

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.
Room S-3502
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.

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.

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,

A handwritten signature in black ink that reads "Winslow Sargeant". The signature is written in a cursive style with a large initial 'W'.

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

A handwritten signature in black ink that reads "Janis Reyes". The signature is written in a cursive style with a large initial 'J'.

Janis C. Reyes
Assistant Chief Counsel

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