



Public Interest Comment on
*Application of the Fair Labor Standards Act to Domestic Services—Exempt Status of
Companionship and Live-in Services*
RIN 1235-AA05

The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, RSP conducts careful and independent analyses employing contemporary economic scholarship to assess rulemaking proposals from the perspective of the public interest. Thus, this comment on the Department of Labor’s (Wage and Hour Division) proposed rulemaking¹ covering the exemption from the Fair Labor Standards Act of workers providing companionship and live-in domestic services does not represent the views of any particular affected party or special-interest group but is designed to assist the Department of Labor as it seeks to exercise its regulatory function in a coherent manner.

This comment provides an evaluation of both the analysis and the proposed rulemaking going beyond the score provided by the Mercatus Regulatory Report Card (“the Report Card,” details of which are attached as an appendix to this comment). The Report Card evaluates the quality and use of the Regulatory Impact Analysis (RIA) that is part of an economically significant proposed rulemaking published by a federal agency and follows an approach to

¹ Department of Labor (2011) Application of the Fair Labor Standards Act to Domestic Services, RIN 1235-AA05, *Federal Register*, 76, 81190-81245.

evaluation operated by the Mercatus Center since 2008.² The Report Card identifies key issues and best practices in the regulatory process and highlights issues of concern applying to specific regulations. It evaluates the quality of regulatory analysis, scoring each area on a 0 to 5 scale, but does not evaluate whether the proposed rule is economically efficient, likely to meet fairness considerations, or a good public policy in any other sense. This public interest comment examines the quality of the underlying reasoning and the regulatory proposal.

The proposed rulemaking for the Application of the Fair Labor Standards Act to Domestic Services (exempt status for companionship services) received a score of 24 out of 60, i.e., 40 percent. This is not a particularly high score and reflects problems such as a poorly focused treatment of the purpose behind the regulatory change and a tendency to run roughshod over the requirement that new federal regulation show a surplus of benefits minus costs.³

Introduction

Among its regulatory effects, The Fair Labor Standards Act (FLSA) establishes a minimum wage, requires overtime payments to be made when the working week exceeds 40 hours, and requires record keeping in relation to nonexempt workers,⁴ with the aim of protecting these workers from the unacceptable conditions of employment thought likely to emerge in some labor markets. The FLSA was extended to most domestic workers in 1974, but allowed an exemption for domestic workers hired as companions and/or live-in domestic workers, who may be employed directly by the client or through an agency.⁵ Such workers often carry out their duties as Home Health Aides (HHA) or Personal Care Aides (PCA), and companions may

² Ellig, J. and P. A. McLaughlin (2011) "The Quality and Use of Regulatory Analysis in 2008," *Risk Analysis*, DOI: 10.1111/j.1539-6924.2011.01715.x.

³ (1993) Executive Order 12866; Regulatory Planning and Review, Federal Register, Title 3, 58, 51735-51744 is the common reference point for a series of Executive Orders broadly requiring a benefit-cost surplus.

⁴ <http://www.dol.gov/whd/regs/compliance/whdfs22.pdf>.

⁵ Sections 13(a)(15) covers exemption from the minimum wage for companions, and 13(b)(21) covers the overtime exemption for live-in domestics.

provide assistance with daily living such as meal preparation, grooming, exercise, toileting, and minor medical support services retaining FLSA exemption as long as these elements are incidental to companionship and as long as any general housework elements do not exceed 20 percent of working time.⁶

Companions are currently exempt from minimum wage and overtime protection, and live-in domestics are exempt from overtime and certain record-keeping requirements. However, the DOL has expressed concern that the FLSA regulations have inadvertently expanded the scope of the exemption beyond the type of companionship employee that Congress intended to exempt, because the home-care industry has grown in a manner tending to supply companionship jointly with assistance with daily living. The DOL sees the changes as reason to propose a revision of the regulations in relation to the scope of the exemptions covering companionship (and live-in services) to (i) revise the definitions of companionship services, (ii) clarify the nature of incidental services undertaken by companions, (iii) limit exemptions to companionship and live-in domestic workers directly employed in the home, and exclude from the exemptions those employed by agencies, and (iv) require all employers to keep records of hours worked by live-in domestic workers to ensure proper payment of wages.

Notably, the proposed definition of companionship services excludes all workers requiring training for medically related services and limits all of their intimate personal care services to such services that are incidental to providing companionship and take up no more than 20 percent of total hours worked. Provision of general housekeeping services by companions is no longer permitted, if exemption is to be kept, which contrasts with the current position of keeping such general housekeeping within a 20 percent time limit. A number of states have already extended comparable regulation to companionship and live-in domestic workers.

⁶ 29 CFR 552.6.

Need for the Regulation

The entry in the Federal Register reveals a concern that private agencies, private clients, and domestic workers, all of which have grown in number in the past decade, may have contracted around the FLSA to carry out services embodying high levels of housework and daily-assistance components, claiming the exemption and thereby leaving workers outside of minimum wage, overtime, and record-keeping regulations. The concern is raised in the context of noting the growth in Medicare/Medicaid financed components in home care. Medicare and Medicaid do not finance general home help such as companionship unless it is incidental to medical treatment. Therefore, the growth of Medicare and Medicaid public financing of home care is not strictly connected with the issue of contracting around the FLSA, and redefining companionship services is unlikely to reduce such public expenditures. In fact, allowing simple medical procedures to be carried out by companions may contain some elements of the costs, which could increase if the demand for the services is inelastic, as suggested in the proposed rulemaking,⁷ and more expensive specialized medical support is substituted.⁸ In the absence of any further compelling argument, issues concerning public funding of home health care can and should be decoupled from questions about the growth of companionship services.

The DOL has not carried out a substantive economic analysis of the market for domestic services but examines Congressional records to argue that the intent of the FLSA amendment in 1974 was to create an exemption for only those companionship domestics for whom personal care services were incidental and asserts this claim with an analogy between babysitting and elder sitting.⁹ The proposal does not identify a market failure that would suggest that there may

⁷ Federal Register, 76, at 81203

⁸ The inelasticity of demand means that those using these services do not perceive an availability of good substitutes, so that increases in prices do not greatly alter their demand for the services.

⁹ Federal Register, 76, at 81191.

be a reason for the federal government to intervene in this market, a precondition outlined in the governing economic Executive Order, 12866. One type of market failure might be the presence of asymmetric information (where one party knows much more about the transaction than another); another could be the presence of a noncompetitive labor market in relation to the growth of the more casual side of the home-care industry. The DOL ignores an important feature of the home-care industry, which has associated companionship and forms of assistance with daily living in a manner that may well reflect cost savings from providing the two forms of service together (thereby achieving “economies of scope”). There is no attention to how these services might develop in the absence of regulatory change or under alternative regulatory approaches. Putting these considerations together explains the low scores for this proposed rulemaking on the Mercatus Scorecard in sections 6A, 6D, and 7A-D, which are the measures associated with an agency’s identifying systemic problems and examining alternatives for dealing with them.

The DOL has not carried out a benefit-cost analysis of its intended changes but does anticipate a deadweight loss¹⁰ in the form of compliance costs and some lost employment. The proposal targets the redistribution of financial benefits from clients and agencies to home-care workers by moving many of them out of exempt status and thereby obtaining minimum wage, overtime, and travel-time payments but at a net cost to the affected groups in total—in particular by imposing compliance costs on direct employers. No thought is given to whether there might be more efficient ways of improving the wellbeing of domestic workers, even if still at the cost of their employers.

¹⁰ Deadweight losses are net losses in value to producers or consumers resulting from restricting market transactions.

In addition, the DOL has not considered whether its regulatory proposals are necessary given the existence of state regulation in areas containing high proportions of care-dependent elderly people. Rather, the focus is on catching up with the growth of state regulation in the area.

Problems with the Proposals

The DOL proposes to revise the definitions of companionship services, clarify the nature of incidental services, limit the FLSA exemptions to companionship and live-in domestic workers directly employed in the home, and require all employers to keep records of hours worked by live-in domestic workers to ensure proper payment of wages. Taking these one at a time, there are foreseeable significant difficulties in applying the proposed revisions, and predictable incentive conflicts likely to affect the agencies, clients, and workers involved.

Defining Domestic Service Employment

The DOL's inconclusive attempts in 1993 and 2001 to provide a definition of companionship services focused on tying exempt services to direct contracts with clients and excluding "vocational" HHA/PCA services from the exemption. The current proposal also requires this direct-service requirement for exemption, while additionally revising the definition of domestic service employment in 29 CFR Part 552.3 to include companions, babysitters, nannies, home health aides, and personal care assistants (and to exclude obsolete categories such as governesses and footmen). The occupational definitions are based on published studies, defined categories in statistical databases, and the experience of state regulators. The revision also removes the current need for companionship services to be carried out in the home, opening up the way for travel-time compensation to be paid in return for traveling between sites. At one level, tightening the definitions of domestic service employment and companionship services is a laudable aim, since there have been cases at law noting the imprecision in the FLSA exemptions

and there are indeed obsolete occupations. However, the list provided by the proposal is illustrative and not exhaustive, and so there will still be scope for future debates over the definition of domestic service employment.

Defining Companionship Services

The proposed definition of companionship services (§552.6) excludes all workers requiring training for medically related services and limits all intimate personal care services to those incidental to companionship and making up no more than 20 percent of total hours worked. This represents a highly significant restriction away from the current position, which allows personal care services for any length of time as long as they are incidental to companionship and protection and allows housekeeping services for up to 20 percent of total hours. General housekeeping services of any amount are to be prohibited in companionship contracts and are seen as the domain of maids and other domestics who are clearly covered by the FLSA, although the proposed wording of §552.6(c) appears to allow purely incidental provision of housekeeping to be counted within the 20 percent limit on incidental personal care services.

The proposed change is very likely to reduce the value of companionship services to clients, who may well react by substituting family labor or by turning to the grey market in domestic services and reducing the wages paid: both possibilities are recognized as risks by the DOL.¹¹ The 20 percent limit on incidental personal care services appears to be arbitrarily defined, and the question can be raised over what mischief is halted by choosing that particular figure, which looks highly likely to undermine economies of scope within the home-care industry.

Economies of scope arise when it is more efficient to produce products or services together rather than separately, and it very much appears to be the case that home care has

¹¹ *Federal Register*, 76, at 81224.

developed around the benefits of mixing services such as companionship, housekeeping, and personal care. The proposed limit of 20 percent on incidental services in the rulemaking looks to control these overlaps with a view to preventing exempt labor from competing with nonexempt labor. It would be better to recognize the probable efficiency of adding complementary services to companionship work by retaining exemption as long as the majority of a companion's time is spent providing fellowship and protection, as this approach would be less likely to undermine valuable economies of scope.

A further aspect of the proposed definition of companionship services in proposed §552.6(b and c) will prove very difficult to enforce in practice. The DOL provides a substantial list of permitted incidental services that is too reliant on qualifiers like "occasional" and yet leaves gaps in the services. A good example is the permitting of "occasional placing [of] clothing ... in the laundry, including ... in a washing machine ... and assisting with hanging, folding." Apparently, ironing risks propelling the companion straight into nonexempt status, and there is a great deal of uncertainty surrounding what is or is not occasional. Similarly, the companion can cook a meal at lunchtime but must eat it alone most of the time or lose exemption through becoming a cook. This is surely going to be fraught, and will undermine commonsense arrangements whereby companions have improved the welfare of clients at very little cost to anybody.

The DOL explicitly asks for comments in relation to some of the incidental services: for example, should occasional driving be a possible incidental service? From an economic point of view, it would be far better to avoid an exhaustive, or over-exemplified, list of tasks. It is more efficient to allow clients and companions to find their own equilibrium over these substitutions within a working week, unless there is a compelling reason to control choices. The DOL is in

fact attempting to list *de minimus* exceptions to the rule that one cannot have an exemption if working as a cook or butler or in a comparable role. Other areas of law do not typically define *de minimus*, but leave it to common sense and the assessments of courts if necessary. Reading the DOL's wish list provides a reminder of Demsetz's argument that the grass is not always greener compared with leaving matters alone.¹²

Limiting Exemptions to Direct Employment

The DOL proposes to limit the exemptions from minimum wage and overtime requirements to companions directly employed in the home and exclude those employed by agencies. As accepted in the *Coke* case,¹³ agencies can currently claim exemptions. The possibility of joint employment contracts is recognized in the proposal, but, in that case, only the direct employer can claim the exemptions. This measure is likely to lead to incentive problems that could endanger clients. The cost of hiring companions will be lower under direct employment, and it therefore seems likely that agencies will push as much of the employee's contract over to direct employment, possibly spread between several clients. The less time the employee works for the agency, the weaker is the agency's incentive to vet employees concerning their likely character in the job. It seems arbitrary to distinguish between employers in this way.

Record Keeping for Live-in Domestic Workers

The proposals are couched in terms of an exercise in statutory interpretation comparing the Congressional record of debates with the current operation of the exemption. The comparison is used to suggest that the home-care industry has used the exemptions to circumvent FLSA

¹² Demsetz H. 1969. "Information and Efficiency: Another Viewpoint." *Journal of Law and Economics* 12: 1-22.

¹³ *Long Island Care at Home v. Coke*, 551 U.S. 158 (2007).

protection of domestic workers.¹⁴ However, the intent of the legislation included the avoidance of heavy compliance costs for direct, domestically based employers.¹⁵ Yet the proposals require new record keeping for live-in domestics, who are exempt separately from the overtime provisions of the FLSA although covered by the minimum wage provision. Currently, it is enough to refer to a general agreement over hours to be worked and indicate any deviations from it. The purpose of the revision is stated as ensuring that employees receive full payment for hours worked, but the proposal is not reviewed in relation to Congressional intent.

Problems with the Analysis

Clarity and Transparency

In undertaking the regulatory scoring, it became apparent that the proposals were easy enough to find using standard computerized searches, e.g., on keywords. The DOL's own website did not link directly to the proposed rulemaking, and once found, documents suffered from repetition and from a lack of a clear statement of overlaps and distinctions between companions and live-in domestics. Assumptions about elasticities and market effects would be easily understood by specialists but not by a layperson.

The analysis uses no formal modeling of an economic or other kind but proceeds by statutory analysis based on a series of legal cases (e.g., *Coke*, supra), Congressional debates, and academic papers. Apart from articulation of a suspicion that employers may circumvent the FLSA because literal elements of an exemption and modern practice do not match Congressional intent, there is some use of the concepts of price elasticity and deadweight loss taken from economics. Most of the data are drawn from agencies such as the Bureau of Labor Statistics or published research. Many assumptions are undocumented.

¹⁴ *Federal Register*, 76, at 81192.

¹⁵ *Federal Register*, 76, at 81196 citing 120 Cong. Rec. S5275 – statement of Sen. Dominick and others concerned about “adding ... chores for the American housewife.”

The proposal received a middle-ranking score of 3 (from 5) on the “Openness” section of the Mercatus Scorecard, indicating room for improvement in making the proposals clear to citizens.

Theory, Analysis, and Testing

In identifying the outcomes of the proposed rule change, the DOL seeks to revise the definition and scope of companionship services so that companions will be reclassified as domestic employees and will be covered by the FSLA. Employers of live-in domestic workers will be required to keep records of hours worked, reflecting the DOL’s assertion that live-in domestic workers who are not exempt owing to companionship status are more likely to be paid the legal minimum wage for the correct number of hours. The proposed rulemaking prohibits agency employers from claiming exemption from Fair Labor Standards. The DOL expects more workers to become eligible for overtime and payment for travel time between worksites, although agencies may reallocate work to avoid overtime and travel. The rule change is expected to increase the cost of providing home care but may also reduce employee turnover and reduce home-care worker recourse to public assistance.

The regulatory impact analysis (RIA) embedded in the proposals does not state how outcomes are to be measured, even though it could use Bureau of Labor Statistics to determine the number and wages of workers that might be affected by the proposed rulemaking. The RIA claims the rule will reduce the number of home-health-care workers exempted from the federal minimum wage and overtime rules. The DOL assumes demand and supply of these services to be price inelastic, owing to payments largely being channeled via Medicaid/Medicare, so that this reduction in exemptions should raise the hourly pay for some of the workers, who may also benefit from overtime and travel payments. The demand for home-health-care services of some

vulnerable people may well be more elastic: for example, that of low income elderly and infirm citizens for whom the services are a substantial part of total expenditures and where they cannot afford to pay the higher wages. If Medicaid/Medicare does not pay, the proposed rulemaking could hit extremely vulnerable people with price hikes that, in some cases, may even leave them without services.

The DOL claims the changes will raise hourly wages, reduce labor turnover and negligence, reduce recourse to public assistance, and, thereby, improve the quality of care. The claims can be criticized for being largely speculative: the DOL admits it has no data in some of the areas, such as travel between sites, uncertainty is not treated in a systematic manner in the RIA, and it is therefore not clear that an increase in total earnings would result. Not surprisingly, the Mercatus Scorecard records low scores of 2 (from 5) for data driven areas like 5D and 5E. In reading the proposals, there is a very strong impression of relentless striving to fashion definitions and rules to provide hoped-for constituency benefits regardless of data shortages in the analysis, which is not therefore central in underpinning the proposals.

Market and Regulatory Failure

The proposed rulemaking fails to identify a labor-market failure that could justify intervention using minimum wage, overtime, travel-compensation, and record-keeping requirements, per the FLSA. Conventionally, market failures are held to revolve around problems of asymmetric information and other noncompetitive labor-market elements. The only real claim made is that the wages of domestic workers are lower than they might be if regulation pushed up the price of home-care services, partly by blocking a low-wage route for those providing many of the services. Raising wages through regulatory change could be seen as favoring special interests, and it is notable that suppression of a competitive low-wage fringe is

exactly what more expensive labor interests would tend to favor. The lack of a coherent welfare case, as compared with a distributional case, for the proposed changes keeps scores very low throughout section 6 of the Mercatus Scorecard for this proposed rulemaking.

The proposal document notes the predominance in domestic services of women drawn from ethnic minorities.¹⁶ A common observation is that these workers tend to take the more casually structured jobs associated with companionship and live-in support. What is missing from the DOL's analysis here is an assessment of whether these jobs, as might be expected, provide a valuable start in the US for recent immigrants. In this sense, looking for a reduction in labor turnover is misleading, since turnover may indicate healthy upward mobility for individuals using domestic-service occupations tolerant of ongoing improvement in the worker's language and other skills.

Costs, Benefits and Alternatives

The DOL does a fairly good job of identifying the expenditures on compliance, higher wages, overtime, and travel-time compensation likely to result from the rule. There is mention of possible market responses—for example, if people switch from home care to institutional care as the latter may become relatively cheaper or if home care becomes more amateur and grey-market supplied—but not much is made of such questions. The RIA does a fair job on the cost side of estimating the deadweight loss, compliance costs, and employment impacts of the proposals, but does not attempt to quantify the benefits of the proposal.¹⁷ The focus on benefits is really on transfers to workers in the sector. Although transfers are to be considered as part of the RIA under the requirements of Executive Order 12866 and its successors, it is not conventional

¹⁶ *Federal Register*, 76, at 81196.

¹⁷ *Federal Register*, 76, at 81230.

economics to trade off transfers (local optimum) against a (general) welfare loss. Again, the Scorecard tends to be pulled down by the incomplete nature of the analysis.

It is well understood in modern economic analysis that a wage floor will cause a reduction in employment, outside of monopsony conditions that are unlikely to apply to the domestic-service labor markets targeted by the FLSA.¹⁸ The DOL accepts that unemployment will result from extending the coverage of the FLSA,¹⁹ which is a worrying part of the regulatory proposal given the employment vulnerability of the people most likely to be displaced, but focuses on the transfer of overtime and travel payments and reduction of working hours for newly covered domestic workers.

The Use of Analysis

On several occasions, the DOL has pursued similar revisions of the definition of companionship services because it considered the application of the law to be inconsistent with the original intent of Congress. No strong link has been established between regulatory analysis and the proposals, which have been developed under changing environmental factors. For example, the home-care market was not as substantial in 1993 as it is now. There is little evidence that the RIA was used in fashioning the current proposed redefinition of companionship services, which seems mostly designed to prevent as many exemptions as possible.

Concluding Comments

The DOL claims that revising the definitions of the nature and scope of domestic services carried out by paid companions to bring more of them under the protection of the Fair Labor Standards Act will improve wages, conditions, and negligence standards in the home-care industry, although no evidence is produced to show systemic problems in relation to any of these

¹⁸ Basker, V. and To, T. (2003) "Minimum Wages, Employment and Monopsonistic Competition, Minimum Wages, Employment and Monopsonistic Competition," U.S. Bureau of Labor Statistics, *Working Paper 369*.

¹⁹ *Federal Register*, 76, at 81228.

variables. Following its claim, the DOL is therefore proposing a revision of the definitions of companionship services, and the nature of incidental services undertaken by companions, the limitation of exemptions to workers directly employed in the home, and a requirement for all employers to keep records of hours worked by live-in domestic workers to ensure proper payment of wages. The effect of the proposals will be to reduce the number of companions and live-in domestic-service workers exempted from minimum wage and overtime exemptions and to bring in payments for travel time. The DOL does not clearly show that the revisions will increase wages for the occupational group (a transfer benefit) but does recognize the likelihood of employment losses and deadweight losses following the implementation of the revisions (welfare losses).

Notably, the proposed definition of companionship services excludes the economies of scope that appear to be developing in home-care services, as basic companionship can be blended advantageously with a variety of simple personal-care and health-care services. This comment asks the DOL to reconsider its proposals in terms of whether the contemplated changes are really likely to cure any genuinely identifiable problems. Is it socially harmful to allow a flexible, low-wage fringe to continue in existence in home care? Can the compliance costs be justified for the proposals? The suggestion here is that both questions provoke a negative answer. Finally, is there a risk that some vulnerable elderly and/or infirm citizens may be excluded from home-care services as costs rise?

APPENDIX

MERCATUS CENTER REGULATORY REPORT CARD		
Agency: Department of Labor, Wage and Hour Division		
Rule title: Application of the Fair Labor Standards Act to Domestic Service		
RIN		
1235-AA05	RIA Separate? No	
Stage	Publication Date: 12/27/11	
Proposed Rule		
<p>Rule summary:</p> <p>The Department of Labor (DOL) proposes to amend the regulations attached to the Fair Labor Standards Act (FLSA) to revise the definitions of "domestic service employment" and "companionship services" and to require employers of live-in domestic workers—known as Home Health Aides (HHA) or, if they carry out limited medical supervision, as Personal Care Aides (PCA)—to maintain an accurate record of hours worked by such employees. In addition, the proposed regulation would limit the scope of duties a companion may perform and prohibit employees of third-party employers from claiming the certain exemptions. Elimination of these exemptions would increase the number of live-in domestic workers covered under minimum wage laws, eligible for overtime pay, and eligible for compensation for time spent commuting between worksites.</p> <p>The RIA fails to identify the labor-market failure that necessitates the use of the minimum wage, overtime, and travel compensation regulations set forth in the DOL's Notice of Proposed Rule Making (NPRM). Without any mention of asymmetric information, noncompetitive labor market, or non-competitive market for live-in domestic workers, the RIA uses only selected quotes from hearings on the 1975 expansion of the Fair Labor Standards Act.</p> <p>Although the NPRM does account for the responsiveness of consumers of services of live-in domestic workers, the proposed amendment does not consider alternative definitions or regulatory approaches, nor does it set forth potential ways to measure the effectiveness of the regulation.</p>		
Openness	Score	Comments
1. How easily were the RIA, the proposed rule, and any supplementary materials found online?	3	1A
2. How verifiable are the data used in the analysis?	3	1B
3. How verifiable are the models and assumptions used in the analysis?	3	1C
4. Was the Regulatory Impact Analysis comprehensible to an informed layperson?	3	1D
Total Openness (Sum of 1-4)	12	
Analysis	Score	Comments
5. How well does the analysis identify the desired outcomes and demonstrate that the regulation will achieve them?	3	2A
6. How well does the analysis identify and demonstrate the existence of a market failure or other systemic problem the regulation is supposed to solve?	1	2B
7. How well does the analysis assess the effectiveness of alternative approaches?	1	2C
8. How well does the analysis assess costs and benefits?	3	2D
Total Analysis (Sum of 5-8)	8	
Use	Score	Comments
9. Does the proposed rule or the RIA present evidence that the agency used the Regulatory Impact Analysis?	1	3A
10. Did the agency maximize net benefits or explain why it chose another alternative?	1	3B
11. Does the proposed rule establish measures and goals that can be used to track the regulation's results in the future?	1	3C
12. Did the agency indicate what data it will use to assess the regulation's performance in the future and establish provisions for doing so?	1	3D
Total Use (Sum of 9-12)	4	
Total Score	24	

OPENNESS			
Criterion	Score	Com. No.	Comment
1. How easily were the RIA, the proposed rule, and any supplementary materials found online?	3	1	The NPRM is easy to find using either the RIN or keywords on regulation.gov. Summary information was easily found using both keyword and RIN search on the Department of Labor's website. The DOL's site did not link directly to the proposed rule, however. A Google RIN search returns both a summary and the entire rule. OMB 'Economic Impact' is just a copy of the Preliminary Regulatory Impact Analysis section of the Federal Register entry.
2. How verifiable are the data used in the analysis?	3	2	For most of the rule, the DOL provides easily verifiable sources and often links directly to the research paper or agency from which the data are gathered. There are a few assumptions, mostly pertaining to benefits of regulation, which are made without reference to any data sources.
3. How verifiable are the models and assumptions used in the analysis?	3	3	There is no formal model overall, but rather a discussion of arguments made in a series of legal cases (e.g., Coke, 551 US 158), Congressional debates, and academic papers: reasoning amounts to a suspicion that employers may circumvent the FLSA because literal elements of an exemption do not match Congressional intent. The exercise is essentially one of statutory interpretation, per Coke. There is some use of price elasticity and deadweight loss. Assumptions are applied speculatively. Most of the data and assumptions come from either government agency data, such as the Bureau of Labor Statistics (BOL) or academic research that is cited and linked in the NPRM. A few of the assumptions are undocumented, though these are readily admitted in the rule.
4. Was the analysis comprehensible to an informed layperson?	3	4	The results and conclusions are clear, however, if only because of repetition. An economist could easily understand the analysis. A layperson may have a bit more difficulty.

ANALYSIS			
	Score	Com. No.	Comment
5. How well does the analysis identify the desired outcomes and demonstrate that the regulation will achieve them?	3		
Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?	4	5A	The NPRM seeks to revise the definition "domestic service employment" and "companionship services" so that employers of live-in workers must maintain records of hours worked and travel time between sites so that workers must be paid the legal minimum wage and overtime. The rule will also narrow the duties they can perform and prohibit employees of third-party employers (instead of families) from claiming exemption from Fair Labor Standards. A small subset of agency-employed and independent workers will realize an increase in the wage rate. A larger fraction will now be eligible for overtime, and all will now be paid an hourly rate for travel time between worksites. The rule will increase the cost of providing care for infirmed family members, however, the rule also proposes that the benefits will be less turnover, fewer worker injuries, less home care worker reliance on direct public assistance, and improved quality of care.
Does the analysis identify how these outcomes are to be measured?	2	5B	The RIA does not specifically state how these outcomes are to be measured. However, the RIA does use BOL statistics to determine the number and wages of workers that might be affected by the rule and thus could use these data to calculate the effect on the wage of workers. The RIA also uses data from a Paraprofessional Healthcare Institute (PHI) analysis of the U.S. Census Bureau's Current Population Survey, Annual Social and Economic Supplement (ASEC), on home-health-care workers, which could be used in the future to determine the number of overtime hours worked. There is little in the way the agency might measure travel time between work sites, turnover, employment injuries, less reliance on direct public assistance, and improved quality of care.
Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?	3	5C	The analysis speculates that moving exemption closer to the perceived intent of Congress will have a series of beneficial effects. The RIA explains how the rule will reduce the number of Home Health Aides (HHAs) and Personal Care Aides (PCAs) who are exempt from the federal or local minimum wage and overtime rules. Because both demand and supply of these services are, with some support, assumed to be inelastic, this will raise the hourly pay for a small subset of home assistance workers. Now that travel time is compensated, workers will now earn while traveling between worksites. The testable theory is that this will raise wages per hour of work, reduce turnover and employment injuries, and result in less reliance on direct public assistance and improved quality of care.
Does the analysis present credible empirical support for the theory?	2	5D	The RIA does report empirical support that a small fraction of current Home Health Aids and Personal Care Aids, from states that do not have state regulations on wages and overtime for home assistance workers, will realize an increase in their wage rate and potentially overtime wages. The DOL admits it has been unable to find data on the number of hours spent traveling between sites and the fraction of HHA or PCAs that are currently compensated for travel. The DOL uses data on the elasticity of demand associated labor services but then asserts that the demand for companionship is one half those for labor services (p. 81224). The RIA only discusses overall employment quality and lower turnover for higher wages in general and not for these types of workers.
Does the analysis adequately assess uncertainty about the outcomes?	2	5E	The RIA does present three scenarios for the uncertainty over overtime and three for travel time. However, the RIA only acknowledges the uncertainty over benefits such as reduced turnover and employment injuries, less reliance on direct public assistance, and improved quality of care.
6. How well does the analysis identify and demonstrate the existence of a market failure or other systemic problem the regulation is supposed to solve?	1		
Does the analysis identify a market failure or other systemic problem?	1	6A	The RIA fails to identify the labor market failure assumed by minimum wage, overtime, and travel compensation required by the NPRM. Without any mention of asymmetric information, noncompetitive labor market, or noncompetitive market for HHA or PCAs, the DOL is simply left with using selected quotes from hearings from the 1975 expansion of the Fair Labor Standards Act.

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?	0	6B	Without identifying a market failure, there is no way to outline a coherent theory of why this rule should be made. The rule does discuss previous congressional reports that support the idea that the intent of the initial rule was to cover all domestic workers under the Fair Labor Act.
Does the analysis present credible empirical support for the theory?	1	6C	The rule does not provide empirical evidence as to why one should believe market failure is the reason that a small fraction of worker's wages are too low or some workers are not compensated for overtime work or travel time. The RIA does present empirical evidence and published support for the relationship between quality of care and the number of hours worked by the care assistant.
Does the analysis adequately assess uncertainty about the existence or size of the problem?	1	6D	The analysis does report the fraction of both HHAs and PCAs whose wages are below the federal minimum wage, though the rule does not describe why or how this is attributable to a market failure. Nor does it describe why lack of overtime pay and travel time pay is a problem, though it does note the higher pay that would result from including these in the compensation of HCAs and PCAs. The regulation also notes the existence of current, higher state-based standards in states with high levels of home-based care. These discussions are not linked clearly to uncertainty over the scale of the underlying problem, defined as underpayment of care workers.
7. How well does the analysis assess the effectiveness of alternative approaches?	1		
Does the analysis enumerate other alternatives to address the problem?	1	7A	The RIA only briefly mentions two alternative options (p.81235): 1) no action or 2) allowing companions to assist with activities of daily living (ADLs) only five percent of the time. They do not report effects of either of these policies, only that the second option is 'overly burdensome.' Nor does the RIA look at different ways to increase the overall compensation for HHA or PCAs, such as only requiring overtime pay or only requiring pay for travel time between worksites. This may be due to how the Fair Labor Standard Act is written.
Is the range of alternatives considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?	1	7B	The proposed rulemaking only investigates one set of policy options. The rule does not consider policy alternatives that would cover fewer HHAs or PCAs. Nor does the rule discuss only seeking minimum wage coverage, or overtime coverage, or travel costs individually. The rule fails to mention that much of this growth in HHA and PCA is likely due to the increases in the cost of institutional provided assistance such as nursing homes and assisted living centers.
Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?	0	7C	There are no alternative approaches evaluated.
Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?	3	7D	The RIA does thoroughly investigate state regulations of companionship. The RIA also acknowledges the projected growth in the number of new families and firms hiring home health providers. The RIA does not acknowledge how the current evolution of policies at the state level might lower the net benefits realized by HHA and PCAs through this rule. A number of states are beginning to require state minimum wage, overtime, and travel costs to be included, but the regulation baseline simply assumes the current status quo and does not consider the trend in state regulations.
8. How well does the analysis assess costs and benefits?	3		
Does the analysis identify and quantify incremental costs of all alternatives considered?	1	8A	The RIA does not offer alternative policies and thus does not report incremental costs for the nonexistent options. It considers the extension of coverage only, save for a sketchy discussion of the impact on small businesses of altering the definition of home care assistants.

Does the analysis identify all expenditures likely to arise as a result of the regulation?	4	8B	The RIA does identify the expenditures on familiarization of regulation, higher wages, overtime wages, and travel-time compensation that will result from the rule. Medicare, Medicaid, private insurance, and private out-of-pocket expenditures will likely increase. The RIA mentions, but does not address, whether those considering home assistance will now, given the higher price, consider institutional care more frequently and thus incur greater costs.
Does the analysis identify how the regulation would likely affect the prices of goods and services?	3	8C	The RIA does calculate the increase in wages realized by HHAs and PCAs separately as well as the total increase in spending by patients, private insurance, Medicare, Medicaid, and other federal and state programs. It does so by halving the elasticity of demand for general labor services, because the RIA assumes that much of the increase in hourly rate will be paid for by government programs.
Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?	3	8D	The RIA does include the elasticity of demand and supply when determining the effect on quantity with an increased price. The RIA also notes that others may go to the grey market to avoid the regulation on compensation. However, the rule does not address the increase in cost realized by those who now seek the more expensive, though now relatively less expensive, option of institutionalized care. Discussion of data within the RIA indicates the DOL's perception that the underlying problem of restricted coverage of the FLSA is small.
If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?	3	8E	Because employers may alter HHA and PCA's work schedules, the RIA proposes three possible increases in costs associated with overtime pay: the current number of hours worked as overtime, only 50 percent of current overtime, or no overtime. The RIA also considers three potential scenarios for travel-time compensation.
Does the analysis identify the alternative that maximizes net benefits?	1	8F	The RIA does not offer alternative policies and thus does not have options on which to potentially maximize net benefits. It does report the potential net benefits from the responses of home companion workers and firms.
Does the analysis identify the cost-effectiveness of each alternative considered?	1	8G	The RIA claims to have chosen the least burdensome option, though it does not offer any analysis of the alternative policies briefly mentioned. Thus it does not report cost effectiveness for the options mentioned in passing.
Does the analysis identify all parties who would bear costs and assess the incidence of costs?	4	8H	The RIA reports figures and describes the various parties that will realize higher costs. These include private family costs, private insurance, federal Medicare, federal and state Medicaid, and other federal and state programs. The RIA also looks at how these higher costs will affect third-party suppliers of various sizes in terms of number of employees. The RIA also reports the costs of record keeping that would be required under the new compensation rules.
Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?	3	8I	The RIA identifies that a number of HCAs and PCAs will receive higher wage rates, the potential for overtime wages, and travel-time compensation. The rule also suggests, though does not assess the magnitude, employees will suffer fewer injuries due to fewer hours and have less reliance on direct public assistance due to higher wages. The rule reports in which states these rules will affect a fraction of HCAs and PCAs. The rule also suggests that, due to higher compensation, the infirmed will realize less turnover and improved quality of care.

USE			
Criterion	Score	Com. No.	Comment
9. Does the proposed rule or the RIA present evidence that the agency used the analysis?	1	9	The department undertook this revision to the definition of 'companionship services' on its own belief that the current application of the law is not consistent with the original intent, not in response to a new law. Regulation is predicated on the belief that HCAs and PCAs are under-compensated. There is little evidence that the RIA was used to redefine companionship services or help the DOL devise the regulation.
10. Did the agency maximize net benefits or explain why it chose another alternative?	1	10	The DOL does not offer alternative regulatory options and thus is unable to show whether net benefits are maximized. The RIA does report the benefits in terms of higher wages, overtime wages, and travel-time compensation for HCAs and PCAs. The RIA also reports the deadweight costs. The RIA only reports potential benefits to those who are unable to care for themselves in speculative and qualitative terms.
11. Does the proposed rule establish measures and goals that can be used to track the regulation's results in the future?	1	11	The goals appear to be to increase the compensation of home assistance workers. The department makes no commitment to track or measure results in the future.
12. Did the agency indicate what data it will use to assess the regulation's performance in the future and establish provisions for doing so?	1	12	The RIA is complete enough to track the effects of this rule on wages and overtime using BLS data as well as the costs to Medicare and Medicaid. It is not complete enough to offer potential ways to measure travel compensation, the effects on small business, nor the suggested benefits through less turnover and greater quality of care.