NAMD
National Association of Medicaid Directors

March 21, 2012

Thomas Markey
Acting Administrator
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Attn: Fair Labor Standards Team
200 Constitution Avenue NW
Washington, DC 20210

Subject: Comments on the Application of the Fair Labor Standards Act to Domestic Service Proposed Rule (RIN 1235-AA05)

Dear Mr. Markey,

On behalf of the nation's Medicaid directors, the National Association of Medicaid Directors (NAMD) is submitting comments on the proposed rulemaking entitled, "Application of the Fair Labor Standards Act to Domestic Service."

NAMD is a bipartisan, professional, nonprofit organization representing the nation's 56 state and territorial Medicaid agencies, including the District of Columbia, whose mission is to represent and serve state Medicaid Directors. Medicaid is responsible for the financing, delivery and oversight of services that are addressed in this proposed regulation. For 2009, Medicaid was the single largest payer at $126.8 billion, or 43.1 percent, of spending on long term services and supports (LTSS). Thus our members have a unique, critical perspective to offer as the Department of Labor reconsiders the application of the Fair Labor Standards Act (FLSA).

Under the current law, domestic companions are exempt from the requirements of the FLSA with regard to minimum wage and overtime. The proposed rule amends the regulations to revise the definition of companionship services; clarifies the criteria used to judge whether employees qualify as trained personnel; amends record-keeping requirements for live-in domestic workers; and amends the regulations to third party providers of companionship services to pay minimum wage and overtime. It also extends the FLSA to many in-home caregivers who may have previously fallen within the statute's exemption for "companionship services."

The National Association of Medicaid Directors respectfully requests consideration of the comments and questions contained herein. Medicaid Directors believe that the availability of appropriately trained workers is essential to providing adequate care to seniors and people with disabilities. As a part of that, we share your concern that qualified, direct care workers who are employed by agencies are given appropriate wage and hour safeguards, and are happy to continue to engage on this issue. However, we do have significant concerns around the large number of workers who are not hired by agencies but are engaged directly by the person receiving care or their family. NAMD's recommendations are summarized as follows:

- The Department should revise its assessment of the proposed rule's impact on Medicaid programs to accurately reflect the multitude of innovative and successful structures and financing arrangements for Medicaid home and community based services (HCBS) state plan and waiver programs and other programs designed to improve community living and integration.

- The Department should revisit any conversations it had with the Department of Health and Human Services' Centers for Medicare and Medicaid Services and state Medicaid agencies who, under the federal-state Medicaid partnership, are among the major payers of the care and services implicated in this rule.

- The Department should reevaluate the rule's administrative reporting requirements and thresholds for companions and live-in caregivers, which as proposed, are overly burdensome and impractical to administer.

Impact on Medicaid program financing and scope of services

The proposed rule is fundamentally flawed in its portrayal of the current scope of policies governing Medicaid programs, specifically the structure and financing of home and community based state plan and waiver programs. In turn, the Department significantly misunderstands the impact of the proposed language on such programs.

The Medicaid program is the major source of public funding for long-term services and supports provided in home and community settings. The Medicaid statute provides states with some alternative ways to increase the availability of home and community

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services while appropriating managing the costs of those services. As states have worked toward the goal of integrating seniors and persons with disabilities into the community, as appropriate, most have undertaken a process of fundamentally rethinking how programs should be structured and how long-term care resources should be allocated.

Medicaid home and community based services programs are structured as both state plan programs and as waiver programs with defined funding levels. Many states provide home and community based care to those who need such care to remain safely in their homes under their Medicaid State Plan. And practically every state operates multiple HCBS waiver programs at once, each offering a distinct package of services and supports to a different group of individuals. These choices combine to give states considerable latitude in deciding which services and supports will be offered and in customizing benefit packages to meet the needs of particular groups.

While intended to expand fair labor protections to domestic workers, we are concerned the regulation instead could also make home and community based care more expensive for many state Medicaid programs and could have unintended consequences for certain populations in some states, such as more people moving into expensive institutional settings because in-home care is no longer affordable.

In many state Medicaid programs, there is a high proportion of providers who are relatives of their recipients. Entitling overtime for domestic workers, as currently defined in the proposed rule, could dramatically increase costs while not increasing the overall hours or quality of service being provided. Therefore, maintaining the current level of consumer choice of provider could either become more expensive, or be sacrificed in favor of cost control.

Further, the preamble discussion suggests that Medicaid rates will increase and offset the additional costs associated with the proposed changes. However, we believe this analysis is flawed and contrary to the likely outcomes given the limitations on federal and state resources that shape the scope of state Medicaid programs. States simply do not have an unlimited supply of resources. Therefore, states that anticipate paying higher rates for these services as result of the provisions of this proposed rule believe the number of people served could decline, the amount of services provided could decrease, choice of providers could be limited, or all of the aforementioned.

Based on our reading, as proposed the federal regulations would allow a recipient to claim the companionship exemption. However, we are concerned that the proposed rule could have adverse financial impacts for some states depending on their state specific

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programs, policies, and governmental structure. Specifically, it could produce an outcome where a recipient who selects and directs the work of their provider can thereby create a county or state liability for payment of overtime wages that the recipient is exempt from paying. NAMD requests that the Department revise language pertaining to the exemption to ensure it applies to any other entities potentially considered the employer as well, for example state government, a public authority, or other entities as appropriate.

NAMD requests that the Department provide additional supporting documentation and analysis for its projections as we believe they have not sufficiently considered other credible projections and analysis of federal and state expenditures – including projections and state fiscal analyses issued by the CMS' Office of the Actuary and the National Association of State Budget Officers. In addition, we urge the Department to supplement its current analysis of the impact of this rule with more rigorous research that incorporates an accurate representation of state Medicaid programs and financing approaches for programs implicated in by this rule.

Impact on integration innovations in state Medicaid programs

Many state Medicaid programs have made significant progress to improve the appropriateness of the care setting and the quality of services available to Medicaid enrollees, particularly those who receive services in their homes and communities. NAMD is concerned the rule could undermine many successful programs that state Medicaid agencies have built in partnership with the Centers for Medicare and Medicaid Services and with input from providers and beneficiaries, particularly programs focused on improving options for community living and integration for persons with disabilities and elderly individuals. In addition, NAMD is concerned the proposed rule may erect barriers to evolving and innovative efforts to deliver care in the most appropriate setting and to the greatest extent possible, based on the individual's preferences.

The Medicaid "Cash and Counseling" demonstration program is one example of an innovative program operating in several states that could be adversely impacted by provisions of this proposed rule. The proposed rule could have the unintended effect of limiting the availability of family and friends as paid attendants in consumer directed personal assistance programs, reducing the available workforce and potentially forcing beneficiaries, primarily frail seniors and people with disabilities, into unwanted institutional placement. The proposed change could also limit access to paid family caregivers, which have become a common solution to the shortage of traditional home care workers.

Paid family caregivers are not typically career attendants. Rather they are usually close family members and friends who willing to help the individual. The proposed DOL changes would limit the hours these individuals would be able to work, reducing the availability of attendants. By reducing the overall availability of this vital component of the attendant workforce, this DOL policy change could increase the strain on the home care system that many states have or plan to transform.

Impact on quality of care. NAMD requests that the Department undertake further analysis of the impact the proposed rule could have on the quality of care for Medicaid enrollees. That is, while higher pay is arguably related to provider continuity through diminished workforce turnover, the requirement to apply overtime payment provisions to current caretakers could have serious unintended consequences. These might include efforts to avoid overtime compensation obligations by requiring more providers each with fewer hours per recipient and more people needing training by the recipient to meet his/her individual needs. This could disrupt the continuity and quality of care for the individual beneficiary.

Scope of definition of providers of care. NAMD also believes that the proposed regulation inappropriately treats all providers of domestic services in the same manner, without regard to their licensure or certification or the types of services or care they provide. We request that DOL consider that the definitions of accreditation, certification or other requirements, if any, for such support staff vary dramatically across states.

For example, the Department proposes to extend the FLSA to registered nurses (RNs) and licensed practical nurses (LPNs) as well as to <u>unlicensed</u> direct support staff who are the primary providers of "companionship services." Cooks, butlers, valets, maids, housekeepers, janitors, laundresses, caretakers, handymen, gardeners and family chauffeurs are performing tasks that are primarily directed at maintaining a household and do not constitute hands on care of a person in the home. Domestic service workers such as home health aides and personal care aides, on the other hand, are focused primarily on providing hands on care and assistance with activities of daily living that enable a person to continue living safely in the community. They are fundamentally different in scope and focus, and we request that these not be treated in the same manner.

Impracticality and burden of administration

NAMD requests the Department revise its approach for establishing a "20 percent" threshold. While tasks that are more consistent with "homemaking duties" such as meal preparation or laundry are not intended to be the primary functions of a companion, establishing a percentage (i.e., 20 percent) which then requires that the minutes apportioned to each task throughout a shift (or for live-in caregivers, a 24-hour period), is burdensome and impractical, if not impossible to administer. We are concerned that the impracticality of implementing this approach may threaten the innovative and successful companionship arrangements that it actually means to leave exempt.

NAMD also requests that the Department clarify how the 20 percent rule is envisioned to be calculated. For example, how is it calculated in the case of a 24-hour live-in arrangement? We are concerned about potential ramifications of the rule sweeping aside companionship arrangements that truly fit the criteria, but cannot continue because of the impossibility of administering the rule. Again, the unintended consequences could include an individual having to deal with multiple shift workers coming into their home, managing them, forming relationships and building trust, etc.

In addition, states impacted by this regulation would need sufficient lead time to budget and plan for any systems changes that would be required to comply with the reporting and subsequent oversight responsibilities attributable to the rule. NAMD requests that the Department consider and adjust its fiscal analysis to reflect these additional expenditures to the federal and state governments and seek additional state input on reasonable timeframes.

On behalf of the nation's Medicaid directors, we thank you for the opportunity to comment on this proposed rule. We look forward to continuing to work with the Department on these issues throughout this rulemaking process and beyond. If you have any questions or concerns about these submitted comments, please do not hesitate to contact Andrea Maresca, NAMD's Director of Federal Policy and Strategy at andrea.maresca@namd.us.org.

Sincerely,

Andy Allison
Director, Division of Medicaid Services
State of Arkansas, Department of Human Services
President, NAMD

Darin J. Gordon
TennCare Director
State of Tennessee, Department of Finance and Administration
Vice President, NAMD

Cc: Ms. Cindy Mann, J.D., Deputy Administrator and Director, Center for Medicaid and CHIP Services, Centers for Medicare and Medicaid Services

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Office of Advocacy
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Advocacy: the voice of small business in government

March 12, 2012

VIA ELECTRONIC SUBMISSION

The Honorable Hilda Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Mary Ziegler
Director
Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
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Washington, DC 20210

Re: *Application of the Fair Labor Standards Act to Domestic Service-Notice of Proposed Rulemaking;* 76 *Fed. Reg.* 81190 (December 27, 2011).

Dear Secretary Solis and Ms. Ziegler,

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) is pleased to submit these comments to the Wage and Hour Division of the U.S. Department of Labor (DOL) regarding its proposed rule entitled, *Application of the Fair Labor Standards Act to Domestic Service*.

Advocacy appreciates DOL's attempt to try to quantify the costs of this rule for small business. Small business representatives have told Advocacy they want DOL to seek regulatory alternatives to this rule.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. The Regulatory Flexibility Act (RFA),[1] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[2] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives in an Initial Regulatory Flexibility Analysis (IRFA).[3]

Background

Companion care workers are non-medical aides that provide the elderly and infirm with assistance with basic daily living activities and fellowship. Currently, an employee hired as a companion cannot spend more than 20 percent of the total weekly hours worked doing general housework. Over 90 percent of home care companies are considered small businesses under the SBA definition of less than $13.5 million dollars in annual revenue.[4]

Under the Fair Labor Standards Act (FLSA), companion care services are exempt from minimum wage and overtime requirements; live-in companion care services are exempt from overtime requirements. The proposed rule would limit the companion care exemption to those employed by the family or household using those services. Third party employers could no longer claim the exemption.[5]

Small Entities Have Expressed Concerns with the Proposed Rule

Advocacy recently hosted a small business roundtable attended by DOL staff and small business representatives in the companion care industry including trade associations, registries, and independent and franchise companion care agencies from across the country. The following comments are reflective of the issues raised during the roundtable discussion and in subsequent conversations with small business representatives.

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[1] 5 U.S.C. § 601 et seq.
[2] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).
[3] 5 U.S.C. § 603, 605.
[4] SBA Office of Advocacy, *Employer Firms, Establishments, Employment and Annual Payroll Small Firm Size Classes, 2007*, based on data provided by the U.S. Census Bureau, available at: http://www.sba.gov/advocacy/849/12162 (Statistics of U.S. Businesses). Advocacy analyzed the NAICS codes for home health care services (621610) and services for the elderly and persons with disabilities (624120). According to this data, about 91 percent have annual revenues of under $10 million dollars.
[5] 76 *Fed. Reg.* at 81190.

1. Small business representatives recommend that DOL reevaluate the private-pay sector of the companion care industry in the agency's IRFA. Roundtable participants believe that DOL's economic analysis should include data from funding sources other than Medicare and Medicaid. At the roundtable, small business representatives presented new industry surveys and data on the companion care industry. This data shows that there are a large number of small companion care businesses in the private-pay sector.[6] The data also shows that a substantial portion of companion care services are provided by the private-pay sector.[7]

2. Small business representatives believe that DOL's economic analysis underestimates the incidence of overtime worked by companion care workers; this may minimize the economic impact of eliminating the overtime exemption in the companion care industry.[8] Small businesses have told Advocacy that they are not likely to be able to increase their rates to pay for their workers' overtime hours.

3. Small business representatives report that they may restrict the hours of their current employees to control overtime costs. These small employers anticipate managerial and human resources costs to reschedule current employees to avoid overtime and to hire new employees to keep up with current client demand. Small businesses recommend that DOL include these compliance costs in the IRFA.

Small Entities Recommend Regulatory Alternatives

Small business representatives at Advocacy's roundtable also discussed alternatives to this rulemaking that may minimize costs, including provisions from state laws on companion care workers.

1. Allow Third Party Employers to Utilize Exemption for Live-In Workers

A majority of small businesses attending Advocacy's roundtable supported the regulatory alternative of allowing third party employers to continue to utilize the overtime exemption for live-in workers, a provision that has been adopted by state legislatures of Michigan, Nevada and Washington.[9] Small businesses are most concerned with the cost of providing overtime to their live-in workers, because these situations have the most overtime and are the most difficult to reschedule with multiple workers.

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[6] *See* comment letter from Joseph H. Hafkenschiel, President, California Association of Health Services at Home to DOL, p. 6 (January 13, 2012) (*CAHSAH Comment Letter*).
[7] *Companionship Services Exemption Survey*, Private Duty Home Care Association, an affiliate of the National Association for Home Care & Hospice, and the National Private Duty Association, p.7 (Forthcoming March 2012).
[8] *See Economic Impact of Eliminating the FLSA Exemption for Companionship Services*, IHS Global Insight, prepared for by the IFA Education Foundation, p. 12 (Feb. 21, 2012).
[9] Michigan Comp. Laws § 408.382(c); Nev. Rev. Stat. § 608.250(2)(b).; Wash. Rev. Code § 49.46.010(5)(j).

2. Calculate Nighttime Hours Differently

DOL's current regulations only allow employers to exclude nighttime and meal hours for employees that are required to be on duty for 24 hours.[10] In Minnesota and North Dakota, the state laws exclude the overnight hours from 10:00 p.m. to 9:00 a.m. (up to 8 hours) from the "hours worked" for purposes of minimum wage and overtime calculations.[11]

3. Calculate Overtime Hours at Reduced Rate

Under New York state law, there is overtime coverage for all companion care workers but those employed by third party agencies receive overtime at a reduced rate of 150% of the minimum wage (rather than the usual 150% of their regular rate of pay).[12]

4. Clarify that Registries Are Not Third Party Employers

A representative of the Private Care Association, an organization that represents approximately 250 caregiver registries, expressed concern that the rule would affect caregiver registries that provide background screening and credential verification for caregivers and refer them to persons seeking a pre-vetted caregiver. This representative recommended that DOL should clarify that the term "third party employer" does not include a caregiver registry.

5. Delay Compliance Time/ Effective Date

Roundtable participants recommended that whatever changes to the companion care exemption are made, DOL provide a delay of this rulemaking to allow small business to change their business practices.

Conclusion

Small business representatives have told Advocacy that this rule will affect the companion care industry. Because DOL's IRFA was published before Advocacy's roundtable, it does not fully reflect all the information provided regarding the impact of this rule. Therefore, Advocacy recommends that DOL review the published IRFA to consider the impact and regulatory alternatives as required under the RFA.

[10] 29 C.F.R. § 785.22 (2010).

[11] Minn. Stat. § 177.23 (11); N.D. Cent. Code §34-06-03.1. In Minnesota, state law requires payment of minimum wage and overtime after 48 hours, and the payment of minimum wage for at least four hours associated with the overnight stay. In North Dakota, nighttime hours where the companion is available to provide care but does not actually do so need not be compensated.

[12] If DOL adopts this alternative, it should require that overtime hourly wage is at least the same as the regular rate of pay.

Please contact me or Janis Reyes at (202) 205-6533 (Janis.Reyes@sba.gov) if you have any questions or require additional information.

Sincerely,

Winslow Sargeant

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cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs