

**ANCOR Comments regarding "Application of the Fair Labor Standards Act to
Domestic Service"
DOL Listening Session August 19, 2013**

My name is Barbara Merrill, and I serve as Vice President of Public Policy for ANCOR, the American Network of Community Options and Resources. ANCOR represents over 700 private providers of services to people with significant disabilities. We are the largest national trade association for providers of services for people with IDD, and our members represent the full spectrum – from the smallest of agencies to the largest multi-states service providers operating across the country.

ANCOR appreciates this opportunity to share our concerns with the proposed regulation today, but in the interest of brevity I will not repeat the points contained in our original comments and our June 20th letter to OMB, and will only focus on a few key points:

- As the department considers the financial impact of this regulation, we urge you to not analyze the changes in isolation, and ask that you consider the following facts:
- Removing the exemption for people with disabilities who self-direct their own services and for provider agencies that provide in home support staff will result in a reduction in service for people with disabilities. People will not be able to purchase as many hours of service, and agencies will not be able to pay overtime, which will result in people with disabilities having to cope with shift workers, and far less continuity of service. That is because:
- Medicaid-funded HCBS providers are price-takers, not price-setters. Providers of services for people with intellectual and developmental disabilities (IDD) rarely, if ever, have sources of funding other than Medicaid, and thus are simply unable to cost-shift to commercial insurance, private pay, or other government programs.

- If the rule is changed, it is doubtful that states will increase rates to account for the increased costs of providing services. Despite the improving economy, state budgets have not fully recovered from the recent recession – which included years of deep state level cuts to Medicaid services, rates to providers, and multiple other state spending programs.
- According to a June 2013 report from The Center on Budget and Policy Priorities, overall state tax revenues are likely to remain more than 3 percent below pre-recession levels, after adjusting for inflation. The Center also cautions that, because much of the recent growth is one time in nature and is likely to slow again, states should use budget surpluses for one time expenditures, as opposed to ongoing costs.
- Furthermore, it is important for DOL to understand that IDD providers and their Medicaid payors are also facing another significant financial challenge – complying with the employer provisions of the Affordable Care Act. Our members employ low-wage workers, many of whom cannot afford to purchase employer sponsored health care coverage. ANCOR has strongly supported the ACA from its inception, and our members are supportive of our direct support professionals having health care coverage. However, the cost to comply with the ACA will be substantial to our members, with their health care costs increasing 15 – 50%.

Thank you again for this opportunity to be heard. We appreciate the Department's commitment to direct service workers, and we share that passion. The members of ANCOR have worked for over a decade to advocate at both the state and federal level to recognize the importance of the direct service workforce, and ANCOR has long supported federal legislation to offer states an increased Medicaid match to address wages. Going forward, we invite the Department to work with us, and with CMS/HHS, to create positive incentives to address the critical issues of retention and turnover.



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June 20, 2013

Brenda Aguilar
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building, Room 10235
725 17th Street, N.W.
Washington, DC 20503

RE: OMB Review of Department of Labor's Proposed Changes to the Application of the Fair Labor Standards Act to Domestic Service, RIN 1235-AA05

Dear Ms. Aguilar:

ANCOR submitted comments on the DOL Companionship proposed rule during the original comment period. The purpose of this letter is to strongly recommend that the Office of Management and Budget (OMB) return the final draft rule currently under its review to DOL to conduct a thorough impact analysis. In the alternative, if DOL intends to finalize the rule without significant revision, ANCOR recommends that implementation be delayed or phased in over at least a three year period to enable states that utilize the exemption time to identify additional sources of revenue to pay for the costs associated with compliance.

In addition, ANCOR requests the Department of Labor – in collaboration with the Department of Health and Human Services and the Centers for Medicare and Medicaid Services – to work with ANCOR to develop and implement a federal initiative incentivizing states to address the adequacy of wages for the direct support workforce.

ANCOR represents over 700 private providers of services to people with significant disabilities. Although the majority of our members provide community supports to people with intellectual and developmental disabilities (IDD), many of our member agencies also serve people with physical disabilities, brain injuries, frail elders and people with mental illnesses/behavioral health challenges. We are the largest national trade association for providers of services for people with IDD, and our members represent the full spectrum – from the smallest of agencies to the largest multi-states service providers operating in the country.

ANCOR is concerned that there has been a lack of due diligence in the proposed rule's economic impact study. DOL's assertion that: 1. home care agencies will try to pass the increased costs resulting from the narrowing of the companionship exemption through to Medicare and Medicaid and, 2. that only private pay individuals may be institutionalized, is based on a flawed understanding of the Medicaid system.

Medicaid-funded HCBS providers are price-takers, not price-setters. Furthermore, providers of services for people with intellectual and developmental disabilities (IDD) rarely, if ever, have sources of funding

other than Medicaid, and thus are simply unable to cost-shift to commercial insurance, private pay, or other government programs.

Medicaid home and community based services are most frequently offered through 1915 (c) waiver programs with defined funding levels. Unlike state plan services, these HCBS waivers are not entitlements; rather, states can target services to particular populations, limit the number of people who will be served, and limit the amount of money that the state will spend on a particular service. Under this zero-sum model, providers will not be able to bill Medicaid for increased costs. In some states, the increased expenses will risk the cost-neutrality of the affected HCBS waiver programs, imperiling the programs' ability to continue and resulting in increased institutionalization.

Furthermore, state plan services' reimbursement rates are based on units of service and therefore do not increase for overtime hours (which providers are mandated to pay at a higher rate). If states do not increase rates to account for overtime, IDD services will be restricted or changed in a manner that will disrupt continuity of care, and jeopardize the ability of people to stay in their own homes. If this proposed rule is finalized without significant change, it is important to have a clear understanding of the impact this will have on HCBS systems so that this impact can be mitigated by other policy changes.

ANCOR submits these comments with a high level of understanding of the complexity of this issue, and of the overarching need to recruit and retain a well-trained and appropriately compensated workforce. Quality home and community supports require a stable workforce. For over ten years our association has identified low wages and related compensation for the direct support workforce as the central focus of our National Advocacy Campaign. **Our approach has been to advocate for financial incentives to states to address this issue – as opposed to solutions that constitute unfunded mandates to the states.** As such, ANCOR worked with Congressman Caps and Congressman Terry in support of the Direct Support Professionals Fairness and Security Act of 2009, which was introduced in the House of Representatives in the 109th, 110th and 11th Congresses, and in the Senate in the 109th Congress.

This legislation would have amended title XIX of the Social Security Act to provide optional funds to States to enable them to increase the wages paid to targeted direct support professionals who serve individuals with disabilities under the Medicaid Program. The legislation was not reintroduced due to the impact of the Great Recession and the deficit reduction debate; subsequently advocates and providers focused solely on the preservation and protection Medicaid – hardly an environment conducive to growing the program to address the critical issue of inadequate compensation for direct support professionals.

We provide that background to emphasize our commitment to finding a solution for the larger issue, and to put our comments on this proposed rule into perspective. Our concern is that the proposed rule will likely exacerbate the most significant barrier to ensuring adequate wages for direct support workers, which is inadequate funding based on state rate methodologies that perpetuate low wages for direct support staff – regardless of whether they provide in home companion services or are employed in group home or other settings. We believe that, in the absence of increased rates, the actual result will be that providers will limit hours for employees, subjecting people served to a revolving door of caregivers; or the greater utilization of independent contractors. Both alternatives may lead to a decrease in the quality of service to those in need of direct support services.

In light of the majority of states having cut services, and slashed rates to providers, if the proposed rule is implemented as proposed, the result will be competition for limited Medicaid funding between services for people with disabilities and compensation for direct support staff. States are only just

emerging from multiple years of overwhelming budget deficits, and many maintain significant waiting lists for Medicaid funded home and community services.

According to 2013 The State of the States in Developmental Disabilities¹, the 2011 national waiting list for residential services for people with intellectual and developmental disabilities numbered 115,059 people, and 740,000 people were residing with aging caregivers. In 2011, 31 states reduced overall spending for IDD services. Furthermore, many states are also under pressure from the Department of Justice to move people off waiting lists, through its enforcement of the Supreme Court's ruling in Olmstead v. L.C.².

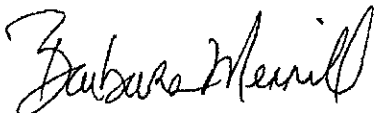
Please recognize that our professional expertise and interest is rooted in the needs of those who access our members' services. Many commenters on this NPRM have drawn the distinction between utilization of the exemption for so-called non-professional, informal caregivers, and direct support workers that are employed by provider agencies or third party entities. While this distinction is valid in as much as relatives and shared living providers should not be considered employees in the traditional sense of the term, the relationship between the person with a disability and a "professional" direct care worker is often just as close, and in many cases, is virtually identical. Many people with IDD do not have active family involvement, and direct support professionals become their staff, their friends, and their family. Many state institution, private group home, and in-home support staff have become so close to the people they support that they have become host home/shared living providers – literally taking them home to become part of their families.

Continuity of care is extremely important for many people with significant disabilities, particularly for people who have exhibited extremely challenging behaviors. Skilled direct support professionals work to earn the trust of these individuals and support them to achieve outcomes that seemed unattainable, but it is almost always on an individual basis, and staffing changes can set back months and sometimes years of progress. It is not uncommon for a person who required a staffing ratio of 2:1 while residing in an institution or group home (and thus receiving supports from a changing array of shift workers), to progress to the point of only needing one person's support once transitioned to their own home.

For the foregoing reasons, ANCOR urges OMB to return the draft final rule to DOL, and work with CMS to better assess the likely impact of the proposed rules on the Medicaid-funded sector of the direct care profession, both in general, and specifically with regard to:

- The fiscal impact of compliance for states, providers and individuals with disabilities, and
- The impact to the provision of services to individuals with disabilities, including costs to states for such aspects of the Medicaid system as paid family caregivers and innovative arrangements such as shared living.

Respectfully submitted,



Barbara Merrill, Vice President for Public Policy
ANCOR

¹ Braddock, D., et al. State of the States in Developmental Disabilities, Preliminary Edition, 2013

² Olmstead v. L.C. ex rel Zimring, 527 U.S. 581 (1999)