

# Challenges and Best Practices for Home Care Employers Following the Elimination of the Companionship Exemption

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## AUTHORS

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Tammy McCutchen

Angelo Spinola

Melissa McDonagh

Breanne Sheetz

Marcia Ganz

**IMPORTANT NOTICE**

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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## **TAMMY MCCUTCHEN, ESQ.**

Tammy McCutchen, a shareholder in Littler Mendelson's Washington D.C. office, is a leading authority on federal and state wage-hour laws and prevailing wage laws. Before joining Littler, she served as Administrator of the U.S. Department of Labor's Wage and Hour Division. While at DOL, Tammy managed an annual budget of \$160 million and 1,400 employees, represented by two unions, in more than 250 offices across the country, and was the primary architect of the first major changes to the DOL overtime regulations in 50 years. Tammy counsels management on wage-hour compliance, represents employers during wage-hour and prevailing wage investigations by DOL, and serves as an expert witness in wage-hour class actions. Tammy is on the Editorial Advisory Board of Law360 and is a member of the Small Business Legal Advisory Board of the National Federation of Independent Business. She is a graduate of Western Illinois University and Northwestern University School of Law, and clerked for Judge Daniel A. Manion on the U.S. Court of Appeals for the Seventh Circuit.

## **ANGELO SPINOLA, ESQ.**

Atlanta office shareholder Angelo Spinola is a nationally recognized authority on the Fair Labor Standards Act who specializes in representing home healthcare and other healthcare industry clients in wage and hour class and collective actions. Angelo has extensive experience defending healthcare companies in wage and hour class and collective actions. He is currently handling numerous class actions and litigation matters for some of the largest and most recognizable home healthcare companies in the nation. Angelo has a deep knowledge of the companionship exemption and has authored various articles and presented to national trade associations regarding the recent DOL regulations affecting the exemption and the implications these will have on home healthcare employers. Angelo is a graduate of the University of Maryland and George Washington University Law School.

## **MARCIA GANZ, ESQ.**

Marcia A. Ganz, an associate in Littler Mendelson's Atlanta office, focuses her practice on representing and advising employers on a wide range of federal and state labor and employment issues. In particular, Marcia has developed a special expertise advising employers on wage and hour matters arising under the Fair Labor Standards Act and various state laws. She represents employers across the country in collective, class, and hybrid actions brought under the federal and state wage and hour laws. Marcia earned her undergraduate and law degrees from the University of Georgia.

## **MELISSA MCDONAGH, ESQ.**

Melissa McDonagh, an associate in the Chicago office, advises employers on a wide range of employment issues, including drafting and reviewing employee handbooks, counseling in hiring and firing employees, and investigating claims of harassment. She litigates cases in state and federal courts and in arbitration forums on wage and hour, negligent hiring, wrongful discharge, employment discrimination, whistleblower, and breach of contract claims. She also specializes in unfair competition and trade secrets, helping clients stop departing employees from taking critical confidential information to compete against them, and assisting clients avoid unfair competition lawsuits when hiring employees from competitors. Her experience extends from pre-litigation counseling through trial. Ms. McDonagh graduated cum laude from Boston College and graduated from Boston College Law School.

## **BREANNE SHEETZ, ESQ.**

Breanne Sheetz of the Seattle office has been practicing exclusively in the area of labor and employment law since she graduated from the University of Michigan Law School. In particular, Breanne specializes in litigating wage and hour class and collective actions in a number of industries, including security, technology, financial services, retail, franchises, and healthcare. She has obtained favorable results in federal collective actions, Washington State class actions, and appeals of decisions by the Washington State Department of Labor and Industries. She also advises employers of all sizes on legal compliance with federal and state wage-and-hour requirements. She is the co-author of a book on the Fair Labor Standards Act and a book chapter on Washington State wage and hour laws, and a frequent contributor to Littler's Healthcare Employment Counsel blog.

## INTRODUCTION

On October 1, 2013, the Department of Labor's Wage and Hour Division (DOL) published a final rule in the *Federal Register* eliminating the Fair Labor Standard Act's (FLSA) minimum wage and overtime exemption for home care workers employed by home care agencies and other companies.<sup>1</sup> The new regulations also significantly narrow the exemption for home care workers employed directly by the individuals or families receiving home care services.

The new regulations will affect home care employers, their employees, and their clients seeking assistance to care for an elderly parent or a disabled child in his or her own home. For home care employers in particular, compliance with the law will require them to invest significant time and resources evaluating their compensation plans, updating their 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 takes a great deal of time, the DOL set an effective date of January 1, 2015. Nonetheless, 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 extending FLSA coverage to "domestic service" workers, Congress 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."<sup>2</sup> Congress granted the Secretary of Labor authority to define the terms in the exemption through regulation.

The DOL exercised that authority in 1975 by issuing the regulations at 29 C.F.R. Part 552 to define the scope of this "companionship exemption." The 1975 regulations addressed two issues that have proved controversial: First, should the exemption apply only to persons employed directly by the family or household using their services? Second, what types of activities should be considered companionship services?

On the first issue, 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."

On the second issue, section 552.6 of the 1975 regulations defines companionship services as "services which provide fellowship, care and protection," including "household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes and similar services." In addition, under section 552.6, an exempt companion could also spend up to 20 percent of weekly hours performing general household work not related to the care of the elderly person or person with an illness, injury, or disability. The 1975 regulations also provided that activities "which require and are performed by trained personnel, such as a registered or practical nurse" are not considered companionship services. Federal courts interpreted the 1975 regulations to allow exempt companions to, *inter alia*:

- Assist with bathing, dressing, cooking, and getting around the home
- Vacuum, dust, mop, and do laundry
- Give medications, take vital signs, change catheters, and turn patients in bed
- Perform simple physical therapy and speech training<sup>3</sup>

<sup>1</sup> *Application of the Fair Labor Standards Act to Domestic Service*, Final Rule, 78 FR 60454 (October 1, 2013) ("Final Rule").

<sup>2</sup> 29 U.S.C. § 213(a)(15).

<sup>3</sup> See, e.g., *Fowler v. Incor*, 279 F. App'x 590, 596 (10th Cir. 2008) (noting that "[c]are related to the individual" that falls within the current definition of companionship services "has been expanded to include more frequent vacuuming and dusting for a client with allergies, mopping and sweeping for clients who crawl on the floor, and habilitation training, which often includes training the client to do housework, cooking, and attending to personal hygiene"); *Cook v. Diana Hays and Options, Inc.*, 212 F. App'x 295, 296-97 (5th Cir. 2006) (holding that a direct care worker "employed by ... a non-profit corporation that provides home health care" who "provided simple physical therapy, prepared [consumers'] meals, assisted with [consumers'] eating, baths, bed-making, and teeth brushing, completed housework ... and accompanied them on walks, to doctor visits, to Mass, and to the grocery store" was exempt from the FLSA under the companionship services exemption as defined in current § 552.6); *Saylor v. Ohio Bureau of Workers' Comp.*, 83 F.3d 784, 787 (6th Cir. 1996) (holding

Since 1975, numerous attempts have been made 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 DOL proposed regulatory changes to limit the exemption in 1993, 1995, and 2001. None of these proposed changes became final. Bills have been introduced in Congress, but have failed to pass. In 2007, the U.S. Supreme Court rejected a challenge to section 552.109, finding reasonable and valid the DOL'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."<sup>4</sup>

## THE NEW REGULATIONS

In the 39 years since Congress enacted the companionship exemption, home care workers employed by home care agencies and other employers (rather than directly by the individual or household receiving the services) have been exempt from the FLSA minimum wage and overtime requirements. That is all about to change. The DOL acknowledges that most home care workers already earn well above the minimum wage, but, beginning January 1, 2015, employers must also begin paying such employees overtime at one-and-a-half times their regular rate of pay for all hours worked over 40.

The final rule amends section 552.109(a) to provide that the companionship exemption is not available to home care workers employed by a third-party company. Effective January 1, 2015, the revised section 552.109(a) will read:

Third party employers of employees engaged in companionship services within the meaning of § 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.

In addition, and equally important, the final rule amends section 552.6 to narrow the definition of companionship services, thereby narrowing the exemption even for home care workers directly employed by the individual, household, or family receiving the services. The final rule amends section 552.6 to remove "care" from the definition of companionship services:

[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.

While "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 final rule, 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. Most likely very few home care aides will be able to limit "care" activities to 20 percent of their working hours, according to industry experts, leaving the companionship services exemption virtually an empty shell.

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that a worker who "helps [an adult with a serious back injury] dress, gives him his medication, helps him bathe, assists him in getting around their home, and cleans his bedclothes when he loses control of his bowels" is providing companionship services under § 552.6); *McCune v. Or. Senior Servs. Div.*, 894 F.2d 1107, 1108-09 (9th Cir. 1990) (accepting that "full-time, live-in attendants for elderly and infirm individuals unable to care for themselves" who perform "cleaning, cooking, and hygiene and medical care" for those individuals were providing companionship services because, under the current regulation, "the recipients of these services [are] the determinative factor in applying the [companionship services] exception").

4 *Long Island Care at Home, Ltd., v. Coke*, 551 U.S. 158 (2007). The Supreme Court ruled that the 1975 regulations and the DOL'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 DOL could adopt.

## IMPACT OF THE NEW REGULATIONS

### Economic Impact: Costs to Employers

The DOL estimates the new regulations will affect approximately 1.9 million home care workers in the United States.<sup>5</sup> The DOL contends the primary effect is “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.”<sup>6</sup> While described by the DOL as a “transfer of income,” in actuality the DOL’s numbers reflect the estimated annual cost to the home care agencies as a result of the new regulations.

The DOL estimates four categories of costs to home care companies: First, the DOL estimates that employers will spend only \$6.9 million in the first year to come into compliance with the new regulations.<sup>7</sup> Many experts view this as a gross underestimate of the cost, as the DOL 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.”<sup>8</sup> The two hour estimate for compliance also seems to be at odds with the DOL’s decision to give the home care industry over a year (until January 1, 2015) 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.”<sup>9</sup> Second, for those employers who choose to limit the hours of home care aides to under 40 in a workweek, the DOL estimates industry costs of \$8.4 million in the first year of the regulation to hire additional employees.<sup>10</sup> Third, for the first time under the revised regulations, employers must pay the newly non-exempt home care aides for the time they spend traveling between households during the work day.<sup>11</sup> The DOL estimates travel time, on average, will cost the industry \$107.1 million per year.<sup>12</sup> Fourth, assuming home care aides work an average of 8.8 hours of overtime per week, the DOL estimates the cost to the industry of \$223.5 million on average each year.<sup>13</sup>

#### Average Annual Costs (in millions)

Compliance*	\$6.9
Hiring*	\$8.4
Travel Pay	\$107.1
Overtime Pay	\$223.5
<b>Total</b>	<b>\$345.9</b>

\* First year cost only

The new requirement for employers to pay the minimum wage is likely to have very little impact because nearly all home care aides already earn significantly above the minimum wage.<sup>14</sup> The median wage for home care workers is between \$9.67 and \$9.94 per hour, according to DOL, with less than 10 percent earning below \$7.55 per hour and less than 10 percent earning above \$19.84 per hour.<sup>15</sup>

The new regulations also likely will have only minimal impact on employers in the following states, which already require the payment of overtime to home care aides at one-and-a-half times their regular rate of pay:

- California (as of 1/1/14)
- Colorado
- Hawaii
- Illinois
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Montana
- Nevada
- New Jersey
- Pennsylvania
- Washington
- Wisconsin

<sup>5</sup> Final Rule, *supra*, at 60520.

<sup>6</sup> *Id.* at 60456.

<sup>7</sup> *Id.* at 60506.

<sup>8</sup> *Id.* at 60523.

<sup>9</sup> *Id.* at 60544.

<sup>10</sup> *Id.* at 60506.

<sup>11</sup> See 29 C.F.R. § 785.33 *et seq.* for the travel time pay regulations.

<sup>12</sup> Final Rule, *supra*, at 60506.

<sup>13</sup> *Id.* at 60534, 60505 n.53 and 60506.

<sup>14</sup> *Id.* at 60456.

<sup>15</sup> *Id.* at 60522.

Under the laws of Arizona, the District of Columbia, Nebraska, North Dakota, Ohio, and South Dakota, many home care aides are entitled to be paid the minimum wage, but not overtime. Thus, home care companies in these states must, for the first time, begin to pay overtime to home care aides. New York home care companies also will be impacted by the regulations as the state law currently requires home care aides be paid overtime only at a rate of one-and-one-half times the state's *minimum wage* (not the employee's regular hourly rate) as required under the FLSA. In Maryland and Wisconsin, home care aides employed by non-profit agencies are exempt from the state minimum wage and overtime requirements. The new federal regulations, however, will nullify this exemption for the non-profits because employers must apply the law—state or federal—which is most favorable to the employee. Also nullified are the state law exemptions for home care aides who work within state programs in California and Illinois.<sup>16</sup>

### **Double Whammy for Employers: The Loss of the Companionship Exemption and Introduction of the ACA**

Home health companies will face simultaneous challenges with the loss of the companionship exemption and the introduction of the Affordable Care Act (“ACA”). Along with the increased costs of hiring additional workers and paying overtime, home care companies must consider the impact of the ACA, which in most cases will require them to provide health insurance to their employees or pay a penalty. The ACA penalty applies to large employers that, during the prior calendar year, employed an average of at least 50 full-time or full-time equivalent employees. Full-time employees are defined as those that work 30 or more hours a week on average, calculated on a monthly basis (equating to 130 hours per month). Even though the hours of part-time workers are counted for purposes of determining whether an employer is a “large” employer, the penalty applies only with respect to full-time employees. Both the ACA's employer penalty provision and the new requirement that home care aides be paid overtime take effect on January 1, 2015. Thus, the requirements of the ACA represent an additional cost for home care companies that hire additional employees to deal with the DOL's new regulations—unless companies restrict employees' hours to less than 30 per week in order to minimize the costs of both the ACA and DOL's new companionship services regulation.

### **Impact on Employees: Restriction of Overtime Hours**

In an IHS Global Insight survey of 542 franchise businesses that provide companion care services, half of the companies responding reported that they were very likely to hire more workers in order to hold the hours of all home care aides to under 40 in a workweek whenever possible; 29 percent of responding companies answered they were somewhat likely to hire more workers and hold work hours to under 40.<sup>17</sup> Thus, 79 percent of home care employers are very likely or somewhat likely to reduce the work hours of their employees to below 40, resulting in lower earnings for current home care aides. Instead of being paid straight time for hours worked over 40, the home care aides will not be scheduled to work over 40 hours in a week. DOL estimates that, currently, home care aides are being paid a median hourly rate of \$9.67 for 48.8 hours of work or \$471.90 per week. Under the new regulations, they will only be working 40 hours at \$9.67 or \$386.80 per week—a net loss of income of \$85.10 per week or \$4,425.20 per year for the average home care aide. Those dollars will be going to other home care aides who employers will hire to cover the hours and meet client needs, but that is probably cold comfort for current employees.<sup>18</sup>

This impact is not hypothetical, but has occurred already as illustrated by the statement of a home health franchise business owner in Michigan during the congressional hearings on the DOL's proposed regulation. Michigan lost the overtime exemption for home health workers in 2006, thus requiring agencies to pay overtime to home care workers employed in Michigan. Immediately following that change, the home health care owner was forced to cut the hours of her employees to stay in business. One of her employees, for example, went from working 54 hours per week and earning \$432 to working 29 hours per week and earning \$232, taking on a second job to maintain her previous income level.<sup>19</sup>

### **Impact on Patients: Decreased Continuity of Care and Increased Cost of Care**

The franchise owner also described the negative impact the new requirement to pay overtime to her employees had on the care she could provide to her patients. Because of her need to reduce overtime and arrange schedules to enable her employees to manage their other jobs, patients needing more than 40 hours of care per week had to either forego necessary care to cut costs or accept a greater number of

<sup>16</sup> *Id.* at 60509-12 (discussing and citing to state laws).

<sup>17</sup> IHS Global Insight, *Economic Impact of Eliminating the FLSA Exemption for Companionship Services* (Feb. 21, 2012) (“IHS Study”), at 18, available at [http://www.franchise.org/uploadedFiles/Franchise\\_Industry/Resources/Education\\_Foundation/IHSGlobalInsightCompanionCareReport.pdf](http://www.franchise.org/uploadedFiles/Franchise_Industry/Resources/Education_Foundation/IHSGlobalInsightCompanionCareReport.pdf).

<sup>18</sup> *Id.* at 19.

<sup>19</sup> Ensuring Regulations Protect Access to Affordable and Quality Companion Care: Hearing Before the Subcommittee on Workforce Protections Committee on Education and the Workforce, 112th Cong. 30 (2012) (“Hearing”).



rotating caregivers into their homes. For example, one senior couple with a dementia patient required care 24 hours per day. Once the overtime exemption was lost, the home health franchise owner had 7-10 caregivers working with the couple. Because consistency and routine are essential for dementia patients, the couple ultimately decided to move into institutional care.<sup>20</sup>

Most of the business owners in the IHS study expected to pass at least a portion of the added costs of overtime, management, and administration and other impacts of the regulation on to their customers. Three-fourths of respondents reported that an increase in fees was very likely, with an average expected fee increase of 20 percent (much more than that projected by the DOL).<sup>21</sup>

As a result of these price increases, the agencies project that they will lose 23 percent of their customers, which reflects a much greater sensitivity to a price increase than assumed by the DOL. The DOL's position was supported by its assumption that Medicare and Medicaid are the primary payers for home health services, but the IHS survey indicates that the overwhelming majority of home health services are personally paid by the families in need of the services.<sup>22</sup> Thus, the price increases will affect consumers and workers. As recognized by Tim Walberg, Chairman of the U.S. House of Representatives' Subcommittee on Workforce Protections, Committee on Education and the Workforce, "as costs rise, those who receive in-home care will be forced to confront difficult choices, such as accepting a diminished quality of care or relying upon institutional services outside the home."<sup>23</sup> In addition to the effect on patients, many home care aides could lose their jobs because of the decrease in demand for home health services. For example, the IHS survey concluded that as many as 2,630 home healthcare workers employed by the 542 businesses responding to the survey could become unemployed as increases in the price of home care services decreases demand. Of course, this number is based only on the companies covered by the survey and would be significantly higher for the industry at large.<sup>24</sup>

## CHALLENGES AND BEST PRACTICES FOR HOME CARE EMPLOYERS

### Alternate Compensation Models

Well before the January 1, 2015 effective date of the new regulations, home care employers should study the financial impact of paying overtime to home care aides, and options for reducing that impact. Continuing to employ all home care aides under current compensation plans, with the addition of travel time pay and overtime pay, could add tremendous costs. However, the additional costs could be reduced by considering alternative compensation models. Most non-exempt employees are either paid by the hour or paid a salary for 40 hours of work. Overtime pay for such employees is calculated as one-and-a-half times the employee's regular rate of pay. However, under the FLSA and most state laws, there are other compliant compensation options where overtime can be paid at half-time, rather than time-and-a-half. These options, discussed below, include: paying home care aides per visit or per day; calculating overtime for salaried employees using the fluctuating workweek method; or paying a fixed salary for a fixed number of work hours each week. In addition, in most states, an employee's overtime pay rate can be legally reduced if the regular rate is calculated by dividing a salary by the actual hours worked by the employee each week, rather than dividing by 40 hours.

#### Pay-Per-Visit

An employer may pay a non-exempt home care aide on a pay-per-visit basis where the employee receives a fee for each patient visit, and the per visit rate may vary depending on the type of visit. Under the FLSA overtime regulations, such a plan is known as paying on a "piece rate." Under a piece rate plan, the per-visit earnings are considered straight time (the 1.0) for all hours worked during the visit and, thus, only the additional half-time premium (the 0.5) is due on the overtime hours.<sup>25</sup>

Although paying employees on a piece-rate basis reduces overtime costs, there are complexities that can increase the risk of an overtime violation if a home care employer does not implement the compensation plan correctly. First, of course, the per visit rates adopted by the employer must be sufficient to ensure the employee is paid at least the applicable federal or state minimum wage for all hours worked. For example, if a home care aide was paid \$20 per visit and spent 45 hours in a week to complete 15 visits, her earnings would fall below the minimum wage:  $\$20 \times 15 \text{ visits} = \$300 / 45 \text{ hours} = \$6.67 \text{ per hour}$ .

<sup>20</sup> *Id.* at 30-33.

<sup>21</sup> IHS Study, *supra*, at 14-15.

<sup>22</sup> *Id.* at 16.

<sup>23</sup> Hearing, *supra*, at 3.

<sup>24</sup> IHS Study, *supra*, at 17. Arguing that demand for home care services is inelastic, DOL will admit to "disemployment" of only 1,144 home care aides, on average, each year. Final Rule, *supra*, at 60501-02 and 50506.

<sup>25</sup> 29 C.F.R. § 778.111.

Second, it is a common misconception that employees paid on a piece rate need not track and record hours worked. Piece rate employees must still accurately record all hours worked to allow the employer to test for compliance with the minimum wage and to calculate overtime pay for hours worked over 40 in a workweek properly.

Third, a piece rate compensation plan must carefully define the work activities that are included within the piece rate pay: Will the piece rate cover travel time? Time spent charting after the visit? Training time? Some states restrict the types of activities that can be included in the piece rate. For example, in California, the piece rate can only cover the time spent in the actual visit, and the home care aide must be paid at least the minimum wage for hours spent travelling, training, etc.

Fourth, and most importantly, the overtime calculation itself is more complex for a piece-rate employer, increasing administrative costs and the risk of errors. Under the piece rate method, the overtime pay rate is calculated by dividing all straight-time earnings in the week—all per-visit earnings, other hourly earnings, any incentive pay, etc.—by the total hours worked in that workweek. The resulting hourly rate, known as the “regular rate,” is then multiplied by 0.5 to determine the overtime pay rate. For example, a home care aide paid \$30 per visit and minimum wage for travel time and who spent 45 hours in the week to complete 15 visits and five hours of travel time, would be owed overtime as follows:

Per visit earnings:  $\$30 \times 15 \text{ visits} = \$450$

Travel time pay:  $\$7.25 \times 5 \text{ hours} = \$36.25$

Regular rate:  $(\$450 + 36.25) / 45 \text{ hours} = \$10.81$

Overtime pay due:  $\$10.81 \times 0.5 \times 5 \text{ overtime hours} = \$27.00$

Because home care employees’ earnings and work hours may change every week, the regular rate and overtime pay rate must be recalculated separately for each workweek (calculating the regular and overtime pay week once for a semi-monthly or bi-weekly pay period can lead to over-payment or under-payment of overtime).

### Day Rate

The FLSA, and most state laws, also allow employers to pay home care aides on a day rate. A day rate is a flat sum for a day’s work, regardless of the number of hours worked that day. Similar to per-visit pay, the day rate earnings are considered straight time (the 1.0) for all hours worked during the day and, thus, only the additional half-time premium (the 0.5) is due on the overtime hours.<sup>26</sup> This reduces overtime costs, but most of the complexities and risks discussed above for per-visit pay also apply for employees paid a day rate. The day rate adopted by the employer must be sufficient to ensure the employee is paid at least the applicable federal or state minimum wage for all hours worked. Day rate employees must still accurately record all hours worked to allow the employer to test for compliance with the minimum wage and to calculate overtime pay properly. Because home care employees’ work hours may change every week, the regular rate and overtime pay rate must be recalculated separately for each workweek. The advantage of a day rate over pay-per-visit is that all activities performed by the home care aide in the course of the day are covered under a day rate.

### Fluctuating Workweek

An employer can also consider paying home care aides on a salary, and reduce overtime costs by using the fluctuating workweek method for calculating overtime pay. Under the fluctuating workweek method, a fixed salary is considered straight time (the 1.0) for all hours worked during the week—whether 30 hour or 50 hours. Thus, only the additional half-time premium (the 0.5) is due on the overtime hours.<sup>27</sup> This fluctuating work week method can provide substantial savings over conventional salaried pay plans, but can be used only if *all* of the following requirements are met:

1. The employee’s hours actually fluctuate from week to week (although hours do not have to fluctuate both under and over 40, but can always fluctuate over 40);
2. The employee receives the same fixed weekly salary every week, without reduction if the employee does not work her full schedule and never supplemented with bonuses, incentive pay, or any other earnings;
3. The salary is sufficiently high to assure that no workweek will be worked in which the employee’s average hourly earnings from the salary fall below the minimum wage; and

<sup>26</sup> 29 C.F.R. § 778.112.

<sup>27</sup> 29 C.F.R. § 778.114.

4. The employee clearly understands that the salary covers straight-time pay whatever hours the job may demand in a particular workweek.<sup>28</sup>

Because of these requirements, and the substantial liability if all the requirements are not met, home care employers should seek legal assistance from a wage and hour expert before implementing a fluctuating workweek plan. While a fluctuating workweek pay plan can provide substantial benefits in terms of controlling overtime costs, it requires careful implementation and ongoing administration. In addition, although the fluctuating workweek plan is generally permissible in most states, a handful of states have questioned or entirely prohibited the use of fluctuating workweek pay plans either through specific statutory authority or by judicial decisions. These states include: Alaska, California, Connecticut, Hawaii, Pennsylvania, and New Mexico.

### Fixed Salary for Fixed Hours

Another salary option that can reduce overtime costs is paying home care aides a fixed weekly salary for a fixed number of hours worked each week.<sup>29</sup> Under this method, the employer and home care employee agree that a fixed salary will cover the straight-time pay for a pre-determined number of hours each week (e.g., 50 hours). Of course, the fixed salary must be sufficiently high to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum wage. Further, the pre-determined number of hours must be reasonably related to the actual number of hours the employee is expected to work—the fixed hours cannot be set at 50 if employees usually work only 45 hours per week. In addition, the fixed hours and fixed salary must be exactly that—fixed—and cannot fluctuate from week to week. Employees must receive their full fixed salary even if they work *less* than the agreed number of weekly hours. If these requirements are met, overtime for hours worked up to the fixed hours are paid at the half-time rate because the salary is the straight-time rate for all hours up to the fixed hours. Hours worked above the fixed hours are paid at time-and-a-half.

The overtime calculations for employees paid a fixed salary for a fixed number of hours is best illustrated through an example. Following is the overtime pay calculation for an employee paid a fixed salary of \$500 per week for a fixed 50 hours in a week in which she worked a total of 55 hours:

$$\text{Regular rate: } \$500 / 50 \text{ hours} = \$10.00$$

$$\text{Overtime for hours: 40 to 50: } \$10.00 \times 0.5 \times 10 \text{ hours} = \$50$$

$$\text{Overtime for hours: 50 to 55: } \$10.00 \times 1.5 \times 5 \text{ hours} = \$75$$

$$\text{Total overtime due: } \$50 + \$75 = \$125$$

As a comparison, under a standard salaried pay plan where the employee is owed time-and-a-half for all hours over 40 in a workweek, the employee in this example would be owed \$225 in overtime pay ( $\$10 \times 1.5 \times 15 \text{ hours} = \$225$ ).

This method likely would not be compliant in states such as Alaska, California, Connecticut, Hawaii, Pennsylvania, and New Mexico, which require that a non-exempt employee's salary always be divided by 40 hours for purposes of calculating the regular rate and overtime pay. Again, home care employers should seek legal assistance before implementing a fixed salary for fixed hours pay plan.

### Salary Divided by Actual Hours Worked

Finally, a home care employer can reduce overtime costs in most states by paying non-exempt employees a salary and calculating overtime pay using the following formula:

$$\text{Salary/Total Hours Worked} \times 1.5 \times \text{Overtime Hours}$$

Of course, multiplying the regular rate by 1.5 versus the 0.5 used in the fluctuating workweek method adds to overtime costs. In addition, this method requires the employer to recalculate the regular rate for each workweek. Nonetheless, this calculation is less complex and still results in savings for the employer. Compare the overtime pay calculation dividing by 40 hours versus dividing by actual hours worked for a home care aide paid a salary of \$500 who worked 55 hours:

$$\text{Dividing by 40 hours: } (\$500/40 \text{ hours}) \times 1.5 \times 15 \text{ overtime hours} = \$12.50 \times 1.5 \times 15 = \$281.25$$

$$\text{Dividing by actual hours: } (\$500/55 \text{ hours}) \times 1.5 \times 15 \text{ overtime hours} = \$9.09 \times 1.5 \times 15 = \$204.55$$

<sup>28</sup> *Id.*

<sup>29</sup> 29 C.F.R. § 778.325.

In order to offset the higher overtime costs, an employer can set a salary level that, based on anticipated overtime hours, will result in the amount of total annual compensation preferred by the employer. However, compensating a non-exempt employee on a salary basis with the understanding that the salary covers more than 40 hours in a workweek is not permitted in all states.

## Hours Worked Challenges

DOL's new regulations will require home care employers to track the hours worked by home care aides—regardless of the compensation structure—to ensure the aides are paid at least the applicable federal or state minimum wage for all hours worked and overtime pay at one-and-a-half times each employee's regular rate of pay for all hours worked over 40 in a workweek. Although understanding what activities are compensable “hours worked” is essential to compliance, the FLSA does not include a definition of the term “work.” Instead, the FLSA provides only an unhelpful definition of the term “employ” as “to suffer or permit to work.”<sup>30</sup> Thus, work includes not only activities which an employer requests an employee to perform, but any activity “suffered or permitted” by the employer.<sup>31</sup> Employees must be paid for all hours within a workday, from the first principle activity to the last principle activity. A “principle activity” includes any activity that is an integral and indispensable part of an employee's work. “Work” includes all the time an employee must be on duty, on the employer's premises, or at any other prescribed place of work. In short, “work” is defined broadly by the DOL and courts to include any activity that the employer knows or has reason to know is being performed. Further, the employer has the duty to ensure that work not required or requested is not performed and to ensure employees accurately track and record all hours worked.

In the home health industry, where employees typically work remotely in the homes of patients, it will be difficult for employers to monitor and track the hours worked by home care employees accurately. Claims for “off-the-clock” work are the most common type of employment law claim asserted in class actions by non-exempt employees, and are certain to increase after the DOL's new companionship regulations become effective. Home care employers will be challenged in accurately tracking hours worked by home care aides in four areas: meal periods and rest breaks, travel time, pre- and post-shift activities, and sleep time. Employers can reduce liability risk by adopting wage and hour policies specifically addressing these challenges and by implementing best practice timekeeping systems.

### Meal Periods and Rest Breaks

About 20 states require employers to provide employees with a meal period,<sup>32</sup> and seven states require employers to provide employees with rest breaks.<sup>33</sup> Although state laws vary, typically, an employer must provide a 30-minute meal period of a certain length after five or six hours of work. Failure to provide a meal period or rest break can result in penalties under state law (e.g., an hour of additional pay in California). The federal FLSA does not *require* employers to provide meal periods. However, if employers do provide a meal period, the FLSA governs when such meal periods may be unpaid. A meal period may be unpaid under the FLSA and most state laws if the period is 30 minutes or longer and the employee is completely relieved of duty.<sup>34</sup> A few state laws also provide that a meal period cannot be unpaid unless employees are free to leave the worksite.

Generally, meal period requirements do not raise liability issues for exempt employees whose salaries cover all hours worked in a week—including their meal breaks. However, for non-exempt employees, class action lawsuits involving missed meal periods are perhaps the most common type of overtime claim. Thus, home care employers need to be ready to comply with state and federal laws on meal breaks when home care aides become non-exempt effective January 1, 2015.

Home care employers should adopt a policy requiring home care aides to take meal periods and rest breaks in accordance with state law. If the meal period will be unpaid, the policy should state that the home care aides should not perform any work during the meal period,

30 29 USC § 203(g).

31 See DOL Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA).

32 These states include: California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Washington, and West Virginia. In Nevada, the meal break requirements do not apply where only one person is employed at a place of employment (an exception that should frequently apply in the home care industry). Nev. Rev. Stat. § 608.019.

33 California, Colorado, Kentucky, Minnesota, Nevada, Oregon, and Washington require employers to provide employees with rest breaks. The most common requirement is a paid 10-minute break for every four hours of work or major fraction thereof.

34 DOL has approved unpaid meal breaks of less than 30 minutes in some circumstances. See e.g., DOL Wage and Hour Division Field Operations Handbook (“FOH”), § 31b23 (bona fide meal periods of less than 30 minutes can be unpaid “under special conditions”); DOL Opinion Letter, 2000 WL 33969986 (Sept. 25, 2000) (15-minute meal period was not compensable time where “all employees either bring their lunch or purchase it from vending machines located in the lunch rooms”); DOL Opinion Letter FLSA2004-22 (Nov. 22, 2004) (approving a 20-minute lunch break).

and provide a process for home care aides to report and be paid for meal periods that are interrupted with work. Neither the FLSA nor state laws require paid meal periods, but a policy is needed to ensure compliance with state laws, even if the employer chooses to pay employees during the meal period or the employee is paid on a per visit or per day basis.

In addition, to comply with state law, especially California, home care employers need to implement a process for recording that home care aides took (or waived, when state law allows) their meal periods and rest breaks. The best practice for unpaid meal periods is to require employees to record the actual times when they left and returned from the meal period. Another option is to require employees to certify each pay period that they took all of their required meal periods and rest breaks. Although some employers have timekeeping systems that automatically deduct 30 minutes of employee time each day for an unpaid meal period, such a practice is an invitation for litigation by employees claiming they worked through the meal period and were not paid for that work.

### Travel Time

Another challenge for home care employers will be tracking and paying home care aides for time spent traveling between work locations. Home care companies in Pennsylvania, where home care aides are non-exempt and entitled to overtime under state law, are already facing this issue: A group of approximately 3,000 home care workers in Pennsylvania brought a class action against their employer, alleging that they had not been paid for travel time between patient homes, resulting in an underpayment of overtime.<sup>35</sup> The case settled for \$2.2 million.

Under the FLSA and state laws, generally, normal commuting between work and home is not considered “work” for which an employee must be paid. Commuting time is not compensable even if the employee works at different job sites (such as patients’ homes) rather than a fixed location (e.g., an office or manufacturing plant).<sup>36</sup> Thus, the time that home care aides spend traveling from their home to the home of their first patient in the morning, and the time driving from the home of the last patient back to their home, need not be paid.

However, all travel by a home care aide that occurs during the work day—for example, travel from one patient’s home to the next—is compensable work time.<sup>37</sup> Home care aides must be paid for this travel time, and this travel time counts towards determining whether the aide worked over 40 hours in the workweek. Thus, if a home care aide performed 40 hours of productive work in patient homes during the week and spent 10 hours driving between patient homes, the aide must be paid for 10 hours of overtime.

In addition, even a normal commute can become compensable work time if a home care aide spends significant time performing work at home before or after the work day. For example, if a home care aide spent several hours at home every evening to complete paperwork or charting required by the employer, the aide’s home may become another work site, thus transforming the typically non-compensable commute into a compensable work site to work site trip.

As noted above, the DOL estimates that the additional cost to the industry of paying home care employees for travel time will be over \$107 million annually, and many experts believe this a gross underestimate. Paying home care aides for their travel time will be a significant challenge for every home care employer.

Thus, home care employers should consider options for reducing travel time costs. For example, whenever possible, home care employers should assign home care aides to work at patient homes within a small geographic area to reduce the travel time between work locations. Alternatively, employers could pay employees at a lower hourly rate (the minimum wage, for example) for time spent traveling from home to home.

Employers also should adopt a travel time policy explaining when and how much home care aides will be paid for travel time. The policy should address reimbursement for travel expenses (e.g., will home care aides be reimbursed based on the IRS mileage rate?). Under California law, non-exempt employees cannot bear the burden of any expense incurred in the course of performing their work. Under the FLSA, travel expenses incurred for work cannot effectively reduce an employee’s wages below the minimum wage. Without a clear policy and established processes, a home care employer would be vulnerable to class action claims for failure to reimburse home care aides for travel and other business expenses.

<sup>35</sup> *Thomas v. Total Health Home Care Corp.*, Case No. 002493 (Phila. Cnty., Pa. Ct. of Common Pleas, May 2006).

<sup>36</sup> 29 C.F.R. § 785.35.

<sup>37</sup> 29 C.F.R. § 785.38.

### Pre- and Post-Shift Activities and Other Compensable Work

Home care aides perform work activities in addition to patient visits, and some of that work may be performed in their homes either before or after patient visits. In addition to travel time, to comply with the FLSA minimum wage and overtime requirements, home care employers must recognize all types of activities not directly involving patient care that are nonetheless compensable work. For example, compensable work in the home care industry could include: (a) completing paperwork or charting that is required or necessary for the job; (b) making telephone calls, sending or reading emails or other communications with supervisors or patients; (c) attending meetings; and (4) attending training that is required by the employer, attended during work hours, or directly related to the job.

Home care employers must be prepared to record and pay home care aides for such activities. Employers should adopt a policy prohibiting managers from requesting, and employees from working, off-the-clock. The policy should state that employees are required to report all hours worked, and may be disciplined for submitting falsified time records. The policy also could specifically identify the types of work activities for which employees must report time and be paid (e.g., charting, meetings, training, emails, etc.). As discussed below, home care employers also need to explore options for timekeeping systems that allow home care aides to record their work time wherever they may be when the work is performed.

### Sleep Time

In the home care industry, patients often need 24/7 care. To meet this need, home care companies may assign two home care aides to each work a 12-hour shift, have home care aides work 24-hour shifts, or provide “live-in” companions (as that term is defined by the DOL). Without some advanced planning, after home care aides become non-exempt on January 1, 2015, their employers may have to pay the aides for the time they spend sleeping. How much and under what circumstances depends on whether the home care aides work shifts of less than 24 hours, work shifts of 24 hours or more, or qualify as “live-in” domestic employees.

#### a. Shift of Less than 24 Hours.

“Work” does not require either mental or physical exertion. Under the FLSA and state law, an employee may be “working” even while sleeping.<sup>38</sup> If an employer requires a home care aide to remain at the patient’s home for less than 24 hours, any time the aide spends sleeping or “engaging in other personal activities when not busy” is “work” for which the employee must be paid.<sup>39</sup> For example, consider a home care aide who arrives at the patient’s home at 8 p.m. for a shift that ends at 8 a.m., but sleeps from 12 a.m. to 6 a.m. while the patient is asleep. The home care aide must be paid for the full 12 hours of work, even though the employee was asleep for six hours.

#### b. Shift of 24 Hours or More

For employees required to be in a patient’s home for a shift of 24 hours or more, the home care employer can exclude up to eight hours of sleep time from hours worked—but *only if all of the following requirements are met*:

1. The employer and employee must agree to exclude sleep time from hours worked;
2. The sleeping period must be bona fide and regularly scheduled;
3. The employee must have adequate sleeping facilities;
4. The employee can usually enjoy an uninterrupted night’s sleep;
5. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked; and
6. The employee must get at least five hours of uninterrupted sleep or the entire sleeping period must be paid.<sup>40</sup>

To take advantage of this hours worked exclusion, home care employers should enter into written sleep time agreements with home care aides on duty for 24 hours or more. In addition, home care employers should adopt a sleep time policy that includes a process for home care aides to report when their sleeping period is interrupted, for how long it was interrupted, 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.

<sup>38</sup> 29 C.F.R. § 785.20.

<sup>39</sup> 29 C.F.R. § 785.21.

<sup>40</sup> 29 C.F.R. § 785.22.

### c. Residing on Employer's Premises ("Live-in Employees")

Employers have additional flexibility to exclude time for an "employee who resides on his employer's premises on a permanent basis or for extended periods of time."<sup>41</sup> DOL recognizes that such employees may not be working all the time they are on the patient's premises. Rather, home care aides who live in the patient's home permanently or for extended periods of time "may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own." Thus, in this situation, the regulations allow "any reasonable agreement" between employer and employee regarding compensable work time. Thus, for live-in home care aides, the employer and aide may agree to exclude from hours worked the amount of time spent during bona fide meal periods, sleep periods, and off-duty time. During off-duty time, the home care aide should be free from all duties, be allowed to leave the premises, and have sufficient time to pursue personal activities. The home care aide must enter into an express written agreement with the employer documenting the times that will be excluded from hours worked. In addition, even with this agreement, if the employee is called to duty during any of the excluded time, the work performed during the interruption is compensable hours worked. The employer must keep a copy of the agreement as part of its recordkeeping obligations, and under the DOL's revisions to section 552.102 of the companionship regulations, the employer and employee must reach a new agreement if there is a "significant deviation from the initial agreement."<sup>42</sup> Also, the new regulations will require employers to keep records of the exact number of hours worked by the live-in home care aide.<sup>43</sup>

## Other Best Practices

### Updating Timekeeping and Payroll Policies

Homecare employers should adopt and update payroll policies to require the payment of overtime and the recording of all work time. The policies should specifically state that employees may be subject to discipline for violation of the policies. Home healthcare 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, including paperwork or charting, work-related phone calls and e-mails, and mandatory meetings or training. This is particularly true for employers paying non-exempt employees on a per-visit basis, day rates, or some alternative pay method as these employees may not understand the importance of capturing all time worked because their straight-time pay is based on the number of home visits completed or on the number of days worked, and not the number of hours worked. Importantly, these employees must still track all hours worked. Additional policies to consider include policies outlining the rules for travel, sleep time, remote work, and meal and rest breaks.

Policies should also directly prohibit off-the-clock work and advise employees that no supervisor can instruct them to work off-the-clock. If employers wish to restrict overtime, then they should include in their policies the conditions under which employees may work overtime (e.g., permission from a supervisor). However, if an employee violates the policy and works overtime anyway, the employer still must pay for the overtime, but may treat the violation as a disciplinary issue. Lastly, employers should also ensure that pay issues are covered under standalone employee complaint and investigation procedures and prohibit retaliation.

### Utilize an Electronic Timekeeping System

If they do not already have an electronic timekeeping system, as a best practice, home care companies should implement a system that employees can access remotely from their cars and patient homes so that they can accurately record their start and stop times each day. At least one such "point of care" system is already on the market. The timekeeping system should have a time stamp feature so that actual start and stop times are more difficult to manipulate. Employers should also require employees to certify they have accurately reported their time worked and taken all required rest breaks and meal periods. For example, the employee's timesheet may include language acknowledging that they have recorded all time worked, along with a space for the employee's signature, certifying their time worked. Employers should provide a mechanism for employees to report errors, including employee signatures to verify corrections, and a method to pay any extra compensation that may be due. Periodic audits of time records to ensure that employees are recording their time properly should be conducted.

<sup>41</sup> 29 C.F.R. § 785.23. See also Final Rule, *supra*, at 60473-75

<sup>42</sup> See 29 C.F.R. § 552.102(a).

<sup>43</sup> See 29 C.F.R. § 552.110.

## Review Your Payroll System

With the implementation of the new DOL regulation, home care employers should also take this opportunity to review the company's payroll system to ensure that overtime is being calculated correctly for non-exempt employees, whether they are paid on an hourly rate, per-visit basis, a day rate, or a salary. Overtime calculation errors are easily made, especially for home care workers paid on a per visit basis or a day rate. Another common overtime calculation error is failure to include bonuses, commissions, or other incentive compensation in the overtime calculation. Such additional compensation must be allocated across all hours worked by the home care employee during the period in which the incentive pay was earned, which effectively increases an employee's regular rate of pay and overtime pay rate. Even if a home care employer has outsourced the payroll function, the payroll company cannot correctly calculate overtime pay if the employer fails to identify and provide information on incentive pay that needs to be included in the overtime calculation.

Employers should also consider transitioning home care workers currently paid semi-monthly to a bi-weekly or weekly payroll in order to simplify the overtime pay calculation. Overtime calculation errors occur more frequently when non-exempt employees are paid semi-monthly because many workweeks—the basis of both minimum wage and overtime compliance—cut across two semi-monthly pay periods.

Home care companies should also ensure their payroll system tests for compliance with the minimum wage—especially for employees paid per visit, per day, or using the salaried fluctuating workweek method. For each workweek, the payroll system should divide all earnings by all hours worked and ensure the result meets or exceeds the applicable federal or state minimum wage.

## Provide Training on Proper Recordkeeping

Home care employers should provide training before the January 1, 2015 transition to reclassified home care workers and their managers regarding the new policies and procedures. Many potential overtime violations can be avoided if both 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. It is essential that managers understand how non-exempt employees should record their time so they may answer any questions the employees have as they learn the new procedure.

## Consider Hiring New Workers

Finally, even under alternative compensation models, some home care companies may still be unable to afford the additional costs of paying travel time and overtime, and thus should consider other ways to control or pass on those costs. Employers may need to hire additional home care workers in order to ensure none works over 40 hours per week. Employers also may need to begin preparing customers for price increases. At the very least, discussion of the financial impact of the final rule should be part of budget planning for 2015.

## CONCLUSION

Although a legal challenge to the final rule is likely, employers should not adopt a “wait and see” approach to compliance with the new regulations. Any legal challenge will be difficult and time-consuming, with uncertain results. Thus, home care employers need to start preparing for the transition now. Reclassifying employees from exempt to non-exempt may seem an easy task, but it is not. 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. Ideally, the employer should have the employees transitioned to a new timekeeping system by July 1, 2014, six months prior to the new regulations taking effect, to allow time to work out any issues with the home care providers not understanding how to record their time properly. If planned properly, employers have multiple options to ensure compliance and control labor costs in a significant way. Although transitioning all of a company's home care aides to non-exempt status may seem daunting, the one thing home care companies should not do is ignore the new regulations, as both the DOL and plaintiffs' attorneys will be watching the industry closely.<sup>44</sup>

<sup>44</sup> This white paper addresses the complete exemption from both minimum wage *and* overtime in 29 U.S.C. § 215(a)(15) 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.” The paper does not address issues related to the separate exemption from overtime only under 29 U.S.C. § 213(b)(21) for “any employee who is employed in domestic service in a household and who resides in such household.” Such “live-in” employees, although they must be paid at least the minimum wage, may continue to be exempt from the FLSA overtime requirements if their duties meet the narrowed definition of companionship services in the final rule (29 C.F.R. § 552.6, discussed above). See DOL Fact Sheet 79B: Live-in Domestic Service Workers Under the Fair Labor Standards Act (“Domestic service workers who reside in the employer's home (and thus are ‘live-in’ domestic service workers) may be exempt from the FLSA's overtime pay requirement.”)



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