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H.R. 3582, THE FAIR HOME HEALTH CARE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON

EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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H.R. 3582, THE FAIR HOME HEALTH CARE ACT

Thursday, October 25, 2007
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and Labor
Washington, DC

The subcommittee met, pursuant to call, at 9:35 a.m., in room 2175, Rayburn House Office Building, Hon. Lynn Woolsey [chairwoman of the subcommittee] presiding.

Present: Representatives Woolsey, Payne, Bishop of New York, Hare, Wilson, Price, and Kline.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Jordan Barab, Health/Safety Professional; Lynn Dondis, Senior Policy Advisor for Subcommittee on Workforce Protections; Jeffrey Hancuff, Staff Assistant, Labor; Robert Borden, Minority General Counsel; Rob Gregg, Minority Legislative Assistant; Taylor Hansen, Minority Legislative Assistant; Victor Klatt, Minority Staff Director; Alexa Marrero, Minority Communications Director; Jim Paretti, Minority Workforce Policy Counsel; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel; and Loren Sweatt, Minority Professional Staff Member.

Chairwoman WOOLSEY [presiding]. A quorum is present. The hearing of the Workforce Protections Subcommittee on H.R. 3582, the Fair Home Health Care Act, will come to order.

Pursuant to Committee Rule 12(a), any member may submit an opening statement in writing which will be made part of the permanent record.

I now recognize myself, followed by Ranking Member Joe Wilson, for an opening statement.

So I thank you all for coming. And, as I said, 9:30 a.m. is kind of off step around here, so you will be surprised that other members will come in and go, "Oh, my goodness, I have missed a half-hour of this."

But we are going to have a hearing on H.R. 3582, the Fair Home Health Care Act, which provides home health care workers with minimum labor protections under the Fair Labor Standards Act. I introduced this legislation in response to a recent Supreme Court decision, Long Island Care at Home Ltd. v. Evelyn Coke, where the Court found that Evelyn Coke was not entitled to the minimum protections of FLSA, particularly overtime pay.

Senator Harkin has introduced the companion bill in the Senate.

Evelyn Coke, who unfortunately could not be with us today, worked as a home health care worker for Long Island Care at Home, a for-profit home health care agency, for 20 years. Home health care was her vocation, and she worked an average of 42 hours a week caring for the elderly and the disabled. Sometimes she was required to work 24-hour shifts. But she was not paid overtime during her two decades of work.

The Supreme Court found that Ms. Coke fell into a narrow exemption created by Congress in 1974. Ironically, when Congress created the exemption, it did so in the context of expanding FLSA to cover most domestic workers, such as chauffeurs and housekeepers, who previously had no labor protections.

The Congressional Record from that period shows that Congress did not mean to exclude home health care workers, but only those workers who provided ad hoc services for the elderly and disabled, only for workers who were "babysitters." So it was a mistake, and it needs to be corrected.

Nonetheless, the Court found that Congress's intent was not clear and that it meant to delegate the details of the exemption to the Department of Labor, and it upheld a Department of Labor regulation that exempted caregivers who worked for third parties from FLSA protections.

So I suppose we could argue whether the Supreme Court's decision was technically correct. But I do know that it was bad policy, absolutely, and if it is allowed to stand, it continues the exploitation of a segment of America's workforce—mostly made up of women and minorities—a segment that does really important and difficult work and barely makes a living wage.

Moreover, there is nothing in the decision that acknowledged what most of us know, that home health care has changed drastically since 1974, when caregiving was largely provided by family and friends. Today, about 2.4 million workers are employed by nursing homes, home health care agencies, assisted living and other residential facilities. Over 800,000 of these workers provide in-home care.

As the baby boomers age, this need is going to grow hugely. According to one estimate, in the year 2000, 13 million elderly needed caregiver services. By 2050, this number will grow to 27 million, from 13 million to 27 million. And the disabled population needing care is also going to grow during this period from 5 million to 8 million.

And I doubt very much that they have taken into consideration the returning wounded Iraqi vets when they came up with that number.

So, today, already, there is a shortage of home health care workers. Turnover is very, very high, and nearly one-half of the home health care workers leave their jobs each year. So this, in turn, impacts the quality of care for people and, in many cases, disrupts their care to the point where they are unable to stay at home.

And the main culprit is low pay. The average home health care worker makes less than $10.00 an hour, about half of what other workers earn. More than 20 percent of home health care workers actually live in poverty themselves and need public assistance just to make ends meet. I mean, that is just unacceptable. And, often-

times, they do not have the work benefits that most of us rely on, such as health care, vacation and sick time.

This work is difficult. It is taxing both physically and emotionally and must be honored.

So I know that there are those who worry that if we pay home health care workers a decent wage, the disabled will not be able to afford in-home care, and I know that there are others who say that Medicaid and Medicare costs will soar, which will ultimately mean a cut-back in services for those who need it the most.

But in some states, such as Michigan and Minnesota, they already pay overtime to home health care workers and, certainly, the sky has not fallen in those states. It is working. Those states recognize that it is simply morally reprehensible to exclude hard-working home health care workers from minimum labor protections. They also recognize that these protections help to stabilize the workforce.

So H.R. 3582, the Fair Home Health Care Act, providing minimum wage labor protections, will be debated today. We will have the hearing. We will ask you questions.

But I want to make sure everybody knows that this bill does not cover occasional caregivers. It does not reach live-in caregivers either because they are already exempted from overtime, but not minimum wages. It simply ensures that home health care workers are paid what they deserve.

So I look forward to exploring the issues with you and hearing your presentations, and I honor you for being here.

And I now yield to my ranking member, Mr. Wilson.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn C. Woolsey, Chairwoman, Subcommittee on Workforce Protections

Thank you for coming here today for this legislative hearing on H.R. 3582, the Fair Home Health Care Act, which provides home health care workers with minimum labor protections under the Fair Labor Standards Act (FLSA).

I introduced this legislation in response to a recent Supreme Court decision, Long Island Care at Home Ltd. v. Evelyn Coke, where the Court found that Evelyn Coke was not entitled to the minimum protections of the FLSA, specifically overtime pay.

Senator Harkin has introduced a companion bill in the Senate.

Evelyn Coke, who unfortunately could not be with us today, worked as a home health care worker for Long Island Care at Home, a for-profit home health care agency, for 20 years.

Home health care was her vocation and she worked an average of 42 hours a week caring for the elderly and disabled.

Sometimes she was required to work 24-hour shifts.

But she was not paid overtime during her 2 decades years of work as a home health care worker.

The Supreme Court found that Ms. Coke fell into a narrow exemption created by Congress in 1974, well over 30 years ago.

Ironically, when Congress created the exemption, it did so in the context of expanding the FLSA to cover most domestic workers—-such as chauffeurs and housekeepers—-who previously had no labor protections.

And the Congressional Record from that period shows that Congress did not mean to exclude home health care workers from the FLSA, but only those workers who provided baby sitting services for an elderly or disabled person on an ad hoc basis.

Nonetheless, Court found that Congress' intent was not clear, and that it meant to delegate the details of the exemption to the Department of Labor. And it upheld a DOL regulation that exempted caregivers who worked for 3rd parties from FLSA protections.

I suppose we can argue about whether the Supreme Court's decision was technically correct. But I do know that it was bad public policy, and if allowed to stand,

continues the exploitation of a segment of America's workforce—mostly made up of women and minorities—that does important and difficult work and barely makes a living wage. Moreover, there is nothing in the decision that acknowledged what most of us know: that home health care has changed drastically since 1974, when caregiving was largely provided by family and friends. Today, about 2.4 million workers are employed by nursing homes, home health agencies, assisted living and other residential facilities. Over 800,000 of these workers provide in-home care.

As the baby boomers age, this need is going to explode. According to one estimate, in 2000, 13 million elderly needed caregiver services. By 2050, this number will grow to 27 million. And the disabled population needing care is also expected to grow during this period from 5 to 8 million. But even today there is a shortage of home health care workers. Turnover is very high, and nearly one-half of the home health care workers leave their jobs each year.

This in turn impacts on the quality of care people receive and in many cases disrupts their care to the point where they are unable to stay at home. The culprit is low pay. The average home health care worker makes less than $10.00 an hour, about half of what other workers make. More than 20% live in poverty, and nearly half need some sort of public assistance to barely make ends meet.

And they oftentimes do not have the work benefits that most of us rely upon, such as health care, vacation and sick time.

This work is difficult and is taxing, both physically and emotionally.

Now I know that there are those, including members of the disability community, who say that if we pay home health care workers a decent wage, the disabled we will not be able to afford in-home care.

And I know that there are others who say that Medicaid and Medicare costs will soar, which will ultimately mean a cut-back in services to those who need it most.

These concerns are overblown. After all, at least 16 states, under their own state laws—including California, New Jersey, New York, Illinois and Minnesota—already pay overtime to some or all of their home health care workers.

And the sky has not fallen in those states.

These states recognize that it is simply morally reprehensible to exclude hard-working home health care workers from minimum labor protections.

H.R. 3582, the Fair Home Health Care Act restores minimum labor protections to these workers.

It doesn't cover occasional caregivers, and it doesn't reach live-in caregivers either, who are already exempted from overtime but not minimum wages.

It simply ensures that home health care workers are paid the bare minimum of what they deserve. I look forward to exploring the issues that this legislation presents and look forward to hearing the Panel's testimony.

Mr. WILSON. Thank you, Madam Chairwoman.

And thank you for scheduling this hearing at an early hour. I want to commend you on getting people together.

Good morning, and welcome to our witnesses.

Before we begin, I would like to particularly welcome a good, longtime friend and fellow South Carolinian, Mr. Alfred Robinson. I had the good fortune of having served with Alfred in the South Carolina General Assembly, as he represented Pickens County, and I particularly appreciate his extraordinary academic background of being a graduate of Washington and Lee University in Lexington, Virginia. I know firsthand of its rigorous standards because I graduated from Washington and Lee several years before Alfred. Additionally, we are fellow graduates of the University of South Carolina Law School, one of America's finest law schools.

Turning to the subject of our hearing this morning, certainly, one of the most important labor laws in our Nation is the Fair Labor Standards Act. Since 1938 and subject to various amendments, the FLSA has provided that a covered nonexempt employee is entitled to be paid a Federal minimum wage and be paid overtime at time and a half when he or she works more than 40 hours a week. Since its enactment, the FLSA has been the lynchpin of our Nation's wage and hour laws and has provided protections to literally hun-

dreds of millions of workers. The FLSA represents the collective wisdom of Congress, the legislators who originally drafted the act and those who have subsequently amended it.

Often in these instances, Congress has struck a balance between competing policies. The issue before us today, I believe is one of those instances. In the Fair Labor Standards Act's amendments of 1974, Congress exempted from minimum wage and overtime requirements certain workers who are "employed in domestic service employment to provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves."

The 1974 amendment struck a balance between the protection of companionship service workers and the needs of elderly and infirm patients to obtain this care in these services. That balance recognizes that increasing the cost of companion care services by way of minimum wage and overtime requirements, it is likely to result in a hardship to many who need these services but for whom they would become too costly.

The Department of Labor is charged with administering this law and issuing regulations under it. There has been significant debate and litigation relating to the Department's regulations regarding companion care workers and specifically the question of whether the law exempts only those workers who are paid directly by the individual to whom these services are provided or whether the exemption covers all companion care workers irrespective of the technicalities of how they are paid.

Through public rulemaking, the Department of Labor has taken the latter view that the exemption extends to cover all companion care workers. Earlier this summer, the United States Supreme Court, in a unanimous 9-to-0 decision known as Long Island Care at Home, upheld the authority of the Department of Labor to interpret these provisions of the Fair Labor Standards Act. They found that the Department's interpretation was a lawful one.

The legislation before us today appears intended to overturn that decision. I use the word "appears" advisedly, and I am glad of the fact that we are having a legislative hearing on this issue and the bill in particular. I am interested in hearing our witnesses today speak about the text and provisions of H.R. 3582. I would like their views as to whether this bill simply voids the regulation at issue in Long Island Care or whether it, in fact, goes beyond that. Some have suggested that H.R. 3582 will result in the companion care exemption becoming so limited as to be meaningless. I would welcome our witnesses' views on that as well.

It is important as we consider legislation in this area that we are mindful of the consequences of our actions. I suspect we will hear more today again that this is a matter of fundamental fairness for these workers, and I respect those witnesses who hold those views. But, as I mentioned earlier, the exemption of certain companion care workers from minimum wage and overtime represents a deliberate choice by Congress. Limiting or eliminating the exemption will absolutely serve to increase costs, not just for employers and agencies, but also for the Federal and state governments who pay for these services by way of programs like Medicare and Medicaid. That, in turn, is likely to have consequences for patient care. These are the issues I would like to explore today.

In closing, let me again say I appreciate the opportunity to examine this legislation in our subcommittee this morning. I welcome our witnesses, and I yield back my time.

[The statement of Mr. Wilson follows:]

Prepared Statement of Hon. Joe Wilson, Ranking Republican, Subcommittee on Workforce Protections

Good morning, and welcome to our witnesses. Before we begin, I'd like to particularly welcome a good, old friend and fellow South Carolinian, Mr. Alfred Robinson. I've had the good fortune to have served with Alfred in the South Carolina General Assembly as he represented Pickens County, and I particularly appreciate his extraordinary academic background of being a graduate of Washington and Lee University in Lexington, Virginia. I know firsthand of its rigorous standards because I graduated from Washington and Lee several years before Alfred.

Turning to the subject of our hearing this morning: Certainly one of the most important labor laws in our nation is the Fair Labor Standards Act. Since 1938, and subject to various amendments, the FLSA has provided that a covered, non-exempt employee is entitled to be paid a federal minimum wage, and be paid overtime at time-and-a-half when he or she works more than forty hours in a week. Since its enactment, the FLSA has been the linchpin of our nation's wage-and-hour laws and has provided protections to literally hundreds of millions of workers.

The FLSA represents the collective wisdom of Congress—the legislators who originally drafted the Act, and those who have subsequently amended it. Often in these instances, Congress has struck a balance between competing policies. The issue before us today I believe is one of those instances.

In the Fair Labor Standards Amendments of 1974, Congress exempted from minimum wage and overtime requirements certain workers who are "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." The 1974 Amendments struck a balance between the protection of companionship service workers, and the needs of elderly and infirm patients to obtain this care and these services. That balance recognizes that increasing the cost of companion care services by way of minimum wage and overtime requirements is likely to result in a hardship to many who need these services, but for whom they would become too costly.

The Department of Labor is charged with administering this law, and issuing regulations under it. There has been significant debate and litigation relating to the Department's regulations regarding companion care workers, and specifically the question of whether the law exempts only those workers who are paid directly by the individual to whom these services are provided, or whether the exemption covers all companion care workers, irrespective of the technicalities of how they are paid. Through public rulemaking, the Department of Labor has taken the latter view—that the exemption extends to cover all companion care workers.

Earlier this summer, the United States Supreme Court—in a unanimous, nine to zero decision known as Long Island Care at Home—upheld the authority of the Department of Labor to interpret these provisions of the Fair Labor Standards Act. They found that the Department's interpretation was a lawful one. The legislation before us today appears intended to overturn that decision.

I use the word "appears" advisedly, and I am glad of the fact we are having a legislative hearing of this issue and the bill in particular. I am interested in hearing our witnesses today speak about the text and provisions of H.R. 3582. I would like their views as to whether this bill simply voids the regulation at issue in Long Island Care, or whether it in fact goes beyond that. Some have suggested that H.R. 3582 will result in the companion care exemption becoming so limited as to be meaningless. I would welcome our witnesses views on that, as well.

It is important as we consider legislation in this area that we are mindful of the consequences of our actions. I suspect we'll hear more than once today that this is a matter of "fundamental fairness" for these workers—and I respect those witnesses who hold those views. But as I mentioned earlier, the exemption of certain companion care workers from minimum wage and overtime represents a deliberate choice by Congress. Limiting or eliminating that exemption will absolutely serve to increase costs—not just to employers and agencies, but also to federal and state governments, who pay for these services by way of programs like Medicare and Medicaid. That in turn is likely to have consequences for patient care. These are the issues I'd like us to explore today.

In closing, let me say again that I appreciate the opportunity to examine this legislation in our Subcommittee this morning. I welcome our witnesses, and yield back my time.

Chairwoman WOOLSEY. Thank you.

I would like to introduce our very distinguished panel of witnesses who are here this morning in the order that they will speak.

First, we will hear from Manuela Butler. She has been a home health care worker for over a decade. She currently cares for an elderly woman with dementia who needs round-the-clock care. She is a lifelong resident of Brooklyn, New York.

Craig Becker serves as associate general counsel to the AFL-CIO and the SEIU Union. He served as a partner at Kirschner, Weinberg & Dempsey and taught labor and employment law at UCLA, the University of Chicago and Georgetown Law School. He has written numerous articles on labor and employment law and recently represented Evelyn Coke before the Supreme Court. He is a graduate of Yale College and Yale Law School.

Alfred Robinson, Jr., is shareholder of Ogletree Deakins, LLP. Previously, he has served as the acting administrator and deputy administrator of the wage and hour division at the Department of Labor. Mr. Robinson was a member of the South Carolina House of Representatives from 1992 to 2002.

So we should be referring to you as the honorable—I am sorry, Mr. Robinson—the honorable Mr. Robinson.

Mr. WILSON. He is honorable.

Chairwoman WOOLSEY. He is. He graduated from Washington and Lee University and received his law degree from the University of South Carolina.

Dr. Dorie Seavey is the director of policy research for the Paraprofessional Healthcare Institute where she conducts research on economic, financial and policy issues affecting the direct-care workforce in the long-term care industry. She has served as an investigator at the Center for Social Policy and as a researcher at the Radcliffe Institute for Advanced Studies. Dr. Seavey has been published extensively in a variety of professional publications. She graduated with a BA from Stanford University and received her Ph.D. in economics from Yale University.

William Dombi is the vice president for law at the National Association for Home Care and director of the Center for Health Care Law. He specializes in legal, legislative and regulatory advocacy on behalf of patients and providers of home health and hospice care. Mr. Dombi has extensive experience in health policy litigation and holds both a bachelor's and law degree from the University of Connecticut.

Henry Claypool is currently the policy director of Independence Care System where he focuses on policy that promotes the health and independence of people with disabilities on Medicare and Medicaid. He previously worked at the Social Security Administration and at Advancing Independence, an advocacy firm, to promote the self-sufficiency of individuals with disabilities. Mr. Claypool also worked at the Department of Health and Human Services in a number of capacities focusing on disability policy. He is a graduate of the University of Colorado.

I welcome all of you. This is going to be a great panel.

And for those of you who have not testified before the committee before, let me explain our lighting system. We have the 5-minute rule. When you begin speaking, the light will be green. When you have completed 4 minutes, it will turn to yellow, and that would be a good time to start wrapping up. Five minutes is the maximum amount of time, but we do not cut you off mid-sentence or mid-thought. I promise you that. But when the red light goes on, please know that your testimony should be complete.

So we will hear from Ms. Butler, our first witness.

STATEMENT OF MANUELA BUTLER, HOME HEALTH CARE WORKER

Ms. BUTLER. Good morning. My name is Manuela Butler, and I thank you for inviting me to testify today. I am a home health care worker. I am a member of District Council 1707, Local 389, which is part of the American Federation of State, County and Municipal Employees.

For the past 17 years I have been a home health care worker. It is physically demanding, dirty, difficult, emotionally challenging, but it can be satisfying. I have been deeply touched by all the people for whom I have worked and cared for. I am proud of my work.

For the past decade, I have worked with a woman who has dementia and diabetes. Mrs. G. is 92 years old. I have seen the progress of dementia. It has taken away memories.

I am nervous.

Chairwoman WOOLSEY. Do not be nervous. We are nice.

Ms. BUTLER. Okay.

It takes away the ability to perform basic activities of daily life. Mrs. G. can no longer walk, sit up, bathe herself, cook, feed herself or clean her house, dress herself, shop for food or even use the toilet. But because of what I do for Mrs. G. 42 hours a week, from 8 in the morning until 8 at night, she could live in her home. She is still the queen of her castle. Dementia can change a person, but it will never take Mrs. G.'s humanity because my work preserves her independence. What I do as a home health care worker helps Mrs. G. keep her dignity.

Mrs. G. cannot sit up. She spends most of her time in bed. I bathe her each morning, cook her breakfast. I also prepare her lunch and dinner. I ask her what she would like to eat like she is in a restaurant. It is the little things that can maintain independence.

Because Mrs. G. is in bed most of the day, we must be very careful to prevent pressure sores. Using a mat and draw sheet, I move her every 2 hours, wash her bottom, change her diaper. I also lift her and move her to be showered. I do her laundry, shop for her food. I update the visiting nurse and Mrs. G.'s family. Even though I regularly work more than 40 hours a week, I do not get overtime pay.

Home care work can be dirty, difficult, but at times it can be also dangerous. This past April, Syndia Jean-Pierre Brye, a home care worker in my local union, was tragically killed on the job. A mentally ill family member shot her and her client and his family. This

young woman was greatly missed by all who knew her. My local union and council are establishing a trust fund for her children.

Unlike my current job, the agency I worked with before did not have a union. At my old agency, I had no paid leave, no health insurance and no pension. Thanks to AFSCME, I now can take a day off with pay if I am sick. I have health insurance. I have a pension plan. I am paid $9.40 an hour during the week and $11.00 an hour during the weekends.

If the woman that works the night shift does not come in, I have to work through the night. I will get straight time pay, not time and a half. Under the Fair Labor Standards Act, I will get time and a half for my overtime for doing the same thing for Mrs. G. if she were in a nursing home. Because of my work, she could stay in her home, but I am deprived of overtime pay. That is just wrong and unfair.

The Fair Home Health Care Act will protect workers like me who are not covered by the overtime and minimum wage protections under the Fair Labor Standards Act.

In a few months, I will be 65 years old! I do not know when I will be able to retire. I cannot afford to retire.

The work I do for Mrs. G. is important for the dignity and independence of persons with disabilities. Home health care workers should be respected, valued. Passing the H.R. 3582 is a good beginning.

This year, you raised the minimum wage. Thank you. This increase was long overdue. Now you must help home care workers receive with overtime pay. I urge you to pass the Fair Home Care Act.

Thank you.

[The statement of Ms. Butler follows:]

Prepared Statement of Manuela Butler, Home Health Care Worker of District Council 1707, Local 389, of the American Federation of State, County and Municipal Employees (AFSCME)

My name is Manuela Butler. I want to thank the Chairwoman and members of the Subcommittee for inviting me to testify today. I'm a home health care worker employed by a private, non-profit home care agency. I am also a member of District Council 1707, Local 389, which is part of the American Federation of State, County and Municipal Employees (AFSCME). District Council 1707 represents 25,000 community and social agency employees and AFSCME has 1.4 million members nationwide.

For the past 17 years I have been a home health care worker caring for seniors with dementia and people with physical disabilities. It is physically demanding, dirty, difficult and emotionally challenging, but it can be satisfying. I have been deeply touched by all the people for whom I have cared. I am proud of my work.

For the past decade, I have worked with a woman who has dementia and diabetes. Mrs. G. is 92. I have seen the progression of dementia. It can take away memories. It can take away the ability to perform basic activities of daily life. Mrs. G. can no longer walk, sit up, bathe herself, cook, feed herself, clean her home, dress herself, shop for food, or use the toilet. But because of what I do for Mrs. G. for 42 hours a week, from eight in the morning until eight at night, she can live in her home. She is still the queen of her castle. Dementia may change a person but it will never take Mrs. G.'s humanity because my work preserves her independence. What I do as a home health care worker helps Mrs. G. keep her dignity.

Because Mrs. G. cannot sit up, she spends most of her time in bed. I bathe her each morning and cook her breakfast. I also prepare her lunch and dinner. I ask her what she would like to eat today, like she is in a restaurant. It is the little things that can maintain independence.

Because Mrs. G. is in bed most of the day we must be very careful to prevent pressure sores. Using a mat and draw sheet I move her every two hours, wash her bottom and change her diapers. I also lift her and move her to be showered.

I also launder her bed linens and clothes and shop for her food. I update the visiting registered nurse and Mrs. G.'s family daily.

Even though I regularly work more than 40 hours a week, I do not get overtime pay.

Home care work can be dirty and difficult but at times it can also be dangerous. This past April, Syndia Jean-Pierre Brye, a home care worker in my local union, was tragically killed on the job when a mentally ill family member shot her, her client and his family. This young woman is greatly missed by all who knew her. My local union and council are establishing a trust fund for Syndia's three children.

Unlike my current job, the agency I worked with before did not have a union. At this previous agency, I had no paid leave, no health insurance and no pension. Thanks to AFSCME, I now can take a day off with pay if I am sick. I have health insurance and we have a pension plan. I am paid $9.40 an hour during the week and $11.00 an hour on the weekends.

Should the woman that works the night shift after me not be able to work, and the agency is unable to send a replacement, I will be required to work through the night. If this were to happen I would get straight time pay, not time and a half for my overtime.

Under the Fair Labor Standards Act, I would get time and half pay for my overtime hours for performing the same tasks for Mrs. G. if she were in a nursing home facility. But because my work helps her to stay in her home, I am deprived of overtime pay. That's just wrong and unfair.

H.R. 3582, the Fair Home Health Care Act, would protect home health care workers who, like me, are currently not covered by the overtime and minimum wage protections under the Fair Labor Standards Act.

In a few months I will turn 65. I don't know when I will be able to retire. I can't afford to retire now.

The work I do for Mrs. G. and the work other home health care workers do across the country, is essential for the dignity and independence of persons with disabilities. Our work should be respected and valued. Passing H.R. 3582 is a good beginning.

Chairwoman WOOLSEY. Thank you very much.

And Mr. Wilson had something he wanted to say.

Mr. WILSON. Ms. Butler, the persons behind you cannot see this, but home health care workers are noted in your profession for having a very pleasant, happy, sincere smile, and you qualify. [Laughter.]

Chairwoman WOOLSEY. Mr. Becker?

STATEMENT OF CRAIG BECKER, ASSOCIATE GENERAL COUNSEL, AFL–CIO AND SERVICE EMPLOYEES INTERNATIONAL UNION

Mr. BECKER. Chairwoman Woolsey, Ranking Member Wilson, other members of the committee, thank you for giving me the opportunity to testify here today.

When I appeared before the Supreme Court on behalf of Ms. Coke, many of the Justices expressed concerns similar to Member Wilson about the cost of protecting home care workers by the Fair Labor Standards Act. I would have liked at that time to turn and point to my client sitting in the audience in a wheelchair being taken care of by her elderly son, so that the Justices could have understood the human cost of excluding home care workers from these basic minimum protections.

The etiquette of the Supreme Court prevented me from doing that, so I was very happy when you invited me here to testify today.

In my very brief time, I would like to make four points.

First, when Congress extended the Fair Labor Standards Act to most domestic workers in 1974, it excluded babysitters and employees who provide "companionship services to individuals who, because of age or infirmity, are unable to care for themselves," but it did not intend to open up the gaping hole in the Fair Labor Standards Act which exists today.

What Congress intended in 1974 was to exempt babysitters, and we all understand what babysitters are, and something akin to babysitters. That is what the chief Senate sponsor called "elder sitters." That is, in 1974, Congress understood companionship services to be services provided in a casual neighbor-to-neighbor relationship. Congress explicitly said it did not intend to exempt regular breadwinners, people responsible for their families' support.

Since 1974, however, this industry has changed dramatically, not only because the number of home care workers has exploded, but because the nature of their work and their employment relationship has changed. These are no longer neighbors employed on a casual basis, but employees largely employed by third-party agencies, most of whom who are for profit. The exemption is now being applied far beyond what Congress intended. Congress surely did not intend to exempt what is today the fastest-growing occupation in the country.

Second, there is nothing about what home care workers do today which justifies treating them as second-class citizens, exempt from our Nation's most basic employment standards. This work they perform is no less demanding than a file clerk, a nursing home worker or any of the other categories of employees who are protected by the Fair Labor Standards Act.

Despite the misleading term in the statute, "companionship services," these workers perform a range of personal and domestic tasks which have already been described. They bathe, feed and move clients. They cook and clean. They assist with medication and using the toilet. In fact, they do almost everything, except sit and act as a companion. And they perform these essential tasks usually for two, three and four clients on a single day, and none of them are typically neighbors.

Their work is emotionally and physically demanding, as evidenced by the fact that the rate of on-the-job injury for home care workers is far above the national average. I ask you what possible justification could there be for not giving these workers the right to receive the minimum wage and additional pay for overtime enjoyed by almost every other employee in this country. There is simply none.

Third, the exemption is not only unsound employment policy. It is unsound long-term care policy as well. There is a growing shortage of home care workers due to the aging population, and most consumers' preference is to receive care at home as opposed to in an institution. This shortage is projected to increase dramatically.

Low wages, obviously, contribute to this shortage, as well as to high turnover which impairs the quality of care, and that is why advocates for consumers—for example, the AARP, took Ms. Coke's side in the Supreme Court because they understand—those who advocate for consumers understand—that the greatest threat to the quality and availability of services is not the extension of the Fair

Labor Standards Act, but the failure to extend the Fair Labor Standards Act, which will exacerbate the shortage of home care workers.

Finally, opponents of the bill will tell you that it will increase costs and lead to reductions in services, but, as the chairwoman has already mentioned, many states, including my home state of Illinois, already protect home care workers with their state wage and hour law, and the quality of care in those states has not been diminished.

Only a small percentage of clients receive more than 40 hours of care per week. Therefore, the fiscal impact will be modest, as projected by the Clinton Labor Department.

More importantly, there is simply no moral or policy justification for requiring the individuals who provide these essential services to bear that cost, whatever it is. There is no justification for asking these workers to bear the cost of our society's unwillingness to devote sufficient resources to long-term care. It will only exacerbate the shortage of workers and decrease the quality of care.

I urge the members of this subcommittee to recommend adoption of the Fair Home Health Care Act.

Thank you.

[The statement of Mr. Becker follows:]

Prepared Statement of Craig Becker, Associate General Counsel, Service Employees International Union

Chairwoman Woolsey, Ranking Member Wilson, and other distinguished members of the subcommittee: Thank you for giving me the opportunity to appear before you today. When I appeared before the United States Supreme Court on April 16 of this year to argue on behalf of Evelyn Coke in the case that gives rise to the proposed bill, H.R. 3582, the Fair Home Healthcare Act, several of the Justices expressed concern about the additional cost that would result if homecare workers employed by third-party agencies were protected by the minimum standards contained in the Fair Labor Standards Act. I would liked to have responded by asking the Justices to look into the audience and see me client, Ms. Coke, who once cared for frail elderly and disabled individuals, sitting in her wheel chair, being cared for by her adult son. I would have liked to have responded in that manner so that the Justices could have understood the human consequences of holding down costs by excluding close to one million workers who provide physically and emotionally demanding and often life-sustaining care for the elderly and disabled in their homes the right to be paid the minimum wage and to receive extra pay when they work overtime. The conventions of argument in the high court prevented me from doing that so I was very pleased when your Committee invited me here today to testify. Unfortunately, Ms. Coke is now too ill to travel so I appear here today to speak not only for her but for the hundreds of thousands of homecare workers across the country like her who labor outside the protections of this country's most basic labor law.

I have represented individual workers and labor unions since 1982. I have taught labor and employment law at the UCLA School of Law, the University of Chicago Law School, and Georgetown Law School. I have published several articles on the Fair Labor Standards Act. For the past 15 years I have served as Associate General Counsel to the Service Employees International Union. The Union represents hundreds of thousands of homecare workers across the country. During that same time period, I have litigated a number of cases on behalf of homecare workers under the Fair Labor Standards Act, including the case recently decided by the Supreme Court, Long Island Care at Home, Ltd. v. Coke.[1]

The Fair Labor Standards Act and the Companionship Exemption

The Fair Labor Standards Act (FLSA), adopted in 1938, guarantees American workers a minimum wage and payment at a rate of one and one-half times their regular rate for hours worked in excess of 40 in one week.[2] Adoption of these minimum employment standards was based on a congressional finding that employment below such standards was "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[3]

However, the Act was not originally applied to domestic employees, maids, butlers, cooks, and similar employees who worked in private homes because regulating their working conditions was thought to fall outside Congress' power under the commerce clause. In 1961 and 1962, Congress extended the Act's coverage to employees employed in an "enterprise engaged in commerce,"[4] including domestic employees so employed.[5] In 1974, Congress passed a sweeping set of amendments to the FLSA, extending the coverage of the Act in several significant respects, including to all domestic employees, even those employed solely by private households.[6] Congress' intent at that time was to afford nearly universal coverage. The House Committee Report explained that it was "the committee's intention to extend the Act's coverage in such a manner as to completely assume the Federal responsibility insofar as it is presently[7] practicable." Such a purpose was consistent with the Supreme Court's observation that "[b]readth of coverage" is "vital to [the Act's] mission."[8]

While generally extending the coverage of the Act in 1974, Congress adopted one narrow exception to the extension of coverage to domestic employees—excluding babysitters and individuals providing "companionship services to individuals who (because of age or infirmity) are unable to care for themselves."[9] In full, the resulting exemption from both the Act's minimum wage and overtime requirements covers: any employee employed on a casual basis in domestic service employment to provide babysitting services or 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).

Congress intended the exemptions of babysitters and companions to be parallel. Senator Harrison Williams, the primary sponsor of the amendments, defined a companion as an "elder sitter."[10] And both Committee Reports make clear that Congress did not intend exempt employees in either category to be "regular breadwinners or responsible for their families' support."[11] In adopting the exemption, Congress was "not concerned with the professional domestic who does this as a daily living."[12] Rather, Congress intended to exempt only the casual form of employment epitomized by the teenager from around the block who occasionally watches another family's children on a Friday night or "people who might have an aged father, an aged mother, an inform father, an infirm mother, and a neighbor comes in and sits with them."[13]

After the adoption of the amendments in 1974, however, the Department of Labor (DOL) adopted regulations that radically broadened the companionship exemption in a manner inconsistent with both Congress' intent and the DOL's treatment of babysitters . The DOL defined "companionship services" to include performance of a range of personal and domestic tasks not limited to provision of fellowship.[14] In addition, the DOL provided that companions employed by third-party agencies and employed on a regular, even full-time, basis, unlike babysitters so employed, fall within the exemption.[15]

The Supreme Court's Recent Decision Applying the Companionship Exemption to Homecare Workers Employed by Third-Party Agencies

The question at issue in Long Island Care at Home, Ltd. v. Coke was whether the DOL's regulation providing that the companionship exemption encompasses employees employed by third-party agencies rather than only by individual consumers and their families is consistent with Congress' intent. The United States Court of Appeals for the Second Circuit had struck the regulation down, reasoning that "[i]t is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered."[16] But the Supreme Court reversed, holding that because Congress did not clearly express its intention in 1974, the courts must defer to the DOL's construction of the companionship exemption.[17] In an editorial on June 22, 2007, The New York Times opined, "[T]he justices were completely silent on the question of whether denying overtime to home health employees is good policy, let along morally justifiable. Clearly it is neither."[18]

I urge this Committee to recommend that Congress now make its intentions clear on this important question by amending the FLSA to provide that only employees employed on a casual basis to provide companionship services, and thus not employees employed by third party agencies, are exempt from the Act's protections.

Excluding Homecare Workers From the Minimum Standards Contained in the FLSA is Both Unsound Labor and Employment Policy and Unsound Long-Term Care Policy.[19]

In 1974, when the exemption was adopted, homecare, like babysitting, was largely provided by neighbors and friends. But since that time a homecare industry has been created and has experienced explosive growth. There are now almost 25,000

homecare agencies in the U.S., with almost three-quarters being for-profit.[20] For-profit companies employed 62% of home health care aides as of 1999.[21] Due to an aging population and the fact that both the elderly and disabled increasing desire to remain in their homes, nonprofessional homecare is now the fastest growing occupation in the United State.[22] Leaving this rapidly expanding, professional homecare industry outside the ambit of out Nation's most basic employment law is inconsistent with both the historic purpose of the FLSA and Congress' progressive expansion of its coverage since 1938. Congress should not leave this gaping hole in what should be the broad, nearly universal coverage of the FLSA.

The continued exclusion of homecare workers from the protections of the FLSA cannot be justified on grounds rooted in labor and employment policy. Today's homecare workers can no longer be compared to the neighborhood teenager who babysits on a Friday night. Close to half of all home care workers work year-round, full-time.[23] Despite the misleading term used in the statute—companionship services—homecare workers perform a range of personal and domestics tasks for clients they typically do not know before being assigned to care for them. Homecare workers bath, feed and move their clients. They cook for their clients and clean their homes. They assist their clients to take medication and use the toilet. They do almost everything except sit and provide companionship. And homecare workers often perform these essential services for two or more clients during a single work day. In fact, on average, each agency-employed homecare worker cares for five or more clients in an eight-hour work day.[24]

Homecare work is physically and emotionally demanding, resulting in rates of occupational injury far above the average for all private employees (280.5 occupational injuries and illnesses involving days away from work per 10,000 full-time workers compared to 188.3 for all private industry).[25] The injury rate in home care is worsened by the fact that, unlike in a nursing homes, home care aides must lift and transfer clients without the help of a mechanical lifting device or the assistance of co-workers.[26] Home care workers often suffer emotional abuse from mentally impaired clients who may have severe behavioral problems.[27] Homes may be "untidy and depressing," and clients may be "angry, abusive, depressed, or otherwise difficult."[28] Workers who perform similar work in nursing homes and like facilities are fully covered by the FLSA. There simply is no valid reason why those who perform this work in private homes should not be similarly covered.

Almost 90% of homecare workers are women and they are predominantly members of minority groups (34% African American; 18% Latina; and 20.4% immigrant).[29] Exemption of homecare workers thus has a disproportionate impact on women and minorities and increases existing income inequalities. For that reason, just as women's rights advocates and civil rights organizations lobbied Congress to extend the FLSA to domestics in 1974,[30] they now advocate closing the companionship loophole.[31]

Placing homecare workers outside the mainstream of workers covered by our Nation's most fundamental employment standards is not only unsound labor and employment policy, but also unsound long-term care policy as we face a growing shortage of workers willing and able to perform these essential services. There is a well-documented and growing shortage of homecare workers as a result of the aging population and the increasing cost of and growing dissatisfaction with nursing home care. It is this shortage of homecare workers that led advocates for the aged and disabled, for example, the AARP and American Association of People with Disabilities to support Ms. Coke's position in the Supreme Court. The AARP forcefully argued that exempting homecare workers employed by third party agencies from "the minimum requirements of the FLSA does not serve, bur rather compromises the interests of both older and disabled persons."[32]

Employment of home health aides is projected to increase by 56% in the next decade, making it the fastest growing occupation in the Nation. Employment of personal and home care aides is expected to grow by 41% during the same time period, making it tenth on that list.[33] As of 2004, Federal statistics documented 701,000 personal home care aides and 624,000 home health care aides.[34] The Bureau of Labor Statistics projects that there will be a need for 974,000 home health aides and 988,000 personal and home care aides by 2014.[35]

Unfortunately, the demographics of those who provide the services are not keeping up with those in need of them. While the population over age 85 will double in the next 30 years, the number of persons in the demographic of most home care workers will increase by just 9%.[36] The General Accounting Office has developed a measure called the "elderly support ratio," which represents the ratio of women aged 20-54 (who currently provide the vast majority of care) to persons aged 85 and over. In 2000, that ratio was 16:1. The ratio is projected to drop to 12:1 by 2010, 9:1 by 2030, and 6:1 by 2040.[37] Nor is the resulting care gap likely to be filled by

informal, uncompensated care because the number of potential family caregivers for each person needing care is also projected to decrease from 11 in 1990 to 4 in 2050.[38]

This labor shortage has already produced adverse consequences for home care clients. Medicaid home care clients have filed lawsuits in Federal and state court challenging home care payment rates on the ground that their inadequacy has caused a shortage of necessary services.[39] They have documented incidents where individuals in need of critical services have been trapped for hours in bed or in a bathroom, or without food or water, because of the unavailability of home care aides.[40] The critical shortage of home care aides also "encourage[s] unnecessary and premature institutional placements among Medicaid participants."[41] Those unnecessary placements, in turn, cost the Federal and state governments far more than would otherwise be spent on home care services.

The current and growing labor shortage is made worse by low wages and the demanding nature of the work.[42] The AARP observes that "[t]he undersupply of home are workers is consistently attributed to inadequate wages and benefits, and the shortage of workers leads to both reductions in quality of care and disruption in access to care for older and disabled persons."[43] The Bureau of Labor Statistics found that the earnings of home care workers "remain among the lowest in the service industry," with a 1998 mean annual income for home health aides of $16,250 and for home care aides of $14,920.[44] One in five home health care aides lives below the poverty level and they are twice as likely as other workers to receive food stamps and to lack health insurance.[45]

Many potential home care workers have the option to choose jobs that are better paying or less demanding than home care, and those that do choose home care work often leave it shortly[46,47] thereafter. File clerks, for example, earn significantly more than home care aides. Turnover, attributable to low wages as well as the physically and emotionally demanding nature of homecare,[48] has been estimated at 40-100% per year by agencies interviewed for a recent news article and at 12-60% by the Department for Health and Human Services.[49] This turnover is expensive, costing approximately $3,362 each time a worker needs to be replaced.[50] It also tends to diminish the quality and continuity of patient care.[51]

When the FLSA was extended to domestic employees in 1974, Congress recognized the positive effect coverage would have on both the size and quality of the domestic workforce. The Senate Committee Report explained: [T]he demand for household workers is not being met. Bringing domestics under the Fair Labor Standards Act would not only assure them a minimum wage but would enhance their status in the community. It is expected that the supply of domestic workers will increase as their pay and working conditions improve.

Minimum wages should serve to attract skilled workers to these jobs at a time when the need for skilled domestic employees is greatly increasing.[52]

The same unmet demand exists today for homecare workers and a similar extension of coverage would have a similar positive effect on that workforce. In words that apply equally to the extension of coverage to home care workers being considered today, Senator Javits explained in 1972, "The more the job becomes dignified and recognized as honorable employment, such as any other employment—working in a factory or working here—the better it will be from the point of view of getting that kind of service, which Americans so urgently need."[53] As the AARP informed the Supreme Court, "Providing a living wage will attract more workers as well as increase job satisfaction and retention for those already providing care."[54]

In 2001, the Clinton administration proposed a sweeping revision of the companionship regulations based on a careful analysis of Congress' intent and the policy interests at stake.[55] The proposals included both a narrower definition of companionship services and a reversal of the rule exempting employees of third-party agencies. However, the proposals did not become final because they were withdrawn by the Bush administration without any form of analysis or justification shortly after it assumed office.[56]

The failure of both the judicial and executive branches to address this critical problem demands legislative action.

Cost Objections Are Not Well Founded

The primary objection to the Fair Home Healthcare Act is that it will increase the cost of homecare. This cannot be considered a valid objection or providers of all essential services would be exempt from the FLSA's protections. Yet police and fire personnel are covered, hospital employees are covered, nursing home employees are covered, and other providers of essential services are covered. Why should homecare workers uniquely carry the burden of society's need for their services.

Moreover, the economic impact of the proposed legislation has been seriously overstated. In part this is due to a failure to consider that some portion of any increase in costs due to higher wages will be offset by savings from reduced turnover.[57] In its 2001 proposal, the Clinton Administration estimated the effect on Medicare costs as negligible given limited expenditures for homecare services under that program. Additional Medicaid costs were estimated at between $30 and 40 million, of which 57% would have been the Federal share. The combined public and private increase in expenditure was estimates to be no more than $75 million.[58]

Suggestions that extending these minimum protections to homecare workers will lead to excessive costs and a deleterious effect on the quality of care are definitively belied by the fact that a significant number of states, for example my home state of Illinois,[59] already cover homecare workers under their state wage and hour laws and no opponent of the proposed legislation has been able to point to any evidence of an adverse effect on long-term care in those states.

Moreover, a large proportion of the services provided by homecare workers is publicly funded. Medicare and Medicaid account for more than half of the funds paid to free-standing homecare agencies.[60] The Federal and state governments should not purchase these essential services at prices that depend on workers not being paid in compliance with the minimum standards of the FLSA. As President Roosevelt stated, "A self-supporting and self-respecting democracy can plead .* * * no economic justification for chiseling workers' wages or stretching workers' hours."[61]

Finally, and most importantly, consumers of homecare services well understand that the greatest threat to their ability to secure these essential services is not any increase in costs that might result from homecare workers gaining the same rights enjoyed by virtually all other American workers to be paid in accordance with the minimum standards established in the FLSA. Rather, consumers understand that the greatest threat to their ability to secure such services lie in homecare workers not gaining that right and continuing to labor in the shadows of our economy. As the AARP concluded its argument to the Supreme Court in Ms. Coke's case, "FLSA protections should be extended to home care workers * * * as such protections will strengthen the home care workforce and result in higher quality of care and continuity of care for America's older and disabled persons."[62]

The Fair Home Healthcare Act Is a Proper Solution to the Problem

The Fair Home Healthcare Act would amend the Fair Labor Standards Act to make the exemptions of babysitters and companions parallel. The language of the companionship exemption would be amended by inserting the limiting term "on a casual basis," which currently precedes only the term "to provide babysitting services," before the term "to provide companionship services" thus exempting only employees who provide babysitting or companionship services "on a casual basis." In addition, the Act would make clear that the exemption only applies to employees whose employment is "irregular or intermittent" and does not apply to employees "whose vocation is the provision of babysitting or companionship services," who are "employed by an employer or agency other than the family or household using such services," or whose employment exceeds 20 hours per week. These criteria are drawn directly from the DOL current definition of "on a casual basis" which was promulgated shortly after Congress adopted the 1974 amendments.[63]

Domestic employees who live in the homes where they work, including homecare workers, would continue to be exempt from the FLSA's overtime provision.[64]

In short, the Act would place under the FLSA's protective umbrella all employees who make their living providing the essential services that constitute today's homecare while leaving unprotected only those casual employees who do not need such protection and who Congress intended to exclude in 1974.

Conclusion

I urge the Committee to recommend that Congress adopt the Fair Home Healthcare Act and thank you for inviting me here today to testify concerning the Act.

ENDNOTES

[1] 127 S.Ct. 2339 (2007).
[2] 29 U.S.C. §§ 206, 207.
[3] 29 U.S.C. § 202(a).
[4] 29 U.S.C. §§ 206(a), 207(a)(1), 203(r) and (s).
[5] See, e.g., Brennan v. Veterans Cleaning Service, Inc., 482 F.2d 1362 (5th Cir. 1973); Homemakers Home and Health Care Services, Inc. v. Carden, 1974 U.S.Dist.LEXIS 9150 (M.D.Tenn. April 4, 1974), aff'd, 538 F.2d 98 (6th Cir. 1976). See also 1972 DOLWH LEXIS 19 at *2-3 (Aug. 20, 1972); Wage and Hour Opinion Letter 147, 1971 WL 33084 (Nov. 17, 1971).
[6] Publ. Law 93-259 (1974).

[7] H.R. Rep. No. 93-232, 93d Cong., 1st Sess. 8 (May 29, 1973).

[8] Powell v. United States Cartridge Co., 339 U.S. 497, 516 (1950).

[9] 29 U.S.C. § 213(a)(15). An additional exemption to the Act's overtime provisions was created for live-in domestic employees. See 29 U.S.C. § 213(b)(21).

[10] Senator Williams explained, "'Companion,' as we mean it, is in the same role—to be there and to watch an older person, in a sense." Thereupon, Seantor Burdick interjected, "in other words, an elder sitter," and Senator Williams replied, "Exactly." 119 Cong. Rec. 24801 (1973).

[11] H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 36 (March 15, 1974); S. Rep. No. 93-690, 93d Cong., 1st Sess. 20 (Feb. 22, 1974).

[12] 119 Cong. Rec. 24801 (1973) (statement of Senator Burdick).

[13] 119 Cong. Rec. 24801 (1973) (statement of Senator Burdick).

[14] 29 C.F.R. § 552.6 provides: As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

[15] 29 C.F.R. § 552.109(a). The contrasting regulations covering babysitters are at 29 U.S.C. §§ 552.5, 552.104, and 552.109(b).

[16] 376 F.3d 118, 133 (2d Cir. 2004).

[17] 127 S.Ct. 2339 (2007).

[18] Congress and the Caregivers, The New York Times, June 21, 2007, A22.

[19] The following section of my testimony has benefitted from the briefs of amicus curiae AARP et al., Alliance for Retired Americans et al., and Urban Justice Center et al. filed in Long Island Care at Home.

[20] National Center for Health Workforce Analyses, Nursing Aides, Home Health Aides, and Related Occupations viii, 12 (U.S. Dep't of Health and Human Servs., 2004).

[21] Rhonda J.V. Montgomery, et al., A Profile of Home Care Workers from the 2000 Census, 45:5 Gerontologist 593, 596 (2005).

[22] Bureau of Labor Statistics ("BLS"), U.S. Department of Labor, Occupational Outlook Handbook 2006-2007 (Nursing, Psychiatric and Home Health Aides) (available at *http://www.bls.gov/oco/home.htm).*

[23] Montgomery et al. at 595, 597; Yoshiko Yamada, Profile of Home Care Aides, Nursing Home Aides, and Hospital Aides: Historical Changes and Data Recommendations, 42:2 Gerontologist 199, 202 (2002).

[24] National Association for Home Care and Hospice, Basic Statistics about Home Care, Table 15 (2001) (available at *http://www.nahc.org/consumer/hcstats.html);* National Association for Home Care and Hospice Care, Basic Statistics about Home Care, Table 14 (2004) (available at *http://www.nahc.org/04HC—stats.pdf).*

[25] Nat'l Center for Health Workforce Analysis, Nursing Aides, Home Health Aides, and Related Health Care Occupations 10, 109 (U.S. Dep't of Health and Human Servs., 2004).

[26] BLS (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides).

[27] UCSF Center for California Health Workforce Studies, An Aging U.S. Population and the Health Care Workforce: Factors Affecting the Need for Geriatric Care Workers 33 (Feb. 2006) (available at *http://www.futurehealth.ucsf.edu/geria/062404-Geria%20Final.pdf).*

[28] BLS (Personal and Home Care Aides); see also id. (Nursing, Psychiatric and Home Health Aides); Jane Gross, New Options (and Risks) in Home Care for Elderly, The New York Times, Mar. 1, 2007.

[29] UCSF, Health Workforce Studies, Table B2.

[30] Representative Shirley Chisholm led the effort to extend the FLSA to domestic employees. In fact, 17 of the 19 women then serving in Congress, representing both parties, wrote a letter to the House Committee expressing "great concern" that the extension of coverage to domestic workers might be dropped from the bill. H.R. Rep. 93-913 at 34. Senator Williams recognized that "many who watch out legislative activities view the coverage of domestics as an effort to remedy racial and sexual discrimination." 119 Cong. Rec. 24,799 (1973).

[31] The Asian American Legal Defense and Education Fund, Mexican American Legal Defense and Educational Fund, Puerto Rican Legal Defense and Education Fund, National Women's Law Center, National Partnership for Women and Families, and Washington Lawyers' Committee for Civil Rights and Urban Affairs filed a brief in support of Ms. Coke in the Supreme Court.

[32] Long Island Care at Home, Brief Amici Curiae of AARP and Older Women's League at 4.

[33] BLS (Tomorrow's Jobs); Daniel E. Hecker, Occupational Employment Projects to 2014, Monthly Labor Rev., Nov. 2005, at 75 (citing BLS statistics).

[34] BLS (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides); Hecker at 75 (citing BLS statistics).

[35] Id.

[36] William J. Scanlon (Director, Health Care Issues, General Accounting Office), Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Testimony before the Senate Committee on Health, Education, Labor and Pensions, GAO-01750T, at 9 (released May 17, 2001) (available at *http://www.gao.gov/new.items/d01750t.pdf).* The total working age population (persons aged 18 to 64) will grow by just 16% during this time period. Id.

[37] Scanlon at 9; UCSF Health Workforce Studies at 34 (citing United States General Accounting Office, GAO analysis of U.S. Census Bureau projections of total resident population, Middle Series (Dec. 1999)). The ratio of the entire working age population to the population over 85 will go from 39.5 workers per elderly person in 2000 to 22.1 in 2030 and 14.8 in 2040. Scanlon at 9. These figures assume relatively high immigration, one million net annually, through 2030. UCSF Health Workforce Studies at 35.

[38] Nora Super, National Health Policy Forum Background Paper, Who Will Be There to Care? The Growing Gap between Caregiver Supply and Demand 3 (Jan. 23, 2002) (available at *http://www.nhpf.org/pdfs—bp/BP—Caregivers—1-02.pdf)* (2040 projections) (citing National Family Caregivers Association, Family Caregiving Statistics, Kensington, Maryland, 2000).

[39] Dorie Seavey and Vera Salter, Paying for Quality Care: State and Local Strategies for Improving Wages and Benefits for Personal Care Assistants 14-17 (American Ass'n of Retired Persons: 2006) (available at *http://assets.aarp.org/rgcenter/il/2006—18—care.pdf).* The legal claims in these actions have been based on requirements of the Medicaid statute and Federal prohibitions against discrimination based on disability. Two cases have resulted in settlements, a Federal lawsuit that prompted Mississippi to agree to increase payments to personal care attendants by $0.50 per hour and to seek funding from the legislature for additional pay increases, and a state court case that caused New Hampshire to agree to establish a new rate-setting methodology based on the average cost of providers. Id. A California lawsuit was dismissed on the ground that the Medicaid statute does not confer individually enforceable rights and that the state was not violating disability law. Sanchez v. Johnson, 416 F.3d 1051, 1061, 1067-68 (9th Cir. 2005). A district court order requiring Arizona to offer a rate of pay that guarantees that clients will receive the services for which they qualify is on appeal to the Ninth Circuit. Ball v. Biedess, 2004 WL 2566262 **6-7 (Aug. 13, 2004), on appeal sub nom. Ball v. Rodgers. A class has been certified and a motion to dismiss denied in a pending Wisconsin case. See Nelson v. Milwaukee County, 2006 WL 290510, No. 04-C-193 (E.D. Wis. Feb. 7, 2006); Bzdawka v. Milwaukee County, 238 F.R.D. 469 (E.D. Wis. Oct. 13, 2006).

[40] See, e.g., Ball, 2004 WL 2566262 at *4 & n.3.

[41] Allen J. LeBlanc et al., State Medicaid Programs Offering Personal Care Services, 22:4 Health Care Financing Rev. 155, 170 (2001).

[42] General Accounting Office, Adults with Severe Disabilities: Federal and State Approaches for Personal Care and Other Services, GAO/HEHS-99-101, at 35 (May 1999).

[43] Long Island Care at Home, Brief Amici Curiae of AARP and Older Women's League at 8.

[44] 66 Fed. Reg. 5483 (2001) (citing BLS Occupational Employment Statistics survey).

[45] William J. Scanlon, Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides is a Growing Concern: Testimony before the Senate Committee on Health, Education, Labor and Pensions, GAO-01-750T, at 13 (released May 17, 2001).

[46] Scanlon at 12; Seavey and Salter at 1-2. In 2000, file clerks earned more than home health aides and significantly more than personal and home care aides. Paraprofessional Healthcare Institute, Long-Term Care Financing and the Long-Term Care Workforce Crisis: Causes and Solutions 19 (Citizens for Long-Term Care: 2003) (available at *http://www.paraprofessional.org/publications/CLTC—doc—rev1.pdf)* (citing BLS data).

[47] Paraprofessional Healthcare Institute, Long-Term Care Financing and the Long-Term Care Workforce Crisis: Causes and Solutions 19 (Citizens for Long-Term Care: 2003) (available at *http://www.paraprofessional.org/publications/CLTC—doc—rev1.pdf)* (citing BLS data).

[48] BLS (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides); Yamada at 204.

[49] Gross, New Options; National Center for Health Workforce Analyses et al., Nursing Aides, Home Health Aides, and Related Health Care Occupations—National and Local Workforce Shortages and Associated Data Needs 14 (U.S. Dep't Health and Human Servs.: 2004) (available at ftp://ftp.hrsa.gov/bhpr/nationalcenter/RNandHomeAides.pdf) (citing R. Stone, Frontline Workers in Long-Term Care: A Background Paper (Institute for the Future of Aging Services: 2001)). Super at 4 (national turnover of 28%); Seavey & Salter at 2 (40-50% annual turnover); New York Association of Homes & Services for the Aging, The Staffing Crisis in New York's Continuing Care System: A Comprehensive Analysis and Recommendations 17 (2000) available at *http://www.nyahsa.org/docs/Staff.pdf* (40-60% turnover in one year and 80-90% in 2 years).

[50] Robyn Stone, The Direct Care Worker: A Key Dimension of Home Care Policy, 16:5 Home Health Care Management & Practice 339, 341. Stone points out that this figure does not even take into account lost productivity during time that new workers are trained and gain experience, or the attrition between initial hiring and placement. Id.

[51] Stone at 341.

[52] S. Rep. 93-300, 93d Cong., 1st Sess. 21 (July 6, 1973). See also S. Rep. No. 93-690 at 19 (same); 119 Cong. Rec. 24,360 (1973) ("[I]n many areas of the country, including New York, * * * there are not enough workers willing to engage in domestic employment to meet the demand. Bringing minimum wage coverage to domestics will be one step, and a very important step, to bringing some measure of dignity to this type of employment and thus serve to attract a more qualified and more stable workforce to the job.").

[53] 118 Cong. Rec. 24,705 (1972).

[54] Long Island Care at Home, Brief Amici Curiae of AARP and Older Women's League at 11.

[55] 66 Fed. Reg. 5481 et seq. (2001).

[56] 67 Fed. Reg. 16668 (2002).

[57] Long Island Care at Home, Brief Amici Curiae of AARP and Older Women's League at 1213 (and sources cited therein).

[58] 66 Fed. Reg. 5486.

[59] 820 ILCS 105/3(d), 105/4(a)(1), 105/4a and Ill. Admin. Code tit. 56, § 210.110 (exempting individuals employed in domestic service but defining category to exclude "person whose primary duty is to be a companion for individual(s) who are aged or infirm")

[60] 66 Fed. Reg. 5483.

[61] Quoted in H.R. Rep. No. 93-913 at 8.
[62] Long Island Care at Home, Brief Amici Curiae of AARP and Older Women's League at 15.
[63] 29 C.F.R. § 552.5 provides that "the term casual basis * * * shall mean employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting." 29 C.F.R. § 552.104(b) further provides that employment "would usually be on a 'casual basis,' whether performed for one or more employers, if such employment by all such employers does not exceed 20 hours per week in the aggregate." Finally, 29 C.F.R. § 552.109(b) provides that "[e]mployees who are engaged in providing babysitting services and who are employed by an employer or agency other than the family or household using their services are not employed on a 'casual basis' for purposes of the section 13(a)(15) exemption. Such employees are engaged in this occupation as a vocation."
[64] 29 U.S.C. § 213(b)(21).

Chairwoman WOOLSEY. Thank you.

Mr. Robinson?

STATEMENT OF ALFRED ROBINSON, JR., SHAREHOLDER, OGLETREE DEAKINS, LLP

Mr. ROBINSON. Thank you, Madam Chair.

Madam Chair, Ranking Member Wilson and honorable members of the subcommittee, my name is Al Robinson, and I am an attorney in the Washington office of the law firm Ogletree Deakins Nash Smoke & Stewart, and as referenced earlier, I was formerly at the United States Department of Labor.

Thank you for this opportunity to speak with you about the Section 13(a)(15) exemption in the Fair Labor Standards Act, commonly referred to as the companionship service exemption, and the proposed bill H.R. 3582, the Fair Home Health Care Act, introduced by Chairman Woolsey.

As you are aware, Congress amended the Fair Labor Standards Act in 1974 essentially to extend coverage of the act. However, included in these amendments was this exemption for companionship services, and specifically it exempts from the minimum wage and overtime protections an employee employed on a casual basis in domestic service to provide babysitting services or an employee employed in domestic service, to provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves.

In this provision, Congress also gave the Secretary of Labor the authority to define these terms. In 1975, the Labor Department did just that. They issued regulations found in 29 CFR Part 552. In particular, Part 552.109(a), which is entitled the Third-Party Employment Regulation, states: "Employees providing companionship services and who are employed by an employer or agency, other than family or household using their services, are exempt from the act's minimum wage and overtime requirements by virtue of the companionship services exemption," the 13(a)(15) exemption. Thus, the companionship services exemption has applied for more than 30 years to employees of a third-party employer or agency based upon the regulations of the Department which were issued in 1975.

Also, in this regulation, the Department exercised a conscious decision to exempt third-party employees with this exemption. As part of its rulemaking responsibilities, the Department's proposed rule was drafted to preclude the application of this exemption to third-party employees. However, based upon the comments, the final regulation that the Department issued did, in fact, apply the exemption to employees of third parties, and Section 552.109 reads

as it exists today. Thus, the application of the companionship services exemption to employees of third-party employers or agencies is the result of a deliberate, well-reasoned rulemaking process and a longstanding interpretation.

The rationale given by the Department is persuasive and direct.

First, it effectuates the statutory language and is consistent with prior practices. The language of the statute is quite clear. The companionship services apply to any employee providing such services. The statute does not qualify the words "any employee." It is not ambiguous. The statute does not contain words that restrict the application of the exemption.

It conditions eligibility of the exemption upon the activities of the employee and not upon the employer who hired them. Many other exemptions of the FLSA do turn on the activities. I will just mention a couple: the bona fide executive, administrative or professional exemption in 13(a)(1), agricultural in 13(a)(16). So this is very in keeping with other regulations and other provisions of the statute.

In addition to effectuating the statutory language, the application of the companionship services exemption to employees of third parties is consistent with congressional intent. Several statements in the record made no distinctions between the employee working for a family member directly versus a third party.

Finally, the Supreme Court, as has been referenced, resolved any conflict in the Department's regulations. They found the regulation of 552.109 as valid and controlling.

In the little time I have remaining, I would offer a few observations about the legislation. Its purpose is to reverse the decision in the Long Island Health Care v. Coke case. However, I submit that it goes well beyond that intent.

H.R. 3582 would limit eligibility for companionship services to the casual babysitter or companionship service provider in very limited circumstances, and that is they must be irregular or intermittent, they must be an individual whose vocation is not providing babysitting or companionship services or is an individual not employed by a third party—in other words, employed only by the family or household of the recipient—and, finally, does not work more than a total of 20 hours a week providing babysitting or companionship services to one or more individuals.

I would welcome the opportunity to address any questions that you may have, and I thank you for this opportunity.

[The statement of Mr. Robinson follows:]

Prepared Statement of Alfred B. Robinson, Jr., Shareholder, Ogletree Deakins LLP

Madam Chair, Ranking Member Wilson and Honorable Members of the Subcommittee, my name is Alfred B. Robinson Jr. I am an attorney in the Washington office of Ogletree, Deakins, Nash, Smoak & Stewart and formerly was at the United States Department of Labor where I served as a Senior Policy Advisor, Deputy Administrator for Policy of the Wage and Hour Division and Acting Administrator of the Wage and Hour Division. Thank you for this opportunity to speak with you about the Section 13(a)(15) exemption in the Fair Labor Standards Act (FLSA), commonly referred to as the "companionship services exemption", and the proposal bill H.R. 3582, the Fair Home Health Care Act, introduced by Chair Woolsey.

As you are aware Congress amended the FLSA in 1974 essentially to extend coverage of the Act. Included in these 1974 amendments was the Section 13(a)(15) companionship services exemption. Specifically, it exempts from the minimum wage and

overtime requirements "an employee employed on a casual basis in domestic service * * * to provide babysitting services or any employee employed in domestic service * * * to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves * * *" 29 USC § 213(a)(15). Also, Congress granted the Secretary of Labor in this statutory provision the authority to define these terms by regulations.

In 1975, the Department of Labor (Department) issued regulations in 29 CFR Part 552to address the companionship services exemption. In particular, Section 552.109(a), entitled "[t]hird party employment", explicitly states:

Employees * * * providing companionship services, as defined in §522.6, and who are employed by an employer or agency other than family or household using their services, are exempt from the Act's minimum wage and overtime requirements by virtues of section 13(a)(15) 29 CFR §552.109(a). Thus, the companionship services exemption has applied to employees of a third-party employer or agency based upon the regulations of the Department since it first issued such guidance in 1975.

Also, Section 552.109 represents a conscious decision by the Department that the companionship services exemption should apply to third-party employers. As part of its rulemaking responsibilities, the Department's proposed rule was drafted to preclude the application of the exemption to employees of a third-party. 30 Fed. Reg. 35382, 35385 (1974). However, in light of a thorough examination of the comments, the final regulation issued by the Department applied the exemption to employees of third-parties and Section 552.109(a) reads as it presently exists. Thus, the application of the companionship services exemption to the employees of third-party employers or agencies is the result of a deliberate, reasoned rulemaking process.

The rationale given by the Department for this regulation is persuasive and direct—it effectuates the statutory language and is consistent with prior practices. The statutory language is quite clear—the companionship services exemption applies to "any employee" providing companionship services for aged or infirmed individuals unable to take care of themselves. The statute does not qualify the words "any employee". In other words, it does not restrict the application of the exemption, for example, to "any employee of a person who receives such services or who is part of a household where a person received such services." Rather, the statute conditions eligibility of the exemption upon the activities of the employee and not upon who hired the employee.

Many other exemptions of the FLSA turn on the activities or duties of an employee. For example, the Section 13(a)(1) exemption for bona fide executive, administrative or professional employees is determined according to their activities or duties, among other requirements. Similarly, the exemption for agricultural employees in Section 13(a)(16) of the FLSA is determined according to the employee's activities, not those of the employer. This basis of reviewing an employee's activities to determine whether an employee is eligible for a particular exemption is contrasted with other exemptions that are employer-based. For example, one employer-based exemption is found in Section 7(i) of the FLSA and exempts a retail or service establishment exemption from overtime where the employer establishment satisfies the definitional requirements and pays its employees in accordance with the statutory requirements. Another is found in Section 13(a)(3) of the FLSA that exempts certain amusement or recreational establishments, organized camp, or religious or non-profit education conference center from the minimum wage and overtime requirements.

In addition to effectuating the statutory language, the application of the companionship services exemption to employees of third-parties is consistent with Congressional intent. Several statements by Senators in the Congressional Record suggest that the companionship services exemption should apply to a person providing such services regardless of whether they were hired directly by the individual receiving such services or by a third-party retained by the individual to receive such services. One of the main reasons that these statements did not make such a distinction is because of concerns that working families would face increased costs for such services if the FLSA minimum wage and overtime requirements applied. Congressional committee reports also focus on the type of activities that are subject to the companionship services exemption. They too do not suggest that the exemption should be restricted based upon who employs the provider of eligible companionship services. It is noteworthy also that the committee reports state that the exemption would not apply to skilled nurses, it only applies to services provided in a private home and a boarding house where such services are provided and that operates as a business is not a private home.

Finally, any suggestion that there is conflict in the Department's regulations was resolved by the Supreme Court in Long Island Care at Home Ltd. v. Coke, No. 06-593 (June 11, 2007). The Second Circuit Court of Appeals had relied on another regulation in Part 552. In particular, it looked at language in Section 552.3 to ration-

alize that the companionship services exemption can not apply to employees of third-parties. However, such reliance was misplaced because Section 552.3, entitled "[d]omestic service employment", defines the types of services that would constitute "domestic service employment" as that term is used in the statute. The Court found that the language of Section 552.3 on the issue of third-party employment was not controlling, in part because the focus of that regulation is to define the scope or type of services that constitutes "domestic service employment" and to which the companionship services exemption applies. The Court ruled that Section 552.109(a) that applied the companionship services exemption to persons employed by third-parties was valid and controlling.

In the time that I have remaining, I would offer a few observations about the proposed legislation, H.R. 3582. As I understand, its purpose is to apply the minimum wage and overtime labor standards of the FLSA to any provider of companionship services who is not employed on a "casual basis" without defining what is meant by "a casual basis". However, H.R. 3582 would go beyond addressing the Supreme Court's decision in the Long Island Health Care v. Coke case, and would preclude the companionship services exemption from applying not only to an employee of a third-party but arguably also to many others who today are eligible for the exemption. In fact, H.R. 3582 would limit eligibility for the companionship services exemption only to the casual babysitter or provider of companionship services who: (1) is an irregular or intermittent employee; (2) is an individual whose vocation is not to provide babysitting or companionship services or is an individual not employed by a third-party employer but rather is employed by the family or household of the recipient, and (3) does not work more that a total of 20 hours a week providing babysitting or companionship service to one or more individuals. This bill would have the effect of applying the minimum wage and overtime requirements to many companionship providers who are employed by the household or family of the recipient. For example, if you perform casual babysitting or companionship services on a regular basis or do so for more than 20 hours a week, then you would not be eligible for the Section 13(a)(15) exemption even if your employer was the recipient of the services or a household family of the recipient.

I would welcome the opportunity to address any questions that you may have. Thank you.

Chairwoman WOOLSEY. Thank you.

Dr. Seavey?

STATEMENT OF DORIE SEAVEY, DIRECTOR OF POLICY RESEARCH, PARAPROFESSIONAL HEALTHCARE INSTITUTE

Ms. SEAVEY. Chairwoman Woolsey, Congressman Wilson and members of the subcommittee, good morning. My name is Dorie Seavey. I am a labor economist and director of policy research at PHI, which is a national nonprofit based in the Bronx that works to help improve the lives of people who need home or residential care by improving the lives of the workers who provide that care.

PHI stands firmly behind the Fair Home Health Care Act, and we have been asked to address the bill from a labor market perceptive with a focus on public policy development in the area of long-term care.

I would like to touch on three points: the changed context for considering this bill, the problem of bad market signals and mixed policy messages and, finally, a word about costs.

I would direct you to my written statement for in-depth analysis.

The context for this bill could not be more different than the one that confronted lawmakers in 1974 at the time of the last set of FLSA amendments. Profound changes in the provision of home-based supports and services have essentially eclipsed the companionship services exemption.

Significant changes have occurred in three areas: in the duties performed by many of the workers now classified as exempt; in the

home care workforce itself, which now totals over 800,000, recently topping the size of the nursing home care workforce; and, finally, in the size and structure of the home care industry.

There is no question that home care occupations are now bona fide forms of employment that generally are not performed on a casual basis. Nonetheless, home care workers need and deserve basic protections. The remuneration of this workforce is notoriously low with mean annual earnings of under $15,000. About a third of home care aides have no health insurance and, shockingly, nearly half of these aides live in households that receive some kind of public assistance, such as Medicaid or food and nutrition assistance.

Propelled by demographic and other trends, home care is a rapidly expanding multibillion-dollar industry in which for-profits constitute the fastest-growing segment. There is also a booming consumer-directed market financed primarily by Medicaid in which consumers serve as the employer of record or as joint employers with agencies.

It is my opinion that maintaining the companionship exemption in its current form contributes to significant structural problems in both the caregiver labor market and in workforce development for the homecare industry. Furthermore, the exemption works to subvert key policy goals established by the Federal Government concerning the development of the Nation's long-term care system.

From a labor market point of view, maintaining the current exemption in only one segment of the long-term care labor market creates distortions and artificial segmentation of caregiver labor markets across the entire system. Strikingly, this same work performed by an aide in a nursing home is unambiguously covered by minimum hour and wage protections. By supporting this kind of disparity, the exemption impedes the normal functioning of markets and serves to undermine the development of a stable, adequate workforce of paid caregivers to provide home and community-based services.

From a workforce development perspective, the exemption acts as a barrier to the overall status of this occupation relative to other low-wage jobs. The bottom line is it is basically impossible to construct any economic arguments as to why other domestic or home-based service jobs, such as maids, cooks, housekeepers and gardeners, should receive this basic protection, but home care workers should not.

Lastly, from a Federal policy vantage point, not extending minimum compensation standards to these workers will only serve to send conflicting messages that undermine several important elements of Federal policy. To mention the biggest one, this exemption in its present form works to subvert the Federal Government's encouragement of rebalancing. That is the expansion of home and community-based services relative to those provided in institutional settings, such as nursing homes.

The costs of this bill need to be carefully and thoroughly explored on a state-by-state basis. However, several factors suggest that extending basic employment protections to non-live-in home care workers is unlikely to dramatically increase the nationwide cost of services or seriously disrupt service delivery systems, so long as steps are taken to adjust service delivery management accordingly.

Four quick cost-related facts to keep in mind: Virtually, all home care workers currently are paid at least the Federal minimum wage. Live-in home care workers would continue to be exempt from overtime under the bill. The vast majority of home care workers do not work over 40 hours a week. And in at least 16 states and the District of Columbia, either all home care workers or significant subgroups of them are already eligible for overtime pay because state laws exceed the Federal standards.

If the argument is that the exemption is needed to help make home care for the elderly and those with disabilities more affordable, then I would submit to you that the proper way to do this is not to artificially depress the market-based minimum cost of labor, but rather, in the case of publicly financed services, to make adjustments in state reimbursement rates and, in the case of private pay services, to use the tax code to subsidize the purchase of care.

In closing, this bill offers Congress an historic opportunity to send three important economic and social signals: first, that home care workers should be on equal footing with respect to all other low-wage occupations; second, that within long-term care, the home care labor market should not have second-class status with respect to compensation and, therefore, with respect to its ability to attract and retain workers; and, finally, that Federal lawmakers can work together to coordinate rather than send conflicting messages about the direction of our Nation's long-term care policy.

Thank you.

[The statement of Ms. Seavey follows:]

WRITTEN STATEMENT

of

DORIE SEAVEY, PH.D.

Director of Policy Research, PHI

Before the

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

HEARING on "H.R. 3582: the Fair Home Health Care Act"

October 25, 2007

My name is Dorie Seavey. I am a Ph.D. economist, and Director of Policy Research at PHI, a national nonprofit based in the Bronx, NY that works to improve the lives of people who need home or residential care—by improving the lives of the workers who provide that care. Our goal is to ensure caring, stable relationships between consumers and workers, so that both may live with dignity, respect and independence. With nearly 50 staff, PHI works to strengthen our nation's long-term direct-care workforce, which includes nearly 3 million home health aides, certified nurse aides, and personal care attendants. PHI's programs and activities develop recruitment, training, supervision, and client-centered caregiving practices—along with the public policies necessary to support those practices. PHI's premise is that creating quality jobs for direct-care workers is essential to providing high-quality, cost-effective services to long-term care consumers: *Quality Care through Quality Jobs*.

As a labor economist, my career has focused on analyzing low-wage labor markets and the impact of public policy on the lives of low-wage workers and families. At PHI, I am responsible for analyzing state caregiver labor markets as well as evaluating national trends and data on the direct-care workforce. I conduct workforce needs analysis, evaluate workforce policy, assist with the assessment of state and local strategies to improve the compensation of this workforce, and advise on efforts to improve state and federal reimbursement policies that affect long-term care. The particular lens that I bring to an assessment of H.R. 3582 is a labor market perspective, with a focus on public policy development in the area of long-term care service delivery systems at both the state and federal level.

The history of the Fair Labor Standards Act (FLSA) is a fascinating one, and I believe that H.R. 3582 offers Congress a critical opportunity—which it has had on only several occasions before—to bring the FLSA into alignment with ever-evolving industry conditions. PHI stands firmly behind the Fair Home Health Care Act, and believes that it is possible to have a long-term care system in this country that meets consumers' need for quality, stable services at the same time as ensuring that paid caregivers have the basic employment protections that allow them to earn a decent livelihood.

It is difficult, if not impossible, to construct any economic arguments as to why other domestic or household-based service jobs such as maids, cooks, housekeepers, and gardeners should receive this basic wage and hour protection but homecare/personal assistance workers should not.

Additionally, keeping this exemption in place works to subvert key policy goals that have been established by the federal government concerning the development of the nation's long-term care system. Most importantly, it undermines the federal government's support of "rebalancing"—that is, the expansion of home- and community- based services relative to those provided in institutional settings, such as nursing homes—and it also undermines federal support for

"consumer direction," a rapidly expanding service delivery model in which consumers directly employ and supervise their own workers.

1. The context for H.R. 3582: Dramatic changes in the provision of home-based supports and services have eclipsed the companionship exemption, essentially rendering it a vestige of prior era.

There have been enormous changes in the homecare industry since 1975, when the regulations implementing the companionship services exemption were published. The debates surrounding the 1974 amendments to the FLSA characterized the "companion" to be exempted as an occasional adult sitter hired by a private household to watch over an elderly or infirm person in the same way that a babysitter watches over children. This notion of "companion" has very little relevance in today's context in which a homecare/personal assistance aide typically delivers a range of in-home services and supports as a primary vocation under formal employment relationships made either with an agency, directly with the consumer/household, or by way of a joint employment relationship between the consumer and an agency.

H.R. 3582 should be considered in light of three fundamentally altered aspects of homecare/personal assistance service delivery: the changed nature of homecare/personal assistance duties and training; the demographic and employment profile of the homecare/personal assistance workforce; and the size and structure of the homecare/personal assistance industry.

a. Changed nature of homecare/personal assistance duties and training. Since the 1974 amendments to the FLSA, dramatic changes have occurred in the nature of the duties performed by many employees classified as exempt under the companionship services exemption. As the U.S. Department of Labor (U.S. DOL) noted in 2001, "Due to significant changes in the home care industry over the last 25 years, workers who today provide in-home care to individuals needing assistance with the activities of daily living are performing types of duties and working in situations that were not envisioned when the companionship services regulations were promulgated."[1]

While not recognized in the current U.S. DOL regulations, there are in fact three levels to the homecare/personal assistance workforce: companions and homemakers, personal care attendants, and home health aides and certified nursing assistants. The work across these three levels ranges from: companionship and help with activities such as shopping, transportation, meal preparation, and light housekeeping; to assistance with everyday self-care activities like bathing, dressing, and eating; to more clinically-oriented tasks such as checking vital signs (pulse, temperature, respiration), medication management, routine skin and back care, and assistance with exercise and simple procedures connected to physical therapy services. While the training

[1] US Department of Labor, Employment Standards Administration, Wage and Hour Division (January 2001) *Notice of proposed rulemaking and request for comments: Application of the Fair Labor Standards Act to Domestic Service*. Federal Register, Vol. 66, No. 13, pp. 5481-5489.

required to assist with self-care activities and more clinically-oriented tasks is far less than the training received by nurses or licensed practical nurses, the broad range of duties now performed by homecare/personal assistance aides extends far beyond the scope of an "elder sitter."

As the tasks performed by the homecare and personal assistance workforce have required greater autonomy and responsibility, the challenges faced by these aides in fulfilling their roles have grown. The increasing use of in-home services translates, on the workforce side, into a much greater need for skill, judgment and personal accountability on the part of homecare/personal assistance aides. Furthermore, changes in the acuity of the consumer population mean that homecare/personal assistance workers are now providing services to nursing home-eligible consumers in home- and community-based settings. Whether they are persons with physical, developmental, and intellectual disabilities, or people with chronic or terminal illnesses and conditions, many of these consumers are older, frailer, and more impaired than the consumer population served even a decade ago.

Additionally, homecare workers must practice their caregiving skills with far less direct supervision and access to on-site consultation from professionals. Much of this work is difficult, physically taxing, and requires responsibility and judgment as well as emotional commitment and flexibility. The demanding nature of this work is presumably reflected in a just-released report from the Substance Abuse and Mental Health Services Administration which found that, among all workers in the United States, personal care workers experience the highest rates of depression lasting two weeks or longer.[2]

b. Demographic and employment profile of the homecare/personal assistance workforce. The number of workers providing in-home services and supports has greatly increased over the last three decades and now totals over 800,000, according to the latest federally-administered Current Population Survey (2007). In fact, nationally there are now more aides providing supports and services in people's homes (826,802) than in nursing care facilities (765,948). Indeed, the combined occupations of personal care and home care aides constitute the tenth most rapidly growing occupational group in the American economy, and the U.S. Bureau of Labor Statistics (BLS) projects that by 2014 the numbers of these positions will have increased by another 41 percent compared to 2004.[3]

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[2] Substance Abuse and Mental Health Services Administration, Office of Applied Studies. (October 11, 2007). *The NSDUH Report: Depression among Adults Employed Full-Time, by Occupational Category*. Rockville, MD. Available at: http://oas.samhsa.gov/2k7/depression/occupation.htm.

[3] Daniel E. Hecker, *Occupational Employment Projections to 2014, Monthly Labor Review* (Washington, DC: U.S. Bureau of Labor Statistics, November 2005). Available at: http://www.bls.gov/opub/mlr/2005/11/art5full.pdf.

From an employment perspective, there is no question that homecare/personal assistance occupations are now *bona fide* forms of employment that by and large are not performed on a casual basis. Forty-one percent of personal and home care aides report working year-round, full-time. Only 16 percent work part-year, part time. (See Exhibit 1.)

The workforce providing homecare/personal assistance services is predominantly low-wage, female, and has low levels of general education. Average earnings are very low, and, according to a recent tabulation by Forbes Magazine, the personal and home care occupation qualifies as one of the 25 worst paid jobs in America, ranking just above cashiers and under parking lot attendants.[4]

Exhibit 1: Demographic and Employment/Income Characteristics of Personal and Home Care Aides, 2005

Demographic Characteristics	
Median age(years)	45
Gender	
Female	87%
Male	13%
Race	
White only, non-Hispanic	53%
Black only, non-Hispanic	23%
Spanish, Hispanic, or Latino	14%
Other or mixed, non-Hispanic	10%
Single parent, grandparent, or caretaker	18%
Citizenship/Foreign Born	
Native	80%
Foreign born	20%
Education: High school or less	64%
Employment & Income Characteristics	
Labor force participation in home & personal care	41%

[4] Paul Maidment (June 4, 2007) "America's Best- and Worst-Paying Jobs," *Forbes Magazine*. Available at: http://www.forbes.com/2007/06/04/jobs-careers-compensation-lead-careers-cx_pm_0604jobs.html.

Year round, full time Year round, part time Part year, full time Part year, part time	25% 18% 16%
Individual annual earnings, mean	$14,675
Individual annual earnings if full time, full year	$23,556
Family poverty status < 1.00 < 2.00	 23% 53%
Health insurance Uninsured Employer provided or other private Public insurance	 32% 48% 20%
Household public assistance Any Medicaid Food and nutrition assistance Housing, energy, transportation, TANF/AFDC	 47% 38% 32% 17%

Source: PHI calculations based on the March Supplement of the2006 Current Population Survey.

The mean annual income of this occupation is only $14,675. Home health aides generally receive higher wages than personal and home care aides—$8.74 per hour (mean hourly wage) for personal and homecare aides, and $9.66 per hour for home health aides.[5]

Over half the workforce lives in households with incomes under 200 percent of the poverty level. Nearly a third of personal and home care aides have no health insurance; another 20 percent are covered at some point during the year by public health insurance.

The degree to which this workforce struggles with basic economic survival is further underscored by the fact that *nearly half (47 percent) of all personal and home care aides live in households that receive some kind of public assistance,* whether it be Medicaid, food and nutrition assistance, cash welfare, or housing, energy, or transportation assistance.

c. Size and structure of the home care/personal assistance industry. The formal provision of homecare/personal assistance services in the United States now occurs within a rapidly expanding, and complex industry composed of a diverse array of providers that includes: long-standing voluntary nonprofit organizations such as the Visiting Nurse Association; public agencies operated by state, county, and city governments; proprietary for-profit homecare

[5] US Bureau of Labor Statistics (May 2006) Occupational Employment Statistics. Available at: http://data.bls.gov/oes/search.jsp?data_tool=OES.

agencies (including rapidly growing chains of elder care franchises); and private non-for-profit private duty agencies. The fastest growing sector of Medicare-certified homecare agencies is the for-profit sector, which increased from 7.3 percent of freestanding agencies in 1980 to 69 percent in 2006.[6] Public health agencies, which constituted half of Medicare-certified agencies in 1980, now represent only 16 percent.

There is also a booming consumer-directed market, financed primarily by Medicaid, in which consumers serve as the employer of record or as joint employers with agencies. Various kinds of intermediary support organizations sometimes serve as fiscal agents under this model. Workers in this sector are known as consumer-directed workers, or "independent providers." About 400,000 of them now rely on public authorities and collective bargaining agreements to stabilize their employment conditions.[7] States with public authorities for independent providers include: California, Massachusetts, Michigan, Oregon, and Washington. Recently, governors in Illinois, Iowa, and Ohio have signed executive orders giving collective bargaining rights to independent providers. One of the reasons why state governments and many provider intermediaries have become supportive of a union presence is that such presence brings greater stability to the workforce and makes these jobs more attractive.

Finally, there is an admittedly huge private-pay "grey market" operating "off the books," where private individuals hire aides on their own and may or may not pay required employer taxes on behalf of the worker, such as Social Security, unemployment compensation, and workers' compensation. This segment of the industry is completely unregulated and, although it is thought to be sizeable, very little is known about it except on an anecdotal basis.

The growth of our multi-billion dollar homecare industry is fueled in large part by significant increases in life expectancy and medical advances that allow individuals with chronic conditions to live longer. In the very near future, caregiving for baby-boomers will become a rapidly growing source of demand: over the next two decades there will be more than 70 million people over the age of 65. Nearly one out of every four U.S. households provides care to a relative or friend aged 50 or older and about 15 percent of adults care for a seriously ill or disabled family member. The growth in the demand for in-home services is further promoted by the availability of public funding assistance for in-home care under Medicaid and Medicare, and also by the rising cost of traditional institutional care combined with a growing preference for receiving supports and services in the home as opposed to in institutional settings.

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[6] National Association of Home Care (2007) *Basic Statistics About Home Care*, Table 1. Available at: http://www.nahc.org/facts/07HC_Stats.pdf.

[7] Dorie Seavey and Vera Salter (October 2006) *Paying for Quality Care: State and Local Strategies for Improving Wages and Benefits for Personal Care Assistants*. Policy Report #2006-18, Washington, DC: AARP Public Policy Institute, pp. 17-19. Available at: http://assets.aarp.org/rgcenter/il/2006_18_care.pdf.

2. It is my opinion that maintaining the companionship exemption in its current form contributes to significant structural problems in both the caregiver labor market and in workforce development for the homecare industry. Furthermore, the exemption works to subvert several key policy goals that have been established by the federal government concerning the development of the nation's long-term care system.

a. From a ***labor market*** point of view, maintaining the current exemption in only one segment of the long-term care labor market creates distortions in and artificial segmentation of caregiver labor markets across the entire system. Strikingly, the same work performed by an aide in a nursing home is unambiguously covered by minimum wage and hour protection.[8] By supporting this kind of disparity, the exemption impedes the normal functioning of markets, and serves to undermine the development of a stable, adequate workforce of paid caregivers to provide home- and community-based services.

b. From a ***workforce development*** perspective, because the exemption has been interpreted as broadly as it has been within the homecare/personal assistance service industry, it acts as a barrier to the overall status of this occupation relative to other low-wage jobs. It is difficult if not impossible to construct *any* economic arguments as to why other domestic or household-based service jobs such as maids, cooks, housekeepers, and gardeners should receive this basic protection but homecare/personal assistance workers should not.

c. From a ***federal policy*** point of view, updating the FLSA with respect to this group of workers (non-live-in homecare and personal assistance workers) will help bring needed alignment to various aspects of federal policy with respect to the provision of publicly reimbursed long-term care services. Not extending minimum compensation standards to these workers will only serve to send conflicting messages that undermine several key elements of federal policy. Specifically, the exemption in its present form subverts:

- The federal government's encouragement of "**rebalancing**"—that is, the expansion of home- and community- based services relative to those provided in institutional settings, such as nursing homes: This realignment is required by the Supreme Court's 1999 Olmstead decision which interpreted the integration mandate of the Americans with Disabilities Act to require that care be provided in the least restrictive setting.
- The federal government's support of the **consumer-as-employer model** whereby Medicaid-eligible consumers directly employ and supervise their own workers (known

[8] U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division. Fact Sheet #31: Nursing Care Facilities Under the Fair Labor Standards Act. Available at: http://www.dol.gov/esa/regs/compliance/whd/whdfs31.htm.

as the "consumer as employer" model under consumer direction): In fact, there are several states now where consumer-directed workers, or "independent providers" as they are also known, outnumber agency-employed workers.

- Recent efforts by the U.S. Department of Labor to support **innovative training and credentialing programs**: Since 2001, the U.S. Department of Labor has invested in creating two federally-sponsored Registered Apprenticeship Programs for homecare and personal assistance services: one is for Home Health Aide and the other for Direct Support Specialist. These are voluntary industry-driven training programs, but, ironically, unless H.R. 3582 is enacted, aides completing these programs will not be entitled to basic federal wage and hour protection.

3. How would H.R. 3582 change the status of homecare/personal assistance workers?

a. What H.R. 3582 would do. My understanding is that this bill would extend federal hour and wage laws to non-casual, non-live-in homecare/personal assistance workers. The overtime provision that would apply is the same one that applies to all other non-exempt occupations—namely, time and half for work over 40 hours in any one week at the worker's regular rate of pay.

By extending basic wage and hour protections to non-casual, non-live-in workers, H.R. 3582 would also allow homecare/personal assistance workers to be paid for travel time between clients and for time spent in required training. When workers fail to be compensated for travel and training time, they can end up making less than minimum wage on a net hourly basis.

It should be underscored that, as a practical, on-the-ground matter, the companionship services exemption, as it now stands and as it has been interpreted by the U.S. DOL and the courts, has created a very grey area in domestic employment that has been the subject of considerable litigation across the country. While the Code of Federal Regulations (29 CRF §552.1-552.110) specifies four conditions that serve to limit the construction of the exemption, the fact is that, in practice, the exemption has tended to be interpreted expansively, creating a broad exemption for almost all homecare/personal assistance workers. As a result, there are third-party agencies across the country that rely on U.S. DOL interpretation of the exemption and hire home-based workers as "companions" in order to avoid overtime, regardless of whether or not the duties of these workers require providing "companionship."

By eliminating the companionship exemption for non-casual, non-live-in aides, two of those most difficult "grey area" matters would be resolved by H.R. 3582:

- The first concerns **whether the type of employer** should condition the exemption. By eliminating the companionship exemption, it will no longer be an issue whether the employer is a third-party agency, the consumer him or herself, the family or a personal representative of the consumer, or a joint employment arrangement which involves both the consumer and an agency. Furthermore, it should not matter whether the "worker" hired by the consumer is a family member. This is important because most states now have implemented Medicaid programs that allow the consumer to hire some categories of family members to provide supports and services at home.

- The second area of confusion concerns **what constitutes a "private home"** for the purpose of household employment. Under 29 CFR §552.3, the term "domestic service employment" is defined as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." Courts have had to address the extent to which a "private home" includes "non-traditional" homes such as group homes, assisted living facilities, or other congregate arrangements.

By removing the companionship services exemption for non-casual, non-live-in aides, H.R. 3582 will eliminate holes that have led to considerable confusion about and litigation of these two issues.

b. What H.R. 3582 would not do. It is important to note that H.R. 3582 would **not** end the exemption for "live-in" workers, and it would still maintain an exemption for "casual" companions who work less than 20 hours per week. *Live-in* aides would need to be reclassified as live-in "domestic service" workers who already have minimum wage protection under the FLSA but are exempt from overtime. That is, the bill would restrict the minimum wage and overtime exemption under 29 USC 213(a)(15) to casual workers (defined as those working 20 hours or less in an irregular, intermittent and non-vocational capacity), and leave intact the overtime exemption for live-in domestic service employees under 29 USC 213 (b)(21).

Furthermore, this bill does not deal with the complex but important task of clarifying the category of workers that should be encompassed by the" live-in" category. Workers who live-in on a permanent basis in consumers' homes probably constitute a very small segment of the homecare/personal assistance workforce. A much larger segment of workers includes those whose duties require that they reside or sleep at their place of employment, or who otherwise spend a substantial portion of their work time subject to call. States have begun to address these varying categories with greater care and specificity as programs and service delivery systems have evolved, particularly those states that are leading the country in the development of public authority structures to support self-directing consumers and their workers. For example, in Washington State, the state overtime exemption is restricted to "an individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise

spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties."[9] Another approach is taken in Minnesota which provides for an exemption for companions working certain hours at night.[10] Oregon exempts live-in companions from overtime and also provides clarification about how overtime is defined under arrangements that involve "waiting time" and "sleeping time."[11]

Careful consideration should be given to clarifying the scope of the "live-in" exemption in consultation with consumer and worker groups.

4. The costs of H.R. 3582 need to be carefully and thoroughly explored on a state-by-state basis. However, several factors suggest that extending basic employment protections to non-live-in homecare and personal assistance workers is unlikely to increase dramatically the nationwide cost of services or seriously disrupt service delivery systems—so long as steps are taken to adjust service delivery management accordingly.

a. Since virtually all homecare and personal assistance workers already are receiving at least the federal minimum wage, extending the minimum hourly wage requirement is unlikely to have tangible cost consequences, except in so far that workers have not been being paid for travel time between clients as well as time spent in any required training.

b. The available evidence at the national level suggests that the vast majority of homecare/personal assistance workers do not work over 40 hours per week, and thus extension of overtime protection would likely have only modest financial impact. Furthermore, homecare/personal assistance workers in many states are already eligible for overtime, because state hour and wage laws exceed the federal standard.

- Predictions that massive dislocations of care would result from H.R. 3582 are inconsistent with the experience of many states with wage and hour laws that cover companions. *In at least 16 states, either all homecare workers or significant subgroups of them already are eligible for overtime because state laws exceed the federal standard.* These states include: California, Illinois, Maine, Maryland, Massachusetts,

[9] See: http://www.lni.wa.gov/WorkplaceRights/files/policies/esa1.pdf.
[10] See 177.23, Minnesota Statutes 2007, Subd 11, available at: http://www.revisor.leg.state.mn.us/bin/getpub.php?pubtype=STAT_CHAP_SEC&year=2007&section=177.23.
[11] See Oregon Administrative Rules, Division 20, Wages, Sections 839-020-0041 and 839-020-0042, available at: http://arcweb.sos.state.or.us/rules/OARS_800/OAR_839/839_020.html.

Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Washington, Wisconsin, and the District of Columbia.[12]

- That several states have already gone beyond the FLSA means that the universe of workers who may be impacted by H.R. 3582 is a subset of all home care workers. From a cost perspective, what is relevant then is ***not*** the entire universe of homecare workers, but rather the subset of non-live-in homecare and personal assistance workers who are: (i) employed for more than 40 hours a week, and (ii) reside in states that have not already taken steps to override fully the federal companionship exemption.

c. Overtime in this industry is not always voluntary. Rather it is often due to understaffing, worker shortages, and inadequate backup service delivery systems to cover no-shows, illness, or other excused absences.[13] Continuing to diminish the profile of this occupation through the denial of basic wage and hour protection only exacerbates this kind of problematic overtime. Instead, what is needed is to make these occupations more attractive relative to other low-wage jobs through better compensation, improved training and supervision, the creation of career advancement opportunities, and scheduling that allows for full-time work, if desired, and stable work schedules with balanced workloads.[14]

d. From an employer/agency perspective, overtime and service delivery disruptions can be managed considerably by improving scheduling and other management practices.

e. These caveats notwithstanding, the cost implications of H.R. 3582 should be studied carefully according to the differing circumstances within each state—it is possible that in some

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[12] Overtime is extended to the following categories of workers: California (home health aides but not personal attendants), Illinois (all aides), Maine (all except live-in aides), Maryland (all aides except those employed by non-profit agencies, and those who are family members), Massachusetts (all aides), Michigan (all aides except those in the Home Help Program), Minnesota (all aides except certain nighttime aides), Montana (all aides except those who are family members), Nevada (all aides except live-in aides), New Jersey (all aides), New York (all aides except live-in aides and aides in NYC's Home Attendant Program who are employed by non-profits; overtime is paid at minimum wage not the employee's regular wage), Ohio (all aides except live-in aides), Oregon (all aides except live-in aides), Pennsylvania (aides that are employed by third parties), Washington(all aides except those that live-in, sleep at, or spend substantial time on-call, and individual providers covered by collective bargaining agreements), Wisconsin (all aides except those who are family members, or those employed by non-profit agencies), and the District of Columbia (all aides). Source: PHI tabulation (preliminary).

[13] Dorie Seavey and Vera Salter (October 2006). *Bridging the Gaps: State and Local Strategies for Ensuring Backup Personal Care Services*, Policy Report #2006-19, Washington, DC: AARP Public Policy Institute. Available at: http://assets.aarp.org/rgcenter/il/2006_19_pcs.pdf.

[14] Steven Dawson (June 2007) *IOM Presentation: Recruitment and Retention of Paraprofessionals*. Bronx, NY: PHI. Available at: http://www.directcareclearinghouse.org/download/Dawson_IOM_6-28-07_bkmk.pdf.

states, the costs could have significant budgetary and service delivery implications that would require adjustments in federal and state funding—at least during a transitional period.

5. If the argument is that the exemption is needed to help make homecare for the elderly and infirm more affordable, then the proper way to do this is not to artificially depress the market-based minimum cost of labor, but rather—in the case of publicly financed services—to make adjustments in state reimbursement rates, and—in the case of private-pay services—to use the tax code to subsidize the purchase of care..

The argument that the exemption should be maintained because it lowers the cost of services for elderly and disabled persons, and thus enables people to receive needed services that might otherwise be unaffordable, may make short-term fiscal sense but fundamentally it is economically flawed. Under-compensating labor in order to keep the cost of services down creates a labor market distortion that depresses the supply of labor, and also distorts the demand for services, among other things. If a change in applicable wage and hour law or its construction results in increased costs for publicly financed care, then the proper way to account for these additional costs is to adjust reimbursement rates so as to enable providers to comply with the FLSA.

To the extent that the true costs of care are beyond the reach of consumers, then the more appropriate remedy is to use the tax code to give subsidies to consumers or families that are burdened by these costs. This is presumably part of the rationale behind the federal "Child and Dependent Care Credit" and plethora of state and new federal level legislation in play that would create income tax credits or deductions for payments for in-home services and time spent in family caregiving.[15]

6. In closing, H.R. 3582 offers Congress an historic opportunity to send important economic and social signals that will help steward the development of home- and community-based long-term care services in our country.

H.R. 3582 offers Congress the opportunity to send three important messages:

- That homecare and personal assistance workers should be on an equal footing with respect to all other low-wage occupations.

[15] See the list of Federal and State Caregiving Legislation that would create "Caregiver Tax Incentives" compiled by the Family Caregiver Alliance, available at: http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=1848.

- That, within long-term care, the homecare and personal assistance labor market should not have second class status with respect to compensation and, therefore, with respect to its ability to attract and retain workers.
- And, finally, that federal lawmakers can work together to coordinate, rather than send conflicting messages about, the direction of our nation's long-term care policy.

Thank you for this opportunity to testify on this important piece of legislation.

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Chairwoman WOOLSEY. Thank you.

I think you heard the bells ringing, but we have time for the final witnesses, both of you, and then we are going to come back for questions, if you will stay with us.

Mr. Dombi?

STATEMENT OF WILLIAM DOMBI, VICE PRESIDENT FOR LAW, NATIONAL ASSOCIATION FOR HOME CARE

Mr. DOMBI. Thank you, Chairman Woolsey and Ranking Member Wilson and the other members of the subcommittee.

Thank you for the opportunity to come here today to express the views of the National Association for Home Care & Hospice. NAHC, as we call it, is a trade association. We represent the busi-

nesses that provide much of the care that we are speaking about today, home care aide services.

Home care aide services takes on a different label under the Fair Labor Standards Act, companionship services. The National Association for Home Care & Hospice has long stood for the proposition that home care aides are the pillars of our long-term care delivery system. Without home care aides, such as Ms. Butler, it would not exist. It would have no chance of success. Society does not give them the level of respect and support that they deserve based on their dedication and their commitment to caring for individuals that most of us avoid even spending time with—the elderly, the disabled, the individuals who are shut into their homes and shut out of society's eyes.

We agree with the goals of this legislation, and the goals of this legislation are to improve the profession of home care aides, stabilize it financially so that it becomes something that people aspire to, dedicate themselves to, continue to work in with a living wage. From a business standpoint, the reasons are very obvious. A stable workforce makes for a stable business, and home care is a workforce-related business.

But while we agree with the goals, we think that this action and this bill actually send things going in the wrong direction. It sends things going in the wrong direction because, as Dr. Seavey mentioned, market forces are at play here, and there is a big difference in home care and hospice than there is in many of the other market-driven economies.

We do not control the price. We do not set the price. The price is set by Congress on occasion, Federal administrative agencies and state legislatures, governors as well as state administrative agencies. When you cannot control the price and the price does not change and the providers of services are not reimbursed additional monies to cover additional costs, the only choice they have is cost avoidance.

And while the sky has not fallen in Michigan, what has happened is limited, if nonexistent, overtime services provided by home care aides as a cost-avoidance measure. The only option that was available to home care providers was to discontinue employing home care aides beyond 40 hours. There was no further increase in reimbursement. In fact, in Michigan, under the state Medicaid programs the fights have been over decreases in payment rates.

When we look at the cost of this legislation, it is a cost that this committee has to seriously consider. My constituency would embrace any change that allows them to pay a fair wage with overtime compensation and full employee benefits to home care aides because the recruitment and retention costs, the nightmares of going through background checks for workers who come in with felony-level backgrounds, is just an unacceptable way to operate a long-term care system.

We do not know what the exact costs would be, but I will give you a few numbers. Today, $15 billion a year is spent under the Medicare program for home health services. About 25 percent of that are home health aide services. In hospice, $9 billion a year spent under Medicare with about 20 percent home health aide services. In excess of $20 billion a year is spent in state Medicaid

programs on personal care supports. And then we have many more programs in addition to that from the Administration on Aging through TRICARE and even the Housing and Urban Development programs for home care services.

These are all Federal and state-funded programs, and there are local home care programs, like in the City of New York where the City of New York estimated that the cost of overtime compensation under this bill, in its evaluation of the Supreme Court case, would be $100 million in New York City alone.

As I stated earlier, the pillars of home care deserve your support, but they cannot get it in isolation with all the factors that are there. So, as an alternative to moving forward with this legislation, we would recommend this committee take a broad-based approach, look beyond just overtime compensation—minimum wage is not an issue. These workers get minimum wage—and, instead, I offer five different areas which this committee should address that will ultimately implicate compensation and benefits.

Number one, mandate all Federal and state programs that finance home care aide services to reform payment rates to accommodate increased costs of improved and appropriate compensation.

Two, require all Federal and state home care programs to provide the necessary financial support for a basic health insurance plan. This Congress is debating SCHIP at this point in time. We are talking of 200 versus 300 percent of the poverty level, but these individuals will not be covered through any SCHIP amendments that are under consideration today. Health insurance for health care workers should seem to be a minimum right.

Number three, provide support for programs that establish career ladder opportunities for home care aides, including scholarships and grants for higher education and training. We have that going at the National Association for Home Care & Hospice now, but our few dollars that we can offer only goes a short way to bringing individuals who start as home care aides who would like to be LPNs, RNs and other health care workers.

Number four, establish economical and efficient background check systems to allow for expedited screening of applicants for home care aide employment. In Wisconsin, 30 percent of applicants for home care aide jobs were found to have felony-level backgrounds. We do not want them in the system, but we do not want to keep individuals like Ms. Butler waiting in the wings to come into the delivery system as well.

And last, require consistent employee protections across all forms of home care aide employment, including Workers' Compensation, Unemployment Compensation, OSHA job safety standards and worker qualifications. The trend across the country is to bring in individual providers without that protection.

So thank you for your time and your patience.

[The statement of Mr. Dombi follows:]

Prepared Statement of William A. Dombi, Vice President for Law, on Behalf of the National Association for Home Care & Hospice, Inc.

Thank you for the opportunity to present testimony regarding H.R. 3582. My name is William A. Dombi, Vice President for Law at the National Association for Home Care & Hospice, Inc, (NAHC). In Washington, D.C. NAHC is a trade association representing the interests of home health agencies, home care organizations,

and hospices throughout the country. Our membership includes entities of all sizes and types including not-for profit and proprietary organizations. These providers of care are freestanding companies, government-based, or part of a health system. All told, NAHC members serve over 5 million of the Nation's elderly and disabled citizens with personal and skilled care that enables these individuals to maximize functioning and stay safely in their own homes.

H.R. 3582 is of great interest to the home care community as the providers of home care services employ tens of thousands of workers that could be impacted by the proposed revision to the "companionship services" exemption under the Fair Labor Standards Act of 1974 (FLSA). In home care, the worker who provides services that would be considered "companionship services" generally works under the title of home health aide, home care aide, or personal care attendant. These workers are the pillars of support for a growing community based long term care system that our Nation needs to respond to the graying of America.

H.R. 3582 follows on the heels of a recent decision of the U.S. Supreme Court in LI Care at Home v. Coke where a unanimous Court upheld the validity of a 30 year old regulation of the US Department of Labor that exempted individuals who are employed by third parties to provide companionship services from the protections of the FLSA with respect to overtime compensation. Ms. Coke argued unsuccessfully that the exemption applies only when the worker is directly employed by the person receiving care. While H.R. 3582 purports to reverse the Court's decision, it actually would limit the FLSA exemption even in situations where the worker is directly employed by the person receiving care.

The proposed legislation represents a well-intentioned effort to provide support for individuals working in an undervalued job. However, it is a piecemeal action that will not only fail to solve the important concerns expressed by the home care aide workforce, but will serve to compound their problems. Instead, NAHC calls for a comprehensive, broad-based strategic plan that integrates action to address worker compensation, access to health insurance, competencies and training, career opportunities, and funding. In the absence of that comprehensive effort, HR 3582 will trigger predictable consequences that naturally develop when health care providers are encumbered with added costs without the essential financial support to meet those increased obligations.

The impact of the proposed legislation must be understood in a very practical context. Most funding for home care services comes from Federal and state programs such as Medicaid, Medicare, the Administration on Aging, and TRICARE. Under these programs, the employer of home care aides has little or no control over the price of services and can only act to affect the costs of care. As a result, the unfunded cost increases that evolve from this legislation will lead the employer/home care agency to control costs through such steps as eliminating overtime work, reducing base compensation rates to minimum wage, and dropping any employee benefit programs. This foreseeable reaction is unlike those that are only speculative in a market driven economy where the seller of services has the option of raising prices to increase revenue to offset the increased compensation costs. These are real consequences when the health care provider must operate in a system of funding that is controlled by Federal and state health care programs.

Consumers of home care aide services also will suffer unintended consequences. Limiting hours of work for the home care aide will disrupt continuity of care as multiple caregivers will be assigned to an individual to avoid unfunded overtime compensation. The anticipated increase in employee turnover when workers cannot get enough work hours will bring consumer dissatisfaction as every day different caregivers arrive on the scene.

These issues are all solvable, but not through an isolated action that addresses only the matter of worker compensation. NAHC sincerely recommends that the Committee re-direct its efforts to bring about the broad-based solution that is needed to protect both the worker and the consumer of care.

Who receives companionship services

Companionship services, otherwise known in health care as home care aide and personal care attendant service, are provided to millions of Medicare, Medicaid, TRICARE, and private pay recipients of care. They are young and old, permanently disabled and chronically ill. In 2000, the U.S. Department of Health and Human Services reports that the number of individuals receiving home care services was 7,178,964.

In 2006, Medicare expenditures for home health services provided to 3.1 million elderly and disabled, homebound beneficiaries with expenditures totaling $13.2 billion. Medicaid expenditures for home care in 2000 reached $24.3 billion, of which $11.6 billion was spent on personal support services. Since 2000, Medicaid spending

on home care has grown exponentially with a rebalancing of spending away from institutional care and into community-based services. Medicaid home care recipients are of all ages, from infant to very advanced age, all with one common characteristic—they must rely on others to safely stay at home.

The 1974 amendment to the Fair Labor Standards Act (FLSA) that established the "companionship services" exemption at issue in this matter is a unique action through which Congress offered protection to a class of consumers rather than employees. The central feature of the exemption is to provide a cost protection for the elderly and the infirm who require personal care and other support services, known as companionship services, to remain in their communities and in their own homes.

From the time of the 1974 amendment through today, all branches of the Federal Government have recognized the importance of providing community based care to the elderly, infirm, and disabled. For example, in 1980, Congress enacted amendments to the Medicare program to eliminate coinsurance requirements under the home health benefit in order to remove any barriers to care in the home that might lead to more costly and less humane institutional care. Section 930(h) of the "Medicare and Medicaid Amendments of 1980," P.L. 96-499, codified at 42 USC 1395l(b)(2).

More recently, with the enactment of the Americans with Disabilities Act of 1990, Congress ensured that individuals with disabilities be afforded the opportunity to receive public services and programs in the most integrated setting appropriate to their needs. 42 USC 12101fff. The right of disabled individuals to community-based care under the ADA and its implementing regulations was affirmed by this Court in Olmstead v L.C., 527 US 581 (1999).

The Executive Branch of the United States government also has weighed in heavily in favor of home care. The "New Freedom Initiative" was announced by President Bush on February 1, 2001, followed by Executive Order 13217, Community-Based Alternatives for People with Disabilities (June 18, 2001).

The United States Department of Health and Human Service (HHS), which manages many of the public home care programs, set out its implementation of the Executive Order establishing civil rights compliance activities that facilitate community integration in "Delivering on the Promise, HHS' Report to the President on Executive Order 13217." www.hhs.gov/newfreedom/eo13217.html.) The HHS initiative is a nationwide effort to remove barriers to community living for people of all ages with disabilities and long term illness.

Profile of the home care aide/companion

The U.S. Department of Labor, Bureau of Labor Statistics, reports that 663,280 workers provide companionship services as home health aides and personal care aides.[1] Among the employers of these workers are 8,728 Medicare certified home health agencies throughout the country.[2]

The bald statistics tell only a minor part of the story about home care aides. In the community of home care, aides are considered heroes. Most often, it is the aide who is the reason the patient can stay at home safely to receive needed health care services. The home care aide is generally considered to have the toughest job in home care as she must respond to a myriad of personal care needs of her patients ranging from simple bathing to managing incontinent, nonambulatory elderly patients with Alzheimer's Disease. Aides are task oriented, schedule regimented, caring people who become the equivalent of temporary family members providing essential caregiving with a tender touch. They care for people who are afflicted with chronic illness or who are recovering from an acute illness or injury. Aides are also significant team members in hospice care, providing special care to individuals at the end of life.

The home care aide may care for one individual or provide services on a shift basis to several. Some provide visit oriented services that occur several times per week per patient for one to two hours a visit. Versatility and dependability are hallmarks of the home care aide. Most are women, but men also participate in this work.

Home care aides are deserving of respect and admiration. They also are well deserving of society's support and recognition for their great contributions. They are truly heroes of home care.

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[1] Occupational Employment Statistics, U.S. Department of Labor, Bureau of Labor Statistics,Occupational Employment and Wages, May 2005 (www.bls.gov/oes/current/oes311011.html). Internet search 12/11/06.

[2] Centers for Medicare & Medicaid Services, Center for Information Systems, Health Standards and Quality Bureau, November 2006.

The profile of home care financing

The provision of essential care by home care aides happens only with the significant financial support of Federal and state health care and personal care service programs. It must be recognized that the proposed changes to the FLSA, designed to guarantee home care aides overtime compensation when applicable, will increase the costs of those important programs. In addition, the nature, structure, and operation of these programs demonstrates that the increased costs occurring through a new overtime compensation obligation will not lead to near term changes in reimbursement rates to reflect and reimburse employers of home care aides for that new cost. In fact, the experiences with state Medicaid programs demonstrate that payment rate changes occur only after access to care problems reach a crisis level.

Medicare pays for home health services through a prospective payment system, 42 USC §1395fff; 42 CFR §484.200 (HHPPS). The HHPPS payment rate is adjusted annually through the application of a "market basket index," a sort of inflation factor. 42 USC §1395fff(b)(3)(B); 42 CFR §484.225.

However, the market basket index formula and the database utilized to apply that formula are not designed to address sudden cost changes without unreasonable delay. For example, the database utilized for the inflation factor for the calendar year 2005 proposed rates includes wages and salary data from 2000. 69 F.R. 31248 (June 2, 2004).

Compounding the problems with the Medicare market basket index update is the use of a wage index for geographic variation in payment rates. 42 USC §1395fff(b)(4)(A)(ii)i; 42 CFR §484.210(c).

However, changes in home care aide wages will not affect payment rates because the home health wage index is based upon hospital services wage data. As a result, providers of companionship services will experience increased cost and unaffected Medicare payment rates.

Medicaid payment systems are even less predictable than the Medicare HHPPS. States participating in Medicaid are required to establish payment rates sufficient to enlist enough care providers to secure services at a level of access comparable to the non-Medicaid patient population. 42 USC §1396a(a)(30)(A); 42 CFR §447.204. Typically, state Medicaid programs adjust payment rates only after individuals have lost access to necessary care. See, Arkansas Medical Society, Inc. v. Reynolds, 6 F.3d 519 (8th Cir. 1993); Orthopedic Hospital v. Belshe, 103 F.3d 1491 (9th Cir. 1997).

In Ball, et al v. Bledess, et al, the District Court held that the Arizona Medicaid program home care payment rates violated 42 USC §1396a(a)(30)(A). CIV 00-0067TUC-EHC (D. AZ. 8/13/2004). The court noted that despite multiple studies and reports since 1998 indicating the loss of access to care triggered by inadequate payment rates, the state did not respond.

Many of the Medicaid home care programs are designed around a standard of cost effectiveness. These programs, otherwise known as home and community-based care waivers, exist only to the extent that the cost of care is less than the cost of placement in an institutional setting. 42 USC §1396h(c) The increase in costs triggered by new overtime compensation obligations threatens the viability of these waiver programs and will block home and community-based care options for currently served individuals.

TRICARE, the health services program for over eight million military dependents and retirees will also be adversely impacted. Its basic home health services program is built on the Medicare payment model referenced above. 32 CFR Part 199. In addition, its Extended Home Care Benefit is founded on cost-effectiveness principles comparable to the Medicaid waiver programs discussed herein. 69 F.R. 44942 (July 28, 2004).

Why is the financing of home care relevant?

The financing system for home care can be boiled down to two basic concepts: (1) the provider of care does not control the price of services; and (2) the provider of care has limited control over the cost of care. Addressing the pressing needs of home care aides in a piecemeal fashion, focusing solely on overtime compensation, compounds rather than solves the problems faced by home care aides.

As the preceding discussion indicates, the price of care is controlled by Federal and state programs that purchase the care from the providers of home care on behalf of participants in the programs. At best, these programs are slow to act to reflect cost changes in payment rates. At worst, there is no reaction to increase service costs leading to serious access problems.

With the inability to respond to increased costs through price increases, the employer of home care aides has no alternative but to take steps to reduce costs. Some costs cannot be avoided as they are creatures of regulatory standards designed to ensure quality of care. For example, Medicare home health agencies must meet rig-

orous standards for participation that include training and competency standards for home health aide service, 42 CFR 484.36. In addition, most states have provider licensing standards with many requiring full criminal background checks on all caregiving staff. In addition, the home care agency must manage staff recruitment, scheduling, and travel costs to patients' homes. As with any employer, the home care agency also must cover the costs of Workers' Compensation, Unemployment Compensation, and the Social Security tax.

These employer obligations leave few options for the home care agency to control costs and respond to an increase in costs such as overtime compensation. In the absence of immediate changes in payment rates by Federal and state programs, the home care agency is left with two cost control options and one cost avoidance option. In terms of cost control, the home care agency can reduce the basic hourly wage of home care aides or eliminate or reduce any available employee benefits such as health insurance. Currently, the employee benefits are, at best, minimal because of currently inadequate payment rates.

The cost avoidance option is for the home care agency to limit the hours worked by the home care aides, capping those hours at 40 per week to stay under any overtime compensation obligation.

Who gains from this dynamic—no one! The patient loses because of the loss of continuity in caregivers. The home care agency loses because of higher recruitment costs and staff scheduling costs to reference just a few. The worker loses because she is subject to capped compensation with no alternative but to find additional supplemental employment.

Are there other risks with the piecemeal approach?

The proposed legislation purports to address compensation protections for home care aides regardless as to whether they are employed by the person receiving the care or by an third party. As Justice Breyer pointed out during the oral argument in Coke v. LI Care at Home, the argument advanced by Ms. Coke would have the unacceptable consequence of discriminating against individuals who did not have the faculties or means to directly employ the home care aide by creating an overtime compensation obligation for individuals that needed to acquire care through a third party. As such, NAHC is very supportive of the proposal in terms of its inclusion of all home care aides within the minimum wage and overtime compensation protection except those that truly work on a casual basis. However, it can reasonably be expected that consumers and workers in the direct employment situation may be tempted by the opportunity to "go underground" in their arrangement to avoid the obligations, scrutiny, and reporting responsibilities that come with a formal, compliant employment relationship.

In such circumstances, both the consumer and the home care aide are losers once again. The consumer loses the quality of care protections designed into many Federal and state laws. Oversight, worker screening and training, and the ready availability of substitute workers is sacrificed. For the home care aides, protections such as Workers' Compensation, Unemployment Compensation, and Social Security contributions are lost.

These risks can only be addressed through a comprehensive strategy to enhance the status of home care aides. Focusing on the isolated overtime compensation concern is not a step toward that strategy. Instead, it is a step backward unless it is part of a plan to include consideration of care financing, health insurance protection, and career building opportunities.

A broad-based home care aide protection plan

To insure unintended consequences triggered by this proposed legislation, NAHC recommends that Congress develop a broad-based strategic plan that provides a comprehensive approach to the protection of home care aides. That comprehensive protection is needed for both the home care aide and the individuals under their care. That plan should include, at a minimum, the following:

1. Mandates for all Federal and state programs that finance home care aide services to reform payment rates to accommodate increased costs of improved compensation.
2. Requiring all Federal and state home care programs to provide the necessary financial support for a basic health insurance plan for home care aides.
3. Providing support for programs that establish career ladder opportunities for home care aides including scholarships and grants for higher education and training.
4. Establishing economical and efficient background check systems to allow for expedited screening of applicants for home care aide employment.

5. Requiring consistent employee protections across all forms of home care aide employment such as Workers' Compensation, Unemployment Compensation, OSHA job safety standards, and worker qualifications.

Comments on the language of H.R. 3582

NAHC recommends that H.R. 3582 move forward only as part of a comprehensive plan to address home care aide protections and employment. However, as it is currently structured, the language is confusing and ambiguous.

Specifically, it is unclear whether proposed subparagraphs (A) and (B) are intended to establish the definition of "casual basis" or add restrictions on the applicability of the "casual basis" exemption. For example, must the companionship service be both "casual basis" work and "irregular or intermittent"? Alternatively, is casual basis defined as work that is irregular or intermittent?

Similarly, the phrase "or an individual employed by an employer or agency other than the family * * *," may be intended as a wholesale exclusion from the companionship services exemption or one applicable when involving services on a casual basis that are irregular or intermittent.

With respect to subparagraph (B), it appears that the 20 hour per week standard may be either an additional qualification on the "casual basis" standard, an additional qualification on the "irregular or intermittent" standard, or a definition of one or both of those standards.

Finally, it is ambiguous as to which employer under the "20 hour in the aggregate" standard has the responsibility for overtime compensation. Is it the employer who is employing the worker for the hours that exceed the aggregate of 40 hours that is responsible for overtime compensation or are the multiple employers responsible only when their employment itself exceeds 40 hours?

NAHC is readily available to work with the Committee to clear up this confusion and these ambiguities.

Conclusion

Home care aides are essential caregivers of the elderly and the disabled. They deserve comprehensive worker protections. However, by addressing the single concern of the application of the FLSA companionship services exemption to the exclusion of the interrelated issues of care financing, health insurance coverage, career support, and other matters, H.R. 3582 is a well intentioned effort that will have unintended adverse consequences for both consumers of home care aide services and the home care aides. NAHC recommends a broad-based strategic legislative plan to address these interrelated concerns to achieve the goals of H.R. 3582.

Chairwoman WOOLSEY. Thank you, Mr. Dombi.

Mr. Claypool?

STATEMENT OF HENRY CLAYPOOL, POLICY DIRECTOR, INDEPENDENCE CARE SYSTEM

Mr. CLAYPOOL. Chairwoman Woolsey, Ranking Member Wilson and members of the subcommittee, good morning. I am Henry Claypool, the policy director of Independence Care System, a nonprofit managed long-term care plan based in New York City, serving more than 1,200 people with disabilities living in their homes.

Thank you for inviting me to testify today.

I would like to give you ICS's perspective on the Fair Home Health Act as both an organization that pays for the services of direct-care workers and as an advocate for services for people with disabilities. My comments are also informed by my own personal experience. I am a former Medicaid beneficiary, and I continue to rely on the supports provided by direct-care workers.

We support the enactment of the Fair Home Health Act, and we believe that there are three major policy challenges that this legislation seeks to address.

One, antiquated Department of Labor rules must be readjusted to address the current shortage of direct care workers. Competition for workers to take jobs in the service sector is fierce, and it makes

no sense to continue to put direct-care jobs at a comparative disadvantage by allowing the erroneous categorization of workers as companions to persist.

Two, Federal labor policies should be conducive to delivering high-quality services. It can be difficult to find someone who is capable, competent and interested in helping with often intimate personal needs like dressing, using the bathroom, and eating. The result is that many people who rely on community-based services struggle with quality issues on a daily basis. To assure quality, all workers who provide noncasual, non-live-in long term services should be fully protected by FLSA.

Three, the current exemptions for some FLSA protections for direct-care workers should be eliminated or at least narrowed so that these protections apply equally to direct-care workers across all long-term services settings.

For the disability community, the number one civil rights issue in this country is the need to expand access to community long-term services so that Medicaid beneficiaries who need these services are not forced to be isolated in a nursing home in order to receive these services. When community-based direct-care workers are exempt from wage and hour protections, it exacerbates the institutional bias by making direct-care jobs in nursing homes more attractive than comparable jobs in community settings.

As the subcommittee moves forward with its consideration of this important legislation, we make the following recommendations.

Consult with the Energy and Commerce Committee to fully consider the ramifications for the Medicaid program. Medicaid is an extremely complex program, and the Energy and Commerce Committee has accrued very significant expertise and may prove valuable to the subcommittee.

Redefine the live-in exemption in a way that provides narrow exemptions from FLSA wage and hour protections. While ICS believes that Department of Labor rules have been misinterpreted to exempt too many workers from FLSA standards, we do acknowledge that some exemptions are appropriate. Careful consideration should be given to reclassifying certain direct-care workers as live-in. This step should be taken, however, after consulting with groups that represent consumers and independent providers.

In closing, I would like to thank the subcommittee for its efforts to protect direct-care workers and for considering how to ensure that Medicaid beneficiaries who depend on community-based long-term services are not adversely harmed. ICS looks forward to serving as a resource to you as you continue to consider this important issue, and we urge the Congress to enact the Fair Home Health Act into law. I look forward to answering any questions you may have.

[The statement of Mr. Claypool follows:]

Prepared Statement of Henry Claypool, Policy Director, Independence Care System

Chairwoman Woolsey, Congressman Wilson, and Members of the Subcommittee, Good morning. I am Henry Claypool, the Policy Director of Independence Care System (ICS), a nonprofit managed long-term care plan based in New York City, serving more than 1,200 people with disabilities living in their homes.

Thank you for inviting me to testify today. I would like to give you ICS' perspective on the Fair Home Health Act (H.R. 3582) as both an organization that pays for the services of direct-care workers and as an advocate for services for people

with disabilities. My comments are also informed by my own personal experience. I am a former Medicaid beneficiary and I continue to rely on supports provided by direct-care workers.

We support enactment of the Fair Home Health Act and we believe that there are three major policy challenges that this legislation seeks to address:

One, Antiquated Department of Labor rules must be re-adjusted to address the current shortage of direct care workers.

Competition for workers to take jobs in the service sector is fierce and it makes no sense to continue to put direct-care jobs at a comparative disadvantage by allowing the erroneous categorization of workers as "companions" to persist.

Two, Federal labor policies should be conducive to delivering high-quality services.

It can be difficult to find someone who is capable, competent and interested in helping with often intimate personal needs like dressing, using the bathroom, and eating. The result is that many people who rely on community-based services struggle with quality issues on a daily basis. To assure quality, all workers who provide non-casual, non-livein long term services should be protected by FLSA.

Three, The current exemption from some FLSA protections for home care workers should be eliminated or at least narrowed, so that these protections apply equally to direct-care workers across all long-term care settings.

For the disability community, the number one civil rights issue in this country is the need to expand access to community long-term services so that Medicaid beneficiaries who need these services are not forced to be isolated in a nursing home in order to receive these services. When community-based direct-care workers are exempted from wage and hour protections, it exacerbates the institutional bias by making direct-care jobs in nursing homes more attractive than comparable jobs in community settings.

As the Subcommittee moves forward with its consideration of this important legislation, we make the following recommendations:

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Medicaid is an extremely complex program and the Energy and Commerce Committee has accrued very significant expertise that may prove valuable to the Subcommittee;

Redefine the live-in exemption in a way that provides narrow exemptions from FLSA's hour and wage protections.

While ICS believes that Department of Labor rules have been misinterpreted to exempt too many workers from FLSA standards, we do acknowledge some exemptions are appropriate. Careful consideration should be given to reclassifying certain direct-care workers as "live-in" per diem workers whose per diem pay must be equivalent to at least 14 hours of regular pay. This step should be taken, however, after consulting with groups that represent consumers and independent providers.

In closing, I would like to thank the Subcommittee for its efforts to protect direct-care workers and for considering how to ensure that Medicaid beneficiaries who depend on community-based long-term services are not inadvertently harmed. ICS looks forward to serving as a resource to you as you continue to consider these important issues. We urge the Congress to enact the Fair Home Health Act into law. I look forward to answering any questions that you may have.

Chairwoman WOOLSEY. Thank you.

We will be back.

[Recess.]

Chairwoman WOOLSEY. I was going to have my committee members ask their questions first, but I am here and they are not. So I want to thank you all for your testimony. I am going to recognize myself for 5 minutes, and then I will yield to Mr. Wilson, and then others will be here by then.

We are going to have a whole series of what we call—excuse me, Republicans—nuisance votes. So we will be running back and forth. But they are 15-minute votes, and they will not be held open very long.

So, again, thank you, and I recognize myself for 5 minutes.

Mr. Dombi, I have a question about these third-party agencies. Are they not for-profit agencies?

Mr. DOMBI. Home care agencies are both not for profit and for profit. Some are government-based agencies. The largest home care agency in South Carolina, for example, is a Department of Health and Environmental Control, which is a government agency that runs the health department and such as well.

Chairwoman WOOLSEY. Okay. When they pay somebody like Ms. Butler, say, $9.00 an hour, what do they charge the client? I mean, where is the profit, I mean, the overhead margin?

Mr. DOMBI. Yes. In most of the instances, they are not charging the client. Instead, they are receiving reimbursement from a public program like Medicaid. So they are getting a fee schedule rate. By and large, the rates vary tremendously across the country. In a situation normally for what we call the home and community-based waiver programs, we see hourly payment rates to the home care providers as low as $9.63 and as high as the low $20s. Within that range, you know, you have a median probably in the $15 range.

Chairwoman WOOLSEY. And so the health care worker takes the whole amount home, I mean, other than taxes, et cetera?

Mr. DOMBI. No, the health care worker takes whatever wages that they get home, and the health care provider then finances other aspects of the delivery of services. For example, in most of the states when they pay an hourly rate for the home care aide-personal care attendant they do not pay for the travel time, yet that is an hour worked for the worker that the employer has to pay. They do not separately pay for training. They do not separately pay for criminal background checks. They do not pay for any of the other overhead aspects that are there in the delivery of the service. They pay that as part of the fee schedule rate to the provider.

Chairwoman WOOLSEY. Okay. Thank you.

Now, Ms. Butler, I would like to ask you a question about something Mr. Dombi did say. He said that what would happen if we passed this legislation would be that you would no longer be privileged to work over a 40-hour week without getting overtime. Right now, you can be forced to work over a 40-hour week without overtime. Is that all right? I mean, you are okay not working over 40 hours, aren't you?

Ms. BUTLER. Well, the overtime will mean to me—it will be $1,500 more a year. For some people, it will be a drop in the bucket, but, for me, it will be quite a lot of money because of the cost of living the way it is in New York. But I guess he is right. Some agencies will try to get the chance to cut down your hours. Then it will be very bad. But, at the same time, they cannot, not with the sick people the way they are.

Chairwoman WOOLSEY. So you see this, rather than ensuring that then the other part of the day would be paid, somebody else would come in and earn straight time.

Ms. BUTLER. But then that will be very disturbing to the patent because, see, we take into consideration the emotional problem of the elderly having people walk into their home every certain amount of hours so they will not pay the overtime. So, you know, how are we benefiting these people as it is?

Chairwoman WOOLSEY. Right. I appreciate that very, very much. Good input.

So, Mr. Becker, talk to us about the patient or the elderly person and what the difference between what quality care and turnover care means to them.

Mr. BECKER. Well, I think the important thing to recognize here in terms of the quality of care is that the most important factor determining quality of care is whether there is an available caregiver. And the greatest threat to the quality of care here is the threat that there will not be enough caregivers available to provide the care, and to keep these workers in the margin of the economy, to categorize them as less worthy than all the employees who are covered by the act, is only furthering that threat.

In terms of the overtime question, when the act was passed in 1938 and it has been extended numerous times, including in 1974, this argument has always been made, that protecting workers is actually going to turn around and harm workers because their hours are going to be cut and their wages are going to be cut. So this is really not an argument against closing this loophole. This is an argument against the principles of the Fair Labor Standards Act itself.

Overwork is generally a problem in the health care industry—in hospitals, in nursing homes, in home care. It is generally not desirable to have people working long hours in this industry in particular, but in all industries. That is the philosophy of the Fair Labor Standards Act. The statistics show that very few clients receive more than 40 hours of care per week. So to have that care provided by individuals who do not work long hours would not lead to significant problems in terms of the discontinuity of care.

So we think that extending the act, including the overtime provisions, will have a positive effect on the quality of care.

Chairwoman WOOLSEY. Thank you very much.

Mr. Wilson?

Mr. WILSON. Again, Ms. Butler, thank you for your service.

In our home state of South Carolina, it is very frequent in obituaries to see the companion care personnel listed as family members, which is truly an indication of the deep affection that the family develops with people in your profession.

As we are facing these very important issues today, Mr. Robinson, as drafted, do you believe that H.R. 3582 goes beyond the scope of the issue decided in Long Island Care and the questions raised under Department of Labor regulations at issue in that case? In what way do you believe this bill goes beyond the Long Island Care?

Mr. ROBINSON. Thank you, Congressman Wilson.

Yes, I do believe it goes beyond the Supreme Court's decision. At issue there was the validity of the exemption applying to caregivers employed by third parties. The way this legislation is drafted, it goes beyond that because it would deny application of that exemption to a babysitter, to a companionship provider who works more than 20 hours.

It also has a provision in there that sort of compounds, if you will, layers the terms "intermittent" and "irregular" in the statutory provision that already has the term "casual basis" in it. So it sort of is, I might say, fraught with confusion in that sense because

you are layering on terms that are not defined, even though the "casual basis" is, in the regulations.

So it could impact the babysitter that was not at issue as well in the Supreme Court case.

Mr. WILSON. Mr. Dombi, you really have the perspective of an attorney, also being real world with the association, and in that context, were H.R. 3582 to become law, what do you predict would be the immediate consequence for companion care workers, the clients they serve, employers and government agencies? And you have already spoken about something Mr. Becker mentioned, and that is setting the price. Who is doing that? What do you predict the long-term consequences to be?

Mr. DOMBI. Well, as much as I have a crystal ball, I would base it on some experiences we have had, which is when a new cost comes to the employer, in this case the home care provider, and that cost is not covered by the payor of that service, Medicaid or Medicare, whatever, they then get into a cost-avoidance mode, and with respect to home care aides, I think they are offered three options and a combination of them that they can take on an immediate basis because experiences also say that the payment MOP systems do not respond immediately and may never respond at all.

The three choices that they would have would be to avoid overtime compensation obligations by controlling the number of hours worked, and some workers might find that beneficial. They can reduce the base wage that is paid to that worker so that they could accommodate then an overtime on that, but I do not think anybody is real happy with taking $10 an hour and reducing it to $7.50 so you can afford to pay overtime when that occurs. Or they could dismantle or in some way diminish the limited benefits that are their employee benefits that might be available, whether they are a limited health plan or pension benefits.

Those are truly the only options that are available in a cost-avoidance mode that occurs, none of which, in my mind, end up benefiting either the consumer or the worker at that point and, certainly, do not benefit the employer because the employer then is probably out there having to recruit more staff because staff leave as a result of those kinds of changes.

Mr. WILSON. And, Mr. Robinson, you had cited the 20-hour-per-week provision in Subsection B of H.R. 3582. So, again, could you restate your concerns about that?

Mr. ROBINSON. Yes, sir. The way this statute is drafted, it could exclude from the exemption—in other words, overtime would apply to anybody, whether they are hired by a third-party employer or directly by the recipient of the services, if they provide more than 20 hours a week. That could be the babysitter, for example, the 14-year-old. Child labor regs limit the number of jobs you can perform. You can have a babysitter who performs more than 20 hours a week who could be impacted by this bill. You could have the person who works directly for the recipient of the services, if they work more than 20 hours a week, would be impacted by this bill. So it has far-reaching consequences beyond just what was addressed in the Long Island v. Coke case.

Mr. WILSON. Thank you all.

Chairwoman WOOLSEY. Mr. Bishop?

Mr. BISHOP. Thank you, Madam Chair. And thank you very much for holding this hearing.

Dr. Seavey, in your testimony, you indicate that the vast majority of home care workers are already paid the minimum wage.

And, Mr. Dombi, you do not dispute that.

So that is not in question.

Ms. SEAVEY. No, it is not.

Mr. BISHOP. All right. So what we are talking about here in terms of economic impact is primarily in terms of overtime pay. You have indicated, Dr. Seavey, in your testimony that the vast majority of home care workers do not work more than 40 hours per week. Do you have an approximation of what proportion of home care workers do on a regular basis work more than 40 hours a week?

Ms. SEAVEY. Well, the only approximation that I have seen is from a Federal dataset called the Current Population Supplement, and the one from March 2006 showed 15 percent of home care workers. It is a highly constructed number. They do not ask you how many hours per week did you work overtime. It is——

Mr. BISHOP. But it is a number that is arrived at in good faith. I mean, 15 percent is——

Ms. SEAVEY. Yes. It is a very derived number. I think it is on the high side.

Mr. BISHOP. All right. And is there any approximation of the number of hours of overtime that this 15 percent approximately of the workforce work?

Ms. SEAVEY. I do not know that.

Mr. BISHOP. All right. Because I mean, the average salary is $9.95 an hour, so $10 an hour. So we are talking about $5 an hour of premium pay—I will put "premium" in quotes—for a small minority of health care workers. And so what are we talking about—3 hours a week of overtime, 4? I mean, are we talking $15 a week per employee per 15 percent of the employees? I mean, is that about right?

Ms. SEAVEY. I think that is in the range, but another way to look at it is that if this bill were to pass, it is not the case that 800,000 home care workers would have any change come to them at all.

Mr. BISHOP. Precisely my point.

And so I guess my question really is to Mr. Dombi. You have predicted rather significant consequences. You have talked about denial of overtime. You have talked about diminution of care. You have talked about withdrawal of health benefits. You have laid out a fairly bleak scenario in the event that this legislation is passed. But it seems to me that the economic consequences, first off, will be attributed to very, very few workers, and they are relatively modest.

So my question is: How do you reconcile this at least apparently very modest economic consequence? Take that as fact one. Fact two, that we already have 16 states in which this appears to be working reasonably well without the onslaught of the consequences that you are predicting. How do you then still take the position that these consequences are consequences that ought to deter us from trying to protect a disadvantaged segment of the workforce?

Mr. DOMBI. Congressman, there are several factors that go into consideration there. I think we do not know all of what we really need to know about the economics of home care and in particular the pay scales and hours worked of home care aides. I would submit that because of those 16 states, one of the reasons why there is limited overtime compensation that is paid and overtime that is worked is because of the obligation to pay the overtime compensation. And, you know, I do not know if I——

Mr. BISHOP. May I just interrupt you for a second?

Presumably, overtime is offered or scheduled because there is a need for it, correct?

Mr. DOMBI. It is a combination of offered and desired. The worker is looking for additional working hours in order to make ends meet.

Mr. BISHOP. No, I guess my question is if overtime is withdrawn or withheld by the employer, how is the care provided?

Mr. DOMBI. If overtime is withdrawn, how is the care provided? With an additional caregiver.

Mr. BISHOP. Okay. But with a paucity of caregivers—my understanding is that this is one of the fastest-growing segments of our economy, and we do not have a workforce of keeping up with the demand—how is that possible? How is that functionally possible?

Mr. DOMBI. At this point, there is sufficient supply of workforce to meet the existing demand. We do not believe that that will continue as the graying of America commands more.

Mr. BISHOP. So wouldn't providing overtime be a more cost-effective way for the employer of providing for an increased demand thereby saving on recruitment costs and training costs? So, I mean, even if there are adverse economic consequences to paying slightly more per hour to a very low number of workers for a very low number of hours, wouldn't that be offset by savings in training, savings in recruitment?

Mr. DOMBI. Well, we do not know, but that is actually the basis of the discussion that Dr. Seavey and Mr. Claypool and I had during the break, which was——

Mr. BISHOP. In other words, what I——

Mr. DOMBI [continuing]. There is some theory that it would be cheaper for the business to provide higher wages and overtime compensation than to take on the cost of recruitment and retention and everything that goes with that, and what I had discussed with Dr. Seavey's organization some months ago and want to continue those discussions based on our further discussions today of joining forces and doing an analysis because if we can present a business model to my constituency that says it makes sense to do this for everybody's interest, then we are going to sell that from here to California.

Chairwoman WOOLSEY. Okay. Mr. Kline?

Mr. KLINE. Thank you, Madam Chair.

To the witnesses, thank you very much for being here today. It was really terrific testimony. It is great to have a panel of experts like this.

We have just been advised by staff that the majority leader is going to shut off the votes very rapidly after the 15 minutes, so the normal slack that we have had is taken away from us.

Let me just say that this issue is really, really pressing, as many of us baby boomers are now looking at our parents and the needs for home health care or assisted living or nursing home, and so the demand is growing.

Mr. Dombi, I think you are right that we are going to have a supply and demand problem here.

So I had some questions. Perhaps we can do them for the record, but let me just say thank you very much for your testimony today.

And I yield back, Madam Chair.

Chairwoman WOOLSEY. Thank you, Mr. Kline.

You guys all go.

I am going to close the hearing today. I would like to say two thoughts have come to mind.

In Ms. Butler's case, I thank you very much. You are the one that does the really hard work.

And, Mr. Claypool, thank you because you know how necessary all this is.

But the rest of you, you have been great experts.

But in Ms. Butler's case, for 2 hours more a week, you are going to pay somebody's travel to and from? No way. So, I mean, there will be times it comes out ahead.

I am sorry. We cannot do anymore.

And then I would like to say the other thing that comes to mind is that we really need a national health care system in this country. What a difference that would make.

So I am going to tell you again thank you very much. And, if we were not going to have these series of votes, we would keep on going for the rest of the day.

As previously ordered, members have 14 days to submit additional materials for the hearing record. Any member who wishes to submit follow-up questions in writing to the witnesses should coordinate with the majority staff within 14 days.

[Ms. Woolsey includes the following statements for the record:]

[The statement of Mr. Oxford follows:]

Sub-committee on Workforce Protections

Of the

House Committee on Education and Labor

Testimony

regarding

S. 2061
The Fair Home Health Care Act of 2007

Provided by
Mike Oxford, Executive Director
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October 24, 2007

Lynn C. Woolsey, Chairwoman
Su-committee on Workforce Protections
House Committee on Education and Labor
2181 Rayburn House Office Building
Washington, D.C. 20515-06100

Dear Chairwoman Woolsey;

Topeka Independent Living Resource Center is a civil and human rights organization whose mission is to advocate for a fully integrated and accessible society. Topeka Independent Living (TILRC) is a 501(c)3, not-for-profit, charitable corporation that is controlled, operated, managed and staffed by people with disabilities of all ages. TILRC provides all sorts of services for people with disabilities including housing assistance, life skills training, assistance with Social Security, help finding a job and so on. TILRC is also an award winning, nationally recognized policy advocate in the arena of home and community long term services and supports and promoting the rights of people to live their own lives free of facilities and institutions, if they so choose.

One of TILRC's largest service areas is helping people to manage their personal attendant services. We assist people with locating, hiring and managing their attendants. TILRC acts as a fiscal intermediary paying taxes and other withholdings and cutting payroll checks for about 1000 people with disabilities per year who employ about 1,800 workers. We perf'orm this function in partnership with the State of Kansas' HCBS Medicaid Waiver programs. Everyone we serve is otherwise eligible for a nursing facility or other institution. These people actually have to qualify for the facility or institution, but then choose the home and community option, if available. During years when the state budget is tight, many people cannot avail themselves of this choice and must wait on a list; sometimes for longer than a year. It their needs are too great or otherwise cannot be met, they must enter a nursing facility and then fight to move out later when their name comes off of the waiting list.

TILRC has always strongly advocated good wages, access to high quality benefits, fair treatment and otherwise good working conditions for personal attendant workers. Personal attendant workers are critical to independent living for people with disabilities of all ages. TILRC strongly believes that this critical work should be respected and valued by government and society as whole. As more and more people live with disabilities, and more and more people choose home and community services instead of nursing facilities and institutions, more and more personal attendant workers will be needed. Key components in assuring a sufficient supply of high quality attendant workers is good wages, benefits and otherwise fair treatment.

S. 2061, the Fair Home Health Care Act of 2007, attempts to solve a problem of providers and programs making workers perform duties and over periods of time that would violate FLSA but for the ability to characterize the work being performed as "domestic service companionship" and therefore exempt under FLSA. The bill addresses this problem by amending "casual basis" into the language covering companionship and then by defining "casual basis" to change the current regulatory definition of "companionship" found in 29 CFR, Part 552 Section 6.

TILRC is opposed and is appalled by anyone, any agency, or any employer not paying an attendant worker their hard earned wages. If this is happening by virtue of it being expedient for employers to merely call attendant services and supports "companionship" and then not complying with FLSA, then it needs to stop. TILRC firmly believes that there is a big difference between companionship and personal attendant services. The former involves mostly passive availability in case of emergency or performing a small amount of actual tasks, while the latter involves mostly active performance of skilled and unskilled tasks necessary to actively promote health, safety and independence.

TILRC has been at the forefront of designing innovative home and community services and supports that are consumer directed and controlled and are also cost effective. [TILRC is the only CIL in the country to have received an award from HCFA (now CMS) for outstanding services and advocacy.] Given budget problems at the state and federal levels caused by rising costs of services and rising numbers of service users, costs of and expenditures for home and community services and supports have been under intense political scrutiny. In fact, the main reason given by federal lawmakers for continuing, and not correcting the well documented institutional bias remains fear about potential costs of home and community services and support alternatives to the nursing facilities and institutions.

Most people with disabilities who receive long term services and supports rely on Medicaid HCBS Waivers which have cost effectiveness constraints built in and face severe budget shortfalls and limitations at the state level. Redefining what are truly companion services as no longer FLSA exempt would greatly increase the cost of the individual service plans and increase the overall state budget expenditures for the programs. The result is likely that such services would be eliminated. This would jeopardize health and safety and the independence of people who need companionship, but not actual attendant services such as cooking, cleaning, chores and so on. S. 2061 goes well beyond solving the problems in the *Coke* case and paints with too broad a brush by eliminating companionship as it is currently defined in regulation and reconstituting it as the same as any form of actual work as long as it is not performed more than 20 hours per week by a worker who doesn't have companionship as a vocation; basically companionship on a casual basis would mean 20 hours or less a week provided by untrained, unlicensed / uncertified people.

TILRC supports fixing any problems caused by mis-use, especially egregious mis-use, of the "companion" exemption in current law. However TILRC has concerns about the definition of "casual basis" in the bill. The current definition of "companion" found in 29 CFR § 552.6 is actually pretty good as it outlines that actual work (as would be performed by a personal attendant) must be limited to under 20% of the time while the vast bulk of the time (at least 80%) must spent as a companion and not actually working, performing tasks. While TILRC applauds the intent of the bill, we have concerns that as constructed, the bill will endanger innovative service and supports programs and threaten the independence of the people with disabilities that rely on such supports and services for maintaining their health and safety in their own homes and communities.

A couple of examples for Kansas may be instructive: HCBS Waivers in Kansas include a service called "Sleep-cycle support" or "Night Support." This is a service that pays for a non-family member to stay the night at an eligible individual with a disability's home to provide incidental assistance or to be there in case of emergency. The service must be provided for at least eight hours and not more than twelve hours and pays a flat daily rate that is negotiated between the worker and the consumer and usually is $25 to $30 per night. (The regular reimbursement rate is $30.00 per night. For the workers who our agency pays $30.00 per night, we pay out more than we are reimbursed after FICA, SUI, liability insurance and other deductions). The actual work or assistance provided MUST be incidental and the vast majority of the time is spent sleeping. Examples of assistance include turning someone once during the night or being available to assist a vent user with emergency battery hookups in case the power goes out, a not uncommon occurrence in many rural parts of Kansas during storms. If more than incidental help is needed, sleep cycle cannot be used and the regular attendant service plan hours must be increased. This creative service, jointly agreed to by the worker and the consumer is vital in that it allows people with very severe disabilities to obtain 24 hour coverage in a cost effective manner. If the regular rate ($12.05 - $14.20 per hour), not to mention overtime, (see above) had to be paid to provide this service, cost effectiveness would be lost and the service availability to those who need it would also be lost. This would likely result in failure to guarantee Medicaid health and safety requirements causing people to lose eligibility for the Waivers. The only safe place left would be the nursing facility or the institution. S.2061 as drafted would eliminate sleep cycle service; a service vital to the independence, health and safety of people with disabilities in my state.

Additionally, there are people with service plans that exceed 40 hours per week. Most of these people have hired family and friends to be their attendants. Many of these folks have one main worker who covers all of their hours and are paid straight time for all the hours. S. 2061 would drastically disrupt the lives and livelihoods of all concerned. Here is the situation:

In the past, the interpretation of FLSA was that more than 40 hours must be paid overtime. Since the reimbursement rate would not support overtime (The reimbursement rate was $11.96 and the wages were $8 to $9.50 per hour.), a single worker could only

work 40 hours, period! As a fiscal agent of the state we had to enforce the no overtime rule at the state level yet we heard pleas from both attendants and workers; they practically begged to be able to work more than 40 hours because of the hassle it involved for the consumer who was, again, usually a family member or friend of the worker. This is a typical scenario presented: Say the service plan for an individual was 51 hours per week. This meant that the main worker took care of 40 of the hours leaving 11 for someone else. It is very difficult to find someone wanting to work only 11 hours per week or even to drive out to the consumer's house for so few hours, especially in rural areas with long distance drives. Cutting the plan up more, say in half, unduly penalized the main worker who had a personal stake in the well being of the consumer. To get around this rule, some consumers and workers simply used two different payroll agencies for the additional hours. This caused extra, unnecessary paperwork, meant two different paychecks sometimes at different wages for the same work and received at different times and the worker still worked as many hours at straight pay thus obviating the whole issue of hours worked and overtime anyway! This is not to mention that FLSA was still probably being violated. What a hassle for all involved! It was a big relief for the relatively few people involved when the ruling was interpreted to allow workers to work more than 40 hours at straight time if they and the consumer agree to the arrangement.

TILRC only assists with self directed services where the consumer hires, manages, schedules, etc. the worker. Under color of state law and regulation, the consumer is the employer, not the agency.

If S. 2061 passes, it will seriously disrupt both the lives of people with disabilities and their attendants. The attendants will have smaller paychecks. It won't really affect my agency. It will cause problems for the people we represent and serve. With the ongoing severe budget constraints here, it is unrealistic to believe that reimbursement rates (and state budgets) will increase significantly to cover the extra cost for overtime. Our state lawmakers WILL NOT go for paying $12 to over $14 per hour for someone to sleep. Some lawmakers already think wages are too generous as it is and we face regular threats to cut reimbursement rates during our annual legislative session. Workers will lose pay; consumers will face difficulty finding workers to fill in the "left over" small amount of hours. Cost efficiencies in the current system will be lost.

For these reasons, please rethink this bill. Since the grassroots, general disability community was not included in the drafting of this bill, these kinds of stories and this kind of hands-on knowledge was not brought to the table. By working together, we can perhaps, address the problems that need fixing while protecting people with severe disabilities and the innovative, cost effective programs they rely on and by the way, also not inadvertently cutting the pay of scarce and valuable attendant workers.

TILRC is aggressively working at the state level to increase wages and create access to good health insurance and other benefits that workers deserve. We take workforce issues

very seriously. After all, the lives and independence of people with disabilities, of ourselves, depend on access to a quality, dependable workforce.

TILRC cannot support this bill as drafted and asks that you do not support either. All stakeholders need to work together and be at the table to solve this problem. Important pieces of information and working knowledge were left out of the equation in the drafting of this bill.

Yours, very truly,

Mike Oxford
Executive Director

[The statement of Ms. Reyes follows:]

Prepared Statement of Laura Reyes, President-Elect, United Domestic Workers of America (AFSCME)

My name is Laura Reyes. I am a home care provider and the President-elect of the United Domestic Workers of America (UDWA). My union and I appreciate the opportunity to submit testimony for the record. Since 1979, UDWA has been the pioneer union representing domestic workers, home attendants and in-home care workers. UDWA is affiliated with the National Union of Hospital and Health Care Employees, of the American Federation of State, County and Municipal Employees (AFSCME) and is proud to represent 50,000 home health care workers who work through the county based In-Home Supportive Services (IHSS) public authorities or Addus HealthCare, Inc., in California. UDWA was inspired by César E. Chávez, who

recruited and trained our founding leaders and planted in them the seed to build the domestic workers movement.

UDWA supports H.R. 3582, the Fair Home Health Care Act, which would ensure that home health care workers have the basic wage and hour protections under the national Fair Labor Standards Act.

The home care providers represented by UDWA assist individuals who have disabilities with mobility, personal hygiene, transportation, cleaning and cooking, allowing them the independence to live at home with dignity and remain active community members. The unique emotional connection required, intense physical and personal nature of the work, and potential hazards of the work, make it very challenging, often draining and rewarding. For many elderly recipients of home care services, we are the only person they see regularly beside their physician. Because home care providers with UDWA are dedicated professionals and committed to the people we serve, we keenly understand the link between providing workers with living wages, benefits and training, which leads to a stable and well-trained workforce, and the delivery of quality services that truly satisfy our client customers' needs.

It is fundamentally wrong, unfair and unacceptable that the current law, as held by the Supreme Court, does not provide home care workers with the basic protections afforded to all hourly workers under the Federal Fair Labor Standards Act. Wages for home care workers are low and keep families near poverty. Two out of five home care workers employed by a home care agency lack health insurance. Due to the high injury rates, home care workers are especially vulnerable without adequate insurance coverage.

The U.S. Department of Labor projects that at least another third of a million new home health aides will be needed by 2014 to meet the home health care needs of an aging population that is expected to more than double, from 13 million in 2000 to 27 million in 2050. By providing home care workers with basic wage and hour protections, H.R. 3582 would help to reduce turnover and begin to address chronic provider shortages.

The failure to provide minimum wage and hour standards for home care workers puts the individuals who need their services at risk. Since a client's quality of life and safety may depend on the reliability and the skill of the home care worker, access to quality services depends on a stable and committed workforce. Low wages, long hours and no benefits will continue to deprive individuals with disabilities of access to needed services because these conditions drive more workers out of these important jobs at a time when the need for home care providers is expected to dramatically increase.

Improving wages and benefits of workers has been shown to substantially reduce turnover and improve clients' access to reliable and quality services that enable them to remain independent and in their homes. An evaluation of the aggregate impact of collective bargaining and changes in local wage statutes found that improving wages and benefits resulted in a 54 percent increase in the number of home care workers and reduced annual turnover by 30 percent.

H.R. 3582, by providing home health care workers with the national minimum wage and hour protections, is an important step in improving the recruitment and retention of a reliable and skilled home care workforce but more must be done. UDWA urges Congress to improve funding for home care services, and to expand affordable access to health care. In America no one should be without health care, especially home health care workers.

Without objection, this hearing is adjourned. Thank you.

[Whereupon, at 11:09 a.m., the subcommittee was adjourned.]

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