



Fair Pay for Home Care Workers: **Reforming the U.S. Department of Labor's Companionship Regulations Under the Fair Labor Standards Act**

NELP
National Employment
Law Project

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Table of Contents

Summary	1
1. The History of the Companionship Exemption	3
A. Legislative History	3
B. Today's Home Care Workforce	5
C. The DOL's Overly Broad Companionship Regulations	7
D. The Exemption's Impact on Workers	8
2. Recommended Principles for a Narrower Companionship Exemption	10
3. Policy Reasons for Narrowing the Companionship Exemption to Extend Minimum Wage and Overtime Coverage to Most Home Care Workers	12
A. Extending Minimum Wage and Overtime Coverage to Most Home Care Workers Is Necessary to Vindicate the FLSA's Goals of Fighting Poverty, Spreading Work and Stimulating Growth Across Our Economy	12
B. The Cost Impact of Transitioning to FLSA Coverage Is Likely to Be Limited	14
(1) Few High Hours Cases	15
(2) Care in Group and Assisted Living Homes Already Covered	15
(3) Many States Already Covered	16
(4) Overtime Usage Should Be Expected to Decline, Helping to Spread Work and Create Jobs	17
C. Raising Wages and Reducing Long Hours Are Important for Strengthening the Home Care System, and Will Ultimately Improve Care and Return Significant Cost Savings	19
Conclusion	23
Appendix: Overview of State Minimum Wage and Overtime Coverage of Home Care Workers	24

Summary

Our nation's 1.7 million home care workers are currently excluded from the basic minimum wage and overtime protections of the federal Fair Labor Standards Act (FLSA) that most other workers have depended on for decades.¹ Home care workers provide the vital care that allows older adults and persons with disabilities needing care to remain in their own homes. Since 1974, home care workers have been excluded from basic minimum wage and overtime protections as the result of overly broad U.S. Department of Labor (DOL) regulations. The regulations have converted what Congress intended to be a very limited exemption for workers providing certain "companionship" services into a wholesale exclusion of workers in the home care industry—one of our nation's top growth fields—from wage-and-hour protections.

The result has been to suppress wages for the home care workforce, consigning millions of caregivers—the overwhelming majority of them women, many of them immigrants and women of color—to working poverty. The lack of ordinary overtime coverage has also facilitated excessive hours in small segments of the industry. Long hours are not only grueling for workers but can contribute to worse care for patients, as caregivers working 60 hours or more a week face fatigue and stress in performing what is a demanding job under any circumstances. These substandard working conditions have created very serious employee recruitment and retention problems, generating labor shortages that prevent us from meeting the nation's rapidly growing need for home care.

This policy brief urges the Department of Labor to exercise its broad discretion to restore the companionship exemption to its properly narrow scope, thereby extending wage-and-hour protections to most of our nation's home care workers. The brief begins by reviewing the history of the companionship exemption. It then explains the impact the current exemption is having on home care jobs, and recommends simple principles that should guide revised regulations. Next it explains why extending minimum wage and overtime coverage to most home care workers is necessary to vindicate FLSA's policy goals. It concludes with a discussion of the potential cost impact of transitioning to a narrowed companionship exemption.

The policy brief's findings include the following:

- DOL's current regulations implementing the companionship exemption are far broader than the limited exemption Congress intended, and have inadvertently excluded most of the home care workforce from basic minimum wage and overtime protections.
- Extending minimum wage and overtime coverage to most home care workers is necessary to vindicate the FLSA's goals of fighting poverty, spreading work and creating jobs in this vital industry.
- A revised regulation should include two significant reforms: (1) it should provide that workers employed by a home care agency or other intermediary are not exempt; and (2) it should narrow the definition of "companionship" to encompass just fellowship and protection—thereby excluding workers who perform other types of duties such as providing assistance with activities of daily living (ADLs), or instrumental activities of daily living (IADLs). Reforms that do not include both of these elements will be ineffective and will leave the fastest-growing segments of the home care industry uncovered.
- The cost of transitioning to coverage for these workers is likely to be moderate and manageable. For example, high overtime usage—the practice that will be most affected by FLSA coverage—is concentrated in a tiny fraction of home care cases. In addition, 21 states and the District of Columbia already provide some coverage of home care workers under state minimum wage and overtime laws. This fact both shows the budgetary feasibility of coverage, and reduces substantially the number of states, employers and workers who will be affected by an expansion of federal coverage.
- Some home care employers—including one of the nation's largest for-profit home care agencies highlighted here—are already paying overtime despite the federal exemption. They have found they can manage and reduce their overtime costs by balancing caseloads across a larger workforce with the assistance of modern scheduling and management systems. These employers' experiences illustrate how the transition to expanded FLSA coverage is ultimately part of a strategy for modernizing the home care delivery system to provide better quality care and attract a skilled workforce to meet our nation's growing need for home care in the 21st century.
- The costs associated with this transition, which are minimal in comparison to overall spending on long term care, would be a much-needed investment in our nation's home care system, and will ultimately deliver savings by strengthening this most cost-effective segment of the long term care system.

1. The History of the Companionship Exemption

A. Legislative History

The companionship exemption has its origins in a 1974 amendment that extended FLSA coverage to domestic workers.² Under the amendment, domestic workers, such as persons who perform cooking, cleaning, child care and other household services, were granted minimum wage and overtime protections for the first time.³ In the process, Congress carved out two narrow exemptions from both minimum wage and overtime protections.⁴ The first was for “casual” baby sitters, meaning persons who perform child care services on a nonregular basis.⁵ The second was for workers who provide “companionship services” to the elderly or disabled.⁶

Congress did not provide a detailed definition of companionship services. However, discussions of the exemption found in the *Congressional Record* and committee reports provide important guidance on what services and workers Congress did and did not intend to exempt.

First, the amendment’s sponsors made clear that the use of the phrase “companionship services” was precise and narrow—corresponding to work whose essence was providing company (i.e., “companionship”) for older adults or persons with disabilities and, through the presence of the “companion,” looking out for their safety. For example, Sen. Harrison Williams described companionship workers as “elder sitters,” whose main purpose of employment is “to be there and watch over an elderly or infirm person”⁷ Similarly, Sen. Quentin Burdick gave as an example of an exempted companion the “neighbor [who] comes in and sits with” an aged or infirm parent.⁸ These activities correspond with what the current Labor Department regulation (discussed below) describes as providing “fellowship” and “protection” for older adults or persons with disabilities.⁹

The sponsors consistently contrasted such exempt “companionship” work with household services, such as cooking and cleaning, which the amendment’s expanded coverage was clearly intended to include. They noted that exempted work could include a very limited amount of covered household duties when those services were minimal and incidental to the “companionship services,” but the extent of such household tasks within exempt work was to be strictly limited. Sen. Burdick acknowledged, for example, that exempted work *might* include “making lunch for the infirm person,” but only where such tasks were “purely incidental” to the principal duties of providing companionship.¹⁰

At the same time, they stressed that a job which included covered household work, where substantial, would not be made exempt simply because the job also included responsibilities that standing alone might constitute exempt work. As Sen. Jacob

These activities [that Congress intended to exempt] correspond with what the current Labor Department regulation ... describes as providing “fellowship” and “protection” for older adults or persons with disabilities.

[N]owhere did the legislative sponsors suggest that physically demanding personal care services, such as assistance with bathing and toileting, or services relating to medical care ... should ever be exempt.

Javits explained, “the fact that persons employed as cooks, maids, housekeepers, etc., may also have duties relating to the care of children does not remove them from the category of domestic service employee.”¹¹

Not only did Congress make clear that the companionship exemption did not include jobs involving substantial household work duties (as does most home care work) but nowhere in the record did the legislative sponsors suggest that physically demanding personal care services, such as assistance with bathing and toileting, or services relating to medical care (all of which are typically essential parts of home care work) should ever be exempt.

Second, although Congress did not use the term “casual” in the statutory language defining companionship services, it is clear from the legislative history the types of services that lawmakers had in mind were informal and were performed by persons for whom the work was a source of supplemental income—not their means of making a living. Senate and House committee reports explained the 1974 amendments aimed “to include within the coverage of the Act all employees whose vocation is domestic service.¹² People who will be employed in the excluded categories,” by contrast “are not regular breadwinners or responsible for their families’ support.”¹³ Sen. Burdick confirmed this understanding, stressing the exemption was not intended to exclude “the professional domestic who does this as a living.”¹⁴ Sen. Javits echoed that, explaining that coverage was meant to extend “to really those who make it a regular part of their occupation ...”¹⁵ Emphasizing the informal nature of the exempted categories, Javits compared companionship and casual baby-sitting to dog-sitting with respect to the amount of work performed.¹⁶ Thus, the amendments were premised on the understanding that expanded coverage was needed to raise incomes for the broad class of workers who depended on domestic work to make a “daily living”—the workforce that Rep. Shirley Chisholm described as the “thousands of ladies who have the sole responsibility for taking care of their families and will not be able to adequately support their families.”¹⁷

Third, prior to 1974, home care workers (like other household service workers) who were employed by commercial agencies with more than \$250,000 in annual revenue were, in fact, already covered by the FLSA’s minimum wage and overtime requirements under the act’s “enterprise coverage” provisions.¹⁸ Nothing in the legislative history of the 1974 amendments suggests any congressional intent to withdraw minimum wage or overtime coverage from any categories of employers or workers who, prior to 1974, were already covered by the FLSA. Instead, the entire thrust of the debates was to extend coverage to categories of domestic workers who previously had not been covered (i.e., those not employed by a previously covered commercial agency).¹⁹

As discussed later in this policy brief, in 2007 the U.S. Supreme Court ruled in the case of *Long Island Care at Home, Ltd. v. Coke* the 1974 amendments vested the

Labor Department with broad policymaking discretion to “work out the details” of the amendment’s definition of companionship services through regulations.²⁰ While the Supreme Court declined to invalidate an existing regulation, it made clear the Labor Department had the authority to determine the scope of the exemption. This legislative history provides crucial guidance for how the Labor Department should wield that authority, to restore the exemption to its appropriate scope.

B. Today’s Home Care Workforce

The type of services Congress intended to exempt—informal, limited to companionship, and not central to the national economy—bears little relationship to the work performed by today’s home care workforce that has been made subject to the companionship exemption as the result of the overly broad Labor Department regulations.²¹

First, providing simple companionship—termed fellowship and protection under the current Labor Department regulations—constitutes a small portion of the services that this workforce provides, and such services are typically incidental to the other services provided.

The duties of home care workers today fall into three major areas. The first is personal care, which includes assisting with eating, dressing, bathing and toileting. The second is assistance with household services, such as meal preparation, shopping, light cleaning and transportation. Assistance with personal care and household services is often collectively referred to as assistance with “activities of daily living” (ADLs) or “instrumental activities of daily living” (IADLs)—terms of art used in the healthcare field and under the Medicaid and Medicare programs.²² The third and final category consists of more paramedical tasks, such as assistance with medication management, range-of-motion exercises, blood pressure readings, vital signs monitoring, and routine skin and back care.²³

A large segment of today’s home care workforce is employed under the Medicaid program, which was expanded in 1975 to finance long term care services for millions of low- and moderate-income elderly persons and persons with disabilities.²⁴ And it has been Medicaid’s expansion to serve the aging population that has fueled the rapid growth of this new industry over the ensuing 35 years.

But the purpose of Medicaid has never been to provide beneficiaries with “companionship.” U.S. Department of Health and Human Services guidance for Medicaid—the program that funds a huge portion of the nation’s home care— instructs that assistance with the ADLs and IADLs is the core focus of home care services provided under Medicaid. Importantly, the guidance stresses that providing “simple companionship” is not encompassed within the program:

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A state may now extend [Medicaid] services to include supervision and assistance to persons with cognitive impairments, which can include persons with mental illness or mental retardation as well as persons who have Alzheimer's disease and other forms of dementia. However, this supervision and assistance must be related directly to performance of ADLs and IADLs. Simple companionship or custodial observation of an individual, absent hands-on or cueing assistance that is necessary and directly related to ADLs or IADLs, is not a Medicaid personal care service.²⁵

Second, far from the informal elder-sitting of which Congress spoke, the home care industry is predominantly formal and, as one of our fastest-growing sectors, plays a central role in our national economy.

Approximately 70 percent of home care workers today are employed by home care agencies.²⁶ These include both for-profit corporations and nonprofit agencies. In the larger of the two segments of the industry, as classified by the U.S. Census Bureau, "Home Healthcare Services," for-profit corporations dominate, representing 70 percent of revenue. In the smaller segment, "Services for Elderly and Persons with Disabilities," for-profits are just 21 percent of revenue, but are growing quickly.²⁷ Thus, entrepreneurial enterprises comprise the largest portion of the industry.

Another segment consists of workers who are employed directly by individual consumers. But as with home care agencies, much of this segment is also financed by Medicaid. This occurs through state "consumer directed" home care programs under which consumers recruit and employ workers, who are then paid through the Medicaid program.²⁸ This segment of the industry has seen increasing regulation over the past decade, with several states having taken increased responsibility for recruiting and referring workers who can be employed by consumers. In addition, a number of states have established public authorities to serve as employers of such home care workers, an important policy innovation which has led to improved wages and job conditions for workers, and has served to further formalize the industry.²⁹

Not only is modern home care employment formalized, but home care is one of the fastest-growing industries in our economy, whether measured by employment, revenues or number of firms. The industry's revenues and number of establishments are today double or more their size in 2000.³⁰ And its workforce is projected to grow by nearly 50 percent again by 2018.³¹ Together with the rest of the healthcare sector, home care will thus increasingly be a major source of growth and jobs in the U.S. economy.

Finally, while Congress aimed to exempt companions who "are not regular breadwinners or responsible for their families' support," the modern home care workforce consists predominantly of workers for whom home care is a primary vocation, and who rely on their earnings for their livelihood. One survey in New York City reported that 81 percent of home care workers served as the primary breadwinner for their family.³²

C. The Labor Department's Overly Broad Companionship Regulations

The regulations issued by the Labor Department in the 1970s to interpret the statutory companionship exemption erroneously expanded its scope to reach far beyond the types of services and persons that Congress contemplated excluding from minimum wage and overtime protections.

First, in terms of duties, they extend the exemption far beyond simple companionship in the form of fellowship and protection. Instead, the regulations allow home care workers whose work consists of providing personal care and household services “such as meal preparation, bed making, washing of clothes, and other similar services” to be deemed exempt companions.³³ The regulations even allow the performance of general household services unrelated to the individual consumer so long as that work is “incidental” or “not exceed[ing] 20 percent of the total weekly hours worked.”³⁴

As a result of this overly broad duties standard embodied in Labor Department regulations, the overwhelming majority of home care workers whose duties consist chiefly of providing personal care and household services—for example, Medicaid-funded home care workers who chiefly provide assistance with ADLs and IADLs—are currently treated as exempt from the FLSA.

This expansive interpretation is clearly at odds with the legislative history recounted above in which Congress focused on exempting persons who provide simple companionship. There Congress did contemplate that exempt companions might under limited circumstances provide assistance with household services so long as (1) the household services were no more than “incidental” in their amount, and (2) they were performed exclusively for the individual for whom the companion was providing the care—not for others in his or her household. But there was never a suggestion that persons whose work consists chiefly of providing such services—or who provide them to persons other than the consumer—were ever meant to be exempt.

Second, the Labor Department defined the exemption to include not only workers employed directly by private households, but also home care workers employed by third-party employers such as home care agencies.³⁵ As detailed above, prior to the 1974 domestic worker amendment, employees of larger home care agencies were already covered under the FLSA's enterprise coverage provision, and such a regulatory rollback of coverage was wholly out of step with the amendment's purpose of expanding coverage. Moreover, as detailed below, expanding the exemption to encompass commercial employers in one of the fastest-growing sectors of our economy is wholly at odds the FLSA's policy goals of fighting poverty, spreading work and promoting growth.

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The combined effect of these provisions in the Labor Department regulations has been to allow most jobs in today's home care industry to be treated as exempt from the FLSA's basic minimum wage and overtime protections. And ironically, much of the population of home care workers that has been excluded as a result are breadwinners—career workers whose families depend on their wages to make ends meet—one of the groups Congress said it did not intend to exclude from FLSA protection.

D. The Exemption's Impact on Workers

Under the current companionship regulations, the nation's roughly 1.7 million home care workers are excluded from federal minimum wage and overtime protections under the FLSA. The exemption's impact is limited by the fact that a significant number of states already cover home care workers under their often higher state minimum wage and overtime laws. Fifteen states extend state minimum wage and overtime protections to some or all home care workers.³⁶ This group includes states with some of the nation's largest home care programs, including New York, Illinois and Pennsylvania.³⁷ And in six more states and the District of Columbia, workers enjoy minimum wage protection, but not overtime.³⁸ As discussed below, these states' experiences illustrate the economic feasibility of providing basic protections to home care workers and provide a road map for a transition to FLSA coverage.

The rest of the states do not extend such protections. Note that in many cases this absence of state protection does not reflect a deliberate policy choice to carve out home care workers. Five states, for example, still do not have state minimum wage or overtime laws for any workers,³⁹ and other states have simply mirrored most or all federal coverage definitions.⁴⁰

There are two chief ways in which the FLSA companionship exclusion harms home care workers and undermines the overall policies of the FLSA. First, while most home care workers are currently paid a couple of dollars more than the federal minimum wage for hours that they work directly providing care,⁴¹ their exclusion from the minimum wage means that employers are not required to pay them for all of their work hours, including work time spent traveling from one client's home to another.⁴²

Nor are employers required to reimburse workers for gas or other transportation costs when they reduce workers' net pay to below the minimum wage.⁴³ This failure to pay for travel time or reimburse travel costs suppresses workers' already low earnings and not infrequently drives their real hourly wages below the minimum wage.⁴⁴

Second, exclusion from overtime protections means that when they work more than 40 hours a week, home care workers are not entitled to the time-and-a-half overtime pay that virtually all other workers receive. This lack of ordinary overtime coverage has likely been one of the factors that has encouraged the use of a high-hours staffing

approach by some employers when serving the very small proportion of home care consumers who need seven-day-a-week care. As discussed below, home care employers that are subject to overtime coverage requirements have been able to reduce the long hours, often through use of improved scheduling and management systems to create more balanced workloads.

Such long hours are grueling for workers, and may contribute to the higher than average incidence of work-related injuries among home care workers.⁴⁵ But many workers are forced to seek them nonetheless because industry wages are so low, in part because they are suppressed by the minimum wage exclusion. The annual income for a home care worker employed for 40 hours per week at the 2009 median wage of \$9.34 an hour was just \$20,283⁴⁶—far below a basic self-sufficiency income for a single adult, let alone someone supporting a family as many home care workers do. For example, in 2008, the income that a single worker supporting one child needed to meet basic housing, food and other costs ranged from \$33,133 in Atlanta to \$40,770 in Los Angeles to \$51,767 in Washington, D.C.⁴⁷

Not only do the low wages and long hours that the FLSA exclusion fuels harm this deserving workforce—they also undermine the quality of care for the consumers it serves. It is well-recognized that poverty wages that typify the home care industry contribute to high employee turnover rates, which are “costly, threaten[] quality of care, and can increase workloads and lower morale among remaining staffers.”⁴⁸ Long hours can also result in worse care for patients, as caregivers working 60-hour or 70-hour weeks face fatigue and stress in performing what is a demanding job under any circumstances.⁴⁹

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2. Recommended Principles for a Narrower Companionship Exemption

In 2001, at the end of the Clinton administration, the Labor Department proposed narrowing the companionship regulation to more faithfully reflect Congress' more limited intent, and to bring industry practices within this rapidly growing part of the economy into line with overall FLSA policies.⁵⁰ However, the Bush administration halted this reform initiative when it took office and the issue has languished since. As noted, during the intervening years, the U.S. Supreme Court heard a challenge to an existing companionship regulation in *Long Island Care at Home, Ltd., et al. v. Coke*. While the Supreme Court declined to invalidate the regulation, it made clear that the 1974 FLSA amendments—which authorize the Secretary of Labor to “define[] and delimit[] by regulations”⁵¹ the companionship exemption—vests the Secretary with broad policymaking latitude to determine its proper scope.⁵² Noting the Labor Department's “thorough knowledge of the subject matter and ability to consult at length with the affected parties,” the Court found that “Congress intended its broad grant of definitional authority to the department to include the authority to answer these kinds of [policy] questions.”⁵³ The Labor Department, therefore, enjoys very broad discretion over the exemption, removing any question of whether the agency may permissibly narrow its regulations.

The Labor Department should use its authority to restore the companionship exemption to its congressionally intended narrow scope and bring this major national industry into conformity with the overall wage-and-hour practices that prevail across the rest of the economy. Following the general outlines of the Clinton proposal, the goal of the regulations should be to restore FLSA protections to most home care workers by (1) limiting the exemption to workers who chiefly provide true companionship services consisting of fellowship and protection, and (2) categorically deeming workers employed by third-party employers such as home care agencies to be covered by FLSA protections. Anything but a very restrictive standard will perpetuate the current loophole and continue to exclude most or all of the nation's 1.7 million professional home care workers.

First, workers employed by a third party such as a home care agency or other intermediary should per se not be exempt. The 1974 amendments aimed to expand, not narrow the FLSA's coverage; Congress never intended to withdraw coverage from agency-employed workers, many of whom were already covered by the FLSA prior to 1974. Such workers represent the core of the fast-growing modern home care industry and, as discussed in the sections that follow, covering this major swath of our economy is essential to serve FLSA's goals.

Moreover, such a rule would provide a bright-line standard that would cover the majority of Medicaid and Medicare-funded home care workers. This reform was one of

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the elements of the Clinton proposal and should be a critical part of new regulations.⁵⁴

Second, regulations should revise and narrow the companionship duties standard to restore it to its intended narrow focus on fellowship and protection services. Only workers whose core responsibilities consist chiefly of providing fellowship or protection for a client should be exempt. Workers whose responsibilities include more than an incidental amount of other services should be covered. Such a duties test would extend coverage to the majority of home care workers—and all who are employed under Medicaid—since they spend the bulk of their time assisting clients with ADLs and IADLs by providing personal care such as bathing, toileting or dressing, or household work such as transportation, housekeeping, cooking or shopping. Note in the case of home care workers providing services that are funded under Medicaid or another government insurance program, examination of whether workers' duties qualify them for the exemption could be performed in part simply by examining the mix of duties that are authorized for funding under the program. Where the services authorized under the program do not focus chiefly on providing fellowship and protection, the exemption would not likely apply.⁵⁵

This proposed standard corresponds with the third and most restrictive of the three options for a revised companionship duties standard outlined in the proposed Clinton regulations.⁵⁶ The other two options outlined under these proposals were insufficiently stringent to adequately narrow the companionship exemption and would create ambiguity as to whether any given home care worker would remain exempt. Under the first Clinton option, a home care worker would remain exempt so long as fellowship and protection remained a “significant” part of the worker's duties, but the proposed regulation did not set any percentage limits. Under the second Clinton option, fellowship and protection would have to comprise 50 percent or more of the home care worker's time for the worker to be exempt.⁵⁷

We believe that under the first Clinton option, virtually all home care workers would remain exempt, while the second would continue to exempt many and would create substantial ambiguity and disagreement. Note that all three of the Clinton options would eliminate the inappropriate allowance in the current regulation that home care workers may perform general household services for persons other than the client while remaining exempt.⁵⁸

Third, the regulations should make clear that employees who perform medically related duties, or who receive training to do so, should be covered by the FLSA. Many home care workers perform duties such as medication management, taking vital signs, routine skin and back care, and assistance with exercise and physical therapy services—often although not always after receiving specialized training. The legislative history, focused as it was on more informal, casual, and nonprofessional services, never contemplated exempting workers who perform such medically related duties. Such a

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rule would provide an additional basis for making clear which workers are covered.

Note, however, that new regulations should make clear that home care workers who perform such medical duties, even if they do not actually receive the training or certification that ordinarily is required to perform such duties, are covered nonetheless. Today's home care workers must often take on medically related tasks in the course of caring for consumers, regardless of whether advanced training is required or whether they have actually received such training. The Clinton proposal included a similar requirement, although it failed to expressly include coverage of home care workers who sometimes perform medically related duties, regardless of whether they have been formally trained to do so.⁵⁹

3. Policy Reasons for Narrowing the Companionship Exemption to Extend Minimum Wage and Overtime Coverage to Most Home Care Workers

There are a variety of important policy reasons for the Labor Department to narrow the companionship exemption and extend minimum wage and overtime coverage to most home care workers. First, doing so is essential for vindicating the FLSA's fundamental policy goal of raising wages, spreading work and promoting growth. Second, while the cost impact of transitioning to coverage would not be an appropriate ground for declining to fix the exemption, every indication is that the impact will be modest and manageable. Third, raising wages and reducing long hours are important for strengthening the home care system, which will ultimately improve care and return significant cost-savings.

A. Extending Minimum Wage and Overtime Coverage to Most Home Care Workers is Necessary to Vindicate the FLSA's Goals of Fighting Poverty, Spreading Work and Stimulating Growth Across Our Economy

Enacting the FLSA in 1938 and broadening it over the decades to include most national industries, Congress has articulated national policy goals the statute serves. Narrowing the companionship exemption to extend minimum wage and overtime coverage to home care workers is essential for vindicating all of these goals, especially since home care is today a leading national industry and growth sector.

First, one of Congress' most basic goals embodied in the FLSA has been to fight poverty by providing low-wage workers higher incomes, better working conditions, and more leisure time. From President Franklin Roosevelt's call to Congress in 1937 to ensure "a fair day's pay for a fair day's work,"⁶⁰ to Sen. Edward Kennedy's explanation in conjunction with the 1996 FLSA amendments that "[n]o one who works for a living

should have to live in poverty,”⁶¹ promoting economic self-sufficiency has always been a central focus of the act.⁶²

Now that the home care industry has emerged as a major source of national employment, the sector’s poverty wages have become a significant problem for workers and communities across the country. Median home care wages are just \$9.34 an hour or \$20,283 per year—far below a basic self-sufficiency standard.⁶³ Partly as a result, according to PHI, about 44 percent of direct care workers live in households earning below 200 percent of the federal poverty level income, making them eligible for most state and federal public assistance programs.⁶⁴ These low wages are a growing national problem—one which FLSA coverage can begin to address.

Second, FLSA’s premium pay requirement for overtime work simultaneously discourages excessive hours while promoting full employment through work spreading. In 1937 during the depths of the Great Depression, President Roosevelt decried the increase in average hours worked per week between 1934 and 1936 because it “tends toward stepping up production without an equivalent stepping up of employment.”⁶⁵ For the Roosevelt administration, “the primary purpose was to make it possible for more workers to be added to the payroll. [FLSA] was thus designed in part as a compulsory ‘share-the-work’ program.”⁶⁶ From the earliest days of the act, courts have recognized the FLSA’s work spreading goal:

[W]ith 9 [million], 10 [million] or 12 million unemployed in this country, the problem was to cut into that unemployment without financially hurting industry or its employees. It was hoped to cut at least 4 [million] or 5 million from the unemployment ranks. This it appears was the big objective of the Wages-and-Hour and Fair Labor Standards Act.⁶⁷

Home care work is particularly amenable to work spreading, because very few home care workers receive employer-provided benefits, making the fixed-cost to employers of reducing hours and hiring additional workers low.⁶⁸ As detailed below, home care employers that currently operate under overtime coverage have responded in precisely this way: they have substantially limited their use of overtime hours and have instead divided caseloads up among larger numbers of workers. This practice has not only created more jobs, but has also helped spread work hours more evenly and boost incomes for those home care workers who previously had been employed just 20–30 hours per week.

Third, in addition to improving jobs and working conditions for the nation’s poorest workers, the FLSA’s authors hoped to achieve the related goal of growing and stabilizing the broader economy by boosting consumer spending. Enacting the FLSA, Congress recognized:

Raising pay for low-wage employees such as home care workers—who then inject the money back into the economy by spending it on necessities at local businesses—is a key strategy for promoting economic growth.

FLSA’s premium pay requirement for overtime work simultaneously discourages excessive hours while promoting full employment through work spreading.

This nation cannot build a stable industry that can adequately support all its people until those who work are given a larger share in the yield Continued low-wage incomes ... will continue to undermine the stability of markets for both farm and factory products. It is only by a wider distribution of our national income that we can expand our markets, increase production and gradually eliminate unemployment⁶⁹

Raising pay for low-wage employees such as home care workers—who then inject the money back into the economy by spending it on necessities at local businesses—is a strategy for promoting economic growth. According to the Federal Reserve Bank of Chicago, every dollar increase in wages for a low-wage worker generates more than \$3,500 in new spending by the worker’s household over the following year.⁷⁰ The Economic Policy Institute estimates the 70-cent increase in the federal minimum wage in 2009 generated \$5.5 billion in new consumer spending.⁷¹

The rapidly growing home care industry is playing an increasingly important role in our national economic life. As such, extending basic minimum wage and overtime protections to the home care workforce is essential to promote FLSA’s goals of fighting poverty, spreading work and restoring the consumer spending that our economy needs to grow again.

B. The Cost Impact of Transitioning to FLSA Coverage Is Likely to Be Limited

The question that is likely to be raised regarding this reform concerns the cost impact of transitioning to a narrower companionship exemption under which most home care workers will receive minimum wage and overtime protection under the FLSA. Segments of the home care employer and consumer communities will fear that, unless expanded coverage is accompanied by increased reimbursements under the Medicaid and Medicare programs, states and employers will be forced to cut care for older adults and persons with disabilities to begin paying home care workers the minimum wage and overtime. Similarly, at a time when the federal government and the states are struggling with serious budget shortfalls, concerns will no doubt be raised about the potential cost impact on these government programs.

It is true that increases in Medicaid and Medicare reimbursements to enable more employers to raise home care workers’ wages—from their current level of roughly \$2 above the minimum wage⁷² to closer to a true living wage—are badly needed and should be a top priority for the Department of Health and Human Services. However, securing such increased funding should not be a prerequisite for Labor Department’s acting to revise the companionship regulations

Congress has charged the Labor Department with the statutory duty to properly

interpret and enforce the FLSA. Our nation's wage-and-hour laws by their nature have a range of cost implications for employers. Yet such impacts are simply not appropriate grounds under the statute for denying much of the home care workforce the basic minimum wage and overtime protections that workers in virtually every other industry have had for decades.

That said, however, experience suggests the cost impact associated with transitioning to a properly narrow companionship exemption will be manageable and can be accommodated through improved scheduling and management of overtime usage. While an actual cost impact projection is beyond the scope of this policy brief, we will review some of the factors that suggest the impact is likely to be modest.

It is likely that most of the cost impact will be limited to a very small number of "high hours" cases in each state, and only a very small number of states have sufficiently large Medicaid home care programs such that they will have more than a small number of these cases. While many individual workers will likely gain substantial benefits from this change, consideration of the factors that could increase costs helps explain why the general impact is likely to be so modest and geographically limited.

(1) Few High-Hours Cases. As noted, the chief impact of a narrowed exemption will be to require time-and-a-half overtime pay for home care workers who work more than 40 hours in a workweek. A secondary but more limited impact will be to require minimum wages for all hours worked, including for any travel time among clients.

First, the prevalence of overtime hours among home care workers is not very high. Estimates vary, and more precise data is expected to be available this fall. But by several accounts only a small slice of the home care workforce works more than 40 hours per week, and most of them only slightly more than 40 hours.⁷³

Second, to the degree that home care workers are currently working more than 40 hours a week on multiple short-hours cases, that problem can be addressed by capping workweeks at 40 hours and dividing up the cases more evenly among more workers. As detailed below, states and agencies that operate under overtime coverage have done just that.

And third, high-hours cases—cases where a single consumer receives home care services for more than 40 hours a week and where eliminating overtime usage is more complicated—represent a tiny fraction of home care cases. This is because very few state Medicaid programs are generous enough to approve individuals for more than 40 hours of care per week. It is likely that the only state where the Medicaid program serves a substantial number of high-hours cases is New York, which for unique historical reasons relies proportionally far more on home care to meet its long term care needs than other states.⁷⁴

[E]xperience suggests the cost impact associated with transitioning to a properly narrow companionship exemption will be manageable and can be accommodated through improved scheduling and management of overtime usage.

[H]igh-hours cases—cases where a single consumer receives home care services for more than 40 hours a week and where eliminating overtime usage is more complicated—represent a tiny fraction of home care cases.

This fact that workers in many of these states are already fully or partly covered by higher standards reduces substantially the impact of a narrower companionship exemption.

Thus, current overtime usage is small and, as discussed below, much of it can be eliminated immediately by (1) limiting overtime by workers who serve multiple short-hours consumers, and (2) adopting work spreading practices by greater use of multiple workers.⁷⁵ And the long hours cases—where such work-spreading is still feasible but more complex—represent a tiny portion of the caseload, and are largely concentrated in just a few states.

(2) Care in Group and Assisted Living Homes Already Covered. In discussions with employers of the possible impact of a revised companionship regulation, some have cited group homes, adult homes or assisted living facilities as an area where some or many workers are currently working more than 40 hours per week but are not being paid overtime, ostensibly because of the companionship exemption. However, the companionship exemption has no applicability in such settings, and the courts have rejected attempts to claim that group homes or assisted living facilities are private homes covered by the exemption.⁷⁶ Any current noncompliance with the FLSA's minimum wage and overtime requirements in such settings is therefore a separate enforcement issue for DOL. Thus, any costs associated with ending such noncompliance cannot be regarded as a "cost impact" of new companionship regulations

(3) Many States Already Covered. Twenty-one states and the District of Columbia already require that home care workers be paid the often-higher state minimum wage for all hours worked, including for travel time among clients. Fifteen of those states in addition guarantee some or all home care workers overtime pay for work over 40 hours in a workweek.⁷⁷ There will thus be limited impact in the 15 states that already mandate both overtime and minimum wage coverage, and only a reduced impact in the six states and the District of Columbia that require just the minimum wage. The states where there is already some overtime and minimum wage coverage include several of those with large Medicaid home care programs—for example, New York, Illinois, Massachusetts, Michigan, New Jersey, Pennsylvania and Washington.⁷⁸ This fact that workers in many of these states are already fully or partly covered by higher standards reduces substantially the impact of a narrower companionship exemption.

State-by-state details on existing coverage are presented in the table in the appendix to this policy brief. In some of these states, current overtime coverage is partial. For example, Illinois, Michigan and Pennsylvania extend overtime coverage to agency employees, but exempt those employed solely by individual consumers.⁷⁹ However, other major states, including New York, Massachusetts and Washington extend overtime to all home care employers, including private households. This existing coverage substantially reduces the impact that will result from extending FLSA overtime coverage. In addition, the experiences of home care agency employers in these states that are already operating with overtime coverage provide a road map for a workable transition to national overtime coverage, as shown below.

New York deserves a special mention here, because it has one of the nation’s largest Medicaid home care programs, and so one might expect the potential impact of companionship reform would be disproportionately concentrated there.⁸⁰ However, because New York has long provided minimum wage and overtime protection to its home care workers, and has recently strengthened those protections, the impact there is likely to be moderate.

New York has always provided minimum wage protection to home care workers, and has provided overtime protection too, although at a reduced rate of time-and-a-half the state’s minimum wage rate, which is currently \$7.25.

In 2010, overtime protections were strengthened further for a large segment of New York’s home care work force, under the New York Domestic Worker Bill of Rights.⁸¹ Under the new measure, home care workers employed directly by private households are now entitled to full overtime pay at time-and-a-half of their regular rate of pay. As a result, a significant portion of New York’s home care industry is now subject to the same overtime standard that would apply nationally under revised companionship regulations.

Moreover, even for New York’s agency-employed home care workers—who remain subject to the reduced overtime rate noted above—the projected impact of expanded FLSA coverage would be fairly modest. This is because the median wage for home care workers in New York is so low—approximately \$8.00–\$8.50 per hour⁸²—that the time-and-a-half overtime rate that will be required under the FLSA is just \$12.00–\$12.75 per hour. That is only \$1.00–\$2.00 more than the \$10.88 these home care employers are already required to pay for overtime hours—a fairly moderate pay differential.

Because nonagency home care employers are already covered by the equivalent of the proposed new FLSA standards, and agency home care employers are already required to pay overtime at rates slightly below a federal overtime rate, the expected impact in New York of transitioning to FLSA coverage should be moderate.⁸³

(4) Overtime Usage Should Be Expected to Decline, Helping to Spread Work and Create Jobs.

In assessing the cost impact of a new companionship regulation, current levels of overtime usage should not be expected to continue once FLSA coverage is extended. Home care employers that are required or have voluntarily elected to begin paying overtime have typically found ways to reduce overtime usage—substantially reducing the costs of transition, generating added jobs to the economy, and over the long term allowing home care workers the greater opportunities that less grueling hours requirements might open to them. The transition to FLSA coverage for most home care workers should presume the home care industry will follow this same approach.

Case studies illustrating the feasibility—and potential advantages—of shifting to a reduced overtime usage model are found in New York and Illinois. In New York

[Cooperative Home Care Associates] has developed a “scorecard” to track and manage costs related to overtime. Since its inception, CHCA has limited overtime to less than 10 percent of all hours (measured on an annual basis), even though approximately 50 percent of its cases require some weekend hours.

[Illinois-based Addus HealthCare] curbed overtime usage and costs through close monitoring of employee workloads and by spreading hours more evenly among its staff.

City, Cooperative Home Care Associates (CHCA), an agency long recognized for its innovation in home care industry practices, has always paid workers a premium overtime rate.⁸⁴ CHCA has developed a “scorecard” to track and manage costs related to overtime. Since its inception, CHCA has limited overtime to less than 10 percent of all hours (measured on an annual basis), even though approximately 50 percent of its cases require some weekend hours.

CHCA’s scheduling approach supports its goals of providing balanced workloads and continuous high quality care while containing overtime costs. Cases that require both weekday and weekend coverage are assigned a permanent every-other-weekend aide to work on alternate weekends. Additionally, cases requiring 24-hour-a-day service, seven-days-a-week, are split among four workers: the day-time aides each work 12 hour shifts for 3.5 days, while the night shift aides each work either three or four days.

This approach to scheduling has been recognized as a best practice for controlling overtime costs while ensuring continuity of care.⁸⁵ The Visiting Nursing Service, a larger provider in New York, has adopted scheduling guidelines similar to CHCA’s as a recommended best practice to assist its contractors in managing their overtime usage. These guidelines could serve as a model for curbing overtime costs for the industry.

A recent transition to a low-overtime staffing and scheduling system occurred in Illinois, when it was confirmed that Illinois’s state overtime and minimum wage rules apply to home care workers. When it began paying overtime, Community Care Systems Inc. (CCSI), a Springfield-based for-profit home care agency, reduced its overtime costs by more evenly distributing hours among workers and carefully tracking worker time through an electronic “roster” program.⁸⁶ It weathered temporary staffing shortfalls without resorting to overtime usage through continuous recruitment and training of new workers, and by maintaining a pool of substitute workers. CCSI estimates that introduction of the roster program resulted in a savings of \$50,000 in overtime costs in one year. Overtime now accounts for only 0.6 percent of CCSI’s wage costs.

Illinois-based Addus HealthCare, a large commercial home care provider, reports similar experiences. It curbed overtime usage and costs through close monitoring of employee workloads and by spreading hours more evenly among its staff.⁸⁷ Addus consistently pays overtime and travel time to its caregivers in all states, regardless of the state’s coverage law.⁸⁸

That Addus has grown to be one of the country’s largest home care employers while consistently following these standards demonstrates that wage-and-hour protections are economically realistic for the industry, and can be achieved without excessive use of costly overtime hours. In some instances, however, Addus reports that its strict compliance creates competitive challenges when other agencies that do not pay overtime or travel time offer lower rates. Extending FLSA coverage to home care workers nationwide will level the playing field by ensuring that all employers follow

these same practices.

These experiences illustrate that high overtime usage is not necessary for providing quality home care services and that once FLSA coverage is extended to home care workers, overtime usage can be expected to decline. In assessing the likely cost impact of the new companionship regulation, the Labor Department should not accept current overtime usage levels as appropriate or expect that they will continue once FLSA coverage begins. First, the Labor Department should assume that where workers serving multiple short-hours clients in a week currently work overtime, home care employers can eliminate that overtime usage by capping work weeks at 40 hours and redistributing caseloads among more workers.

Second, in high hours home care cases involving the very small number of consumers who receive seven-day-a-week or 24-hour-per-day care, the Labor Department should assume that home care employers and programs will divide up caseloads among multiple workers using models similar to that developed by Cooperative Home Care Associates for its high hours cases.

Using such reasonable assumptions as the basis for projections of future overtime usage, the Labor Department can make realistic projections of the cost impact of transitioning to FLSA coverage—a cost that should be moderate and manageable for employers, consumers and the government.

C. Raising Wages and Reducing Long Hours Are Important for Strengthening the Home Care System, and Will Ultimately Improve Care and Return Significant Cost Savings

While there will be costs associated with extending minimum wage and overtime protections to home care workers, it is important not to overlook the corresponding benefits that reform promises—benefits that are likely ultimately to translate into long-term savings. Bringing these shamefully underpaid workers under basic legal protections is a first step toward easing the chronic recruitment problems and high turnover that plague the industry—problems that impede access to quality care for consumers. Moreover, the cost of this transition is likely to be small in absolute terms—and will surely be tiny as a proportion of our nation’s overall spending on long term care. By strengthening the home care system—which is fundamentally more cost effective than other forms of long term care such as nursing homes and assisted living facilities—companionship reform, together with other steps to improve wages and working conditions, has the potential to deliver cost savings for the healthcare system as a whole over the long term.

Whatever the initial costs—and they are likely to be quite modest for the reasons outlined in this brief—the cost of this adjustment would amount to only a small fraction

By strengthening the home care system—which is fundamentally more cost-effective than other forms of long term care such as nursing homes and assisted living facilities—companionship reform ... has the potential to deliver cost savings for the healthcare system as a whole over the long term.

Improving wages and working conditions for home care workers is crucial for strengthening this system that delivers significant cost-savings, and helps keep long term care expenditures in check.

of the more than \$200 billion the United States spends on long term care each year.⁸⁹ That modest outlay should be viewed as a strategic investment in the home care system, which has proved to be a far more efficient and humane way of caring for the elderly and disabled. Average Medicaid expenditures per home care beneficiary are substantially lower than they are per nursing home beneficiary.⁹⁰ And research shows that states that invest in home and community-based services have been able to better control Medicaid expenditure growth than states with lower home care spending.¹

For more than a decade, the states have been shifting their long term care spending away from more costly institutional care and toward home care.⁹² Not only is home care substantially more cost-effective, but it is overwhelmingly preferred by the older adult and persons with disabilities communities. Unless we are able to improve working conditions in home care jobs, the industry will continue to be plagued by high turnover and labor shortages that both compromise the quality of care provided, and pose substantial challenges to rebalancing the long term care system by expanding the use of home care.

Moreover, the current shortage of home care workers is expected to become more acute in the years to come.⁹³ Experts warn that a 56 percent increase in the number of home care workers is needed over the next decade to meet growing needs.⁹⁴ But population growth among women aged 20 to 54—the group of workers that typically provides home care services—is not keeping pace with the skyrocketing demand for such care.⁹⁵

Improving wages and working conditions for home care workers is crucial for strengthening this system that delivers significant cost-savings, and helps keep long term care expenditures in check. Without better wages, it will be impossible to improve employee retention and attract the new workers the sector will need in the coming years.

Extending FLSA coverage is a very modest first step toward improving the sector's wages. Ultimately, sustained investment will be required to lift wages and benefits above the minimum wage to a living wage level. But this initial step of bringing basic wage-and-hour protections to the home care workforce costs very little.

While the need to control overtime costs is the primary motivation for the shift by the agencies profiled in this policy brief to a low-overtime model, experiences also suggest that reducing overtime can be part of a strategy for improving quality of care in the home care industry. Thus, the beneficial impacts of the proposed FLSA rule change may not only benefit workers, but also lead to overall improvements in the quality of home care services.

Some defenders of the current broad FLSA companionship regulations have suggested, especially for the small subset of consumers needing seven-day-a-week

support, having a single home care worker provide services for 60 or 70 hours per week or more is the only feasible means of delivering quality care. They suggest that continuity of care is fundamental for quality service, and that such continuity can only be achieved by having a single home care worker employed for long hours.⁹⁶

But the view that, on seven-day-a-week cases, quality care can only be achieved in this way is not the consensus view among industry experts. Long hours and uncompromising schedules generally tend to reduce work quality in ways that—particularly with respect to health-related services—may have serious and deleterious effects.

Michael Elsas, CEO of Cooperative Home Care Associates (CHCA), reports his agency has found that when employees are forced to work long hours, they face fatigue and stress that increase the likelihood of accidents, and generally reduce the quality of care provided.⁹⁷ While Elsas notes that his agency does not take a position on whether the FLSA companionship regulation should be changed, he believes that limiting overtime usage is not only feasible—even for the long-hours cases that his agency tends to serve — but has improved the quality of home care that CHCA provides.

Other agencies such as New Hampshire-based Quality Care Partners have successfully used the same team approach to ensure continuity of care provided through multiple home care workers.⁹⁸ And throughout the broader long term care field there is a growing body of evidence that balanced workloads—together with stable schedules, full-time hours and adequate wages—are vital to recruiting and retaining a workforce that can deliver quality care.⁹⁹

The healthcare system has slowly recognized that excessive hours and inadequate staffing are a problem and has begun to address them for other categories of caregivers such as medical residents and nurses.¹⁰⁰ Through use of appropriate training and management systems, this approach delivers high quality care without relying on overworked staff. The experience of Cooperative Home Care Associates suggests the same can be done in home care.

The transition to expanded FLSA coverage, and new staffing, scheduling and management systems are part of a strategy for modernizing the home care delivery system to provide better quality, more cost-effective care and attract a skilled workforce to meet our nation's growing need for home care in the 21st century.

We recommend that the Labor Department join with Health and Human Services to facilitate this transition by accompanying the new rule with an initiative to provide technical assistance to employers on best practices regarding modern scheduling, personnel and other systems the industry will need to improve both the quality of jobs and the quality of care it provides in the years ahead.

Conclusion

Home care is one of our nation's fastest-growing industries. But low wages and irregular hours are harming these vital caregivers and undermining the quality of care that consumers receive. The overly broad FLSA companionship exemption is contributing to these problems by suppressing wages and facilitating excessive overtime usage in segments of the industry. The Labor Department should restore the companionship exemption to its intended narrow scope in order to bring basic wage-and-hour protections to more than 1.7 million home care workers. Companionship reform can play an important role in helping the home care industry modernize to improve care and attract the skilled workforce necessary to meet our nation's needs in the 21st century.

Overview of State Minimum Wage and Overtime Coverage of Home Care Workers

States that Provide Minimum Wage and Overtime Coverage to Home Care Workers	
Colorado	Minimum wage and overtime coverage for home care workers, but exemption for those employed directly by private households. Colorado Minimum Wage Order No. 26 § 5; 7 Colo. Code Regs. § 1103-1:5 (West 2010).
Hawaii	Minimum wage and overtime coverage for home care workers, but exemption for those employed directly by private households. Haw. Rev. Stat. § 387-1 (West 2010).
Illinois	Minimum wage and overtime coverage for home care workers, but possible exemption for those employed solely by private households as a result of exemption for employers with fewer than four employees. 820 Ill. Comp. Stat. § 105/3(d) (West 2010); Ill. Adm. Code § 210.110.
Maine	Minimum wage and overtime coverage for all home care workers. No relevant exemptions. Me. Rev. Stat. Ann. tit. 26, §§ 663, 664 (West 2010).
Maryland	Minimum wage coverage for all home care workers. Overtime coverage for most home care workers but exemption for workers employed by non-profit agencies. Md. Code Ann., Lab. & Empl. § 3-415 (West 2010).
Massachusetts	Minimum wage and overtime coverage for all home care workers. No relevant exemptions. Mass. Gen. Laws ch. 151, § 1 (West 2010).
Michigan	Minimum wage and overtime coverage for home care workers, but exemption for live-in workers. Mich. Comp. Laws § 408.394(2)(a) (West 2010). Exemption for workers employed solely by private household as a result of exemption for employer with fewer than two employees. Mich. Comp. Laws § 408.382(c) (West 2010).
Minnesota	Minimum wage and overtime coverage for all home care workers, but nighttime hours where employee is available to provide services but does not actually do so need not be compensated. Minn. Stat. § 177.23(11) (West 2010).
Montana	Minimum wage and overtime coverage for home care workers, but exemption for those employed directly by private households. Mont. Code. Ann. § 39-3-406(p) (West 2010).
Nevada	Minimum wage and overtime coverage for home care workers, but exemption for live-in workers. Nev. Rev. Stat. § 608.250(2)(b) (West 2010).
New Jersey	Minimum wage and overtime coverage for all home care workers. No relevant exemptions. N.J. Stat. Ann. § 34:11-56a et seq. (West 2010).
New York	Minimum wage coverage for all home care workers. N.Y. Labor Law § 651 (5) (West 2010). Overtime coverage for all home care workers but workers employed by agencies receive overtime at a reduced rate of 150% of the minimum wage (rather than the usual 150% of their regular rate of pay). N.Y. Labor Law §§ 2(16), 170; N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2 (West 2010). Overtime coverage for live-in workers after 44 hours/week (rather than the usual 40 hours) at the same rates detailed above. Id.

Pennsylvania	Minimum wage and overtime coverage for home care workers, but exemption for those employed solely by private households. Pa. Stat. Ann. tit. 43, § 333.105(a)(2) (West 2010).
Washington	Minimum wage and overtime coverage for most home care workers, but exemption for live-in workers. Wash. Rev. Code § 49.46.010(5)(j) (West 2010).
Wisconsin	Minimum wage and overtime coverage for most home care workers, but overtime exemption for those employed directly by private households, Wis. Admin. Code § 274.015 (West 2010), and those employed by non-profit organizations. Wis. Admin. Code §§ 274.015, 274.01 (West 2010). Additional minimum wage exemption for live-in workers who spend less than 15 hours a week on general household work. Wis. Admin. Code § 272.06(2) (West 2010).
States that Provide Minimum Wage But No Overtime Coverage to Home Care Workers	
Arizona	Minimum wage but no overtime coverage for home care workers. No state overtime law. Ariz. Rev. Stat. Ann. §§ 23-362, 23-363 (West 2010); see also Office of the Attorney General of the State of Arizona, Opinion No. I07-002 (Feb. 7, 2007).
California	Minimum wage but no overtime coverage for most home care workers. "Personal attendants" exempt from overtime. Industrial Welfare Commission Order No. 5-2001.
District of Columbia	Minimum wage but no overtime coverage for home care workers. D.C. Mun. Regs. tit. 7, § 902.5(b) (West 2010).
Nebraska	Minimum wage but no overtime coverage for home care workers. No state overtime law. Neb. Rev. Stat. §§ 48-1202, 48-1203 (West 2010).
North Dakota	Minimum wage but no overtime coverage for home care workers. Additionally, nighttime hours where employee is available to provide services but does not actually do so need not be compensated. N.D. Cent. Code § 34-06-03.1 (West 2010).
Ohio	Minimum wage but no overtime coverage for home care workers because overtime law adopts FLSA exemptions. Oh. Rev. Code Ann. § 4111.03(A) (West 2010). Additional overtime exemption for live-in workers. Ibid., (D)(3)(d).
South Dakota	Minimum wage but no overtime coverage for home care workers. No state overtime law. S.D. Codified Laws §§ 60-11-3, 60-11-5 (West 2010).

Endnotes

- 1 As of 2008, there were 1.7 million home care workers in the United States, including 817,000 personal and home care aides and 922,000 home health aides – the two major occupational categories that are together commonly referred to as home care workers. PHI, *Who Are Direct-Care Workers?* (Feb. 2010 Update), 2, <http://www.directcareclearinghouse.org/download/NCDCW%20Fact%20Sheet-1.pdf>.
- 2 See *Fair Labor Standards Amendments of 1974*, Public Law 93-259, *U.S. Statutes at Large* 88 (1974): 55, codified at *U.S. Code* 29, §§ 201-219.
- 3 *U.S. Code* 29 (2010), § 206 (minimum wage); *U.S. Code* 29 (2010), § 207 (overtime).
- 4 *U.S. Code* 29 (2010), § 213(a)(15).
- 5 *Ibid.* The Department of Labor defines “babysitting services” as:
[T]he custodial care and protection, during any part of the 24-hour day, of infants or children in or about the private home in which the infants or young children reside. The term “babysitting services” does not include services relating to the care and protection of infants or children which are performed by trained personnel, such as registered, vocational, or practical nurses. While such trained personnel do not qualify as babysitters, this fact does not remove them from the category of a covered domestic service employee when employed in or about a private household. *Code of Federal Regulations* tit. 29, § 552.4 (2010).
- 6 *U.S. Code* 29 (2010), § 213(a)(15); *Code of Federal Regulations* tit. 29, §§ 552.6, 552.106, 552.109 (2010).
- 7 *Congressional Record* 119 (1973): 24,801 (statement of Sen. Williams).
- 8 *Ibid.* (statement of Sen. Burdick).
- 9 *Code of Federal Regulations*, tit. 29, § 552.6 (2010).
- 10 *Congressional Record* 119 (1973): 24,801 (statement of Sen. Williams); *ibid.* (statement of Sen. Burdick).
- 11 *Ibid.* (comments of Sen. Javits).
- 12 U.S.Senate, Report No. 93-690 (1974), 20.
- 13 *Ibid.*
- 14 *Congressional Record* 119 (1973): 24,801 (statement of Sen. Burdick).
- 15 *Congressional Record* 120 (1974): 4,708 (comments of Sen. Javits).
- 16 *Congressional Record* 119 (1973): 24,801 (comments of Sen. Javits).
- 17 *Congressional Record* 119 (1973): 30,267 (comments of Rep. Chisolm).
- 18 In 1974, an enterprise engaged in commerce included any enterprise “which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which ... is an enterprise whose annual gross volume of sales made or business done is not less than \$250,000.” *U.S. Code* 29 (1974), § 203(s)(1). See Department of Labor, *Private Household Workers* (1974), 7 n. 1 (“Employees of a household service business are presently covered by the FLSA if the business is part of an enterprise under section 3(s) of the Act.”). See also *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167 (2007) (“[T]he FLSA in 1974 already covered some of the third-party paid workers”) (emphasis omitted).
- 19 Peggie R. Smith, *Protecting Home Care Workers under the Fair Labor Standards Act* (Direct Care Alliance, June 2009). 2 (“The legislative history of the 1974 amendments indicates that Congress, in exempting companions, intended to exclude those individuals who, like occasional babysitters, worked in a casual, non-professional capacity for a private household.”)
- 20 *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167 (2007).
- 21 Note that the home care workforce today is often broken down into two related sub-occupations: “home health aides” and “personal and home care aides” (also sometimes referred to as personal care attendants or home attendants). PHI, *Who Are Direct-Care Workers?*, 1. There exist differences between the two, including the fact that home health aides, who generally operate under the supervision of a nurse or a therapist, must be certified as having completed a federally mandated training program if they work for agencies that receive reimbursement under Medicaid or Medicare. U.S. Department of Labor, Bureau of Labor Statistics, “Occupational Outlook Handbook, 2010-2011 Edition, Home Health Aides and Personal and Home Care Aides,” <http://www.bls.gov/oco/ocos326.htm>. However, according to the Bureau of Labor Statistics’ Occupational Outlook Handbook, in practice the duties performed by the two are “similar” and the differences are “small.” *Ibid.*
- 22 For a discussion of assistance with activities of daily living (ADLs) provided under the Medicaid Long Term Care program, see Kaiser Commission on Medicaid and the Uninsured, *Medicaid and Long Term Care Services* (July 2006), <http://www.kff.org/medicaid/upload/Medicaid-and-Long-Term-Care-Services-PDF.pdf>.
- 23 As DOL explained in the Proposed Clinton Companionship Regulation, “[i]ndividuals treated as exempt in providing companionship services may now perform duties such as medication management, taking vital signs (pulse, temperature, respiration), routine skin and back care, and assistance with exercise and the performance of simple procedures as an extension of physical therapy service.” *Federal Register* 66 (2001): 5,484.
- 24 Allen J. Leblanc, M. Christine Tonner, and Charlene Harrington, “State Medicaid Programs Offering Personal Care Services,” *Healthcare Financing Review* 22, no. 4 (Summer 2001): 156.
- 25 U.S. Department of Health & Human Services, Office of the Assistant Secretary for Planning & Evaluation, *Understanding Medicaid Home and Community Services: A Primer* (Nov. 2000), 61, <http://aspe.hhs.gov/daltcp/reports/primer.pdf>.
- 26 University of California San Francisco, Center for California Health Workforce Studies, *An Aging U.S. Population and the Healthcare Workforce: Factors Affecting the Need for Geriatric Care Workers* (Feb. 2006), 30.
- 27 U.S. Census Bureau, “2008 Service Annual Survey Data for Healthcare and Social Assistance,” http://www.census.gov/services/sas_data.html.

28 PHI, *Who Are Direct-Care Workers?*, 1-2. See also Teresa Scherzer, Alice Wong and Robert Newcomer, "Financial Services in Consumer Directed Programs," *Home Healthcare Services Quarterly* 26(1) (2007): 29-42.

29 Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390 (2008). Note that for purposes of employment status under the FLSA, attempts to treat home care workers as independent contractors who are not employees of anyone and therefore not covered at all by the FLSA is almost always improper and contrary to court rulings. See, for example, *Brock v. Superior Care*, 840 F2d 1054 (2d Cir. 1988).

30 U.S. Census Bureau, "2008 Service Annual Survey Data".

31 PHI, *Occupational Projections for Direct-Care Workers 2008-2018* (Feb. 2010), [http://directcareclearinghouse.org/download/PHI%20FactSheet1Update_singles%20\(2\).pdf](http://directcareclearinghouse.org/download/PHI%20FactSheet1Update_singles%20(2).pdf).

32 Lenora Gilbert, "Home Care Workers: The New York City Experience," in *Encyclopedia of Occupational Safety and Health*, Vol. 3 (4th ed., International Labor Organization, 1998), http://books.google.com/books?id=nDhpLa1rl44C&pg=PT1055&lpg=PT1055&dq=home+care+workers+breadwinners&source=bl&ots=zKZiPSAZqY&sig=tHvo076GmvZjw2WxVtf5bfUWmi8&hl=en&ei=w6tcTPrQlKB8gaMoaTVAg&sa=X&oi=book_result&ct=result&resnum=10&ved=0CEAQ6AEwCQ#v=onepage&q&f=false.

33 *Code of Federal Regulations* tit. 29, § 552.6 (2010).

34 *Ibid.*

35 *Code of Federal Regulations* tit. 29, § 552.109(a) (2010).

36 See *Appendix: Overview of State Minimum Wage and Overtime Coverage of Home Care Workers*, *infra* at 27 [hereinafter *State Coverage Overview*].

37 PHI, "State-by-State Projected Demand for New Direct-Care Workers, 2006-16," <http://directcareclearinghouse.org/download/State%20by%20State%20DCW%20Demand%20Projections%202006-16%20FINAL%20rev.pdf>.

38 *State Coverage Overview*.

39 Alabama, Louisiana, Mississippi, South Carolina and Tennessee. See U.S. Department of Labor, "Minimum Wage Laws in the States," <http://www.dol.gov/whd/minwage/america.htm>.

40 For example, Florida. See *Fla. Const.* art. X, § 24.

41 In 2009, the national median hourly wages for home health aides and personal and home care aides in the "Home Health Services" industry were \$9.49 and \$8.55 respectively. Within the "Services for Elderly and Persons with Disabilities" industry group, the figures were \$9.36 for home health aides and \$9.78 for personal and home care aides. The weighted average for these groups of workers was \$9.34 an hour. "2009 BLS/OES Industry/Occupation Matrix Data," prepared by PHI based on data available at http://www.bls.gov/oes/2009/may/naics4_621600.htm and http://www.bls.gov/oes/2009/may/naics5_624120.htm.

42 *Code of Federal Regulations* tit. 29, § 785.38 (2010).

43 *U.S. Code* 29 (2010), § 203(m).

44 See, for example, *Bayada Nurses Inc. v. Dep't of Labor & Industry*, 958 A.2d 1050 (Pa. Commw. 2008) (plaintiff home care workers netted less than the minimum wage once their travel time and travel costs were factored in).

45 Home care work is physically demanding and aides are vulnerable to workplace injuries, including back injury, infections and exposure to communicable disease. Home care workers experience a larger than average number of work-related injuries and illnesses. U.S. Department of Labor, Bureau of Labor Statistics, "Occupational Outlook Handbook, 2010-11 Edition," <http://www.bls.gov/oco/ocos326.htm>. The rate of "days away from work" (work days missed due to on-the-job injuries) for nursing aides, orderlies and attendants was almost four times greater than the all-worker rate—449 per 10,000 full time workers as compared with 113 per 10,000 for all workers. U.S. Department of Labor, Bureau of Labor Statistics, *Press Release: Nonfatal Occupational Injuries and Illnesses Requiring Days Away From Work, 2008* (Nov. 24, 2009), http://www.bls.gov/news.release/archives/osh2_12042009.pdf. Injury rates for this occupation are higher than injury rates for construction laborers. *Ibid.*

46 See *supra* note 41.

47 Economic Policy Institute, "Basic Family Budget Calculator," http://www.epi.org/content/budget_calculator/.

48 Linda Hiddemen Barondess, "Some Potential Solutions to High Direct-Care Staff Turnover Rates," *Annals of Longterm Care* 15, issue 10 (Oct. 1, 2007), <http://www.annalsoflongtermcare.com/article/7860>.

49 Studies have linked excessive work hours in the medical field to failures of attention and medical errors. See, for example, C.P. Ladrigan et al., "Effect of Reducing Intern's Weekly Work Hours on Sleep and Attentional Failures," *New England Journal of Medicine* 351 (2004): 1838-1848. Recognizing that excessive hours threaten both patient care and workers' well-being, some states have passed legislation restricting mandatory overtime for healthcare personnel. See, for example, *N.J. Stat. Ann.* § 34:11-56a31 et seq. (West 2010) (prohibiting healthcare facilities from assigning mandatory overtime to employees involved in direct patient care activities "in order to safeguard their health, efficiency, and general well-being as well as the health and general well-being of the persons to whom these employees provide services"). Fifteen states have restrictions on the use of mandatory overtime for nurses, including thirteen that have done so by statute (CT, IL, MD, MN, NJ, NH, NY, OR, PA, RI, TX, WA, and WV), and two that have done the same by regulation (CA and MO).

50 *Federal Register* 66 (2001): 5,481.

51 *U.S. Code* 29 (2010), § 213(a)(15).

52 As the Supreme Court has explained, "[w]e have previously pointed out that the 'power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly by Congress.' When an agency fills such a gap reasonably, and in accordance with other applicable (e.g., procedural) requirements, the courts accept the result as legally binding." *Long Island Care at Home*, 551 U.S. at 165.

53 *Ibid.* at 167-68.

54 *Federal Register* 66 (2001): 5,485.

55 We do not propose any special regulatory changes in the treatment of live-in home care workers. The above reforms in the

companionship standard would mean that home care workers who live in would be covered by the FLSA's minimum wage requirements, but would remain exempt from overtime under the FLSA's statutory overtime exemption for live-in domestic workers. See *U.S. Code* 29 (2010), § 213(b)(21). This would mean that home care workers who live-in with consumers would be required to be paid at least the minimum wage for all hours worked, but some of the hours that they spend at their clients' homes would remain non-compensable under the existing DOL regulation that does not require compensation for some sleeping time, meal breaks and free time, as long as certain conditions are met. See *Code of Federal Regulations* tit. 29, § 552.102 (2010) (specific to domestic service employees) and *Code of Federal Regulations* tit. 29, §§ 785.15–23 (2010) (applicable to all employees).

56 *Federal Register* 66 (2001): 5,484.

57 *Ibid.*

58 *Ibid.*

59 *Federal Register* 66 (2001): 5,484-85.

60 Ellen C. Kearns et al., eds., *The Fair Labor Standards Act* (1999), 11 (citing statement of President Franklin D. Roosevelt).

61 *Congressional Record* 142 (May 2, 1996): S 4615 (statement of Sen. Kennedy).

62 As the Supreme Court noted, "[t]he legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945) (superseded by statute), adding that "[t]he legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Ibid.* at 707 (citing *Congressional Record* 81 (1937): 7652, 7672, 7885; *Congressional Record* 82 (1937): 1386, 1395, 1491, 1505, 1507; *Congressional Record* 83 (1938): 7283, 7298, 9260, 9265; U.S. House, Report No. 75-1452 (1937), 9; U.S. Senate, Report No. 75-884 (1937), 3-4.

63 See *supra* note 41.

64 PHI, *Who Are Direct-Care Workers?*, 3. See also William J. Scanlon, Director, Healthcare Issues, Government Accountability Office, *Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aids Is a Growing Concern: Testimony Before the Senate Committee on Health, Education, Labor and Pensions* (May 17, 2001), <http://www.gao.gov/new.items/d01750t.pdf> (reporting that the home care workforce is 89.2% female, 33.8% Black, 17.6% Hispanic, and 24.6% unmarried with children, as compared with figures of 52% female, 11.5% Black, 14.7% Hispanic, and 11% unmarried with children for all workers).

65 Benjamin Kline Hunnicutt, *Work Without End: Abandoning Shorter Hours for the Right to Work* (Temple University Press, 1988).

66 Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 Mich. L. Rev. 2212, 2285-86 (1998).

67 *Williams v. General Mills, Inc.*, 39 F. Supp. 849, 852 (D. Ohio 1941) (citing U.S. House, Report No. 75-1452 (1937), 9, 14), reversed on other grounds, 132 F.2d 367 (6th Cir. 1942).

68 See Dora L. Costa, *Hours of Work and the Fair Labor Standards Act: A Study of Retail and Wholesale Trade, 1938-1950* (1999), 3, <http://www.econ.ucla.edu/costa/flsailr.pdf> (discussing the increased effectiveness of work spreading via overtime laws among low wage workers); see also Stephen J. Trejo, *Does the Statutory Overtime Premium Discourage Long Workweeks?* 56 Ind. & Lab. Rel. Rev. 530, 534 (2003) (discussing the limited effectiveness of work spreading where employment costs are fixed).

69 *Congressional Record* 83 (June 14, 1938): H 9264 (statement of Rep. Keller).

70 Daniel Aaronson, Sumit Agarwal, and Eric French, "The Spending and Debt Response to Minimum Wage Hikes," (working paper #2007-23, Federal Reserve Bank of Chicago, Dec. 29, 2008).

71 Kai Filion, "A Stealthy Stimulus: How Boosting the Minimum Wage is Helping to Support the Economy," (Economic Policy Institute, May 28, 2009).

72 See *supra* note 41.

73 See PHI, *Background Report on the U.S. Home Care & Personal Assistance Workforce and Industry*, (Aug. 2010), *forthcoming*.

74 Approximately 60 percent of New York City's personal care program beneficiaries receive 36 or more hours of direct care per week. Medicaid Institute at United Hospital Fund, *An Overview of Medicaid Long term care Programs in New York* (Apr. 2009), System Overview 31. Twenty-four percent of personal care program beneficiaries in New York City receive 12 to 24 hours of direct care per day. *Ibid.*, 32. In September 2007, there were an estimated 57,000 New Yorkers enrolled in the "traditional" Medicaid personal care program (called the Home Attendant program in New York City) and an additional 7,000 enrolled in the consumer-directed personal care program. *Ibid.*, Personal Care 3. Just over half of traditional personal care program beneficiaries in New York City receive over 48 hours of care per week. *Ibid.*, Personal Care 9.

75 Some may raise concerns about the cost impact of companionship reform on live-in home care workers. However, not only are such workers a tiny portion of the home care workforce, as noted above, but companionship reform would not require drastic changes to the way live-in home care workers are currently treated. Live-in domestic workers will still be subject to an overtime exemption and sleep and meal time exemptions that should substantially mitigate the cost impact of expanding FLSA coverage. See *supra* note 55.

76 See, for example, *Johnston v. Volunteers of Am.*, 213 F.3d 559, 563-65 (10th Cir. 2000); *Linn v. Developmental Services of Tulsa, Inc.*, 891 F. Supp. 574 (N.D. Okla. 1995); *Lott v. Rigby*, 746 F. Supp. 1084 (N.D. Ga. 1990). But see, *Park v. Choe*, 2007 WL 2677135, *4 (W.D. Wash. 2007) (finding live-in domestic services employee exemption applied to caregivers at a licensed "adult family home" with four elderly residents).

77 *State Coverage Overview*.

78 *Ibid.*

79 See *State Coverage Overview*.

80 See Kaiser Commission on Medicaid and the Uninsured, *Medicaid Home and Community-Based Service Programs: Data Update* (Nov.

2009), 16.

81 2010 LEXIS N.Y. Advance Legis. Svces. (ALS) 481, codified at N.Y. Labor Law §§ 2(16), 170.

82 According to a PHI analysis, the median wage for home care aides in New York was approximately \$8.03 in 2006 dollars. That figure corresponds with \$8.69 in 2010 dollars according to the Consumer Price Index Inflation Calculator of the Bureau of Labor Statistics. However, industry experts suggest that median home care worker wages in New York are not quite that high, so \$8.00-\$8.50 appears to be a safe approximation of current home care wages in New York. See PHI, *State Chart Book on Wages for Personal and Home Care Aides, 1999-2006* (July 2008), http://www.pascenter.org/phca_wages/PHCA_wage_report.pdf; U.S. Department of Labor, Bureau of Labor Statistics, "CPI Inflation Calculator," http://www.bls.gov/data/inflation_calculator.htm.

83 Note, however, that there is one group of home care workers in New York whose wages are higher—the roughly 50,000 personal and home care aides employed under New York City's Medicaid home care program. Their wages are currently \$10.00 per hour because of New York City's living wage law. *N.Y.C. Admin. Code* § 6-109(b)(2)(a) (2010) (New York City living wage \$10.00 per hour since 2006); Medicaid Institute, *Medicaid Long term care Programs*, 16. For them, the increased overtime rate under FLSA coverage would be \$15.00 – a nearly \$4.00 an hour increase over the \$10.88 currently required under state law. However, only a small number of cases served by this group are very high hours cases requiring overtime pay.

84 Michael Elsas (CEO, Cooperative Home Care Associates, Inc.) and Latifa Beato (Executive Associate, Cooperative Home Care Associates, Inc.), in discussion with the authors March 4, 2010.

85 Ibid.

86 Toni Gerencir (Director of Operations, Community Care Systems Inc.), in discussion with the authors May 3, 2010.

87 Darby Anderson (Vice President of Home & Community Services, Addus HealthCare) and Paul Diamond (Vice President of Human Resources, Addus HealthCare), in discussion with the authors May 11, 2010.

88 Ibid.

89 Georgetown University Long Term Care Financing Project, *Fact Sheet on National Spending for Long term care* (Feb. 2007), <http://ltc.georgetown.edu/pdfs/natspendfeb07.pdf>.

90 H. Stephen Kaye, Mitchell P. LaPlante, and Charlene Harrington, "Do Noninstitutional Long term care Services Reduce Medicaid Spending?" *Health Affairs* 28, no. 1 (Jan./ Feb. 2009).

91 Ibid.; National Conference of State Legislatures, A Guide to Long term care for State Policy Makers: Recent State Initiatives in Rebalancing Long Term Care, <http://www.ncsl.org/default.aspx?tabid=14482>.

92 Enid Kassner et al., *A Balancing Act: State Long Term Care Reform* (AARP Public Policy Institute, July 2008), http://www.aarp.org/health/doctors-hospitals/info-07-2008/A_Balancing_Act_State_Long-Term_Care_Reform.html.

93 Brief of *Amici Curiae* AARP et al., *Long Island Care at Home, Ltd. v. Coke*, 2007 WL 922217, *3 (2007).

94 Brief of *Amici Curiae* Alliance for Retired Americans et al., *Long Island Care at Home, Ltd. v. Coke*, 2007 WL 951137, *23 (2007).

95 Brief of *Amici Curiae* AARP et al., 6.

96 New York City made such assertions in the *Coke* litigation. See Brief of *Amici Curiae* City of New York et al., *Long Island Care at Home, Ltd. v. Coke*, 2007 WL 460416, *27 (2007).

97 Discussion with Elsas & Beato.

98 PHI, *Elements of a Quality Job for Caregivers: Key Research Findings* (June 2007), 6.

99 Ibid., 5-6.

100 See supra note 49.

