Westlaw Journal
EMPLOYMENT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 28, ISSUE 13 / JANUARY 22, 2014

EXPERT ANALYSIS

FLSA Compliance for Home Care Employers After the Companionship Exemption

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The U.S. Department of Labor's Wage and Hour Division recently published new regulations in the Federal Register eliminating the Fair Labor Standard Act's minimum-wage and overtime exemption for home care workers employed by home care agencies and other companies.[1]

The new regulations will affect home care employers, employees and their clients seeking assistance to care for elderly parents or disabled children in their homes. Home care employers in particular will need to invest significant time and resources evaluating compensation plans, updating payroll and timekeeping systems, adopting new or revising wage-and-hour policies, and training their employees.

Recognizing that such a sea-change conversion of home care workers from exempt to non-exempt will take a great deal of time, the Labor Department set an effective date of Jan. 1, 2015. Given the many challenges employers will face preparing their organizations for the changes, it would be best to begin planning for the transition now.

HISTORY OF THE 'COMPANIONSHIP EXEMPTION'

In 1974 when Congress extended FLSA coverage to "domestic service" workers, it also created an exemption from the minimum-wage and overtime requirements for "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."[2] Congress granted the U.S. secretary of labor authority to define the exemption's terms through regulation.

The Labor Department exercised that authority in 1975 by issuing the regulations at 29 C.F.R. Part 552 to define the scope of the "companionship exemption." Section 552.109 of the 1975 regulations established that the exemption applies to employees "who are engaged in providing companionship services" and "who are employed by an employer or agency other than the family or household using their services."

Numerous attempts have been made since 1975 to narrow the scope of the companionship-services exemption. Most focused on limiting the exemption to cover only those home care workers employed directly by the individual or family receiving the home care services. The Labor Department proposed regulatory changes to limit the exemption in 1993, 1995 and 2001. None of these proposed changes became final.

Bills introduced in Congress have failed to pass.

In 2007 the U.S. Supreme Court rejected a challenge to Section 552.109, finding reasonable and valid the Labor Department's interpretation that the companionship exemption extends to home care workers employed by "an employer or agency other than the family or household using their services."[3]

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THE NEW REGULATIONS

In the 39 years since Congress enacted the companionship exemption, home care workers employed by home care agencies and other employers have been exempt from the FLSA minimum-wage and overtime requirements. That is all about to change.

The Labor Department acknowledges that most home care workers already earn above the minimum wage, but beginning Jan. 1, 2015, third-party employers must also begin paying these employees overtime at 1½ times the regular pay rate for all hours worked in excess of 40 a week.

The new regulations amend Section 552.109(a) to provide that the companionship exemption is not available to home care workers employed by a third-party company. As amended, Section 552.109(a) will read:

"Third-party employers of employees engaged in companionship services within the meaning of Section 552.6 may not avail themselves of the minimum-wage and overtime exemption provided by Section 13(a)(15) of the act, even if the employee is jointly employed by the individual or member of the family or household using the services."

Equally important, the new regulations amend Section 552.6 to narrow the definition of companionship services, narrowing the exemption even for home care workers employed directly by the individual, household or family receiving the services.

The current regulations define "companionship services" as:

> [T]hose services which provide *fellowship, care and protection* for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work, provided, however, that such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked. The term 'companionship services' does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

The new regulations amend Section 552.6 to remove "care" from the definition of companionship service:

> [T]he term companionship services means 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, on errands, to 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.

Although "care" has been removed from the definition of companionship services, providing some care is still allowed as long as the care activities do not exceed 20 percent of the time worked. Care activities are defined as assisting with "activities of daily living (such as dressing, grooming, feeding, bathing, toileting and transferring)" or with "instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medication and arranging medical care)." Under the new regulations the exemption will no longer be available for home care workers who spend more than 20 percent of their working hours engaged in such activities.

IMPACT OF THE NEW REGULATIONS

The Labor Department estimates the new regulations will affect about 1.9 million home care workers in the United States,[4] and it contends the primary effect will be "the transfer of income from home care agencies (and payers because a portion of costs will likely be passed through via price increases) to direct care workers, due to more workers being protected under the FLSA."[5] But the Labor Department's numbers are actually the estimated annual cost to the home care agencies as a result of the new regulations.

The Labor Department estimates four categories of costs to home care companies. First, it estimates that employers will spend $6.9 million in the first year to come into compliance with the new regulations.[6] Many experts view this as a gross underestimation because the Labor Department assumes that each company will spend only two hours to "read and review the new regulation, update employee handbooks and make any needed changes to the payroll systems."[7] The two-hour estimate for compliance seems at odds with the department's decision to give the home care industry over a year to comply as a "transition period during which all entities potentially impacted by this rule have the opportunity to review existing policies and practices and make necessary adjustments for compliance with this final rule."[8]

Second, for employers who choose to limit the hours of home care aides to fewer than 40 in a workweek, the Labor Department estimates industry costs of $8.4 million in the first year of the regulation to hire additional employees.[9]

Third, for the first time under the new regulations, employers must pay the newly non-exempt home care aides for the time they spend traveling between households during the work day.[10] The Labor Department estimates travel time will cost the industry $107.1 million a year on average.[11]

Fourth, assuming home care aides work an average of 8.8 hours of overtime a week, the Labor Department estimates a cost to the industry of $223.5 million each year on average.[12]

A March 2012 Navigant Economics Study, "Estimating the Economic Impact of Repealing the FLSA Companion Care Exemption," suggests a much higher cost to home care agencies.

According to Navigant, the Labor Department has disregarded the impact on live-in workers, a group the study contends are disproportionately more likely to incur extended periods of pay at the overtime wage under the new regulations, and has underestimated both the cost of paying home care workers for travel time and the increased cost to the home care agencies for compliance with the FLSA's minimum-wage protection.

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Some industry experts are predicting increased Medicare and Medicaid costs, increased costs to families that use home care services, and an increase in institutionalized care. They also predict fewer jobs as more families will opt to institutionalize ailing parents instead of seeking home care services and fewer work hours as home care employers limit employee hours to under 40 a week.

WHAT SHOULD HOME CARE EMPLOYERS DO TO PREPARE FOR THE CHANGE?

Although the new regulations may be challenged, employers should not adopt a "wait and see" approach to compliance with them. Any legal challenge will be difficult and time-consuming, with uncertain results. Home care employers need to start preparing for the transition now.

Employers considering reclassifying employees from exempt to non-exempt should bear in mind that reclassifications can take months to complete, requiring employers to review current compensation structures, implement new timekeeping systems, reprogram payroll systems, adopt new pay policies, and train the newly non-exempt employees and their managers on the new policies and procedures.

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The following are some guidelines for employers of home care workers.

- Determine the increased labor overtime costs if the current compensation structure continues after the home care employees become non-exempt, and consider options for controlling or passing on those costs. Employers may need to plan to hire additional home care workers to ensure none of them works over 40 hours per week, and consider whether overtime costs could be controlled through paying on a piece rate or paying a salary under the fluctuating workweek method. These alternative pay models can reduce overtime payments. Employers also may need to begin preparing customers for price increases. At the very least, discussion of the financial impact of the new regulations should be part of budget planning for 2015.

- Explore transitioning home care employees to an electronic timekeeping system, allowing employees accurately to record their daily and weekly hours, including clocking out for unpaid lunch periods. Employees should be required to certify the accuracy of their reported time. Ideally, the employer should transition the employees to a new timekeeping system by July 1, six months before the new regulations take effect, to allow time to ensure home care providers understand how to record their time properly.

- Review payroll systems to ensure overtime pay will be calculated correctly. Overtime calculation errors are easily made, especially for home care workers who will continue to be paid on a salary or per-visit basis, or continue to receive incentive compensation, after being reclassified as non-exempt. Employers should also consider transitioning home care workers paid semi-monthly to a bi-weekly or weekly payroll to simplify the overtime-pay calculation.

- Begin updating or adopting new pay policies and procedures. For example, a policy on timekeeping and hours worked should require that employees accurately record all work time, prohibit off-the-clock work, and inform employees that they may be subject to discipline for inaccurate time reporting or working off the clock. Home care employers should consider specifically listing the various types of activities for which time should be recorded to provide the employees with a clear understanding of what activities constitute work. Additional policies to consider include policies outlining the rules for travel, training time, and meal and rest breaks. Ensure that pay issues are covered under existing employee complaint and investigation procedures, and prohibit retaliation.

- For direct care workers required to be on duty for 24 hours or more at a time, the employer and employee may agree to exclude sleep time (a period not more than eight hours) from hours worked. To exclude properly this time from the hours worked, the employer must provide adequate sleeping accommodations and uninterrupted sleep time in most cases. To take advantage of the hours-worked exclusion, home care employers should enter into written sleep-time agreements with direct care workers on duty for 24 hours or more. In addition, home care employers should include a process for direct care workers to report when their sleeping period is interrupted, for how long and whether they got at least five hours of uninterrupted sleep. Without a sleep-time agreement and policy, home care employers not paying 24-hour employees for sleep time may find themselves facing an expensive class action lawsuit.

- Provide training on the new policies and procedures to reclassified home care workers and their managers before the Jan. 1, 2015, transition. Many overtime violations can be avoided if non-exempt employees and their managers understand what activities are considered "work" that must be recorded in the timekeeping system and are aware of their role in ensuring accurate timekeeping.

NOTES

[1] Application of the Fair Labor Standards Act to Domestic Service, Final Rule, 78 FR 60454 (Oct. 1, 2013).

[2] 29 U.S.C. § 213(a)(15).

[3] *Long Island Care at Home v. Coke,* 551 U.S. 158 (2007). The U.S. Supreme Court ruled that the 1975 regulations and the Labor Department's interpretation of those regulations were reasonable, within the secretary of labor's authority to define the terms of the exemption, and thus entitled to deference by the courts. However, the court did not find that the 1975 regulations were the only reasonable interpretation that the Labor Department could adopt.

[4] Final Rule, at 60520.

[5] *Id.* at 60456.

[6] *Id.* at 60506.

[7] *Id.* at 60523.

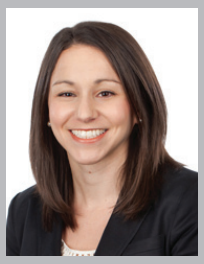
[8] *Id.* at 60544.

[9] *Id.* at 60506.

[10] *See* 29 C.F.R. § 785.33 for the travel-time-pay regulations.

[11] Final Rule, *supra,* at 60506.

[12] *Id.* at 60534, 60505 n. 53 and 60506.



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