MEMORANDUM

TO: CAPA members
   Diana Boyer - CWDA

FROM: Karen Keeslar

DATE: March 14, 2013

RE: Background and Status of Federal Overtime Regulations

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Background about the “Companionship Exemption”

The Fair Labor Standards Act (FLSA) is the primary federal statute dealing with minimum wage, overtime pay, child labor, and related issues. In general, the FLSA’s minimum wage and overtime requirements “cover” most employees; however, under current law, certain employees are “exempt” from coverage. One such exemption is the “Companionship Services Exemption” specified at Section 13(a)(15) of the Act. Specifically, this section exempts from FLSA coverage domestic service employees who (1) provide babysitting services on a casual basis or (2) provide companionship services (regardless of whether they are provided on a casual basis) “to individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).” The term “companionship services” is defined in federal regulation to mean services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental disability, cannot care for his or her own needs. Such services may include household work related to care for the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. General housework may be included as a service, as long as it does not exceed 20% of the total weekly hours worked by the companion.

Since the 1970s, Congress has debated extending coverage under FLSA to new groups of workers, including persons employed to provide companionship services to older individuals and persons with disability. In 1974, Congress extended minimum wage and overtime
protections to certain domestic workers under FLSA, and granted the U.S. Department of Labor (US-DOL) regulatory authority to define the terms of this coverage. These regulations, which have largely been unchanged since they were promulgated in 1975, exempt employees of third-party agencies and live-in domestic service employees who provide companionship services from coverage. Proposals to revise these regulations under the Clinton Administration, which extended into the Bush Administration, were not adopted. In 2007, the issue was heard by the U.S. Supreme Court (*Long Island Care at Home, Ltd. v. Coke*) which affirmed DOL’s regulatory interpretation of the 1974 amendments.

**Overview of the Proposed Federal Rules**

The proposed regulations would change the Companion Care and Live-in Exemptions in several important ways.

1) The proposed rules would repeal altogether both the companion-care and live-in exemptions for workers employed by third-party employers.

2) The proposed rules would substantially narrow the companion care exemption for families which employ companion care providers directly. The current regulations (29 CFR §552.6) define companionship care as follows:

   “As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term “companionship services” does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.”

Thus, the effect of the current rules is to exempt from minimum wage and overtime coverage those providing “fellowship, care and protection,” including “work related to the care of the aged or infirm” (such as meal preparation) and even “general household work,” so long as the latter does not exceed 20 percent of total weekly hours. Services which can only be performed by trained personnel are not “companionship services.”

The proposed rules would eliminate altogether the list of incidental activities (such as meal preparation) which can be provided without specific limitation, while prescribing in detail a limited set of activities that would be subject to the “not more than 20 percent” limitation. The new rules would provide specifically that directly-employed
companion care providers could spend up to 20 percent of their time each week providing the following services:

(a) occasional dressing, such as assistance with putting on and taking off outerwear and footwear;
(b) occasional grooming, including combing and brushing hair, assisting with brushing teeth, application of deodorant, or cleansing the hands and face of the person, such as before or after meals;
(c) occasional toileting, including assisting with transfers, mobility, positioning, use of toileting equipment and supplies (such as toilet paper, wipes, and elevated toilet seats or safety frames), changing diapers, and related personal cleansing;
(d) occasional driving to appointments, errands, and social events;
(e) occasional feeding, including preparing food eaten by the person while the companion is present and assisting with clean-up associated with such food preparation and feeding;
(e) occasional placing clothing that has been worn by the person in the laundry, including depositing the person’s clothing in a washing machine or dryer, and assisting with hanging, folding, and putting away the person’s clothing; and
(f) occasional bathing when exigent circumstances arise.

Under the proposal, if during any week the companion care provider's performance of these activities accounts for more than 20 percent of the employee's time during that week, “then the exemption may not be claimed for that week and workers must be paid minimum wage and overtime.”

**Employer Compliance Options**

The proposed rules outline three potential scenarios with respect to overtime costs. The first scenario is that employers will make no adjustments to staffing and pay the costs for overtime compensation. The second scenario assumes employers will make some adjustments to scheduling to reduce exposure to overtime costs, but will still incur some new costs for overtime pay. The third scenario is that employers will ban overtime and ensure that no employee works more than 40 hours a week.

**Significant Dates in the Rule-Making Process and Current Status**

On December 15, 2011, President Obama announced the US-DOL was proposing to narrow the companionship exemption. The US-DOL posted a Notice of Proposed Rulemaking (NPRM), complete with background information, economic impact analyses and proposed regulatory text, the same day. The US-DOL published the NPRM in the Federal Register on December 27, 2011 requesting public comments on the proposed revisions to the regulations. Interested parties were requested to submit comments on or before February 27, 2012. On February 24, 2012, the US-DOL extended the original
comment period by 14 days to March 12, 2012. The deadline for public comment was extended again to March 21, 2012 at the request of several members of Congress. There were 9,802 comments filed on the draft rules.

On January 15, 2013, the US-DOL filed the proposed rule with the Office of Information and Regulatory Affairs [a division of the Office of Management and Budget (OMB)]. The regulations fall under Executive Order 12886 which covers timing and procedures for "major rules" that would have a fiscal impact on both the public and private sector. Regulations filed under Executive Order 12886 are confidential until the OMB completes its review. The OMB cannot amend a rule; their authority only allows them to finalize/publish the regulation or return it back to the sponsoring department. OMB normally has 90 days to review regulations; however, Executive Order 12886 allows OMB to take a shorter or longer time to finalize regulations. If the regulations filed by the DOL do not have a specific implementation date, the rule would automatically take effect 60 days after the final rule is published by OMB.

The OMB website with information about the proposed rule is: http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1235-AA05
State of California
HEALTH AND HUMAN SERVICES AGENCY

May 11, 2012

Nancy J. Leppink
Deputy Wage and Hour Administrator
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1235-AA05: FLSA Exemption for companionship services and live-in domestic services.

Dear Deputy Administrator Leppink,

Thank you for this opportunity to explain why the proposed overtime regulations would add $250 million in governmental costs to our state’s In Home Supportive Services and developmental disabilities programs or force us to alter those programs to avoid that cost to the detriment of the recipients of care.

Overtime cost calculation.

Nearly three-fourths of California’s 361,000 In Home Supportive Services (IHSS) workers are family members of care recipients. Half of all workers live in the home with the recipient they care for. They earn an average of $11.62/hour, and that income often contributes to the joint income of the household. More detail on the recipient/provider relationship is provided on the attached charts.

Approximately 46,000 of these workers work more than 160 hours per month for a single recipient. Those additional hours average 63.2 per month. The annual overtime cost for those additional hours under the proposed rules would total $202.7 million per year ($5.81 (additional hourly overtime cost) x 63.2 (overtime hours per month) x 46,000 (workers) x 12 (months)). The overtime cost for programs that provide in home care to persons with developmental disabilities would add an additional $49 million annually, to bring the total added governmental cost of the proposed regulations to approximately $250 million annually. These increased costs would require cuts to either our In Home Supportive Services programs or other public service programs, in addition to the painful reductions already applied to California’s health and human services programs.

Impacts on programs and recipients of avoiding overtime.

The economic analysis in the regulatory proposal notes that the additional overtime costs can be avoided by hiring more workers to cover the hours in excess of the federal maximum. This is true. But where the employee and the...
employer are members of the same family, the proposed rule would have negative consequences for both IHSS recipients and their caregiver workers.

Recipient employers currently have the right and ability to choose to have care provided by a family member. California law gives recipient employers the right to hire, fire, and direct the activities of their provider. This right, for personal and attendant care, is also set forth in the Affordable Care Act as part of the Community First Choice Option. In addition, the ability to self-direct living arrangements and care management is a fundamental component of the Americans with Disabilities Act, as well as the U.S. Supreme Court Olmstead decision.

Based on the right to hire their own caregivers, 72% of IHSS recipients in California have chosen to hire a family member to provide the intimate and personal care they need rather than have a stranger provide that care in the home. Under the proposed new rule, however, recipients would no longer be able to have a family member provide care beyond 40 hours per week and would instead have to hire additional caregivers to cover the overtime hours. More caregivers would add stress to aged and disabled recipients and burden them with the responsibility of managing and directing the work of additional workers. They would also need to find and interview replacement workers more often.

If overtime is not authorized, workers would either accept the loss of the $11.62 hourly wage earned for hours beyond 40 per week or replace that lost income by taking on other work. In addition, because many of these workers live with a family member recipient, the net effect would be to reduce the overall joint household income that often allowed the caregiver to stay at home and care for both his or her own family and a relative in need.

Further background on California’s In Home Supportive Services program

California’s program currently serves 440,000 recipients who are cared for by 361,000 providers. Severely impaired recipients can be authorized to receive up to 283 hours per month; on average, they are authorized to receive 149 hours per month. All other recipients can be authorized to receive up to 195 hours per month; on average, they are authorized to receive 87 hours per month. County social workers conduct full biopsychosocial assessments of recipients in their homes to carefully calculate and document the actual number of hours authorized.

In conducting those assessments, social workers use a 6-point Functional Index Rankings scale to evaluate a recipient’s level of physical, cognitive and emotional functionality across 14 Activities of Daily Living. They use the functionality ratings to determine recipients’ specific services needs, and the precise amount of time (in minutes) required for each, on a daily, weekly or monthly basis, and they adjust those
determinations based on the availability of other supports and services, and the presence of other needs, within the household. Social workers follow detailed guidelines that establish the amount of time authorized for each service category, based on a recipient’s functional index ranking, to achieve statewide consistency in approving time allowed for services.

The program covers services that recipients would normally perform themselves were it not for their functional limitations. These include domestic and related services (such as housework, meal preparation and clean-up, laundry, shopping for food, and running errands); non-medical personal care services (such as bathing, ambulation, and bowel/bladder care); transportation (such as accompaniment to medical appointments); and medical services that do not require licensing or specialized training (such as rewrapping a sprained ankle or helping them take their medication). County and State Quality Assurance Teams regularly monitor recipients’ cases, and contact recipients as needed, to ensure services are provided and recipient needs are appropriately met through program services.

In-home care providers complete timesheets twice per month. As the direct employers, recipients sign providers’ timesheets verifying the hours worked. The co-employer state and public agencies provide payroll services.

Once again, thank you for allowing me to answer your questions about how we arrived at the $250 million cost estimate above and to explain why the rule change would result in unintended consequences to the recipients of publicly funded in-home care programs in California.

Sincerely,

Diana S. Dooley, Secretary
California Health and Human Services Agency

Attachments
IHSS providers working more than 160 hours per month

The attached data was derived from December 2011, Case Management Information Payrolling System (CMIPS). All providers who were in Eligible status and were authorized to provide more than 160 hours of service per month to an eligible recipient were identified. From that data set, we have displayed the provider's relationship to the recipient, and number of authorized hours over 160 in 20 hour increments.

Provider Relationship to Recipient
Total Providers: 46,314

- Total Relative Providers: 14,496 (31%)
- Total Non-Relative Providers: 31,818 (69%)
Providers with FLSA Hours Over 160
Total Providers: 46,314
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


Dear Ms. Ziegler:

The California State Association of Counties (CSAC), County Welfare Directors Association of California (CWDA), California Association of Public Authorities for In-Home Supportive Services (CAPA), and California IHSS Consumers Alliance (CICA) write to express concerns about the Department of Labor’s proposal to narrow the companionship exemption to the Fair Labor Standards Act (FLSA). The proposed rule would significantly change long-standing regulations pertaining to the companionship services minimum wage and overtime exemption under the Fair Labor Standards Act (FLSA). The proposed rule would significantly change long-standing regulations pertaining to the companionship services minimum wage and overtime exemption under the Fair Labor Standards Act (FLSA). Specifically, the proposed rule would redefine what constitutes companionship services, thereby limiting the types of duties and tasks that qualify for the exemption, and provide that companionship workers who work for third-party employers are subject to FLSA requirements. This proposed rule may have a significant impact on California’s In-Home Supportive Services (IHSS) program.

California’s IHSS program is the largest publicly-funded personal care program in the United States. It is now a $5 billion entitlement program that serves approximately 442,000 consumers and there are about 380,000 IHSS providers. To qualify for IHSS, consumers must be disabled, blind, or elderly (65 or older). The IHSS program is funded by a combination of federal, state and county dollars; the federal Medicaid program pays 50 percent, the state pays 65% of the nonfederal costs and counties pay the remaining 35% of the nonfederal costs of the program. There is a very small percentage of IHSS consumers
that don’t qualify for federal funding; the state pays 65% and the county pays 35% for these cases.

There is no single employer in the IHSS program. The IHSS consumer is responsible for hiring a worker and day-to-day management of that worker. The state handles payroll and, on behalf of the consumer, also handles workers’ comp, unemployment insurance and state disability insurance. Counties are mandated to act as or establish an “employer of record”; 56 out of 58 counties in California have established a Public Authority that acts as the employer of record for purposes of collective bargaining over provider wages and benefits. Public Authorities also provide registry and referral services to assist consumers to obtain IHSS providers. In the 1983 decision in Bonnette v. Health & Welfare Agency, the federal Ninth Circuit Court ruled that IHSS workers are covered by the Fair Labor Standards Act (FLSA). The landmark ruling established that IHSS providers were employees of the state and counties for the purposes of the minimum wage provisions of the FLSA. Accordingly, IHSS workers have been receiving wages that equal or exceed the minimum wage in California for nearly 30 years and we have no concerns with the minimum wage provisions in the draft regulations. At page 81201, the commentary notes that California provides overtime coverage for “home health care workers”. This is true for the contract-agency mode, but is not the case for Individual Providers who are paid by the IHSS Program. Out of approximately 440,000 IHSS cases in California, less than 2,000 are under the contract mode and the vast majority of IHSS workers are Individual Providers.

Our organizations recognize the invaluable role that homecare workers play in supporting the independence of seniors and people with disabilities. However, in reviewing the changes in the companionship exemption proposed by the Department of Labor, it is clear that, although well-intentioned, the proposed changes on overtime could have a negative impact on people with disabilities who rely on IHSS to live safely in their own homes. According to California Department of Social Services, there are approximately 50,000 IHSS providers who routinely submit timesheets who work more than 40 hours a week and that the annual cost of overtime pay would be approximately $200 million. The California Department of Finance has estimated the FY 12/13 state budget deficit to be $9.2 billion. To help close the state’s budget gap, Governor Brown has proposed to reduce state spending in FY 12/13 by $179 million through the implementation of a 20% across-the-board cut in IHSS hours and another $164 million by eliminating domestic & related services to IHSS consumers who live with another person. It is hard to imagine, given the state’s fiscal circumstances, how $200 million or more could be identified to pay for overtime on hourly wages for IHSS workers.

The U.S. Labor Department estimates these proposed regulations would increase the cost of in-home companion care from anywhere between $420 million to upwards of $2.3 billion, over the first 10 years. The proposal states on page 81218, “It is highly unlikely that agencies will simply accept overtime costs without changing operating and staffing policies.”
On page 81220, the proposal outlines three potential scenarios with respect to overtime costs. The first scenario is that employers will make no adjustments to staffing and pay the costs for overtime compensation. The second scenario assumes employers will make some adjustments to scheduling to reduce exposure to overtime costs, but will still incur some new costs for overtime pay. The third scenario is that employers will ban overtime and ensure that no employee works more than 40 hours a week.

If these regulations are adopted, it seems inevitable that the state administration and legislature will need to evaluate options to mitigate the costs of paying overtime to IHSS providers. The reality of California’s bleak fiscal condition causes us to be very concerned that limits could be placed on the number of hours IHSS providers can be paid in order to avoid overtime compensation. That would break down the continuity of care for IHSS consumers and also reduce pay for many IHSS workers. Personal care is very private, and most consumers develop an attachment to their homecare worker. In fact, approximately 70% of all IHSS providers in California are family members of the consumer. Most consumers do not want more than one home care worker coming into their home. If hours are capped, many IHSS providers would lose income unless they are able to work for multiple consumers or find other employment.

In the absence of legislative direction to mitigate costs of overtime, it is uncertain who would bear the costs to pay overtime to IHSS workers. On July 18, 2011, the Sonoma County Superior Court concluded that an IHSS consumer is the responsible party for payment of overtime. In Guerrero v. Jo Weber, the plaintiff worked as an IHSS provider seven days a week, seven hours a day with only 3 days off over a three-month period. She sued Sonoma County and the Sonoma County Public Authority, and also named as defendants the IHSS consumer and the consumer’s guardian/grandmother. The court ruled that defendants Sonoma County and the Sonoma Public Authority are “not an employer of the provider for purposes of wage and hour claims” and ordered the plaintiff to seek recovery from the IHSS consumer and her guardian/grandmother. The ruling states, “Significantly, the court ruling states, “On the one hand, the County has the responsibility to bargain with the provider's union for purposes of wage rates' but any such agreement must be approved by the State. (Welfare & Inst. Code §12306.1(a).) On the other hand, the recipient is completely in charge of how often the provider works, what time of day, and whether the provider's work is satisfactory or not.” The plaintiff filed an appeal and the case is pending before the Court of Appeal for the State of California - First Appellate District. Our organizations are not just concerned about the potential fiscal exposure for state and local government for overtime compensation. It is completely unrealistic to think that IHSS consumers can or should pay the costs of overtime pay. IHSS consumers are very poor; in order to qualify for the program their total assets must be less than $2,000, excluding their house and car. However, the Sonoma litigation reveals the potential that consumers could bear responsibility to pay overtime costs.
For these reasons, we are very concerned about these proposed regulations and urge the DOL to carefully weigh the potential for negative consequences before taking action to finalize these regulations.

Sincerely,

Kelly Brooks-Lindsey
Senior Legislative Representative
California State Association of Counties

Frank Mecca
Executive Director
County Welfare Directors Association of California

Janie Whiteford, President Emeritus
California In-Home Supportive Services Consumer Alliance