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Employers Must Pay Minimum Wage and Overtime to Home Care Workers They Jointly or Solely Employ

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Many groups that have lobbied for change as it relates to home care aides seem to have received some victory. Specifically, the Labor Department announced a Final Rule on September 17, 2013 that extends overtime and wage protection to domestic service employment, particularly home care workers who provide essential home care assistance to elderly people and people with illnesses, injuries, or disabilities. The rule will affect nearly two million workers, but it does not take effect until January 1, 2015. Some question the true affect the rule will have on the pay for home aides because many are part-time workers. But with the new requirements, domestic service workers now receive federal protection as it relates to wages and overtime pay.

Domestic service employment includes services provided by babysitters, cooks, waiters, maids, housekeepers, nannies, nurses, janitors, caretakers, handymen, home health aides, personal care aides, and family chauffeurs. It also encompasses "direct care workers," a term that includes companions, personal care aides, home health aides, nurses, and other workers who provide assistance to individuals in their home. The Final Rule amends two exemptions -- companionship services and live-in domestic services workers -- in order to better reflect Congressional intent in light of the changes to the home care industry since 1975.

Companionship services now excludes medically related services that typically require and are performed by trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants, *regardless* of the actual training or occupational title of the individual providing the services. This means that while previously a person performing RN, LPN, or CNA services could fall under the companionship services exemption such that no overtime or minimum wage requirements were at play, this is no longer true. Any person performing such services must now be paid overtime and minimum wage. The Labor Department also amended the regulations governing live-in domestic service workers.¹ Now, third party employers may no longer claim the overtime exemption for live-in domestic service workers. The employer must pay overtime even if the worker is jointly employed by an individual, family, or household.²

There are about 1.9 million direct care workers in the United States, nearly all of whom are employed by home care agencies, according to the DOL. Given the final rule, effective January 1, 2015, home care agencies must ensure that these workers are paid at least the federal minimum wage, currently \$7.25 per hour, and receive overtime pay. This is true regardless of whether the worker is jointly employed by an individual, family, or household. The employer must also maintain records of the hours worked by the employee.³

One concern is that homecare agencies will now reduce the worker's hours and employ only part-time workers. After the Labor Department decision was issued, the chair of the National Association for Home Care and Hospice said: "Home care companies will have little choice but to employ workers part-time rather than full-time, as Medicaid payment rates and consumers with limited incomes cannot afford higher costs." However, given the growing need for such services and the fact that many states already have overtime regulations, many agencies are already managing to do what the FLSA now requires. Nonetheless, there is now federal oversight to ensure home care workers are receiving proper pay for overtime hours

worked and even travel time. Although the rule takes effect in 2015, employers should begin to ensure they have proper record keeping and pay procedures in place to account for the FLSA amendments.

To assist with understanding the new requirements, the Labor Department will host five public webinars in October and has created a new, dedicated web portal at <http://www.dol.gov/whd/homecare/> with fact sheets, FAQs, interactive web tools, and other material.

¹The definition of domestic service workers did not change and includes babysitters, cooks, waiters, maids, housekeepers, nannies, nurses, caretakers, etc. as indicated above. Such persons must be paid the federal minimum wage for all hours worked and overtime pay at a time-and-a-half for all hours over 40 hours in a workweek.

²Fact Sheet #79E (<http://www.dol.gov/whd/regs/compliance/whdfs79e.htm>) provides some insight for employers.

³The FLSA requires that records be kept by the employer for at least three years and records used to compute pay should be kept for two years (including time cards, work and time schedules, and records of additions to or reductions from wages).