

July 20, 2001

VIA FACSIMILE &  
REGULAR MAIL

Thomas Markey  
Acting Administrator  
Wage and Hour Division  
Employment Standards Administration  
U.S. Department of Labor  
Attn: Fair Labor Standards Team  
Room S-3516  
200 Constitution Avenue NW  
Washington, DC 20210  
Facsimile: (202) 693-1432

Re: Supplemental Comments on the Application of the Fair Labor Standards Act to Domestic Service

Dear Mr. Markey:

By way of introduction, the Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is also required by the Regulatory Flexibility Act (RFA) to monitor agency compliance with the RFA. 5 U.S.C. § 612. The Chief Counsel of Advocacy is authorized to appear as *amicus curiae* in regulatory appeals from final agency actions, and is allowed to present views with respect to compliance with the RFA, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities. Id.

On January 19, 2001, the Employment Standards Administration (ESA) of the Department of Labor published a proposed rule on Application of the Fair Labor Standards Act to Domestic Service, in the Federal Register, Vol. 66, No. 13, p. 5481. The purpose of the proposed rule is to amend the existing regulations under the Fair Labor Standards Act (FLSA) that pertain to the exemption for companionship services.

Under the current law, domestic companions are exempt from the requirements of the FLSA with regard to minimum wage and overtime. The proposed rule amends the regulations to revise the definition of companionship services; clarifies the criteria used to judge whether employees qualify as trained personnel; and amends the regulations to third party providers of companionship services to pay minimum wage and overtime. It also extends the FLSA to live in domestics, if they are employed by someone other than a member of the family in whose home they reside and work. In the proposal, ESA performed an initial regulatory flexibility analysis (IRFA) and determined that the rule would not have a significant economic impact on a substantial number of small entities.

The Office of Advocacy submitted comments on the proposal in March 2001. In its comments, Advocacy asserted that ESA had not met its obligations under the RFA. Specifically, Advocacy argued that the information provided in the RFA section of the preamble was insufficient to meet the requirements of the RFA, in that there was not enough information to provide an adequate basis to support a finding of no significant economic impact. Moreover, Advocacy asserted that the information provided in the proposed rule lacked some of the fundamental elements of an IRFA. Advocacy posed several questions ESA needed to address in order to perform an adequate IRFA with regard to the issue of minimum wage. Those comments are incorporated by reference and attached to this letter as Exhibit #1. ESA reopened the comment period for the proposed rule on April 23, 2001.

### **Requiring the Home Health Care Industry to Comply with FLSA May Have a Detrimental Impact on the Industry**

Recently, members of the home care industry contacted Advocacy about the potential impact of the rule. According to the industry, the requirement that domestic companions be paid overtime will be harmful to small home health care providers. This is an industry where employees often work twelve-hour shifts and overnight shifts. Requiring overtime pay could be extremely burdensome on the industry. For example, in the overnight shifts, the companion often spends the majority of the time asleep. Under the proposal, a small business may be required to pay employees for sleeping as well as working. If the employee works other shifts as well, it is quite possible for the small business to have to pay overtime wages to an employee who is sleeping.

In order to overcome the economic burden of the requirements, third party providers will need to increase their rates substantially to pay the overtime or hire additional workers to fulfil the needs of their customers. Both options are costly to the industry. The former may increase rates to the point where customers will decide not to utilize the services, therefore causing the small businesses to lose revenue. The latter will increase costs.

### **The RFA Requires ESA to Perform a Thorough Analysis of the Impact of the Proposal on the Industry**

Like the minimum wage issue, the economic impact of the requiring small home health care agency services to pay overtime for companionship service was not evaluated fully by ESA as required by the RFA. As we stated in our previous comments regarding this rule, the RFA requires regulatory agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. See 5 U.S.C. §§ 601, et. seq.; Northwest Mining Association v. Babbitt, 5 F. Supp. 2d 9 (D.D.C., 1998). Among other things, this includes providing the public with information about the nature of the industry, the impact of the action on small entities, and a discussion of the alternatives that the agency considered. See, 5 U.S.C. §§ 603 (b), 607.

Advocacy asserts that, in addition to the questions posed in Advocacy's previous correspondence, there are a number of questions that need to be addressed regarding the impact of requiring overtime payment for companionship services. Those questions include:

- How many home healthcare agencies employ domestic companions that provide overnight services, twelve-hour shifts, or live-in services?
- On average, how many hours do those companions work?
- How much time do the companions spend awake versus asleep?
- How much are the agencies charging their customers for overnight service and extended shifts? Is there an additional charge for such services? If so, how much?
- Will requiring third party providers to pay employees overtime substantially increase their operating costs? If so, by how much? If not, why not?
- Are there alternatives to removing the overtime exemption that would minimize the economic impact on third party providers?

Those are some of the questions that need to be answered for ESA to comply with the requirements of the RFA.

## **Conclusion**

While it is important to assure that workers receive fair wages for the work that they provide, it is also important for the public to understand the economic impact of imposing the requirements of the FLSA on an industry that was traditionally exempt. Requiring third party providers to pay overtime pay may cause the companies to pass the additional costs on to consumers through price increases. If the consumers cannot absorb the costs, some will have to go without such services. If the consumers go without the services, small home health care providers will lose revenue and possibly cease operations.

Performing a thorough regulatory flexibility analysis will allow the ESA and the public to comprehend fully the possible impact of the proposal on the consumers and the providers of home health care services. Moreover, it will provide ESA with an opportunity to consider meaningful alternatives to the proposal that may mitigate the impact on small entities.

The intent of the RFA is to assure that the economic impacts of regulatory actions are fairly weighed in the regulatory decision making process. This information assists small entities in understanding the impact of the proposal so that they can provide ESA with meaningful comments and suggestions for possible alternatives. Failure to provide the necessary information at the proposed rule stage undermines the intent of the RFA. Accordingly, as stated in its earlier correspondence, Advocacy maintains that ESA should publish an amended IRFA to provide the public with the information it needs to determine the impact of the rule prior to its finalization.

Thank you for the opportunity to comment on this proposal. If you have any questions, please feel free to contact this office.

Sincerely,

Susan M. Walthall  
Acting Chief Counsel  
Office of Advocacy

Enclosure

Sincerely,

Jennifer A. Smith  
Assistant Chief Counsel  
for Economic Regulation