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October 30, 2013

The Honorable Tom Harkin
Chairman
The Honorable Lamar Alexander
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable John Kline
Chairman
The Honorable George Miller
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *Department of Labor, Wage and Hour Division: Application of the Fair Labor Standards Act to Domestic Service*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor (Labor), Wage and Hour Division entitled “Application of the Fair Labor Standards Act to Domestic Service” (RIN: 1235-AA05). We received the rule on September 30, 2013. It was published in the *Federal Register* as a final rule on October 1, 2013, with an effective date of January 1, 2015. 78 Fed. Reg. 60,454.

The final rule revises Labor’s 1975 regulations implementing amendments to the Fair Labor Standards Act (FLSA or the Act) to better reflect congressional intent given the changes to the home care industry and workforce since that time. In 1974, Congress extended the protections of the Act to “domestic service” employees, but it exempted from the Act’s minimum wage and overtime provisions domestic service employees who provide “companionship services” to elderly people or people with illnesses, injuries, or disabilities who require assistance in caring for themselves, and it exempted from the Act’s overtime provision domestic service employees who reside in the household in which they provide services. Most significantly, Labor is revising the definition of “companionship services” to clarify and narrow the duties that fall within the term; in addition, third-party employers, such as home care agencies, will not be able to claim either of the exemptions. The major effect of the final rule is that more domestic service workers will be protected by the FLSA’s minimum wage, overtime, and recordkeeping provisions.

Enclosed is our assessment of Labor’s compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that Labor complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Mary Ziegler
Director, Division of Regulations,
Legislation, and Interpretation
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
WAGE AND HOUR DIVISION
ENTITLED
"APPLICATION OF THE FAIR LABOR STANDARDS ACT
TO DOMESTIC SERVICE"
(RIN: 1235-AA05)

(i) Cost-benefit analysis

Labor illustrates the potential scale of projected transfers, costs, and net benefits of the revisions to the FLSA regulations addressing domestic service employment. According to Labor, the primary effect is the transfer of income from home care agencies (and payers because a portion of costs will likely be passed through via price increases) to direct care workers, due to more workers being protected under the FLSA. Labor projects an average annualized transfer of \$321.8 million in the medium-impact scenario (using a 7 percent real discount rate). Labor projects that the average annualized direct costs for regulatory familiarization, hiring new workers, and the deadweight loss due to the potential allocative inefficiency resulting from the rule will average \$6.8 million per year over a 10-year period. The Department also expects that the final rule will reduce the high turnover rate among direct care workers, along with its associated employment costs to agencies, a key quantifiable benefit of the final rule. Because overtime compensation, hiring costs, and reduction in turnover depend on how employers choose to comply with the rule, Labor estimated a range of impacts based on three adjustment scenarios. Labor presents "Overtime Scenario 2"—which is, along with a complete discussion of the data sources, methods, and results of this analysis, presented in the final rule.

Not included in Labor's illustration is the opportunity cost of managerial time spent adjusting worker schedules to reduce or avoid overtime hours and travel time. Labor expects these costs to be relatively small because employers, particularly home care agencies, already manage the schedules of nonexempt home care employees and, therefore, have systems in place to facilitate scheduling workers. Additionally, Labor states that the potential impact on direct care workers resulting from employers making such schedule changes is also unquantified. Labor explains that the costs, benefits, and transfer effects of the final rule depend on the actions of employers, decisionmakers within federal and state programs that provide funding for home care services, consumers, and workers. According to Labor, depending upon whether employers choose to continue current work practices, rearrange worker schedules, or hire new workers, the costs, benefits, and transfers will vary. Labor notes that the delayed effective date of this final rule creates a transition period during which all entities potentially impacted by this rule have the opportunity to review existing policies and practices and make necessary adjustments for compliance with this final rule. Labor believes that this transition period mitigates short-term impacts for the regulated community, relative to a regulatory alternative in which compliance is required immediately upon finalization. In order to ensure a transition that minimizes potential disruption in services and supports the progress that has allowed elderly people and persons with disabilities to remain in their homes and participate in their communities, Labor states that it will work closely with stakeholders and the Department of

Health and Human Services to provide additional guidance and technical assistance during the period before the rule becomes effective.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

Labor believes that the final rule will have a significant economic impact on a substantial number of small entities; therefore, the final rule contains a final regulatory flexibility analysis.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

Labor states that the final rule includes a federal mandate that might result in increased expenditures by the private sector or state, local, and tribal governments of more than \$100 million in any one year. Labor notes that the primary impact on state, local, and tribal governments may be through increased Medicaid reimbursement rates. According to Labor, the magnitude of that impact will depend on two factors: (1) how home care agencies adjust scheduling to reduce or eliminate overtime hours; and (2) how states adjust Medicaid budgets in response to the rule.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

On December 27, 2011, Labor published a Notice of Proposed Rulemaking (NPRM) inviting public comments for a period of 60 days on proposed changes to the exemptions for employees performing companionship services and live-in domestic service employees. 76 Fed. Reg. 81,190. The proposed changes were based on Labor's experience, including its previous rulemaking efforts, a thorough review of the legislative history, meetings with stakeholders, as well as additional research conducted concerning the changes in the demand for home care services, the home care industry, and the home care services workforce. On February 24, 2012, Labor extended the period for filing written comments. 77 Fed. Reg. 11,021. On March 13, 2012, Labor again extended the period for filing written comments with a final comment closing date of March 21, 2012. 77 Fed. Reg. 14,688. The final rule is the result of consideration of the comments received in response to the December 27, 2011, NPRM.

More than 26,000 individuals commented on Labor's NPRM. Labor notes that comments were received from a broad array of constituencies, including direct care workers, consumers of home care services, small business owners and employers, worker advocacy groups and unions, employer and industry advocacy groups, law firms, Members of Congress, state government agencies, federal government agencies, professional associations, the disability community, and other interested members of the public. Several organizations attached the views of some of their individual members: National Partnership for Women and Families, Progressive Jewish Alliance and Jewish Funds for Justice, and Interfaith Worker Justice, for example. Other organizations submitted a comment and attached membership signatures, such as the National Women's Law. Labor notes that the final rule includes substantive comments on the proposed regulations, together with Labor's responses to those comments, and a section-by-section discussion of the changes that have been made in the final regulatory text.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

The Office of Management and Budget (OMB) has assigned control number 1235-0018 to the FLSA information collections. In accordance with the PRA, the December 27, 2011, NPRM solicited comments on the FLSA information collections as they were proposed to be changed.

Statutory authorization for the rule

Labor states that the final rule is issued pursuant to sections 13(a)(15), 13(b)(21), and 11(c) of the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 213(a)(15), 213(b)(21), 211(c).

Executive Order No. 12,866 (Regulatory Planning and Review)

Labor states that the final rule is economically significant within the meaning of Executive Order 12,866. Therefore, OMB has reviewed the final rule.

Executive Order No. 13,132 (Federalism)

Labor states that the final rule does not have federalism implication. Additionally, Labor notes that the final rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.