



Congress of the United States
House of Representatives
Washington, DC 20515-3605

September 23, 2020

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Secretary Scalia:

Families caring for an elderly or disabled family member continue to struggle with the high cost of home care. During a recent House Ways and Means Committee hearing,¹ it was estimated 24-hour in-home care costs approximately \$180,000 per year. This is simply unaffordable for most working families. As our population ages and the number of elderly individuals needing home care continues to grow,² the upward cost pressure on home care will continue.

The U.S. Department of Labor (“DOL”) can help mitigate the growing cost of home care by rescinding certain 2013 regulations (the “2013 Regulations”)³ issued by the prior Administration. These regulations effectively repealed an exemption to the Fair Labor Standards Act (“FLSA”) intended to keep home care affordable for working families. We encourage the initiation of new rulemaking to rescind those regulations.

In 1974, Congress expanded the FLSA to cover “domestic workers.” At the same time, it created the companionship-services exemption, contained in 29 U.S.C. §213(a)(15), to exempt home care for elderly and disabled individuals from the expansion. The exemption was intended to ensure home care would remain affordable for working families with an elderly and disabled family member. DOL explained this compromise (the “1974 Compromise”) in a 2005 advisory memorandum as follows:

. . . 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

¹ *Caring for Aging Americans*, Ways & Means Committee, U.S. House of Representatives (Nov. 14, 2019).

² BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, *Occupational Outlook Handbook, Home Health Aides and Personal Care Aides*, available at <https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm> (last visited Jan. 10, 2020) (“Employment of home health aides and personal care aides is projected to grow 36 percent from 2018 to 2028, much faster than the average for all occupations. As the baby-boom population ages and the elderly population grows, the demand for the services of home health aides and personal care aides will continue to increase.”).

³ *Application of the Fair Labor Standards Act to Domestic Service*, 78 Fed. Reg. 60,454 (Oct. 1, 2013).

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).⁴

The following year, in 1975, DOL issued regulations (the “1975 Regulations”) clarifying the application of the companionship services exemption.

Critics of the 1974 Compromise attempted a legal challenge to the 1975 Regulations and introduced legislation which would undo the exemption on several occasions.⁵ These attempts were unsuccessful, as the Courts upheld the regulations and Congress continued to oppose expanding FLSA coverage at the expense of keeping home care affordable for families of the disabled and elderly.

Despite the lack of legislative support for undoing the 1974 Compromise, the Obama Administration took unilateral executive action to change the status quo by issuing the 2013 Regulations. This effectively repealed the statutory companionship services exemption by narrowing the definition of “companionship services” and denying the exemption to third-party employers.

The Obama Administration’s clear desire to circumvent Congress regarding this exemption spurred a legal challenge to the 2013 Regulations and the U.S. District Court for the District of Columbia invalidated them. DOL appealed the decision, and the U.S. Court of Appeals for the District of Columbia reversed, holding the regulations valid. The U.S. District Court in its decision finding 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.⁶

The 2013 Regulations have significantly increased the cost of home care for working families. As DOL acknowledges in its Preamble accompanying the 2013 Regulations, “[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

⁴ WAGE AND HOUR ADVISORY MEMORANDUM No. 2005-1 (Dec. 1, 2005), titled *Application of Section 13(a)(15) to Third Party Employers* (emphasis added).

⁵ See *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); see also *Long Island Care at Home, LTD v. Coke*, 551 U.S. 158 (2007).

⁶ *Home Care Ass'n of Am. v. Weil*, 76 F. Supp. 3d 138, 142 (D.D.C. 2014).

more workers being protected under the FLSA...”⁷ In what DOL characterized as its “medium impact scenario,” it projected an average annualized income transfer to direct care workers of \$321.8 million.⁸ In substance, this transfer of income contravenes the economic protection the Congress sought to provide working families of elderly and disabled individuals. Based on DOL’s own estimate, the 2013 regulations contributed to an increase in the cost of home care by more than \$1.6 billion over the five years the regulations have been in effect. Hardworking American families cannot sustain this enormous burden.

Each day, more Americans are reaching a point in their life when they might need home care to remain independent. But home care is quickly becoming a luxury only the very wealthy can afford. This is precisely what Congress sought to avoid, when it enacted the companionship-services exemption. We urge the DOL to open a new rulemaking project to rescind the 2013 Regulations and reinstate the 1974 Compromise the Congress struck when it enacted the companionship services exemption – to keep home care affordable for working Americans.

Sincerely,



Adrian Smith
Member of Congress

Jeff Fortenberry
Member of Congress

Don Bacon
Member of Congress

Brian Mast
Member of Congress

Gus Bilirakis
Member of Congress

Bill Posey
Member of Congress

Bradley Byrne
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Ross Spano
Member of Congress

Neal P. Dunn, M.D.
Member of Congress

Ted S. Yoho, D.V.M.
Member of Congress

⁷ 78 Fed. Reg. 60454, 60456 (Oct 1, 2013) (emphasis added).

⁸ 78 Fed. Reg. at 60456.