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## United States Senate

COMMITTEE ON SMALL BUSINESS

WASHINGTON, DC 20510-6350

July 26, 2001

Mr. Thomas M. Markey, Acting Administrator  
Wage and Hour Division  
Employment Standards Administration  
U.S. Department of Labor  
Fair Labor Standards Team  
Room S-3516  
200 Constitution Ave., N.W.  
Washington, DC 20210

By Facsimile: 202-693-1432

Dear Mr. Markey:

On January 19, 2001, the Clinton administration published a proposed regulation to redefine the exemption from the Fair Labor Standards Act (FLSA, the Act) provided by Congress for those employees who provide companionship services in a client's home. On March 19, 2001, I wrote to Secretary of Labor Elaine Chao to request more time to comment on the proposal, specifically with regard to the proposal's impact on small businesses. The Secretary then issued a notice in the Federal Register on April 23, 2001 reopening the docket to accept further comments on this proposal.

Although the Department asserts that this proposal is necessary because of confusion among both employees and employers over the scope of the companionship services exemption, no evidence is offered to support this claim.<sup>1</sup> It is hard to avoid the perception that this proposed regulation was rushed out the door at the last possible moment in an effort to satisfy supporters of the Clinton administration where no genuine issue or reason for it existed.

Unfortunately, in its rush to get this proposal published before leaving office, the previous administration underestimated the impact of this proposal on the small businesses who provide these services. In addition, the Department's proposal to redefine this exemption goes beyond merely updating it to be consistent with current industry practice, all the way to eliminating effectively the exemption by redefining the duties that qualify for the exemption extremely narrowly. The Department further undermines the availability of the exemption by eliminating it for employees employed by a third party employer who provides companionship

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<sup>1</sup> 66 Fed. Reg. 5487, January 19, 2001.

services for clients.

This directly contradicts the intent of Congress when it passed the amendments in 1974 which included this exemption. Thus, this proposal attempts to achieve through regulation what the previous administration was not able to achieve through legislation. Accordingly, this proposed regulatory change should be withdrawn as being inconsistent with the authorizing legislation.

### **The Department Incorrectly Applied the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act**

When promulgating a regulation, the Department of Labor is required under the Regulatory Flexibility Act (RFA) to determine if the regulation will have a "significant economic impact on a substantial number of small entities." If so, the Department must then conduct an Initial Regulatory Flexibility Analysis to determine further the impact of the regulation on small businesses, and to identify any alternatives that may be less burdensome to small businesses.<sup>2</sup>

The Small Business Regulatory Enforcement Fairness Act (SBREFA) places the further requirement that the regulation and supporting analyses be submitted to the General Accounting Office and both Houses of Congress for review before it goes into effect. If the regulation will have an impact of \$100 million or more on the economy, the regulation can not take effect until 60 days after Congress receives the report or it is published in the Federal Register, whichever is later.<sup>3</sup> The Department asserts that this proposed regulation will not have an impact of \$100 million or more and then concludes that because this regulation is not a "major" rule, as defined by SBREFA, "approval by the Congress under SBREFA" is not required.<sup>4</sup>

Such a conclusion is nonsensical as it does not capture the requirements of SBREFA accurately. Congress does not "approve" regulations under SBREFA, it can only disapprove regulations and this is not a function of whether the regulation is a "major rule."

In applying the RFA, the Department erroneously concludes (as explained below) that this proposed regulation will not have a "significant economic impact on a substantial number of small entities." However, the Department proceeds to conduct a regulatory flexibility analysis to support this conclusion even though a regulatory flexibility analysis is only required if the

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<sup>2</sup> 5 U.S.C. 603, 605(b).

<sup>3</sup> 5 U.S.C. 801 (a). This title of SBREFA is commonly referred to as the Congressional Review Act.

<sup>4</sup> 66 Fed. Reg. 5486.

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Department concludes that the proposed regulation would have such an impact.<sup>5</sup>

To determine the number of small businesses affected, the Department relies on the U.S. Economic Census for the number of home health care service businesses. The Department concedes that "most of the entities potentially affected by this proposal would likely meet the applicable criteria defining a small business in the home-health-care industry." Indeed, the Department has determined that 98% (16, 486 out of 16, 895) of the businesses listed in the U.S. Census Bureau's 1997 Economic Census under the home-health-care services industry category would be below the \$10 million annual receipts threshold used by the Small Business Administration to define a small business in this industry.<sup>6</sup>

The Department then concludes that, even though this proposal would require these businesses to comply with the FLSA where they have not had to previously, the proposal would not represent a "significant economic impact." Since the comment period was reopened, I have heard from hundreds of small businesses from around the country who have explained in detail the impact this regulation would have on their operations. While these businesses are paying their companionship services employees wages that are well above the minimum wage, the prospect of having to fit their schedules into the statutory requirements for overtime would mean a significant increase in the amounts these employees would earn. Many of the visits with clients include over night stays which last longer than the eight hour work period allowed before overtime must be paid. Requiring overtime to be paid would mean an extra 50% per hour worked beyond eight. One business indicated this would result in a 75% increase in the cost to the client.

Unfortunately, one of the likely consequences of increasing the cost this much will be that those who need this assistance will not be able to afford this assistance or will be forced to get it from less professional operations. Another consequence of this proposal is that because of the increased cost of operations, it would cause employees to be given less hours thus reducing their income. Both of these outcomes undermine whatever benefit may be achieved by restricting or eliminating the exemption from FLSA for employees providing companionship services.

### **The Department Proposal Creates More Confusion Than it Cures**

The fundamental problem with the proposed changes to this regulation is that employers are not present in the workplace to determine how much time is spent on the activities that the Department has identified as qualifying for the exemption. Despite the Department's assertions

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<sup>5</sup> *Id.*

<sup>6</sup> 66 Fed. Reg. 5487.

that this proposal is necessary to clear up confusion<sup>7</sup>, any adjustment to the current definition will certainly create more confusion. With a 26 year history of complying with the current regulation, whatever vagueness is present has been incorporated into employer practices, and employers and employees have come to know what to expect.

No matter which option of the Department is considered, it would require a determination by the employer about how much time an employee in the client's home spends performing specific tasks some of which would allow the employer to take advantage of the exemption and some of which would not. This is all but impossible for these employers to do given the remote location of the work activities. This opens up many possibilities for fraud, confusion, and abuse. Although Congress left the term "companionship services" to be further defined by the Secretary, the term was left without specific definition to reflect the broad category of services that could qualify.<sup>8</sup>

By trying to parse the terms "companionship services" and "fellowship, care and protection" further, the Department is introducing further subjectivity and speculation to an employer's determination of whether the exemption applies. Furthermore, the term "fellowship" which the Department is suggesting must be at the core of the companionship duties to qualify for the FLSA exemption is not even mentioned in the legislation establishing this exemption. Thus, the Department is injecting a requirement which Congress never envisioned or intended.

Eliminating the use of the exemption for third party employers<sup>9</sup> not only would cause problems for these employers, but would likely create difficulties for the clients who previously relied on these companies. Without this exemption, these services are likely to be significantly more expensive than these elderly individuals can afford thus requiring them to become the employer instead of contracting with a third party employer. Many elderly do not care to be in this role, preferring the simplicity and reliability of using a third party who is in the business of supplying home care personnel. The reason for the proliferation of these companies is the simplicity and reliability of the service provided by them. Eliminating the companionship services exemption for third party employers would thus create problems for both these employers and their clients.

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<sup>7</sup> *Id.*

<sup>8</sup> Exempting "...any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)", 29 U.S.C. 213 (a)(15).

<sup>9</sup> Proposed revision to 29 CFR 552.109 (a), (c).

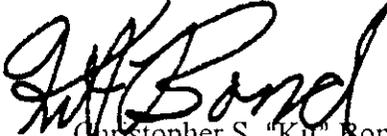
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**The Department Contradicts the Intent of Congress by Eliminating the Companionship Services Exemption**

The Department has proposed to eliminate the companionship-services exemption by both narrowing the definition so much as effectively to cancel the exemption, and by eliminating it outright for third-party employers providing these services. Whatever latitude Congress may have provided the Secretary to define further the terms of this exemption, it is unequivocal that Congress intended the exemption to exist. Indeed, in the same 1974 amendments, Congress eliminated the exemption that had previously covered domestic workers. Had it wanted to, Congress would have similarly made companionship services covered by the FLSA. Instead, Congress went out of its way to exempt these services from the FLSA. The Department's attempts to nullify this exemption, therefore, contradict the intent of Congress and suggest that the previous administration was desperately trying to achieve through regulation what it could not achieve through legislation.

For all of these reasons, the proposed changes to the FLSA regulations affecting the companionship services exemption should be withdrawn.

Sincerely,



Christopher S. "Kit" Bond