U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 1, 2005

WAGE AND HOUR ADVISORY MEMORANDUM No. 2005-1

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
DISTRICT DIRECTORS

FROM: ALFRED B. ROBINSON, JR.
Deputy Administrator

SUBJECT: Application of Section 13(a)(15) to Third Party Employers

Policy and Interpretation for Applying the Section 13(a)(15) Exemption
The purpose of this memorandum is to advise staff how to apply the Section 13(a)(15) companionship services exemption in light of the Second Circuit's decision in *Coke v. Long Island Care at Home*, 376 F.3d 118 (2nd Cir. 2004). As indicated in Opinion Letter FLSA 2005-12, the Division continues to adhere to its regulation, set out at 29 C.F.R. § 552.109(a), exempting companions who are employed by third parties from the minimum wage and overtime requirements of the FLSA. Regional Administrators and District Directors are instructed to continue to apply the exemption in states outside the Second Circuit.

Rationale for Applying the Exemption
The following explains and justifies the Division's policy to continue to apply the section 13(a)(15) exemption in all jurisdictions except those that comprise the Second Circuit Court of Appeals.

The text of the FLSA makes the applicability of the companionship exemption dependent upon the nature of an employee's activities and the place of their performance, without regard to the identity of the employer. Section 13(a)(15) exempts "any employee employed in domestic service employment to provide companionship services for 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)." 29 U.S.C. § 213(a)(15). This language is naturally read to exempt any employee who provides companionship services to an aged or infirm individual in a private home. The statute does not draw any distinction between companions who are employed by the owners of the homes in which they are working and companions who are instead employed by third party employers.

The Department's regulations explicitly state that the companionship exemption applies to companions employed by third party employers. The Department promulgated the Part 552 regulations pursuant to its express statutory authority under section 13(a)(15) to define and delimit the terms of the exemption, as well as its additional authority to issue regulations to implement the 1974 FLSA amendments. 40 Fed. Reg. 7404 (1975); see Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (authority to issue implementing regulations). Section 552.109(a) of Part 552 provides:

> Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime requirements by virtue of section 13(a)(15).

In promulgating 29 C.F.R. § 552.109(a), the Department explained that applying the exemption to employees of third parties "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975). The Department continues to agree with that assessment because the statutory phrase "any employee" indicates that the exemption is naturally read to apply based on the activities of the employee, not identity of the

employer. See, e.g., 29 C.F.R. § 780.303 (exemption in 29 U.S.C. § 213(a)(6)(A) for "any employee employed in agriculture" turns on "the activities of the employee rather than those of his employer"); 29 C.F.R. § 780.403 (exemption in 29 U.S.C. § 213(b)(12) for "any employee employed in" certain activities "may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities").

Section 552.109(a) is also consistent with the policy objectives that Congress was pursuing in creating the companionship exemption. Soon after the regulations were promulgated, the Department explained that Congress was mindful of the special problems of working fathers and mothers who need a person to care for an elderly invalid in their home. Opinion Letter from Wage & Hour Div., Dep't of Labor, WH-368, 1975 WL 40991 (Nov. 25, 1975). In particular, legislators were concerned that working people could not afford to pay for companionship services if they had to pay FLSA wages. See 119 Cong. Rec. 24,797 (statement of Sen. Dominick, discussing letter from Hilda R. Poppell); id. at 24,798 (statement of Sen. Johnston); id. at 24,801 (statement of Sen. Burdick). That cost concern applies whether the working person obtains the companionship services by directly hiring an employee or by obtaining the services through a third party.

In *Coke v. Long Island*, supra, the Second Circuit ruled that section 552.109(a) of the Department's regulations is inconsistent with congressional intent and with section 552.3 of the regulations. The Department disagrees. As explained above, Congress created the exemption to ensure that working families in need of companionship services would be able to obtain them, a concern that has nothing to do with the source of the companions' employment. Thus, it is unsurprising that the text of the statute focuses exclusively on the nature of the activities that companions perform and does not even hint that the source of a companion's employment is a relevant factor. Presumably, if Congress had wanted to limit the companionship exemption to employees of a particular employer, it would have said so expressly, as it has done with other FLSA exemptions. See, e.g., 29 U.S.C. § 213(a)(3) (exemption for "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center"); 29 U.S.C. § 213(b)(3) ("any employee of a carrier by air").

Moreover, the congressional committee reports that discuss section 13(a)(15) repeatedly emphasize that the key factors in determining whether an employee qualifies for the companionship exemption are the nature of the employee's activities, *see, e.g.*, H.R. Rep. No. 93-913, at 33 (1974) ("The bill exempts … employees employed *in the capacity* of companion to an individual who, by reason of age or necessity, necessitates a companion.") (emphasis added); S. Rep. No. 93-690, at 20 (1974) ("It is not, however, the Committee's intent to include within the term 'domestic service' *such activities as* casual babysitting and acting as a companion.") (emphasis added); 119 Cong. Rec. 24,801 (1973) (describing tasks performed by companions) (statements of Sens. Burdick and Williams); H.R. Conf. Rep. No. 93-413, at 27 (1973) (explaining that the kinds of services that are performed by trained personnel such as nurses do not fall within the exemption), and the place that the activities are performed. *See, e.g.*, S. Rep. No. 93-300, at 22 (1973) ("The domestic service must be performed in a private home which is a fixed place of abode of an individual or family"); S. Rep. No. 93-690, supra, at 20 (same); 119 Cong. Rec. at 24,799 ("A dwelling used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.") (statement of Sen. Williams).

The Department's regulations are not only consistent with congressional intent, but they are also internally consistent. The regulations address the issue of third party employment in only one place – section 552.109(a), which clearly and explicitly provides that companions employed by third parties can qualify for the exemption. The Department intentionally chose to include third party employees within the exemption after careful deliberation. When the regulations were first proposed, the Department drafted section 552.109 to exclude companions employed by third party employers from the exemption. 39 Fed. Reg. 35382, 35385 (1974). After reviewing the comments it received, however, the Department reconsidered its position. When the regulations were issued in final form,

the Department adopted the present language of section 552.109(a), which expressly includes companions employed by third party employers within the exemption. The Department explained that "[o]n further consideration, [it had] concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services. This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975).

The Department's January 19, 2001 NPRM and the Second Circuit's decision in *Coke v. Long Island* identified a conflict between section 552.109(a)'s pronouncement that the companionship exemption extends to third party employers and section 552.3's definition of "domestic service employment." *See* 66 Fed. Reg. at 5485; *Coke v. Long Island*, 376 F.3d at 133-34. The Department has reviewed section 552.3 and another regulation, 29 C.F.R. 552.101(a), which also addresses the concept of "domestic service employment." The regulations' definition of "domestic service employment" is relevant to determining the scope of the companionship exemption because the text of section 13(a)(15) exempts only those companions who are "employed in domestic service employment to provide companionship services." Thus, the statute seems to contemplate that to qualify for the exemption, an employee must both "provide companionship services" and be "employed in domestic service employment." If the definition of "domestic service employment" in sections 552.3 and 552.101(a) is properly read as excluding all third party employees, then those provision can fairly be said to be significantly in tension with section 552.109(a), which expressly includes companions employed by third party employers.

The Department does not believe, however, that sections 552.3 and 552.101(a), when properly read in context, speak to the issue of third party employment. Neither provision explicitly mentions the subject. And unlike section 552.109(a), there is no indication that the Department ever considered the potential impact of the provisions on the coverage of third party employees, much less that it actually intended the provisions to entirely exclude them. To the contrary, at the time the regulations were promulgated the Department seems to have believed that sections 552.3 and 552.101(a) did not resolve the issue of third party employment, since it included a separate section – section 552.109 – in both the NPRM and the final rule to expressly address the subject.

Admittedly, there are phrases in sections 552.3 and 552.101(a) that could potentially be read to exclude third party employees from the definition of "domestic service employment." Section 552.3 provides:

> As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

And section 552.101(a) explains:

> The definition of *domestic service employment* contained in §552.3 is derived from the regulations issued under the Social Security Act (20 CFR 404.1057) and from the "generally accepted meaning" of the term. Accordingly, the term includes persons who are frequently referred to as "private household workers." See S. Rep. 93-690, p. 20. The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate

> and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home.

The statement in section 552.3 that domestic service employment is "performed by an employee in or about the private home … of the person by whom he or she is employed," and the statement in section 552.101(a) that domestic service employment "must be performed in or about the private home of the employer," could be read to exclude companions who are employed by third party employers from the scope of the exemption. As explained above, however, there is no reason to believe that the Department intended the provisions to have that effect. Because there are available readings of the various regulations that allow them to be internally reconciled, the Department believes that they can and should be read in harmony. *See generally* 73 CJS Public Admin. Law and Proc. § 211 (2005) ("The court should read a regulation as an entirety, and should harmonize the various parts and provisions of the entire regulation and give them effect, if possible.").

Sections 552.3 and 552.101 are best read as describing the kinds of work that constitute domestic service employment and establishing that such work must be performed in a private home, rather than in a place of business. The references in those provisions to domestic service employment needing to be performed in the home of the employer are not intended to address the issue of third party employment, but rather are an extraneous vestige of the language's origin in the Social Security regulations. *See* S. Rep. No. 93-690, supra, at 20. *See also* 20 C.F.R. § 404.1057 (social security regulation describing "[d]omestic service in the employer's home"); 26 C.F.R. § 31.3121(a)(7)-1(a)(2) (social security tax regulation describing "[d]omestic service in a private home of the employer").

Because the Department borrowed the language of sections 552.3 and 552.101 from the congressional committee reports underlying the 1974 amendments to the FLSA without discussion or elaboration, the legislative history must be consulted to determine their meaning. Significantly, while the legislation was being drafted, Congress repeatedly referred to and discussed in detail its view that work must be performed in a private home to qualify as "domestic service employment." For example, the 1974 amendments extending FLSA coverage to domestic workers did so by referring to employees "employed in domestic service in a household." P.L. 93-259, § 7(b)(1), 88 Stat. 55, 62 (1974) (emphasis added). The committee reports, in turn, described the newly covered workers using a variety of phrases emphasizing the importance of the employment bring performed in a private home: "domestic service employees in private households," S. Rep. No. 93-300, supra, at 20 (emphasis added); "domestic service in and about a private home," id. at 22 (emphasis added); "domestic service employees employed in households," H.R. Rep. No. 93-232, supra, at 31 (emphasis added); "household domestic employees," S. Rep. No. 93-758, supra, at 27 (emphasis added); "employee in domestic service in a household," id. (emphasis added); "domestic service workers," H.R. Rep. No. 93-913, supra, at 11; and "private household workers." S. Rep. No. 93-690, supra, at 19 (emphasis added). Indeed, the reports contain a detailed discussion of Congress's intention to require that covered domestic service be performed in a private home:

> The domestic service must be performed in a private home which is a fixed place of abode of an individual family. A separate and distinct dwelling maintained by an individual or family in an apartment house or hotel may constitute a private home. However, a dwelling house used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.

S. Rep. No. 93-300, supra, at 22. See also S. Rep. No. 93-690, supra, at 20 (same); H.R. Rep. No. 93-913, supra, at 33 (same). This passage is particularly significant because it supplies content and meaning to the sentence immediately preceding it – specifically, the previously referenced sentence that draws upon the language of the Social Security regulations to define "domestic service employment" and states that its generally accepted meaning relates to "services of a household

nature performed by an employee in or about a private home of the person by whom he or she is employed." The fact that the sentence is immediately followed by a descriptive passage elaborating on the sentence's requirement that domestic service employment must be performed in a private home, but making no mention at all of the issue of third party employment, makes it clear that the sole purpose of the sentence is to specify the place where domestic service employment must be performed.

The sentence from the committee report is incorporated virtually verbatim into section 552.3, with the only modification being the addition of a brief parenthetical specifying that a private home can be fixed or temporary. In the view of the Department, when the sentence was imported into the regulations from the committee report, it carried with it the meaning ascribed to it by Congress. The Department signaled its understanding that the sentence should be read as addressing place of performance but as not speaking to third party employment in two distinct ways. First, the one change the Department made to the sentence was the insertion of a parenthetical explaining that, with respect to the place of performance, a private home can either be fixed or temporary. The insertion of the parenthetical shows that the Department was primarily concerned with clarifying the operative effect of the regulation on the place of performance requirement. Second, the Department drafted a separate regulatory provision specifically to address the issue of third party employment. This would have been entirely unnecessary if the definition of domestic service employment excluded third party employment – particularly at the NPRM stage, when the meaning of the two provisions would have been aligned. In sum, all signs indicate that neither Congress nor the Department intended the sentence that first appeared in the committee report and was then incorporated into section 552.3 to be construed as excluding employees who are employed by third party employers from the definition of domestic service employment.

In fact, if the sentence in question were construed as excluding all employees of third party employers from the definition of domestic service employment, it would have the perverse effect of excluding many domestic workers from the coverage of the FLSA – despite Congress' express intent "to include within the coverage of the Act all employees whose vocation is domestic service," excepting only casual babysitters and companions for the aged and infirm. *See* S. Rep. No. 93-690, supra, at 20 (emphasis added); see also H.R. Conf. Rep. No. 93-413, at 27 (1973); S. Conf. Rep. No. 93-358, at 27 (1973). Prior to the enactment of the 1974 amendments, the only domestic workers that were covered by the FLSA were those employed by "covered enterprises," which are currently defined by the FLSA as businesses with annual gross sales of at least $500,000 that employ at least two employees in interstate commerce. *See* 29 U.S.C. § 203(s); see also 29 U.S.C. § 203(s) (1970) ($250,000 threshold applicable at time of 1974 amendments). Two categories of domestic workers generally were not covered prior to the amendments: those employed by homeowners because there usually was no basis for individual coverage and those employed by third party employers that did not meet the test for enterprise coverage. There can be no question that Congress intended for the 1974 amendments generally to cover both of these categories, with only a few expressly enumerated exceptions. Yet if the sentence in the committee report is construed as excluding all third party employers from the definition of domestic service employment, then those domestic workers who are employed by third party employers that are not covered enterprises would to this very day not be covered by the FLSA.[1] That result is contrary to Congress' express intent, and cannot be correct.

[1] Unlike the sentence in the committee report, section 552.3 of the regulations purports to define domestic service employment only "[a]s used in section 13(a)(15) of the Act." As mentioned previously, however, since the Department copied the sentence from the committee report virtually verbatim into the regulations, there is no reason to believe that the Department intended for it to have a different meaning than the one that was attached to it by Congress. Indeed, there is good reason to believe that despite section 552.3's purported limitation of the definition to the companionship exemption, the Department in fact intended the provision to supply a general definition of the term as used throughout the Act. First, there is no other provision in the regulations that supplies an alternative definition of domestic service employment. Second, the examples that the regulation provides of workers that qualify as domestic service employees – including

Sections 552.3 and 552.101(a) should also not be read as addressing the issue of third party employment because doing so would render them inconsistent with themselves. Section 552.101, which elaborates on the definition of domestic service employment provided by section 552.3, specifies that "private household workers" are included within the definition of domestic service employees. The term "private household workers" has long been understood by both Congress and the Department to include the employees of third party employers. During the time Congress was considering the 1974 amendments to the FLSA, the Department submitted reports defining the term as:

> [A]nyone aged 14 and over working for wages, including pay-in-kind, in or about a private residence who was employed by (1) a member of the household occupying that residence or (2) a household service business whose services had been requested by a member of the household occupying that residence.

See Department's 1973 Report to Congress on Minimum Wage and Maximum Hours Standards under the Fair Labor Standards Act at 27; 1974 Report at 31-32. The second prong of the definition unambiguously includes domestic workers who are employed by third party employers. It is not surprising that the Department incorporated private household workers into the regulations' definition of domestic service employment, since Congress referred to the Department's reports on several occasions, *see* H.R. Rep. 92-232, supra, at 31; H.R. Rep. No. 93-913, supra, at 33; S. Rep. No. 93-690, supra, at 19-20; 119 Cong. Rec. 24,796 (statement of Sen. Dominick), and repeatedly used the phrase "private household workers" interchangeably with the term "domestic service employees." *See* H.R. Rep. No. 93-233, supra, at 31 (using the term "domestic service employees" and "private household workers" in a single paragraph to describe the same set of employees); S. Rep. No. 93-300, supra, at 21-22 (describing the same set of employees in successive paragraphs using the interchangeable terms "private household workers," "domestics," "household workers," and "domestic workers"); H.R. Rep. No. 93-913, supra, at 33; S. Rep. No. 93-690, supra, at 19. In fact, the Department's definition of "private household worker" was quoted in full during the floor debate in the Senate on the amendments to the FLSA. *See* 119 Cong. Rec. at 24,796 (statement of Sen. Dominick). Since section 552.101(a) clearly states that at least some domestic workers employed by third party employers are included within the definition of domestic service employees, it makes no sense to construe the ambiguous language requiring that domestic service "be performed in or about the private home of the employer" as designed to exclude them.

The governing rules of legal interpretation require the Department to adopt a reading of the regulations that harmonizes them and renders them internally consistent as a whole. *See Jay v. Boyd*, 351 U.S. 345, 360 (1956) (Court must read regulations "so as to give effect, if possible, to all of its provisions"); *APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003) ("[A] basic tenet of statutory construction, equally applicable to regulatory construction, [is] that [a text] should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error") (citations and internal quotations omitted); *Miller v. AT&T Corp*., 250 F.3d 820, 832 (4th Cir. 2001) ("Whenever possible, this court must reconcile apparently conflicting provisions"). If sections 552.3 and 552.101(a) were read to exclude third party employees from the definition of domestic service employment, it would not only create a conflict with section 552.109(a), but it would also be inconsistent with section 552.101(a)'s inclusion of "private household workers" within the definition of domestic service employment and with Congress's express intent "to include within the coverage of the Act all employees whose vocation is domestic service." *See* S. Rep. No. 93-690, supra, at 20; H.R. Conf. Rep. No. 93-413, supra, at 27; S. Conf. Rep. No. 93-358, supra, at 27. By contrast, when sections 552.3 and 552.101(a) are read as requiring that domestic service

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gardeners, handymen, janitors, grooms, and valets -- have little or nothing to do with the provision of companionship services, but instead fall within the broader category of domestic workers generally. *See* 29 C.F.R. 552.3.

employment be performed in private homes, but as not addressing the issue of third party employment, the regulations are fully harmonized and rendered internally consistent. Consequently, the Department reads sections 552.3 and 552.101(a) as not addressing the issue of third party employment. Read in that context, I find no inconsistency between sections 552.3 and 552.109(a). All prior statements by the Department to the contrary, including the Department's January 19, 2001 NPRM, *see* 66 Fed. Reg. at 5485, are hereby repudiated and withdrawn.

The Department is aware that the Second Circuit suggested in *Coke v. Long Island Health Care, Ltd.*, 376 F.3d at 131-33, that the Department's regulations governing third party employment were intended to be advisory interpretations only, and that they therefore do not have the force and effect of law. That is not the case; the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding. When the Department promulgated the final regulations in February 1975, it noted that as originally proposed, section 552.109(a) "would not have *allowed* the [FLSA] section 13(a)(15) or the [FLSA] section 13(b)(21) exemption for employees who, although providing companionship services, are employed by an employer or agency other than the family or household using their services." 40 Fed. Reg. 7404-05 (emphasis added). The Department stated in the final rule that it had changed its mind, "conclud[ing] that these exemptions *can be available* to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." *Id*. at 7405 (emphasis added). The highlighted language makes it clear that at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations – something that could be true only of a legislative rule. Accordingly, the Department has always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis.