

PUBLICATION

Employers of Home Care Workers to Begin Paying Overtime in January 2015

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March 19, 2014

The United States Department of Labor issued a final rule, extending the protections of the Fair Labor Standards Act (FLSA) to home health care workers who provide care for the sick, disabled or elderly, otherwise known as "companionship services." Beginning in January 2015, employers will be required to pay these workers both minimum wage and overtime, and maintain records of the hours that they work. The rule was issued on September 17, 2013.

The FLSA was enacted in 1938 and, among other things, provides minimum wage and overtime protections for workers. In addition to workers employed in a traditional workplace setting, the FLSA also protects workers employed in "domestic service" by a household in a private home (such as cooks, housekeepers and maids) and employers of these domestic service workers must pay minimum wage and overtime. However, under the FLSA Amendment of 1974, "domestic service employees employed" to provide "companionship services" for persons unable to care for themselves were exempt under the FLSA. Under the prior DOL regulations, it was not clear as to whether all individuals who provided companionship services in a private home were also considered exempt.

The question of whether this exemption applied to home health care workers employed under third-party contracts was considered by the United States Supreme Court in *Long Island Care at Home, Ltd. v. Coke*. 127 S.Ct. 2339 (2007). While the Court noted that the regulations governing these workers were conflicting, it ultimately deferred to the DOL's interpretation that its regulations exempted these workers from coverage and they were, consequently, not entitled to minimum wage or overtime under the FLSA. Since that time, labor advocates have pressed the DOL to bring these workers within the ambit of the FLSA.

The final regulations now define the tasks that comprise exempt companionship services more narrowly. The new definition of "companionship services" means that many workers employed within the home to care for the sick or elderly, such as certified nursing assistants, home health aides, personal care aides and other caregivers, will now fall under the FLSA's protections.

Importantly, the regulations make clear that the exemptions for companionship services and live-in domestic service employees may only be claimed by individuals or families and not by third-party employers such as home health care agencies. In other words, they distinguish between workers who are employed through a home care agency or other third party employer as opposed to those who are employed directly by the elderly or ill person or his or her family. Families often use home care agencies or other third party companies to identify and hire quality individuals to care for their loved ones and to take on the administrative tasks of an employer, such as conducting background checks, training, scheduling and payroll. The family simply pays the agency's invoice for the services provided. The new rules take aim at these agencies and require that they pay at least the federal minimum wage and overtime to any direct care worker they employ, regardless of the employee's duties.

Given that these workers are typically scheduled on eight to 12-hour shifts, there is little question that home health care agencies and third-party providers who provide services to the sick or elderly in the home will be reevaluating how they schedule these workers, which will, in turn, implicate continuity of care issues and the

affordability of care in the home. The DOL has offered some preliminary statistics on the projected monetary impact on the home health care industry, but these regulations will unquestionably have a ripple effect on other industries.