

September 2, 2025

Daniel Navarrete
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

Submitted via regulations.gov

Re: RIN 1235-AA51: Application of the Fair Labor Standards Act to Domestic Service

Dear Mr. Navarrete:

The National Center for Law and Economic Justice (“NCLEJ”) submits these comments strongly opposing the rule proposed by the Department of Labor (“Department”), Application of the Fair Labor Standards Act to Domestic Service, RIN 1235-AA51, which seeks to rescind the 2013 Home Care Final Rule extending Fair Labor Standards Act (“FLSA”) protections to domestic workers, including home care workers. The proposed rule would return the definition of “companionship services” to the version promulgated in 1975 to deprive more than 3.7 million home care workers of their federally protected rights to receive the minimum wage and overtime. The proposed rule will have disastrous effects on home care workers, care recipients, and the home care services industry as a whole.

NCLEJ advances economic, racial, and disability justice for low-income families, individuals, and communities across the country. For more than 60 years, NCLEJ has been a powerful instrument for improving the lives of the most disadvantaged members of our society by enforcing the rule of law, protecting entitlement to a wide range of public benefits, and advancing the rights and safety of low-wage workers. In recent years, NCLEJ has worked extensively to secure the rights of home care aides in New York State to be paid for all compensable hours and to prevent the institutionalization of Michiganders with intellectual and developmental disabilities who rely on Medicaid Living Support services to live at home and participate in their communities.

The Department attempts to justify its proposal to rescind the 2013 Home Care Final Rule and return to the 1975 regulations by claiming without evidence that its proposed rule will result in numerous benefits, including: relieving challenges for consumers to obtain home care; expanding access to home care services; increasing the supply of qualified home health

workers; counteracting a decline in the growth of the home care workforce; delaying or preventing the institutionalization of people who rely on home care services; reducing the regulatory burden for consumers and providers of home care services; and otherwise reversing the negative effects caused by the 2013 Home Care Final Rule. The Department also claims that the proposed rule will have no net cost to society and only minimal practical effect on home care workers. The Department further claims that the changes it proposes will make the regulations more consistent with Congress' original intent and may be necessary given the U.S. Supreme Court's recent decision, *Loper Bright Enterprises v. Raimondo*, 602 U.S. 369 (2024).

For all the reasons stated below, NCLEJ strongly contests the Department claims. Rescinding the 2013 Home Care Final Rule will harm millions of home care workers as well as the people who rely on home care services. The proposed rule will exacerbate the workforce shortage and make it harder for consumers to obtain home care services, may cause the quality of care services provided to deteriorate, and will worsen the economic precarity of home care workers and increase their risk of occupational injury. The proposed rule will also have discriminatory effects on the disabled, women, immigrants, and people of color, who will be disproportionately harmed by the proposed changes. Reverting back to the 1975 regulations is also an unnecessary move that is inconsistent with the intent and purpose of the FLSA.

A. The Proposed Rule Will Hinder Consumer Access to Home Care Services.

The Department claims, without any evidence, that its proposed rule will increase consumer access to home- and community-based services: "By lowering labor costs, the proposed rule may encourage more providers to enter or expand operations in the home care market, increasing the availability of home care services for aging and disabled populations."¹ However, this claim is false. As experienced by providers of home care services in Michigan, when wages are driven down, providers become unable to hire and retain the staff necessary to sustain their businesses. Even the Department itself admits:

losing the right to receive overtime pay could result in home care workers working additional overtime hours at straight-time pay and/or receiving less pay for the overtime work they would perform in the absence of this proposed rule. These potential effects—longer work hours and/or less pay—could negatively impact the morale of affected home care workers and lead to increased employee turnover

¹ Application of the Fair Labor Standards Act to Domestic Service ("RIN 1235-AA51 NPRM"), 90 Fed. Reg. 28976, 28982 (Jul. 2, 2025).

and difficulty attracting skilled workers to the industry.²

There is no reason to believe that the proposed rule will expand access to home care services. In fact, NCLEJ's work in Michigan demonstrates that the proposed rule will cause a contraction in the industry and make it harder for people to obtain the services they need to remain independent in the community.

1. The workforce has grown explosively since the 2013 Home Care Final Rule.

Contrary to the Department's claims, the 2013 Home Care Final Rule did not result in a decline in the home care workforce. In the past decade, the home care workforce has added more than 1.5 million new jobs, growing from 1.4 million workers in 2014 to 2.9 million in 2023.³ By the Department's own estimation, there are now approximately 3.7 million home care workers employed by third-party agencies and an additional 1.5 million home care workers employed directly by consumers or their families. The industry is projected to continue its rapid growth. Citing information from the Bureau of Labor Statistics ("BLS"), the Department states that "the demand for 'home health and personal care aide' workers will grow 21 percent from 2023 to 2033, much faster than the 4 percent average for all occupations."⁴ This is because of major demographic forces: "From 2022 to 2060, the population of adults age 65 and older in the U.S. is projected to increase dramatically from 57.8 million to 88.8 million."⁵

These national trends are evident in New York as well, where home care aides make up one of the largest occupational groupings in the state and the workforce is experiencing explosive growth.⁶ In 2006, approximately 212,000 people worked as home care aides in the state.⁷ In 2016, there were 330,660 people employed as home care aides.⁸ By 2023, almost 567,000 workers were employed as home care aides,⁹ and that number is projected to rise above 700,000 by 2028.¹⁰ "[O]ver a ten-year period 2018-2028, nearly 1,000,000 job positions

² *Id.*

³ PHI, 2024, Workforce Data Center. <https://www.phinational.org/policy-research/workforce-data-center/>.

⁴ RIN 1235-AA51 NPRM, 90 Fed. Reg. at 28981.

⁵ PHI, *Direct Care Workers in the United States: Key Facts 2024* (2024),

<https://www.phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-2024/>.

⁶ U.S. Bureau of Labor Statistics, *May 2024 State Occupational Employment and Wage Estimates New York*, https://www.bls.gov/oes/current/oes_ny.htm#31-0000.

⁷ PHI, *New York's Home Care Aid Workforce*, <https://www.phinational.org/wp-content/uploads/legacy/clearinghouse/PHI-495%20NY%20ExecSummary.pdf>.

⁸ PHI, 2024, Workforce Data Center. <https://www.phinational.org/policy-research/workforce-data-center/>.

⁹ *Id.*

¹⁰ Isaac Jabola-Carolus, Stephanie Luce & Ruth Milkman, *The Case for Public Investment in Higher Pay for New York State Home Care Workers: Estimated Costs and Savings*, CUNY Graduate Center (2021),

must be filled to meet the demand for aides” because in New York people are getting older.¹¹ The NYS Office of the Aging has reported that by 2025, 25% of the population in 51 out of 62 New York counties will be age 60 or over.¹²

Each of these figures belies the Department’s claim that a rescission of the 2013 Home Care Final Rule is necessary to counteract a decline in the growth of the home care workforce. Since 2013, the home care industry has experienced a tremendous workforce expansion.

2. Low wages are the single largest factor in limiting additional growth.

Despite explosive growth in the home care workforce, there is a workforce shortage because demand for home care services is so overwhelming.¹³ NCLEJ’s work in Michigan demonstrates clearly that the single largest factor in creating the workforce shortage is low wages.

From 2017 through 2025, NCLEJ represented individuals with intellectual and developmental disabilities living in Michigan who receive community living support (“CLS”) services that allow them to live independently in their home communities. A 2015 change in budgeting methodology made it impossible for the plaintiffs to hire and/or retain sufficient staff to meet their needs. Though the plaintiffs were able to pay their care workers the statutory minimum wage and overtime, the plaintiffs’ reduced budgets prevented the plaintiffs from being able to offer wages that were competitive. As a result, the plaintiffs were isolated in their homes and at serious risk of institutionalization, in violation of the integration mandates under the Americans with Disabilities Act (“ADA”) and Rehabilitation Act. The plaintiffs also alleged that the budgeting methodology employed by the defendants violated the Medicaid Act’s reasonable-promptness and comparability-of-services provisions. In January 2025, NCLEJ obtained court approval of a settlement that will, over the next five years, secure more than \$100 million in additional state and federal Medicaid expenditures for CLS recipients across the state of Michigan. The plaintiffs will each receive a 52% increase in their hourly service rate, which will finally allow them to meet their staffing requirements.

In the course of litigation, NCLEJ obtained affidavits from many owners and executive officers of home care services agencies. The director of operations of one home care services

<https://slu.cuny.edu/wp-content/uploads/2021/03/The-Case-for-Public-Investment-in-Higher-Pay-for-New-York-State-H.pdf>.

¹¹ *Id.*

¹² *Id.*

¹³ Amanda R. Kreider & Rachel M. Warner, *The Home Care Workforce Has Not Kept Pace With Growth In Home and Community-Based Services*, Health Affairs, vol. 42, no. 5, p. 650 (May 2023), <https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2022.01351>.

agency described staffing as “devastatingly difficult.” According to him, “[h]iring direct care staff has always been difficult. This field has never been a desired part of the healthcare system.” The owner and managing director of another agency declared that current trends in the labor market were making it much easier for people to opt out of home care work to take on less physically and emotionally difficult work:

So many jobs that weren't available to people previously are now available remotely. There are a lot of jobs where people can do customer service intake at home for corporations that have a lot of money and can pay an employee more than we could ever pay. Our jobs are much harder than remote work, and without the ability to raise wages to compete, it's extremely hard to encourage people to enter, or re-enter, this type of work.

This statement was echoed by the state operations administrator for another provider of home care services, who said, “Workers can go to McDonald's and Subway, or take entry-level retail jobs, and make more than what we can pay while also doing an easier job.”

Although the availability of remote work was a compounding factor, every person who submitted an affidavit stated that the single most important cause for their difficulty in hiring staff and maintaining operations was the low wages they were able to offer. The executive director of a provider of in-home community living supports in Ypsilanti, MI adamantly stated:

For years, I believe there has been a direct-care staffing crisis in Washtenaw County, across the state of Michigan and across the United States. I believe this staffing crisis has been in the making since at least 1994 and is the result of historically undervaluing the services that direct care workers provide. The staffing crisis long predates the COVID-19 pandemic because the per capita rates have always been insufficient to hire and retain workers, handle overtime and any more than the barest of administrative expenses.

However, most agencies have limited ability to raise wages because they are dependent on contract rates set by government agencies that do not account for market pressures. The same executive director who believes that the staffing crisis is due to the historic undervaluing of the services of direct care workers also said that: “Currently, we are able to pay direct care workers starting at \$11.00 per hour (not including the \$2.35 per hour premium being provided by the State). Current market rate for entry level positions at local grocery stores and fast food

restaurants is \$15.00 per hour. We simply cannot compete.”

The Chief Financial Officer of an agency that operates in Washtenaw and Oakland Counties in Michigan declared:

Our contracts to offer support services in specialized community housing are not adequate to offer wages that are commensurate with the high level of responsibilities direct care staff are asked to assume and maintain on a daily basis. Additionally, these wages do not keep track with the prevailing labor market at any level. Due to our difficulty hiring direct care workers, [our] direct care staff must work many hours of overtime in order to keep individuals safe in the community. The inability to pay a wage commensurate with staff responsibilities and skills has made it so difficult to hire new staff that we have been forced to close programs in order to consolidate the staff we have.

The executive director of another agency described a conscious decision to pay their staff at a much higher rate than the agency is being reimbursed by the county government. Nevertheless, “[d]espite paying a higher salary than many other providers in Washtenaw County, we still struggle to find staff. The staffing situation is so dire right now. I do not know how other agencies are keeping their doors open. To address gaps in coverage, we have to pay a substantial amount of money in bonuses and overtime.”

Paying above contract rates, though, is not a sustainable practice. The program manager of a not-for-profit agency stated that “[m]ost of the time we are under-water financially.” The agency has had to take out loans multiple times to address their budget shortfall and has even had individual board members guarantee loans using their personal assets.

3. *The proposed rule will depress wages and cause a contraction in the industry.*

At least one detailed study has found that the 2013 Home Care Final Rule is associated with higher hourly wage rates and weekly earnings.¹⁴ This outcome comports with common sense: by giving home care workers, especially those employed by third-party employers, a right under the federal law to receive the minimum wage and overtime, earnings that previously had no floor adjusted upwards. By the same token, the proposed rule will lead to a

¹⁴ Joy Jeounghee Kim, *Extending the FLSA protection to home care workers: effects on workers' labor market outcomes*, Rutgers University, 2021, DOI: <https://doi.org/10.7282/00000139>.

depression of wages.

The Department claims that:

Under this proposal, some or all of the 3.7 million home care workers employed by third-party agencies could become newly exempt under the FLSA as a consequence of the proposed changes third party employment in section 552.109, but some of these workers may not be affected as a practical matter if they remain subject to minimum wage and overtime pay requirements under state law.¹⁵

This, though, is patently untrue in New York and Ohio, where the right to overtime is dependent on federal law exemptions. As a result of the 2013 Home Care Final Rule, home care workers employed by third-party employers in New York and Ohio received, for the first time, the right to be paid overtime at their regular hourly rate. *See* 12 N.Y.C.R.R. §§ 142-2.2, 142-3.2; Oh. Rev. Code Ann. § 4111.03(A). The Department's misguided proposal to rescind the 2013 Home Care Final Rule and revert to the 1975 standard will have immediate impact on the tens of thousands of aides who regularly work overtime. These aides will no longer be entitled to receive overtime at 1.5 times their regularly hourly rate. In NY, aides will instead receive overtime at only 1.5 times the basic minimum wage. For aides employed in New York City, where the difference between the minimum compensation rate for home care aides and the regular minimum wage rate can be as much as \$4.59, such a change is deeply impactful. In Ohio, the proposed rule will cause aides in the state to lose their right to overtime entirely.

The proposed rule will reduce the earning capacity for home care workers and make home care work even less attractive. Instead of increasing the supply of qualified home health workers, the proposed rule will make it even more likely that people will opt out of the home care industry to work at jobs that are higher earning, or less physically and psychologically strenuous, or both. The proposed rule will exacerbate the workforce shortage already faced by the home care industry. And, as a consequence, access to home care services will decrease.

B. The Proposed Rule Will Increase the Risk of Institutionalization to Consumers and May Cause Care Quality to Deteriorate.

The Department states that “easier access to home-based care may delay or prevent placement in more expensive institutional settings, aligning with federal and state policies favoring HCBS.”¹⁶ While NCLEJ agrees that easier access to home care services allows more

¹⁵ RIN 1235-AA51 NPRM, 90 Fed. Reg. at 28981.

¹⁶ *Id.* At 28982.

aging and disabled people to live independently in their communities, NCLEJ contests the Department's claim that the proposed rule will increase access to home care services. Instead, as discussed above, by depressing wages, the proposed rule will make home care work less attractive and cause more businesses to contract or collapse. By exacerbating the workforce shortage, the proposed rule will place people who are elderly and/or those with disabilities at serious risk of institutionalization because they will be unable to obtain adequate care services in their homes.

This is precisely what happened to people in Michigan when a change in budgeting methodology made it so that CLS recipients could no longer afford to offer competitive wages to home care staff. As a result, CLS recipients, including NCLEJ's clients, were forced to make untenable choices, either forgoing necessary medical services in order to pay their staff so that they could remain in the community, relying on family members to subsidize their care, or becoming confined in their own homes, which the Sixth Circuit recognized could be a violation of the Americans with Disabilities Act's integration mandate. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 462 (2020).

With fewer available workers and no federal minimum wage and overtime requirements, home care services providers will be incentivized to squeeze as much work out of their staff as possible. Consumers may then be forced to receive services from care workers who are overworked and underpaid, leading to a deterioration of care standards. Already in New York, people who require 24-hour care are frequently forced to choose between insufficient care or institutionalization. Mr. H. described the Hobson's choice presented to him at a New York City Council hearing:

I experienced a spinal cord injury back in 1995 when I was just 15 years old. Initially when I was released from the hospital I was authorized for a 2 - 12 hour split shift. A year after being home a worker from HRA came into my home and gave me an ultimatum - sign paperwork to convert my case to a 24 hour live-in case or go into a nursing home. As a scared teenager, I signed the form and had a live-in case for the next 16 years.¹⁷

Mr. H.'s story was echoed by Ms. R., who testified at the same hearing:

When my husband became seriously disabled and ill, he could not get

¹⁷ NYC Council Hearing Testimony of José Hernandez at 221, <https://legistar.council.nyc.gov/View.ashx?M=F&ID=11255997&GUID=5E71649C-1DF0-46B5-BD2E-BB6E968589D5>.

the care he needed. He needed 24 hours and the state offered live-in care, but I knew that the aides would not get enough sleep, nor would they be able to care for him adequately at night because he needed a lot of care at night. It was a huge dilemma.¹⁸

The Department does not address this potential for deteriorating care standards that might result if its proposed rule goes into effect. Instead, the Department characterizes the significant reduction in the cost of obtaining and providing home care as an unqualified benefit without looking deeply into any of the negative consequences that the people who receive home care services may experience as a result of its proposed rule.

C. The Proposed Rule Will Worsen the Economic Precarity Already Experienced by Many Home Care Workers.

In its Notice of Proposed Rulemaking, the Department acknowledges that:

[t]he proposed rule would likely result in a transfer of income from domestic workers to employers, state Medicaid programs, and private consumers. The majority of this income transfer would come from home care workers currently employed by third party employers, who could become newly exempt from minimum wage and overtime pay as a consequence of this rulemaking.¹⁹

The Department therefore recognizes that the proposed rule will negatively impact the economic circumstances of millions of home care workers. However, much research shows that home care workers can scarcely tolerate the sort of “transfer of income” contemplated by the Department. Approximately 58% of home care aides already receive some form of public assistance, in no small part because their wages are so low.²⁰ Moreover, wage theft is endemic to the industry, with as many as 90% of home care workers experiencing some form of wage violation.²¹ According to a recent report issued by the New York City Council’s Committee on

¹⁸ NYC Council Hearing Testimony of Jean Ryan at 220, <https://legistar.council.nyc.gov/View.ashx?M=F&ID=11255997&GUID=5E71649C-1DF0-46B5-BD2E-BB6E968589D5>.

¹⁹ RIN 1235-AA51 NPRM, 90 Fed. Reg. at 28982.

²⁰ PHI, 2024, Workforce Data Center. <https://www.phinational.org/policy-research/workforce-data-center/>.

²¹ See, e.g., Sarah Leberstein, Irene Tung, & Caitlin Connolly, *Upholding Labor Standards in Home Care: How to Build Employer Accountability into America’s Fastest-Growing Jobs*, NELP (Dec. 2015), <https://www.nelp.org/app/uploads/2015/12/Report-Upholding-Labor-Standards-Home-Care-Employer-Accountability.pdf>.

Civil Service & Labor, “a full-time home care aide [working in New York City] can expect to earn just \$31,200 per year, well under New York City poverty thresholds.”²² The New York Senate Aging Committee reports that one in four home care workers in New York City lives below the federal poverty line, with poverty rates for home care aides in other parts of the state hovering between 39-50%.²³

The economic precarity experienced by most home care workers is borne out in the lives of the home care workers represented by NCLEJ. For years, Ms. X. was employed as a home care aide. Before she retired in 2018, Ms. X. alternated between three and four consecutive, 24-hour shifts per week. Ms. X. did not sleep or have meal breaks when she worked, but she was never paid for more than 13 hours per shift, in violation of state and federal labor laws. Ms. X.’s monthly expenses were extremely modest: each month, she paid \$400 in rent, \$300 for food, \$120 in transportation costs, \$100 for clothing and \$20 for her telephone bill. Ms. X. also sent approximately \$200 each month to support her son and elderly mother-in-law in China. Nevertheless, despite working between 72 and 96 hours each week, Ms. X. was left with only \$20-\$40 per month in savings to cover emergencies because the wages she received were so low.

Ms. B. is another worker who embodies the difficult circumstances of home care aides. Between September 2016 and September 2019, Ms. B. began worked six, 24-hour shifts per week. She never received five hours of sleep or three hours of meal breaks, but was paid for only 13 hours of each shift in violation of the law. In May 2022, Ms. B. “retired.” She now receives \$1,050 per month in retirement benefits – \$998 from Social Security and \$52 from her union pension. Undoubtedly, her benefits would be higher if they were based on her true earnings, but they are not. Instead, Ms. B. was paid less than half of her earned income and less than half of her earned income was covered by Social Security and credited towards her pension benefits. Because she was paid so little per hour and also experienced years of wage theft, Ms. B. has no savings. Now, since her monthly rent alone is \$1,200 per month and she still needs to feed herself and her sick husband, Ms. B. continues to work three, 24-hour shifts per week, even though the years of working “live-in” shifts, caring for care recipients who required total assistance, have left her with chronic health problems.

H. L. C. is another client of NCLEJ’s. From January 2009 until July 2015, Ms. C.

²² The New York City Council, *Briefing Paper and Comm. Report of the Hum. Serv. Div.* (Sept. 6, 2022), at 3, <https://legistar.council.nyc.gov/View.ashx?M=F&ID=11203884&GUID=2A1ED593-4D4C-4D22-B5A1-3BBCBA6A93AB>.

²³ New York State Senate, *Addressing the Crisis in the Long-term Care Workforce*, at 7, https://www.nysenate.gov/sites/default/files/article/attachment/long_term_care_workforce_hearing_report_2021.pdf.

worked four consecutive 24-hour shifts per week. From August 2015 until October 2022, Ms. C. worked three consecutive 24-hour shifts per week. Despite working 96 consecutive hours weekly for years, Ms. C. has never been paid enough money to cover all of her monthly expenses. In order to survive, she relies on contributions from her son and daughter.

L. Y. C. provides another example of the extreme income insecurity full-time home care aides experience. Ms. C. worked between three and four consecutive 24-hour shifts per week for years. However, her income, added together with her husband's monthly retirement benefits, was not enough to cover their modest monthly expenses. Eventually, Ms. C. was forced to borrow against her IRA. This most likely means that even after Ms. C. formally retires, she will be forced to continue working, like Ms. B.

The Department diminishes the grave economic harm that will be suffered by home care workers by stating that “[t]his transfer is not a net cost to society but represents a redistribution of income and purchasing power.”²⁴ However, such a “redistribution” is unjustifiable, particularly when data shows that home health agencies already enjoy large profit margins.²⁵

D. The Proposed Rule Will Increase the High Risk of Occupational Injuries That Home Care Workers Already Face.

The Department claims that “[c]onsumers who would prefer one home care worker, rather than having multiple people assist them with sensitive activities such as bathing and toilet use, would benefit from the proposed rule to the extent that it lessens incentives to spread jobs across multiple workers.”²⁶ This position, though, ignores the fact that home care workers already face escalating rates of injury on the job.²⁷ By incentivizing employers to schedule home care workers for longer hours, the Department will also ensure that more workers will report the debilitating—sometimes permanent—injuries that NCLEJ's home care worker clients have experienced from long hours of physically and psychologically demanding work.

In public testimony to the New York State Department of Labor, Ms. Y. stated, “For a long time, like many home attendants of 24-hour shifts, I suffered from fatigue, lack of sleep

²⁴ RIN 1235-AA51 NPRM, 90 Fed. Reg. at 28982.

²⁵ Medicare Payment Advisory Commission (MedPAC), *Medicare Payment Policy*, 237-238 (Mar. 2024), https://www.medpac.gov/wp-content/uploads/2024/03/Mar24_MedPAC_Report_To_Congress_SEC.pdf.

²⁶ RIN 1235-AA51 NPRM, 90 Fed. Reg. at 28982.

²⁷ AFL-CIO, *Death on the Job: The Toll of Neglect* (Apr. 2024), <https://aflcio.org/sites/default/files/2024-04/2411%20DOTJ%202024%20DIG%20NB%20REV.pdf>.

and neurasthenia in order to make a living.”²⁸ Another home care aide, Ms. C. described:

Day and night, 24 hours at work without rest. My body aches all over. My nerves have been damaged. I am not able to fall asleep when I go back home. Sometimes, even at home, I still think I’m in my patient’s home. When I hear a sound from outside, I sometimes mistake it for my patient’s cry, so I shout, “I’m coming!”²⁹

From 2016 to 2020, Ms. R. was forced to work 24-hour shifts exclusively. The years of “live-in” shifts have taken their toll. The difficulty of the work she had to do and the chronic sleep deprivation she endured has left her body in constant pain. She also suffers from chronic fatigue, anxiety, and depression. Ms. R.’s body is injured; she is tired and wants to rest, but she does not have any savings and so has no choice but to continue working.

Ms. M. is 70-years-old. Since arriving in the United States, she has only worked in home care. Since 2016, she has worked four consecutive 24-hour shifts per week. In her words, “This schedule has ruined my health.” She suffers from enormous stress and anxiety. She sometimes shakes uncontrollably. She has had sudden dizzy spells and panic attacks. She has been experiencing pressure headaches for years. The people she cares for are often isolated and depressed, and Ms. M. also feels sympathetic pain. Ms. M. has no savings and so many medical bills from her own health problems that she can barely pay her rent. She wants to stop working, but she cannot afford to.

Ms. X. has worked three consecutive 24-hour shifts since April 2018 providing care services to an elderly woman, Ms. Y., who requires assistance throughout the night. For the entire time that Ms. X. has provided services to Ms. Y., Ms. X. has never been able to obtain more than one or two hours of sleep per shift. Ms. X. complained to her agency several times that the stress of her work is making her sick, yet her employer refused to place her on a different work schedule. Instead, Ms. X. was consistently told to quit if she didn’t like her work.

In 2019, Ms. X. collapsed on the job from cardiac arrest and received emergency bypass surgery. Ms. X.’s doctor attributed her dangerously poor health to her onerous work schedule. Ms. X. took approximately two months off to recuperate. During that time, she requested that her employer assign her to a different care recipient. The company refused and again told Ms. X. that she should get another job if she did not want to continue providing care services to Ms. Y. Unable to endure any additional loss of income after her period of recuperation, Ms. X.

²⁸ Vimeo, *Stop the Violence of the 24-Hour Workdays*, <https://vimeo.com/697611582> at 1:11-1:17.

²⁹ Vimeo, *24-Hour Workdays*, <https://vimeo.com/286121886> at 2:25-3:36.

returned to work. However, in 2022, Ms. X. suffered another cardiac event that required a second emergency bypass surgery. Ms. X. continues to provide care services to Ms. Y., putting her life at great risk, because she believes that she has no other option than to continue to work.

Sickness and injury in the workforce of course impact care recipients too. By ignoring the increased risk of serious occupational injury to home care workers—and the resultant impact on the care services they provide—the Department does not appropriately balance the interests of workers and care recipients against those of employers.

E. The Proposed Rule Disproportionately Harms Women, Immigrants, and People of Color.

As previously discussed, the Department’s proposed rule will harm people with disabilities: by taking away federal wage and hour protections from home care workers, the workforce shortage will become exacerbated, making access to home care services even more limited. As a result, more people with disabilities will be unjustifiably isolated in their homes or institutions.

The proposed rule will also cause disproportionate harm to women, immigrants, and people of color as home care workers are significantly more likely to fall into one of these protected categories than both the general population and workers in other health care fields. Nationally, 67% of home care workers identify as non-white: 27% are Black, 26% are Hispanic or Latino, 9% are Asian or Pacific Islander, and 4% are non-white other. An overwhelming 84% are female.³⁰ In New York, where NCLEJ has spent years working to protect the rights of home care aides, the home care workforce is also predominantly comprised of immigrant women of color. In 2022, 81% of all home care aides in New York identified as non-white: 27% as Black, 32% as Hispanic or Latino, 18% as Asian or Pacific Islander, and 4% as non-white other.³¹ 88% of workers are female and 64% are immigrants.³² These demographics stand in stark contrast to workers in other direct care categories or medical fields: in 2020, 73% of “residential care home” workers are U.S. citizens by birth and 45% identified as white;³³ and, in 2021, almost 70% of nurse practitioners in New York identified as white.³⁴ In comparison, the general population of New York State is 13.6% Black or African-American, 19.6% percent

³⁰ PHI, 2024, Workforce Data Center. <https://www.phinational.org/policy-research/workforce-data-center/>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Center for Health Workforce Studies, *Nurse Practitioner Diversity in New York State*, https://www.chwsny.org/wp-content/uploads/2021/01/NP-Diversity-Brief_2021.pdf.

Hispanic or Latino, 8.83% Asian, and 22.4% foreign-born.³⁵ Even in New York City, home care workers are more likely to be immigrants and people of color than the general population: approximately 20.8% of people residing in New York City identify as Black or African-American, 28.4% identify as Hispanic or Latino, 14.5% identify as Asian, and 36% are immigrants.³⁶

Because of the demographics of the home care workforce, any rule change that affects this population requires careful scrutiny to identify and address areas of sexist, racist, and xenophobic bias and disparate impact. In this case, though, the Department has failed to conduct or share any analysis on the discriminatory impact that its proposed rule will have. However, there is no doubt that taking away federal wage and hour protections from home care workers will do great damage to the health, wealth, and safety of this workforce.

F. The Proposed Rule Will Not Reduce Regulatory Burdens on Consumers and Providers

The Department diminishes the “modest regulatory familiarization costs” associated with rescinding the 2013 Home Care Final Rule and claims—without evidence—that the proposed rule will reduce regulatory burdens on home care consumers and providers. This is not true. By reinstating the 1975 regulations, the Department will re-introduce a definition for “companionship services” that is difficult to implement and fits poorly with today’s professionalized home care workforce.

Pursuant to the 1975 regulations, a worker is not an exempt companion if she spends more than 20% of her weekly worktime performing “general household work.” However, the dividing line between “care work” and “general household work” is frequently difficult to discern. Additionally, the 1975 regulations also provide that “companionship services” do not include “services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.” But the modern-day job responsibilities of a licensed practical nurse and home health aide are virtually indistinguishable.³⁷ Therefore, the 1975 regulations present a minefield of liability even for

³⁵ Data USA: New York, *Population & Diversity*, <https://datausa.io/profile/geo/new-york#demographics>.

³⁶ Data USA: New York, NY, *Population & Diversity*, <https://datausa.io/profile/geo/new-york-ny#demographics>.

³⁷ The U.S. Bureau of Labor Statistics Occupational Outlook Handbook describes the duties of a licensed practical nurse as monitoring patients’ health by checking their blood pressure, body temperature, and other vital signs; providing basic patient care and comfort, including changing bandages and helping with bathing and dressing; discussing care with patients and listening to their concerns; and documenting patient care and maintaining health records. The Occupational Outlook Handbook describes the duties of a home health aides as checking a client’s pulse, temperature, and respiration rate; helping with simple prescribed exercises and with giving

employers who seek to comply with the law. And if an employer mistakenly categorizes work as “care work” instead of “general household work”, or does not correctly identify those tasks that are performed by trained personnel, the consequences are costly: a worker who would otherwise be entitled to the minimum wage and overtime becomes the victim of wage theft, and the employer becomes liable for, not only the workers’ unpaid wages and overtime, but statutory liquidated damages as well.

Alternatively, the 2013 Home Care Final Rule altered the definition of “companionship services” in a manner that has easy practical application. As a result, all workers employed as “home health aides” and “personal care aides”, whose main duties are to assist with activities of living and instrumental activities of living, are excluded from the companionship exemption. This straightforward taxonomy makes it highly unlikely that employers will accidentally misclassify workers as exempt. The 2013 Home Care Final Rule actually helps employers to avoid unnecessary regulatory burdens that the proposed rule would impose.

G. The Proposed Rule is Contradictory to the Goals of the FLSA.

In 2013, the Department exercised the authority expressly delegated to it by Congress and determined that the purpose and intent of the FLSA was best fulfilled by altering the definition of “companionship services” and making the companionship services exemption unavailable to the third-party employers.

The Department’s proposal to remove federal minimum wage and overtime protections from home care workers will drive millions of American workers deeper into economic precarity. The proposed rule is therefore inconsistent with the goals of the FLSA, which are to correct and as rapidly as practicable to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers...” 29 U.S.C. § 202.

For this and all the other reasons articulated above, NCLEJ strongly opposes the proposed rule and urges that the Department preserve the status quo under the current regulations that have been in effect for 13 years.

Sincerely,
Carmela Huang
Senior Attorney

medications; changing bandages and dressings; caring for skin, and helping with braces, artificial limbs, and medical equipment, such as ventilators to help clients breath. U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook*, <https://www.bls.gov/ooh/>.