

July 19, 2012

To ensure that all are aware of the administrative and legislative developments affecting the companionship exemption to the Fair Labor Standards Act of 1938 (the “FLSA”), the following provides an overview of the status of this issue at this time.

I. Current Law

A. Companionship Services Exempt from FLSA’s Overtime and Minimum Wage Requirements

The FLSA, at 29 U.S.C. § 213(a)(15), currently provides that the FLSA’s overtime and minimum-wage requirements shall not apply with respect 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 (as such terms are defined and delimited by regulations of the Secretary)....

U.S. Department of Labor (“DOL”) regulations, at 29 CFR § 552.6, define companionship services for these purposes to mean:

those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

B. Live-In Domestic Workers Exempt from FLSA’s Overtime Requirements

The FLSA, at 29 U.S.C. § 213(b)(21), currently provides that the FLSA's overtime requirements shall not apply with respect to—

any employee who is employed in domestic service in a household and who resides in such household....

II. DOL's Issuance of the NPRM

On December 27, 2011, the DOL published a Notice of Proposed Rulemaking ("NPRM") addressing the application of the FLSA to domestic service. This NPRM, in practical terms, would repeal the FLSA's companionship exemption and its overtime exemption for live-in domestic workers.

III. Adverse Bills

The following bills, which have been introduced in the U.S. Congress, would effectively repeal the companionship exemption.

- **H.R. 2341, the *Direct Care Job Quality Improvement Act of 2011***
 - **Introduced June 23, 2011**
 - **By Rep. Linda Sanchez (D-Cal) – Not a Member of a Committee with jurisdiction over the companionship exemption**

and

- **S. 1273, the *Direct Care Job Quality Improvement Act of 2011***
 - **Introduced June 23, 2011**
 - **By Senator Robert Casey (D-Pa) – Member of the Senate Committee on Health, Education, Labor and Pensions**

IV. Supportive Bills

The following bills, which have been introduced in the U.S. Congress, appear intended to preserve the FLSA's companionship exemption and insulate the exemption against administrative rulemaking that could eliminate or narrow the exemption.

A. H.R. 3066, the *Companionship Exemption Protection Act*

- i. **Introduced September 23, 2011**

- ii. **By Rep. Lee Terry (R-Neb)** – Not a Member of a Committee with jurisdiction over the companionship exemption

H.R. 3066 would amend 29 U.S.C. § 213(a)(15) – which defines exempt *companionship services* – as indicated by the following “red-lined” changes:

any employee employed in domestic service employment to provide companionship services (including third party non-medical in-home care such as companionship, light housekeeping, meal preparation, errands, assistance to appointments, laundry, medication reminders, bathing, and assistance with incontinence and grooming) for individuals who (because of age or infirmity) are unable to care for themselves.

B. **H.R. 5969, the Ensuring Access to Affordable and Quality Companion Care Act**

i. **Introduced June 19, 2012**

- ii. **By Rep. Tim Walberg (R-Mich)** – Chairman of the Workforce Protections Subcommittee of the House Committee on Education and the Workforce

H.R. 5969 would amend 29 U.S.C. § 213(a)(15) – which defines exempt *companionship services* – as indicated by the following “red-lined” changes:

any employee employed in domestic service employment to provide companionship services (including through third-party employment) for individuals who (because of age or infirmity) are unable to care for themselves.

29 U.S.C. § 213(a)(15).

The bill also would amend Section 3 of the FLSA by adding at the end the following:

“(z)(1) Except as provided in paragraph (2), ‘companionship services’ as used in section 13(a)(15), means those services which provide fellowship, care, and protection for individuals who, because of advanced age or physical or mental infirmity, are unable to care for themselves, including but not limited to, non-medical in-home personal care or household work related to the care of the aged or

infirm individuals (such as meal preparation, bed making, washing of clothes, errands, assistance to appointments, laundry, medication reminders, bathing, assistance with incontinence and grooming, and other similar services). Such term may also include the performance of general household work, provided that such work is incidental.

“(2) ‘Companionship services’ shall not include services relating to the care and protection of the aged or infirm which require and are performed by trained medical personnel, such as a registered or practical nurse.

“(aa) ‘Domestic service employment’ as used in section 13(a)(15), means services of a household nature performed by an employee in or about a private home (permanent or temporary), including but not limited to, employees such as cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home care aides, home health aides, personal care aides, chauffeurs of automobiles for family use, and babysitters employed on other than a casual basis.

“(bb) ‘Third-party employment’ as used in section 13(a)(15), means employees who are engaged in providing companionship services and who are employed by an employer or agency other than the family or household using their services, whether or not such an employee is assigned to more than one household or family in the same workweek to provide companionship services.”.

The bill also would amend 29 U.S.C. § 213(b)(21) – which defines exempt *live-in domestic workers* – as indicated by the following “red-lined” changes:

any employee who is employed in domestic service
“(including through third-party employment) in a
household and who resides in such household

C. S. 3280, the Companionship Exemption Protection Act

i. Introduced June 7, 2012

ii. By Senator Mike Johanns (R-Neb) – Not a Member of a Committee with jurisdiction over the companionship exemption

S. 3280 would amend 29 U.S.C. § 213(a)(15) – which defines exempt *companionship services* – as indicated by the following “red-lined” changes:

any employee employed in domestic service employment to provide companionship services (including through third-party employment) for individuals who (because of age or infirmity) are unable to care for themselves.

29 U.S.C. § 213(a)(15).

The bill also would amend Section 3 of the FLSA by adding at the end the following:

“(z)(1) Except as provided in paragraph (2), ‘companionship services’ as used in section 13(a)(15), means those services which provide fellowship, care, and protection for individuals who, because of advanced age or physical or mental infirmity, are unable to care for themselves, including but not limited to, non-medical in-home care or household work related to the care of the aged or infirm individuals (such as meal preparation, bed making, washing of clothes, errands, assistance to appointments, laundry, medication reminders, bathing, assistance with incontinence and grooming, and other similar services). Such term may also include the performance of general household work.

“(2) ‘Companionship services’ shall not include services relating to the care and protection of the aged or infirm which require and are performed by trained medical personnel, such as a registered or practical nurse.

“(aa) ‘Domestic service employment’ as used in section 13(a)(15), means services of a household nature performed by an employee in or about a private home (permanent or temporary), including but not limited to, employees such as cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides,

chauffeurs of automobiles for family use, and babysitters employed on other than a casual basis.

“(bb) ‘Third-party employment’ as used in section 13(a)(15), means employees who are engaged in providing companionship services and who are employed by an employer or agency other than the family or household using their services, whether or not such an employee is assigned to more than one household or family in the same workweek to provide companionship services.”.

V. Additional Development – Bill to De-Fund Work on Companionship Exemption NPRM

A House appropriations bill for the Department of Health and Human Services would de-fund the DOL’s ability to finalize the proposed regulations.

Pages 35-36 of an appropriations bill introduced by Rep. Dennis Rehberg (R-MT), Chairman of the Labor, Health and Humans Services, Education and Related Agencies Subcommittee of the House Appropriations Committee, currently provides:

SEC. 115. None of the funds made available by this Act may be used to continue the development of or to promulgate, administer, enforce, or otherwise implement the Application of the Fair Labor Standards Act to Domestic Service regulation (Regulatory Identification Number 1235-AA05) being developed by the Wage and Hour Division of the Department of Labor.

July 15, 2012

<http://appropriations.house.gov/uploadedfiles/bills-112hr-sc-ap-fy13-laborhhsed.pdf>

VI. Co-Sponsors of Above-Referenced Bills

The co-sponsors of the bills discussed above, as of this date, are set forth in **Exhibit 1** hereto.

VII. Conclusion

The foregoing demonstrates the results of the collaborative and vigorous efforts of caregivers, care recipients, registries and agencies that oppose the

NPRM. While the NPRM is not yet defeated, each day that goes by without the issuance by DOL of final regulations incorporating the NPRM's proposals is a day closer to achieving victory. In this regard, it is critical that we remain vigilant in our advocacy on this issue.

If you have any questions concerning the foregoing, please contact attorney Russ Hollrah at (202) 659-0878 or rhollrah@hollrahllc.com.

Exhibit 1

H.R.2341

Latest Title: Direct Care Job Quality Improvement Act of 2011

Sponsor: [Rep Sanchez, Linda T.](#) [CA-39] (introduced 6/23/2011) [Cosponsors](#)

(34)

[Rep Baca, Joe](#) [CA-43] - 1/24/2012
[Rep Baldwin, Tammy](#) [WI-2] - 7/7/2011
[Rep Braley, Bruce L.](#) [IA-1] - 6/23/2011
[Rep Brown, Corrine](#) [FL-3] - 7/21/2011
[Rep Chu, Judy](#) [CA-32] - 11/4/2011
[Rep Conyers, John, Jr.](#) [MI-14] - 7/20/2011
[Rep DeLauro, Rosa L.](#) [CT-3] - 6/23/2011
[Rep Edwards, Donna F.](#) [MD-4] - 6/23/2011
[Rep Farr, Sam](#) [CA-17] - 7/7/2011
[Rep Filner, Bob](#) [CA-51] - 6/23/2011
[Rep Frank, Barney](#) [MA-4] - 7/7/2011
[Rep Grijalva, Raul M.](#) [AZ-7] - 6/23/2011
[Rep Gutierrez, Luis V.](#) [IL-4] - 6/23/2011
[Rep Hastings, Alcee L.](#) [FL-23] - 6/23/2011
[Rep Heinrich, Martin](#) [NM-1] - 9/15/2011
[Rep Honda, Michael M.](#) [CA-15] - 6/23/2011
[Rep Jackson, Jesse L., Jr.](#) [IL-2] - 7/7/2011
[Rep Johnson, Henry C. "Hank," Jr.](#) [GA-4] - 7/7/2011
[Rep Kildee, Dale E.](#) [MI-5] - 6/23/2011
[Rep Loeb sack, David](#) [IA-2] - 7/7/2011
[Rep Lujan, Ben Ray](#) [NM-3] - 12/16/2011
[Rep McGovern, James P.](#) [MA-3] - 6/23/2011
[Rep Michaud, Michael H.](#) [ME-2] - 6/23/2011
[Rep Moore, Gwen](#) [WI-4] - 6/23/2011
[Rep Pascrell, Bill, Jr.](#) [NJ-8] - 6/23/2011
[Rep Payne, Donald M.](#) [NJ-10] - 9/15/2011
[Rep Perlmutter, Ed](#) [CO-7] - 6/23/2011
[Rep Pingree, Chellie](#) [ME-1] - 6/23/2011
[Rep Richardson, Laura](#) [CA-37] - 6/23/2011
[Rep Roybal-Allard, Lucille](#) [CA-34] - 6/23/2011
[Rep Schakowsky, Janice D.](#) [IL-9] - 6/23/2011
[Rep Sutton, Betty](#) [OH-13] - 6/23/2011
[Rep Woolsey, Lynn C.](#) [CA-6] - 7/20/2011
[Rep Wu, David](#) [OR-1] - 6/23/2011
[Rep Langevin, James R.](#) [RI-2] - 6/23/2011(withdrawn - 4/19/2012)

S.1273

Latest Title: Direct Care Job Quality Improvement Act of 2011

Sponsor: [Sen Casey, Robert P., Jr.](#) [PA] (introduced 6/23/2011) [Cosponsors](#) (8)

[Sen Akaka, Daniel K.](#) [HI] - 9/21/2011

[Sen Blumenthal, Richard](#) [CT] - 8/1/2011

[Sen Franken, Al](#) [MN] - 8/2/2011

[Sen Gillibrand, Kirsten E.](#) [NY] - 6/29/2011

[Sen Harkin, Tom](#) [IA] - 6/23/2011

[Sen Merkley, Jeff](#) [OR] - 9/7/2011

[Sen Mikulski, Barbara A.](#) [MD] - 3/12/2012

[Sen Sanders, Bernard](#) [VT] - 6/23/2011

H.R.3066

Latest Title: **Companionship** Exemption Protection Act

Sponsor: [Rep Terry, Lee](#) [NE-2] (introduced 9/23/2011) [Cosponsors](#) (23)

[Rep Barletta, Lou](#) [PA-11] - 12/16/2011

[Rep Barrow, John](#) [GA-12] - 3/26/2012

[Rep Black, Diane](#) [TN-6] - 5/31/2012

[Rep Bucshon, Larry](#) [IN-8] - 12/12/2011

[Rep Coble, Howard](#) [NC-6] - 2/17/2012

[Rep DesJarlais, Scott](#) [TN-4] - 12/7/2011

[Rep Harper, Gregg](#) [MS-3] - 10/25/2011

[Rep Kingston, Jack](#) [GA-1] - 4/16/2012

[Rep Landry, Jeffrey M.](#) [LA-3] - 10/6/2011

[Rep Latham, Tom](#) [IA-4] - 2/2/2012

[Rep Noem, Kristi L.](#) [SD] - 2/2/2012

[Rep Nunnelee, Alan](#) [MS-1] - 11/1/2011

[Rep Palazzo, Steven M.](#) [MS-4] - 2/29/2012

[Rep Paul, Ron](#) [TX-14] - 10/24/2011

[Rep Petri, Thomas E.](#) [WI-6] - 11/29/2011

[Rep Rokita, Todd](#) [IN-4] - 1/23/2012

[Rep Ross, Dennis](#) [FL-12] - 3/19/2012

[Rep Smith, Adrian](#) [NE-3] - 11/16/2011

[Rep Stearns, Cliff](#) [FL-6] - 5/8/2012

[Rep Walden, Greg](#) [OR-2] - 5/25/2012

[Rep Westmoreland, Lynn A.](#) [GA-3] - 11/3/2011

[Rep Wilson, Joe](#) [SC-2] - 2/27/2012

[Rep Womack, Steve](#) [AR-3] - 2/2/2012

H.R.5969

Latest Title: Ensuring Access to Affordable and Quality Companion Care Act

Sponsor: [Rep Walberg, Tim](#) [MI-7] (introduced 6/19/2012) [Cosponsors](#) (13)

[Rep Barrow, John](#) [GA-12] - 7/12/2012
[Rep Bucshon, Larry](#) [IN-8] - 6/29/2012
[Rep Carter, John R.](#) [TX-31] - 7/10/2012
[Rep Goodlatte, Bob](#) [VA-6] - 6/19/2012
[Rep Gowdy, Trey](#) [SC-4] - 6/19/2012
[Rep Hunter, Duncan D.](#) [CA-52] - 7/12/2012
[Rep Kelly, Mike](#) [PA-3] - 6/29/2012
[Rep Kingston, Jack](#) [GA-1] - 7/12/2012
[Rep Noem, Kristi L.](#) [SD] - 6/28/2012
[Rep Rokita, Todd](#) [IN-4] - 6/19/2012
[Rep Ross, Dennis](#) [FL-12] - 6/28/2012
[Rep Schmidt, Jean](#) [OH-2] - 6/19/2012
[Rep Terry, Lee](#) [NE-2] - 6/19/2012

S.3280

Latest Title: **Companionship** Exemption Protection Act

Sponsor: [Sen Johanns, Mike](#) [NE] (introduced 6/7/2012) [Cosponsors](#) (15)

[Sen Alexander, Lamar](#) [TN] - 6/7/2012
[Sen Boozman, John](#) [AR] - 6/7/2012
[Sen Burr, Richard](#) [NC] - 6/7/2012
[Sen Chambliss, Saxby](#) [GA] - 6/7/2012
[Sen Coburn, Tom](#) [OK] - 6/7/2012
[Sen Corker, Bob](#) [TN] - 6/7/2012
[Sen Cornyn, John](#) [TX] - 6/7/2012
[Sen Enzi, Michael B.](#) [WY] - 6/7/2012
[Sen Hatch, Orrin G.](#) [UT] - 7/10/2012
[Sen Isakson, Johnny](#) [GA] - 6/7/2012
[Sen Portman, Rob](#) [OH] - 6/7/2012
[Sen Risch, James E.](#) [ID] - 6/26/2012
[Sen Rubio, Marco](#) [FL] - 6/7/2012
[Sen Snowe, Olympia J.](#) [ME] - 6/7/2012
[Sen Vitter, David](#) [LA] - 6/19/2012