



U.S. Department of Labor Teleconferences Regarding the Companionship Exemption

Recently, the U.S. Department of Labor (“DOL”) hosted two teleconferences with the public concerning its intent to update companionship regulations to clarify when domestic service providers, who provide companionship services to the aged or infirm, are exempt from minimum wage and overtime provisions of the Fair Labor Standards Act (“FLSA”) (the “Project”). The first teleconference was held on July 25, 2011, and the second on July 27, 2011.

On July 25, 2011, Michael Hancock, Assistant Administrator for Policy in the Office of the Administrator in the Wage and Hour Division (“WHD”), acted as the primary spokesperson for DOL. On July 27, 2011, Mary Ziegler, Director of Division of Regulations, Legislation and Interpretation in the WHD, acted as the primary spokesperson for DOL. Various other DOL representatives from the WHD, the Office of Solicitor, and the Office of the Assistant Secretary for Policy were present during the teleconferences, but did not participate.

I. Summary

While the public expressed strong opinions regarding the Project, both in opposition and in support, it appears that DOL will issue a Notice of Proposed Rulemaking (“NPRM”). However, the position which DOL will take upon issuance of an NPRM is not clear. A variety of entities and individuals participated in the teleconferences, including individual caregivers, care recipients, homecare agency owners, attorneys, and representatives from a variety of advocacy organizations. Other than a brief introduction by DOL during each teleconference, DOL’s participation was limited to listening to the views expressed by the public participants. DOL did not engage in any meaningful discussion of the concerns expressed during the calls.

II. Details

With few exceptions, opinions of individual caregivers were generally directly opposed to the opinions of homecare agencies. Caregivers indicated that the companionship exemption should be narrowed, while agencies were strongly opposed to such narrowing.

A. Caregivers

Reasons set forth by individual caregivers for extending minimum wage and overtime included the following.

- The original exemption was intended for *casual* babysitters and companions, and it was always intended to reflect the casual nature of the work. The industry has changed such that

the work is no longer casual, but involves highly skilled and trained individuals. Such highly skilled and trained individuals were not originally intended to be covered by the exemption.

- The existing high turnover rate in the industry will be decreased by providing protections of minimum wage and overtime to workers, as such protections will make the profession more attractive to workers and better equip such workers to remain in the industry for longer periods of time.

B. Homecare Agencies

The vast majority of homecare agency representatives expressed opposition to narrowing of the companionship exemption. Such homecare agencies included several Senior Helpers agencies, Comfort Keepers, Home Instead, and various other smaller homecare agencies located throughout the United States. Reasons set forth by homecare agency representatives for such opposition included the following.

- Narrowing the exemption would force agencies to raise rates in order to cover costs, which would cause consumers who generally cannot afford such increased costs to choose between decreasing vital service hours and sacrificing continuity of care by utilizing more caregivers.
- Most non-medical caregivers already receive more than minimum wage. However, if the exemption is narrowed, many agencies will no longer be able to afford to employ those caregivers who presently desire to work more than 40 hours per week.
- Narrowing the exemption will encourage consumers to utilize the underground economy, in which background checks and screening processes will not take place and caregivers will be unsupervised and untrained. Though most comments did not include nurse registries as part of such “underground economy,” at least one homecare agency owner expressed this view and several insinuated that states would lose tax revenues if consumers moved to nurse registries.

C. Advocacy Organizations

Representative advocacy organizations from both sides of the issue participated in the teleconference calls. The following advocacy organizations expressed support for the narrowing of the companionship exemption:

- New Mexico Direct Caregivers Coalition
- The National Consumer Voice for Quality Long-Term Care
- The Direct Care Alliance
- National Employment Law Project

Organizations in support of narrowing the companionship exemption expressed the following.

- The caregiving industry is no longer composed of low-skilled individuals who provide companionship services only. Overall, the work is strenuous and requires high skill.

Whereas previously such workers were typically only employed by the individual to whom they provided care, now such workers are often employees of third-party companies.

- Twenty-one states and the District of Columbia have successfully implemented the protections contemplated by DOL, without creating budgetary problems or lowering quality of care.
- Turnover rates in the industry are high because the current quality of the work is poor. Continuity would be increased and turnover decreased by providing better pay.

The following advocacy organizations expressed opposition to narrowing the companionship exemption:

- Home Care Association of New York State
- National Private Duty Care Association
- Personal Attendant Coalition of Texas, associated with ADAPT of Texas

Advocacy organizations opposed to narrowing the companionship set forth the following views.

- Though increased compensation for homecare providers is wise in the abstract, enhancing pay is not viable because sufficient funding does not exist. For many, funding for services depends on Medicaid, which cannot afford to cover the increased costs which would be associated with narrowing the companionship exemption.
- A representative from the National Private Duty Care Association expressed concern that a change in the exemption could destroy Medicaid-funded state self-determination models, like one in Michigan, as individuals would no longer be able to afford care.

During both teleconferences, DOL emphasized that the views expressed therein would not become part of the official administrative record, and that when DOL issues an NPRM, any comments should be formally submitted at that time.