

March 21, 2012

Mary Ziegler, Director  
Division of Regulations, Legislation and Interpretation  
Wage and Hour division  
U.S. Department of Labor, Room S-3502  
200 Constitution Avenue, NW  
Washington, DC 20210

RE: RIN 1235-AA05

Application of the Fair Labor Standards Act to Domestic Service (Document ID WHD-2011-0003-0001)

Dear Ms. Ziegler:

The National Consumer Voice for Quality Long-Term Care and the undersigned organizations that advocate on behalf of long-term care consumers support the Department of Labor's proposed rule that would narrow the current exemption of home care workers from the minimum wage and overtime protections under the Fair Labor Standards Act (FLSA).

Home care workers provide care for the consumers for whom we advocate which far exceeds simple companionship. In fact, many individuals who receive care and services in their homes could not do so without home care workers. They rely upon workers for help with intimate personal care and for the tasks of everyday life. If not for their workers, many home care consumers would not even be able to get out of bed in the morning or out of their wheelchairs at the end of the day.

Home care workers are vital to the delivery of quality care for elders and persons with disabilities. As one consumer told us, "My workers make all the difference in the world. Without them, I would be in a nursing home." Yet despite their important work, home care workers are very poorly paid - with some not even receiving minimum wage and overtime protections.

Narrowing the current exemptions of home care workers from the FLSA would give these essential workers basic protections that they should have received decades ago. These protections would be an important step toward greater financial stability, improved working conditions and better lives for personal care aides/attendants and home care aides.

*The National Consumer Voice for Quality Long-Term Care (formerly NCCNHR) is a 501(c)(3) nonprofit membership organization founded in 1975 by Elma L. Holder that advocates for quality care and quality of life for consumers in all long-term-care settings.*

**Extending FLSA protections to home care workers would also benefit consumers by improving the availability, continuity and quality of care they receive at home.**

### **Availability**

**Implementation of the proposed change would help increase the number of workers available to assist consumers.** Currently, there are not enough workers to provide all the care a consumer needs or to fill in when a worker is out due to illness, injury or other reasons. One home care consumer shared with us that she can only receive one bath a week because there are not enough home care aides to come in more frequently. Another home care consumer told us that when her morning personal attendant cannot come and there is no one for back-up, she has to remain in her bed until her evening worker arrives. On the occasions when this has happened, she has been forced to remain soiled and wet all day long.

Giving workers basic labor protections would:

- Attract more and better qualified workers, helping to ease the chronic recruitment problems in home care. This would make it easier for both agencies and consumers to find workers to hire. As one advocate stated:

*“If this rule is changed, it will go far to help families to find a larger pool of workers to support aged family members to stay in their homes.”*

- Decrease the turnover rate. Home care workers leave the direct care workforce at an alarming rate because they have to work long grueling hours in order to make ends meet, are stressed and worried about their financial situation, and feel undervalued by not even having the same rights as all other American workers – including those who do the very same work in long-term care facilities. Increasing wages would give home care workers more economic security, reduce the stress and strain of working extended hours, and send a message that their work deserves respect. This would reduce the number of workers who quit to find another job that pays more. One advocate told us:

*“Improving wages for home health care workers is one step toward securing/maintaining a stable workforce.”*

### **Continuity**

**Implementation of the proposed rule would increase continuity of care.** The staggeringly high rate of turnover - as high as 50-60% - means that consumers are frequently cared for by different workers or not at all, as noted above. Extending FLSA protections to home care workers would increase the number of people who want to do this vitally important work, thus increasing the probability that consumers will have the same worker more than once.

### **Quality**

**Implementation of the proposed rule would improve the quality of care.**

Giving home care aides and personal care aides/attendants minimum wage, overtime protections, and pay for travel time would improve quality of care in a number of significant ways:

- Receiving the same protections as other workers would make home care workers no longer feel like second-class citizens. It would also communicate that society respects caregiving, not as “glorified babysitting,” but as an important profession. As a result, workers would feel more appreciated and more pride in the work they do, which in turn, could result in improved care.

Consumers recognize this strong connection between quality and feeling valued.

*“These workers work very hard and deserve to make better money. When people are appreciated they do provide better care.”*

*“As a daughter of a woman for whom we needed in home care, I fully support the NCV's efforts in supporting this rule. Poor wages mean poor disposition toward [the] client. Period.”*

Moreover, a sense of appreciation increases morale and job satisfaction, both of which have been shown to be linked to better care.

- The decreased turnover rate that would result from better wages and protections means that consumers are less likely to be cared for by a different worker every time. This strengthens the relationship between the consumer and his/her workers and allows workers to become more familiar with the individual’s needs. A consumer told us how important having some consistency in workers meant to her:

*“They got to know me and I got to know them and that helped SO MUCH. They knew how to take care of me and what to do without me telling them all the time. They knew when I wasn't myself and they were able to call 911 and get me immediate medical help that saved my life! If they had not known me, they may have 'blown off' my change in behavior and I would have very likely died!!”*

While consistency does not always make a life or death difference, it nevertheless has a great impact on quality of care.

- The availability of more home workers stemming from improved wages would make consumers more likely to receive care and services at times that correspond to their routines and preferences. Currently, consumers must “take what they can get, when they can get it” due to a shortage of workers. One consumer informed us that there are instances when her worker has had to help her out of bed at 3:00 am or assist her to bed at 4:30 pm – times that create a hardship for her and negatively impact her activities and life. However, the worker is stretched so thin that this schedule is the only way she can visit and care for all the clients she has in one day. Getting up so early means the consumer can’t get the sleep she needs for her health, while going to bed so early means she must remain in bed until the next morning - a length of time that puts her at risk of pressure ulcers. Receiving assistance at a time consistent with a consumer’s needs and preferences results in better outcomes and quality of life.

### **Extending FLSA protection to home care workers is the “right thing to do”**

Home care workers make it possible for millions of older adults and persons with disabilities to remain at home. Even though some individuals who hire their own workers may end up paying more under the

proposed rules, consumers and advocates in our network believe that providing minimum wage, overtime, and pay for travel time for these crucial health care workers is the right thing to do:

*“Fair pay for the hard work homecare workers provide is the right thing both for the workers and those they serve!”*

*“Caring for our nation’s children and aged in their homes is such a vital and important role it is time that the workers who serve in this capacity receive the recognition and compensation that they deserve.”*

*“Home care workers deserve the same protections as every other worker in the United States.”*

*“They work so hard and deserve these basic protections. In fact, they should be paid more than minimum wage!”*

*“This is a ‘no brainer.’ There shouldn’t even be any debate on something like this.”*

**In summary, the Consumer Voice strongly supports fair pay for home care workers and believes the basic protections of minimum wage, overtime and travel time pay are long overdue. In fact, a number of consumers believe that these workers should be paid more than minimum wage and be reimbursed for travel mileage.**

**There are, however, sections of the rule that are unclear, too vague, impractical or almost impossible for consumers to follow. These areas are identified below along with recommendations.**

- Use of the term “occasional” is too ambiguous and vague. For example, a worker hired as a companion helps Mrs. Jones take a walk three times a week, and assists Mrs. Jones in putting on and taking off her coat every time. Is helping Mrs. Jones with her coat considered to be an “occasional” task as part of companionship? Or does the repeated nature of this task mean that the worker is performing home care services, not companionship?

**Recommendation: Define “occasional” in the proposed rule or provide detailed guidance, with examples, to give consumers a better understanding of when a task is considered “occasional” as part of companionship and when it is viewed as a regularly performed duty of a home care worker.**

- The restriction in the proposed rule that incidental services cannot benefit others in the household is unrealistic and impractical. For instance, if a companion makes a meal for the consumer while providing fellowship and protection and cleans up the kitchen afterwards, cleaning up the kitchen would certainly benefit others living in the house. This would mean the companion would no longer meet the exemption requirements.

Such an artificial division of labor is unreasonable. If a companion needed to wash a pair of pants that had been soiled while she was with the consumer, this would mean that she would have to run the washing machine with only one item in it. Strict compliance could also lead to unintentional consequences – like not wiping up a spill on the floor because it would benefit other members of the household, thereby putting the consumer at risk of an accident.

**Recommendation: Change to read: Incidental intimate personal care services does not include household work performed primarily for the benefit of other members of the household.**

- The preamble (81198) indicates that if the employee is jointly employed by a third party and an individual, family or household member, the individual, family or household member is jointly and severally liable for any violation. While this language is not repeated in the proposed rule itself, the fact that it is mentioned at all is troublesome and problematic for consumers and their families. Holding individuals, family or a household member liable would place an unfair burden on them. Since the individual, family or household member is entitled to assert the exemption when a worker is employed jointly, individuals, family or household members should also be exempt from liability under those same circumstances.

**Recommendation: Explicitly state in the proposed rule that if the employee is jointly employed by a third party and an individual, family or household member, the individual, family or household member would not be jointly or severally liable for any violation.**

- In order to prove that the exemption applies, an individual, family or household member would have to track how much time the companion is spending on “incidental services.” To do this with any accuracy would require being aware of what the companion was doing every minute, even when the companion is in another room. While some consumers could certainly do this, it would be difficult to impossible for others. Furthermore, tracking the amount of time spent on incidental services would be unfeasible for family members who hire a companion to stay with a loved one. The family member would likely be out of the home at the time, and in many cases would not even live in the same house.

**Recommendation: DoL should develop a simple, practical way in which the time spent on incidental services can be documented by an individual, family or household member or explicitly state that the burden would be on the worker to document that he or she believes the exemption does not apply because the 20% tolerance level has been exceeded.**

Thank you again for the opportunity to comment on this proposed rule that would benefit both home care workers and home care consumers. As a group of consumers from various parts of the country told us, “It’s only fair.”

Sincerely,

National Consumer Voice for Quality Long-Term Care  
Area Agency on Aging, Austin, TX  
Advocates for Nursing Home Residents, AR  
Asian Services in Action, OH  
Association of South Central Oklahoma Governments Area Agency on Aging, OK  
Baltimore County Association of Senior Citizens Organizations, MD  
California State Long-Term Care Ombudsman Program, CA  
Carillon House Family Council, NY  
Center for Advocacy for the Rights and Interests of the Elderly, PA  
Central Alabama Aging Consortium, AL

Citizens for Better Care, MI  
Colorado State Long-Term Care Ombudsman Program, CO  
D.C. Long-Term Care Ombudsman Program, DC  
Delaware State Long-Term Care Ombudsman Program, DE  
Division of Senior Citizens, Department of Public Health and Social Services, GU  
Families for Better Care, FL  
Florida State Long-Term Care Ombudsman Program, FL  
Friends of Residents in Long Term Care, NC  
Georgia Office of State Long-Term Care Ombudsman, GA  
Greene County Department for the Aging, NY  
Human Services Department, Kalamazoo County Government, Area Agency on Aging Region IIIA, MI  
Illinois State Long-Term Care Ombudsman Program, IL  
Indiana State Long-Term Care Ombudsman Program, IN  
Kansas Advocates for Better Care, KS  
Kansas State Long-Term Care Ombudsman Program, KS  
Kentucky State Long-Term Care Ombudsman Program, KY  
Laura H. Leigh, PLC, VA  
Levin & Perconti, IL  
Long-Term Care Ombudsman Program, Cleveland, OH  
Long-Term Care Ombudsman Program, Mansfield, OH  
Long Term Care Ombudsman Services of San Luis Obispo, CA  
Long Term Care Community Coalition, NY  
Maine State Long-Term Care Ombudsman Program, ME  
Massachusetts Advocates for Nursing Home Reform, MA  
Michigan Center for Law and Aging, MI  
Michigan State Long-Term Care Ombudsman Program, MI  
Michigan Campaign for Quality Care, MI  
Minnesota State Long-Term Care Ombudsman Program, MN  
Missouri State Long-Term Care Ombudsman Program, MO  
Montgomery County Long-Term Care Ombudsman Program, MD  
National Association of Local Long-Term Care Ombudsmen  
National Council of Certified Dementia Practitioners  
New Mexico Long-Term Care Ombudsman Program, NM  
Nursing Home Victim Coalition, Inc., TX  
Ombudsman Program of Lake and Mendocino Counties, CA  
Ombudsman Services of Northern California, CA  
Resident Councils of Washington, WA  
Terence Cardinal Cooke Health Care Center, NY  
Tennessee State Long-Term Care Ombudsman Program, TN  
The Elder Law Clinic, NC  
Vermont State Long-Term Care Ombudsman Program, VT  
Virginia Friends & Relatives of Nursing Home Residents, VA  
Virginia Poverty Law Center  
Waccamaw Area Agency on Aging/ADRC, SC  
Washington State Long-Term Care Ombudsman Program, WA

