



March 27, 2009

Secretary of Labor Hilda L. Solis
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Secretary of Health and Human Services Designate Kathleen Sebelius
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Secretary Solis and Secretary Designate Sebelius,

The organizational members, whose names appear below, of the newly formed *Eldercare Workforce Alliance*, request that the U.S. Department of Labor (DOL) review and re-interpret the current DOL “companionship exemption.”¹ The goal of our request is to extend greater federal minimum wage and overtime protection under the Fair Labor Standards Act to the more than 1,500,000 paid home- and community-based care workers who provide essential services to our nation’s older adults and people with disabilities.

We acknowledge that this is a complex issue, and a number of issues must be considered in addressing the companionship exemption. First, some categories of paid home care workers, such as live-in staff, might still justify continued exemption. Second, several states have developed extensive home care service delivery systems based on the presumption of this companionship exemption. Consequently, an abrupt implementation of any significant re-interpretation might in some states cause temporary but significant disruption—for consumers, workers, and employers. Finally, education will be critical regarding any changes that may be implemented; it is essential for those affected by any changes in policy to understand how the policy will impact them.

Therefore, the undersigned members of the Eldercare Workforce Alliance recommend the following:

- That the DOL seek input from key stakeholders—users of home care services, their family caregivers, home care workers, and employers—to help shape the definitions and manner in which the companionship exemption might be amended, and that the DOL consider the impact of any potential changes on consumer-directed programs, including

¹ *Fact Sheet #25: The Home Health Care Industry under the Fair Labor Standards Act (FLSA)*; U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division; November, 2007.

those that pay family caregivers to provide services; avoid any unintended consequences; and help ensure a smooth implementation of any potential changes.

- That DOL cooperate closely with the U.S. Department of Health and Human Services (DHHS), seeking ways in which DHHS can give guidance to states on managing any resulting increase in the cost of providing home care services.
- That upon any final decision to extend federal minimum wage and overtime protection to home care workers, states, home care delivery systems and employers be granted a time-limited “grace period” by the DOL to adjust to the revised exemption.

Members of the *Eldercare Workforce Alliance* stand ready to assist you as a resource as you consider changes to the companionship exemption and our recommendations.

Eldercare Workforce Alliance

The Institute of Medicine, in its 2008 report “Re-tooling for an Aging America: Building the Health Care Workforce,” called for immediate investments in preparing our health care system to care for the rapidly increasing numbers of older Americans and their families. In response, the 29 members of the *Eldercare Workforce Alliance* joined together in 2009 to address the immediate and future workforce crisis in caring for an aging America.

The eldercare industry employs millions of individuals in the United States, and according to the DOL, is the fastest-growing employment sector within the health care industry, as more people require this care. The Alliance believes that an important part of improving the quality of care is ensuring the recruitment and retention of a quality workforce, which includes paying adequate wages. Strengthening home care occupations can also drive long-term economic growth, particularly within low-income communities.

Background on the “companionship exemption”

In January 2001, the DOL, under the Clinton Administration, issued a notice of proposed rulemaking that offered several ways of modernizing the companionship exemption to the federal FLSA. According to the DOL, these updates were required in order to reflect “significant changes in the home care industry over the last 25 years” and because the regulations “exempt types of employees far beyond those whom Congress intended to exempt.”² Unfortunately, before the revision process could be concluded, it was terminated by the incoming Administration.

Subsequently the U.S. Supreme Court, in a 2007 unanimous decision in *Coke v. Long Island Care at Home*, upheld the DOL’s authority to interpret the scope of the FLSA’s companionship exemption. In 2008, the Fair Home Health Care Act (S. 2061/H. R. 3582) was proposed—co-sponsored by then-Senator Barack Obama—which if it had passed, would have extended FLSA protection to a broader definition of home care workers.

² http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-1590-filed.pdf

Most recently, the January 28, 2009 lead editorial in *The New York Times*, "Caring for the Caregivers" stated:

"Outdated labor rules from 1975 allow home care aides to be defined as companions, which exempts their employers, usually private agencies, from federal standards governing overtime and minimum wages. As the population has aged, however, demand for home care has grown and the work has evolved far beyond companionship. ...It is unconscionable that workers who are entrusted with the care of some of the nation's most vulnerable citizens are themselves unprotected by basic labor standards."

Although 16 states and the District of Columbia extend varying degrees of minimum wage and overtime protection to home care workers in their states, a federal minimum standard of protection would provide some level of protection to workers in all states. We therefore urge the DOL to revise and modernize the companionship exemption after seeking and considering input from all relevant stakeholders.

Request for meeting

Extending FLSA protection to those who work day and night to care for our elders is only one step that our nation should take to prepare for the coming "graying of America." Therefore, the members of the *Alliance*—representing a broad spectrum of consumers, family caregivers, the direct-care workforce, and healthcare professionals—request a meeting with each of you, and your senior staff, at your earliest convenience, to explore ways in which the Eldercare Workforce Alliance can assist your departments to strengthen the eldercare workforce, and in doing so, support older adults and their families.

We congratulate you on your new positions and look forward to working with you on these critical issues.

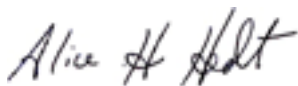
Sincerely,



Steven L. Dawson
EWA Co-convener
sdawson@PHInational.org



Nancy E. Lundebjerg
EWA Co-convener
nlundebjerg@americangeriatrics.org



Alice H. Hedt
EWA Project Director
EWAlliance@aol.com

The *Eldercare Workforce Alliance* members who support this request are:

- ◆ AARP
 - ◆ Alzheimer's Association
 - ◆ Alzheimer's Foundation of America
 - ◆ American Academy of Nursing
- ◆ American Association for Geriatric Psychiatry
 - ◆ American Geriatrics Society
 - ◆ American Medical Directors Association
 - ◆ American Nurses Association
 - ◆ American Physical Therapy Association
 - ◆ American Psychological Association
- ◆ American Society of Consultant Pharmacists
 - ◆ American Society on Aging
- ◆ Coalition of Geriatric Nursing Organizations
 - ◆ Council on Social Work Education
 - ◆ Direct Care Alliance
 - ◆ Family Caregiver Alliance
 - ◆ Gerontological Society of America
 - ◆ National Alliance for Caregiving
- ◆ National Association for Geriatric Education
 - ◆ National Council on Aging
 - ◆ National Hispanic Council on Aging
- ◆ NCCNHR – The National Consumer Voice for Quality Long-Term Care
- ◆ NCB Capital Impact/THE GREEN HOUSE® Project
- ◆ New York Academy of Medicine / Social Work Leadership Institute
 - ◆ PHI – Quality Care through Quality Jobs

The New York Times

January 28, 2009 - Editorial

Caring for the Caregivers

With more jobs being lost all the time across the board — more than 71,000 layoffs in the United States were announced on Monday and Tuesday alone — there should be comfort in the fact that one sector, health care, continues to add jobs. In December, employers added 32,000 health-related positions.

Unfortunately, one of the fastest-growing areas within the health care field — home care for the elderly — also is one of the lowest paid and most exploitable.

Outdated labor rules from 1975 allow home care aides to be defined as companions, which exempts their employers, usually private agencies, from federal standards governing overtime and minimum wages. As the population has aged, however, demand for home care has grown and the work has evolved far beyond companionship. It is not uncommon for home care workers to perform significant housekeeping chores and to help their elderly clients move, dress and eat, make sure they take their medicines and go to doctors' appointments.

In its last days in office in 2001, the Clinton administration proposed a revision to the labor rules to allow federal protections to apply to personal home care aides, but the Bush administration promptly threw that out and reasserted the status quo. A 2007 Supreme Court ruling upheld the rules, and a push that year by House and Senate Democrats to pass a bill to update the law went nowhere.

According to the Labor Department, personal and home care aides are expected to be the second fastest-growing occupation in the United States from 2006-2016, increasing by 51 percent, slightly behind the expected growth in systems and data communications analysts.

Most home care aides are women, low income and minority, and many of them are immigrants. Some states have taken steps to provide them with basic labor protections. Efforts to unionize home care workers in some states also has led to wage gains and better conditions. But the progress is incomplete without a federal law to recognize and protect the home care work force. It is unconscionable that workers who are entrusted with the care of some of the nation's most vulnerable citizens are themselves unprotected by basic labor standards.

It is also unwise, because poor pay for long hours leads to high turnover, which undermines the quality of care. Turnover also drives up the cost of providing home care — a needless drain on Medicaid, which pays for many home care services. And that is not the only way that poor quality home care jobs end up costing taxpayers. Nearly half of home care workers rely on food stamps or other public assistance, so taxpayers ultimately compensate for their low pay and inadequate benefits.

Of necessity, job creation and job quality will be the focus of the Obama administration in 2009, and, most likely, for many years. The Department of Labor could rewrite the rules to extend federal protections to home care workers. Or Congress and the White House could work together to pass a law granting those protections. Either way, the point is to ensure that home care, a 21st-century growth industry, creates good jobs.