



March 21, 2012

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

RE: Comments on Notice of Proposed Rulemaking RIN 1235-AA05 Regarding 29 CFR Part 552—Application of the Fair Labor Standards Act to Domestic Service

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). 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 payrolling 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.

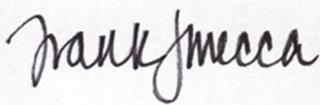
In the absence of legislative direction to mitigate costs of overtime, it is uncertain who would bear the costs to pay overtime to IHSS workers. On July 18, 2011, the Sonoma County Superior Court concluded that an IHSS consumer is the responsible party for payment of overtime. In *Guerrero v. Jo Weber*, 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



Karen Jordan
Executive Director
California Association of Public Authorities for IHSS



Janie Whiteford, President Emeritus
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