



DOL Announces Final Rule Eliminating Companionship Exemption for Third Party Employers

On September 17, 2013, the United States Department of Labor ([DOL](#)) [announced](#) a [final rule](#) extending the Fair Labor Standards Act (FLSA) minimum wage and overtime protections to most direct care workers who “provide essential home assistance to elderly people and people with illnesses, injuries, or disabilities.” The new regulations eliminate the companionship exemption for home care workers employed by third party employers such as home care agencies, and narrow the exemption for home care workers employed directly by individuals or families receiving home care services. The final rule will go into effect on January 1, 2015.

Major Changes

According to the DOL, the final rule makes two significant changes: (1) the tasks that comprise exempt “companionship services” are clarified and more narrowly defined; and (2) the exemptions for companionship services and live-in domestic service employees may only be claimed by the individual, family, or household using the services rather than third party employers such as home health care agencies. The DOL intends the exemption to apply only to those direct care workers who are performing “elder sitting” rather than the professionalized workforce for whom home care is a vocation, and estimates that the changes to the current regulations will apply the FLSA’s minimum wage and overtime protections to nearly two million direct care workers, including home health aides, personal care aides and certified nursing assistants.

The final rule defines “companionship services” as “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.” Companionship services no longer includes “care” except for those care activities that are provided attendant to and in conjunction with the provision of “fellowship” and “protection”.

“Care” activities are defined as the 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 medication, and arranging medical care).” Under the final rule, the companionship exemption will only be available for home care workers who spend *less than twenty (20%) percent of their*

working hours engaged in such activities; otherwise the employee is entitled to minimum wage and overtime pay.

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 his/her 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 include conversation, reading, games, crafts, accompanying the person on walks, and going on errands, to appointments or to social events with the person.

The companionship exemption will also not apply if the aide or companion provides medically related services that are typically performed by trained personnel, like nurses or certified nursing assistants. However, live-in domestic service workers who reside in the employer’s home 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.

Effects on CDPAP Waiver Programs

Based on FAQs issued by DOL, it appears that the homecare agency acting as the “fiscal intermediary” in a CDPAP Waiver program is not intended to be considered the employer for purposes of compliance with the minimum wage and overtime requirements. Rather, the companionship exemption may be claimed by the individual, family or household, who would be considered to be the employer of the personal assistant. However, for the individual, family or household to claim the exemption, the worker must still meet the definition of “companion” under the new rules. If the “care” provided by the personal assistant exceeds twenty (20%) percent of his/her hours for the week, that assistant would not meet the definition of “companionship services” and the individual, family or household would not be able to assert the companionship exemption. In such a case, agencies serving as fiscal intermediaries will need to consider what steps to take to reduce or eliminate overtime work for personal assistants.

How Employers Should Prepare

Although the final rule will not go into effect until January 1, 2015, home care employers should start preparing for the transition now by educating patients and caregivers, making new schedules so that multiple aides are assigned to higher hour cases, updating policies and procedures to comply with the final rule and reclassifying employees where necessary from exempt to non-exempt. DOL has [created a page](#) on its website to assist agencies and other third party employers.

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