FLSA Companionship Exemption: How the Home Care Final Rule WILL Affect Your Organization

Background
On August 21, 2015, the U.S. Court of Appeals for the D.C. Circuit issued a determination to uphold the United States Department of Labor’s (US DOL) Home Care Final Rule, which eliminates the federal “companionship exemption” for certain “domestic service” workers, including home care aides employed by agencies. The final rule also institutes new record-keeping requirements for agencies employing “live-in” staff. These changes are effective October 13, 2015.
What is the federal companionship exemption?
The federal companionship exemption exempts certain domestic employees, including home care paraprofessionals, from minimum wage and overtime requirements under the federal Fair Labor Standards Act (FLSA). New York already requires that aides be paid minimum wage and overtime.

Specifically, exempted from the FLSA are persons “employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves . . .” The final rule eliminates the companionship exemption for aides employed by agencies and revises the exemption for aides employed by individuals.

How does the final rule affect Medicaid-funded personal care, home health and other home and community-based waiver services?
Medicaid services provided by agencies are no longer covered by the companionship exemption and consumer directed personal assistance services are highly unlikely to fit within the new, restricted definition of “companionship services” and thus will not fall under the FLSA exemption.

“Companionship services” are defined in the final rule 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. The provision of “fellowship” means to engage the person in social, physical and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, errands, appointments or to social events. The provision of “protection” means to be present with the person in his or her home or to accompany the person when outside of the home to monitor the person’s safety and well-being.

Companionship services also include the provision of “care” activities (i.e. assistance with activities of daily living such as dressing, grooming, feeding, bathing and toileting, and instrumental activities of daily living, including meal preparation, managing finances and light housework) as long as the care activities do not exceed 20% of the worker’s time.

Since Medicaid generally does not pay for “fellowship” or “protection” and Medicaid-covered care often encompasses well more than 20% of the caregiver’s workweek, it is expected that the exemption will not continue to apply to any worker providing Medicaid-covered services whether through an agency or in a consumer-directed care model (see separate question on how the final rule affects Consumer Directed Personal Assistance Services).

To the extent that agencies provide services that fit under the new “companionship services” definition, the exemption will not apply because the DOL rule eliminates any application of the exemption to “third-party employers,” i.e. home care agencies.

Do companionship services include medically related services?
No. The term “companionship services” does not include medically related services and thus aides who provide such services do not fall under the companionship exemption and are entitled to minimum wage and overtime. The determination of whether services are 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 individual performing the services.”

How does the FLSA interrelate with New York State labor regulations and the State Home Care Worker Wage Parity Law?
Regardless of the FLSA companionship exemption, New York State labor regulations separately require agencies to pay minimum wage and pay overtime at time-and-a-half of minimum wage. The elimination of this federal exemption means that agencies in New York now have to follow federal rules and pay overtime to their aides at time-and-a-half of the aide’s regular rate of pay, rather than time-and-a-half of minimum wage, starting October 13, 2015.

An aide’s “regular rate of pay,” upon which overtime would be based, is further affected in New York by the state Home Care Worker Wage Parity Law, local living wage laws, and any increases in the state’s minimum wage amount. Under the state wage parity law, agencies are required to pay distinct minimum wages for home care aides in specified living wage law areas (New York City, Westchester and Long Island). Also, the state minimum wage is scheduled to rise to $9.00 by the end of 2015.

Determining how overtime is calculated in areas affected by the state wage parity law and local living wage laws is complex and HCA is seeking clarification from the state Department of Health and state Department of Labor.

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Is overtime compensation required if an aide works more than 40 hours in a week for one agency but for two different individuals?
An aide must be paid overtime if working more than 40 hours in a work week for any single employer. So, if an aide works for one consumer for 25 hours and for another consumer for 20 hours (total of 45 hours), the aide is owed 5 hours of overtime compensation.

Is overtime required if an aide’s work includes more than 40 hours for two different agencies?
If the aide does not work more than 40 hours for one of those agencies, then overtime is not required. So if the aide works 30 hours for one agency and 20 hours for another agency, each agency is not responsible for paying overtime.

How is overtime calculated when an aide is paid different hourly rates for different types of work?
Under the FLSA, an employer may pay the same employee different rates for different types of work as long as the employee’s regular rate of pay is at least the minimum wage.

If an employee receives different rates of pay for work in a single workweek, the employee’s “regular rate” for that week is the weighted average of such rates (or “blended rate”). That is, each workweek, the earnings from all hourly rates are added together and the sum is then divided by the total number of hours worked at all jobs for the same employer, and the overtime pay due is one-half of that result times the number of hours worked over 40.

How does the final FLSA rule affect individuals and/or families employing their own companions/aides?
The final rule will limit the ability of individuals and/or families to claim the companionship exemption. Under the final rule, an individual, family or household (not an agency) who employs a worker providing companionship services to an elderly person or person with illness, injury or disability may still claim the companionship services exemption from the FLSA’s minimum wage and overtime pay provisions if the employee meets a certain “duties” test. Under this test, “companionship services” are defined as “fellowship” and “protection,” and also include the provision of “care” activities as long as the care activities do not exceed 20% of the worker’s time. (Companionship and fellowship are defined in a previous question.)

So, if a worker providing services in a private home spends more than 20% of the work week providing assistance with activities of daily living, the worker is not providing companionship services. This worker would still be exempt from federal overtime requirements if providing services that meet the federal “live-in” definition (see next question) because of another provision of the FLSA known as the “live-in exemption,” but New York State law (“Domestic Workers’ Bill of Rights”) requires that the worker must be paid at least the minimum wage and overtime at time-and-a-half of the regular rate of pay.

Under New York State’s “Domestic Workers’ Bill of Rights,” these workers must be:

- Paid at least the minimum wage;
- Paid overtime at one-and-a-half their regular rate of pay after 40 hours of work (or 44 hours if the worker lives in the person’s home);
- Given one day of rest per week; and
- Given at least three paid days off after one year of work for the same employer.

More information on this law is at:

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**Does the “Domestic Workers’ Bill of Rights” also apply to home care agencies?**

The Domestic Workers’ Bill of Rights generally applies to “domestic workers” who are “employed in a home or residence for the purpose of caring for a child, serving as a companion for a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose.” The Domestic Workers’ Bill of Rights excludes from the term “domestic worker” aides employed by agencies who perform "companionship services,” as defined in the FLSA and its implementing regulations. Historically, home care agency-employed aides typically provided services that met the prior, broader definition of “companionship services.” Therefore, the Domestic Worker Bill of Rights did not apply to agency-employed aides. Now, however, it appears that some home care agency-employed aides might not be providing services that are considered "companionship services" under the new, narrower definition described above.

Thus, those agency-employed aides would now be eligible for the provisions listed in the prior question to the extent that they are “domestic workers.” HCA is seeking verification from the state Department of Labor on this issue.

**What changes affect live-in workers as defined under federal regulations?**

In addition to paying overtime at time-and-a-half of the worker’s regular rate of pay, agencies will be required to maintain an accurate record of the actual hours worked by “live-in” workers. Live-in workers under the federal regulation are employees who reside in a private home without a separate residence (“residential employees”), where they work on a “permanent basis” or for “extended periods of time.”

Employees who work and sleep on the employer’s premises seven days per week and therefore have no home of their own other than the one provided by the employer under the employment agreement are considered to reside on the employer’s premises on a “permanent basis.” Employees who work 120 hours or more each week and work and sleep on the employer's premises five days a week reside on the employer's premises for "extended periods of time." Employees who work and sleep on the employer's premises for five consecutive days or nights each week would also qualify as residing on the premises for "extended periods of time" even if they do not work 120 or more hours each week.

In determining the number of hours worked by a live-in worker, the current federal regulations allow an employer to enter into an agreement with the employee to exclude, from hours worked, sleeping periods of not more than 8 hours (of which 5 hours are uninterrupted), bona fide meal periods and other periods of “complete freedom” from duty; maintain a copy of this agreement of the hours to be worked; and to indicate that the employee’s work time generally coincides with that agreement (29 CFR sections 552.102 and 552.110).

If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the worker is not able to sleep for at least five hours, the entire eight hour period must be counted as work time. More information is at 29 CFR sections 785.21 and 785.22.

The employee must be completely relieved from duty for the purposes of eating regular meals for that time not to count as work time. Bona-fide meal periods (typically 30 minutes or more) are not work time, and the employee does not have to be paid for them.

If a meal period is interrupted by a call to duty, that interruption must be counted as hours worked, but the entire meal period must only be compensated if meals are interrupted so frequently that the meal period is predominantly for the benefit of the employer. More information is at 29 CFR 785.19 and DOL Fact Sheet #53 at: http://www.dol.gov/whd/regs/compliance/whdfs53.pdf.

Now the live-in worker will have to keep a record of his or her actual hours worked and the employer still has to maintain a copy of any agreement with the employee.

Resources for maintaining time records are available at:

**Work hours calendar**

**Timesheet application**

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What changes affect aides who don’t meet the federal definition of “live-in” but are considered as “live-in 24 hour care” under state rules and practice?
Based on a New York State Department of Labor opinion, the state Department of Health and home care agencies consider live-in 24 hour care cases (where aides have separate residences and don’t live with the patient) to fall under similar rules that apply under the federal regulations to aides that reside in the patient’s home. For such live-in 24 hour cases, the practice has been to pay aides for 13 hours if they have 8 hours of sleep (of which 5 are interrupted) and three hours for meals.

However, in two recent lower court cases, the application of the “13 hour payment” practice for live-in 24 hour cases has been challenged and the courts have ruled that the New York State Department of Labor opinion letter did not apply to “non-residential” employees and that such employees must be paid for all 24 hours of a 24-hour shift. These cases are being appealed and HCA has submitted an amicus brief for one of the cases.

Irrespective of these court cases, agencies should maintain detailed records of the time their aides spend with patients and their sleep time and meal periods on live-in 24 hour care cases. This can include a call in or other system so that aides can record any interruptions to sleep and meals. Agencies should also consider a written agreement with their aides on such cases that includes the agency’s policy (how many hours aides are paid for such cases, documentation requirements, disciplinary actions for providing false information, etc.) and what aides should do if their work exceeds this number of hours.

Does the final rule change requirements for aides who work on overnight shifts (for less than 24 hours)?
No. Under the FLSA, an employee who is required to be at work for less than 24 hours must be paid even though the worker is permitted to sleep or engage in other personal activities when not busy (29 CFR section 785.21). All the time is counted as work time and must be paid.

Does the final rule change the requirements for paying aides for travel time?
No. Travel time between multiple patients during a workday is considered hours worked under the FLSA and agencies in New York State are responsible for paying both the aide’s regular wage and overtime when appropriate. However, time spent by an employee in traveling from home before the regular workday to a patient and traveling back to home from a patient at the end of the workday are not considered work time. More information is at 29 CFR sections 785.35 and 785.38.

If the travel is not direct because the aide is relieved from duty long enough to engage in purely personal pursuits, such as shopping, only the time necessary to make the trip from one patient to another must be paid.

When employees work for two different employers, they do not need to be compensated for time spent going from one employer’s patient to the other employer’s patient.

Does an agency have to pay aides for time they spend at a training or educational program?
According to US DOL, attendance at lectures, meetings, training programs and similar activities are viewed as working time unless all of the following criteria are met:

- Attendance is outside of the employee’s regular working hours;
- Attendance is in fact voluntary;
- The course, lecture, or meeting is not directly related to the employee’s job: and
- The employee does not perform any productive work during such attendance.

More information is at 29 CFR sections 785.27 through 785.32.

How does the final rule affect the state’s Consumer Directed Personal Assistance Program (CDPAP) or the delivery of Consumer Directed Personal Assistance Services (CDPAS)?
Due to the change in the definition of companionship services (i.e. care activities cannot exceed 20% of the worker’s time) and certain factors that must be considered in determining whether a fiscal intermediary that handles administrative functions (i.e. payroll, etc.) is liable for payment of minimum wage or overtime pay, it seems likely that “personal assistants” participating in CDPAP/CDPAS will have to be paid overtime at time-and-a-half of the aide’s regular rate of pay.

The amount of hours a personal assistant works for one or more consumers will be totaled and counted towards overtime.

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Some of the factors that must be considered in determining whether a fiscal intermediary is a “joint employer” and is liable for payment of minimum wage or overtime pay include:

- whether the entity has the power to direct, control, or supervise the worker(s) or the work performed;
- whether the entity has the power to hire or fire, modify the employment conditions or determine the pay rates or the methods of wage payment for the worker(s);
- the degree of permanency and duration of the relationship, where the work is performed and whether the tasks performed require special skills;
- whether the work performed is an integral part of the overall business operation, whether the entity undertakes responsibilities in relation to the worker(s) which are commonly performed by employers;
- whose equipment is used; and
- who performs payroll and similar functions.

US DOL states that other factors may be considered, and no one factor is controlling. “While no one factor is controlling, the entity will likely be considered an employer under the FLSA if the entity has the power to direct or supervise the worker, or the power to hire, fire, or modify the conditions of employment, or determine the pay rate or method of pay.”

**What is the implementation date of the final rule?**

October 13, 2015. While US DOL has indicated that it will not enforce the rule’s provisions for an additional 30 days, and from November 12 through the end of 2015, it will exercise “prosecutorial discretion” in determining whether to bring enforcement actions, agencies should have complied by October 13; otherwise, they can face private lawsuits by attorneys representing home care workers.

**Where can I obtain more information on the final rule?**


**What is HCA’s position on the implementation of the FLSA rule?**

HCA continues to strenuously advocate for adequate reimbursement to agencies and sufficient premiums to managed care plans to support strong compensation and benefits for home care workers. However, HCA is gravely concerned that without any concurrent increases in reimbursement to cover the costs of this new mandate, such a change will adversely impact agency stability, worker hours and assignment to cases, and patient access to services. When combined with the wage requirements of the state Worker Wage Parity Law in New York City, Long Island and Westchester, local living wage laws, and other increased labor related expenses, the cost of paying for overtime under this final rule will be prohibitive.

HCA has already reached out to the state Department of Health and the State Legislature about the effects of the overtime changes and the need for immediate relief to providers and plans.