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Ms. 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: Application of the Fair Labor Standards Act to Domestic Service, RIN 1235-AA05

Dear Ms. Ziegler:

I. Introduction

AARP is a nonprofit, nonpartisan, organization with a membership representing people age 50 and older, dedicated to enhancing the quality of life for all as we age. Accordingly, we have several strong interests in this rulemaking: we are concerned about individual consumers¹ and their family caregivers who need access to affordable, quality long-term services and supports (LTSS); we are concerned about ensuring we have a system of LTSS that is sustainably financed and has a sufficient workforce that is capable of delivering that care to a rapidly aging population; and we are concerned about economic and retirement security for the nearly half of the direct care workforce² who are older workers.

¹ The term “patient” is used throughout the rule, regardless of whether the individual is receiving medically related home health care or receiving personal care services – help with daily activities such as eating, bathing, and dressing – that are non-medical in nature. AARP urges DOL to use the term “patient” only in a medical context, and otherwise to refer to the recipient of services as a “consumer”, “individual”, “recipient of services”, “beneficiary”, “client” or something similar.

Similarly, the term “home health care” is used throughout the proposed regulation, sometimes referring broadly to care provided at home, sometimes specifically to home health aides or home health agencies, and sometimes to home health care provided under Medicare and Medicaid. Home health care services are services covered under Medicare, Medicaid, and other coverage, yet Medicaid also covers other LTSS provided in the home that are not home health care and would be impacted by this rule. We encourage DOL to use the term “home health care” consistently throughout the rule to refer to care that is more medical in nature, and to use a different term, such as home care or personal care, when referring to assistance with daily activities that are non-medical. Home health agencies may provide both home health care and home care.

² DOL uses the term “caregiver” generally in reference to direct care workers such as a home health aide or personal care aide. Since it is common for individuals to use “caregiver” as short for “family caregiver,” we suggest that DOL use the terms “direct care worker,” “home care worker” or “home health aide” to differentiate home health aides, personal care aides, and others who provide care as a vocation, from family or informal caregivers. AARP is using the term “family caregiver” to refer to any relative, partner, friend, or neighbor who provides assistance to an older adult or an adult with chronic or disabling conditions. Family caregivers may live with or separately from the person receiving services; long-distance family caregivers often live far away from the consumer.

Summary of Position

AARP is pleased that the Department of Labor (DOL) released this proposed rule³ and appreciates the opportunity to comment on this proposed regulation regarding the application of the Fair Labor Standards Act (FLSA)'s protections to what has traditionally been exempt "companionship" services. As we read the proposals, there are three major components to the rulemaking. First, the definition of exempt companionship services has been narrowed. Second, the rules would require third-party employers such as agencies to pay minimum wage and overtime to their employees. Third, the rules tighten the recordkeeping requirements applicable to live-in employees (who would remain ineligible for overtime under the proposed rules if they are employed by an individual, member of the family or household, but who would be eligible for overtime if they are employed by a third-party employer) to help ensure they are paid at least minimum wage for all hours actually worked.

AARP supports the intent and general approach of this rule to help ensure most home care and home health care workers receive minimum wage and overtime pay. These workers perform very important services for older adults and their families, and it is difficult work, both physically and emotionally. It should be fairly compensated. However, AARP has some specific and important concerns, enumerated in the comments below, regarding each of the three components of the proposed rules. Certain aspects of the proposed rules are too vague or do not acknowledge the full realities of how services are arranged or provided, which could make it difficult for families to comply. Some proposals place an undue burden on consumers and family caregivers, and thus need to be changed to fit the unique circumstances of home care.

- Narrower definition of "companionship" services** - AARP agrees that the definition of companionship services should be narrowed, and only true "fellowship and protection" services, accompanied by personal care or household services *incidental* to those companionship services, should be exempt from the FLSA. Consumers and their families who directly hire⁴ and privately pay a companion would remain exempt if they meet the requirements of the narrowed companionship exemption, but others would for the first time be considered an "employer" under the FLSA. AARP finds the requirement that incidental intimate personal care services only be "occasional" to be too vague and impractical to be helpful to consumers and their families, and the absolute disqualification for "general housework" to be overly restrictive. AARP recommends deleting the "occasional" requirement from incidental intimate personal care services, and instead recommends relying solely on the bright line provided by a threshold (percentage) for incidental services. DOL should also revise the general housework provision to specify that, if household work is incidental to exempt companionship services, and only provides *incidental* benefits to other household members, such

³ Application of the Fair Labor Standards Act to Domestic Service, Notice of Proposed Rulemaking, 76 Fed. Reg. 81190 (Dec. 27, 2011), (amending 29 C.F.R. pt. 552) [hereinafter *NPRM*].

⁴ The NPRM uses the term "consumer-directed employment" broadly to encompass direct-hire and private-pay arrangements, even including the grey market (see, e.g., *NPRM*, 81208), as well as consumer-directed care. This terminology is unnecessarily confusing. "Consumer direction" often refers to delivery models in public programs wherein services are paid for from public funds but consumers have more choice and control over how and when services are received and who provides them; often, they are permitted to hire a family member (in or outside the household) to provide those care services. Such models are clearly not the grey market. While publicly funded consumer-direction programs – an important option for consumers – have some similar characteristics to direct-hire and private-pay, AARP urges DOL to more clearly distinguish between the two, and to reserve the term "consumer-directed services" (or similar terms) in reference to publicly funded programs.

household work should be permitted within the companionship exemption and should not be an automatic disqualifier.

- **Elimination of exemption for third-party employers** - AARP agrees that third-party employers such as agencies should be required to pay minimum wage and overtime to their employees, a position AARP has previously taken in litigation on this issue. However, AARP strongly opposes the proposal to impose joint and several liability for FLSA compliance on consumers *when the worker is supplied and employed by a third-party employer such as an agency. When agencies are involved, they should be considered the sole employer.* The proposal for joint liability runs counter to the very reasons why consumers and their families seek the services of agencies in the first place, and in these situations is impractical and unwarranted.
- **Additional recordkeeping requirements for employers of live-in employees** - Long-term services and supports are qualitatively different in key respects from other domestic services, especially in cases requiring a live-in direct care worker. Consumers or their nonresident family caregivers may not be able to effectively monitor hours and wages or to keep sufficient records of hours and wages. DOL's proposed recordkeeping requirements need to be changed to reflect these real-life circumstances. Because of the particular situations that give rise to the need for round-the-clock, overnight, or live-in home care for the elderly or infirm, DOL should preserve some of the current recordkeeping rules. However, AARP agrees that live-in employees directly hired by a consumer or family caregiver, who would remain ineligible for overtime under the proposed rules, should be paid at least minimum wage for all hours actually worked.

AARP has analyzed the proposed rules through the lens of consumers and family caregivers – how the proposals will impact them and what further changes are needed – and has developed these comments to help ensure adequate LTSS for an aging population. With some essential improvements, AARP believes DOL can strike the right balance.

Background

Maintaining independence, choice and control is a paramount concern for older adults as they age. A vast majority (89%) of Americans age 50+ want to remain in their own homes as long as they can. Not only is receiving services in their homes and communities the choice of most older Americans, it is also cost effective. On average, the Medicaid program can provide home and community-based services (HCBS) to three older adults and adults with physical disabilities for the cost of serving one person in a nursing home.⁵ Family caregivers provide the overwhelming share of most types of assistance to their loved ones – from personal hands-on care to management of finances to coordinating services. In 2009, the estimated economic value of family caregivers' unpaid contributions was about \$450 billion, more than total Medicaid spending in that year, according to AARP's Public Policy Institute.⁶

Families often undertake caregiving willingly and many find it a source of deep satisfaction and meaning, but they often face physical, mental, emotional and financial challenges in their caregiving roles. When family caregivers reach a point where they can no longer provide all the care or services their loved one needs, the individual or family caregiver may decide to seek

⁵ A. Houser, W. Fox-Grage, & M. Gibson, *Across the States: Profiles of Long-Term Care and Independent Living 2009* 17 (AARP PPI, 2009), available at http://assets.aarp.org/rgcenter/il/d19105_2008_atl.pdf.

⁶ L. Feinberg, S. Reinhard, A. Houser, & R. Choula, *Valuing the Invaluable: 2011 Update, The Growing Contributions and Costs of Family Caregiving* 2-3 (AARP PPI, 2011), available at <http://assets.aarp.org/rgcenter/ppi/ltc/i51-caregiving.pdf>.

some additional help to provide services. The direct care workforce – through an array of delivery and payment models – provides vital assistance to older adults and people with disabilities to help them live in their homes and communities and avoid institutional settings such as nursing homes. This assistance is expensive but most often far less expensive than nursing homes. Nationally, the average hourly rate for agency-supplied direct care workers was \$21 for home health aides and about \$19 for companions.⁷ Over the course of a year, the median cost amounts to 88 percent of the age 65+ consumer's median household income (national average), and that is on top of other living expenses. The equivalent national average figure for nursing home costs and household income is 241 percent.⁸

Despite the cost, the number of people needing LTSS is expected to rise after 2021, when the oldest baby boomers begin to turn 75, and will continue to rise until at least 2050, when all of the boomers reach late old age. Another factor driving increased demand for direct care workers is the continued and appropriate rebalancing of Medicaid toward more cost-efficient home and community-based services. According to the Bureau of Labor Statistics, home health aides and personal care aides are in the top half of the list of the top 30 occupations with the largest projected number of total job openings between 2010 and 2020: they are 9th and 11th on that list respectively, and together are projected to offer over 1.5 million more job openings in 2020 than in 2010.⁹

At the same time, as the demand for services increases, the number of adults in their primary caregiving years (ages 40-54) is remaining relatively stable. The result will be a dwindling supply of potential caregivers, both family caregivers and direct care workers, in relation to the numbers who need care. Already, people who can afford home care services often have difficulty locating competent, trained workers. Providers, too, face challenges with recruitment and retention of workers.¹⁰ Some studies have found turnover rates for aides ranging from 44 to 65 percent.¹¹ If aging boomers want to be able to receive services at home and the nation hopes to respond to the growing need for such care in a cost-effective manner, the workforce challenges in LTSS will need to be addressed sooner rather than later. AARP is committed to seeing that we meet those challenges.

One of the reasons for the high turnover in the direct care workforce is in part because of low wages and inadequate benefits. In 2010, home health aides earned a median wage of only \$9.56/hour, and personal care aides earned even less, \$8.79/hour.¹² As a consequence, half of

⁷ National Health Policy Forum, *National Spending for Long-Term Services and Supports (LTSS)* (Mar. 2011), available at http://www.nhpf.org/library/the-basics/Basics_LongTermServicesSupports_03-15-11.pdf. As indicated in n. 6 of this publication, the hourly rate for agency-supplied workers is about double what the workers themselves are paid, according to BLS.

⁸ S. Reinhard, E. Kassner, A. Houser, & R. Mollica, *Raising Expectations A State Scorecard on Long-Term Services and Supports for Older Adults, People with Physical Disabilities, and Family Caregivers* 28-29 (AARP et al., Sept. 2011), available at http://www.longtermscorecard.org/~media/Files/Scorecard%20site/Report/AARP_Reinhard_Realizing_Exp_LTSS_Scorecard_REPORT_WEB_v4.pdf.

⁹ Bureau of Labor Statistics, Table 10. The 30 occupations with the largest projected number of total job openings due to growth and replacements, 2010-20 (Feb. 1, 2012), available at <http://www.bls.gov/news.release/ecopro.t10.htm>.

¹⁰ Institute of Medicine, *Retooling for an Aging America: Building the Health Care Workforce* 21 (National Academies Press, 2008) [hereinafter *Retooling for an Aging America*].

¹¹ D. Seavey & A. Marquand, *Caring in America: A Comprehensive Analysis of the Nation's Fastest-Growing Jobs: Home Health and Personal Care Aides* 69 (PHI, Dec. 2011), available at <http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf> [hereinafter *Caring in America*].

¹² *Id.*, 53, Table 7.1. See also, *Retooling for an Aging America*, supra n. 10, Ch. 5.

personal care aides' households rely on some sort of public assistance.¹³ Home care needs to be competitive with other occupations vying for that labor. Direct care workers who work in nursing homes are not classified as companions and are already covered by the FLSA. If workers can earn more in institutional settings than they can in private homes, the home care industry will likely have a harder time recruiting and retaining a quality workforce. Unless these workers are adequately compensated and given training and other career opportunities, it will be difficult to attract and retain a competent, stable workforce on which consumers and family caregivers can rely.

Finally, from AARP's perspective, it is important to note this workforce is comprised mostly of older workers, almost half of whom are 45 and older. In 2008, 26% of personal care aides were age 45-54, and another 28% were age 55 and older.¹⁴ By 2018, about one-third of the direct care workforce is expected to be in that older 55+ age group.¹⁵ In addition to being older, this workforce is overwhelmingly female and disproportionately comprised of women of color. If these workers are making poverty-level wages and half are relying on public assistance while they are still in the workforce, their prospects for a secure retirement are nil. To the extent this rulemaking will improve wages for direct care workers, it will also enhance the opportunity to improve the retirement income of this older and diverse workforce.

II. Companionship Services for the Aged or Infirm (Duties of a Companion)

Currently, because of an overly broad interpretation of the FLSA's exemption for companions to the elderly and infirm, most home care workers – even those employed by agencies – are excluded from the Fair Labor Standards Act's minimum wage and overtime protections. Home health care and personal care services have been included within that exemption; even general household work has been considered exempt as long as it is incidental (constitutes 20% or less of the worker's weekly hours) to the exempt companionship services.

DoL proposes to reverse this presumption. Personal care aides and home health aides would be expressly covered under the FLSA as are other types of domestic employees. "Companions" would also receive the FLSA minimum wage and overtime protections, unless their duties meet the requirements of the companionship exemption, which the Department plans to narrow and significantly modify. The proposed definition of "companionship services" centers on the provision of *fellowship such as, reading, walks, errands, and social events* and *protection*, being present to monitor the consumer's "safety and well being." AARP agrees the companionship exemption should be narrowed to fellowship and protection.

The provision of intimate personal care and help with activities of daily living (ADLs) would *not* be exempt unless they are *both* incidental – 20% or less of the worker's weekly hours – *and* occasional, which is used as modifier and proviso for each listed example of incidental intimate personal care services. AARP also agrees that an incidental amount of intimate personal care services, including toileting and diaper changing, as well as not-so-intimate personal care services such as driving to appointments, errands, and social events, should be in the companionship exemption. We do not support excluding any of the services on the proposed list, and we do not believe this list should be an exclusive list. Incidental intimate personal care

¹³ *Caring in America*, *supra* n. 11, at 58.

¹⁴ PHI, *Older Direct-Care Workers: Key Facts and Trends 3*, Chart 2 (Apr. 2010), available at <http://www.directcareclearinghouse.org/download/PHI%20Older%20DCW%20Analysis%20April%202010.pdf>.

¹⁵ D. Seavey, *Caregivers on the Front Line: Building a Better Direct-Care Workforce*, 34 GENERATIONS – *J. of the Am. Society on Aging* 29 (Winter 2010–11), available at http://www.directcareclearinghouse.org/download/Gens_v34n4-4_Seavey.pdf.

services are appropriately defined as being performed attendant to and in conjunction with the provision of fellowship and protection. The proposed list of personal care examples is and needs to be inclusive enough to anticipate realistic situations in the provision of companionship services and should be clear enough and not too burdensome to permit compliance by consumers and their families.

In contrast, the requirement that incidental intimate personal care services must also be "occasional" is problematic. First, the "occasional" limitation is not always appropriate when one considers how fellowship is actually provided. An individual may perform duties clearly within the proposed definition of "fellowship," but the regular performance of tasks included in the definition of incidental intimate personal care services might be part and parcel of providing that fellowship. Yet, it appears the proposed definition of incidental intimate personal care services would unnecessarily disqualify the services from being included in the companionship exemption because they are not "occasional," even though they are under the 20 percent threshold. For example, if a companion takes an older adult for a walk on a regular basis (clearly within the definition of "fellowship") and assists the individual in putting on and taking off a coat before and after the walk, the assistance with the coat (dressing) would not be an occasional service, though it would clearly be incidental. Such personal care services incident to companionship, even if regular and recurring, should not prevent these services from being included within the companionship exemption.

Second, the term "occasional" is vague and open to differing interpretations. It is not defined in the proposed regulations and its meaning is only alluded to in the preamble. Since third-party employers cannot claim the companionship exemption under the notice of proposed rulemaking (NPRM), it is consumers and members of the family or household that will be trying to figure out whether the duties performed by their companion meet the companionship exemption. The use of vague, undefined, subjective terms such as "occasional" will expose individuals/families/households to an undue risk of liability and make it harder for them to comply.

We understand the impulse to require incidental intimate personal care services to be occasional, as individuals who are spending regular, *considerable* amounts of time on personal care tasks should not be included in the companionship exemption. However, the term "occasional" is too subjective to be workable for consumers, and it would unnecessarily and inappropriately disqualify services from the companionship exemption as in the above example. AARP recommends deleting the "occasional" requirement from incidental intimate personal care services, and instead we recommend relying solely on the bright line provided by a threshold (percentage) for incidental services. If DOL is concerned that deletion of the "occasional" requirement would result in abuses, it could propose an "incidental" time threshold lower than 20 percent. However, it is important to keep the definition of "incidental" as a specific percentage of time in order to make it easier for individuals or members of the family or household to determine if the exemption applies. If DOL retains the "occasional" requirement, it should provide a clearly understandable definition in the regulations themselves, and it should retain the 20 percent time threshold. We believe the removal of "occasional" would give additional flexibility to accommodate actual everyday situations.

General Household Work

The NPRM proposes that household work benefiting other members of the household, such as general housekeeping, making meals for other members of the household, or laundering clothing worn or linens used by other members of the household not be included as incidental intimate personal care services that would be exempt. DOL also proposes that household

services ordinarily performed by employees such as cooks, housekeepers, home health aides, and personal care aides not be considered exempt “companionship services” unless they are incidental to “the provision of fellowship and protection as described in paragraph (b) of this section,” which discusses permissible incidental intimate personal care services. It is confusing that DOL includes personal care and home health aides in this list, and it is unclear why DOL is imposing an “incidental” condition (in (c)) on services already specified as needing to be incidental to companionship (in (b)). It appears that the proposed §552.6(c) is making a distinction between whether the household work is *solely* for the benefit of the individual receiving companionship services vs. whether it also benefits other members of the household.

This distinction raises questions about what is incidental and becomes unclear, particularly in a household where individuals in addition to the person receiving companionship services reside. For example, a companion who is providing services that fall under the companionship exemption makes some tuna salad for lunch. If some tuna salad is left over after the individual receiving companionship services has eaten lunch, and another member of the household eats this left over tuna salad, would this be considered general household work, thereby denying the companionship exemption for the week? What if an individual providing companionship services washes the sheets of the person receiving companionship services, and another person also sleeps in that bed? Some household work, such as cleaning up a spill on the floor to prevent a fall, could and should be “protection” under the companionship services definition, even if others in the household also benefit.

AARP agrees that providing general household services such as cooking a meal or doing laundry for the whole family, which significantly benefit all household members, should not be exempt. However, DOL should revise the general housework provision to specify that, if household work is incidental to exempt companionship services, i.e., that the amount of time spent falls under the “incidental” threshold, and only provides *incidental* benefits to other household members, such household work should be permitted within the companionship exemption and should not be an automatic disqualifier. In other words, whether a worker’s services are covered or exempt – and whether an individual/family/household must pay overtime – should not vary from week to week only because some general household task happened to incidentally benefit another household member. Moreover, to help consumers and families to understand and comply with the rule, DOL should specify what is of incidental benefit to others, and give examples, as we have done here.

Companions as Exempt and Non-Exempt

The NPRM proposes to add “companions” to the definition of “domestic service employment,” so companions would receive minimum wage and overtime unless their duties meet the requirements of the companionship exemption. The substance of the work, and not the title, controls whether or not a worker falls under the companionship exemption. The proposed regulation does not expressly state what happens if the 20 percent threshold of incidental intimate personal care services is exceeded. The preamble is much clearer: “Should the provision of these incidental services exceed 20 percent of the total hours worked in any workweek, then the exemption may not be claimed for that week and workers must be paid minimum wage and overtime.”

To avoid confusion, and since it is unrealistic and overly burdensome to expect someone needing companionship services or a member of the family or household to read the preamble of a federal regulation, DOL should add a sentence to §552.3 of the regulations noting the job title does not control the legal status of the work and that the exemption is based on the tasks performed in each workweek. DOL should also revise §552.6(b) to read as follows: “The

performance of incidental intimate personal care services must not exceed 20 percent of the total hours worked in the work week in order to claim the exemption for that workweek."

Medical Care

AARP supports the proposal to exclude medical care "typically provided by personnel with specialized training" from the definition of "companionship services". Medical care that requires and is performed by trained personnel is currently excluded from the exemption and should remain so. We also agree with the proposal that "companionship services" includes reminding the person of a medical appointment or a predetermined medicinal schedule. Reminders are appropriately considered incidental intimate personal care services and necessary for protection. We would also support the inclusion of additional examples of minor health-related actions that do not require training and could be included within companionship services, such as applying a band aid to a minor cut or helping an elderly person take over-the-counter medication.

We also note, as delivery system reforms and other health care and LTSS reforms are implemented, direct care workers are more likely to be part of an interdisciplinary care team that provides person and family-centered care, working with the individual and their family caregiver at the center of the care team. In addition to the reasons outlined in the NPRM and in these comments, this team approach to care and the integration and coordination of health care and LTSS give further justification to providing minimum wage and overtime to direct care workers and valuing them as important members of the care team.

III. Third-Party Employment

The NPRM revises the regulations to deny assertion of the companionship exemption to third-party employers under any circumstances: whether the services provided fit within the newly narrowed companion services definition or not, whether the employee provides live-in services or not, and whether the individual/family/household may be considered a joint employer or not. AARP strongly agrees with denying any exemption to third-party agencies, a position AARP has long advocated¹⁶ as more in keeping with the design and intent of the FLSA and the better interpretation of the current regulatory requirement that the exemption be reserved for those who are employed in the *private home of the employer*. In AARP's view, requiring all home care and home health care agencies to pay minimum wage and overtime to *their* employees is a centrally important component of the NPRM.

The proposed regulations emphasize that the individual/family/household utilizing the domestic services may still assert the exemption, but only as long as the worker qualifies as a companion under the new, narrower definition. Because few direct care workers will do so, most consumers, in fact, will *not* be able to assert the exemption. Making the consumer responsible for FLSA compliance may be unavoidable in the situation in which an individual/family/household directly hires and pays a direct care worker, and is thus the *sole* employer.¹⁷ However, without so much as an acknowledgement of its import or even one

¹⁶ See Brief *Amici Curiae* of AARP and The Older Women's League (OWL) in Support of Respondent, *Long Island Care at Home v. Coke*, 551 U.S. 158 (2007) (No. 06-593) (on file with AARP), and *Amicus* Brief of AARP, Pennsylvania AFL-CIO, and Service Employees International Union, in Support of Appellee, *Bayada Nurses, Inc. v. Dep't of Labor & Indus.*, ___ Pa. ___, 8 A.3d 866 (2010), available at http://www.aarp.org/content/dam/aarp/aarp_foundation/litigation/amicus_brief_pdfs/Bayada%20Nurses_CommonwealthofPA.pdf.

¹⁷ AARP notes that the NPRM does not address whether or the circumstances under which a direct care worker in the direct-hire, private-pay situation would be considered an employee of the consumer vs. an

sentence of a rationale, the NPRM would impose joint and several liability for FLSA compliance on consumers *when the worker is supplied and employed by a third-party employer*.

To impose such liability on the consumer or family when an agency-employer supplies the worker is manifestly inconsistent with DOL's entire discussion in the NPRM of congressional objectives and the legislative history of the 1974 amendments. The NPRM goes to great lengths to cite legislative history to the effect that Congress intended for the exemption to apply only to family members and private households – citing one Senator who could not imagine “...the housewife struggling with the paper work which would be required.”¹⁸ Yet, the imposition of joint and several liability on an individual or family caregiver would cause those very consumers/family members to similarly struggle with legal compliance obligations and paperwork. DOL offers no explanation or rationale in the preamble for such an incongruous result. Nor does it cite any benefit to be gained by the imposition of liability in this situation, or weigh any such benefits against the burdens imposed on the consumer or family.

The imposition of joint and several liability in instances of joint employment with a third-party employer also runs counter to the very reasons why consumers and their families seek the services of home care agencies in the first place: they need and want someone else to screen, recruit and supervise the employees, and someone else to be responsible for compliance with labor and tax laws and to handle all the paperwork. Families remain the most important source of support to older adults with chronic illness or disability. But, family caregivers who are in the workplace, long-distance family caregivers, and family caregivers who need more help than they themselves can provide may all seek out paid care to fill the gap. According to PHI, about three-fourths of direct care workers work for agencies.¹⁹ Family members often turn to these agencies, even if it means paying more per hour, *precisely because* the agency handles all of the management, legal, and paperwork duties of an employer.

Moreover, it is wholly unclear how this imposition of joint liability would be triggered. If, for example, an agency fails to pay overtime to one of its employees, how would the consumer ever find that out or have access to the information underlying the claim of noncompliance? The consumer has no access to the agency-employer's wage and hour records. In the case of an agency-supplied home care worker who has worked 15 hours per week for three households, which two households would be considered liable for paying the regular wage and which one would be jointly and severally responsible for paying overtime? What if the consumer and agency have conflicting records of hours worked? At what point, and how, would the consumer find out they are considered a joint employer – when an agency goes bankrupt? Because this important caveat on agency responsibility and family exemption is only mentioned in one sentence in the preamble and is not addressed in the regulations at all, many unanswered logistical questions exist about how this obligation would be enforced and administered.

independent contractor. The issue of whether any worker is an employee, an independent contractor, or an employee misclassified as an independent contractor is always a factual determination, and a problem of longstanding concern to the Department and others, independent of this rulemaking. Because the determination of employee vs. independent contractor status is a factual one based on the economic realities of the relationship and cuts across all occupations, it makes sense for DOL to keep this issue separate from this rulemaking. However, if these proposed regulations are finalized, it is quite possible that an individual/family/household who directly hires and pays a home care worker may continue to be free from FLSA compliance requirements, not because the services themselves are exempt, but because the direct care worker is an independent contractor.

¹⁸ NPRM, *supra* n. 3, at 81196 (citing 120 Cong. Rec. S5269 (daily ed. Mar. 5, 1974) (statement of Sen. Fannin)).

¹⁹ PHI, *Who Are Direct Care Workers?* 2 (Feb. 2011), available at <http://www.directcareclearinghouse.org/download/NCDCW%20Fact%20Sheet-1.pdf>.

A consumer may be a joint employer in the sense of prescribing a home care worker's duties and some aspects of how the home care worker should accomplish them. The consumer can also tell the agency whether they like the worker supplied or would prefer a different worker, but they cannot hire or fire the worker. It is neither sensible nor practical to impose joint and several liability for FLSA compliance on the individual/family/household when a direct care worker is furnished and supervised by an agency. AARP strongly opposes the imposition of joint and several liability on consumers for FLSA compliance for agency-supplied employees. *When third-party employers are involved, they should be considered the sole employer.*

Two additional definitional issues concerning third-party employers merit comment. First, what constitutes an agency or third-party employer for purposes of these rules? Neither the current regulations nor the NPRM define the term "third party employer" in the context of domestic employment. Yet, as the NPRM indicates, many different kinds of agencies or entities are involved in the field of long-term services and supports, and not all should be considered third-party employers. If home care and home health care agencies are on one end of the spectrum, registries could be considered at the other end. In most cases, registries are merely sources of referrals for consumers. They may also perform basic background checks on their listed workers, but generally they do not train them, supervise them, or hire or fire them. Under such circumstances, they should not be considered third-party employers. Somewhere in between are 1) fiscal intermediaries, entities whose *raison d'être* is to handle payroll and provide legal and tax compliance services to consumers, often in connection with a consumer-directed care program financed by Medicaid or another public program, and 2) public authorities, which serve as employers-of-record in some states and also perform the duties enumerated for fiscal intermediaries. Entities such as registries and fiscal intermediaries play a valuable role in assisting consumers and their family caregivers. Whether fiscal intermediaries and public authorities should be considered third-party employers for purposes of FLSA compliance, however, will depend on the facts and the economic realities of the relationship. AARP urges, to the extent they are considered at least joint employers with the consumer, they should be considered the *sole* employer for purposes of FLSA compliance, similar to our position on third-party agencies, and for all of the same practical reasons enunciated above.

However, there is one specific scenario in which we believe DOL should apply an exception to its proposal to require all third-party employers to pay overtime. Often, public authorities or fiscal intermediaries are involved in the administration of publicly financed consumer-directed care (CDC) programs (see footnote 3). CDC programs may allow individuals who need HCBS to hire family caregivers to provide services and may permit them to provide more than 40 hours of assistance per week, assistance that is vital to keeping their loved one at home and out of an institution. Frequently, such family caregivers live with the person for whom they are providing services. Requiring the payment of overtime in these cases, merely because public authorities or fiscal intermediaries are involved in making these programs possible, could prevent family caregivers from providing more than 40 hours a week in paid care and impact the ability of the individual to remain at home. In addition, the situation of a family caregiver who lives with the person for whom they provide services is analogous to the overtime exemption DOL proposes for individuals or members of the family or household who have a live-in worker. For these reasons, in cases where all of the following criteria are met, we urge DOL *not* to require payment of overtime for more than 40 hours of work per week if: 1) the individual is receiving HCBS under a publicly financed consumer-directed program; 2) a third-party such as a public authority or a fiscal intermediary is involved in facilitating the CDC; and 3) a family caregiver *who lives with the care recipient* is being paid under the consumer-directed program to provide services for the individual.

The second definitional issue is what types of relationships to the consumer qualify as individual/family/household relationships for the purposes of asserting the exemption. AARP agrees with DOL's formulation that "family" and household members should be construed broadly to encompass any family relationships, whether or not the family member lives with the consumer; any householder regardless of relationship; and both legal guardians as well as those acting in loco parentis, who may be friends and neighbors who put themselves in the role of a family member to the extent they help hire a worker for someone in need. Such a broad formulation accurately reflects the realities of how eldercare actually happens today. All of these individuals should be able to assert the companionship exemption when it is appropriate, and none of them should be considered a third-party employer or a joint employer of a third-party-supplied worker under these regulations.

IV. Recordkeeping Requirements

Home care and home health workers who work in private households deserve the same rights to decent wages as other domestic service workers. However, it must be noted that long-term services and supports are qualitatively different in key respects from other domestic services such as housecleaning and gardening. The consumer may be very frail or ill or have cognitive impairments precluding her or him from being able to effectively monitor hours and wages or to keep sufficient records of hours and wages.²⁰ In these situations, the "employer" (person or persons who did the hiring) may not be in a position to adequately monitor or record hours actually worked because they may not live in the same home, state or even country as the care recipient. These impediments to fulfilling recordkeeping requirements are likely to be especially pronounced under circumstances in which the consumer requires services for longer hours – such as round-the-clock care or a live-in home care worker. AARP believes third-party agencies can fulfill the necessary recordkeeping requirements. However, in some situations in which an individual/family/household directly hires and privately pays a direct care worker, recordkeeping requirements must be adjusted to fit the circumstances.²¹

Live-In Employees

Currently, live-in domestic workers of all occupations are entitled to minimum wage for all hours worked, but they are not entitled to overtime. The employer and live-in worker can have a written agreement establishing standard hours and other parameters, but no record of actual hours worked is required; instead, the parties may rely on the agreement and other recordkeeping shortcuts. Further, the live-in worker can be required to record and submit their hours. The proposals contained in the NPRM would continue current policy that overtime for live-in workers is not compulsory, unless the live-in worker is supplied by a third-party employer. However, the NPRM would make several changes in the recordkeeping requirements for live-in domestic employees, including for live-in home care workers. The employer could no longer use agreements as a records substitute; they would have to keep records of actual, exact hours worked. They could no longer use the shortcut of notating adherence to or deviations from a fixed schedule. Instead, nonagency employers of live-in employees would need to keep the same kinds of records as other domestic service employers. Finally, employers of live-in employees would no longer be permitted to shift the responsibility for recordkeeping and submission of hours to the employee; that duty would rest on the employer.

²⁰ Nannies who care for small children also are not monitored by the "consumers" of their services. However, nannies are generally hired by a competent parent or other guardian who lives in the same household as the children and are able to monitor and keep records of hours and wages.

²¹ This will be especially important should the Department go forward with its "Right to Know under the Fair Labor Standards Act" rulemaking, RIN 1235-AA04, *available at* <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=1235-AA04>.

Different compensation and recordkeeping rules are provided for live-in employees, presumably because they raise different issues than other types of employees, even those who provide overnight or round-the-clock services. Differences such as the provision of room and board and the presumption of there being certain times in which the live-in worker is off the clock justify some differences in the rules.

However, AARP is greatly concerned about requiring employers of live-in companions/home care workers to meet the same recordkeeping requirements as for other types of live-in employees, such as nannies. As noted above, the need for a live-in employee is usually due to the presence of serious medical issues or cognitive impairments. Where the consumer is too ill or cognitively impaired to supervise and monitor hours, or the hiring family member or other individual is not on-site to supervise/monitor hours, *which are usually the circumstances that give rise to the need for round-the-clock, overnight, or live-in home care for the elderly or infirm*, AARP believes DOL should preserve some of the current recordkeeping rules. Where a fixed schedule is set by agreement, the parties should continue to be able to presume the fixed schedule was worked unless weekly deviations are recorded. Moreover, the hiring employer should continue to be able to require the employee to record and submit hours. These changes would require DOL to withdraw the blanket proposed language in §552.110(c) and (d) excepting live-in domestic employees and to retain the provisions on recordkeeping currently applicable to live-in companions and home care workers. While we have the above concerns, we agree that live-in home care workers should be paid for all hours actually worked, in accordance with current regulations regarding what constitutes work time.

Direct-Hire/Private-Pay Arrangements

Should the proposed rules be approved, most direct-hire/private-pay arrangements would be newly covered. This coverage would not only be new to the home health and home care workers, it would also be new to the millions of individuals/family caregivers/household members who hire them. According to a new survey of service providers by the National Association for Home Care and Hospice (NAHC), a large portion of the respondents reported a majority of their services were paid for with private funds by the client/family or through a commercial insurance plan.²² In its analysis, DOL notes also the existence of a “grey market” in this area, wherein consumers directly hire and pay home care workers, often in cash, evading reporting and tax withholding requirements.²³ Making recordkeeping requirements too onerous will not only be a burden on consumers and their families, it will act as a disincentive for compliance.

The NPRM makes no mention of how these consumer-employers would be made aware of their new legal obligations or what tools, if any, would be available to assist them with recordkeeping and implementation. One of best ways to encourage compliance would be to make the new rules clear in the regulations themselves, as most consumers and their families will not have easy access to the preamble. Further, it will be absolutely critical for the Wage and Hour

²² National Association for Home Care and Hospice, Companionship Services Exemption Survey, Slide 7 (Jan. 23, 2012), *available at* http://www.privatedutybenchmarking.com/wp-content/uploads/2012/01/2012_Companionship_Exemption_Survey_Results1.pdf [hereinafter *NAHC Survey*].

²³ In one recent study, consumers’ lack of awareness about their legal obligations and the complexity of complying with tax laws played a key role in payroll tax evasion by employers of domestic workers. See, Catherine B. Haskins, *Household Employer Payroll Tax Evasion: An Exploration Based on IRS Data and on Interviews with Employers and Domestic Workers* (Dissertation, Univ. of Massachusetts – Amherst) (2010).

Division to provide easy-to-understand information about what the law requires, and tools such as checklists, recordkeeping forms, and sample agreements to assist consumers and their families with implementation. In this vein, AARP genuinely questions the estimate that “each family that directly hires a caregiver will spend one hour on regulatory familiarization.” Unless DOL makes an effort to raise awareness and provide adequate consumer information and assistance, we believe it will take consumers in direct-hire arrangements far longer than one hour to become familiar with all of the nuances of the companionship services definition, the potential for weekly variation, and the recordkeeping responsibilities they must assume. Moreover, unless the recordkeeping requirements are easy to implement, they could impose an additional burden on families who may already be struggling with medical care paperwork, coordinating care, obtaining support services, and other caregiving issues.

AARP strongly urges DOL to partner with other agencies in order to get information and tools into the hands of the consumers and family caregivers who need them. Older adults who require care and their family caregivers do not have much occasion to interact with DOL, but these populations do interact, for example, with Medicare or Medicaid (Centers for Medicare and Medicaid Services), or with the aging network services (Administration on Aging), or with services for people with disabilities (HHS Office on Disability), or with the National Clearinghouse for Long-Term Care Information, or with community-based organizations. In addition to offering more direct distribution channels for the recommended materials, these agencies and other entities might also be able to provide valuable insights to DOL regarding how best to convey information to consumers and family caregivers, who are not a typical audience for DOL communications.

V. Costs of the Proposed Rule

The proposed rule specifically invites comments “on the impact of the rule on Medicaid, Medicare, and the private market, including the impact on the affordability of home health and home and community-based services.” Medicare provides only limited coverage for skilled nursing facility care and some home health care services. Instead, the major public financing for LTSS comes through the federally and state-funded Medicaid program. Rising health care costs overall and the current fiscal pressures have made Medicaid a target for budget cuts. AARP is greatly concerned about preventing harmful cuts and preserving adequate funding for and access to Medicaid and other publicly-funded LTSS.

There are major differences among Medicare, Medicaid, and private payers in how they administer and pay for services. The proposed rule makes an estimate of the total cost of home health and personal care, then multiplies the total by 75 percent to get the cost of Medicare and Medicaid – with the balance being attributed to private insurance, out-of-pocket expenses, and a mix of other government programs. But this method assumes the costs of the proposed rule will play out in the same way with each of these types of payers – a highly unlikely assumption. For example, Medicare is moving to more bundled, episode-based reimbursements – so per-hour costs are not likely to play as big a role as with the other payers, even if it makes providers more conscious of labor-driven costs.

In Medicaid, workers already generally receive minimum wage and public programs rarely authorize more than 40 hours per week of home health aide or personal care aide services²⁴ for older adults, so we would not generally expect significant new costs to Medicaid for this population. To the extent that a state program had a concern about scarce Medicaid or other

²⁴ See P.K. Sonn, C.K. Ruckelshaus, & S. Leberstein, Fair Pay for Home Care Workers: Reforming the U.S. Department of Labor’s Companionship Rules Under the Fair Labor Standards Act 15 (NELP, 2011), available at <http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1>.

public dollars being consumed due to a need to pay overtime, and about this causing a decrease in hours of services for consumers, it seems like this concern could be addressed by hiring additional workers who could work the extra hours.²⁵ Home care agencies and the state programs that pay them may also be able to minimize any additional travel time costs (for employees traveling between clients) by more efficient scheduling, where possible. These regulatory changes may help reduce turnover, which could also help reduce or even possibly cancel out any additional costs due to paying for travel time between clients. Under DOL's economic analysis accompanying the NPRM, the proposed rule's costs are very small, between "0.06 to 0.29 percent of the total HHS and state outlays for home health care programs."²⁶

In addition to the impact on publicly financed programs, AARP is chiefly focused on the impact of this rule on the affordability of home care services for our members and older adults generally. The home care industry asserts that the majority of home care services are paid for with private funds of the family, not from public programs.²⁷ As DOL's analysis indicates, little is documented about the *direct-hire*, private-pay market. However, even assuming the industry's assertion is correct, and most *third-party* home care agencies' services are paid for from a family's private funds rather than being reimbursed from public funds, DOL suggests the cost impact on most individuals and families will not be significant. DOL points out that 16 states provide minimum wage and overtime coverage to "most home health care workers who would otherwise be excluded under the current regulations..." and five states provide minimum wage, but not overtime to home care workers. The general absence of reported problems in these states would seem to indicate that the application of minimum wage and overtime protections to home care services has not significantly raised costs. As DOL notes, one of the main reasons why overtime requirements can be less of a problem than might otherwise be surmised is because agencies, as well as private-pay consumer-employers, can avoid paying overtime by restricting hours for a worker to 40 hours/week and hiring another worker to cover the hours in excess of 40. NAHC's own survey found that, among the agencies already required to pay overtime or voluntarily paying overtime, over half experienced minimal to moderate increases in business costs.²⁸

AARP understands that some consumers and family caregivers would strongly prefer to be able to keep the same worker for more than 40 hours. These regulatory changes *would* require some consumers and their families to make a choice: they could pay overtime to keep the same worker for more than 40 hours (if the worker's duties did not meet the companionship exemption), or if they wanted to avoid overtime they could hire another worker to cover the extra hours. The specific calculus of this will vary for every consumer depending on their preferences, hours and types of assistance needed, availability of family caregivers, and other factors. The right answer for one consumer will not be the right answer for another consumer. Some consumers may prefer only one worker, whom they trust and with whom they have a long-standing relationship, to assist them with intimate personal care tasks. Others may want more than one worker who understands their needs and preferences, as well as knowing they have another worker to turn to if the scheduled worker is ill or unable to work at the scheduled time.

²⁵ See generally, D. Seavey & A. Olins, Can Home Care Companies Manage Overtime Hours? (PHI, 2012), available at <http://www.directcareclearinghouse.org/download/overtime-casestudies-20120209.pdf>.

²⁶ NPRM, *supra* n. 3, at 81245.

²⁷ Memorandum from Michaelle L. Baumert, Partner, Husch Blackwell LLP, to Janis Reyes, Asst. Chief Counsel, Small Bus. Admin. Office of Advocacy, re: Companionship Exemption – NPRM of December 27, 2011, at 3, (Jan. 30, 2012) (citing NAHC Survey, *supra* n. 22, however this study found only that 70% of agencies that elected to answer that survey report that the majority of their services are private-pay, not that the majority of all home care services are private-pay).

²⁸ NAHC Survey, *supra* n. 22, Slide 18.

The issue of continuity and quality of care is important, and there are multiple aspects to continuity of care. It is not self-evident that continuity of care suffers merely by virtue of involving more than one home care worker, though communication between home care workers and with the consumer and family caregiver is critical to ensuring continuity of care. Moreover, continuity of care entails more than simply the number of workers. Continuity means continuing attention and quality, attributes that can suffer when a worker is fatigued from working too many hours. Also, as noted above, the home care industry faces high turnover in the workforce, in part due to low wages, which detracts from continuity of care. Finally, adequate back-up systems and workers are vital, so that another worker is available when a regularly scheduled worker is unable to work. This is especially important in a direct-hire situation when there is no agency with a ready supply of workers involved.

Some have contended that if agency-supplied home care workers must be paid overtime and have their costs increase, consumers will no longer be able to afford them; and they will either opt for direct-hire arrangements or be "forced" into nursing homes. Even assuming the uncertain result that consumers would have a more difficult time affording agency-supplied services, AARP is not aware of any evidence indicating that consumers would be forced into nursing homes regardless of payer source.²⁹ Nursing homes are generally *more* expensive, not less, than home care services. On average, for instance, the Medicaid program can provide home and community-based services (HCBS) to three older adults and adults with physical disabilities for the cost of serving one person in a nursing home.

Moreover, if the requirement for overtime leads to greater rates of institutionalization (thus higher levels of spending on institutional care), one might expect higher rates of institutionalization or spending on such care in states that already require minimum wage and overtime. While there are many factors that influence state spending on HCBS vs. institutional care and there is no strong correlation between minimum wage and overtime pay requirements and expenditures in states on HCBS vs. institutional care for older adults and persons with physical disabilities, the data show that states can and have made progress with HCBS spending and still provide minimum wage and overtime protections. Of the six states that spend over 50 percent of Medicaid LTSS expenditures for older adults and adults with physical disabilities on HCBS, three of them provide minimum wage and at least some overtime protections (Washington, Minnesota, and California). Of the 10 states with the lowest percentage of Medicaid HCBS expenditures, six states have no minimum wage and overtime provisions and four states have minimum wage or minimum wage and overtime provisions for home care workers.³⁰

Given that overnight shifts often contemplate that both the consumer and the home care worker will be asleep for some or all of that shift, AARP would be open to some modification of the regulations being proposed regarding overnight shifts, however, any such modifications should be reasonable. Some have suggested that the companionship exemption be retained for overnight shifts, or that some or all of a home care worker's overnight hours not be considered work hours. These recommendations seem to go too far. Even if a worker can sleep for a few hours or read a book, an overnight shift is a shift spent away from home and with very limited ability to engage in one's normal private pursuits. They are at work. We note this situation may

²⁹ See discussion regarding treatment of third-party agencies in the context of consumer-directed care in section III *supra*.

³⁰ *Cf.*, S. Eiken et al., *Medicaid Expenditures for Long-Term Services and Supports: 2011 Update*, Table AG, (Thompson Reuters, October 31, 2011), available at <http://www.hcbs.org/files/208/10395/2011LTSSExpenditures-final.pdf>, and *NPRM*, *supra* n. 3, Table 1-2, at 81204-81206.

also arise when a consumer or family caregiver hires a worker to travel with the consumer and provide services, such as on a vacation, if the worker is not considered a live-in worker.

DOL already has regulations on the books that address waiting time,³¹ on-call time,³² and sleep time.³³ Currently, for shifts that last less than 24 hours, all hours are considered work hours, even though the employee may sleep or engage in other personal activities when not being called to duty. Under the NPRM, it is our understanding that these regulations would now apply to night shift home care workers. Also under current regulations, for shifts of 24 hours or more, the parties are permitted to exclude an entire sleep period of eight hours, unless the sleep is interrupted to such an extent that the employee cannot get 5 hours of sleep at some point during the night. Perhaps DOL could consider applying some of the concepts in §785.22 to shifts covered by §785.21. For instance, if the overnight hours worked represent overtime hours, perhaps they could be considered work hours, but not overtime hours, assuming that sleep time was largely uninterrupted. Or the regulations could permit the parties to agree on an overnight flat rate of sufficient size to ensure that the worker is paid at least minimum wage for all shift hours. Some slight modification to account for the fact that both the consumer and the worker may be asleep for most of the shift might make the new regulations more workable for both employers and employees, and is one that DOL may wish to consider.

VI. Conclusion

In summary, the aging population, the strong preference of older adults to live at home, and the need for cost-effective and balanced state LTSS systems means a strong demand for home health aides and personal care aides now and in the future. These jobs are low-paying, offer few or no benefits, are physically and emotionally challenging, and have high turnover rates that can mean poor quality and lack of continuity of care. People performing similar jobs in nursing homes or other residential settings receive minimum wage and overtime, while home care workers do not. There should be parity across settings for the same or similar jobs.

Helping individuals live in their homes and supporting family caregivers means having a home care workforce sufficient in size, skills, and competencies available to provide the quality services that consumers and their family caregivers need. The proposed rule takes an important step by providing minimum wage and overtime to most home care workers to help ensure their availability to consumers, reduce turnover, and improve the economic security of a workforce in which older workers predominate. However, this should be done in a way that makes key changes to the proposed rules to ensure they do not place inappropriate or unnecessary burdens on consumers and their family caregivers.

As noted above, the changes made in the proposed regulations would be new to direct care workers and to millions of individuals and family caregivers. They would also be new to many third-party employers, state Medicaid programs, consumer-directed care programs, and other publicly financed programs. Because it may take some time for consumers and family caregivers to learn about what the changes would mean for them, take providers some time to prepare to comply (for instance by hiring additional staff), and take public programs some time to determine what the changes mean for them and implement them, AARP urges DOL to consider whether a reasonable transition period (e.g., a phase-in period or a grace period during which no penalties for noncompliance are assessed) might be advisable.

³¹ 29 C.F.R. §§785.14-15.

³² 29 C.F.R. §785.17.

³³ 29 C.F.R. §785.20-22.

Thank you for the opportunity to comment on these important proposed regulations and your consideration of our recommendations for ways to make the proposed rule more workable for consumers and their family caregivers. If you have any questions, please contact Deborah Chalfie at 202-434-3760 or Rhonda Richards at 202-434-3770 in our Government Affairs Department.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs