

March 22, 2001

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

Re: 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) 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) pertaining to the exemption for companionship services.

Currently, “domestic companions” are, by law, exempt from the requirements of FLSA, such as minimum wage and overtime. The proposal 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 would also extend 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 asserts that ESA has not met its obligations under the RFA.

ESA Has Not Complied with the Regulatory Flexibility Act

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. When an agency issues a rulemaking proposal, the RFA requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities.” 5 U.S.C. § 603(a); *Id.*

The information provided in the RFA section of the preamble is insufficient to meet the requirements of the RFA. There is not enough information to provide an adequate basis to support a finding of no significant economic impact and the information provided lacks some of the fundamental elements of an IRFA. Several questions must be answered in order to meet the requirements of the RFA. Some questions that ESA needs to address include:

- How many home healthcare agencies employ domestic companions?
- Are the activities of the agencies limited to companionship services or do they offer other services as well? If they offer other services, what percentage of the business will be affected by the proposal?
- How many home healthcare agencies are not paying minimum wage to employees who provide companionship services? How many of these employees do not receive minimum wage? How many are paid over the minimum wage?
- How much are the agencies charging their customers for domestic companions?
- How many companions are employed by home healthcare agencies?
- Will requiring third party providers to pay employees minimum wage substantially increase their operating costs? If so, by how much? If not, why not?
- Are there alternatives to removing the 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.

The Office of Advocacy recognizes the importance of assuring that workers receive fair wages for the work that they provide. However, there is also an important public policy concern in understanding the impact that this requirement may have on the economy. Requiring third party providers to pay minimum wage 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. Performing a thorough IRFA will allow the ESA an opportunity to fully comprehend the possible impact of the proposal and provide the public with the necessary economic information to provide meaningful comments.

The requirements of the RFA are not intended to prevent an agency from fulfilling its statutory mandate. Rather it is intended to assure that the economic impacts are fairly weighed in the regulatory decision making process. The public has an interest in knowing the potential economic impact of a particular proposed regulation. By failing to provide this information, ESA has failed to comply with the requirements of the RFA and has denied the public of its right to know the potential economic impacts of the proposal. Without this information, small entities cannot provide ESA with meaningful comments and suggestions for possible alternatives. This not only usurps the purpose of the RFA, it also usurps the notice and comment process. In order to overcome this failure, Advocacy asserts that ESA should publish an amended IRFA that provides the information that the public needs to determine the impact of the rule prior to the finalization.

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

Sincerely,

Sincerely,

Mary K. Ryan
Deputy Chief Counsel
Office of Advocacy

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation