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PRESERVE THE COMPANIONSHIP SERVICES EXEMPTION

Background

In 1974, Congress established an exemption for companionship services from the Minimum Wage and Overtime Requirements of the Fair Labor Standards Act (FLSA). Congress made a societal choice in balancing the interests of the worker relative to the needs for care to the elderly and the infirm. Current law provides the Secretary of the U.S. Department of Labor (DOL) the authority to define and determine the scope of the companionship exemption.

In June 2007, the US Supreme Court ruled that the current DOL companionship services exemption regulation was valid thereby reversing the Court of Appeals in a final decision. Since the Supreme Court ruling, there has been a re-focusing of efforts by some opposed to the current regulation. Some states already have passed laws that eliminated parts or all of the companionship services exemption. In others, there are efforts to interpret the regulations in a manner different than the federal rules.

On December 27, 2011, DOL issued a proposed rule that would significantly restrict the exemption and make it inapplicable to workers employed by home care companies. The proposed rule limits companionship care to “fellowship and protection” and requires third party employers to pay overtime to companion care employees, including those caregivers that provide live-in care services. DOL accepted public comments on the proposed rule until March 21, 2012.

Need for Legislation

- The DOL proposed rule does nothing to create career opportunities for home care aides or to address their need for health insurance. This isolated action related to a minor element of the home care aide working conditions will have a reverse negative impact on those workers. A comprehensive rather than a piecemeal approach to worker compensation and working conditions is necessary if access to high quality of care and continuity of services is to be achieved.
- DOL relies heavily on Medicare and Medicaid data to support the proposed rule and its cost-analysis impact. Medicare and Medicaid pay for most home health care services and are limited in their coverage of companionship services. DOL’s analysis does not accurately reflect the role of private duty home care which provides a significant amount of companionship care. DOL should not implement the proposed rule based on inaccurate economic impact data.

- The result of eliminating the companionship services exemption would be to reduce the availability of care to the elderly and the infirm and to increase the costs of service delivery with no corresponding increase from third party payers, such as Medicaid.

Legislation

The National Association for Home Care & Hospice is supportive of H.R. 5969 and H.R. 5970 which would create certainty for home care providers and patients rather than leaving the definition open to changes through the regulatory process.

H.R. 5969, the Ensuring Access to Affordable and Quality Companion Care Act would:

- Clarify that any domestic employee providing companionship services under standards consistent with current long-standing regulations, including those employed by a third party, is exempt from FLSA coverage.
- Clarify that live-in services provided through third-party employers are exempt from FLSA coverage consistent with current long-standing regulations.

H.R. 5970, the Protecting In-Home Care from Government Intrusion Act would:

- Prevent the DOL Secretary from implementing the December 2011 proposed rule or any similar rule that would narrow the companionship services exemption.