



Overtime Liability for Home Health Employers

History of Companionship Exemption

In 1938, Congress enacted the Fair Labor Standards Act (FLSA). The FLSA created the general rule that employers must compensate each employee at a rate not less than one and one-half times the regular rate for all hours worked in excess of 40 per week. However, the FLSA has long exempted various categories of employees from the protections of the FLSA, such as certain employees providing services in a household. This includes persons who provide “companionship services” and persons who live in the homes where they provide care.

In 1975, the Department of Labor (DOL) extended the “companionship” and “live-in domestic-service” exemptions to employees providing such services for third party employers.

In 2013, however, the DOL reversed course. Citing dramatic changes to the healthcare industry during the past several decades, the DOL issued new regulations specifically eliminating the companionship services and live-in domestic-service exemptions for third party employers (Final Rule). The Final Rule had an effective date of January 1, 2015.

In June 2014, a conglomerate of trade associations representing third-party home care providers brought suit to prevent the implementation of the Final Rule. The trade associations argued that the FLSA did not delegate the DOL the authority to exclude a class of employers from the FLSA’s exemptions. In December 2014, siding with these trade associations, a federal district court issued an order stopping the Final Rule from taking effect.

In August 2015, however, the decision stopping the Final Rule from taking effect was reversed by the United States Court of Appeals for the District of Columbia (D.C. Circuit). The D.C. Circuit held that the DOL did have the authority to issue the Final Rule. Subsequently, the United States Supreme Court declined to review the D.C. Circuit’s decision. On October 13, 2015, the D.C. Circuit issued a final order (mandate) upholding the Final Rule.

Summary of DOL Final Rule

Third Party Employers. Under the Final Rule, third party employers of direct care workers (such as home care staffing agencies) are not permitted to claim either the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim either exemption even when the employee is jointly employed by the third party employer and the individual, family, or household using the services. However, the individual, family, or household may claim any applicable exemption. Therefore, even if there is another third party employer, the individual, family, or household will not be liable for unpaid wages under the FLSA provided the requirements of an applicable exemption are met.

Companionship Services. The term “companionship services” means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. Under the Final Rule, “companionship services” also

includes the provision of “care” if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek.

Fellowship and Protection. Under the Final Rule, “fellowship” means to engage the person in social, physical, and mental activities. “Protection” means to be present with the person in their home or to accompany the person when outside of the home to monitor the person’s safety and well-being. Examples of fellowship and protection may include: conversation; reading; games; crafts; accompanying the person on walks; and going on errands, to appointments, or to social events with the person.

Care. The definition of companionship services allows for the performance of “care” services if those services are performed attendant to and in conjunction with the provision of fellowship and protection and if they do not exceed 20 percent of the employee’s total hours worked in a workweek per consumer. The companionship services exemption is not applicable when the employee spends more than 20 percent of his or her workweek performing care; in such workweeks, the employee is entitled to minimum wage and overtime.

In the Final Rule, “care” is defined as assistance with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

Household Work. The Final Rule limits household work to that benefitting the elderly person or person with an illness, injury, or disability. Household work that primarily benefits other members of the household, such as making dinner for another household member or doing laundry for everyone in the household, results in loss of the companionship exemption and thus the employee would be entitled to minimum wage and overtime pay for that workweek.

Medically Related Services. The definition of companionship services does not include the provision of medically related services which are typically performed by trained personnel. Under the Final Rule, the determination of whether a task is medically related is based on whether the services typically require (and are performed by) trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants. The determination is not based on the actual training or occupational title of the worker performing the services. Performance of medically related tasks during the workweek results in loss of the exemption and the employee is entitled to minimum wage and overtime pay for that workweek.

Live-In Domestic Service Employees. Live-in domestic service workers who reside in the employer’s home permanently or for an extended period of time and are employed by an individual, family, or household are exempt from overtime pay, although they must be paid at least the federal minimum wage for all hours worked. Live-in domestic service workers who are solely or jointly employed by a third party must be paid at least the federal minimum wage and overtime pay for all hours worked by that third party employer. Employers of live-in domestic service workers may enter into agreements to exclude certain time from compensable hours worked, such as sleep time, meal time, and other periods of complete freedom from work duties. (If the sleep time, meal periods, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked.) Under the Final Rule, these employers must also maintain an accurate record of hours worked by live-in domestic service workers. The employer

may require the live-in domestic service employee to record his or her hours worked and to submit the record to the employer.

Paid Family or Household Members in Certain Publicly Funded Programs Offering Home Care. In recognition of the significant and unique nature of paid family and household caregiving in certain Medicaid-funded and certain other publicly funded programs, the DOL has determined that the FLSA does not necessarily require that once a family or household member is paid to provide some home care services that all care provided by that family or household member is part of the employment relationship. Where applicable, the DOL will not consider a family or household member with a pre-existing close personal relationship with the consumer to be employed beyond a written agreement developed with the involvement and approval of the program and the consumer (or the consumer's representative), usually called a plan of care, that reasonably defines and limits the hours for which paid home care services will be provided.

DOL Guidance on Effective Date and Enforcement of Final Rule

DOL appears to still be of the opinion that the Final Rule was effective January 1, 2015.

On September 14, 2015, the DOL announced a 30-day non-enforcement policy. The DOL stated that it would not bring enforcement actions against any employer for violations of FLSA obligations resulting from the Final Rule for 30 days after the date the D.C. Circuit issues a mandate making its opinion effective.

The D.C. Circuit issued its mandate on October 13, 2015. As such, the DOL began implementing certain enforcement mechanisms 30 days later: November 12, 2015.

From November 12 through December 31, 2015, the DOL exercised prosecutorial discretion in determining whether to bring enforcement actions, with particular consideration given to the extent to which States and other entities had made good faith efforts to bring their home care programs into compliance with the FLSA since the promulgation of the Final Rule.

Private Cause of Action in Federal Court

The FLSA provides a private cause of action for failure to pay overtime. After the D.C. Circuit's decision, federal district courts presiding over claims of alleged overtime liability associated with the Final Rule were faced with the decision of when the Final Rule should be effective:

- January 1, 2015, the date the Final Rule was initially to become effective;
- October 13, 2015, when the D.C. Circuit issued its mandate; or
- November 12, 2015, the end of DOL's discretionary delayed enforcement period.

Unfortunately, the issue of when federal courts will consider the Final Rule to be effective is still in flux.

- At least 20 district courts have issued decisions holding that the proper effective date is January 1, 2015.
- 3 district courts have issued decisions holding that the proper effective date is October 13, 2015.
- 1 district court has issued a decision holding that the proper effective date is November 12, 2015.

No Court of Appeals has issued an opinion on the issue. Until the Courts of Appeals issue consistent opinions and the Supreme Court declines review, or the Supreme Court makes its own opinion, employers are recommended to rely on a date of January 1, 2015, as the effective date of the Final Rule.



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