

Congress of the United States

Washington, DC 20510

September 30, 2014

The Honorable Thomas E. Perez
Secretary
U. S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Secretary Perez:

On October 1, 2013, the U.S. Department of Labor's (DOL) Wage and Hour Division published its final rule entitled "Application of the Fair Labor Standards Act to Domestic Service." When fully implemented, this regulation will make significant changes to the long-standing minimum wage and overtime exemption for companionship services under the *Fair Labor Standards Act* (FLSA) by creating a new definition for what constitutes companionship services.¹ Since publication, we have heard from many stakeholders expressing their concerns that requiring these sweeping changes to be implemented on January 1, 2015 will significantly disrupt non-medical, in-home personal care services for seniors and individuals with disabilities. In light of the real possibility this regulation will disrupt care, we write to request that you suspend implementation of this rule.

Many Americans rely on these personal care services through Medicaid and other state programs. Yet, these programs are still working through numerous issues as they endeavor to implement this complicated DOL rule. The National Association of Medicaid Directors has asked for an 18-month extension of the rule's implementation, and the states of Oregon and Kansas have also requested a delay.² In addition, the National Council on Disability – an independent federal agency – has requested a delay due to concerns about how the rule will affect individuals living with disabilities.³ These states and stakeholders believe that the current effective date does not provide sufficient time to fully understand the more technical and nuanced aspects of the rule and to implement workable solutions for affected programs and consumers. In particular, a number of Medicaid agencies have stated they will not have time to

¹ Regulatory Information Number 1235-AA05, 78 *Fed. Reg.* 60453 ("Companionship Exemption rule") (Oct. 1, 2013). Available at: <https://federalregister.gov/a/2013-22799> (Accessed on Oct. 24, 2013)

² Letter from Mr. Darin J. Gordon, Pres. and Mr. Thomas J. Betlach, V.P., Nat'l Ass'n of Medicaid Directors, to the Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (April 23, 2014) Available at: http://medicaiddirectors.org/sites/medicaiddirectors.org/files/public/namd_ltr_to_dol_flsa_rule_140423.pdf. Letter from Kari Bruffett, Sec'y, Kansas Department for Aging and Disability Services, to the Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (August 11, 2014). Letter from the Hon. John A. Kitzhaber, M.D., Governor, State of Oregon, to the Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (August 14, 2014).

³ Letter from Mr. Jeff Rosen, Chair, Nat'l Council on Disability, to the Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (May 12, 2014) Available at: <http://www.ncd.gov/publications/2014/05122014/>.

reprogram payment systems, purchase and implement technology solutions, and educate agency staff and consumers by the rule's effective date. We are concerned about these outstanding issues and believe DOL should suspend the rule's implementation to prevent its negative impact on the continuity and quality of care for vulnerable Americans.

This rule also presents numerous financial challenges for our nation's long term care system. Entities affected by the rule are not only working to comply with the new requirements in the rule, but also to adapt to guidance materials issued by the Wage and Hour Division on June 19, 2014.⁴ As a result, state agencies may need to receive approval from their state legislatures, as well as additional time to modify or procure contracts with outside entities. Rushing states and other program officials to fully implement this final rule will negatively affect non-medical, in-home personal care services and result in sudden increases in institutionalized care, which is often more costly and frequently covered by taxpayer dollars.

Long term services and supports involve deeply personal arrangements often supported by valuable taxpayer dollars to ensure good, continuous care for seniors and individuals with disabilities. Seniors and individuals with disabilities rely on personal care services for help with activities of daily living like eating, dressing, and transferring. We are concerned that forcing state Medicaid programs and other programs to comply with this new rule will put many seniors and individuals with disabilities in danger of losing personal care workers and important intimate care relationships. Not only could seniors and individuals with disabilities lose beloved caregivers, but those same caregivers could lose valuable paid hours and much needed income.

Financing long term services and supports is a tremendous fiscal challenge for Americans and significantly strains our health care system. At a time when approximately 76 million baby boomers are reaching retirement, the federal government has a compelling interest in containing the cost of long term services and supports and expanding the low-cost care options available to this aging demographic. We are deeply troubled that this rule runs contradictory to those goals. Therefore, we urge you to suspend the rule and work with state agencies and other affected programs to prevent the cost of long term services and supports from soaring.

We are committed to protecting care options that maintain the dignity and self-determination of seniors and individuals with disabilities and allow them to receive support in the comfort of their

⁴U.S. Department of Labor Wage and Hour Division, Administrator's Interpretation No. 2014-2 (June 19, 2014). Available at: http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAI2014_2.pdf. U.S. Department of Labor Wage and Hour Division, Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA). Available at: <http://www.dol.gov/whd/regs/compliance/whdfs79e.pdf>.

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homes at lower costs. We appreciate your careful consideration of this request and look forward to your response by no later than October 15, 2014. Thank you for your consideration of this request.

Sincerely,



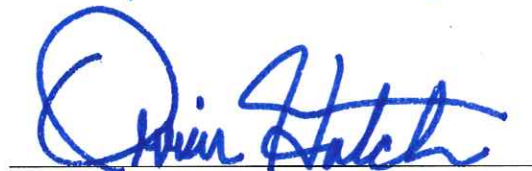
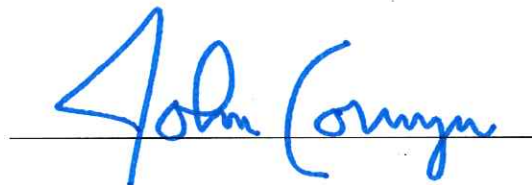
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