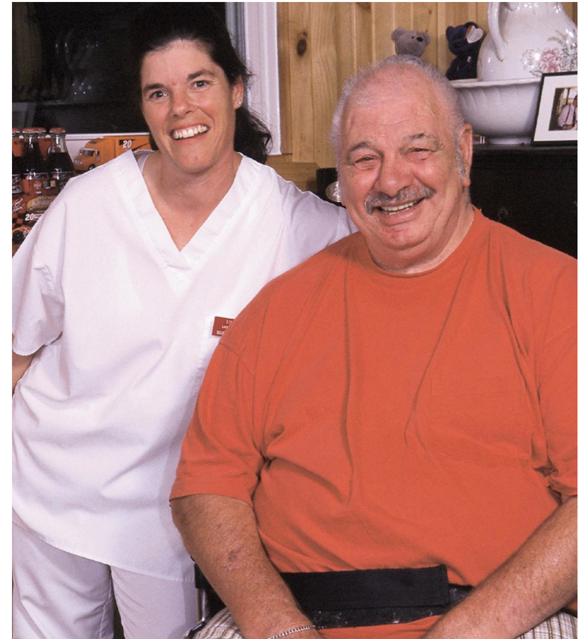
FLSA Facts
Update: October 2015

Understanding the Revised Companionship Exemption



On October 1, 2013, the U.S. Department of Labor (DOL) published its final rule narrowing the "companionship exemption" under the Fair Labor Standards Act (FLSA). As of October 13, 2015, the rule will be in effect, with full enforcement beginning in January 2016. Most home care workers are now guaranteed federal minimum wage and overtime protections. In addition, home care workers are now eligible for compensation when driving between clients, and are protected by federal law when challenging employers in wage and hour disputes.

This fact sheet outlines the primary provisions of the revised regulation. For more detailed answers to questions regarding legal obligations under the revised rule, visit the DOL website at **www.dol.gov/whd/homecare/**

What are the key changes in the companionship exemption?

1) **Third party-employers**, such as home care agencies, can no longer claim exemption from the Fair Labor Standards Act, regardless of the type of assistance their workers provide. This applies even in cases of live-in services, and when the services meet the revised definition of "companionship."

2) **"Companionship services" have been more narrowly defined to mean the provision of "fellowship and protection"** for an elderly person or person with an illness, injury, or disability who requires assistance in caring for him or herself. This includes conversation, reading, games, crafts, and accompanying a client on errands or to social events.

   Under the revised rule, "companionship" can also include "care" as long as it is provided attendant to or in conjunction with "fellowship and protection" and it *does not exceed 20 percent of the total hours worked in a week*. Care in this context means any assistance with Activities of Daily Living (ADL, e.g., bathing, dressing, toileting and preparing meals) and

FLSA Facts is a publication of the **PHI Campaign for Fair Pay (www.PHInational.org/fairpay)**, which is working to ensure successful implementation of the revised rule extending minimum wage and overtime protections to home care workers.

Instrumental Activities of Daily Living (IADL, e.g., paying bills, accompanying clients to doctor's appointments, shopping).

When does the revised rule go into effect?

The revised rule goes into effect on October 13, 2015; however, the U.S. Department of Labor will not begin full enforcement until January 1, 2016.

Who is newly covered by the Fair Labor Standards Act?

1) **All workers employed by third party employers** such as home care agencies —or workers jointly employed by a third party and a consumer—will now be covered.

2) Any worker employed directly by a household is also covered if their employment meets any of the following conditions:
   - More than 20 percent of weekly hours are spent on assistance with ADLs or IADLs
   - Housekeeping is performed for family members other than the client
   - Assistance for the client includes any medically related tasks

When any of the above conditions are met during a given week, all hours worked in that week are subject to the requirements of the FLSA and must be paid at minimum wage, with all hours over 40 paid at time and a half.

Who can claim the companionship exemption under the revised rule?

A householder—the recipient of services, family member, or other individual employer—can claim the exemption if, and only if, the worker she employs provides services that meet the revised definition of companionship: i.e, primarily "fellowship and protection" (defined above). Third party employers cannot claim the companionship exemption under any circumstances.

What are the FLSA rules that now apply to most home care workers?

1) Workers must be paid at least the **federal minimum wage** (or state minimum wage, where it exceeds the federal standard) for the first 40 hours of the workweek. Any hours worked over 40 must be paid at **time and half** (calculated on the worker's base pay rate).

2) Workers must be paid for **travel time** *between* clients, if clients are assigned by a single employer. The travel time requirement does not include time spent commuting at the beginning or end of the day—from the worker's home to the client or from the client to the worker's home.

3) **Live-in caregivers employed by a third party (e.g., a home care agency)** are subject to minimum wage and overtime rules. Employers may exclude up to 8 hours of sleep time from wage and hour calculations if: a) the worker and employer have agreed to this arrangement; b) the worker is given adequate sleeping facilities; and c) the worker's sleep time is generally not interrupted. Uninterrupted break or meal time may also be excluded by agreement.

4) **Live-in caregivers hired directly by a consumer or family** are exempt from the overtime requirement, but must be paid at least the minimum wage for all hours worked (see more on live-in caregivers at **www.dol.gov/whd/regs/compliance/whdfs79b.htm**).

How will this revised rule impact consumer-directed programs?

Consumer or participant-direction programs, operated under many states' Medicaid programs, grant consumers responsibility for certain employment functions, such as hiring and firing, supervising, training, and in some instances setting the wage rate for the home care worker. These programs may also use the service of a third party such as a payroll agent, fiscal intermediary, or an agency. State programs vary widely in terms of the division of functions between the consumer and the third party employers. Despite this variability, there are two likely scenarios for a consumer-directed employment relationship:

1) **The consumer is the sole employer of the home care worker.** In guidance on the revised rule, DOL cites an example where the fiscal intermediary's sole function is to issue a home care worker's paycheck, and all other employment functions, including supervision, negotiating the wage rate, and scheduling the worker are left to the consumer. In this situation, it is likely that the consumer will be considered the sole employer and, thus, will be liable for compliance with FLSA. If the services or supports provided meet the strict criteria for "companionship services," the consumer can claim an exemption to FLSA.

2) **The consumer and a third party are joint-employers.** In this situation, the consumer and a third party, such as a fiscal intermediary, share the employment role with each side responsible for some of the employment functions. The third party employer, in this case, is liable for compliance with FLSA, but the consumer is not. The third party cannot claim an exemption, even if the duties performed by the home care worker meet the definition of "companionship." (See the DOL fact sheet on joint employment: **www.dol.gov/whd/regs/compliance/whdfs79e.htm**.)

States may wish to seek legal guidance on employment liability and the applicability of FLSA protections as it relates specifically to the design and operation of consumer-directed programs in their state. Additional resources, including fact sheets and answers to frequently asked questions, are available at the DOL website (**www.dol.gov/whd/homecare**). The US Department of Health and Human Services will be providing information and guidance to state Medicaid programs as well.

How does the new rule impact family members providing paid services?

Under Medicaid-funded and other publicly funded consumer-directed programs, consumers often choose to employ family members to provide their home care service. When a consumer chooses to hire a family member, then they must follow the rules for minimum wage and overtime for all hours authorized in the "plan of care" approved by the program. If the plan of care calls for more than a 40-hour workweek, and the consumer chooses to rely on a single family caregiver to provide those services, then the caregiver would be entitled to overtime.

However, the revised rule does not turn all care provided by a paid family member into compensated employment. When the family caregiver provides services in addition to the paid hours outlined in the plan of care, the additional hours are considered "informal" unpaid services, outside the employment relationship. The new rule does not limit, nor affect in any way, the number of hours of informal, unpaid care that can be provided by a family caregiver (see more on paid family caregivers at **www.dol.gov/whd/regs/compliance/whdfs79f.htm**).

For more information visit the websites of the PHI Campaign for Fair Pay (**www.companionshipexemption.com**) and the National Employment Law Project (**www.NELP.org**). Or contact PHI Government Affairs staff at 202-888-1972.

The FLSA "companionship exemption" timeline

1938 – The federal Fair Labor Standards Act (FLSA) is enacted to ensure a minimum standard of living for workers through the provision of a minimum wage, overtime pay, and other protections—*but domestic workers are excluded*.

1974 – The FLSA is amended to include domestic employees such as housekeepers, full-time nannies, chauffeurs, and cleaners. However, persons employed as "companions to the elderly or infirm" *remain excluded from the law*.

1975 – The Department of Labor interprets the "companionship exemption" as including all direct-care workers in the home, *even those employed by third parties* such as home care agencies.

2001 – The Clinton DOL finds that *"significant changes in the home care industry" have occurred* and issues a "notice of proposed rulemaking" that would have made important changes to the exemption. The revision process is terminated, however, by the incoming Bush Administration.

2007 – The US Supreme Court, in a case brought by New York home care aide *Evelyn Coke*, upholds the *DOL's authority to define exceptions* to FLSA.

2011 – President Obama announces a Notice of Proposed Rulemaking (NPRM) that, if enacted, will finally extend minimum wage and overtime protections to the vast majority of home care workers.

2013 – After extensive review by the Office of Management and Budget, on October 1, the U.S. Department of Labor publishes the revised companionship rule in the Federal Register.

2015 – A federal district court vacates the rule, but it is upheld on appeal. On October 13, the rule goes into effect.

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