

May 19, 2017

The Honorable Alexander Acosta
Secretary
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Dear Secretary Acosta:

We write to you regarding the adverse impact in Florida of certain regulatory changes the U.S. Department of Labor (“DOL”) implemented through its promulgation of *Application of the Fair Labor Standards Act to Domestic Service*, 78 Fed. Reg. 60,454 (Oct. 1, 2013) (referred to herein as the “New Home Care Regulations”), and urge you to take action to remedy these problems.

The New Home Care Regulations, overturning 40 years of precedent, accomplished a *de facto* repeal of the companionship-services exemption,¹ which – since its enactment in 1974 – has protected the elderly and disabled who receive home-care services from the overtime, minimum-wage and recordkeeping requirements that the Fair Labor Standards Act of 1938 (“FLSA”) imposes on employers with respect to their employees. Prior to the issuance of the New Home Care Regulations, home care was largely exempt from the FLSA.²

As a practical matter, this action has created havoc for the elderly and disabled who rely on home-care services in order to live independently, and for their caregivers.³ The impact has been especially acute in Florida. The State of Florida has a large population of elderly individuals. Consequently, the Florida Legislature enacted a thoughtful regulatory system to address the home-care needs of Florida citizens, and to ensure that home-care providers have the opportunity to offer their services either (i) as an employee of an agency, or (ii) independently, as a self-employed caregiver. It accomplished this through the creation of two different types of Florida-licensed entities, namely, a licensed nurse registry,⁴ which refers background-screened self-employed home-care providers to families who elect to self-manage their own home care,⁵ and a licensed home health agency,⁶ which provides home-care services with its own employee caregivers to families that elect not to self-manage their own care.

¹ 29 U.S.C. §213(a)(15).

² The prior regulations were upheld by a unanimous U.S. Supreme Court decision in *Long Island Care at Home, LTD v. Coke*, 551 U.S. 158 (2007).

³ The adverse impact of the New Home Care Regulations has been broadly felt. In addition to disrupting Florida’s regulatory structure for home care, it has created systemic problems for state Medicaid programs and for the disabled. See, e.g., BRIEF OF AMICI CURIAE STATES OF KANSAS, ARIZONA, ARKANSAS, GEORGIA, MICHIGAN, NEVADA, NORTH DAKOTA, OKLAHOMA, TEXAS, UTAH, WISCONSIN, and WYOMING IN SUPPORT OF PETITIONERS, available at <http://www.scotusblog.com/wp-content/uploads/2016/01/15-683-Amici-Brief-Kansas.pdf>; and BRIEF OF AMICI CURIAE ADAPT AND THE NATIONAL COUNCIL ON INDEPENDENT LIVING IN SUPPORT OF THE PETITIONER, available at <http://www.scotusblog.com/wp-content/uploads/2016/01/No.-15-683-OK-TO-PRINT-Center-For-Disability-Rights.pdf>.

⁴ Fla. Stat. Ann. § 400.506.

⁵ Fla. Stat. Ann. § 400.462 (21) explicitly provides for the caregivers referred by a nurse registry to be “independent contractors, as it defines the term “nurse registry” to mean “any person that procures, offers, promises, or attempts to secure health-care-related contracts for registered nurses, licensed practical nurses, certified nursing assistants, home health aides, companions, or homemakers, who are compensated by fees as independent contractors....” (Emphasis added).

⁶ Fla. Stat. Ann. § 400.464.

Florida's regulatory structure functioned extremely well throughout the state – until the New Home Care Regulations became effective.⁷ At this time, we have been informed that licensed nurse registries operating in Florida are at risk of being eliminated, due to aggressive enforcement actions by the DOL and plaintiff lawsuits. In this regard, shortly after the New Home Care Regulations became effective, DOL launched an aggressive enforcement program specifically targeting Florida nurse registries. The Florida registries have informed us that many have been investigated by DOL during this past year, and that DOL investigators told them that all of the Florida registries investigated thus far have been determined to be the employer, for purposes of the FLSA, of the caregivers they refer. Such a determination can expose a nurse registry – operating in lawful compliance with the Florida nurse-registry statute – to a financial liability of devastating proportions.⁸

Unless DOL takes prompt action to address the adverse impact of the New Home Care Regulations, the Florida regulatory structure risks being fundamentally undermined, by nurse registries being gradually eliminated from the marketplace. Such an outcome would eliminate one of the two licensed home-care delivery models that the Florida Legislature created. Without nurse registries, elderly and disabled individuals in Florida who self-manage their home care will be exposed to a heightened risk of abuse and exploitation, due to the absence of a licensed source for obtaining referrals of independent home-care providers who have been thoroughly background-screened.

We urge you to (i) immediately suspend any ongoing DOL investigations of Florida nurse registries, pending an opportunity for the new Administration to conduct a thorough policy review of these enforcement actions, (ii) develop and publish clarifying guidance on how a nurse registry can avoid being deemed an “employer,” for purposes of the FLSA, of the caregivers it refers, and (iii) issue a new set of regulations that rescinds the New Home Care Regulations, reinstates the prior regulations and thereby restores to the Congress its legislative prerogatives concerning this important exemption.

Sincerely,

Francis Rooney
Member of Congress

Member of Congress

⁷ The New Home Care Regulations provided for a January 1, 2015, effective date, but DOL announced that it would defer enforcement efforts until November 12, 2015, following the resolution of litigation challenging the validity of one aspect of the New Home Care Regulations. See, <https://www.dol.gov/whd/homecare/litigation.htm>.

⁸ This is because the FLSA provides that employees are entitled to overtime pay for hours worked in excess of 40 during a week, and caregivers who provide home care commonly work well in excess of 40 hours each week.