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STATEMENT OF WILLIAM A. DOMBI

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SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

Good morning Chairman Walberg, Ranking Member Woolsey, and members of the Subcommittee on Worker Protections. I am William A. Dombi, Vice President for Law at the National Association for Home Care & Hospice. Thank you for the opportunity to testify at today's hearing.

The subject of today's hearing is of crucial importance to the provision of home care to our nation's elderly and people with disabilities. The U.S. Department of Labor has proposed changes in overtime compensation exemptions that would effectively eliminate the application of the exemptions for home care services. Specifically, the proposed rule would redefine "companionship services" to limit the application of the exemption to primarily "fellowship." Also, the proposed rule would eliminate any application of the companionship services and live-in exemptions where the worker is employed by a third party. There has been no change in the law mandating these revisions. Further, these rules have been in effect for nearly 40 years.

The proposed rule raises several legal and factual concerns.

First, the proposed redefinition of "companionship services" is in direct conflict with the language of the Fair Labor Standards Act as well as its legislative history. Specifically, the FLSA applies the exemption to employees providing "companionship services for individuals who (because of age or infirmity) are unable to care for themselves." This exemption relates to care, not "fellowship" a term never referenced in the law.

In 1973, Senator Taft noted that the services are directed to caring for the elderly in their homes to avoid nursing home placement. Senator Burdick further noted that the exemption applies for services to the aged and infirm that needs someone to take care of them. “Fellowship” is not care and does little or nothing to keep people out of nursing homes.

Second, excluding employees of third-party employers from the application of the exemption is in direct contradiction to the language of the FLSA and the position advanced by the Department of Labor at the US Supreme Court in *Long Island Care at Home v. Coke*. The law applies the exemption to “any employee.” The Department relied on this language in defending its current regulations at the Supreme Court in 2007. The exemption is not limited to the infirm that have the wherewithal and financial capabilities to take on the difficult tasks required of employers.

Third, the proposed rules have existed essentially with identical standards since the original rulemaking proceeding in 1975. Congress has had many opportunities to change the law in line with the Department’s proposal. Where Congress does not find sufficient reason to change the law over 36 years, the legal validity of the current proposal is called into serious question.

Finally, the analysis by the Department of Labor regarding the likely impact of the proposed rules falls very far short of the analysis required under the Small Business Regulatory Flexibility Act, the Paperwork Reduction Act, and Executive Orders 12886 and 13563. While the Department offers a lengthy impact report, it has several major failings at its core. Given the potential impact of the proposal, the Department should be held to a very high standard of accuracy and completeness in its impact analysis.

The analysis misses completely one of the most significant forms of home care—privately purchased personal care. It is estimated that several million elderly and persons with disabilities use such care through 20,000 companies with an estimated \$25-30 billion in annual expenditures.

The Department’s impact analysis is also devoid of any evaluation of live-in services. This unique segment of home care is virtually all on a private pay basis. The impact on live-in care and caregivers cannot be simply assumed by using Medicare data or even the limited, but unrelated data on Medicaid home care services. It is a service that is wholly different from any public program home care.

The major weakness in the Department’s impact analysis is the great reliance on Medicare data on home health services and other public reports on such care. However, only 6% of Medicare home health spending is on home health aides, the closest service to companionship care.

Medicaid is a much larger public purchaser of personal care services through a variety of state specific programs. However, Medicaid data on the actual hours of care provided by personal care workers is virtually unavailable making an assessment of impact unreliable when using public data reports.

NAHC has conducted a study of the impact of the proposal. This nationwide survey, including private pay home care and live-in services providers, indicates the following adverse impacts:

1. Moderate to significant increases in care costs
2. Restrictions in overtime hours to the detriment of the workers overall compensation

3. Loss of service quality and continuity
4. Increased costs passed on to the patients and public programs that would decrease service utilization, increase unregulated “grey market” care purchases, and increase institutional care utilization rather than absorbing and covering the higher cost of care.

Further, an analysis by Navigant Economics confirms that the Department fell far short of the depth and accuracy needed to produce the mandated impact analysis sufficient to protect the public from harmful policy changes. Navigant Economics uncovered essential flaws and weakness in the Department’s analysis, indicating that it would be prudent to re-initiate a comprehensive review before proceeding further with the proposed rule change.

In conclusion, the Department of Labor’s proposed rule significantly changes its longstanding policy. This proposal is in conflict with the language of the law and its legislative history. Also, the proposal fails to comply with requirements that the Department undertake a comprehensive and reliable impact analysis before issuing the proposal. Consumers, workers, small businesses, and public health care financing programs such as Medicaid all would be adversely affected by the proposal.