



Labor & Employment ADVISORY ■

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Department of Labor Revises Regulations to Provide Wage and Hour Coverage to More Domestic Service Workers

On September 17, 2013, the Wage and Hour Division of the U.S. Department of Labor (DOL) announced final regulations (published in the Federal Register on October 1, 2013) that will extend overtime and minimum wage protections to a larger number of domestic service workers who care for and assist the elderly, ill, injured or disabled by revising current regulations that exempt many of these workers from the Fair Labor Standard Act's (FLSA) wage and hour protections. Currently, domestic service employees who provide so-called "companionship services" to their clients are exempt from FLSA's minimum wage and overtime provisions, and domestic service workers who reside in the households in which they provide services are exempt from the FLSA's overtime requirements. The current regulations also permit third-party employers of domestic service workers, such as home care agencies, to claim both the companionship services and the live-in domestic service exemptions. The new rule, which takes effect on January 1, 2015, narrows the definition of companionship services to provide more home care workers with FLSA protections; limits the exemption for live-in domestic service workers to the individual, family or household using the services; and prohibits third-party employers from claiming either of the two exemptions.

Background

In 1974, Congress extended FLSA coverage to all domestic service workers, but created an exemption from the minimum wage and overtime compensation requirements for domestic service workers who provide companionship services, as well as a separate exemption from the FLSA's overtime requirements for domestic service workers who resided in the households in which they provided services.

The term "companionship services" was not specifically defined in the statute. According to the DOL, the companionship services exemption was intended to apply to individuals whose primary responsibilities were similar to the responsibilities of babysitters—namely, to look after persons in their care in the same way a babysitter looks after children. The DOL has concluded that the companionship exemption was not meant to exclude trained personnel, such a nurses and professional caregivers, from FLSA protections.

The 1974 statute also excluded live-in care providers from FLSA overtime protections, a decision that the DOL attributes to the fact that, in the 1970s, individuals with significant health care needs tended to go to institutional rather than domestic settings for care and assistance. Congress' intent in 1974, the DOL maintains, was focused on giving FLSA coverage to care providers in the settings in which they worked.

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Although the original regulations interpreting these exemptions have remained unchanged since their promulgation in 1975, the home care industry has transformed dramatically in the past 40 years. A growing demand for long-term home care, an increase in the number of home care agencies, a shift in the duties performed by home care workers and growth in the use of live-in, rather than institutional, care workers have all led to the exclusion of a larger swath of domestic service workers from FLSA protections. Such changes in the direct care industry prompted the DOL to amend the regulations interpreting the home care exemptions.

Changes to the Current Regulations

The DOL's regulatory revisions narrow the definition of the term "companionship services" and clarify who may or may not claim the live-in domestic service workers exemption. Overall, these changes make it significantly harder for employers to claim either exemption and increase the number of home care workers to whom employers must pay minimum wage and overtime compensation pursuant to the FLSA.

The new rule revises the definition of the term "companionship services" so that it includes fewer and less-skilled activities than before. Examples of companionship services are conversation, reading, playing games and taking walks. Home care workers who spend the majority of their time performing such activities with their clients remain exempt from FLSA minimum wage and overtime protections. However, those who primarily assist others with tasks such as dressing, grooming, feeding, bathing, taking medications and arranging medical care will not fall within the companionship services exemption. Moreover, under the new rule, third-party employers are no longer entitled to claim the companionship services exemption.

Domestic service workers who reside in the employer's home and who are employed directly by the family of their ill or elderly client remain exempt from overtime protections under the revised rule. However, third-party employers of live-in domestic service workers are no longer permitted to claim the overtime exemption.

According to the DOL, the new rule will bring nearly two million home health and personal care workers under FLSA protection. While advocates for low-wage home care workers have encouraged the revisions included in the new regulations, others have criticized the government's decision to upend the status quo. Members of this latter group argue that the new rule will raise costs and result in people receiving less care. Acknowledging the significance of its changes to the current regulation, the DOL has delayed the effective date of the new rule until January 1, 2015, giving the families, individuals and agencies that will be affected by the changes time to prepare.

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