April 19, 2013

Brenda Aguilar, Office of Information and Regulatory Affairs (OIRA)
White House – Office of Management & Budget
725 17th Street, NW
Washington, DC 20503

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

Dear Ms. Aguilar,

Thank you for conducting the recent listening session with Will Lightbourne, the Director of the California Department of Social Services, and several of our valued partners. We appreciated the opportunity to share California’s concern about the significant negative effects of the draft Department of Labor (DOL) rules. We want to reinforce several of the key points in writing to facilitate your ability to share them with others unable to participate in the call.

Please understand that we share the President’s and DOL’s view that domestic care and other workers should be fairly compensated for the important services they provide. However, we believe the proposed overtime rule will significantly impact the hundreds of thousands of persons who are elderly, blind, and disabled that depend upon those workers for their care. It also will make community care more costly and less likely to be provided contrary to the move towards lower cost community care called for in the President’s Affordable Care Act.

California’s Medicaid program, known as Medi-Cal, provides home and community based services to nearly 450,000 people through the work of over 360,000 providers. These services are delivered under an optional Medicaid benefit program called In-Home Supportive Services (IHSS). The California IHSS program has operated for nearly four decades. It is exactly the care model advocated by the President’s Affordable Care Act, which called for all states to “rebalance” their care models away from institutional care to at least 50 percent of long-term care services provided in home- and community-like settings. Last month, the Centers for Medicare and Medicaid Services further recognized the value of this program in the continuum of care options, both its preventative value and its use as a long-term care service and support, when
it approved California’s Coordinated Care Initiative / Dual Eligible Demonstration in eight of our counties, representing nearly 60 percent of all IHSS recipients in the State. California is leading the nation in implementing the Affordable Care Act and the IHSS program is five times larger than the next-largest program operated by any other state. Any changes to the IHSS program due to the draft overtime rules would destabilize this complex initiative.

The provision of home- and community-based care is critical for several reasons. It is the right of all persons to receive care in the most community-like setting appropriate for the needs of an individual’s conditions. People must be able to choose their care provider in the same way in which any of us would choose a primary care physician or select an institution in which to receive care outside of the home. Similarly, California’s IHSS program has always operated under the principle that the consumer is the employer of his or her provider of care—a role that allows the consumer to select, hire, fire, and direct the work of each provider of service.

If the overtime rules are issued and the responsibility for paying overtime falls to the state, the State has two options. The first is to pay overtime. The second option is to avoid the increased cost by not allowing providers to work overtime. This would require beneficiaries to hire additional providers to meet their needs that exceed the work hour limit.

Under the first option, the cost of paying overtime to IHSS care providers is nearly $300 million annually from all fund sources; this is an increase from our 2012 estimate. This does not include the additional millions of dollars in administrative costs that would be required to reprogram the massive computer software programs California recently updated in order to track, calculate, and provide payments to IHSS providers.

Additionally, two of the State’s Medicaid waiver programs for home and community based services have mandated health care service expenditure caps that require cost neutrality. The amount expended on each recipient in these two programs is required to be cost neutral. Thus, if the companionship exemption cannot be claimed, the number of service hours for these recipients will need to be reduced proportionately. Hence, changing the overtime rules will cause many beneficiaries in these two programs to receive a reduced amount of services and possibly become unable to safely remain in their homes.
The second option—limiting overtime cost exposure by requiring authorized services be provided by multiple providers—would harm the consumer-driven self-direction principles of the program and make it more difficult for the aged, blind, and disabled recipients to manage the resources needed for their in-home care.

Assuming the State would limit hours worked to avoid overtime, our analysis of existing payroll data indicates we would need 55,000 additional providers. Some of the highest need recipients of services would have to accept strangers into their homes to perform their most intimate tasks and coordinate which providers would perform which tasks on which days and which hours of the day. In California, overtime obligations are triggered after 8 hours in a day, rather than after 40 hours-per-week. Therefore, if the companionship exemption to FLSA is eliminated, this stranger-engagement may be triggered in cases not exceeding 40 hours-per-week.

In many other employment situations, the number of employees can be adjusted to manage cost exposure—the employer simply hires additional workers. In the case of care services in the home or community, however, such options are far less practical. The intensely personal nature of the services, including bowel and bladder care, menstrual care, meal preparation and cleanup, laundry, and accompaniment at medical appointments, require that the recipient trust his or her care provider(s). As the number of providers increases, it becomes difficult to ensure: 1) trust between the recipient and provider, 2) the recipient’s ability to adequately train each provider, and 3) the proper coordination of services. Consumer self-direction of care becomes much more complicated as the number of providers increases; this would put at risk an individual’s ability to remain independently in his or her home.

Most people who wish to remain in the home or community do so by receiving care from persons already living with or related to them. Over 72 percent of IHSS recipients have chosen to receive their care from a relative, and more than 42 percent of care providers actually live with the recipient for whom they provide care. Both the disability and the aging communities are concerned that the new definition of companionship services, especially the types of services that would be considered incidental and therefore limited to 20 percent of the caregiver’s time, would reduce the availability of family and friend caregivers; we also share this concern. Given that three-quarters of the providers in the IHSS program are family members, consideration should also be given to the element of family income maintenance. Without this, many relative caregivers would need to seek outside employment to sustain the household and would not be available to provide care and companionship.
Companionship care is critically important for the health and well-being of our most vulnerable Californians. Many other groups that represent the interests of these beneficiaries share our concerns. To address these concerns, we urge you to leave in place the companionship exemption from overtime as it presently exists.

We hope the information in this letter is helpful as you finalize your decision. As always, we stand ready to assist and contribute in any way that we can. Please feel free to contact Will Lightbourne at Will.Lightbourne@dss.ca.gov or (916) 657-2598 or to contact me directly.

Respectfully,

Diana S. Dooley
Secretary

Cc: Marilyn Tavenner, Centers for Medicare and Medicaid Services
    Will Lightbourne, Director, California Department of Social Services
    Toby Douglas, Director, California Department of Health Care Services
    Ana Matosantos, Director, California Department of Finance