to those elderly and disabled clients that pay privately.

The 2013 regulations violated the Congressional intent to protect working families of elderly and disabled individuals against having to pay FLSA wages to "direct care" workers. The regulations also disrupted the entire marketplace for home care, leaving both direct care workers and the families of disabled and elderly individuals worse off and exacerbating the already significant financial pressure on government-funded home-care programs, such as Medicaid. We urge you to open a rulemaking project that considers rescinding the 2013 regulations and restoring the companionship services exemption that Congress enacted.

Sincerely,

Francis Rooney
Member of Congress

Tim Walberg
Member of Congress

[3] 78 Fed. Reg. at 60507.
[4] Id.
[5] 78 Fed. Reg. at 60507.
[6] Id.

John Rutherford
Member of Congress

Bradley Byrne
Member of Congress

Matt Gaetz
Member of Congress

David P. Roe, M.D.
Member of Congress

Ross Spano
Member of Congress

Rick Crawford
Member of Congress

Brian Mast
Member of Congress

Rick W. Allen
Member of Congress

Bill Posey
Member of Congress

Exhibit 2

PETITION

Rescind 2013 U.S. Department of Labor Regulations Modifying the Companionship Services Exemption to the Fair Labor Standards Act

To be delivered to

The United States House of Representatives

The United States Senate

President Donald Trump

Secretary of the United States Department of Labor

The home-care workers who sign this Petition hereby wish to communicate to the federal government that while they appreciate the efforts by the U.S. Department of Labor to increase their earnings by issuing new regulations in 2013 that substantially curtail the application of the companionship services exemption to the Fair Labor Standards Act ("FLSA"), the change has actually had the opposite effect of reducing our work hours with clients, and reducing our earnings, and forcing us to obtain other work in order to maintain our same level of income. We respectfully urge that these new companionship services regulations be rescinded and withdrawn, so we can, once again, work with one client for as many hours as we choose without regard to the FLSA.

1. _____ _____
Printed Name Signature

_____
Street Address

_____ _____
City State