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**CFR** Code of Federal Regulations Pertaining to ESA↳ **Title 29** Labor↳ **Chapter V** Wage and Hour Division, Department of Labor↳ **Part 552** Application of the Fair Labor Standards Act to Domestic Service↳ **Subpart A** General Regulations

29 CFR 552.6 - Companionship services for the aged or infirm

- **Section Number:** 552.6
 - **Section Name:** Companionship services for the aged or infirm.
-

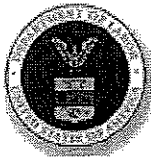
As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does 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. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

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CFR Code of Federal Regulations Pertaining to ESA

↳ **Title 29** Labor

↳ **Chapter V** Wage and Hour Division, Department of Labor

↳ **Part 552** Application of the Fair Labor Standards Act to Domestic Service

↳ **Subpart A** General Regulations

29 CFR 552.3 - Domestic service employment.

- **Section Number:** 552.3
- **Section Name:** Domestic service employment.

As used in section 13(a)(15) of the Act, the term domestic service employment refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.



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Business

D-6
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inc.
Innovators

 A weekly look at Fox Valley
 up-and-comers and trend-setters

One for the AGES

Young entrepreneur
reaches out to older clients

Business: Home Instead Senior Care
Owner: Steve Nooyen, 37

Type of business: Provide non-medical care to senior citizens such as cleaning, errand running, companionship, meal planning and incidental transportation such as doctor visits.

Number of employees: 240

Location: 1920 E. Northland Ave., Appleton

Year started: 1997 in Green Bay, 1998 in Appleton

By **MaryBeth Matzek**
 P-C assistant business editor

INNOVATOR INSIGHTS

ON THE FUTURE

"Everyone out there has a story about a mother, father, grandfather, aunt or neighbor who needed this kind of service. This is something that touches everyone and as the population ages, more people are going to require these kind of services."

ON GROWING CHOICES

"It used to be that people would go straight from their home to a nursing home. That is no longer the case. There are a lot of steps in between. Our business is just a piece of that. There are home health care agencies, assisted living and other services out there. The challenge is to get the word out and let people know there are other options besides the nursing home."

ON ENTREPRENEURISM

"I had a goal that I wanted to start my own business by age 30. I just didn't know what it would be. I looked around at a lot of franchises and this just fit. Not only was it a good business opportunity, it is just good to be doing something that helps so many people."

Know an innovator in the Fox Valley? Send nominations to [Maureen Wallenfang at mwallenfang@postcrescent.com](mailto:Maureen.Wallenfang@postcrescent.com) or call 920-993-1000, ext. 287.

Q: Your business' name is Home Instead Senior Care, which implies you help seniors stay in their home rather than moving to a nursing home, is that accurate?

A: What we do is really difficult to describe. Our mission is to help our clients stay home instead. The private home is where most of our care takes place although we do some care in assisted living centers where our clients want a little more of that one-on-one attention. We help with a number of things — meal preparation, light housekeeping, laundry, driving to appointments, reminders to take medication. They are all supportive type of services that help seniors stay in their home longer. A lot of our clients suffer from dementia or Alzheimer's so the need may not be specifically for meal preparation or housekeeping, but it provides supervision frankly. We make sure they don't endanger themselves by leaving the stove on or not taking their medication. We become the eyes and ears of the family who are not able to be there all the time.

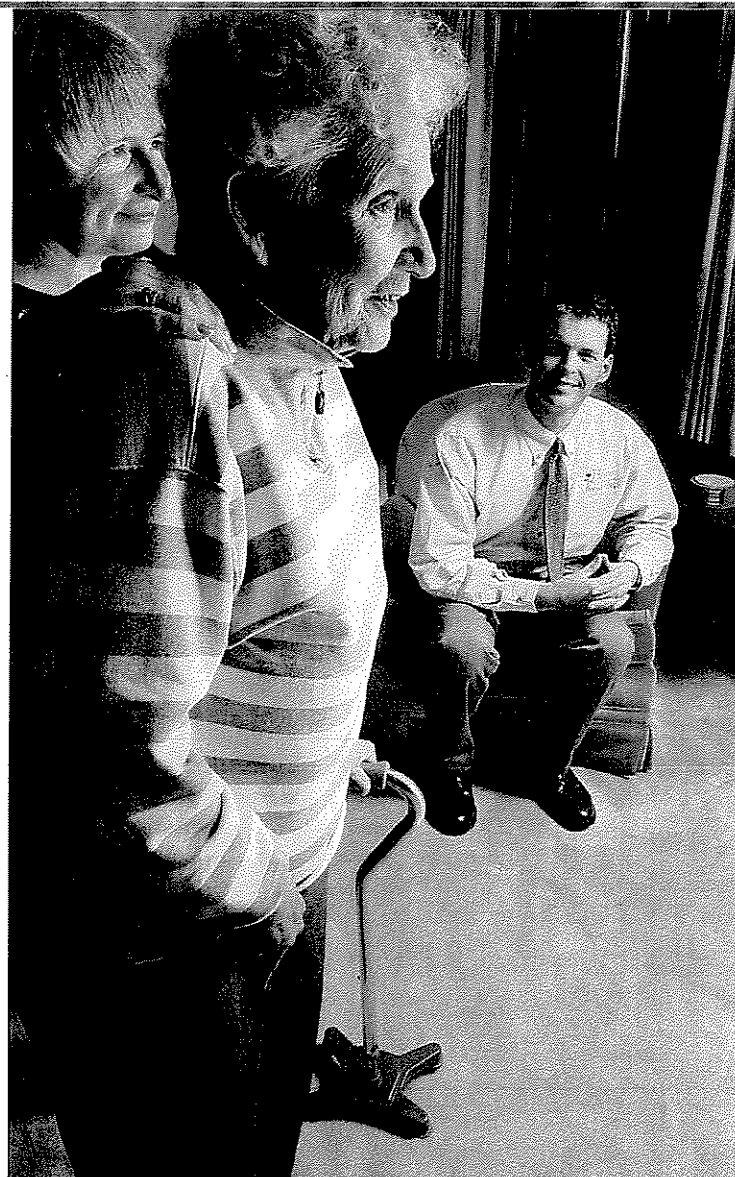
Q: How often do your caregivers see their clients?

A: It varies. At least, we see everyone weekly. Some clients we see three hours a week while others we see 24 hours a day, seven days a week.

Q: That must be a team approach.

A: Yes. We have two to four caregivers, but we do have some caregivers who will spend a week at a time with a client, except for some respite time.

The clients who require our care on the extreme end are the ones who suffer from dementia or Alzheimer's who just can't be left alone. Those clients with dementia or Alzheimer's are good candidates for a lot of care. Also, people who are rehabilitating from a stroke or knee or hip replacement also sometimes require a lot of care. The need, in this case, isn't indefinite. We're just there to help them as they rehabilitate. It's not like dementia or Alzheimer's because they aren't going to improve. These



HELEN CHRISTIAN (left) is the primary caregiver for 80-year-old Mary "Johnnie" Drews. She works for Steve Nooyen, owner of Home Instead Senior Care, which pairs area caregivers with senior citizen clients.

clients are going to improve. Once they improve, we move on.

Q: Who usually decides to bring a candidate in — other family members?

A: Definitely. It's the sons and daughters and concerned family members who recognize their loved ones' problems and the inability of them to manage for themselves. We have 250 seniors throughout northeast Wisconsin that we see on a weekly basis and I have often kidded that there's probably not one of them who wants us there in the beginning. But to be honest, once we're there, the seniors are very welcoming and receptive. More often than not, they forget the person is a hired caregiver, but rather a friend or companion and they look forward to their visits.

Q: People often talk about the sandwich generation — people who are concerned with not only their elderly parents' care, but also their children. Are those the people who

take advantage of your service?

A: Exactly right. And it's only going to grow more. Today, things are different. People may no longer be living in the same area as their parents or they just might not have the time. Even if they live in town, they still may want the help so they actually go over to their parents and enjoy a visit instead of being worried about doing the cleaning or running to the store.

Q: Some people may be afraid to hire a caregiver since it is bringing a stranger into their home.

A: True. That's an advantage by going with an agency like ours. We go through all the screening processes. We do a background check, reference checks, orientation program. We are selective. We hire just a few of the many who apply.

Q: What kind of background do these caregivers have?

A: That's what makes our business so great — it is so

varied. We have recent retirees, moms who are looking to pick up a few hours while their kids are at school. Since we don't do anything medical, it really opens up the variety of people we hire. We have three criteria — people are compassionate, a good communicator and dependable.

Q: What is your biggest challenge as a small business owner?

A: Making sure we have enough caregivers to serve our clients. So far, we have stayed ahead of the curve.

When I first started out, it was hard. However, it was very motivating for me in the beginning to know that I had a business that was going out in the community and doing some good. When we weren't showing a profit, I took comfort in all the wonderful stories we would share about our clients who we were helping.

MaryBeth Matzek can be reached at 920-993-1000, ext. 292, or by e-mail at mmatzek@postcrescent.com.



Evelyn Braun, left, talks last month about her grandsons and family Christmas traditions with caregiver Benna Armstrong at Braun's home. Armstrong enjoys reading as a caregiver for elderly citizens like Braun. Photos by Corey Wilson/Press-Gazette

There's no place like

H O M E

Care services keep elderly area residents where they want to be



BY THOMAS ROZWADOWSKI
rozwado@greenbaypressgazette.com

► Family caregivers have resource in federal program, A-8

Call it cliché, but sometimes it's the simple things that make life worth living.

For numerous area residents, that means having home not just feel like home but rather be home, as they struggle to adjust to the mental and physical limitations ushered in by old age.

It's a personal and painful battle Benna Armstrong, a caregiver for a local company, knows all too well. While watching her mother

and grandmother strive for independence amid escalating illness, the De Pere resident said she realized the importance of home for those close to her.

"It's what they've known their entire life. It's where their children grew up," said Armstrong, who works for Home Instead Senior Care. "When my grandmother was sick and the illness started agitating her, it really took a toll

on her legs.

"And although it became very hard for her to function, she always wanted to stay in her home. That's what she loved, that's what meant a lot to her."

Allowing others to hold onto their memories and maintain a sense of independence is the very reason Armstrong became a caregiver with Home Instead. Whether Armstrong is sharing life stories or tidying up a client's apartment during the week, her role is becoming increasingly important as the trend of in-home care

gains popularity.

As families become separated by distance more frequently and the baby-boomer generation begins to experience the frailties of old age, the need for everyday assistance beyond the realm of medical care has invariably increased, said Steve Nooyen, owner of Home Instead.

Nooyen developed the Green Bay/Fox Cities-based company in 1997 with "the little things" in mind. Following the death of his grandfather, Al DeCleene, two years earlier, Nooyen's goal was to provide area residents with options his family didn't have.

Home Instead serves roughly 250 clients in Northeastern Wisconsin.

"I watched the whole process with my grandpa, Al, and I'll always remember feeling a bit helpless that we couldn't keep him in his home," Nooyen said. "Had there been caregivers around, that could have happened, but it just didn't exist when he was suffering from his dementia.

"Now, knowing we can help someone stay in their home, where they have all their memories, you can't help but feel there's something special attached to that."

Roundtable:

What Is the Future of Elder Care?

Judith E. Frye, State Department of Health and Family Services: If you look at the statistics, the number of folks, obviously the Baby Boomers, begin turning 65 in about 10 years, or actually down to 8 I guess since I'm one of those second-year boomers. We anticipate the boomers are healthier in many respects than some earlier generations so they are expected to live longer and may not need long-term care in the immediate future as they start turning 65. Those over age 85 are the fastest growing population segment that we have today and it's expected to continue and it's those folks who generally are looking at drawing on long-term care resources.

What the Department of Health and Family Services is trying to do is look at the current long-term care system and position the state to address that expansion by reforming, redesigning the system as we see it today, trying to put in place some of the key elements of a system that (now) really can't address long-term care needs, of not only the elderly population but also the population of people with disabilities, so we can cope with the growth in the future and still have a cost-effective system.

Right now in Wisconsin there are a lot of people being cared for in the community rather than having to go to a nursing home setting, which can be quite expensive. But even then, we have waiting lists for community care. We need strategies to address those people who are waiting for care so they don't end up going to a costly institution setting. That's what our efforts at the state are about.

It's a very long time before the trend in population over 65, and actually over 85, flattens out. I don't know that even looking out to 2040 that it starts down again. There are just that many more people. So as the initial population growth hits us, we need to have strategies, even if we don't have all the providers on that first day, which would be cost effective, but strategies to be sure we have enough providers of home and community-based care and the right kind of acute primary health care growing and being fostered as time goes on.

We have a few more years and we're looking now to position ourselves before the boom hits and we have a number of initiatives under way to move in that direction. The new administration is particularly interested in some of the experiments

Participants:

- Steve Nooyen, Franchise Owner, Home Instead Senior Care
- Judith E. Frye, Associate Administrator for Long Term Support in the Division of Disability and Elder Services at the State Department of Health and Family Services in Madison
- Vince Cassiani, President, Angelus Retirement Communities

Steve
NooyenVince
Cassiani

ROUNDTABLE *from page 17*

we've done, like family care in Fond du Lac County, being pushed across the state because it's more cost effective and it's more what people want.

Steve Nooyen, Home Instead Senior Care: Since the Baby Boomers were born between 1946 and '64, the first of the Boomers will just be turning 65 in the year 2011.

In the homecare segment of elder care, we generally consider our client market to include seniors over the age of 65, yet more realistically most of our clients who suffer from the frailties of aging are those over the age of 75. The "younger" seniors (age 65-75) are more often in and out of hospitals, clinics or rehab facilities with shorter-term needs associated with joint replacements, heart conditions, mild strokes and cancer treatment. So the first impacts will be on the hospitals and related specialty care centers as they care for these sorts of conditions.

Eventually, as the Boomers reach the age of 75 and beyond, longer term conditions associated with general aging and the onset of dementia like Alzheimer's will result in greater needs for non-medical homecare, such as we provide through Home Instead Senior Care, skilled home health care and facility-based care

through Community Based Residential Facilities and nursing homes.

The compounding factor is that by the time the Boomers require elder care services; they will have a longer life expectancy than any preceding generation. Therefore, not only will there be more people than ever utilizing various elder care services, they will be "in the system" for a longer period of time. We currently serve several seniors over 100 years of age who live in their own home. I'd expect to see those numbers rise.

Operators of multi-family housing certainly benefit from economies of scale and prior building experience. However, many people in Elder care are people like myself who've had family experience caring for the elderly, and through those experiences they've recognized needs that have led them to the industry.

Vince Cassiani, Angelus Retirement Communities: "Boomers," believe it or not, are just coming into the "60" age category and, despite the anticipation of the Boomers coming of age, at this particular time, they will have little impact on elder care. However, the "silent" agers (my generation), who are in the 70-75-age category are those who are now seeking services of elder care. With regard to the future and the Baby Boomers, it is anticipated that by 2010 their im-

pact will begin to be felt within the senior services market. Notice I indicate "senior services" because more services will be available which will include a greater focus on keeping the frail elder person in her home.

Unfortunately, the consequence will be seniors who require more intense care going into the congregate or assisted living residences. More care will equate to more labor; more labor equates to higher costs for the prospective resident. Also, assisted living will act more like a nursing home, and as the nursing home industry "retools" its products and services, their physical environment will more resemble an assisted living model. From a market perspective, when the Boomers migrate into the "frail senior" category, there will be a tremendous demand for a wide market basket of services.

From 2000 through 2010 the demand is flat. Consequently the industry has seen some keen economic changes. The capital market has become more difficult, and weak or undercapitalized operators are selling out or going out of business. However, from 2010 to 2030 the demand curve will tend more to a vertical position as those Boomers actually come into the market segment where they will require support service. The Boomers are not the tip of the ice-

berg, they are the iceberg.

Following the Boomers comes the "X" generation, a totally different group, much more independent, very mobile and extremely health conscience. This group is the post-Vietnam group who is educated and demanding. This group was raised during part of the Vietnam era, highly opinionated and angry. The product mix to serve this group when they hit the "frail senior" category will have to be multiple and "seamless" with services being provided in a setting or "campus" where the degree of frailty will be indistinguishable.

Most elder care facilities are operated by nonprofit secular organizations. However, the future will belong to the for-profit sector, public and private. This is my opinion based upon having worked in both nonprofit and private sectors. The decision processes will require rapid changes to meet market demand from 2010 into the future and are too slow in the nonprofit sector. Capital in the amount necessary for rapid change doesn't gravitate to the nonprofit sector as readily as it does to public and private sectors. Most hospitals and nursing homes were either community owned or owned by religious organizations. The market now has private and public organizations providing the full continuum of services. M



Small Business Review

Home Instead offers options for senior citizen care

By John J. Archibald
of the Northwestern

Profile

Last summer, Robert Guenther had to find a home health care visitor in a way that wasn't financially draining.

He learned through references of Home Instead Senior Care, a company that specializes in training people to provide non-medical care for senior citizens.

"They're very conscious of my needs. They clean my house for me, they clean my lawn for me, they clean my dishes for me," Guenther said.

Judy Dant, a Home Instead Senior Care caregiver, visits every evening. Guenther has a caregiver from another agency visit an hour each noon.

"Judy is, I'd say, an angel. She takes good care of me. She's always on time, and she's always got things planned in advance, according to what we're going to do. She's very good," he said.

The name behind the local success of Home Instead Senior Care is Steve Nooyen. He started with a Home Instead office in Green Bay in 1997 and opened an Appleton office in 1998. Demand for services in Oshkosh prompted opening an office in this city last month.

"Our mission is to be able to help seniors to stay in their home as long as they can," he said.

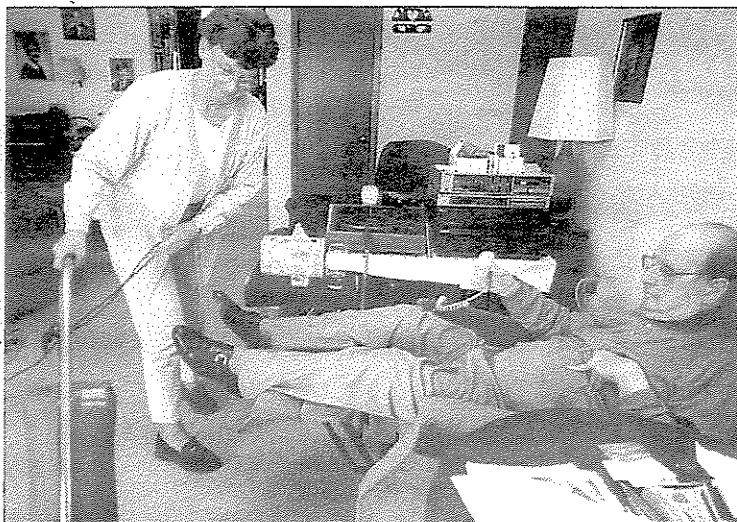
Nooyen, 34, graduated from Marquette University in 1988 with a degree in business administration. An experience with his grandfather's health problems led

- **Business:** Home Instead Senior Care
- **Owner:** Steve Nooyen
- **Service:** Non-medical, in-home senior citizen care
- **Location:** 105 Washington Ave., Suite 248
- **Hours:** 8 a.m. to 5 p.m. Monday through Friday
- **2000 sales:** \$1.23 million; projected 2001 sales: \$1.5 million
- **Contact number:** (920) 966-1220

Nooyen into the business.

His grandfather suffered from dementia in 1987 and 1988 to the point that the family was concerned for his safety. Nooyen had a goal to own a business by age 30, and investigated the concept of non-medical home care offered by Home Instead Senior Care of Omaha, Neb.

From these humble beginnings, the business has grown to 10 administrative staff and almost 150 caregivers serving. All told, they serve just over 160 people.



SHU-LING ZHOU/OF THE NORTHWESTERN

JUDY DANT, a caregiver from Home Instead Senior Care, maintains her client Robert Guenther's home.

The oldest customer is 103.

"We are one part of the overall solution for a senior citizen," he said.

Nooyen also chairs the Outagamie County Aging Advisory Committee.

Several factors illustrate the need for home health care for senior citizens. Demographics show the average lifespan for Americans is 76 years. At the turn of the last century, the average age was 49. "So the problems that we have today in aging aren't the same as we did (even) 50 years ago," he said.

The nation also has witnessed its population growing older. One-third of the population will be over age 50 by 2010. "The fastest growing segment of our population today is the 85-plus," Nooyen said.

The key focus behind Home Instead's success is the recruiting of its care providers. Home Instead staff interview potential care providers who next attend orientation classes. Background checks also are done. The training includes exposure to the kinds of jobs that caregivers provide. They perform light housekeeping, shop for groceries and prepare light meals, among other tasks, working about 15 to 30 hours a week.

The average age of a caregiver is 48, about 90 percent of them are female and about 75 percent come from client families, though caregivers aren't specifically required to come from families. Costs for clients range from \$8 to \$13.25 per hour.

The caregiver concept also becomes an option for families who hire nurses for home medical care, but still need help with daily life tasks.

"What you can't do today is have that nurse stay, cook a meal or do the laundry," Nooyen said.

But what happens if the care provider becomes ill? Home Instead will appoint a successor care provider. "If caregiver A can't be there, then caregiver B, C or D will be out there," Nooyen said.

That's similar to what happened to Guenther. Dant, his care provider, started working for him in October.

Dant suffers from chronic fatigue syndrome, which limits her active hours in any given day.

"So this was just perfect, to work three hours a day. That is a blessing to somebody and a blessing to me," she said.

Dant gestures to Guenther's clown memorabilia, mentioning Guenther and a friend entertained Oshkosh audiences for years as "Wally and Ches, the Nut Brothers."

They both smile and talk about his life, and the blessings each has had.

The match of Guenther with a care provider illustrates Nooyen's favorite quote which has become his company motto: "To never lose sight of the fact that old age needs so little but needs that little so much."

John J. Archibald: (920) 426-6689 or jarchibald@smgpo.gannett.com.



SHU-LING ZHOU/OF THE NORTHWESTERN

JUDY DANT shares a laugh with her client Robert Guenther. Dant's duties include preparing meals and washing clothes.



WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director
Laura D. Rose, Deputy Director*

TO: REPRESENTATIVE GLENN GROTHMAN
FROM: Ronald Sklansky, Senior Staff Attorney
RE: Agency Requirement to Promulgate an Interpretation of a Statute as an Emergency Rule
DATE: February 19, 2004

You have asked whether the Joint Committee for Review of Administrative Rules (JCRAR) has the statutory authority to direct the Department of Workforce Development (DWD) to promulgate, as an administrative rule, an administrative code provision applying Wisconsin's overtime pay regulations to nonmedical home care companion employees of a private agency.

A. BACKGROUND

Section 103.02, Stats., prohibits the employment of a person in any place of employment or at any employment for periods of time that are dangerous or prejudicial to the person's life, health, safety, or welfare and requires DWD to promulgate rules setting periods of time for work which are necessary to protect the person. Also, DWD must, by rule, classify these periods of time into periods to be paid for at regular rates and periods to be paid for at the rate of at least one and one-half times the regular rates.

In turn, s. 103.01 (2) and (3), Stats., defines the terms "employment" and "place of employment." The term "employment" includes any trade or occupation, or any method of carrying on the trade or occupation in which a person may be engaged or for any place of employment. The term "place of employment" includes any manufactory or mercantile establishment.

In the Wisconsin Administrative Code, s. DWD 274.03 generally provides that an employer subject to ch. DWD 274 must pay to each employee time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week. Section DWD 274.015 (1) states that the overtime rates apply to an employee employed in manufactories or mercantile establishments, but do not apply to an employee "employed in domestic service in a household by a household...."

At a hearing before JCRAR on January 21, 2004, an attorney representing DWD presented testimony to the committee regarding the applicability of overtime rates to nonmedical home care

companion employees of a private agency. Among other statements, the testimony included the following:

The language contained in DWD's rule simply clarifies the language in the statute. Individuals employed by private households to perform work for the household of a domestic nature are not eligible to receive overtime premium pay.

On the other hand, individuals employed by a commercial business performing work in or around a private home are eligible to receive overtime premium pay when they work more than 40 hours in a pay week....

After receiving this testimony regarding the meaning of the statutes and the department's own administrative rules, JCRAR adopted a motion, in accordance with s. 227.26 (2) (b), Stats., to direct DWD to promulgate as an emergency rule the department's overtime policy for nonmedical home care companion employees of a private agency as part of ch. DWD 274. [Section 227.26 (2) (b), Stats., provides that if JCRAR determines that a statement of policy or an interpretation of a statute meets the definition of a rule, it may direct the agency to promulgate the statement or interpretation as an emergency rule within 30 days after the committee's action.]

In response to JCRAR's motion, the Secretary of DWD, in correspondence dated February 9, 2004, informed the committee that the department is not in a position to promulgate any further administrative rule on this matter. In support of this conclusion, the Secretary stated that:

1. JCRAR has not identified a statement of policy that it is directing the agency to promulgate.
2. JCRAR's intent appears to be for the agency to promulgate a rule that exempts from overtime requirements nonmedical home care companion employees of a private agency.
3. The policy of DWD "is not and has not been" that nonmedical home care companion employees of a private agency be exempt from overtime regulations and therefore such a policy cannot be the subject of a JCRAR motion under s. 227.26 (2) (b), Stats.

B. DISCUSSION

Section 227.26 (2) (b), Stats., authorizes JCRAR to find that either a statement of policy or an interpretation of a statute meets the definition of a rule and then direct the appropriate agency to promulgate the statement or the interpretation as an emergency rule. Nothing in ss. 103.01 or 103.02, Stats., or ss. DWD 274.015 or 274.03, Wis. Adm. Code, explicitly states that overtime requirements apply to nonmedical home care companion employees of a private agency. The statutes are not self-executing. Instead, the statutes give the agency broad discretion to create "reasonable classifications" fixing periods of time within which a person may be employed at regular and overtime rates, consistent with the protection of the person's general welfare. Conceivably, DWD could have provided, by rule, that nonmedical home care companion employees be paid at a regular rate for 60 or more hours in one week. Thus, when the agency concludes that such overtime requirements apply after 40 hours in a week, it must be interpreting the meaning of the existing statutes. If it is accurate to conclude that the

application of the overtime requirements in this situation is an interpretation of the statutes, the interpretation certainly meets the definition of the term "rule" in s. 227.01 (13) (intro.), Stats. That is, the interpretation obviously has general application to a nonclosed class, has the effect of law since it requires a private agency to pay overtime rates in certain situations, is implemented by DWD, and interprets the specific legislation set out in ss. 103.01 and 103.02, Stats.

Further, the Secretary of DWD misapprehends the nature of JCRAR's motion on January 21, 2004. She states that the committee's intent appears to be that DWD promulgate a rule exempting nonmedical home care companion employees of a private agency from overtime requirements. This is not the case. JCRAR's directive is that DWD specifically state, through an emergency rule, its policy on this overtime issue.

For all of the above reasons, JCRAR appears to be well within its statutory authority to have adopted its motion on January 21, 2004.

If I can be of any further assistance in this matter, please feel free to contact me.

RS:tlu;ksm

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State of Wisconsin
Department of Workforce Development
Jim Doyle, Governor
Roberta Gassman, Secretary

March 1, 2004

The Honorable Joseph Leibham
Co-Chair, Joint Committee for
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Room 409 South, State Capitol
P.O. Box 7882
Madison WI 53707-7882

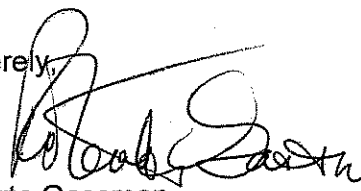
The Honorable Glenn Grothman
Co-Chair, Joint Committee for
Review of Administrative Rules
Room 15 North, State Capitol
P.O. Box 8952
Madison WI 57308

Dear Senator Leibham and Representative Grothman:

On February 19, 2004, in response to my earlier letter, you provided a response and a memorandum from a Legislative Council attorney which clarified your Committee's directive to DWD concerning the promulgation of an emergency rule on the application of Wisconsin's overtime pay regulations to nonmedical home care companion employees of a private agency.

I have enclosed a copy of the emergency rule that DWD is promulgating today in response to the directive of your Committee.

Sincerely,


Roberta Gassman
Secretary

*Hope this is
helpful and
best to you*

Enclosure

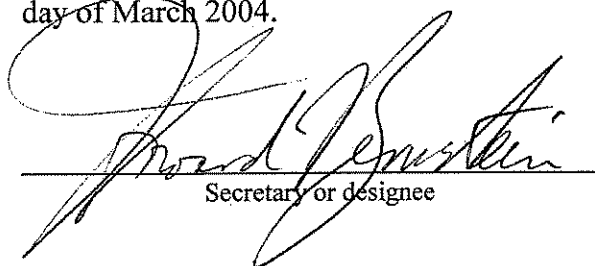
Rules Certificate

STATE OF WISCONSIN)
) SS
DEPARTMENT OF WORKFORCE DEVELOPMENT)

I, Roberta Gassman, Secretary of the Department of Workforce Development, and custodian of the official records, certify that the annexed rules, relating to overtime pay for employees performing companionship services, were duly approved and adopted by this department on March 1st, 2004.

I further certify that this copy has been compared by me with the original on file in this department and that it is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the of the Department of Workforce Development at 201 E. Washington Avenue in the city of Madison, this 1st day of March 2004.


Secretary or designee

Order Adopting Rules

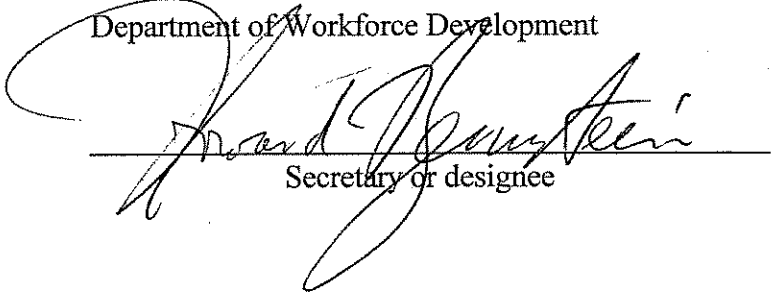
Pursuant to authority vested in the Department of Workforce Development by Sections 103.005, 103.02, and 227.11, Stats., the Department of Workforce Development repeals and recreates and creates rules of Wisconsin Administrative Code Chapter DWD 274, relating to overtime pay for employees performing companionship services.

The attached rules shall take effect on March 1st, 2004, pursuant to section 227.24, Stats.

Adopted at Madison, Wisconsin this

date: March 1, 2004

Department of Workforce Development


Secretary or designee

**State of Wisconsin
Department of Workforce Development**

EMERGENCY RULE

Overtime Pay for Employees Performing Companionship Services

Chapter DWD 274

The Wisconsin Department of Workforce Development orders the repeal and recreation of ss. DWD 274.015 and 274.03 and the creation of s. DWD 274.035, relating to overtime pay for employees performing companionship services.

Finding of Emergency

The Department of Workforce Development finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of facts constituting the emergency is:

On January 21, 2004, pursuant to s. 227.26(2)(b), Stats., the Joint Committee for Review of Administrative Rules directed the Department of Workforce Development to promulgate an emergency rule regarding their overtime policy for nonmedical home care companion employees of an agency as part of DWD 274.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 103.005, 103.02, and 227.11, Stats.

Statutes interpreted: Sections 103.01 and 103.02, Stats.

Section 103.02, Stats., provides that “no person may be employed or be permitted to work in any place of employment or at any employment for such period of time during any day, night or week, as is prejudicial to the person’s life, health, safety or welfare.” Section 103.01 (3), Stats., defines “place of employment” as “any manufactory, mechanical or mercantile establishment, beauty parlor, laundry, restaurant, confectionary store, or telegraph or telecommunications office or exchange, or any express or transportation establishment or any hotel.”

Chapter DWD 274 governs hours of work and overtime. Section DWD 274.015, the applicability section of the chapter, incorporates the statutory definition of “place of employment” and limits coverage of the chapter to the places of employment delineated in s. 103.01 (3), Stats., and various governmental bodies. Section DWD 274.015 also

provides that the chapter does not apply to employees employed in domestic service in a household by a household.

Section 103.02, Stats., directs that the "department shall, by rule, classify such periods of time into periods to be paid for at the rate of at least one and one-half times the regular rates." Under s. DWD 274.03, "each employer subject to this chapter shall pay to each employee time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week." Section DWD 274.04 lists 15 types of employees who are exempt from this general rule and s. DWD 274.08 provides that the section is inapplicable to public employees.

Nonmedical home care companion employees who are employed by a third-party, commercial agency are covered by the overtime provision in s. DWD 274.03. Section DWD 274.03 applies to all employees who are subject to the chapter and not exempt under ss. DWD 274.04 or 274.08. The chapter applies to companion employees of a commercial agency because under s. DWD 274.015 a commercial agency is considered a mercantile establishment. Section DWD 270.01 (5) defines a mercantile establishment as a commercial, for-profit business. The chapter does not apply to companion employees of a nonprofit agency or a private household. In addition, none of the exemptions to the overtime section in ss. DWD 274.04 or 274.08 apply to companion employees of a commercial agency.

The Joint Committee for the Review of Administrative Rules has directed DWD to promulgate an emergency rule regarding the overtime policy for nonmedical home care companion employees of an agency. This provision is created at s. DWD 274.035 to say that employees who are employed by a mercantile establishment to perform companionship services shall be subject to the overtime pay requirement in s. DWD 274.03. "Companionship services" is defined as those services which provide fellowship, care, and protection for a person who because of advanced age, physical infirmity, or mental infirmity cannot care for his or her own needs. Such services may include general household work and work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. The term "companionship services" does not include services relating to the care and protection of the aged or infirm person that require and are performed by trained personnel, such as registered or practical nurses.

This order also repeals and recreates the applicability of the chapter section and the overtime section to write these rules in a clearer format. There is no substantive change in these sections.

SECTION 1. DWD 274.015 and 274.03 are repealed and recreated to read:

DWD 274.015 Applicability of chapter. (1) This chapter applies to employees who work in any of the following places of employment:

- (a) Manufactories.
- (b) Mechanical or mercantile establishments.
- (c) Beauty parlors.
- (d) Laundries.
- (e) Restaurants.
- (f) Confectionary stores.
- (g) Telegraph or telephone offices or exchanges.
- (h) Express or transportation establishments.
- (i) Hotels.

(j) The state, its political subdivision and any office, department, independent agency, authority, institution, association, society, or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts.

(2) This chapter does not apply to domestic service employees in a household who are employed by a household.

DWD 274.03 Overtime pay. Each employer shall pay to each employee time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week, except any of the following:

- (1)** Employees who are not subject to this chapter pursuant to s. DWD 274.015.
- (2)** Employees who are exempt from this section under s. DWD 274.04.
- (3)** Public employees who are exempt from this section under s. DWD 274.08.

SECTION 2. DWD 274.035 and 274.035 (note) are created to read:

DWD 274.035 Companionship services. (1) Employees who are employed by a mercantile establishment to perform companionship services shall be subject to the overtime pay requirement in s. DWD 274.03.

(2) For the purpose of this section, “companionship services” means those services which provide fellowship, care, and protection for a person who because of advanced age, physical infirmity, or mental infirmity cannot care for his or her own needs. Such services may include general household work and work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. The term “companionship services” does not include services relating to the care and protection of the aged or infirm person that require and are performed by trained personnel, such as registered or practical nurses.

Note: This section was promulgated in response to a motion by the Joint Committee for Review of Administrative Rules under s. 227.26(2)(b), Stats. The overtime pay requirement in s. DWD 274.03 applies to all employees who are subject to this chapter under s. DWD 274.015 and not exempt under ss. DWD 274.04 or 274.08. The existence of this section should not be construed to affect the coverage of employees or occupations that are not specifically enumerated.

SECTION 3. EFFECTIVE DATE. This rule shall take effect upon publication as provided in s. 227.24 (1)(d), Stats.

FISCAL ESTIMATE WORKSHEET

2004 Session

Detailed Estimate of Annual Fiscal Effect
DOA-2047 (R10/94)

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.
DWD 274

Amendment No.

Subject
Overtime pay for employees performing companionship services

I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

0

II. Annualized Costs:		Annualized Fiscal impact on State funds from:	
A. State Costs by Category		Increased Costs	Decreased Costs
State Operations - Salaries and Fringes		\$0	\$0 -
(FTE Position Changes)		0 (FTE)	0
State Operations - Other Costs		0	0
Local Assistance		0	0
Aids to Individuals or Organizations		0	0
TOTAL State Costs by Category		\$0	\$
B. State Costs by Source of Funds		Increased Costs	Decreased Costs
GPR		\$0	\$0-
FED		0	0
PRO/PRS		0	0
SEG/SEG-S		0	0
III. State Revenues -		Increased Rev.	Decreased Rev.
	Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	\$	\$ -
GPR Taxes			
GPR Earned			-
FED			-
PRO/PRS			-
SEG/SEG-S			-
TOTAL State Revenues		\$0	\$0-

NET ANNUALIZED FISCAL IMPACT

	STATE	LOCAL
NET CHANGE IN COSTS	0	0
NET CHANGE IN REVENUES	\$0	\$0

Agency/Prepared by: (Name & Phone No.)
DWD/ Elaine Pridden 267-9403

Authorized Signature/Telephone No.

Howard J. Smith 266-9407

Date 2/11/04

LRB or Bill No./Adm. Rule No.
DWD 274

Amendment No. if Applicable

- ORIGINAL UPDATED
- CORRECTED SUPPLEMENTAL

FISCAL ESTIMATE
DOA-2048 N(R03/97)

Subject
Overtime pay for employees performing companionship services

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Costs - May be possible to Absorb Within Agency's Budget Yes No

- Increase Existing Appropriation Increase Existing Revenues
- Decrease Existing Appropriation Decrease Existing Revenues
- Create New Appropriation

Decrease Costs

Local: No local government costs

- 1. Increase Costs
 Permissive Mandatory
- 2. Decrease Costs
 Permissive Mandatory

- 3. Increase Revenues
 Permissive Mandatory
- 4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:

- Towns Villages Cities
- Counties Others _____
- School Districts WTCS Districts

Fund Sources Affected
 GPR FED PRO PRS SEG SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The new rule section duplicates coverage of existing rules.

Long-Range Fiscal Implications
None

Agency/Prepared by: (Name & Phone No.)
DWD/Elaine Pridgen 267-9403

Authorized Signature/Telephone No.

Frankenstein 266 9427

Date

3/1/04

**State of Wisconsin
Department of Workforce Development**

EMERGENCY RULE

Overtime Pay for Employees Performing Companionship Services

Chapter DWD 274

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- (e) Restaurants.
- (f) Confectionary stores.
- (g) Telegraph or telephone offices or exchanges.
- (h) Express or transportation establishments.
- (i) Hotels.

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- (3) Public employees who are exempt from this section under s. DWD 274.08.

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Note: This section was promulgated in response to a motion by the Joint Committee for Review of Administrative Rules under s. 227.26(2)(b), Stats. The overtime pay requirement in s. DWD 274.03 applies to all employees who are subject to this chapter under s. DWD 274.015 and not exempt under ss. DWD 274.04 or 274.08. The existence of this section should not be construed to affect the coverage of employees or occupations that are not specifically enumerated.

SECTION 3. EFFECTIVE DATE. This rule shall take effect upon publication as provided in s. 227.24 (1)(d), Stats.

Jim Doyle
Governor

Roberta Gassman
Secretary

Micabil Diaz-Martinez, Esq.
Division Administrator



State of Wisconsin
Department of Workforce Development

EQUAL RIGHTS DIVISION
201 E. Washington Ave., Room A300
P.O. Box 8928
Madison, WI 53708-8928
Telephone: (608) 266-6860
Fax: (608) 267-4592
TTY: (608) 264-8752
<http://www.dwd.state.wi.us/>
e-mail: dwdder@dwd.state.wi.us

April 28, 2004

Statement before the
Joint Committee for Review of Administrative Rules
On Overtime Pay for Employees of For-Profit Businesses that Perform
Non-medical Home Care

By: Attorney Micabil Díaz-Martínez
Administrator- Equal Rights Division
Department of Workforce Development, State of Wisconsin

Good afternoon, Mr. Chair and members of this committee. On January 21, 2004, the JCRAR adopted a motion directing the Department of Workforce Development to promulgate an emergency rule regarding their overtime policy for non-medical home care companion employees.

Based on the aforementioned, the department issued the enclosed emergency rule and, in doing so, complied with the committee's directive. This emergency rule had an effective date of March 1, 2004.

I hope this information is helpful to the committee in its deliberations. My staff and I would be glad to answer any questions the committee may have on this issue.



April 28, 2004

To: Joint Committee for Review of Administrative Rules
Re: Emergency Rule – DWD 274
From: Gail Sumi, Government Affairs Representative – 286-6307

AARP Wisconsin supports the policy expressed in DWD 274, but we are concerned that the legislature intends to suspend the rule when the statute remains clear that the overtime payment must be made. This will add confusion to the administration of the law without benefit to anyone.

As you may know, 2003-04 AB 903 and SB 508 stated that for-profit providers of companionship services do not need to provide companions overtime compensation. AARP registered in opposition to these bills and the Governor vetoed enrolled SB 508.

AARP Wisconsin believes that the state needs to strike an equitable balance between the needs of the person requiring companionship services and those of the person providing those services, offering viable protections to both parties against exploitation or abuse. While individuals requiring companionship services are typically elderly and infirm, many of those hired as companions are age 50 or older. In fact, individuals who testified as companions at public hearings on the bills were eligible for membership in AARP.

As Wisconsin's population ages, demand for companionship services will grow. Preserving the dignity of those providing companionship services should help in recruiting and retaining workers for these jobs.

Thank you for your consideration.



Organizing Today for
Wisconsin's Future

**Service Employees
International Union
AFL-CIO, CLC**

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Vice-President

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www.seiuwi.org

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Testimony on DWD Emergency Rule 274
Robert Kraig, Ph.D., Political Director, SEIU Wisconsin State
Council

Joint Committee for Review of Administrative Rules
April 28, 2004

Thank You Co-Chair Leibham, Co-Chair Grothman.

SEIU opposes suspension of DWD Emergency Rule 274, as we opposed SB 508, the legislative vehicle for achieving the same purpose that was vetoed by Governor Doyle on April 12.

The object of this proposal is to adopt federal rules governing overtime pay that were created by the Bush Administration in 2001. SEIU believes these federal rules are flawed, and therefore opposes grafting them into the state wage and hour scheme.

First, the federal rule is poorly written, and in fact exempts more work from over time rules than the supporters of the proposal suggest. As Governor Doyle said in his veto message "the definition of companionship services included in [the federal rule] is so broad that the exemptions provided may be subject to misapplication and misuse." The for-profit home care agencies that supported SB 508, and its companion bill AB 903, claimed a desire to exempt from over time requirements workers who spend 80% of their time performing pure companionship services (watching TV, playing cards, or simply being with a client) and less than 20% of their time performing household chores and other home care activities. In fact, the language of the Bush Administration rule that would be read verbatim into state rules includes "meal preparation, bed making, clothes washing, and other similar services" as companionship services. This means a person would be eligible for overtime if they did performed such services as an the employee of a commercial housekeeping service, but not if the were employed by a companionship agency. It also means that substantial amounts of higher level care such as personal care and supportive home care could be performed within the 20% exemption in the rule, as housekeeping services would be counted as part of the 80% that is classified as companionship. This interpretation of the federal rule is shared by the Legislative Reference Bureau.

Second, the proposal goes in the opposite direction that is needed to accommodate the expanding need for community based services. There is a general consensus that there if a critical need for Wisconsin to expand community options for senior citizens and people with disabilities. It is generally recognized that the demographic shift to an older population, and

Local 150 (statewide)	District 1199W/UP (statewide)	Local 1171 (WI-IL)	Local 113 (MN - Western WI)
Local 152 (Madison)	Local 180 (LaCrosse)	Local 168 (Kenosha)	Local 21 (LaCrosse)

with more disabled citizens living longer, that there will be a tremendous demand for more community based service workers. One of the major barriers to expansion of community based and in home supports has been the lack of a stable and well trained workforce. The expansion of the so-called companionship exemption to agency employees goes in the opposite direction that we need to go in order to encourage the development of this workforce. As Governor Doyle observed in his veto message of SB 508: "By downgrading the pay status of the companionship services occupation at a time when the demand for home care workers is increasing [the adoption of the federal rule] will lead to a less professional and less stable home care workforce." In addition to ethical considerations, it is not in the public interest to exempt work as meaningful and as socially important as this from based wage and hours standards.

Third, as a union of predominantly female care givers who work in a broad range of health care professions, we strongly oppose any perpetuation of the traditional view that care giving vocations are not real jobs that require the same basic labor standards and legal protections as traditionally male dominated professions. This traditional devaluation of female care giving has been used to deny generations of women (from nurses to nursing assistants to home care aides) the rightful fruits of their socially vital work.

Fourth, suspension of DWD 274 will not achieve the desired purpose of its supporters, as the federal rule they wish to adopt is inconsistent with Wisconsin law. This is a legislative issue that was ended this session by the Governor's veto of SB 508.

Thank you for your consideration.



P.O. Box 7882
MADISON, WI 53707-7882
(608) 266-2056

P.O. Box 8952
MADISON, WI 53708-8952
(608) 264-8486

**JOINT COMMITTEE FOR
REVIEW OF ADMINISTRATIVE RULES**

Emergency Rule Suspension Motion Form

April 28, 2004
201 Southeast
State Capitol

Moved by GROTHMAN, Seconded by LAZICHA

THAT, pursuant to s. 227.19(4)(d)1-3, stats. the Joint Committee for Review of Administrative Rules suspends DWD 274 in it's entirety.

227.24(2)(d) &

COMMITTEE MEMBER	Aye	No	Absent
1. Senator LEIBHAM	✓		
2. Senator WELCH	✓		
3. Senator LAZICH	✓		
4. Senator ROBSON	✗	✓	
5. Senator COGGS		✓	
6. Representative GROTHMAN	✓		
7. Representative SERATTI	✓		
8. Representative GUNDERSON	✓		
9. Representative BLACK		✓	
10. Representative HEBL		✓	
Totals	65	34	

Motion Carried

Motion Failed



P.O. Box 7882
MADISON, WI 53707-7882
(608) 266-2056

P.O. Box 8952
MADISON, WI 53708-8952
(608) 264-8486

JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

April 30, 2004

Roberta Gassman, Secretary
Department of Workforce Development
P.O. Box 7946
Madison, WI 53707-7946

Dear Secretary Gassman:

The Joint Committee for the Review of Administrative Rules met in Executive Session on April 28, 2004 and adopted the following motion:

Emergency Rule DWD 274.035 Relating to overtime pay for employees performing companionship services. Moved by Representative Grothman, seconded by Senator Lazich that, pursuant to s. 227.26(2)(d) & 227.19(4)(d) 1-3, Stats, the suspends Emergency Rule DWD 274.035 in it's entirety.
Ayes 6, Noes 4 Motion Carried.

Pursuant to s. 227.24(2)(c) Stats, we are notifying the Secretary of State and the Revisor of Statutes of the Committee's action through copies of this letter.

Sincerely,

Senator Joseph Leibham
Senate Co-Chair

Representative Glenn Grothman
Assembly Co-Chair

JKL:GSG:pvs

cc: Secretary of State Doug LaFollette
Revisor of Statutes Gary Poulson

SENATOR JOSEPH LEIBHAM
CO-CHAIR



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIR

P.O. Box 7882
MADISON, WI 53707-7882
(608) 266-2056

P.O. Box 8952
MADISON, WI 53708-8952
(608) 264-8486

JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

April 30, 2004

The Honorable Alan Lasee
Senate President
State Capitol Building, Room 220 South
Madison, WI 53702

The Honorable John Gard
Assembly Speaker
State Capitol Building, Room 211 West
Madison, WI 53702

Dear President Lasee and Speaker Gard:

The Joint Committee for the Review of Administrative Rules met in Executive Session on April 28, 2004 and adopted the following motions:


Emergency Rule DWD 274.035 Relating to overtime pay for employees performing companionship services. Moved by Representative Grothman, seconded by Senator Lazich that, pursuant to s. 227.26(2)(d) & 227.19(4)(d) 1-3, stats, the suspends Emergency Rule DWD 274.035 in it's entirety.
Ayes 6, Noes 4 Motion Carried.

NR 27.03(3)(c) 3 Relating to the Endangered and Threatened Species Butler's garter snake. Moved by Representative Grothman, seconded by Senator Lazich that, the Joint Committee for Review of Administrative Rules requests the Department of Natural Resources to promulgate their policy, "conservation measures for site classifications" as it relates to the Butler's garter snake into a draft emergency rule within 30 days.
Ayes 6, Noes 4 Motion Carried.

Pursuant to s. 227.24(2)(c), stats., as treated by 1997 Wisconsin Act 185, please forward a copy of this notice to the chairperson of the standing committee in your respective house most likely to have jurisdiction over the Clearinghouse Rule corresponding to the above emergency rule.

Sincerely,


Senator Joseph Leibham
Senate Co-Chair


Representative Glenn Grothman
Assembly Co-Chair

JKL:GSG:pvs

cc: Secretary of State Doug LaFollette
Revisor of Statutes Gary Poulson



WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director
Laura D. Rose, Deputy Director*

TO: REPRESENTATIVE GLENN GROTHMAN

FROM: Ronald Sklansky, Senior Staff Attorney 

RE: Effect of Rule Suspension

DATE: May 5, 2004

MAY 05 2004

This memorandum, prepared at your request, responds to a question you have raised regarding the effect of a rule suspension. Specifically, you have asked whether the Department of Workforce Development (DWD) may require an employer to pay overtime compensation to an employee performing companionship services following a rule suspension by the Joint Committee for Review of Administrative Rules (JCRAR).

On March 1, 2004, an emergency rule promulgated by the DWD took effect. In part, the rule provided generally that each employer must pay to each employee time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week. The overtime pay requirement specifically applied to an employee who performs companionship services. [See DWD Emergency Rule ss. DWD 274.03 (intro.) and 274.035.]

Exercising its authority under s. 227.26 (2) (d), Stats., JCRAR adopted a motion on April 28, 2004 suspending DWD Emergency Rule s. DWD 274.035, specifically relating to overtime pay for an employee who performs companionship services.

The clear intent and effect of the JCRAR motion is to prevent DWD from enforcing overtime pay rules in the context of the performance of companionship services. The rule, having the force and effect of law, that imposed the requirement has been suspended. In light of the JCRAR rule suspension, DWD's continuing enforcement of overtime pay with respect to an employee who performs companionship services would amount to the agency's enforcement of an invalidly promulgated rule.

If I can be of any further assistance in this matter, please feel free to contact me.

RS:ksm

Department of Workforce Development
Office of the Secretary
201 East Washington Avenue
P.O. Box 7946
Madison, WI 53707-7946
Telephone: (608) 266-3131
Fax: (608) 266-1784
e-mail: dwdsec@dwd.state.wi.us



State of Wisconsin
Department of Workforce Development
Jim Doyle, Governor
Roberta Gassman, Secretary

May 5, 2004

The Honorable Joseph Leibham
Co-Chair, Joint Committee for
Review of Administrative Rules
Room 409 South, State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Leibham:

This letter is in response to Representative Hebl's request at the April 28, 2004, meeting of the JCRAR. Representative Hebl requested that the Department confirm in writing its position that a suspension of emergency rule DWD 274, relating to overtime pay for employees performing companionship services, would have no effect.

The emergency rule specifies a non-exemption of companion employees of for-profit businesses from the overtime provision. It duplicates coverage of the existing permanent rule that already provides that these employees must be paid overtime. Suspending the emergency rule would not create an exemption for these employees because they would still be covered by the existing permanent rule.

I hope you find this information helpful. Let me know if I can provide any other assistance.

Best to you,


Roberta Gassman
Secretary


cc: Representative Tom Hebl



WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: REPRESENTATIVE GLENN GROTHMAN

FROM: Ronald Sklansky, Senior Staff Attorney 

RE: Effect of Rule Suspension

DATE: May 5, 2004

MAY 05 2004

This memorandum, prepared at your request, responds to a question you have raised regarding the effect of a rule suspension. Specifically, you have asked whether the Department of Workforce Development (DWD) may require an employer to pay overtime compensation to an employee performing companionship services following a rule suspension by the Joint Committee for Review of Administrative Rules (JCRAR).

On March 1, 2004, an emergency rule promulgated by the DWD took effect. In part, the rule provided generally that each employer must pay to each employee time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week. The overtime pay requirement specifically applied to an employee who performs companionship services. [See DWD Emergency Rule ss. DWD 274.03 (intro.) and 274.035.]

Exercising its authority under s. 227.26 (2) (d), Stats., JCRAR adopted a motion on April 28, 2004 suspending DWD Emergency Rule s. DWD 274.035, specifically relating to overtime pay for an employee who performs companionship services.

The clear intent and effect of the JCRAR motion is to prevent DWD from enforcing overtime pay rules in the context of the performance of companionship services. The rule, having the force and effect of law, that imposed the requirement has been suspended. In light of the JCRAR rule suspension, DWD's continuing enforcement of overtime pay with respect to an employee who performs companionship services would amount to the agency's enforcement of an invalidly promulgated rule.

If I can be of any further assistance in this matter, please feel free to contact me.

RS:ksm



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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

May 10, 2004

Roberta Gassman, Secretary
Department of Workforce Development
P.O. Box 7946
Madison, WI 53707-7946

Dear Secretary Gassman:

We are writing with regard to action taken at the April 28, 2004 executive session of the Joint Committee for Review of Administrative Rules (JCRAR). As you know, the committee passed a motion to suspend DWD Emergency Rule DWD 274.035, relating to the payment of overtime compensation to employees engaged in companionship services. Questions were raised at the time of the motion whether or not enforcement of the suspension by DWD would be required.

Enclosed is a memo prepared by Ron Sklansky, Legislative Council Attorney and legal counsel for JCRAR. He counters assumptions made that enforcement of the suspension is not required and that JCRAR, with authority under s. 227.26 (2) (d), Stats., specifically requires DWD to cease the enforcement of the emergency rule. Mr. Sklansky states that the JCRAR motion to suspend was clearly intended to halt enforcement of DWD Emergency Rule DWD 274.035.

Supplemented by Legislative Council opinion, we, the Co-Chairs of JCRAR continue to contend that staff in the Equal Rights Division shall no longer enforce DWD Emergency Rule DWD 274.035 as mandated by the approved motion, until such time that the issue is resolved through the legislative review process.

Thank you for your attention and follow through on this matter. If you have any questions regarding our conclusions, please do not hesitate to contact either of our offices.

Sincerely,

Senator Joseph Leibham
Senate Co-Chair

Representative Glenn Grothman
Assembly Co-Chair

JKL:GSG:pvs

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State of Wisconsin
Department of Workforce Development
Jim Doyle, Governor
Roberta Gassman, Secretary

MAY 17 2004

May 13, 2004

The Honorable Joseph Leibham
Co-Chair, Joint Committee for
Review of Administrative Rules
Room 409 South, State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Leibham:

I received your letter of April 30, 2004, regarding the JCRAR suspension of Emergency Rule DWD 274.035, relating to overtime pay for employees performing companionship services.

The Department is evaluating the matter and will respond shortly. I appreciate your patience and understanding.

Best to you,


Roberta Gassman
Secretary

Many thanks.