Where the Heart Is: Amending the Fair Labor Standards Act To Provide Wage and Overtime Pay Protection to Agency-Employed Home Health Aides

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INTRODUCTION

In June 2009, fifteen Senators, led by Senator Tom Harkin, sent a letter to U.S. Department of Labor ("DOL") Secretary Hilda Solis urging the DOL to interpret the Fair Labor Standards Act to extend wage and hour protection to America's home health care workers. The Senators’ letter voiced the plight of approximately one million home health aides whose claim to unpaid wages and overtime pay has made its way to the Supreme Court by an unlikely champion: Evelyn Coke. Ms. Coke was a mother of five who worked as a home health aide for more than two decades. Although she often worked more than seventy hours a week, she never received a penny of overtime pay. Under existing federal law, she had no right to.

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837
While the Fair Labor Standards Act ("FLSA") extends broad minimum wage and overtime pay protections to millions of low-wage workers, a 1974 amendment that extended protection to domestic employees simultaneously carved out an exception for certain types of employees under the "companionship exemption." With this exemption, Congress intended to exclude casual babysitters and "companions," essentially elder sitters, from wage and hour law protections in light of the ad hoc nature of these employment relationships. Today, despite the bona fide employment status of home health aides employed by third party agencies, the DOL has deemed these employees "companions" within the companionship exemption. Under this third party rule, agency-employed home health aides have no claim to overtime pay, regardless of the size or sophistication of their employer. When faced with Ms. Coke's challenge to the third party rule in *Long Island Care at Home, Ltd. v. Coke*, the Supreme Court deferred to the DOL's rulemaking authority, essentially punting the issue to Congress. As a result, home health aides—at the heart of one of the fastest growing segments of the direct care industry—remain among the ranks of its lowest paid.

This Note argues that Congress must amend the companionship exemption to extend minimum wage protection and overtime pay to home health aides employed by third party agencies if the direct care industry is to accommodate America's growing senior population. To avoid burdening patients with increased costs of care, Congress should include an

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5 See id. § 213(a)(15). FLSA protections shall not apply to "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 . . . ." Id. (emphasis added).
6 It should be noted that a significant amount of home health aides are employed by private individuals and are not affiliated with third party agencies. See infra note 61. Arguably, these aides are similarly deserving of wage and hour protections. However, in light of the logistical difficulties in regulating these types of employment relationships and the fact that third party employment more readily fits within the scope of formal employment as defined by courts, the reach of this Note is limited to agency-employed home health aides. See infra notes 63–66 and accompanying text.
7 See 29 C.F.R. § 552.109(a) (2011).
9 See infra note 147 and accompanying text.
accompanying tax-incentive to third party agencies whose compliance is mandated. Building on existing scholarship concerning the disparity between Congress’s conception of an exempt “companion” and the contemporary home health aide, as well as the need for alternate legislation, this Note examines both Coke and proposed legislation to bring home health aides within the scope of the FLSA. Ultimately, this Note endeavors to address the practical problems inherent in past and current legislative proposals and to offer a plan to extend FLSA protections to agency-employed home health aides without projecting increased costs onto consumers.

Part I of this Note explores the increasing demand for long-term senior care services and the vital role of home health aides within the direct care industry. Part I also examines the 1974 amendment to the FLSA that created the companionship exemption and illustrates that in using the term “companion” Congress did not intend to exclude workers formally employed by private, for-profit agencies. Part II explores litigation surrounding the companionship exemption, and, in particular, courts’ unfavorable treatment of home health aides’ claims for overtime pay. Part II also examines the DOL’s third party rule, which extends the companionship exemption to home health aides employed by third party agencies, and the Supreme Court’s deference to the rule in Coke. Part II argues that in light of Coke and the crisis the companionship exemption poses to quality senior care, Congress should amend the exemption to bring the FLSA in line with its original intent.

Part III examines potential legislative responses to Coke and argues that the proposed 2007 Fair Home Health Care Act is the best option for extending wage and overtime protection to home health aides. Part III seeks to make the Act an affordable option by proposing an accompanying tax-incentive aimed at home health agencies, which will offset a percentage of an agency’s wage expenditures per employee. This solution: (1) restores a federal cause of action for home health aides employed by third party agencies; (2) allows increased costs to be absorbed by agencies rather than consumers, who in turn rely on already


burdened Medicare and Medicaid systems; and (3) will attract new and competent workers to the home health profession thereby increasing access to quality, affordable senior care and meeting the demand of America's booming senior population. Indeed, the Fair Home Health Care Act is not only imperative to ensuring quality long-term care but a necessary and overdue affirmation of the dignity of home health care workers and the people they serve.

I. HOME HEALTH CARE, THE FAIR LABOR STANDARDS ACT, AND A LEGACY OF EXCLUSION

A. Scope of the Home Health Care Industry

With an aging baby-boomer population and "increases in life expectancy and medical advances that allow individuals with chronic conditions to live longer,"12 the need for long-term care services is increasing rapidly.13 "Between 2003 and 2030, the percentage of people in the United States aged [sixty-five] and older is expected to increase from [twelve] percent of the total population to [twenty] percent."14 Furthermore, the number of Americans age eighty-five and older—those most likely to need personal care services—is projected to more than double, from 4.3 million to 8.9 million.15 Care giving for those within this group is an issue that touches millions of American households: "Nearly one out of every four ... households provides care to a relative or friend aged [fifty] or older and about [fifteen] percent of adults care for a seriously ill or disabled family member."16

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13 Id.


16 See Hearing, supra note 12 (statement of Dorie Seavey).
A shift in cultural attitudes and federal policy away from institutionalization toward home health care services has placed home health aides in high demand. In recent years, the federal government has implemented formal efforts toward "rebalancing"...the expansion of home—and community—based services relative to those provided in institutional settings, such as nursing homes...." Under The Older Americans Act, the federal government has provided funding to support states' rebalancing programs to "[d]ivert people from nursing homes" by using Medicaid funds to support "consumer-directed models of service delivery that enable a person receiving...[funds] to...hire [a person] of their choice" and enter community-based long-term care programs or receive at-home care. States' reports indicate the success of rebalancing measures, as the number of nursing home residents has declined in favor of at-home care. The distribution of health care workers between private residences and institutional facilities reflects the impact of "rebalancing" and the increased demand for home health aides. "Nationally there are now more [home health] aides providing supports and services in people's homes... than in nursing care

17 See id.
18 Id. at 26.
Moreover, the DOL projected a fifty percent increase in the number of home health aides between 2008 and 2018. In short, home health care is a rapidly expanding sector of the direct care industry.

The breadth of work performed by home health aides has made it possible for this shift to occur, enabling thousands of elderly and infirm individuals to remain in the comfort of their homes while they receive critical care that otherwise might only be available to them within the confines of a full-time nursing care facility. Home health aides' daily tasks include taking a patient's temperature, pulse rate, respiration rate or blood pressure; helping patients get in and out of bed; changing medical dressings; assisting with braces and artificial limbs; assisting with other medical equipment such as ventilators; as well as administering medications; observing and reporting changes in medical condition; providing oversight for people with cognitive and mental impairments; and assisting with toileting functions such as administering catheters. Additionally, many home health aides perform personal care tasks including cooking, doing laundry, bathing, feeding, and dressing clients. This broad scope of care provides a lifeline for homebound and limited-mobility seniors, and effectuates the government's stated preference for at-home versus institutionalized long-term care.

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22 Hearing, supra note 12, at 29 (statement of Dorie Seavey) (explaining that there are 826,802 home health aides versus 782,948 aides employed in nursing homes).


24 See id.

25 Id. at 1–2.

26 See id. at 1; Wright, supra note 15, at 1.

27 OCCUPATIONAL OUTLOOK HANDBOOK, supra note 23; see, e.g., Cox v. Acme Health Servs., 55 F.3d 1304, 1310 (7th Cir. 1995).

28 OCCUPATIONAL OUTLOOK HANDBOOK, supra note 23, at 1.
B. Exclusion of Home Health Aides Under the Fair Labor Standards Act's Companionship Exemption

1. Enactment and Scope of the FLSA

A "cornerstone of the New Deal,"29 the FLSA was enacted in 1938 as a broad remedial measure to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for [the] health, efficiency, and general well-being of workers...."30 Toward this end, the Act not only established a federal minimum wage but provided overtime protection, requiring that "employee[s] receive[ ] compensation for...employment in excess of...[forty hours a week] at a rate not less than one and one-half times the regular rate."31

These FLSA protections as originally adopted, however, did not reach domestic service workers—overwhelmingly comprised of African Americans and females32—"because of doubt about whether they were engaged in interstate commerce."33 As commentators have noted, this "history of exclusion" from federal minimum wage protection "was a result of the ideological separation of the private home and workplace, and the 'special' place of domestic labor within the family."34 Home was thought of "as a separate sphere from the market"35 and, therefore, beyond reach of the federal commerce power.36 "As the paradigmatic form of woman's work," one scholar writes, "society

29 Biklen, supra note 10, at 113.
32 See Brief for the Urban Justice Center et al. as Amici Curiae Supporting Respondent at 2 n.1, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007) (No. 06-593) [hereinafter Brief for the Urban Justice Center] ("By 1940, [sixty] percent of all black female workers were domestic servants, as compared to only [ten] percent of all white women workers.").
33 SMITH, supra note 14, at 2; see also Biklen, supra note 10, at 117–21.
35 Biklen, supra note 10, at 118.
36 That this idea persisted is evident in remarks made during the legislative debates surrounding the 1974 amendment: "[I]f domestic workers are in interstate commerce by virtue of the fact that they use vacuum cleaners, then the commerce power indeed has no limits." 119 CONG. REC. 24,796 (1973) (statement of Sen. Dominick).
viewed domestic service as easy, stress-free work that required minimal exertion,” and by extension, no legal protection.

Congress sought to correct this categorical and discriminatory exclusion with a 1974 amendment extending FLSA protections to domestic workers. Debates on the amendments reverberated with disparate notions of the nature of domestic labor—characterized on the one hand as women’s work performed out of affection and on the other as an arm’s length employment relationship in need of governmental oversight. Opponents of the amendment “remind[ed] their fellow legislators that domestic service was unique in that it was merely a substitute for, or an addition to, the labor of a housewife.” This familial characterization of domestic labor implied a level of intimacy that defied market regulation. Proponents, in contrast, argued that the long days, low wages and demeaning treatment to which domestic employees were subjected were precisely the type of labor conditions the FLSA was enacted to address. For proponents, “considerations of racial justice and gender equality were [also] a central theme of their argument for covering domestic service employees.” The proponents prevailed, and resulting legislation brought domestic workers ranging from “cooks, waiters, butlers, valets, maids, housekeepers, [and] governesses” to “footmen, grooms, and chauffeurs” and others under the FLSA’s protective umbrella.

2. The Companionship Exemption

Despite the triumph that the 1974 amendment symbolized for many domestic workers, Congress, as a bipartisan

37 Biklen, supra note 10, at 120 (quoting Smith, supra note 34, at 894).
38 See id. at 124–25. “For... proponents [of the amendment], this focus on the modernization of domestic employment was part of a larger movement for civil rights. At the time of the legislative debates about the FLSA extension, ninety-seven percent of all domestic employees were women and two-thirds were black.” Id. at 124 (footnote omitted).
40 Biklen, supra note 10, at 120.
41 See id. at 114.
42 See id. at 123 n.54.
43 Brief for the Urban Justice Center, supra note 32, at 24; see 119 CONG. REC. 24,799 (1973) (statement of Sen. Williams).
44 29 C.F.R. § 552.3 (2011).
45 Id.
compromise, withheld wage and overtime protection from some domestic employees. First, Congress exempted from FLSA protection “any employee employed on a casual basis . . . to provide babysitting services.” Here, Congress ensured that individuals who hire a neighborhood babysitter for an evening out would not have to comply with federal wage and hour laws. “[B]abysitters employed on other than a casual basis,” however, would enjoy full protection under the FLSA. This distinction indicates that Congress did not intend for the exemption to reach full-time employees or those formally engaged in a vocation.

Second, Congress excluded any person “employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.” Like the exemption of neighborhood babysitters, this companionship exemption was intended to exclude friends, family or others hired “in a pinch” to sit with an aged or infirm relative. In short: “an elder sitter.”

The congressional debates surrounding the companionship exemption indicate that lawmakers contemplating an “elder sitter” did not intend to exclude from the FLSA the complex and varied work of home health aides. For example, the definition of “companion” proposed by Senator Harrison Williams—Chairman of the Subcommittee on Labor and Public Welfare and a leading proponent of wage protections for domestic servants—presumes a level of informality: “I think we all have . . . in mind . . . what a babysitter is there for—to watch youngsters. ‘Companion,’ as we mean it, is in the same role—to be there and to watch an older person, in a sense.” As one commentator noted, the correlation to a babysitter suggests that the companion is an ad hoc

46 See Biklen, supra note 10, at 125–27.
48 See id.
49 29 C.F.R. § 552.3.
50 See Biklen, supra note 10, at 129.
54 The companionship exemption would shield from FLSA requirements “people who . . . have an aged father, an aged mother, an infirm father, an infirm mother, and a neighbor comes in and sits with them.” Id.
55 Senator Burdick stated that a companion is, “[i]n other words, an elder sitter,” to which Senator Williams responded, “Exactly.” Id.
56 Id.
substitute for the primary caregiver, typically a family member: "The implication that companions serve a similar function—to watch older people when the primary caretakers had errands to run—suggests that the legislators still viewed this as part of a core family function that did not need to be legitimated . . . ." Thus, the terms "babysitter" and "companion" were not intended to characterize "regular bread-winners . . . responsible for their families' support" or workers who "do[ ] this as a daily living." Nevertheless, home health aides have been considered "companions" by virtue of DOL regulations defining "'companionship services' " as "services for the 'fellowship, care, and protection' of persons who cannot care for themselves": a definition "that greatly exceed[s] the essential understanding of a companion that prevailed in 1974."

Unlike the casual and intermittent arrangement envisioned by Congress, agency-based home health care work constitutes bona fide employment. Most home health aides are formally "employed by home healthcare or independent living agencies, which are often paid through Medicaid and Medicare," consistent with federal and state rebalancing efforts. These aides satisfy both tests adopted by courts to determine worker status as an employee versus an independent contractor: the common law control test and the economic realities test. The common law test essentially looks at "the extent of control" the employer "exercise[ ] over the details of the work." Even broader than the common law control test is the economic realities test, which was adopted by the Supreme Court

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57 Biklen, supra note 10, at 129.
59 119 CONG REC. 24,801 (1973) (statement of Senator Burdick).
60 SMITH, supra note 14, at 5.
61 Biklen, supra note 10, at 132; see Hearing, supra note 12, at 31–32 (statement of Dorie Seavey). There is also "an admittedly huge private-pay 'grey market' operating 'off the books,' where private individuals hire aides on their own" that is "completely unregulated." Id. at 32.
62 See supra notes 17–21 and accompanying text.
The economic realities test asks whether a worker is dependent on the employer as a matter of economic realities by looking at several factors in addition to control, such as the company's power to hire, fire, or modify the employment condition. In agency-based home health care, "the agency usually exercises considerable control over the worker." In fact, court records indicate that agency-employed home health aides are required to adhere to agency-established procedures and a plan of care for a particular client and typically work under the direction of a registered nurse. Given this lack of professional autonomy and the extent to which the agency is relied upon as the primary source of livelihood, agency-employed home health aides constitute bona fide employees.

Moreover, the work of home health aides is highly demanding. The home health work force is largely full-time, with work weeks often exceeding forty hours. "Most aides work with a number of different patients, each job lasting a few hours, days, or weeks" and often see "multiple patients on the same day." Because many patients need care twenty-four hours a

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66 See, e.g., Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754–55 (9th Cir. 1979). For a discussion of the specific factors considered in the economic realities test, as well as the different employment status tests that have been developed by courts under various labor and employment laws, see generally Katherine V.W. Stone, Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers, 27 BERKELEY J. EMP. & LAB. L. 251 (2006).

67 Smith, Home Sweet Home?, supra note 63, at 544.

68 See Cox v. Acme Health Servs., Inc., 55 F.3d 1304, 1306 (7th Cir. 1996); Anglin v. Maxim Healthcare Servs., Inc., No. 6:08-cv-689-Orl-22DAB, 2009 WL 2473685, at *1 (M.D. Fla. Aug. 11, 2009) (“Plaintiff worked under the supervision of a Registered Nurse to provide medically necessary assistance and personal care to patients in accordance with the orders of the [patient's] physician and the plan of care.”).


70 See, e.g., Cox, 55 F.3d at 1307 (stating that Plaintiff Cox was regularly employed in excess of forty hours per week); Buckner v. Fla. Habilitation Network, Inc., 489 F.3d 1151, 1153 (11th Cir. 2007) (declaring that the Appellee, a home health aide employed by appellant agency, regularly worked in excess of forty hours per week).

day, some aides work evenings, nights, weekends, and holidays.\textsuperscript{72} Furthermore, "[o]vertime in this industry is not always voluntary. Rather it is often due to understaffing [and] worker shortages . . . .\textsuperscript{73}" Adding to an often grueling schedule, work as an aide can be physically taxing with many hours spent standing, walking, and lifting or transporting patients.\textsuperscript{74} The emotional impact of the work also appears significant: Among all workers in the United States, personal care workers experience the highest rates of depression lasting two weeks or longer.\textsuperscript{75}

II. HOME HEALTH AIDES IN THE FEDERAL COURT SYSTEM

A. Exceptions to the Companionship Exemption & Pre-Coke Litigation

In light of the disparity between the realities of the home health profession and the category of "companion" under which home health aides have been lumped, aides have turned to courts for redress. In fact, the companionship exemption has been among the most litigated aspects of the FLSA.\textsuperscript{76} Plaintiffs' challenges to the companionship exemption typically invoke two exceptions to the exemption established by DOL regulations: the "household work" exception and "trained personnel" exception.\textsuperscript{77} Both have proven ineffective as inroads for home health aides to FLSA protections. A third challenge—of greatest importance to this Note and discussed in the section below—calls into question the application of the companionship exemption to home health aides employed by third party agencies.

1. The Household Work Exception

Under the "household work exception" to the companionship exemption, home health aides' claims to FLSA protection hinges on their allocation of time between household chores and direct client care.\textsuperscript{78} A home health aide whose general household work "exceed[s] [twenty] percent of the total weekly hours worked" will
be entitled to minimum wage and overtime so long as the household work is “incidental” and not “related to the care of the aged or infirm person.” As no precise definition of “general household work” is provided by the department’s regulation, it has been left to courts to determine which tasks will count toward the twenty percent threshold.

Courts have had difficulty drawing a precise line between household work that is “general” as opposed to “related to” client care, and the ambiguity has favored defendants. In McCune v. Oregon Senior Services Division, the Ninth Circuit “affirmed [the] district court[s] [finding] that regular dusting or cleaning . . . would . . . [constitute] general household work that could not exceed twenty percent of the [home health aide’s] time.” “Cleaning a spill by the client,” however, “would be . . . care more related to the individual than to the general household,” and would therefore not count toward the twenty percent threshold. The scope of related care discussed by the court in McCune was expanded so broadly in Terwilliger v. Home of Hope, Inc. as to render the twenty percent exception virtually inapplicable to home health aides. In Terwilliger, the court declared that “mopping and dusting,” for example, were related to a client’s care because the client crawled around on the floor; for another client who was allergic to dust and mold, “[d]usting, sweeping, mopping[,] and wiping countertops” all constituted household work related to his care. As one scholar noted, by the Terwilliger logic, “an employee could perform unlimited household work for an elderly client and still be under the companionship services exemption.”

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79 29 C.F.R. § 552.6.
81 Biklen, supra note 10, at 142–43.
82 894 F.2d 1107 (9th Cir. 1990).
83 Biklen, supra note 10, at 143.
84 Id.; see Biklen, supra note 10, at 143.
86 Id. at 1238, 1251; see Biklen, supra note 10, at 143–44.
87 Biklen, supra note 10, at 144.
2. The Trained Personnel Exception

Like the household work exception, the trained personnel exception has proven futile for home health aides seeking a right to overtime pay through the courts. Under the trained personnel exception, the companionship exemption does not extend to services that "require and are performed by trained personnel, such as a registered or practical nurse." While the use of the phrase "such as" would seemingly indicate that nurses are but an example of such trained personnel, in practice, courts have limited the exception to those who are actually registered and licensed practical nurses. In *Cox v. Acme Health Services, Inc.*, for example, the Seventh Circuit rejected the Plaintiff's argument that the regulation's "use of the phrase 'such as'. . . left open the possibility that other trained employees [like the Plaintiff] would also qualify for this exception." The court held that the Plaintiff, who was certified in CPR and had completed seventy-five hours of home health aide training in addition to 105 hours of certified nursing assistant training, did not qualify as trained personnel. The court reasoned that the "mere seventy-five hours of training [required] to become a home health aide" was but "a fraction of the training received by registered or practical nurses." This reasoning has been pervasive, with identical conclusions reached in the Fifth, Ninth, and Tenth Circuits. "Reading literally the regulation's

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89 29 C.F.R. § 552.6 (2011).
90 Biklen, supra note 10, at 141; see, e.g., *Cox v. Acme Health Servs, Inc.*, 55 F.3d 1304, 1309–10 (7th Cir. 1995).
91 55 F.3d 1304 (7th Cir. 1995).
92 *Id.* at 1309 (emphasis omitted).
93 *Id.* at 1307 & n.5, 1309–10.
94 *Id.* at 1309–10. The court's analysis focused on the hierarchical structure of direct home health care, finding “[o]f particular significance . . . the fact that a home health aide must be closely supervised by a registered nurse, who is responsible for providing the home health aide with written instructions for patient care and making regular supervisory visits to the patient's home.” *Id.* at 1310 (internal quotation marks omitted).
95 See *Cook v. Hays*, 212 F. App'x 295, 295–96 (5th Cir. 2006) (affirming the district court's holding that Plaintiff, who was trained as a radiologist technician but was not a registered nurse, was not trained personnel).
96 See *McCune v. Or. Senior Servs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990) (affirming the district court's holding that Plaintiffs, who were certified nursing assistants who received sixty hours of formal training, were not trained personnel).
use of nurses as an example of trained personnel, . . . the courts therefore require that an employee actually be a nurse or have received training equivalent to that of a nurse to fall within the ‘trained personnel’ exception. \(^9\)

Courts’ narrow reading of the trained personnel exception as essentially a nurses’ exception is problematic for three reasons. First, as Judge Pregerson stated in her dissent in \textit{McCune}, the court’s holding that certified nursing assistants were “not trained for the purposes of minimum wage coverage smacks of elitism.” \(^9\) Judge Pregerson’s pointed comment is supported by courts’ frequent characterization of home-health-aide plaintiffs’ tasks as “simple,” \(^10\) even where the range of tasks cited in those same opinions is lengthy and complex. Second, because the FLSA was enacted as a humanitarian statute intended “to extend the frontiers of social progress,” \(^10\) courts have almost universally recognized that exemptions to the FLSA must be narrowly construed. \(^10\) In fact, as the Supreme Court articulated in \textit{A.H. Phillips, Inc. v. Walling}, “[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.” \(^10\) From this principle, as Judge Pregerson has argued, it follows “that exceptions to the exemptions should be broadly [interpreted]” in favor of plaintiffs. \(^10\) A broader

\(^{99}\) Courtois, 926 F.2d at 1118 (Pregerson, J., dissenting).

\(^{100}\) See, e.g., Cox v. Acme Health Servs, Inc., 55 F.3d 1304, 1306 (7th Cir. 1995) (“Duties [of home health aides] may include the performance of \textit{simple procedures} as an extension of therapy services or nursing service, personal care, ambulation and exercise, household services essential to health care at home, assistance with medications that are ordinarily self-administered, reporting changes in the patient’s conditions and needs, and completing appropriate records.”) (emphasis added); \textit{Cook}, 212 F. App’x at 296 (stating that Plaintiff, a full-time direct care worker, performed “\textit{simple physical therapy}” as part of a “comprehensive Plan of Care”) (emphasis added).


\(^{102}\) See, e.g., \textit{Arnold v. Ben Kanowsky, Inc.}, 361 U.S. 388, 392 (1960); \textit{A.H. Phillips, Inc.}, 324 U.S. at 493; \textit{McCune}, 894 F.2d at 1109.

\(^{103}\) \textit{A.H. Phillips, Inc.}, 324 U.S. at 493.

\(^{104}\) \textit{McCune}, 894 F.2d at 1113 (Pregerson, J., dissenting).
application of the trained personnel exception would bring more low-wage workers into the scope of FLSA protection, consistent with the legislative intent of the Act.

Finally, the courts' application of the trained personnel exception reveals the logical inconsistency underscoring the exemption: Home health aides working in domestic employment—including those employed by third party agencies—are not entitled to minimum wage and overtime pay while “the same work performed by an aide in a nursing home is unambiguously covered by” the FLSA. This discrepancy “ignores the rapidly changing realities of the contemporary health care industry” and undermines the federal government's policy favoring home care as a preferable alternative to institutionalization.

B. The Third Party Rule and Long Island Care at Home, Ltd. v. Coke

Perhaps the most visibly litigated aspect of the companionship exemption, the third party rule—which declares that agency-employed home health aides are excluded from FLSA protection—rests on the shaky foundation of conflicting regulatory language. The DOL's “General Provisions” define the statutory term “domestic service employment” as “[s]ervices of a household nature performed by an employee in or about a private home of the person by whom he [or she] is employed.” Under this first regulation—the crux of the Plaintiff's argument in Coke—a home health aide employed by a third party agency would not qualify as a domestic service employee for purposes of the companionship exemption. In other words, agency-employed home health aides would be entitled to minimum wage and overtime pay, a status their formal employment relationship would have garnered them prior to the 1974 amendments. A second regulation, however, set forth in a subsection entitled “Interpretations” states that exempt companionship workers include those “who are employed by an employer or agency other

105 Hearing, supra note 12, at 33 (statement of Dorie Seavey).
106 McCune, 894 F.2d at 1113 (Pregerson, J., dissenting).
107 See supra notes 17–21 and accompanying text.
than the family or household using their services."109 Under this third party rule, home health aides who are employed by an agency are within the scope of the companionship exemption, despite the formal nature of their employment relationship. As the Court noted in Coke, the DOL had on at least three separate occasions attempted to reconcile the inconsistency by "changing the regulation and narrowing the exemption in order to bring [home health aides employed by third parties] within the scope of the FLSA's wage and hour coverage."110

Political turnover stymied attempts to reconcile the conflict in favor of home health aides. Under outgoing President Clinton, the DOL issued three proposals for a new definition of companionship services intended to reduce the number of employees excluded from FLSA wage and hour protection.111 A new definition was warranted, according to the DOL, as "significant changes in the home care industry over the last [twenty five] years, [have meant that] workers who today provide in-home care . . . are performing types of duties and working in situations that were not envisioned when the companionship services regulations were promulgated."112 In 2002, however, the Bush administration withdrew the proposed regulations, citing concerns about increased costs of homecare.113 Ultimately, the DOL made no changes, leaving the judiciary with the task of ironing out the conflict.

Adding to the regulatory tangle is the fact that prior to the DOL's enactment of the third party rule in 1975, home health aides employed by third party agencies were unambiguously protected by the FLSA under the "enterprise" coverage provision.114 The "enterprise" provision of the FLSA, added in the 1960s, extended minimum wage and overtime protections to

110 Coke, 551 U.S. at 163.
individuals, including domestic service employees employed in an “enterprise” of a certain size. As such, the enterprise coverage provision kept agency-employed home health aides within the scope of federal protection, even after the enactment of the companionship exemption. The DOL's 1975 third party rule, however, interpreted the companionship exemption as withdrawing coverage of such employees. In other words, the 1975 rule operated to repeal enterprise coverage in the area of at-home care, despite the size or profit margin of the employer. In this way, the DOL shifted the focus of wage and hour laws from the nature of the employer to the nature of the work performed. The current result of the DOL's action is that the proliferation of large for-profit home health agencies, which employ the majority of the nation's home health aides, are not held to compliance with federal wage and hour laws.

Whether the DOL's third party rule was enforceable in light of this long-standing conflict took center stage in Coke. In Coke, home health aide Evelyn Coke sued her agency-employer claiming that “despite working more than [forty] hours a week she never received overtime payments and that her hourly wage was less [than] the minimum wage outlined in the FLSA.” In response, Long Island Care at Home argued that it was exempt

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115 Id. To qualify as an “enterprise,” an employer had to have annual gross sales of at least $250,000. See id. § 203(s)(1); 1 NLRB, LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS AMENDMENTS OF 1966, at 2 (1968). The limit has since been changed to $500,000. See § 203(s)(1)(A)(ii).

116 See Brief for the Urban Justice Center, supra note 32, at 4–5.

117 See Brief for the United States as Amicus Curiae Supporting Petitioners at 4, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007) (No. 06-593). “After receiving and considering comments on the proposed rule . . . [the] DOL decided that all third-party employment, without regard to the employer's status as a covered enterprise, should be included within the scope of the companionship services exemption.” Id.; see also Application of the Fair Labor Standards Act to Domestic Service, 40 Fed. Reg. 7405 (1975) (codified at 29 C.F.R. § 552.3 (2010)).

118 See Brief for the Urban Justice Center, supra note 32, at 11 (“There simply is no evidence of some freestanding authorization to exempt large, profit-making employers whose economic activities are at the heartland of Congress's legislative jurisdiction.”).

119 “There are now almost 25,000 homecare agencies in the U.S., with almost three-quarters being for-profit. For-profit companies employed [sixty-two percent] of home health care aides as of 1999.” Hearing, supra note 12, at 13–14 (statement of Craig Becker, Associate General Counsel, Service Employees International Union).

120 See 29 C.F.R. § 552.109(a) (2010).


122 Id. at 334.
from FLSA wage and hour requirements in light of the third party rule because Ms. Coke fell within the companionship exemption.

At issue throughout Coke's journey to the Supreme Court were not the substantive merits of Ms. Coke's wage and hour claims, but the degree of judicial deference to afford to the DOL's interpretation of the companionship exemption. The Supreme Court established the standard of judicial deference owed to administrative agencies in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.123 *Chevron* declared that when Congress "has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."2124 In light of *Chevron*, the district court held that the DOL's third party rule was valid.125 The Second Circuit posited, however, that some agency regulations are entitled to less than *Chevron* deference, namely where those regulations are interpretive, rather than legislative.126 Where a regulation is merely interpretive, the court explained, it is entitled to the lower-level deference established in *Skidmore v. Swift & Co.*127 Under *Skidmore*, an interpretation is not binding on courts, as it would be under *Chevron*, but rather, should be looked to for its "power to persuade."128

Applying precedent to the regulations at hand, the Second Circuit declared that the third-party rule was not a legislative regulation entitled to full *Chevron* deference, but merely an interpretive regulation entitled to lower-level *Skidmore* deference.129 Of particular, if perhaps obvious, significance to the court was that the DOL published the rule among its

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124 Id. at 843–44.
125 See Coke, 267 F. Supp. 2d at 341.
126 See Coke v. Long Island Care at Home, Ltd., 376 F.3d 118, 131 (2d Cir. 2004) ("[Interpretive rules . . . enjoy no *Chevron* status as a class."] (second alteration in original) (quoting United States v. Mead Corp., 533 U.S. 218, 232 (2001))). The Court noted that while all prior courts had granted the third party rule *Chevron* deference, those decisions were post-dated by *Mead*, which called for a different analysis. See id.
127 See id. at 133 (citing Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)).
128 Skidmore, 323 U.S. at 140; see Coke, 376 F.3d at 133.
129 See Coke, 376 F.3d at 133.
interpretations, rather than among other regulations holding the force of law. Moreover, the court refuted the DOL’s argument that the third party rule “was promulgated after notice and comment” and therefore within the proper exercise of the DOL’s rulemaking authority.

Consistent with judicial treatment of an administrative interpretation, the Second Circuit turned to an analysis of the third party rule’s “power to persuade” and subsequently declared the rule to be unenforceable. To determine the interpretation’s persuasive value, the court examined several factors, including: its “consistency with the congressional purpose,” as well as “its consistency with other regulations; the consistency of the agency’s position over time; the thoroughness evident in [the agency’s] consideration; and the validity of its reasoning.”

Pointing out abounding inconsistencies for each of these factors, the Second Circuit found the DOL’s third party rule lacking.

The Supreme Court, however, reversed the Second Circuit, holding that the third party rule was a valid and binding exercise of the DOL’s rulemaking authority entitled to full Chevron deference. The Court first acknowledged that the DOL’s regulations conflicted as to whether the companionship

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130 See id. at 131. That the “DOL did not intend to use the legislative power delegated in § 213(a)(15),” the companionship exemption, was “apparent from its inclusion of the regulation under ‘Subpart B-Interpretations’ as opposed to ‘Subpart A-General Regulations.’” Id.

131 See id. at 132. “[T]he notice and comment procedure...was at best idiosyncratic and at worst insufficient.” Id.

132 See id. at 133–35. The Supreme Court vacated the court’s decision and remanded the case to “the Second Circuit for further consideration in light of the [DOL’s] Wage and Hour Advisory Memorandum No.2005-1 (December 1, 2005).” Long Island Care at Home, Ltd. v. Coke, 546 U.S. 1147, 1147 (2006). On remand the Second Circuit “adhered to [its] original position” that § 552.109(a) was unenforceable. Coke v. Long Island Care at Home, Ltd., 462 F.3d 48, 50 (2006).

133 Coke, 376 F.3d at 133 (alterations in original) (citations omitted) (internal quotation marks omitted).

134 See id. at 133–35. Specifically, the Second Circuit found: (1) that it was “implausible, to say the least, that Congress...would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered”; (2) that the third party rule was “jarringly inconsistent” with the DOL’s other regulations; (3) that the agency itself had taken inconsistent positions with regard to FLSA coverage over time; and (4) “the DOL’s inadequate reasoning in support of the regulation is matched by its failure to exhibit thoroughness in its consideration.” Id. at 133–34.

exemption applied to agency-employed home health aides. To determine which regulation controlled, the Court deferred to a DOL Advisory Memorandum, which declared that the third party regulation governed. Writing for the Court, Justice Breyer offered several reasons for supporting the memorandum. First, a decision to the contrary would create considerable practical problems. Second, because “normally the specific governs the general” third party rule, as the more specific regulation with regard to third party employment should control on that issue. Third, although the DOL has interpreted these regulations differently throughout its history, it is unlikely that these legislative changes have caused “unfair surprise.” Fourth, the Court dismissed the notion that the Advisory Memorandum, though written in response to the litigation, was “merely a post hoc rationalizatio[n].” Thus, the Court affirmed the third party rule, effectively insulating it from future challenges by agency-employed home health aides.

C. The Wake of Long Island Care at Home, Ltd. v. Coke and the Crisis in At-Home Care

Absent legislative action, the impossibility of successful claims by agency-employed home health aides to FLSA wage and hour protections under the Court’s decision in Coke presents a grave threat to the future of the home health care industry. As one industry analyst declared, “[h]ome care workers are exiting the job—and, as a result, the quality of care is suffering—because of the job’s poor working conditions, including low compensation

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136 See id. at 169.
137 See id.
138 See id. For example, the Court states that if it were to decide that 29 C.F.R. § 552.3 controlled on the issue of third party employment, that is, that the FLSA’s domestic service provisions applied only to those persons employed in the home of the employer, “that would place outside the scope of FLSA’s wage and hour rules any butlers, chauffeurs, and so forth who are employed by any third party.” Id.
139 Id. at 170.
140 See id.
141 Id. at 171 (alteration in original) (internal quotation marks omitted).
142 Lower courts have since relied conclusively on the Court’s holding in Coke. See, e.g., Buckner v. Fla. Habilitation Network, Inc., 489 F.3d 1151, 1153 (11th Cir. 2007) (“[Pursuant to Coke,] a domestic service employee, employed by a third party employer rather than directly by the family of the person receiving care, is exempt from the overtime requirements of the FLSA . . . .”).
levels.” Indeed, high employee turnover rates in home health care pose problems not only for providers, who face considerable direct and indirect staffing costs, but for states seeking to effectuate federal rebalancing goals. Ultimately, the loss of trained home health aides and the shortage of new aides entering the field will mean that the increasing demand for home aides will go unmet—a prospect long-term care providers are calling a “crisis.”

Moreover, Congress’s persistent exclusion of home health aides under the companionship exemption recalls the economic marginalization of women and minorities that proponents of the 1974 amendment sought to address. Home health care is largely “women’s work”: Eighty-nine percent of home health aides are female and more than half are minorities. And they remain among the ranks of the health care industry’s lowest paid.

According to a recent tabulation by Forbes, the personal and home care occupation qualifies as one of the twenty-five worst

143 SMITH, supra note 14, at 3. “For consumers, high turnover and understaffing lead to inadequate and unsafe care, poorer quality of life, and reduced access to services.” WRIGHT, supra note 15, at 3.


145 Estimates indicate that the average cost to replace a direct care worker ranges from $4,200 to $5,200. Brief Amici Curiae of AARP and The Older Women’s League (OWL) in Support of Respondent at 13, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007) (No. 06-593). “Turnover may also entail important indirect costs for providers, such as costs associated with lost productivity, reduced service quality, and deterioration in employee morale. For workers, high turnover rates and high workloads can mean increased risk of on-the-job injuries, more stress and frustration, and less opportunity for training and mentoring, all of which can further increase turnover.” WRIGHT, supra note 15, at 3.


149 In 2008, the DOL reported that the mean hourly wage for home health aides was $10.31, and the mean annual wage $21,440. Compare with other health care support positions: nursing aides, orderlies and attendants at $11.84 and $24,620; psychiatric aides at $13.10 and $27,260; and massage therapists at $19.16 and $39,850, respectively. Occupational Employment Statistics, BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, http://www.bls.gov/oes/2008/may/oes_nat.htm#b31-0000 (last modified May 29, 2009).
paid jobs in America, ranking just above cashiers and parking attendants. Additionally, most employers provide no benefits. "The degree to which this workforce struggles with basic economic survival is further underscored by the fact that nearly half... of all personal and home care aides live in households that receive some kind of public assistance..." In fact, "[a] 2004 report by the Department of Health and Human Services indicates that between thirty and thirty-five percent of single-parent home health aides receive food stamps." Such a result illustrates precisely the effect that Congress sought to avoid when it indicated that the companionship exemption should not be applied to "regular bread-winners [who are] responsible for their families' support."

In their June 2009 letter, Senator Harkin and his colleagues aptly summarized the need for change and argued that the Supreme Court's decision in Coke leaves the door open for the DOL to change its interpretation under the Obama administration. The Senators are correct in writing that "[i]t is critical that these professional workers, who provide essential services to our nation's elderly and disabled, have the same right to minimum wage and overtime pay as enjoyed by other workers." The next section examines legislative possibilities for extending FLSA protections to home health aides and posits that, despite the Senators' recommendation, a congressional amendment, rather than altered DOL regulations, would provide the best vehicle by which to achieve this pivotal goal.

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150 Hearing, supra note 12, at 30 (statement of Dorie Seavey).
152 Hearing, supra note 12, at 31 (statement of Dorie Seavey).
153 SMITH, supra note 14, at 3.
156 Id. (internal quotation marks omitted).
III. BRINGING HOME HEALTH AIDES WITHIN THE SCOPE OF THE FLSA

A. Past and Present Legislative Proposals: An Examination and Critique

1. Clinton-Era DOL Proposed Changes to the Definition of Exempt Companionship Services

Though subsequently withdrawn, the DOL’s three proposed alternatives to the definition of companionship services remain prevalent in legal and industry analysts’ commentary as a blueprint for future regulation. All three proposals emphasize “fellowship”—never precisely defined but suggestive of personal interaction between the aide and patient—as a “critical component” of the duties that would fall under the companionship exemption. The three proposals then necessarily call for an examination of a worker’s allocation of time between certain duties.

“Under the first proposal, the companionship exemption . . . [would apply to home health aides] if fellowship is a ‘significant part’ of the worker’s duties.” While “this option does not define what percentage of a worker’s time spent on fellowship qualifies as ‘significant,’ ” it “anticipate[d] that fellowship would occur in conjunction with the performance of other intimate personal care chores, such as bathing, grooming, and dressing, which also would constitute exempt duties.” This first option would also exempt household work related to the care of the elderly or infirm client, in line with Terwilliger and other cases dealing with the general household work exception.

The second proposal made the companionship exemption applicable if fellowship is the “primary” duty of the worker, such

157 See, e.g., SMITH, supra note 14, at 5; see also Biklen, supra note 10, at 146–47.
159 See id.
160 SMITH, supra note 14, at 5; see also Biklen, supra note 10, at 146–47.
161 SMITH, supra note 14, at 5.
163 Id. at 5488; see also Biklen, supra note 10, at 147.
that a worker “must spend at least [fifty percent] of his or her weekly hours worked providing fellowship or protection” to be exempt from the FLSA.\textsuperscript{165} While this second proposal is more protective of employees than the first,\textsuperscript{166} it approximates the first definition in that courts may find that fellowship activities exist in conjunction with other non-fellowship activities. For example, as one scholar noted, if a home health “aide chatted with the client while vacuuming the room,” the time spent vacuuming would “count towards the fifty percent fellowship figure.”\textsuperscript{167}

Finally, a third proposal—one that would extend coverage to the most significant number of home health aides—would limit the companionship exemption to apply only if fellowship were the core duty of the worker. Specifically, the third definition would require a companion to spend at least eighty percent of his or her time “exclusively providing fellowship or protection”\textsuperscript{168} in order to be exempt from FLSA protection. Distinct from the former proposals, the eighty percent fellowship requirement could not include the performance of intimate tasks such as bathing, grooming, or dressing. In other words, those activities would not be exempt as they are not purely fellowship activities, which include “reading a book or a newspaper to the person, [or] chatting with him or her about family or other events.”\textsuperscript{169} As industry and legal commentators have noted, this third proposal most closely aligns with congressional intent to exclude from minimum wage and overtime pay protection only those persons acting as occasional and informal companions,\textsuperscript{170} rather than persons formally engaged in a vocation.

While the first and second proposals take a necessary step toward extending FLSA protection to home health aides, they compromise client care by linking compensation to the impersonal nature of the interaction between an aide and client.

\textsuperscript{166} Biklen, supra note 10, at 147.
\textsuperscript{167} Id. at 148; see Application of the Fair Labor Standards Act to Domestic Service, 66 Fed. Reg. at 5488.
\textsuperscript{170} See Biklen, supra note 10, at 137; SMITH, supra note 14, at 5; see also supra Part I.B.2.
The first two proposals exempt from FLSA protection acts of fellowship performed in conjunction with non-fellowship activities—for example, conversing with a client while vacuuming, as one scholar suggested,\textsuperscript{171} or even while assisting with medical functions.\textsuperscript{172} As such, they risk incentivizing home health aides to avoid engaging in friendly interaction with clients while accomplishing household or medical tasks. Such a result would negatively impact care by frustrating the formation of amicable and therapeutic working relationships. This is particularly troubling in light of the fact that for many homebound seniors, a visiting home health aide may be one of few, if not the only, regular sources of social interaction.\textsuperscript{173}

Moreover, all three proposals would perhaps prove unworkable in practice and promote more litigation. Like the general household work exception, these alternate proposals raise important record-keeping and supervisory issues.\textsuperscript{174} Just as it may be difficult for a trier of fact to discern the time per week an aide spent on household work related to a client’s care, such as cleaning up spills,\textsuperscript{175} for the purpose of the twenty percent threshold, how would one accurately assess the amount of time spent in fellowship versus non-fellowship activities for the purposes of the DOL’s proposals? Whether the exempted activity is cleaning a spill or chatting, its impromptu nature defies the kind of record keeping on which both of the exception DOL proposals rely. Moreover, in the absence of accurate records, litigation would be reduced to the home health aides’ word against that of her employer, often with only the client as a witness to the amount of time his or her aide spent on various activities.

\textsuperscript{171} Biklen, supra note 10, at 148.
\textsuperscript{172} Buckman, supra note 76.
\textsuperscript{173} See PARAPROFESSIONAL HEALTHCARE INSTITUTE, supra note 147.
\textsuperscript{174} With regard to the household work exception, Deborah Buckman advises that “counsel should ensure that the employer has kept accurate and complete records, which can provide essential evidence” in litigation. Buckman, supra note 76. Because the “determination of whether household work falls into the [twenty percent] category is a fact question dependent on the particular situation in each case,” without such record keeping, a court may not be able adequately rule on that question. Id.
\textsuperscript{175} See McCune v. Or. Senior Servs. Div., 894 F.2d 1107, 1111 (9th Cir. 1990).
2. The Fair Home Health Care Act

Although the Senators’ letter asks the DOL to change its interpretations of the companionship exemption, a formal congressional amendment to the exemption, such as that offered by the proposed Fair Home Health Care Act of 2007, is a preferable legislative channel. As illustrated by the turnover between the Clinton and Bush administrations, agency regulations—including the DOL’s regulations regarding the companionship exemption—are subject to the political process and are therefore imbued with a level of impermanence. Conversely, a congressional amendment presents a more stable solution that is better suited to reinforcing federal rebalancing goals for the longterm care industry.

The Fair Home Health Care Act, sponsored by Senator Harkin, emphasizes the distinction between casual and non-casual employment. The bill, known as H.R. 3582, “would extend federal hour and wage laws to non-casual, non-live- in [sic] homecare/personal assistance workers.” The bill does so through the simple modification of the existing statutory language of the companionship exemption. Specifically, where the existing language exempts “any employee employed on a casual basis .. to provide babysitting services or any employee employed ... to provide companionship services,” the bill’s amended language exempts “any employee employed on a casual basis .. to provide babysitting services or any employee employed on a casual basis ... to provide companionship services.” “Casual basis” is further defined as employment which “is irregular or intermittent, and is not performed by an individual whose vocation is the provision or babysitting or companionship services or an individual employed by an employer or agency other than the family or household using such

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177 See supra notes 109–11 and accompanying text.
179 See Hearing, supra note 12, at 34 (statement of Dorie Seavey).
services.” 182 By declaring that casual basis employment does not apply to “an individual employed by an . . . agency,” 183 H.R. 3582 effectively disables the DOL’s third party rule and reinstates the protections that agency-employed home health aides enjoyed under the FLSA’s enterprise provision. 184

B. Making the Fair Home Health Care Act a Viable and Affordable Option

Despite its viability, the Fair Home Health Care Act does not, on its face, respond to the long-standing argument against the extension of wage protection to home health aides: increased costs of, and reduced access to, home care. Concerns about increasing the cost of at-home care have been cited as the primary motive for excluding home health aides from the FLSA. 185 As one industry analyst stated, “the cost implications of H.R. 3582 should be studied carefully . . . [as] it is possible that in some states, the costs could have significant budgetary and service delivery implications that would require adjustments in federal and state funding.” 186

While the concern about increased cost of care is a logical one, it is easily addressed and does not warrant the denial of FLSA protections for agency-employed home health aides. As one industry analyst notes, “[u]nder-compensating labor in order to keep the cost of services down creates a labor market distortion that depresses the supply of labor . . .” 187 Moreover, “cost-based concerns fail to consider the costs that will be saved by reducing job turnover among home care workers.” 188

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182 Id. (emphasis added).
183 Id.
185 See McCune v. Or. Senior Servs. Div., 894 F.2d 1107, 1110 (9th Cir. 1990) (“[M]any private individuals, who do not benefit from federal and state assistance, may also be forced to forego the option of receiving these services in their homes if the cost of the services increases. The only alternative for these individuals may be institutionalization.”).
187 Id. at 38.
188 SMITH, supra note 14, at 3.
One method for offsetting costs which has not yet been proposed is a tax incentive aimed directly at employers who will be mandated to comply with FLSA protections for agency-employed home health aides under the Fair Home Health Care Act. Such a tax credit would approximate existing federal employer tax incentives, such as the Disabled Access Tax Credit, that offset an employer's cost of compliance with laws aimed at protecting certain employees. The Disabled Access Tax Credit reimburses eligible employers for expenditures made for the purpose of meeting the requirements of the Americans with Disabilities Act. Similarly, a tax credit for home health agencies of a certain size would prevent increased operating costs incurred through compliance with the Fair Home Health Care Act from being unduly burdensome. Able to absorb the expense of overtime pay, home health agencies would not be forced to increase consumer costs to maintain profit margins.

Using the tax code to effectuate federal employment policy is both a familiar and tested method. Two examples of business related tax credits aimed at achieving policy goals are the Work Opportunity Tax Credit ("WOTC") and the Empowerment Zone Employment Credit ("EZEC"). The WOTC credits employers for each employee that falls within statutorily identified groups, including ex-felons, social security income recipients, veterans, and long-term family assistance recipients. Similarly, the EZEC provides that employers will receive a credit for wages

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189 Dorie Seavey has proposed reimbursements aimed directly at individual consumers: "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." Hearing, supra note 12, at 38 (statement of Dorie Seavey).


192 See id. § 44(b).

193 See id. § 44(c)(1)–(2). "[E]ligible access expenditures" include, but are not limited to, expenses incurred for the purpose of removing "barriers which prevent a business from being accessible to, or usable by, individuals with disabilities." Id. § 44(c)(2)(A).

194 26 U.S.C. § 1396 (2006). The enterprise provision of the FLSA arguably provides a guideline for designating home health agencies earning $500,000 per year as those subject to the Fair Home Health Care Act and an accompanying tax incentive. See supra notes 113–14 and accompanying text.


paid to each “qualified zone employee,” that is, an employee who lives and works in a government designated “empowerment zone.” In both cases, Congress has used tax cuts tied directly to employee wages to incentivize employers to hire individuals from targeted groups for the purpose of increasing employment opportunities for underrepresented individuals.

Despite inherent differences between a business tax incentive like the WOTC and one potentially accompanying the Fair Home Health Care Act, the WOTC provides a workable model by which Congress may design a tax incentive in the context of agency-based home health care. Admittedly, the WOTC is a short-term incentive: The credit is set at forty percent of a target-group employee’s first-year wages, not to exceed $6,000. In contrast, however, a home health agency tax incentive should extend into the length of the employee’s tenure in order to mitigate continued overtime pay expenses. Despite this distinction, the agency-based incentive could approximate the WOTC by crediting a significant percentage of expenditures for overtime payments. Adding to this credit, home health agencies would also see reduced turnover costs, as compensation would appropriately reflect the number of hours worked. With this dual benefit, the Fair Home Health Care Act is both an affordable option and one that provides solid reinforcement of the government’s stated support of home health care as a long-term care option for older Americans.

Finally, the Fair Home Health Care Act’s guarantee of FLSA protections for agency-employed home health aides, coupled with a tax incentive for agency employers, may have the added benefits of stabilizing the home care industry by promoting third party employment, rather than independent “off-the-books” employment, and attracting new, qualified individuals to the home health care field.

201 It is beyond the scope of this Note to determine the precise mechanics of the tax incentive proposed. Rather, it should be left to the legislature to determine the percentage of wages to be credited each year, based on empirical analyses of home health agencies’ increased wage expenditures.
Conclusion

With the number of elderly people in the United States growing more rapidly than ever before, the need for long-term care services is at its zenith. Within the long-term care industry, home care has been promoted through the federal government’s rebalancing policy as a preferable alternative to institutionalization. While home health aides make home care possible, federal law continues to deny them the same pay and overtime protections guaranteed to other health care workers, domestic employees, and full-time babysitters. Although agency-employed home health aides are certainly not the casual “elder sitters” Congress intended to exclude from FLSA protections when it enacted the “companionship exemption,” the DOL’s interpretations of the exemption have kept these professional workers—mostly women who are minorities and often heads of households—relegated to a position of financial dependence.

With the DOL’s third-party rule upheld by the Supreme Court in Long Island Care at Home, Ltd. v. Coke, agency-employed home health aides have effectively been foreclosed from seeking redress for unfair labor conditions in the federal court system. As such, legislative action is necessary to secure wage and hour protections for home health aides and stem the tide of employee turnover that poses a crisis to the future of the home health industry. While the DOL has previously proposed new definitions of “companionship” to narrow the exemption, the proposals’ unworkable standards may only add to the abundance of litigation surrounding the FLSA.

The Fair Home Health Care Act offers the best solution for extending FLSA protections to America’s home health aides. By revising the language of the “companionship exemption” such that the exemption applies only to those domestic workers employed on a “casual basis”—less than twenty hours per week and not by a third party agency—the Fair Home Health Care Act brings the exempt “companion” into alignment with the Congress’s intent. Moreover, the Act ensures as, Franklin Delano Roosevelt declared as the purpose of the FLSA, that “all our able-bodied working men and women [earn] a fair day’s pay for a fair day’s work.”202 For home health aides like Evelyn Coke,

who at 74 was unable to afford an aide of her own while suffering from kidney disease—\textsuperscript{203} the alternative is simply not an option.

Making the Fair Home Health Care Act a viable option is possible with an accompanying tax incentive to third party home health agencies. Such a tax incentive will enable agencies to absorb the costs compliance with FLSA wage and hour laws without projecting those costs onto consumers and the Medicare system. Much like other business related tax credits already enacted in furtherance of federal employment policies, a tax incentive for home health agencies will support, rather than undermine, the expansion of quality, affordable, at-home senior care.

\footnotesize
\begin{itemize}
\item Minimum Wages and Maximum Hours, Message to Congress (May 24, 1937), \textit{in} 6 \textsc{The Public Papers and Addresses of Franklin D. Roosevelt} 210 (Samuel I. Rosenman ed., 2009)).
\item Martin, \textit{supra} note 3.
\end{itemize}