



FLSA COMPANIONSHIP EXEMPTION: WHAT IT IS AND HOW FINAL CHANGES WILL AFFECT YOUR ORGANIZATION

Background

In mid-September, the United States Department of Labor (DOL) issued a final rule that 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 January 1, 2015. This action follows up on a proposed DOL rule issued on December 27, 2011 that covered the companionship exemption.

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**GUIDE
BOOK**

What is the companionship exemption?

The current 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 (see next question).

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 will the final rule affect Medicaid-funded personal care, home health and other home and community-based waiver services?

Medicaid 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 can be 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 New York’s Consumer Directed Personal Assistance Program).

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 will 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 will have to follow federal rules and pay overtime to their aides at **time-and-a-half of the aide’s regular wage rate**, rather than time-and-a-half of **minimum wage, starting January 1, 2015**.

An aide’s “regular wage rate,” upon which overtime would be based, is further affected in New York by local living wage laws, the state Home Care Worker Wage Parity Law, and recent 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, New York recently approved legislation that raises the minimum wage from \$7.25/hour to \$9.00/hour over three years, beginning with \$8.00 by the end of 2013, \$8.75 by the end of 2014, and \$9.00 by the end of 2015.

How will this elimination 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 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 on previous page.)

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 and must be paid at least the minimum wage and overtime at time-and-a-half of the regular pay rate.

Under recent State legislation ("Domestic Workers' Bill of Rights"), these workers who work more than 40 hours (non-live-in) or 44 hours (live-in) and continue to fall under the revised federal companionship exemption rules, must still be paid overtime at time-and-a-half of their regular wage rate.

What changes affect live-in workers?

In addition to paying overtime at time-and-a-half of the worker's regular wage rate, agencies will be required to maintain an accurate record of the actual hours worked by live-in workers. A live-in worker is an employee who resides in a private home where she/he works on a "permanent basis" or for "extended periods of time." The employer may require the live-in worker to record his or her hours worked and to submit the record to the employer.

In determining the number of hours worked by a live-in worker, the current 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, bonafide 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 period must be counted as work time. More information is at 29 CFR sections 785.21 and 785.22.

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
<http://www.dol.gov/whd/FLSAEmployeeCard/calendarR5Web.pdf>
- Timesheet application
<https://itunes.apple.com/us/app/dol-timesheet/id433638193?mt=8>

Live-in workers who reside in the employer's home and are employed solely by an individual, family or household are **exempt** from overtime pay, but must be paid at least the federal minimum wage for all hours worked. Under recent State legislation ("Domestic Workers' Bill of Rights") these live-in workers who work more than 44 hours must be paid at time-and-a-half of their regular wage rate.

Does the final rule change requirements for aides who work on overnight shifts?

No. The general rule is that an employee who is working on an overnight shift, that is not part of a live-in case, is awake and alert for the entire shift and therefore paid an hourly rate for all hours worked (29 CFR section 785.21). However, if an employee is completely relieved from duty, is able to use his or her time effectively for his or her own purposes, and is allowed to leave the employer's premises, the time is not compensable.

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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 Fair Labor Standards Act 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 and traveling back to home at the end of the workday are **not** considered work time. More information is at 29 CFR sections 785.35 and 785.38.

How does the final rule affect the Consumer Directed Personal Assistance Program?

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) is liable for payment of minimum wage or overtime pay, it seems likely that New York's Consumer Directed Personal Assistance Program will have to pay overtime at time-and-a-half of the aide's regular wage rate. DOL plans to issue further guidance on this issue.

Some of the factors that must be considered in determining whether a fiscal intermediary 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);

What is the effective date of the final rule?

January 1, 2015.

Where can I obtain more information on the final rule?

More information is at <http://www.gpo.gov/fdsys/pkg/FR-2013-10-01/pdf/2013-22799.pdf> and <http://www.dol.gov/whd/homecare/>.

- 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.

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 HCA's position on the elimination of the companionship exemption?

HCA continues to strenuously advocate for adequate reimbursement to agencies 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. With the implementation of the state Worker Wage Parity Law in New York City, Long Island and Westchester, the cost of paying for overtime under this final rule will be prohibitive.

Because of these seriously adverse effects, without commensurate adjustment in agency reimbursement levels, HCA has strongly opposed repeal of the FLSA exemption.

GUIDEBOOK

This guidebook is intended to highlight the most important changes to the federal regulations under the final rule and is not meant to provide an exhaustive review of federal regulations or the interplay of New York State law.