

## Efforts To Curtail The FLSA's "Companionship" Exemption Possibly Moving To The Regulatory Arena.

by John E. Thompson

July 24, 2011

In late June, we noted legislation introduced in the Senate and in the House of Representatives that would essentially repeal the federal Fair Labor Standards Act's Section 13(a)(15) "companionship" exemption in any practical sense. U.S. Labor Department regulations and interpretations elaborate upon how and to whom the exemption may be applied.

Recent correspondence (link below) from the 28-member Eldercare Workforce Alliance to U.S. Secretary of Labor Hilda L. Solis suggests that proponents of such a change are re-directing their focus from legislation to regulatory limitations. This letter urges DOL to take "timely action" by imposing a "revised interpretation of the exemption that will extend greater federal minimum wage and overtime protection under FLSA to the more than 1,500,000 paid home- and community-based care workers who provide essential services to our nation's older adults and people with disabilities." It is highly likely that the "revised interpretation" this advocates will amount to gutting the exemption by regulation. Perhaps this reflects a political calculation that the legislative prospects are unfavorable.

For some time now, DOL's regulatory agenda has included a very general item expressing an intention to revisit the exemption. A number of questions were raised about this in the U.S. Wage and Hour Division's July 13 short-on-transparency "webchat", but these were met repeatedly with DOL's reply that it is "premature" to discuss whatever the looming "proposal" is. The sole detail to emerge is that DOL expects to publish a Notice of Proposed Rulemaking in October.

While of course it remains to be seen what actually transpires, one may reasonably suspect that at least some of the forthcoming proposal will consist of concepts that also appear in the pending legislation. For example, the proposal might well say that the exemption cannot apply to a worker who is employed by the agency supplying his or her services to an elderly person or to the person's family.

It is also probable that the time period for commenting on and registering objections to this proposal will be relatively brief. Those who oppose cutting-back on the "companionship" exemption must be vigilant and should be prepared to act on short notice.