



299 Broadway
New York, NY 10007
Phone 212-417-3700
Fax 212-417-3891
www.mfy.org

Mark E. Segall
Board Chair

Jeanette Zelhof
Executive Director

Elise Brown
Deputy Director &
Director of Litigation for
Housing & Economic Justice

Kevin Cremin
Director of Litigation for
Disability & Aging Rights

Carolyn E. Coffey
Ramonita Cordero
Mallory Curran
Kenneth Lau
Christopher Schwartz
Supervising Attorneys

By Electronic Submission: <http://www.regulations.gov>

March 12, 2012

Mary Ziegler, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Companionship Regulations 552.109, 552.1-2, 552.110, and 552.6
RIN 1235-AA05

Dear Ms. Ziegler:

The Workplace Justice Project at MFY Legal Services, Inc. (MFY) supports the Department of Labor’s proposed regulations, collectively RIN 1235-AA05, narrowing the FLSA companionship exemption. These proposed regulations will give greater stability and wage security to thousands of professional home care workers in New York City. In adopting such measures, the Department of Labor has also taken a step towards ensuring a sustainable, high-quality labor pool for America’s growing home care needs.

MFY is dedicated to equal access to justice for all, and assists low-income New Yorkers to resolve legal problems in the areas of employment, housing, foreclosure, public benefits, disability rights, elder issues, mental health, consumer, and family matters. MFY’s Workplace Justice Project has counseled and represented hundreds of New York City’s home care workers in wage and hour, unemployment insurance, and short-term disability matters. These clients—most of whom are immigrant women who work to support their children—have struggled with the poverty, injuries, and fatigue that come from working seventy and eighty hour weeks at rock-bottom wages.

The Workplace Justice Project Supports Ending the Exemption of Third-Party Employers: Proposed Regulation C.F.R. § 552.109

In New York City—where home care is the fastest-growing occupation and employs more people than any other single job—staffing agencies dominate the home care industry. *See New York City’s Home Care Workforce*, PHI State Facts (December 2010). All of the Workplace Justice Project’s clients who are employed in this industry work for agencies rather than directly for those that they assist. Year after year, many of these agencies pocket millions of Medicaid and Medicare dollars while paying workers a pittance.

In the last two years, the Workplace Justice Project has filed two class-action lawsuits against home care staffing agencies, *Montero v. McMillan's Home Care Agency, Inc.*, Index No. 104779-2010, Supreme Court, New York County, and *Montero Bernandez v. BNV Home care Agency, Inc.*, Index No. 65305-2011, Supreme Court, New York County. These companies have openly and repeatedly refused to pay state-mandated overtime wages to hundreds of workers. Many home care agencies appear to believe that they can flout state laws without consequences; employers know that they are beyond the jurisdiction of the federal Department of Labor, and also know that if they are caught, they will only be subjected to the lesser penalties of state law. One of the employers targeted by a class action lawsuit, Yvonne McMillan, freely admitted to a reporter, "We just haven't paid overtime.... It's no mystery in this industry." *Home Care Service Sued Over Pay Practices*, Crain's N.Y. Bus., April 14, 2010. Such a culture of lawlessness is bad for taxpayers, honest employers who already comply with New York's overtime requirements, workers, and home care consumers. Increased regulatory supervision and federal oversight will go a long way to combat these illegal practices.

The Workplace Justice Project Supports Increased Record-Keeping for Live-In Employees: Proposed Regulations 29 C.F.R. §§ 552.1-2 and 552.110

In New York City, the proposed regulations' emphasis on record-keeping for live-in workers will curb the erosion of home care workers' wages. Though New York's agencies employ hundreds of people and manage multi-million dollar billing systems, these businesses have historically been excused from accurately recording their employees' hours and pay when those workers are staffed on "live-in" shifts. Instead, agencies have provided workers with "take it or leave it" lump-sum payments that supposedly cover a pre-determined amount of hours.

The current record-keeping regulations place the burden on employees to confront employers when hours exceed the "agreement," and, not surprisingly, abuse is rampant. Workplace Justice Project clients have reported that employers: deduct time for non-existent lunch breaks; log workers as "asleep" while they actively provide care to very ill consumers; and refuse to pay workers for time spent working while waiting for a shift replacement. Over weeks and years, these tactics allow agencies to steal thousands of dollars from each live-in worker. Extending basic record-keeping requirements to employers of live-in workers would help bring important transparency and accountability to the live-in staffing industry.

The Workplace Justice Project Supports the Professionalization and Stabilization of Home Care Services: Proposed Regulation 29 C.F.R. § 552.6

The workers who provide vital services to people who are elderly or have disabilities deserve to be treated with dignity and respect. The proposed regulations will put professional home care workers on the same footing as those

in other industries and help legitimize home care as a career path, thereby attracting a larger pool of trained and experienced care providers. Such quality care is necessary to ensure that New York's elderly may continue to age in place and that people with disabilities live in the most integrated settings possible. MFY urges the Department of Labor to continue to consider the intersection of the interests of homecare workers and home care consumers, and to focus on finding solutions that don't sacrifice one oppressed group's needs over another. We must balance the need for home care wages and benefits with the needs of those they serve, as stated in the "Guiding Principles," positions developed collaboratively between SEIU and disability advocates. According to that document, "Enhancements to workers' wages and benefits shall be paid for through increased funding" and should not compromise other needed services and supports. The Department of Labor must ensure that these regulatory changes do not result in cuts in workers' hours or the erosion of available hours of care for people with disabilities.

In sum, with an emphasis on fair treatment for both consumers and workers, the Workplace Justice Project urges the Department of Labor to end the exemption of professional home care workers from the Fair Labor Standards Act and enact proposed regulations RIN 1235-AA05.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lindsey Rothfeder', with a long horizontal flourish extending to the right.

Lindsey Rothfeder
Senior Staff Attorney