

# Department of Labor Issues New Rule Extending FLSA Protections to Home Health Care "Companionship" Workers

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On September 17, 2013, the Department of Labor ("DOL") issued a final rule that changes the "companionship exemption" to the Fair Labor Standards Act ("FLSA"). The new rule, which goes into effect on January 1, 2015, extends the FLSA's minimum wage and overtime protections to "companionship workers," such as personal care aides and home health aides, who are employed by home health care agencies. According to the DOL's website, the new rule will affect "nearly two million direct care workers."

## The New Rule

The FLSA currently contains an exemption for employees who provide "companionship services." The "companionship exemption" currently applies to

"any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves" Under the new rule, the definition of companionship services is limited to those duties that are directly related to the provision of fellowship and protection for a person who, because of advanced age or infirmity, is unable to care for himself or herself. "Companionship services" can include the performance of "personal care services" - such as help with dressing, grooming or driving to doctor's appointments - but only when those services are performed incidental to the core companionship functions and so long as they do not exceed 20 percent of the employee's time during a work week.

Once the new rule becomes effective on January 1, 2015, the exemption for companionship services may **only** be claimed by individuals and families directly employing these workers. Third-party employers, such as home health care agencies, cannot claim that employees providing these services are exempt from the FLSA's overtime and minimum wage requirements.

## Change Ahead

While 15 states extend state minimum wage and overtime protections to home health care workers, the DOL's new rule will require employers to adjust, even in those states that already provide protections under state law. In New York, for example, companion workers receive minimum wage, but those employed by third-party agencies receive overtime at a reduced rate of 150% of the

minimum wage, as opposed to 150% of their regular rate of pay as under the FLSA, and overtime coverage for live-in workers begins at 44 hours/week (instead of 40 under the FLSA) at the same percentages.

In-home care has numerous variables. One can imagine many situations where a companion worker may have to stay extra hours for fear of leaving a vulnerable older person alone, when, for example, waiting for a relative who was unexpectedly delayed. Employers should be aware of these changes in advance of the new rule's effective date of January 1, 2015.

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