



April 8, 2013

Jeffrey Zients
Acting Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Application of the Fair Labor Standards Act to Domestic Service (RIN 1235-AA05)

Dear Mr. Zients:

We are writing on behalf of the National Association of Medicaid Directors (NAMD) to request that the Office of Management and Budget undertake a more rigorous review of the U.S. Department of Labor's Notice of Proposed Rulemaking, "Application of the Fair Labor Standards Act to Domestic Service," (RIN 1235-AA05). NAMD is a bipartisan, professional, nonprofit organization representing the nation's 56 state and territorial Medicaid agencies, including the District of Columbia, whose mission is to represent and serve state Medicaid directors. Medicaid is responsible for the financing, delivery and oversight of services that are addressed in this proposed regulation. In turn, our members have a unique, critical perspective on the implications this proposed rule could have in many states.

We believe the OMB's Office of Information and Regulatory Affairs (OIRA) should examine the unintended consequences, cost-effectiveness, and alternatives to this complicated and burdensome rule. The OIRA review is warranted for three main reasons.

First, the proposed rule is incompatible with the objectives and guidance of the Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS) as well as the Department of Justice. Specifically, it could jeopardize existing Medicaid delivery system models that give people choice. These models include participant-directed programs, where individuals receiving long-term services and supports (LTSS) employ their own domestic employees. The models further provide states with flexibility to design programs that allow people to receive care and services in their communities rather than institutions. States have developed these programs over several decades to take into account Medicaid's requirements for economy, efficiency, and appropriate utilization. These complex initiatives require inter-agency coordination in assessing the impact of this regulation on state systems.

In addition, states are preparing for and implementing innovative home and community based service (HCBS) programs and long-term care services and supports through new or



consolidated HCBS waiver programs; demonstration efforts for individuals eligible for Medicaid and Medicare; the Health Homes, Community First Choice, and Balancing Incentive Payment programs; and the Money Follows the Person demonstration. States are thoughtfully designing these programs in close coordination with CMS, beneficiaries, and provider and advocacy organizations to encompass a person-centered focus. However, the complexity and financial impact of the proposed rule may chill state initiatives to develop and implement person-centered care programs. We believe these issues need further consideration particularly in light of the programs states have developed to comply with the Americans with Disabilities Act (ADA) and the Supreme Court's decision in *Olmstead v. L.C.*

Finally, yet we are not aware that any federal agency has conducted a comprehensive financial impact analysis of the proposed changes for both state and federal taxpayers. A rule of such significance requires a pragmatic financial analysis of the range of state responses to this rule. This analysis should incorporate immediate and longer-term state budget projections and recognize that states have limited resources.

State Medicaid agencies have made significant progress in developing programs and services, including personal care services, that enable an individual to remain in or transition back into the community rather than in institutions. We want to ensure that any changes in this area are cost effective, operational, allow adequate implementation time and do not disrupt the services made available through these carefully designed programs. We strongly urge OMB to direct DOL to undertake more comprehensive impact analysis of the proposed rule and consider alternatives to the proposed changes. Please also find enclosed NAMD's March 21, 2012, comment letter to DOL, which you may reference for the types of Medicaid programs and services that could be impacted by the proposed rule.

On behalf of the nation's Medicaid directors, we appreciate your consideration of this request, and look forward to your timely response. If you have any questions or concerns about this request, please do not hesitate to contact Andrea Maresca, NAMD's Director of Federal Policy and Strategy at andrea.maresca@namd-us.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Darin J. Gordon".

Darin J. Gordon
TennCare Director
Department of Finance and Administration
State of Tennessee
President, NAMD

A handwritten signature in black ink, appearing to read "Thomas J. Betlach".

Thomas J. Betlach
Arizona Health Care Cost
Containment System Director
State of Arizona
Vice President, NAMD



Enclosure

Cc:

Brenda Aguilar
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building, Room 10235
725 13th St., NW
Washington, DC 20503



March 21, 2012

Thomas Markey
Acting Administrator
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Attn: Fair Labor Standards Team
200 Constitution Avenue NW
Washington, DC 20210

Subject: Comments on the Application of the Fair Labor Standards Act to Domestic Service Proposed Rule (RIN 1235-AA05)

Dear Mr. Markey,

On behalf of the nation's Medicaid directors, the National Association of Medicaid Directors (NAMD) is submitting comments on the proposed rulemaking entitled, "Application of the Fair Labor Standards Act to Domestic Service."

NAMD is a bipartisan, professional, nonprofit organization representing the nation's 56 state and territorial Medicaid agencies, including the District of Columbia, whose mission is to represent and serve state Medicaid Directors. Medicaid is responsible for the financing, delivery and oversight of services that are addressed in this proposed regulation. For 2009, Medicaid was the single largest payer at \$126.8 billion, or 43.1 percent, of spending on long term services and supports (LTSS). Thus our members have a unique, critical perspective to offer as the Department of Labor reconsiders the application of the Fair Labor Standards Act (FLSA).

Under the current law, domestic companions are exempt from the requirements of the FLSA with regard to minimum wage and overtime. The proposed rule amends the regulations to revise the definition of companionship services; clarifies the criteria used to judge whether employees qualify as trained personnel; amends record-keeping requirements for live-in domestic workers; and amends the regulations to third party providers of companionship services to pay minimum wage and overtime. It also



extends the FLSA to many in-home caregivers who may have previously fallen within the statute's exemption for "companionship services."

The National Association of Medicaid Directors respectfully requests consideration of the comments and questions contained herein. Medicaid Directors believe that the availability of appropriately trained workers is essential to providing adequate care to seniors and people with disabilities. As a part of that, we share your concern that qualified, direct care workers who are employed by agencies are given appropriate wage and hour safeguards, and are happy to continue to engage on this issue. However, we do have significant concerns around the large number of workers who are not hired by agencies but are engaged directly by the person receiving care or their family. NAMD's recommendations are summarized as follows:

- The Department should revise its assessment of the proposed rule's impact on Medicaid programs to accurately reflect the multitude of innovative and successful structures and financing arrangements for Medicaid home and community based services (HCBS) state plan and waiver programs and other programs designed to improve community living and integration.
- The Department should revisit any conversations it had with the Department of Health and Human Services' Centers for Medicare and Medicaid Services and state Medicaid agencies who, under the federal-state Medicaid partnership, are among the major payers of the care and services implicated in this rule.
- The Department should reevaluate the rule's administrative reporting requirements and thresholds for companions and live-in caregivers, which as proposed, are overly burdensome and impractical to administer.

Impact on Medicaid program financing and scope of services

The proposed rule is fundamentally flawed in its portrayal of the current scope of policies governing Medicaid programs, specifically the structure and financing of home and community based state plan and waiver programs. In turn, the Department significantly misunderstands the impact of the proposed language on such programs.

The Medicaid program is the major source of public funding for long-term services and supports provided in home and community settings. The Medicaid statute provides states with some alternative ways to increase the availability of home and community



services while appropriating managing the costs of those services. As states have worked toward the goal of integrating seniors and persons with disabilities into the community, as appropriate, most have undertaken a process of fundamentally rethinking how programs should be structured and how long-term care resources should be allocated.

Medicaid home and community based services programs are structured as both state plan programs and as waiver programs with defined funding levels. Many states provide home and community based care to those who need such care to remain safely in their homes under their Medicaid State Plan. And practically every state operates multiple HCBS waiver programs at once, each offering a distinct package of services and supports to a different group of individuals. These choices combine to give states considerable latitude in deciding which services and supports will be offered and in customizing benefit packages to meet the needs of particular groups.

While intended to expand fair labor protections to domestic workers, we are concerned the regulation instead could also make home and community based care more expensive for many state Medicaid programs and could have unintended consequences for certain populations in some states, such as more people moving into expensive institutional settings because in-home care is no longer affordable.

In many state Medicaid programs, there is a high proportion of providers who are relatives of their recipients. Entitling overtime for domestic workers, as currently defined in the proposed rule, could dramatically increase costs while not increasing the overall hours or quality of service being provided. Therefore, maintaining the current level of consumer choice of provider could either become more expensive, or be sacrificed in favor of cost control.

Further, the preamble discussion suggests that Medicaid rates will increase and offset the additional costs associated with the proposed changes. However, we believe this analysis is flawed and contrary to the likely outcomes given the limitations on federal and state resources that shape the scope of state Medicaid programs. States simply do not have an unlimited supply of resources. Therefore, states that anticipate paying higher rates for these services as result of the provisions of this proposed rule believe the number of people served could decline, the amount of services provided could decrease, choice of providers could be limited, or all of the aforementioned.

Based on our reading, as proposed the federal regulations would allow a recipient to claim the companionship exemption. However, we are concerned that the proposed rule could have adverse financial impacts for some states depending on their state specific



programs, policies, and governmental structure. Specifically, it could produce an outcome where a recipient who selects and directs the work of their provider can thereby create a county or state liability for payment of overtime wages that the recipient is exempt from paying. NAMD requests that the Department revise language pertaining to the exemption to ensure it applies to any other entities potentially considered the employer as well, for example state government, a public authority, or other entities as appropriate.

NAMD requests that the Department provide additional supporting documentation and analysis for its projections as we believe they have not sufficiently considered other credible projections and analysis of federal and state expenditures – including projections and state fiscal analyses issued by the CMS’ Office of the Actuary and the National Association of State Budget Officers. In addition, we urge the Department to supplement its current analysis of the impact of this rule with more rigorous research that incorporates an accurate representation of state Medicaid programs and financing approaches for programs implicated in by this rule.

Impact on integration innovations in state Medicaid programs

Many state Medicaid programs have made significant progress to improve the appropriateness of the care setting and the quality of services available to Medicaid enrollees, particularly those who receive services in their homes and communities. NAMD is concerned the rule could undermine many successful programs that state Medicaid agencies have built in partnership with the Centers for Medicare and Medicaid Services and with input from providers and beneficiaries, particularly programs focused on improving options for community living and integration for persons with disabilities and elderly individuals. In addition, NAMD is concerned the proposed rule may erect barriers to evolving and innovative efforts to deliver care in the most appropriate setting and to the greatest extent possible, based on the individual’s preferences.

The Medicaid “Cash and Counseling” demonstration program is one example of an innovative program operating in several states that could be adversely impacted by provisions of this proposed rule. The proposed rule could have the unintended effect of limiting the availability of family and friends as paid attendants in consumer directed personal assistance programs, reducing the available workforce and potentially forcing beneficiaries, primarily frail seniors and people with disabilities, into unwanted institutional placement. The proposed change could also limit access to paid family



caregivers, which have become a common solution to the shortage of traditional home care workers.

Paid family caregivers are not typically career attendants. Rather they are usually close family members and friends who willing to help the individual. The proposed DOL changes would limit the hours these individuals would be able to work, reducing the availability of attendants. By reducing the overall availability of this vital component of the attendant workforce, this DOL policy change could increase the strain on the home care system that many states have or plan to transform.

Impact on quality of care. NAMD requests that the Department undertake further analysis of the impact the proposed rule could have on the quality of care for Medicaid enrollees. That is, while higher pay is arguably related to provider continuity through diminished workforce turnover, the requirement to apply overtime payment provisions to current caretakers could have serious unintended consequences. These might include efforts to avoid overtime compensation obligations by requiring more providers each with fewer hours per recipient and more people needing training by the recipient to meet his/her individual needs. This could disrupt the continuity and quality of care for the individual beneficiary.

Scope of definition of providers of care. NAMD also believes that the proposed regulation inappropriately treats all providers of domestic services in the same manner, without regard to their licensure or certification or the types of services or care they provide. We request that DOL consider that the definitions of accreditation, certification or other requirements, if any, for such support staff vary dramatically across states.

For example, the Department proposes to extend the FLSA to registered nurses (RNs) and licensed practical nurses (LPNs) as well as to unlicensed direct support staff who are the primary providers of "companionship services." Cooks, butlers, valets, maids, housekeepers, janitors, laundresses, caretakers, handymen, gardeners and family chauffeurs are performing tasks that are primarily directed at maintaining a household and do not constitute hands on care of a person in the home. Domestic service workers such as home health aides and personal care aides, on the other hand, are focused primarily on providing hands on care and assistance with activities of daily living that enable a person to continue living safely in the community. They are fundamentally different in scope and focus, and we request that these not be treated in the same manner.



Impracticality and burden of administration

NAMD requests the Department revise its approach for establishing a "20 percent" threshold. While tasks that are more consistent with "homemaking duties" such as meal preparation or laundry are not intended to be the primary functions of a companion, establishing a percentage (i.e., 20 percent) which then requires that the minutes apportioned to each task throughout a shift (or for live-in caregivers, a 24-hour period), is burdensome and impractical, if not impossible to administer. We are concerned that the impracticality of implementing this approach may threaten the innovative and successful companionship arrangements that it actually means to leave exempt.

NAMD also requests that the Department clarify how the 20 percent rule is envisioned to be calculated. For example, how is it calculated in the case of a 24-hour live-in arrangement? We are concerned about potential ramifications of the rule sweeping aside companionship arrangements that truly fit the criteria, but cannot continue because of the impossibility of administering the rule. Again, the unintended consequences could include an individual having to deal with multiple shift workers coming into their home, managing them, forming relationships and building trust, etc.

In addition, states impacted by this regulation would need sufficient lead time to budget and plan for any systems changes that would be required to comply with the reporting and subsequent oversight responsibilities attributable to the rule. NAMD requests that the Department consider and adjust its fiscal analysis to reflect these additional expenditures to the federal and state governments and seek additional state input on reasonable timeframes.

On behalf of the nation's Medicaid directors, we thank you for the opportunity to comment on this proposed rule. We look forward to continuing to work with the Department on these issues throughout this rulemaking process and beyond. If you have any questions or concerns about these submitted comments, please do not hesitate to contact Andrea Maresca, NAMD's Director of Federal Policy and Strategy at andrea.maresca@namd.us.org.



Sincerely,

A handwritten signature in black ink that reads "Andy Allison". The signature is written in a cursive style with a large, prominent "A" and "L".

Andy Allison
Director, Division of Medicaid Services
State of Arkansas, Department of Human
Services
President, NAMD

A handwritten signature in black ink that reads "Darin J. Gordon". The signature is written in a cursive style with a large, prominent "D" and "G".

Darin J. Gordon
TennCare Director
State of Tennessee, Department of Finance and
Administration
Vice President, NAMD

Cc: Ms. Cindy Mann, J.D., Deputy Administrator and Director, Center for Medicaid and
CHIP Services, Centers for Medicare and Medicaid Services