STATEMENT OF WYNN ESTERLINE

Before the House Committee on Education and the Workforce

Concerning

"Ensuring Regulations Protect Access to Affordable and Quality Companion Care"

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Good morning, Chairman Walberg, Ranking Member Woolsey, and other Members of the Committee. My name is Wynn Esterline, and I am the owner of an in-home non-medical companionship care business in Adrian, Michigan. We are a Home Instead Senior Care® franchise. I appreciate the Committee's invitation to present my views on the Department of Labor's proposed changes to the federal companionship exemption. I speak today on behalf of my Home Instead Senior Care franchise, as well as our network of 568 franchise businesses across the United States.

I started my business in 2000. In 2006, the Michigan legislature passed a new law that required employees providing companionship services to be paid minimum wage and overtime. The only exemption for this type of work that remained was for live-in situations.

This new Michigan law drastically changed my business, negatively affecting my caregivers and the seniors we serve. No one is better off than they were before this change went into effect, not me, not my clients, and certainly not my employees. I firmly believe that the rest of the country is headed for the edge of this same cliff, and I urge you to consider our experience as you consider the Department's proposed changes to the companionship exemption.

In reviewing the Notice of Proposed Rulemaking, it is clear to me that the Department of Labor does not understand the companionship industry, the work our employees perform, or who is paying for these services. We are not a "home health care" provider. Over and over, the Department cites to Medicare and Medicaid figures on "home health" as support for its conclusions. For my business, and for the industry as a whole, government programs, including Medicaid and Medicare, only account for a very small portion of the payments for companionship services. In fact, Medicaid and Medicare only account for 5.2% of the payments to our industry.[1] Overwhelmingly, payments for our services are by the elderly and their families – 85%.[2] Their ability to pay, and consequently the market for companionship services, is extremely sensitive to its cost.

The Department's fundamental misunderstanding of our industry results in incorrect conclusions regarding the effect these proposed changes will have.

I understand that the main goal in making these changes is to increase wages for those who work as companions to the elderly and disabled. To be sure, I understand the importance and the quality of the work our caregivers perform. My employees are professional, hard-working, caring, good people who pour their hearts into their jobs and will do all they can to protect and care for their seniors. I do, and think we all should, have a great deal of respect for my caregivers and the thousands of workers like them across this country.

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[1] "*Economic Impact of Eliminating the FLSA Exemption for Companionship Services,*" IHS Global Insight, February 21, 2012.

[2] *Id.*

However, our experience in Michigan has shown that these proposed changes will not increase employee wages. My caregivers are not better off now than they were in 2005 before our state law changes went into effect. Their wages have not increased. If anything, their wages have decreased because I have been forced to cut their hours down to 40 or below each week, to do all I can to keep the services affordable so that the seniors we serve can continue to be our clients.

Frankly, in my estimation, these proposed changes accomplish nothing of what they propose to do. I'm sure if these changes go forward that we'll hear how the Department of Labor has stood up for these hard-working caregivers, protected them, and bettered their situation by making sure they are compensated more fairly. But after the cheering dies down and all these companions go back to work, they will find, as did companions in Michigan, that the harsh reality is that the only difference the Department will have made for them is that they will need to work for multiple agencies, and probably for more hours each workweek, in order to earn the same amount of money they were making before the exemption went into effect.[3]

Doris

As an example, I'd like to talk about one of my best caregivers, Doris. Doris has been my employee since 2003, and is as professional, hardworking, and caring an individual as you could

[3] As a matter of fact, Michigan state lawmakers are poised to introduce legislation to reverse the 2006 change to our state law, and to fully reinstate the "companionship exemption" there. These proposed changes to the federal exemption have stalled that effort. However, if the changes we are discussing today do not move forward, we believe the groundswell of dissatisfaction with the 2006 state law change will result in Michigan restoring the companionship exemption.

ever find. Any of us would be lucky to have a Doris to care for us in our later years, or to care for one of our family members.

My staff and I had to begin to alter our scheduling in September of 2006 to ready ourselves for the coming change in state law. Prior to that, from January through August of 2006, Doris was working an average of 54 hours per week for my business, mostly on overnight shifts which included a great deal of downtime and sleeping time. During those eight months right before the change in state law went into effect, she was earning approximately $432.00 per week in gross earnings. In contrast, during the first week of October 2006 when the change officially went into effect, Doris' gross wages immediately decreased to $320.00 as we limited her hours to 40. In the eight months after this change to Michigan state law, Doris worked an average of 29 hours per week and earned approximately $232.00 per week – just a little more than half the average hours and earnings she had with us before the law changed. Doris asked us for more hours, and I sincerely wanted to put her on more shifts, but I couldn't do so and still control her overtime and my clients' costs. Eventually, Doris had to start working for another agency to make up the difference.

Doris' work/life situation is drastically different now than it was before October of 2006. At this point in time, she is working for two different businesses, including mine. She has two different sets of supervisors, two different schedules to coordinate, and even with all that she is still unable to secure the same number of hours she used to work for Home Instead alone – so she makes much less money than she used to. During all of 2011, she worked less than 10 hours of overtime for my business. Six years after the exemption was taken away from us in Michigan, Doris will tell you that she is much worse off than she was before. And Doris' situation is not at all unique, among my caregivers or those of other companionship companies in Michigan.

For my office staff and myself, where we used to be able to spend the majority of our time focused on meeting the needs of our caregivers and seniors, now we spend the majority of our time analyzing the potential overtime impact of every assignment we make. Where we used to be able to find out from a caregiver what hours and schedule he or she wanted to work, and follow that pretty closely, now we cannot. I haven't been able to hire additional staff to take on this burden — they too have to work harder for the same or less money than they did before this change. I know that the Notice of Proposed Rulemaking says that care will improve, and there will be more training, but that has not been our experience in Michigan. We simply do not have the time to devote to new training programs because we're spending too much time trying to keep our services affordable and our business alive.

Ruth and John[4]

As difficult as this situation has been for Doris, the circumstances my clients have been left to cope with have been even more heartbreaking. Most would do anything to stay in their homes and avoid institutionalized care — but there is a definite limit on what they can afford. All of my clients in need of care for more than forty hours per week have had to forego necessary care they used to get in order to cut costs, or they have had to accept a greater number of rotating caregivers into their homes.

[4] These names have been changed to protect the individuals' privacy interests.

Unfortunately, our seniors who need the most care are usually those with Alzheimer's or dementia, and they are least likely to be able to comprehend or handle a parade of different people into their homes over a week — like my client, Ruth, who lived at home with her husband John. Both are in their 80's and Ruth started receiving care from us when her health began to fail significantly. John was in good health and did not need service for himself, but could not care for Ruth all on his own. Ruth has Alzheimer's and like most people with that or similar conditions, continuity of care is extremely important for her. In January of this year, despite our best efforts, we had to place an average of ten caregivers in their home each week in order to juggle schedules around overtime, and the strain became too much for Ruth. She and John couldn't afford to pay overtime and so we couldn't reduce the number of caregivers we sent to them. Finally, John called me to say they'd had enough, he and Ruth couldn't cope with the strain the additional caregivers brought any longer. Now, both of them are in a nursing home — Ruth because she couldn't handle having so many caregivers, and John to be near her.

Tell me how these proposed changes will make a positive difference for couples like Ruth and John in these other states. How is it that they are better off in an institution, rather than together in their own home — where they desperately wanted to be, and could be before this change in the law? How is society better because they've been forced into a nursing home, which is care that is paid for by mostly government sources, where without these changes they would have been able to manage using only their own finances at home.[5]

[5] Nursing home costs are borne by the following sources of payment: Medicaid: 49.3%, Medicare: 12.5%, Other Government: 5.6%, Private Insurance: 7.5%, Out of Pocket: 25.1%. In other words, the government through one

Frankly, even if there was no third party employer prohibition included in these changes, the removal of "care" from the duties a caregiver can perform renders the exemption meaningless. It will be absolutely impossible for the elderly in need of care to accomplish all the tasks the Department has defined (eating, bathing, dressing, going to appointments, toileting) in less than 20% of their time. If these changes go forward, there will not only not be a companionship exemption for third party agencies — there will be no exemption for the elderly and their families who choose to employ companions on their own, either. How is it in anyone's best interest to tell these vulnerable adults who cannot care for themselves that they are only allowed to use the toilet "occasionally," only dress "occasionally," only bathe "occasionally," and only eat "occasionally," or they will be forced by higher costs to succumb to institutionalized care?

Michigan's Live-In Exemption

Finally, I believe it is important to consider the impact that this proposed change will have on other businesses in my state that have live-in companions. I do not employ live-in's, but many businesses in the state do, including some based solely on live-in care. Our state law in Michigan exempts live-in's from minimum wage and overtime to keep care affordable for at least these most fragile seniors. My neighbors who base their businesses on live-in care will struggle to survive the blow the loss of this exemption will bring — if they can survive at all. Their employees will lose their jobs. The elderly they serve will turn to "grey market" caregivers and violate the law, or they will end up in nursing homes, as have many of my clients already.

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source or another pays 67.4% of the costs of nursing home care. 2005 Statistical Abstract of the United States: Nursing Home Costs by Source of Payment, 2002.

International Franchise Association (IFA) Study Data

I would like to share with Committee Members the key findings of a recent study conducted by IHS Global Insight for the International Franchise Association (IFA).[6] The study examines the impact of the proposed rule changes on companion care businesses that operate as franchises. The study includes an analysis of the Department of Labor's impact analysis and the results of a survey of 542 franchise businesses. The conclusions the study reaches provide a picture of the fallout we can expect from these proposed regulatory changes on a national scale, similar to what we have experienced in Michigan since 2006.

These are the key findings – quoting from their report –

- "The Department of Labor's economic impact analysis of the proposed rule changes substantially understated the extent of overtime work among companion care workers, at least among those working for franchise-operated companion care businesses. The average amount of overtime worked is three times greater than estimated in the Department of Labor analysis."
- "Other costs of the proposed rule change may also be understated . . . including management costs of adding staff to avoid the cost of overtime pay (assumed zero) and the cost of travel time for employees travel between work sites."
- "We believe the Department of Labor's assumption about the sensitivity of the demand for companion care services to price increases (the demand price elasticity) is based on incomplete data on the source of payment for these services and is, therefore, significantly understated."
- "As a result of the underestimation of costs and the price elasticity, the Department of Labor has significantly understated some of the economic impacts...that will result from the proposed changes in regulations."
- "The impact of the proposed rule changes on employment is less clear. Businesses that responded to our survey indicate a strong intention to avoid

[6] "*Economic Impact of Eliminating the FLSA Exemption for Companionship Services,*" IHS Global Insight, February 21, 2012.

paying higher overtime costs, which may lead to sufficient hiring of additional employees to offset job loss due to reduced demand. To the extent this occurs, the effect of the proposed Department of Labor regulations may be to create a certain number of additional (primarily low-wage) jobs, while at the same time reducing the earnings of a substantial number of workers who are already low-wage workers."

The 542 franchise business owners who supplied the survey data operate 706 locations in 47 states, representing a very broad cross-section of businesses. In general, these are small businesses – more than half reported revenue of less than $1 million and only 5 percent had revenue of more than $4 million. The typical – average – agency employs 75 to 85 employees. It is also important to note that about 80 percent of the agencies receive more than half of their revenue from companion care services. In addition, these agencies report that more than 83% of their employees are engaged in providing companion care services.

The survey revealed a few other key findings –

- These business owners say that higher rates of overtime pay, increased numbers of workers, and larger administrative costs will force them to raise client fees by 20 percent or more.
- Ninety percent of these business owners say that higher fees will cause some of their clients – approximately 1 in 5 of their clients – to seek care from "underground" or "grey market", unregulated care givers.
- Ninety-five percent of the business owners operating in states without overtime regulations say they will eliminate all scheduled overtime – which will result in less income for thousands of low-wage companion care workers.

Lastly, this survey report represents only those franchise businesses that are members of the International Franchise Association, and therefore, it may not be representative of the entire industry. In the IFA membership, there are 27 franchise companies in this sector, with an estimated 4,193 franchisees. The greatest impact of the Department of Labor's proposed rule changes would be on approximately 2,500 of these businesses, which are located in states that currently do not require overtime pay to companion care workers. These businesses operate approximately 3,200 establishments (locations), with approximately 200,000 employees, including 168,000 companion care workers.

When considering just this one segment of the companion care industry, the franchising sector, it is very apparent that the Department of Labor analysis has "substantially understated" the negative impact of the proposed rule changes on our businesses, on our clients, and on our employees.

Conclusion

I firmly believe that in-home companionship care should not be a luxury afforded only to those who are willing to violate the law in the unsafe "grey market" or the very wealthy who can afford to pay the increased cost that will result from these proposed changes.

I hope that you will consider urging the Department of Labor to withdraw these proposed regulations. Thank you for giving me this opportunity to present my views. I would be happy to answer any questions you might have.