

Before the

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

of the

COMMITTEE ON EDUCATION AND LABOR

US HOUSE OF REPRESENTATIVES

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STATEMENT OF

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Madam Chair, Ranking Member Wilson and Honorable Members of the Subcommittee, my name is Alfred B. Robinson Jr. I am an attorney in the Washington office of Ogletree, Deakins, Nash, Smoak & Stewart and formerly was at the United States Department of Labor where I served as a Senior Policy Advisor, Deputy Administrator for Policy of the Wage and Hour Division and Acting Administrator of the Wage and Hour Division. Thank you for this opportunity to speak with you about the Section 13(a)(15) exemption in the Fair Labor Standards Act (FLSA), commonly referred to as the “companionship services exemption”, and the proposal bill H.R. 3582, the Fair Home Health Care Act, introduced by Chair Woolsey.

As you are aware Congress amended the FLSA in 1974 essentially to extend coverage of the Act. Included in these 1974 amendments was the Section 13(a)(15) companionship services exemption. Specifically, it exempts from the minimum wage and overtime requirements “an employee employed on a casual basis in domestic service...to provide babysitting services or any employee employed in domestic service...to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves...” 29 USC § 213(a)(15). Also, Congress granted the Secretary of Labor in this statutory provision the authority to define these terms by regulations.

In 1975, the Department of Labor (Department) issued regulations in 29 CFR Part 552 to address the companionship services exemption. In particular, Section 552.109(a), entitled “[t]hird party employment”, explicitly states :

Employees...providing companionship services, as defined in §522.6, and who are employed by an employer or agency other than family or household using their services, are exempt from the Act’s minimum wage and overtime requirements by virtue of section 13(a)(15)

29 CFR §552.109(a). Thus, the companionship services exemption has applied to employees of a third-party employer or agency based upon the regulations of the Department since it first issued such guidance in 1975.

Also, Section 552.109 represents a conscious decision by the Department that the companionship services exemption should apply to third-party employers. As part of its rulemaking responsibilities, the Department’s proposed rule was drafted to preclude the application of the exemption to employees of a third-party. 30 Fed. Reg. 35382, 35385 (1974). However, in light of a thorough examination of the comments, the final regulation issued by the Department applied the exemption to employees of third-parties

and Section 552.109(a) reads as it presently exists. Thus, the application of the companionship services exemption to the employees of third-party employers or agencies is the result of a deliberate, reasoned rulemaking process.

The rationale given by the Department for this regulation is persuasive and direct – it effectuates the statutory language and is consistent with prior practices. The statutory language is quite clear – the companionship services exemption applies to “any employee” providing companionship services for aged or infirmed individuals unable to take care of themselves. The statute does not qualify the words “any employee”. In other words, it does not restrict the application of the exemption, for example, to “any employee of a person who receives such services or who is part of a household where a person received such services.” Rather, the statute conditions eligibility of the exemption upon the activities of the employee and not upon who hired the employee.

Many other exemptions of the FLSA turn on the activities or duties of an employee. For example, the Section 13(a)(1) exemption for bona fide executive, administrative or professional employees is determined according to their activities or duties, among other requirements. Similarly, the exemption for agricultural employees in Section 13(a)(16) of the FLSA is determined according to the employee’s activities, not those of the employer. This basis of reviewing an employee’s activities to determine whether an employee is eligible for a particular exemption is contrasted with other exemptions that are employer-based. For example, one employer-based exemption is found in Section 7(i) of the FLSA and exempts a retail or service establishment exemption from overtime where the employer establishment satisfies the definitional requirements and pays its employees in accordance with the statutory requirements.

Another is found in Section 13(a)(3) of the FLSA that exempts certain amusement or recreational establishments, organized camp, or religious or non-profit education conference center from the minimum wage and overtime requirements.

In addition to effectuating the statutory language, the application of the companionship services exemption to employees of third-parties is consistent with Congressional intent. Several statements by Senators in the Congressional Record suggest that the companionship services exemption should apply to a person providing such services regardless of whether they were hired directly by the individual receiving such services or by a third-party retained by the individual to receive such services. One of the main reasons that these statements did not make such a distinction is because of concerns that working families would face increased costs for such services if the FLSA minimum wage and overtime requirements applied. Congressional committee reports also focus on the type of activities that are subject to the companionship services exemption. They too do not suggest that the exemption should be restricted based upon who employs the provider of eligible companionship services. It is noteworthy also that the committee reports state that the exemption would not apply to skilled nurses, it only applies to services provided in a private home and a boarding house where such services are provided and that operates as a business is not a private home.

Finally, any suggestion that there is conflict in the Department's regulations was resolved by the Supreme Court in *Long Island Care at Home Ltd. v. Coke*, No. 06-593 (June 11, 2007). The Second Circuit Court of Appeals had relied on another regulation in Part 552. In particular, it looked at language in Section 552.3 to rationalize that the companionship services exemption can not apply to employees of third-parties. However,

such reliance was misplaced because Section 552.3, entitled “[d]omestic service employment”, defines the types of services that would constitute “domestic service employment” as that term is used in the statute. The Court found that the language of Section 552.3 on the issue of third-party employment was not controlling, in part because the focus of that regulation is to define the scope or type of services that constitutes “domestic service employment” and to which the companionship services exemption applies. The Court ruled that Section 552.109(a) that applied the companionship services exemption to persons employed by third-parties was valid and controlling.

In the time that I have remaining, I would offer a few observations about the proposed legislation, H.R. 3582. As I understand, its purpose is to apply the minimum wage and overtime labor standards of the FLSA to any provider of companionship services who is not employed on a “casual basis” without defining what is meant by “a casual basis”. However, H.R. 3582 would go beyond addressing the Supreme Court’s decision in the *Long Island Health Care v. Coke* case, and would preclude the companionship services exemption from applying not only to an employee of a third-party but arguably also to many others who today are eligible for the exemption. In fact, H.R. 3582 would limit eligibility for the companionship services exemption only to the casual babysitter or provider of companionship services who: (1) is an irregular or intermittent employee; (2) is an individual whose vocation is not to provide babysitting or companionship services or is an individual not employed by a third-party employer but rather is employed by the family or household of the recipient, and (3) does not work more than a total of 20 hours a week providing babysitting or companionship service to one or more individuals. This bill would have the effect of applying the minimum wage

and overtime requirements to many companionship providers who are employed by the household or family of the recipient. For example, if you perform casual babysitting or companionship services on a regular basis or do so for more than 20 hours a week, then you would not be eligible for the Section 13(a)(15) exemption even if your employer was the recipient of the services or a household family of the recipient.

I would welcome the opportunity to address any questions that you may have.

Thank you.