



December 2014

# FAIR LABOR STANDARDS ACT

## Extending Protections to Home Care Workers

Highlights of GAO-15-12, a report to congressional requesters

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### Extending Protections to Home Care Workers

#### Why GAO Did This Study

Older adults and people with disabilities are increasingly receiving care at home, and home care workers are performing increasingly skilled duties. DOL recently revised its FLSA regulations to extend minimum wage and overtime protections to more of those home care workers. The Home Care Rule, scheduled to go into effect January 2015, may affect a diverse set of stakeholders, including home care workers, consumers receiving home care services, private home care agencies, and state Medicaid programs. GAO was asked to assess the potential effects of this rule.

GAO examined (1) changes DOL made in the Home Care Rule and factors it considered during the rulemaking process, (2) the potential effects of the rule identified by key stakeholders, and (3) steps DOL has taken to help state Medicaid agencies and other stakeholders understand and comply with the Home Care Rule. GAO visited six state Medicaid programs selected in part for variation in state Medicaid program design; reviewed relevant federal regulations; and interviewed government officials and representatives from 14 national organizations representing the spectrum of home care stakeholders, including workers and consumers.

#### What GAO Recommends

Depending on the outcome of the litigation, GAO recommends that the Secretary of Labor take steps to ensure the agency will be positioned to conduct a meaningful retrospective review of the rule at an appropriate time. DOL agreed with this recommendation and is working on developing data collection plans.

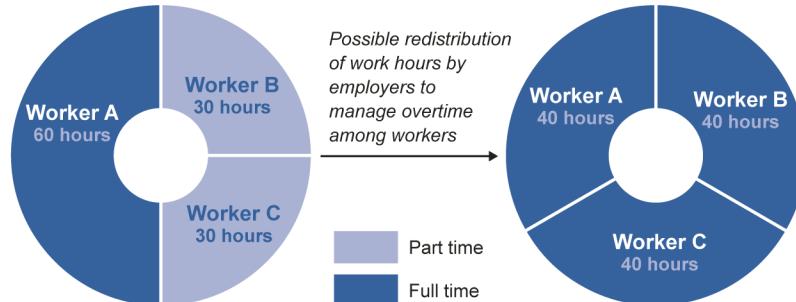
View [GAO-15-12](#). For more information, contact Andrew Sherrill, 202-512-7215 or [sherrilla@gao.gov](mailto:sherrilla@gao.gov).

#### What GAO Found

The Department of Labor's (DOL) Home Care Rule is expected to increase the number of home care workers who qualify for minimum wage and overtime protections under the Fair Labor Standards Act of 1938, as amended (FLSA). The Home Care Rule narrows the definition of companionship services and limits who may claim the companionship services exemption, among other changes. It is scheduled to go into effect in January 2015, although a challenge to the rule is currently pending in federal court. When developing the rule, DOL considered several factors, including the growth and specialization of the home care workforce, as well as the amount of time needed to make adjustments.

Representatives from national organizations GAO interviewed identified potential effects of the Home Care Rule on jobs and earnings, employer costs, and care, but did not always agree. Some representatives said extending FLSA protections to home care workers will create more full-time employment opportunities for part-time workers, while others said those who work more than 40 hours in a workweek may see reduced hours and earnings. Some representatives said employers may face increased business costs to pay overtime and some said that certain consumers could be placed in institutions because of possible service cost increases. Effects on Medicaid home care services will vary by state. Officials in five of six states GAO visited explained that they were still assessing possible changes to their programs, while one state had determined what changes it would make to comply with the new rule.

Potential Redistribution of Home Care Worker Hours



Source: GAO analysis of interviews with national stakeholders. | GAO-15-12

After the Home Care Rule was published, DOL collaborated with other federal agencies and stakeholders to develop guidance, conduct outreach, and provide technical assistance to help stakeholders plan for implementation. For example, DOL worked with the Centers for Medicare & Medicaid Services to develop guidance on applying FLSA principles to different home care living arrangements commonly funded by Medicaid. DOL officials said they are focusing on technical assistance to help employers and states with implementation and have developed a phased-in enforcement strategy. The effects of the Home Care Rule, such as whether the workforce will grow or the use of institutional care will increase, remain uncertain, and DOL officials said they do not currently have any plans to evaluate the rule.

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## **Abbreviations**

ADL	activities of daily living
BLS	Bureau of Labor Statistics
CMS	Centers for Medicare & Medicaid Services
DOJ	Department of Justice
DOL	Department of Labor
FAQ	frequently asked questions
FLSA	Fair Labor Standards Act of 1938
HHS	Department of Health and Human Services
IADL	instrumental activities of daily living
NPRM	Notice of Proposed Rulemaking
WHD	Wage and Hour Division

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U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.  
Washington, DC 20548

December 17, 2014

The Honorable John Kline  
Chairman  
Committee on Education and the Workforce  
The Honorable Tim Walberg  
Chairman  
Subcommittee on Workforce Protections  
Committee on Education and the Workforce  
House of Representatives

The home care workforce—comprising approximately 2 million workers—is considered to be among the fastest growing in the United States, yet many of these workers have not been covered by the federal minimum wage and overtime law, the Fair Labor Standards Act of 1938 (FLSA).<sup>1</sup> Home care workers provide support to people who have limited ability to care for themselves due to aging-related impairments or disabilities. The home care industry has experienced significant changes and growth in recent decades as home care has become a viable option for many, including people with significant care needs. Consumers often prefer home care over receiving care in an institutional setting because it allows them to maintain their independence and receive less costly services in their homes. State Medicaid agencies may cover home care for eligible individuals as an alternative to institutional care.

As the home care workforce has grown to meet the demand, worker arrangements have become more formalized and workers often use private agencies to be matched with a consumer who needs care. As a result, policymakers have been reexamining rules that have excluded many home care workers from minimum wage and overtime protections. Recently, the U.S. Department of Labor (DOL) published a final rule, the Home Care Rule, revising its regulations under the FLSA to provide federal minimum wage and overtime protections to more home care

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<sup>1</sup> The Fair Labor Standards Act of 1938 (FLSA), as amended, is the primary federal law that sets minimum wage and overtime pay standards. Ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219). In general, the term “home care” is used as an umbrella term that includes all the nonmedical and paramedical services that can be provided in people’s homes, including those services often provided by workers referred to as home health aides or personal care attendants.

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workers.<sup>2</sup> Many researchers and worker advocates support the changes to the FLSA regulations because they believe these changes will help improve working conditions for home care workers. However, other stakeholders are concerned that the changes will increase the costs of home care and potentially make it an unaffordable option for some consumers. To understand some of the potential effects, we reviewed: (1) changes the Department of Labor made in the Home Care Rule and factors it considered during the rulemaking process, (2) potential effects of the Home Care Rule identified by key stakeholders, and (3) steps the Department of Labor has taken to help state Medicaid agencies and other stakeholders understand and comply with the Home Care Rule.

To address these objectives, we reviewed relevant provisions of the existing regulations,<sup>3</sup> the proposed rule, DOL's regulatory impact analyses, and the final rule. We did not assess DOL's authority to issue the Home Care Rule or whether DOL's rulemaking procedures or analyses complied with applicable legal requirements.<sup>4</sup> We also conducted structured interviews from October 2013 to July 2014 with officials from 14 national organizations representing the spectrum of

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<sup>2</sup> Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (Oct. 1, 2013) (amending 29 C.F.R. pt. 552). For purposes of this report, we will refer to this final rule as the Home Care Rule. The rule is currently scheduled to go into effect January 1, 2015.

<sup>3</sup> In this report, we use the term "existing regulations" to refer to the regulations in effect on the date that this report was issued (December 17, 2014) and when DOL issued the final Home Care Rule.

<sup>4</sup> These issues are currently under litigation. In June 2014, the Home Care Association of America, International Franchise Association, and National Association for Home Care and Hospice filed a complaint in federal court alleging, among other things, that DOL exceeded its statutory authority in issuing the rule. See Home Care Ass'n of Am. v. Weil, No. 14-967 (D.D.C. filed June 6, 2014). As of December 9, 2014, the lawsuit was pending before the U.S. District Court for the District of Columbia.

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home care stakeholders: consumers, workers, employers, and states.<sup>5</sup> We selected organizations based in part on whose interests they represent as well as recommendations from experts. We also reviewed the comments they submitted in response to the proposed rule, if any. We interviewed officials from DOL and the Department of Health and Human Services' Centers for Medicare & Medicaid Services. In addition, we visited a nongeneralizable sample of six states from December 2013 to May 2014: Arkansas, California, New York, Pennsylvania, Tennessee, and Vermont, which represent a variety of Medicaid programs and are geographically diverse. In selecting states, we included some whose laws already require minimum wage and overtime wages for home care workers, and some that do not, as described in the proposed rule. During our visits, we interviewed state and local officials to learn about their Medicaid programs, what specific changes they plan to make, if any, and any challenges they may face in doing so.<sup>6</sup> In addition to state officials, we interviewed more than 20 other stakeholders in the states we visited—including private home care companies, managed care organizations, state associations, and fiscal agents—to gain their perspectives on the potential effects of the final rule and to inquire about pay and scheduling for home care workers.

We conducted this performance audit from August 2013 to December 2014 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit work to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We

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<sup>5</sup> The 14 national organizations we interviewed are: National Association of States United for Aging and Disabilities, National Association of State Directors of Developmental Disabilities Services, National Association of Medicaid Directors, National Association for Home Care & Hospice, The National Consumer Voice for Quality Long-Term Care, Direct Care Alliance, National Employment Law Project, American Network of Community Options and Resources, ADAPT, Paraprofessional Healthcare Institute, AARP, Service Employees International Union, National Council on Disability, and the Small Business Administration Office of Advocacy. The Small Business Administration Office of Advocacy is an office within the Small Business Administration and the National Council on Disability is an independent federal agency. Thirteen of the 14 organizations we interviewed had provided comments on the proposed rule during the public comment period. In addition to the 14 national organizations, we also interviewed private home care companies, a consulting group, and a personal attendant coalition in one state.

<sup>6</sup> From July 2014 to August 2014, we conducted follow-up interviews with officials in four of the six states.

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believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

Home care workers support consumers of home care services, typically individuals with disabilities and older adults, with their personal care needs. Some of the activities that home care workers perform include helping with activities of daily living (ADLs) such as dressing, grooming, eating, or bathing, as well as instrumental activities of daily living (IADLs) that enable a person to live independently such as meal preparation, driving, light housework, managing finances, and assisting with medications. Home care services may be provided by one or more worker(s); however, given the personal nature of the work, experts have noted the benefits of maintaining continuity among home care workers, and consumers often prefer to receive care from a limited number of workers. Home care needs depend on many factors including each consumer's functional limitations and the availability of informal supports, such as those provided by family members, so the amount of time a home care worker provides care can vary. For example, home care workers may provide a few hours of home care per week or up to 24 hours per day depending on an individual's needs. Home care workers may be employed directly by the consumer or by a third party home health care agency that matches workers with consumers. Examples of traditional types of home health care companies include: for-profit home care agencies, voluntary non-profits, and private not-for-profit home care agencies.

## Funding Sources for Home Care and the Role of Federal Agencies

A variety of public and private sources pay for home care services. The majority of home care is paid for by public sources, such as Medicaid.<sup>7</sup> Medicaid is a federal-state program that provides health care services to certain low-income populations. Individuals who qualify for Medicaid and receive coverage for home care services include individuals aged 65 or older and individuals who are disabled or blind.<sup>8</sup> Although Medicaid is

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<sup>7</sup> Other public sources that may pay for home care services include Medicare, certain programs administered by the Veterans Health Administration, and state and local programs.

<sup>8</sup> Medicaid provides coverage of different types of services provided in an individual's home, which include home health services and home and community-based services. These may include "home care services" as that term is used in this report.

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jointly financed by the states and the federal government, it is directly administered by the states, with oversight from the Centers for Medicare & Medicaid Services (CMS), within the Department of Health and Human Services (HHS). State Medicaid spending for most services is matched by the federal government at a rate that is based in part on each state's per capita income according to a formula established by law.<sup>9</sup> State Medicaid programs cover home care services through a wide and complex range of options within Medicaid, which include providing this coverage as an alternative to institutional care. The Medicaid program requires states to cover certain home health services, and states may also elect to cover additional home and community-based services under their Medicaid programs, or through special waivers that allow them added flexibility in covering these services.<sup>10</sup> CMS has been working in partnership with states, consumers, providers, and other stakeholders to create a sustainable, person-driven long-term support system. According to CMS, the system aims to allow people with disabilities and chronic conditions to exercise choice and control, and to access quality services that assure optimal outcomes, such as independence and quality of life. States have an obligation to provide Medicaid services to eligible individuals with disabilities in the most integrated setting appropriate to their needs, consistent with title II, part A of the Americans with Disabilities Act, which is overseen by the Department of Justice.<sup>11</sup>

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## Department of Labor and the FLSA

The FLSA is the primary federal statute that establishes standards for minimum wage, overtime pay, and child labor. The FLSA requires that workers who are covered by the act and not specifically exempt from its provisions be paid at least the federal minimum wage (currently \$7.25 per

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<sup>9</sup> 42 U.S.C. § 1396d(b).

<sup>10</sup> For example, under section 1915(c) of the Social Security Act, states may seek CMS approval of waivers that allow states to provide a broad range of home and community-based services. Under these section 1915(c) waivers, states may cover personal care and other types of services that allow individuals to remain in their homes as an alternative to institutional care. See 42 U.S.C. § 1396n(c). Over 300 different section 1915(c) waivers have been approved by CMS and have been implemented by various states.

<sup>11</sup> In 1999, the Supreme Court held that states must serve individuals with disabilities in community-based settings under certain circumstances. *Olmstead v. L.C.*, 527 U.S. 581 (1999). Accordingly, states must ensure that in serving their Medicaid populations, they are compliant with this mandate as well as title II of the Americans with Disabilities Act and DOJ's implementing regulations, which prohibit discrimination on the basis of disability by public entities. See 42 U.S.C. § 12131 et seq., 28 C.F.R. pt. 35.

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hour) and 1.5 times their regular rate of pay for hours worked over 40 in a workweek. The 1974 amendments to the FLSA extended coverage to workers employed in “domestic service” but established an exemption from the minimum wage and overtime provisions for individuals providing “companionship services” to older adults or people with disabilities.<sup>12</sup> The amendments also created a more limited exemption from the overtime pay requirements for domestic service employees who reside in the household where they work (live-in domestic service workers).<sup>13</sup> In 1975, DOL, the federal agency responsible for overseeing and enforcing the FLSA, issued the existing regulations which implemented these provisions and, among other things, defined “companionship services.”<sup>14</sup> These regulations define companionship services as those which provide “fellowship, care, and protection” to an elderly person or individual with a disability, and include household activities related to the care of that person such as preparing a meal, making the bed, and washing clothes, for example.<sup>15</sup> Additionally, these regulations permit third party employers, such as home care services agencies, to claim the companionship services exemption for workers (which we refer to in this report as the companionship exemption).<sup>16</sup>

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<sup>12</sup> Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7, 88 Stat. 55, 62 (codified at 29 U.S.C. §§ 202(a), 206(f), 207(l), 213(a)(15)). Specifically, the exemption applies to casual babysitters and “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).”

<sup>13</sup> Codified at 29 U.S.C. § 213(b)(21).

<sup>14</sup> Extension to Domestic Service Employees, 40 Fed. Reg. 7404 (Feb. 20, 1975) (codified at 29 C.F.R. pt. 552).

<sup>15</sup> 29 C.F.R. §§ 522.6, 522.106. Companionship services may also include “general household work,” provided that such work does not exceed 20 percent of the total weekly hours worked.

<sup>16</sup> 29 C.F.R. § 552.109. Employees providing companionship services who are employed by “an employer or agency other than the family or household using their services” are exempt. Third party employers may also claim the overtime exemption for live-in domestic workers.

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## DOL Revised the Definition of Companionship Services in Light of the Changes in the Home Care Industry

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### DOL Narrowed the Definition of Companionship Services

In October 2013, DOL issued a final rule, commonly referred to as the Home Care Rule, revising its existing regulations on domestic services employment and the companionship services exemption. The Home Care Rule, scheduled to go into effect January 2015, makes three main changes to the existing regulations:<sup>17</sup>

- it updates terminology and narrows the definition of companionship services;
- it limits who may claim the companionship services and live-in domestic services exemptions by stipulating that third party employers, such as private home care agencies, will no longer be able to claim these exemptions; and
- it changes the record-keeping requirements for employers of live-in domestic services workers.

As a result of these changes, more home care workers will be entitled to protections under the FLSA, which may include the right to time and one-half of their regular hourly wage when they work more than 40 hours in a week; compensation for time spent traveling between clients' homes; and compensation when they wake to care for clients on overnight shifts.<sup>18</sup> According to DOL, the workers who will be directly affected by the change to the companionship services exemption are predominantly women in

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<sup>17</sup> In the Home Care Rule, DOL also updated certain terminology; for example, it deleted governesses, grooms, and footmen from the definition of "domestic service employment," and added nannies and home health aides. 78 Fed. Reg. 60,454, 60,557 (Oct. 1, 2013).

<sup>18</sup> Whether a particular worker may be entitled to pay for these hours depends on the circumstances. DOL has regulations on the compensability of sleep time, 29 C.F.R. §§ 785.20-785.23, and travel time, 29 C.F.R. §§ 785.33-785.41, which were unchanged by the Home Care Rule.

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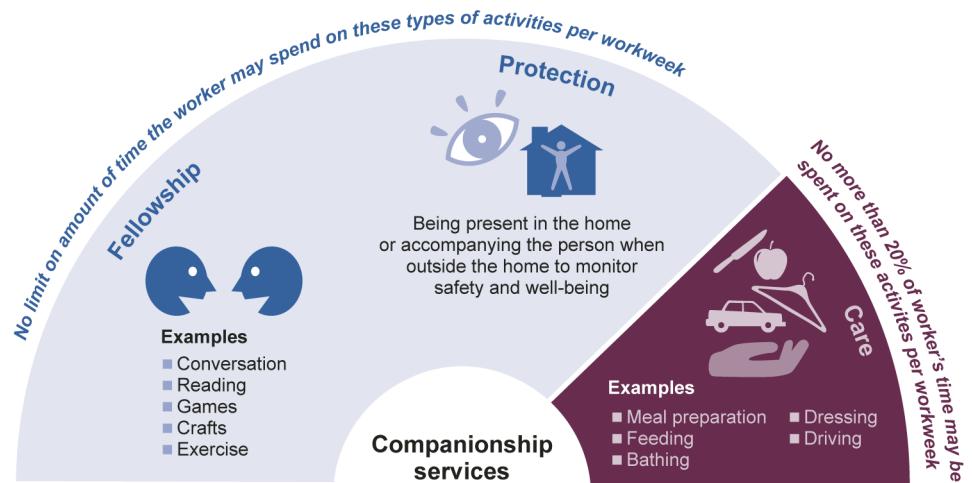
their mid-40s or older and minorities who have a high school diploma or less education.

The existing regulations define companionship services as “fellowship, care, and protection,” and the revised definition of companionship services includes “fellowship” and “protection” but limits the amount of time that a worker can spend on the provision of “care” (see fig.1). Under the Home Care Rule, examples of “fellowship” and “protection” include activities such as engaging in conversation, reading, accompanying the person on walks or to appointments, and being present to monitor the person’s safety and well-being. “Care” is defined to include assisting with activities of daily living and instrumental activities of daily living such as dressing, feeding, meal preparation, and light housework – precisely the types of activities that many home care workers engage in today. Under the existing regulations, which apply until the Home Care Rule goes into effect, workers may spend an unlimited amount of time providing these types of services and still be exempt from the FLSA minimum wage and overtime provisions.<sup>19</sup> However, in order to qualify for the companionship services exemption under the revised regulation, the amount of time a worker spends on these types of activities may not exceed 20 percent of the total hours worked per person and per workweek.

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<sup>19</sup> However, under the existing regulations, the companion must provide these services with respect to the elderly or disabled person and not generally to other persons. 29 C.F.R. § 552.106. As previously mentioned, any general household work must not exceed 20 percent of the total weekly hours worked. 29 C.F.R. § 552.6.

**Figure 1: Key Elements of the Revised Definition of Companionship Services under the Home Care Rule**



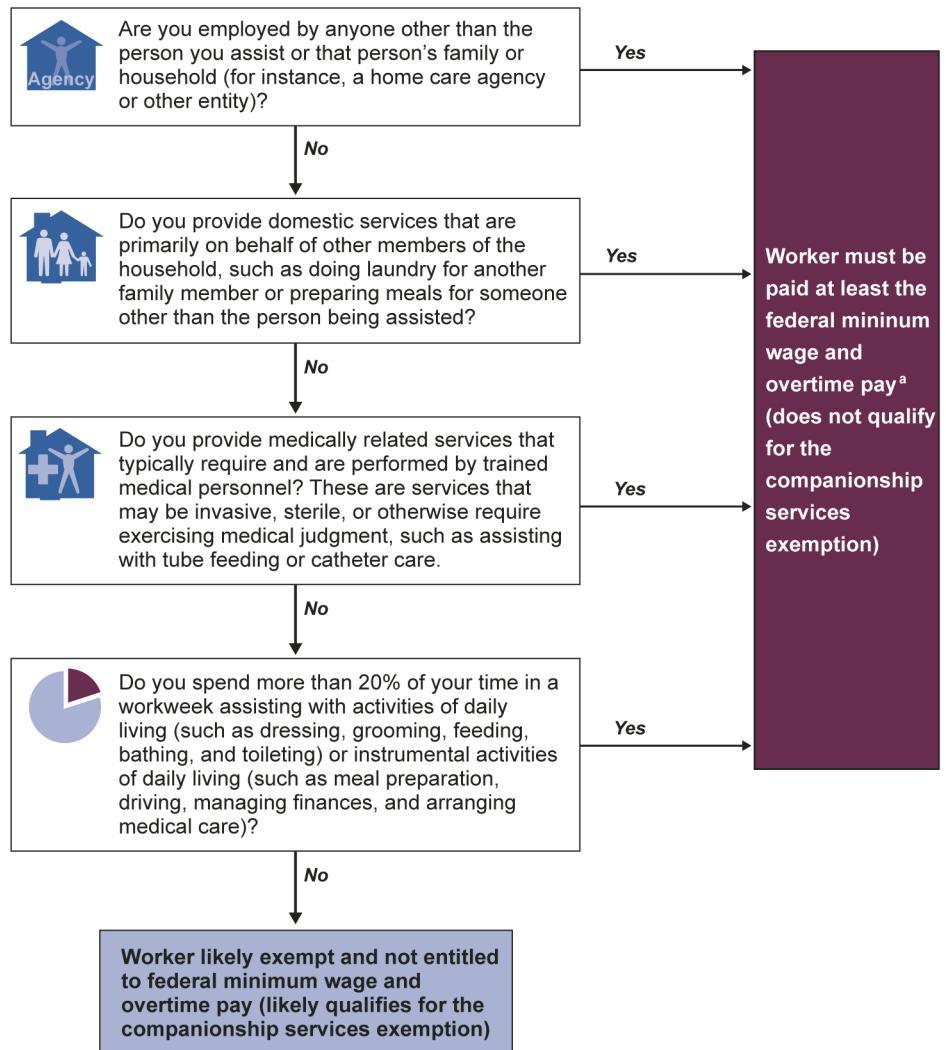
Source: GAO summary of Home Care Rule. | GAO-15-12

Note: The Home Care Rule, including the revised definition illustrated here, is scheduled to go into effect January 1, 2015. 78 Fed. Reg. 60,454, 60,557 (Oct. 1, 2013). Until the rule goes into effect, the existing regulatory definition applies. 29 C.F.R. § 552.6.

In the revised Home Care Rule, DOL also limited who may claim the companionship services exemption. Under the existing regulations, third party employers may claim the companionship services exemption and are not required to pay home care workers who qualify for minimum wage and overtime. However, under the revised regulation, third party employers, such as private home care agencies, will no longer be able to claim the companionship services exemption from minimum wage and overtime.<sup>20</sup> In contrast, the consumer or his/her family members may still claim the exemption if the home care worker primarily provides fellowship and protection and spends 20 percent or less of his or her weekly work hours per care recipient on activities of daily living (ADLs) and instrumental activities of daily living (IADLs) and if the worker meets certain other requirements (see fig. 2).

<sup>20</sup> Similarly, under the revised Home Care Rule, third party employers may not claim the live-in domestic services exemption from the FLSA's overtime requirements, although they are entitled to claim this exemption under the existing regulations.

**Figure 2: How Workers Can Determine If They Meet the Definition for the Companionship Services Exemption under the Home Care Rule**



Source: GAO analysis of Department of Labor's self assessment for workers. | GAO-15-12

<sup>a</sup>For questions 2-4, whether a worker must be paid at least the federal minimum wage and overtime pay will depend on the activities the worker performed that workweek.

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## In Developing the Home Care Rule, DOL Considered Changes to the Home Care Industry and Time Needed for Implementation

When DOL was developing the Home Care Rule, it considered the growth in the home care industry and the resulting changes in the home care workforce. In March 2012, Congress held a hearing to examine the proposed rule and the possible effects of the narrowed definition of companionship services.<sup>21</sup> According to testimony from a DOL official, the home care industry has “undergone a dramatic transformation” –due in part to increased demand for home care—since DOL issued its regulations on the companionship and live-in exemptions in 1975.<sup>22</sup> For example, the official stated that the number of certified home health care agencies had increased from 2,242 in 1975 to more than 10,000 at the end of 2009.<sup>23</sup> The DOL official stated that the demand for home care has increased as a result of the growth in the aging population, the rising costs of institutional care, and the availability of funding assistance from federally supported programs, such as Medicaid. Similarly, the number of home care workers has increased. The Bureau of Labor Statistics (BLS) has reported that the total number of home care workers has more than doubled in each of the last two decades—with nearly 2.1 million workers in 2012—and is expected to be among the fastest growing occupations in the coming years.<sup>24</sup> DOL officials also told us that as the industry has grown, home care workers’ duties have become more specialized. Home care workers are assisting consumers with many more services than they had been when the exemptions were enacted. According to DOL officials,

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<sup>21</sup> DOL had published the proposed rule on December 27, 2011. Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. 81,190 (Dec. 27, 2011).

<sup>22</sup> According to this DOL official, who cited the FLSA’s legislative history, the FLSA was not meant to apply to workers who are essentially “elder sitters” who watch over elderly or infirm individuals in the same manner that a babysitter watches over children. Additionally, she said that at that time, home care workers who provided these types of companionship services were not considered to be the “breadwinners” responsible for their own families’ support. *Ensuring Regulations Protect Access to Affordable and Quality Companion Care: Hearing Before the H. Subcomm. on Workforce Protections, Comm. on Education and the Workforce*, 112th Cong. 8-23 (2012) (statement of Nancy J. Leppink, Deputy Administrator Wage and Hour Division, U.S. Department of Labor).

<sup>23</sup> See National Association of Home Care and Hospice, “Basic Statistics about Home Care” (2010 update).

<sup>24</sup> Paid home care workers are known by a variety of job titles such as home health aide and personal care aide, among others. DOL officials said they used data for occupations classified by BLS as Personal Care Aides and Home Health Aides to represent the universe of potentially affected home care workers. BLS projects that between 2012 and 2022, these will be the fastest growing occupations in overall growth and two of the top three fastest growing occupations in terms of rate of growth. Over this time period, BLS projects that these two occupational categories will add more than 1 million new jobs.

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home care workers are increasingly providing specialized care, such as assistance with activities of daily living and limited medical-related care—services that were previously provided in nursing homes or other professional settings by trained nurses.

With the expected continued growth in the demand for home care, DOL officials also told us that in developing the proposed rule, they considered how to improve worker wages and address high worker turnover. DOL officials have noted that the growth in the industry and worker responsibilities has not translated to growth in home care workers' wages, which are among the lowest in the country. Additionally, home care worker turnover has been a concern and one national group describes the characteristics of the home care workforce to have "chronically high rates of workforce instability." DOL officials said the Home Care Rule is an important step in ensuring that the home care industry attracts and retains qualified workers, which the industry will need in the future.

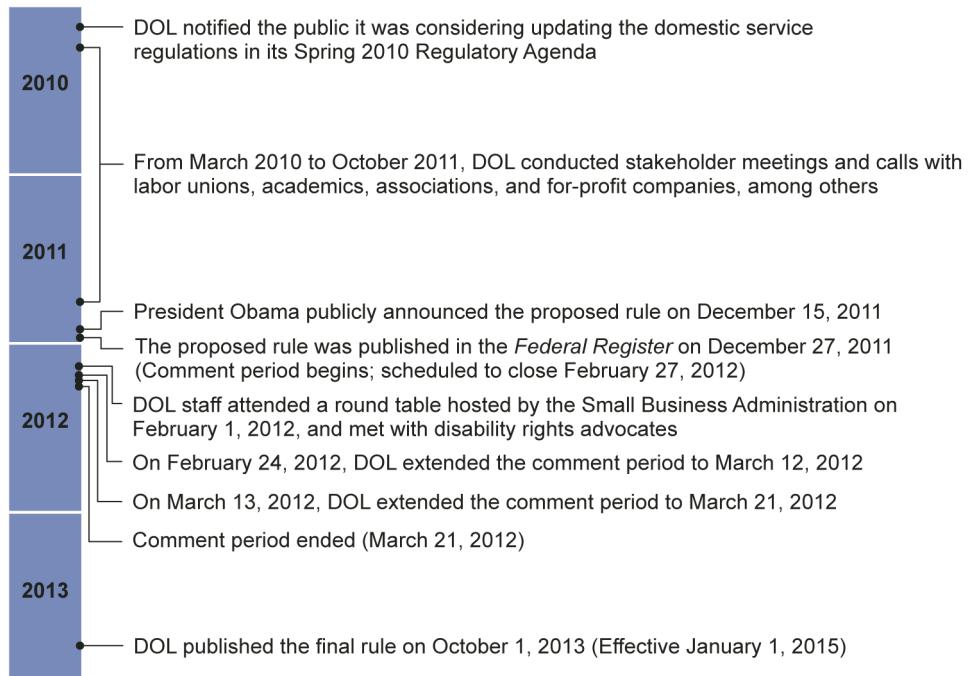
The basic process by which federal agencies typically develop and issue regulations is set forth in the Administrative Procedure Act, as well as certain other statutes and Executive Orders.<sup>25</sup> Federal rulemaking procedures generally include issuing a Notice of Proposed Rulemaking (NPRM) and providing an opportunity for public comment before issuing a final rule, and may also include conducting a cost-benefit analysis, among other things. During the rulemaking process for the Home Care Rule, DOL officials said that in addition to considering the thousands of public comments received in response to the proposed rule, the agency also sought input from stakeholders in a variety of forums. Figure 3 highlights some of the outreach that DOL conducted during the rulemaking process.

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<sup>25</sup> Some of the other relevant laws and Executive Orders include, among others, the Paperwork Reduction Act of 1980, the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, the Congressional Review Act, Executive Order 12866 (Regulatory Planning and Review), and Executive Order 13563 (Improving Regulation and Regulatory Review).

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**Figure 3: Outreach Conducted by DOL Before Issuing the Home Care Final Rule**



Source: GAO analysis of Department of Labor documents. | GAO-15-12

During the comment period, DOL received more than 26,000 public comments from various stakeholders. Comments were submitted by a range of stakeholders, including individuals and organizations representing home care workers, consumers of home care services, public and private home care agencies, the disability community, and state and federal government agencies. According to DOL, the comments reflected a wide variety of views, with most of the comments supporting FLSA protections for home care workers.<sup>26</sup>

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<sup>26</sup> In the preamble to the final rule, DOL characterized the 26,000 comments it received by saying that many were: (1) very general statements of support or opposition; (2) personal anecdotes that do not address a specific aspect of the proposed changes; (3) comments that are beyond the scope or authority of the proposed regulations; or (4) identical or nearly identical “form letters” sent in response to comment initiatives sponsored by various constituent groups.

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In the final rule, DOL made some changes from the proposed rule in response to stakeholder comments. Among the changes, DOL:<sup>27</sup>

- Set the effective date for 15 months after the publication of the final rule. Because of concerns over the amount of time needed for employers and state Medicaid programs to make the necessary adjustments to their programs, the final rule set an extended effective date for the rule of January 1, 2015.<sup>28</sup>
- Modified the proposed recordkeeping requirements for live-in home care workers to allow employers to require their workers to record and submit their hours worked.<sup>29</sup> Under the proposed rule, the employer could not require the live-in home care worker to record his or her hours worked; rather, the employer would be responsible for making, keeping, and preserving these records. However, DOL received comments that such a prohibition would be difficult for individual consumers who also serve as employers, particularly for those who have Alzheimer's disease, dementia, or developmental disabilities.
- Clarified the description of services that qualify as "care" and which are subject to the 20 percent limit.<sup>30</sup> In the proposed rule, DOL

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<sup>27</sup> This is not meant to be an exhaustive list; DOL may have made other changes not described here. In addition, DOL elected not to make changes in response to some comments. We did not evaluate whether DOL appropriately considered or responded to the comments.

<sup>28</sup> In the final rule, DOL noted that this effective date exceeds the 30-day minimum delayed effective date required under the Administrative Procedure Act and the 60-day delayed effective date for "major rules" under the Congressional Review Act. Although DOL stated that it typically utilizes the legislatively-required effective dates, as applicable, it has in the past extended the effective date for a significant FLSA rule in response to comments. DOL received comments suggesting a range of effective dates, from "immediately" to 18 months later.

<sup>29</sup> The final rule requires employers of live-in home care workers to maintain accurate records of actual hours worked. The existing regulations, by contrast, allow individual, household, or family employers who have an agreement with their live-in home care workers describing the workers' hours of work and non-work time to rely on the agreement to establish the employee's hours of work in lieu of maintaining precise records of the hours actually worked. This simplified recordkeeping option is not available to third party employers. 29 C.F.R. §§ 552.102(b), 552.110(b).

<sup>30</sup> As previously noted, one central change made by the Home Care Rule is that the companionship services exemption will apply only when the amount of time a worker spends on certain activities—including activities of daily living and instrumental activities of daily living—does not exceed 20 percent of the total hours worked per workweek per consumer. The description of services that are subject to this limit was changed in the final rule from the description in the proposed rule.

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referred to these services as “intimate personal care services that are incidental to the provision of fellowship and protection.” While DOL retained the fundamental purpose of the description, to make it easier for the regulated community to understand, the final rule defines the provision of care as assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs).

- Updated its estimate of the overall economic impact from a net cost of \$4.7 million per year in the proposed rule to a net benefit in the final rule of between \$3.9 and \$27.3 million per year on average over 10 years.<sup>31</sup> DOL officials told us that developing estimates of the number of home care workers was one of the greatest challenges they faced when estimating economic impacts. However, they said that they believe that their assumptions related to their earlier estimate resulted in an overestimation of the number of workers. In general, limited data are available on the number of home care workers or the amount of services provided. As a result, information is limited on the characteristics of the home care workforce, the terms under which they are employed, the wage rates they currently earn, or the hours they currently work.<sup>32</sup> The updated estimate of economic impact reflects changes to DOL’s assumptions including, among others: (1) how employers might respond to overtime requirements; (2) the number of current home care workers without overtime coverage; (3) the costs associated with hiring new workers; and (4) an estimate of the benefits of reduced worker turnover resulting from workers receiving increased wages through travel reimbursement and overtime compensation.

In the final rule, DOL also responded to some commenters’ questions about how existing FLSA principles—those not changed by the Home Care Rule—will likely apply to home care workers. Many of these questions were raised because when the Home Care Rule becomes

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<sup>31</sup> Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). DOL determined that this rule is economically significant within the meaning of Executive Order 12866 and therefore prepared a regulatory impact analysis.

<sup>32</sup> Navigant Economics, Estimating the Economic Impact of Repealing the FLSA Companion Care Exemption, (March 2012). The Paraprofessional Healthcare Institute (PHI) estimates that approximately 10 percent of home care workers work more than 40 hours per week. PHI analysis of the U.S. Census Bureau, Current Population Survey (CPS), 2010 Annual Social and Economic (ASEC) Supplement.

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effective, the FLSA will apply to many home care arrangements that were not originally structured with FLSA requirements in mind. For example, many stakeholders raised questions about how to calculate work hours for live-in home care workers who spend some of their time sleeping, traveling, eating, or engaging in personal pursuits. DOL also responded to comments in the final rule related to applying FLSA principles to various home care structures, including those with shared living arrangements and those where more than one entity could be considered a worker's employer under the FLSA (known as joint employment). DOL provided additional information and example-based scenarios about how the existing FLSA principles for shared living and joint employment might apply, noting that actual determinations depend on the unique facts specific to each individual situation.

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## **Stakeholders Provided Numerous and Sometimes Differing Perspectives on the Potential Effects of the Home Care Rule on Employers, Workers, Consumers, and State Medicaid Programs**

### **Potential Effects on Employers and the Cost of Implementation**

The Home Care Rule is expected to extend FLSA overtime requirements to more home care workers and, as a result of this change, representatives of almost all of the 14 national organizations we interviewed agreed that employers will likely manage workers' hours more closely. Since third party employers such as private home care agencies will no longer be able to claim the companionship services or live-in

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exemption under the Home Care Rule, more employers will be required to pay workers an overtime premium when hours worked exceed 40 hours per week.<sup>33</sup> While almost all (13 out of 14) of the national organizations we interviewed agree that employers will actively manage overtime hours, they do not always agree on whether employers will experience a noticeable difference compared with their current operating procedures.

Representatives in 5 of the 14 national organizations we interviewed explained how they think employers might react to applying the FLSA overtime requirements to home care workers and how those decisions could adversely affect business costs and services, including for small businesses. One possibility these representatives mentioned is that employers may avoid increased costs associated with overtime pay by limiting workers' hours. However, a couple of stakeholders noted that these employers would have some increased costs associated with hiring and training new workers to continue providing the same level of services to consumers. Representatives of one organization told us that small businesses, in particular, would not have the capacity to pay overtime wages and anticipate increased costs to adjust schedules for their current workers and to hire new workers. Stakeholders also discussed how the Home Care Rule could potentially decrease business for some employers. For example, representatives from one private home care agency we interviewed said they plan to pass along any additional costs incurred as a result of the Home Care Rule to consumers who pay for their care privately, which could potentially cause clients to leave their agency and seek care elsewhere. However, representatives from four national organizations who predict that the Home Care Rule will help reduce worker turnover also believe that the transition costs associated with extending FLSA coverage to home care workers should be moderate and manageable or that the Home Care Rule could potentially lead to cost savings for employers in the long-run due to reduced worker turnover.

In order to estimate the economic impact of the Home Care Rule, DOL used several assumptions about how employers might choose to comply with the rule. For example, DOL estimated how much overtime employers might choose to pay workers and what the costs associated with hiring

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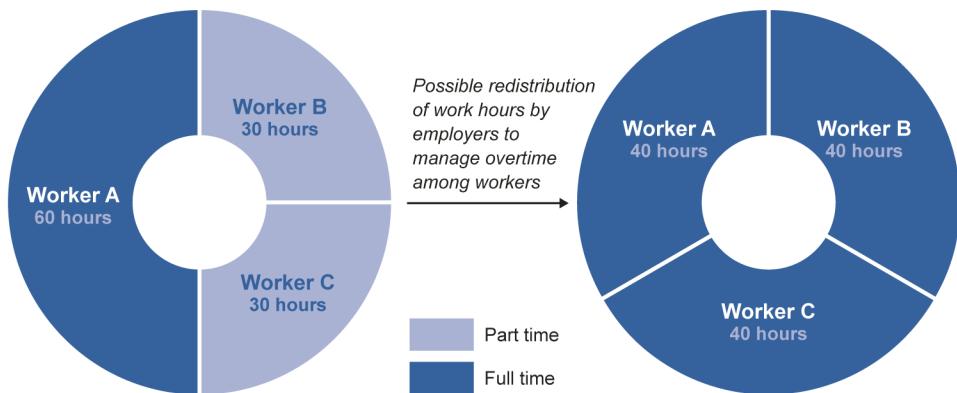
<sup>33</sup> Unless specifically exempted, employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay. 29 U.S.C. § 207(a)(1).

new workers would be. According to DOL, the effects of the rule will depend on what actions employers take and the costs and benefits of the rule will vary depending upon whether employers choose to continue current practices, rearrange worker schedules, or hire new workers. Because overtime compensation, hiring costs, and reduction in turnover depend on how employers choose to comply with the rule, DOL estimated a range of impacts.

## Potential Effects on the Home Care Workforce

Several national organizations representing the interests of workers identified potential effects on workers including increased pay and opportunities, especially for part-time workers. For example, representatives from four of these national organizations said the Home Care Rule may help create more full-time employment opportunities for part-time workers, and that if employers respond to the rule by actively managing workers' hours in order to avoid paying overtime, then part-time workers might benefit from a redistribution of work hours (see fig. 4). These stakeholders believe that logging many hours of overtime may not be in a worker's best interest and can lead to low morale or increase the risk of workplace injury. In addition, some workers' wages may increase because they may be entitled to overtime pay and compensation for travel time when the Home Care Rule goes into effect. For example, DOL's economic analysis estimates that 12 percent of home care workers currently work more than 40 hours per week, and whether some of these workers' wages will go up will depend on how much overtime employers choose to pay workers.

**Figure 4: Potential Redistribution of Home Care Worker Hours**



Source: GAO analysis of interviews with national stakeholders. | GAO-15-12

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On the other hand, representatives in 4 of the 14 national organizations we interviewed emphasized how workers who are employed for more than 40 hours in a workweek may be at a disadvantage once the Home Care Rule goes into effect (see fig. 4). The representatives said these workers could see their hours and wages reduced by employers seeking to avoid paying overtime wages. At least two national organizations predict that in certain situations, workers will have to work for multiple agencies in order to maintain their current level of income.

Extending minimum wage and overtime protections to home care workers may help expand the workforce and reduce turnover at a time when the demand for home care services is expected to increase, according to representatives in 8 of the 14 national organizations we interviewed, including worker and consumer advocacy organizations. These stakeholders often pointed to low wages and poor benefits as an impediment to recruiting and retaining qualified home care workers and the cause of high turnover. On the other hand, five national organizations, including disability advocacy groups and organizations representing employers, predict that if some workers' hours are reduced, the Home Care Rule could lead to higher turnover among workers and cause them to seek out other jobs, which could result in a labor shortage.

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### Potential Effects on Consumers, Including the Cost and Continuity of Care

Extending FLSA coverage to home care workers could also have effects on consumers. For example, representatives in six national organizations we interviewed said the Home Care Rule could result in better quality of care for consumers by reducing turnover among workers. However, representatives in eight national organizations we interviewed expressed concern over how the implementation of the overtime requirements might potentially affect the continuity of care for some consumers. Employers and consumers seeking to minimize overtime payments might need to hire additional workers to provide care. Representatives in one national organization said because of the nature of the work, it is not unusual for consumers and home care workers to forge close relationships, and according to a personal attendant coalition we interviewed, introducing additional workers may disrupt the routines and continuity of care for consumers who need substantial care. One home care worker we interviewed said that continuity of care is important for developing trust and that the particular consumer she works with might be wary of introducing new workers into her home. Another home care worker said it takes a considerable amount of time to learn the different techniques used to support consumers with disabilities and that the Home Care Rule

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has the potential to disrupt established relationships between workers and consumers.

Several national organizations discussed how the Home Care Rule could potentially affect the affordability of in-home care. Representatives in 8 of the 14 national organizations we interviewed noted specific situations where certain consumers receiving home care could be at risk of being transferred to an institution or having to move to an alternate setting because of possible service cost increases. For example, in anticipation of the Home Care Rule going into effect and increased costs, representatives from one home care agency we interviewed said some consumers have already decided to hire a neighbor or friend to meet their home care needs or have left their homes to move into a congregate setting.

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#### Potential Effects on State Medicaid Programs

Effects on Medicaid-funded home care services will likely vary by state since states have some flexibility in designing their Medicaid Programs and could choose to make adjustments in response to the rule. Many of the potential effects described by officials in the six states we visited are similar to some of those we heard from the national organizations—including concerns about cost and potential disruption of the continuity of care. Most state officials we interviewed were concerned about the potential effects of the Home Care Rule on existing programs that were structured and made affordable by means of the companionship or live-in exemptions. How the FLSA will apply in each case will depend in part on how services are delivered and the specific facts and circumstances of each situation. Among the potential effects we heard in the six states we visited were:<sup>34</sup>

- Consumer-directed programs—Consumers have the option to direct their own care in certain Medicaid-funded programs. Consumer-directed programs under Medicaid are designed to optimize consumers' autonomy and independence.<sup>35</sup> In these programs, consumers may exercise their own decision-making authority in areas

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<sup>34</sup> We visited states from December 2013 to May 2014. We conducted follow-up interviews with officials in four of the six states from July 2014 to August 2014.

<sup>35</sup> In the preamble to the Home Care Rule and FLSA guidance, DOL refers to "consumer-directed" programs. CMS uses the term "self-directed." See 42 C.F.R. §§ 441.301, 441.740. According to recent CMS guidance, both terms hold the same meaning.

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such as recruiting, hiring, training, and supervising workers. Officials in at least two states we visited expressed concern over how the Home Care Rule might affect the flexibility of these programs or restrict consumer choice in situations where the state may be considered an employer along with the consumer. For example, a consumer may potentially have less decision-making authority over how many workers are needed to provide care if a state exercises some control over workers and decides it is necessary to limit workers' hours to reduce overtime costs. According to the National Association of Medicaid Directors, maintaining current levels of consumer choice under Medicaid either becomes more expensive in certain situations as a result of the Home Care Rule, or may be sacrificed in some situations in favor of cost control.

- Family caregivers—Some states with consumer-directed Medicaid programs allow consumers to hire family members to provide their care. According to the National Association of Medicaid Directors, paid family caregivers have become a common solution to the shortage of traditional home care workers. Some states may consider limiting the number of hours workers, including family members, can work in order to minimize overtime costs once the Home Care Rule goes into effect, which could potentially reduce the available workforce. In addition, some family caregivers may rely on the income they receive by providing care. In two states we visited, state officials specifically expressed concern over situations where family members' work hours may be reduced in response to the Home Care Rule in order to minimize overtime payments, which could reduce the family's income. In another state, officials were less concerned about the Home Care Rule's potential effect on family caregivers because one of their Medicaid home care programs includes certain restrictions on hiring a family member and limits the number of hours a family worker can provide care.

Though DOL guidance describes the parameters of an employment relationship versus a familial relationship for the purposes of the Home Care Rule,<sup>36</sup> officials from one national organization told us that it may be a challenge for some consumers and their family caregivers to determine when FLSA principles apply. According to DOL

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<sup>36</sup> Department of Labor, Wage and Hour Division, "Fact Sheet #79F: Paid Family or Household Members in Certain Medicaid-Funded and Certain Other Publicly Funded Programs Offering Home Care Services Under the Fair Labor Standards Act (FLSA)" June 2014.

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#### What are family caregivers?

Paid family caregivers are typically not career home care workers; rather they are usually close family members and friends willing to help the consumer. DOL guidance states that in situations where family members are paid care providers, there is both a familial and an employment relationship, and only hours worked within the scope of the employment relationship are covered by the FLSA. In these circumstances, the employment relationship is usually limited by a "plan of care" or other written agreement approved by the program funding the services. For example, a familial relationship rather than an employment relationship would exist for a father who has an adult son with a physical disability and helps his son with eating dinner and bathing in the evenings. If the son enrolls in a Medicaid-funded program and the father becomes his paid care provider under a program-approved plan of care that funds 8 hours of services per day, then the father would also be in an employment relationship with his son for purposes of the FLSA for those 8 hours.

guidance, family workers may be entitled to FLSA minimum wage and overtime protections depending on the specific circumstances of the work arrangement.

- Respite care—The Medicaid program also permits states to offer respite care—a break from caregiving responsibilities—to family caregivers. In one state we visited, officials expressed concern that FLSA principles would apply to respite workers. For example, officials in this state said a worker may easily incur overtime in overnight respite situations, which could potentially strain a consumer's budget for care. Introducing additional workers to provide respite in order to avoid overtime costs may not always be practical. For example, one state official said it may be very disruptive for some consumers, such as those with intellectual and developmental disabilities who do not handle changes well, to have different caregivers in a respite situation over the course of a weekend.
- Live-in arrangements—Under some Medicaid-funded programs, home care workers and consumers may live together. Officials in two of the states we visited told us they were concerned about how FLSA requirements may affect live-in care arrangements for those consumers who require substantial care and how it could be costly to comply with the FLSA in certain live-in situations. Many of these live-in arrangements were designed without consideration of FLSA overtime requirements and were made affordable by reliance on the companionship and live-in exemptions. State officials in one state we visited said they may redesign one of their live-in programs in response to the Home Care Rule to help keep overtime costs down. However, they said it would require time to reevaluate and possibly rewrite parts of existing program guidance.
- State budgets—Officials in all of the six states we visited said the Home Care Rule has the potential to strain limited state budgets. For example, officials in three states said that Medicaid rates may not be sufficient to cover additional costs incurred as a result of the rule, including compensable travel time between Medicaid beneficiaries. According to state officials in three of the states we visited, their state legislatures had not yet budgeted additional funding that may be needed to comply with the Home Care Rule once it goes into effect. States may have to make systems changes to track overtime among workers, for example, which could be costly and would require time to implement. States are also facing their own unique budgetary challenges. For example, officials from at least two states we visited mentioned wages increasing, which could also pose a financial strain and mean that implementing the Home Care Rule's overtime

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- requirements will cost more. In one state we visited, the minimum wage is set to increase from \$8.00 to \$9.00 by December 31, 2015.
- Capacity—In addition to implementing the Home Care Rule, state officials we interviewed expressed concern over resources and having the capacity to implement and comply with other recent federal requirements. For example, officials in three states said that the Patient Protection and Affordable Care Act's penalties for employers failing to offer full-time employees affordable health insurance are scheduled to go into effect at roughly the same time as the Home Care Rule.<sup>37</sup> CMS also recently issued regulations on home and community-based services and some state officials said that they have been focusing their attention on complying with these regulations.<sup>38</sup>
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## DOL Worked with Federal Agencies and Stakeholders to Develop Guidance on Implementing the Home Care Rule

### DOL Developed Implementation Guidance

After the Home Care Rule was published, DOL developed guidance, conducted outreach, and provided technical assistance to help state Medicaid programs and other stakeholders plan for implementation. For example, to help workers and consumers determine if federal minimum wage and overtime pay are required, DOL has made available on its

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<sup>37</sup> Among other things, the act provides that, beginning in 2014, employers with 50 or more full-time employees that fail to offer their full-time employees (and their dependents) affordable health insurance will be subject to a tax penalty. Full-time employees are those who work an average of 30 or more hours of work per week. Pub. L. No. 111-148, § 1513(a), 124 Stat. 119, 253 (2010), (amending 26 U.S.C. § 4980H). The Internal Revenue Service has delayed implementation of the penalty and has announced that it will gradually be phased in beginning in 2015.

<sup>38</sup> Medicaid Program: State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Home and Community-Based Setting Requirements for Community First Choice and Home and Community-Based Services (HCBS) Waivers, 79 Fed. Reg. 2948 (Jan. 16, 2014).

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website several self-assessment tools which ask a series of questions about the nature of the work, the employer, and the services performed. In addition, DOL has answered various Frequently Asked Questions (FAQs) and developed fact sheets to explain how the Home Care Rule will apply. For example, DOL answers questions on its website about how to apply FLSA to the hours a worker spends sleeping, as is the case when a home care worker lives with a consumer. DOL has also published several fact sheets on specific topics on its website to provide stakeholders with compliance assistance, such as how the FLSA will apply to paid family caregivers once the Home Care Rule goes into effect. DOL officials said they have trained staff in the national and regional offices in order to expand their capacity for compliance assistance, such as providing technical assistance.

In its 2014-2018 Strategic Plan, DOL states that one of its goals is to improve compliance with federal wage and overtime laws by providing compliance assistance and conducting outreach with stakeholders.<sup>39</sup> After the final rule was issued, DOL collaborated with federal agencies and conducted outreach with stakeholders to help them better understand the implications of the rule on state Medicaid programs and develop applicable guidance (see fig. 5). Since many Medicaid programs providing home care services were created with the expectation that the workers would be exempt from the FLSA, DOL initiated an interagency workgroup comprised of individuals from DOL, CMS, and DOJ to understand the variation among different state Medicaid programs and the laws that protect people with disabilities.<sup>40</sup> DOL identified two areas in which Medicaid programs could use additional guidance and developed written guidance, sponsored webinars, and conducted outreach with all 50 states to assist with compliance. In addition, CMS also issued

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<sup>39</sup> GAO also recommended in a prior report and DOL agreed that it should develop a systematic approach for identifying areas of confusion about FLSA requirements—including gathering and using input from FLSA stakeholders—to help inform compliance assistance efforts and improve its guidance to employers and workers. GAO, *Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance*, GAO-14-69 (Washington, D.C.: Dec. 18, 2013).

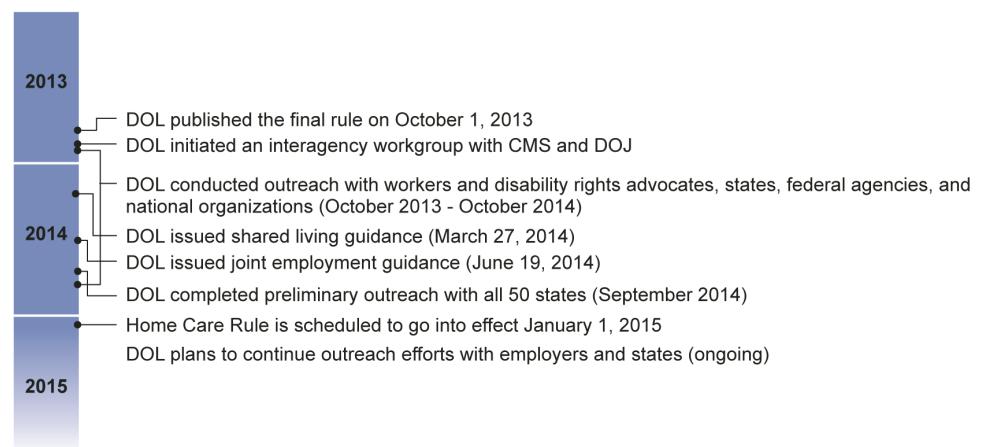
<sup>40</sup> States are required, under title II of the Americans with Disabilities Act and Department of Justice regulations, to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d). See also 42 U.S.C. § 12131 et seq.; Olmstead v. L.C., 527 U.S. 581 (1999).

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guidance to assist states in understanding options for consumer-directed programs in implementing the changes made by the Home Care Rule.<sup>41</sup>

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**Figure 5: Outreach Conducted by DOL after the Final Home Care Rule Was Issued**



Source: GAO analysis of Department of Labor documents. | GAO-15-12

The two major guidance documents DOL issued pertain to:

- Shared living arrangements—In response to the proposed rule, DOL received many comments from stakeholders requesting that it clarify how FLSA wage and hour requirements apply to certain shared living arrangements funded under Medicaid.<sup>42</sup> DOL consulted with stakeholders to learn about the different types of shared living models used by states and the differences among them. In March 2014, DOL issued an Administrator's Interpretation, which provided guidance on

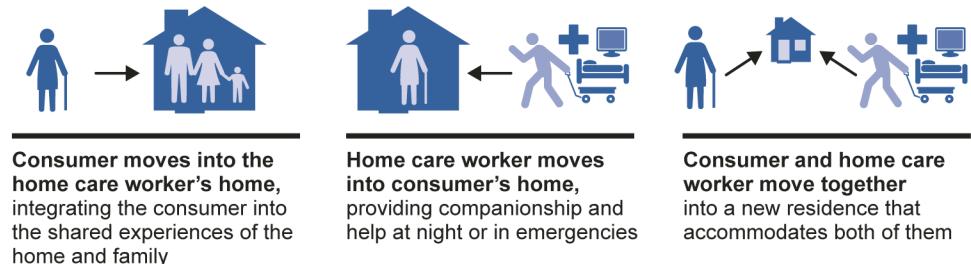
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<sup>41</sup> CMCS Informational Bulletin, "Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes" July 3, 2014.

<sup>42</sup> Shared living arrangements occur when workers and consumers live together in a private home and are commonly funded by Medicaid. These programs are referred to by various titles, such as "adult foster care," "host home," "paid roommate," "supported living," or "life sharing."

how FLSA principles apply to shared living arrangements.<sup>43</sup> A representative from one national organization we interviewed said that it was collaborating with another national organization to develop a reader-friendly guide on shared living to further help state Medicaid agencies and other home care providers implement FLSA requirements. The design of states' shared living programs can vary greatly, as can the specific facts and circumstances around these living situations. For example, in one state we visited, a state official said that most shared living arrangements in the state consist of home care providers opening up their homes to consumers. In another state we visited, home care workers typically move into the home of the consumer. The shared living guidance provides detailed examples about different types of live-in arrangements including: (1) those in which a consumer lives in a home care worker's house, (2) those in which a home care worker lives in a consumer's house, and (3) those in which the two move into a new house together (see fig. 6).

**Figure 6: Different Types of Shared Living Arrangements Outlined in DOL Guidance**



Source: Department of Labor guidance. | GAO-15-12

The guidance on shared living also explains that FLSA requirements may or may not apply to home care workers in these arrangements and will depend, in part, on whether the home care worker would be considered

<sup>43</sup> Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2014-1: The application of the Fair Labor Standards Act to home care services provided through shared living arrangements, including adult foster care and paid roommate situations. March 2014. See also Department of Labor, Wage and Hour Division, "Fact Sheet #79G: Application of the Fair Labor Standards Act to Shared Living Programs, including Adult Foster Care and Paid Roommate Situations" March 2014.

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an employee or an independent contractor.<sup>44</sup> To determine this, DOL uses the “economic realities” test, which reviews a series of factors. Some of the factors reviewed in determining whether a worker is an employee or an independent contractor include who sets wages and work hours and who determines how the work is performed.<sup>45</sup> The guidance also provides various examples of shared living arrangements and what the result would be under the economic realities test. According to the guidance, in most situations where a consumer moves into the home care worker’s existing home, the worker will not be considered an employee of the consumer under the FLSA. This is primarily because the home care worker has a greater degree of control over the work and investment in the arrangement, including maintaining and modifying the residence.<sup>46</sup> On the other hand, the guidance says that when a worker moves into the home of a consumer, the worker will typically be considered an employee of the consumer under the FLSA, because the consumer has invested in and controls the residence, and likely sets the schedule and directs how and when tasks are to be performed. Several of the national organizations and states we interviewed appreciated DOL’s efforts to explain how these different types of Medicaid services are delivered and the specific examples provided in the shared living guidance. Based on the guidance, officials in two states we visited said that they do not anticipate having to make changes because they believe the FLSA does not apply to them based on the way their shared living programs are structured.

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<sup>44</sup> The FLSA applies only when there is an employee-employer relationship; it does not require payment of minimum wage and overtime compensation to workers who are properly categorized as independent contractors.

<sup>45</sup> DOL has existing guidance on how courts and the department determine whether a worker is an employee and therefore covered by the FLSA. According to this guidance, workers who are economically dependent on the business of the employer are considered to be employees. All facts relevant to the relationship between the worker and the employer must be considered. The factors considered can vary and no one set of factors is exclusive. Department of Labor, Wage and Hour Division, “Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)” May 2014.

<sup>46</sup> According to the guidance, in most shared living arrangements in a home care worker’s home, the worker will not be an employee of the consumer or a third party (provided the third party’s role is limited), but will be considered an independent contractor instead. See Department of Labor, Wage and Hour Division, “Fact Sheet #79G: Application of the Fair Labor Standards Act to Shared Living Programs, including Adult Foster Care and Paid Roommate Situations” March 2014.

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- Joint employment—DOL reached out to stakeholders to understand how different Medicaid programs are structured to develop guidance on the application of FLSA joint employment principles and to help states implement the Home Care Rule. Under the FLSA, a single worker may be an employee of two or more employers at the same time.<sup>47</sup> For example, in the context of home care, a consumer and a third party such as a state Medicaid agency or a private home care agency may jointly employ a worker.<sup>48</sup> Because the FLSA will apply to many more home care workers once the Home Care Rule goes into effect, in June 2014 DOL issued an Administrator's Interpretation providing guidance on joint employment. This guidance could help stakeholders understand situations in which there is a third party joint employer for purposes of FLSA, such as in certain Medicaid-funded consumer-directed programs.<sup>49</sup> According to DOL, most, but not all, consumer-directed programs will have a third party joint employer such as a private agency, non-profit organization, or public entity in addition to the consumer.

States have been reexamining their roles and responsibilities under Medicaid in order to determine if they are third party joint employers in certain situations and therefore responsible for meeting the FLSA's minimum wage and overtime requirements, according to an official at the National Association of Medicaid Directors. States are particularly concerned about situations in which they may be a joint employer to home care workers who provide care for multiple consumers because such workers may accrue overtime. For example, in one state we

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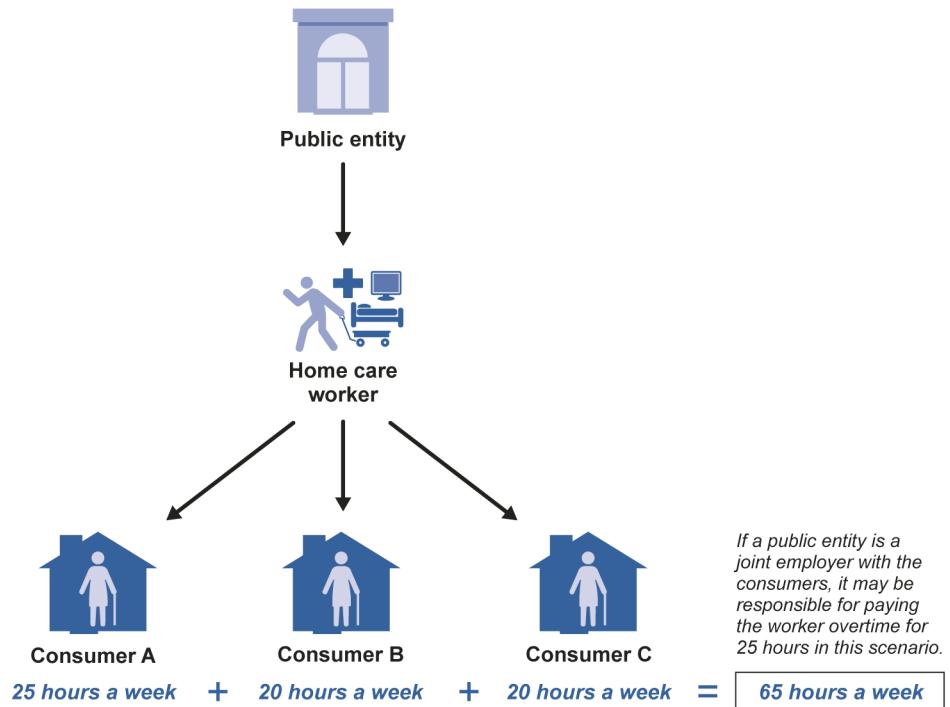
<sup>47</sup> See 29 C.F.R. § 791.2. If an employee is jointly employed by two employers (i.e., employment by one employer is not completely disassociated from employment by the other), the employee's work for the joint employers during the workweek "is considered as one employment," and the joint employers are responsible, both individually and jointly, for FLSA compliance, including paying overtime compensation for all hours worked over 40 during the workweek.

<sup>48</sup> Employers may be consumers, private home care agencies, non-profit organizations, or a public entity such as a state or county, depending on how states' programs are designed and how certain roles and responsibilities are defined. To determine whether an entity is an employer under the FLSA, courts and DOL use the "economic realities" test, described above.

<sup>49</sup> Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2014-2: Joint employment of home care workers in consumer-directed, Medicaid-funded programs by public entities under the Fair Labor Standards Act. June 2014. DOL also revised its pre-existing Fact Sheet on joint employment; see Department of Labor, Wage and Hour Division, "Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA)" June 2014.

visited, a home care worker said she works for three different consumers under the state's consumer-directed programs where the consumer or a family member is considered the employer. She does not work for any one consumer for more than 40 hours per week. If the state is a joint employer for these programs, it may be responsible for compensating the worker with overtime wages any time she works more than 40 hours per week cumulatively across any of the consumers (see fig. 7).

**Figure 7: Example of a State's Responsibility for Paying Overtime in a Joint Employment Scenario**



Source: GAO analysis of Department of Labor guidance. | GAO-15-12

Note: According to the Department of Labor, a home care worker who works for multiple consumers and a single third party joint employer must be paid at the overtime rate for any hours worked more than 40 in a single workweek, aggregating the time worked across consumers.

Certain states have already determined that they are joint employers. Prior to issuing the Administrator's Interpretation on joint employment, DOL responded to specific inquiries from states about the application of FLSA to specific scenarios. For example, an Oregon state official asked DOL to provide an official opinion on whether the state would be considered a joint employer of home care workers who provided services under their Oregon-sponsored consumer-directed Medicaid

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program. DOL applied the “economic realities” test used by the courts, using information provided by the state and determined that the state would be considered a joint employer in that program. One state we visited, California, has already determined based on prior experience that it would be considered a joint employer under the FLSA in certain Medicaid-funded situations and would therefore be responsible for paying eligible workers overtime under the new rule. For one California program, the state considered limiting workers’ hours to 40 hours per week to help control costs, but ultimately budgeted more than \$170 million to pay the approximately 50,000 workers in that program who work up to a certain amount of overtime, with that cost expected to increase.

However, five of the six states we visited were still in the process of trying to determine how the FLSA joint employment principles apply to their specific Medicaid programs and whether they will have to make any changes to their programs to keep the cost of home care services affordable. Two of these states also said they need additional time to understand the joint employment guidance in order to determine how their existing Medicaid programs may be affected by the FLSA framework and what steps they may need to take to comply. Officials in these two states also said they are trying to figure out if any of their programmatic changes would require CMS approval. CMS officials said the approval process could take from 90 to 180 days, depending on the type of change.<sup>50</sup>

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<sup>50</sup> According to CMS officials, this may require changes to waivers, and in some cases, CMS can approve amendments to waivers retroactively.

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## DOL Plans a Phased-In Enforcement Strategy but Does Not Have Plans to Evaluate the Effects of the Rule

While DOL has several enforcement mechanisms in place to oversee the Home Care Rule's implementation once it goes into effect, DOL officials said they are currently focusing their efforts on technical assistance to help employers and states with implementing the rule.<sup>51</sup> For example, in October 2014, DOL announced that it will not bring enforcement actions against any employer for violations of FLSA resulting from the Home Care Rule through June 2015.<sup>52</sup> DOL stated that it had received requests from national organizations representing state Medicaid programs and disability advocates and two states to extend the effective date of the Home Care Rule. According to DOL, these entities requested additional time to make programmatic, budgetary, and operational adjustments to state Medicaid programs. DOL also said it received requests from national organizations and worker advocates to implement the Home Care Rule on the published date of January 1, 2015 so that workers could be protected by the FLSA without delay. While DOL did not extend the effective date of the Home Care Rule, the agency recognized that the implementation of the Home Care Rule raised sensitive issues and it has been working with employers to minimize the effects on consumers who rely on home care. For these reasons, DOL stated that during the six month period of non-enforcement, it will concentrate its resources on providing intensive technical assistance to the community, particularly state agencies administering home care programs. In the notice, DOL stated that from July 1, 2015 until December 31, 2015, it will make determinations on a case-by-case basis as to whether to bring enforcement actions in the home care context and will give strong consideration to an employer's efforts to meet the requirements under the FLSA. During this time period, DOL plans to continue extensive outreach and technical assistance.

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<sup>51</sup> DOL's 2014-2018 Strategic Plan also states that compliance is dependent upon the effective use of enforcement tools. The FLSA authorizes DOL to enforce its provisions by, for example, conducting investigations, assessing penalties, supervising payments of back wages and bringing suit in court on behalf of employees. Workers also have the right under the FLSA to file a private lawsuit to recover wages they claim they are owed because of their employer's violation of the act's minimum wage or overtime pay requirements. For more information see GAO, *Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance*, GAO-14-69 (Washington, D.C.: Dec. 18, 2013).

<sup>52</sup> See Application of the Fair Labor Standards Act to Domestic Service; Announcement of Time-Limited Non-Enforcement Policy. 79 Fed. Reg. 60,974 (Oct. 9, 2014).

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While DOL has adopted this phased-in enforcement strategy to promote compliance, the effects of the Home Care Rule still remain uncertain. In 2011, the President signed Executive Order 13563, entitled *Improving Regulation and Regulatory Review*. The order states that our regulatory system “must promote predictability and reduce uncertainty.” The order directed each federal executive agency to develop a plan for conducting retrospective reviews of existing significant regulations, to determine whether they should be modified, streamlined, expanded, or repealed to make the agency’s regulatory program more effective or less burdensome.<sup>53</sup> We previously reported that retrospective reviews are useful because regulations can change the behavior of regulated entities and the public in ways that cannot be predicted prior to implementation. In addition, these reviews may result in various outcomes such as changes to regulations, changes or additions to guidance, decisions to conduct additional studies, or validation that existing rules were working as planned.<sup>54</sup> We have also observed that it is important for agencies to consider in advance how they will evaluate their regulations, to better position them to conduct future retrospective analyses. DOL officials told us it would be premature to think about the effects of the rule since they are developing further implementation plans and focusing on providing technical assistance. DOL officials also said they had not made any plans for evaluating the Home Care Rule and that it is too early to design such a study. In 2007, we recommended that during the promulgation of certain new rules, agencies consider how and when they will measure the performance of the regulation, including how and when they will collect, analyze, and report the data needed to conduct a retrospective review. Consistent with that recommendation, guidance from the Office of Management and Budget also states that regulations should be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses.

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## Conclusions

Home care agencies and state Medicaid programs are responding to the Home Care Rule through programmatic and policy changes, and while

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<sup>53</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>54</sup> GAO, *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO-14-268 (Washington, D.C.: Apr. 11, 2014) and GAO, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791 (Washington, D.C.: July 16, 2007).

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more home care workers will be entitled to receive federal minimum wage and overtime pay protections as a result of the Home Care Rule, the effects of the rule will remain unclear until after it is implemented. The effects on workers and consumers will largely depend on how employers respond to overtime requirements and the changes that are made to state Medicaid programs. Given that many state Medicaid programs have relied on the companionship services exemption and emphasize providing care at home, state Medicaid officials continue to be concerned about maintaining services for consumers in their homes as opposed to institutions. DOL's recent announcement regarding the phase-in of its enforcement, coupled with its substantial outreach to stakeholders and revised estimate of the economic impact of the rule, highlight the challenges and complexity of implementing the rule. The future of the Home Care Rule will depend on the outcome of pending litigation and DOL's subsequent decisions about implementation. Should the rule go into effect as scheduled, once it is fully implemented, DOL will have an opportunity to examine some of the broader implications of the Home Care Rule such as whether the workforce grows as a result to meet any increased demand for home care and whether there is any resulting increase in the use of institutional care. However, in the absence of a plan to evaluate the effects of the rule, DOL may be unprepared to collect the necessary data to take advantage of this opportunity. Given the uncertainty of the Home Care Rule's ultimate impact, planning for a retrospective review is important because regulations can change behaviors and result in consequences that cannot be predicted prior to implementation.

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## Recommendation for Executive Action

Depending on the outcome of the litigation, the Secretary of Labor should take steps to ensure the agency will be positioned to conduct a meaningful retrospective review consistent with the Executive Order at an appropriate time. These steps should be taken in consultation with the Centers for Medicare & Medicaid Services, and could include, for example, identifying metrics that could be used to evaluate the rule, and implementing a plan to gather and analyze the necessary data.

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## Agency Comments and Our Evaluation

We provided a draft of this report to DOL for review and comment. DOL's Wage and Hour Division (WHD) provided written comments which are reproduced in appendix I. WHD agreed with our recommendation that the agency position itself to conduct a meaningful retrospective review at an appropriate time. Moving forward, WHD said it is working to develop data collection plans and to explore a potential evaluation that is focused on

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the Home Care Rule. As part of this effort, WHD noted that DOL will continue to work with HHS and other federal partners. DOL also provided technical comments, which we incorporated as appropriate.

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We are sending copies of this report to appropriate congressional committees, the Secretary of Labor, and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staffs have any questions concerning this report, please contact me at (202) 512-7215 or [sherrilla@gao.gov](mailto:sherrilla@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report are listed in appendix II.



Andrew Sherrill, Director  
Education, Workforce, and Income Security Issues

# Appendix I: Comments from the Department of Labor

**U.S. Department of Labor**

Wage and Hour Division  
Washington, DC 20210



December 4, 2014

Barbara D. Bovbjerg  
Managing Director  
Education, Workforce, and  
Income Security Issues  
U.S. Government Accountability Office  
Washington, D.C. 20548

Dear Ms. Bovbjerg:

The Department of Labor's Wage and Hour Division (WHD) appreciates the opportunity to submit a statement in response to the Government Accountability Office (GAO) Draft Report (Report) titled "Fair Labor Standards Act: Extending Protections to Home Care Workers" (GAO-15-12).

The Department was pleased to publish the Home Care Final Rule on October 1, 2013. This Rule updates out-of-date regulations to correct the exclusion of home care workers from the FLSA's minimum wage and overtime protections and ensures that nearly two million workers will receive the same basic protections already provided to most U.S. workers – including those who perform the same jobs in nursing homes. The Rule will also help to ensure that consumers have access to high-quality care in their homes from a stable and increasingly professionalized workforce.

As your Report reflects, the Rule is the result of a deliberate, thoughtful and inclusive rulemaking process completed over the course of several years. On December 27, 2011, the Department published a Notice of Proposed Rulemaking (NPRM) based on the Department's enforcement experience, relevant legislative history, significant stakeholder input, and a thorough review of research concerning the home care industry. During the rulemaking process, the Department carefully considered over 26,000 comments received in response to the NPRM, including comments from home care workers, consumers of home care services, state officials, small business owners and employers, worker advocacy groups and unions, employer and industry advocacy groups, the disability community, and others.

We appreciate GAO's acknowledgement of the Department's significant outreach efforts during the rulemaking process and since promulgating the Final Rule. Since the Rule was published, we have worked closely with all stakeholders to implement the Rule in a manner that achieves two goals: extending basic labor protections to home care workers, and ensuring that Medicaid participants and their families continue to have access to the

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**Appendix I: Comments from the Department of  
Labor**

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critical home and community-based services upon which they rely, particularly services delivered through innovative models of care.

In addition to extensive written guidance, the Department's unprecedented implementation program has included engagement with a wide variety of stakeholder organizations at every step throughout the implementation process. In the 14 months since the Rule was published, the Department has directly reached thousands of people through over 200 webinars, conference calls, meetings and presentations, engaging relevant state associations, states, consumers, disability and senior citizens' advocates, veterans' organizations, worker representatives, and industry groups, among others. As part of our individualized, ongoing technical assistance program, we have held at least one state-specific conference call with representatives from all 50 state governments. We continue to stand ready to provide assistance to all stakeholders throughout the implementation process.

As the Report states, GAO recommends that "Depending on the outcome of the litigation, the Secretary of Labor should take steps to ensure the agency will be positioned to conduct a meaningful retrospective review consistent with the Executive Order at an appropriate time. These steps should be taken in consultation with the Centers for Medicare & Medicaid Services, and could include, for example, identifying metrics that could be used to evaluate the rule, and implementing a plan to gather and analyze the necessary data."

WHD agrees that the agency should position itself to conduct meaningful retrospective review at the appropriate time. Consistent with the government-wide goal of building and applying evidence relevant to addressing important policy challenges and to ensuring programs are effective, WHD has been engaged in discussions on the topic of the unique data collection needs of implementing the home care rule. As evidenced in this audit, WHD has documented the extensive rulemaking-related activities to date. Moving forward, WHD is working with the Department to develop data collection plans and to explore a potential evaluation focused on various aspects of this overall effort. As part of this effort, the Department of Labor will continue to engage with the Department of Health and Human Services and other federal partners.

Again, thank you for the opportunity to comment on the Report. If you have any questions, please do not hesitate to contact us.

Sincerely,



David Weil  
Administrator

# Appendix II: GAO Contact and Staff Acknowledgments

<b>GAO Contact</b>	Andrew Sherrill, (202) 512-7215 or <a href="mailto:sherrilla@gao.gov">sherrilla@gao.gov</a>
<b>Staff Acknowledgments</b>	In addition to the contact named above, Blake Ainsworth (Assistant Director), Anjali Tekchandani (Analyst-in-Charge), Robert Campbell, Sara Edmondson, and Meredith Moore made significant contributions to all phases of the work. Also contributing to this report were James Bennett, Kenneth Bombara, Catina Bradley, Sarah Cornetto, Patricia Donahue, Alexandra Edwards, Katherine Iritani, Kathy Leslie, Sheila McCoy, Linda McIver, Jean McSween, Clarita Mrena, Mimi Nguyen, and Kathleen van Gelder.

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