



New Federal Companionship Services Rules: A Guide for Caregivers and Consumers

The U.S. Department of Labor has made significant changes in rules governing how people who provide companionship services are to be paid. While the new rules do not take effect until January 1, 2015, many providers of companionship services are already taking steps toward compliance. The impact of these new rules is further complicated by their interaction with more restrictive state and local rules as well as reimbursement practices under Medicare and Medicaid or through private insurance.

The purpose of this Guide is to summarize the major changes and how they may impact the provision of companionship services. This Guide also provides references to additional sources of information that provide more detailed information.

This guide is for informational purposes and should not be considered legal advice. If you need legal advice, please consult a competent attorney.

Background: Federal Wage and Hour Rules

The nation's fundamental law governing how people are paid in the workplace is the Fair Labor Standards Act (FLSA). The FLSA was enacted in 1938 and has been amended many times. This is the law that established the minimum wage and the requirement to pay overtime pay to most employees who work more than 40 hours in one week. There are many exceptions to the minimum wage and overtime provisions included in the FLSA. The U.S. Department of Labor has the responsibility for issuing and implementing regulations that interpret the FLSA. The law is enforced both by the Department of Labor and through private lawsuits.

In 1974, Congress expanded the FLSA to include domestic service employment. However, it also added new exemptions for particular types of domestic service

employees. One of those exemptions was for employees hired to provide companionship services to individuals who are unable to care for themselves. One of the reasons Congress included this exemption from the FLSA's requirements was a concern that applying the law to workers who provide companionship services would make the cost of those services too expensive for many consumers.

Shortly after the 1974 amendments, the Department of Labor issued regulations that defined companionship services to include the provision of fellowship, care, and protection for individuals who cannot care for their own needs, meaning that workers performing these services would not be regulated by the FLSA's minimum wage and overtime requirements. The regulations also made it clear that this exception applied to caregivers without regard to whether they were employed directly by the individual needing care, by the individual's family, or through an employer in the business of providing companionship service employees.

These interpretations remained unchanged for nearly 40 years.

What Changes Were Made to the Rules?

On October 1, 2013, the Department of Labor published significant revisions to its longstanding rules interpreting the companionship exemption. Two of these changes are especially important and will have a significant impact: the rule's definition of companionship services and the elimination of third party employers' ability to use the companionship exemption. These changes are scheduled to take effect on January 1, 2015.

New Interpretation of Companionship Services

One of the most significant revisions that the Labor Department made was to redefine "companionship services" to include the provision of fellowship and protection, but not care. The new rules now state that an employee cannot be eligible for the companionship exemption if he or she spends more than 20 percent of work time performing services defined as "care." Under the rules, "care" means assisting a person with the activities of daily living (such as dressing, grooming, feeding, toileting, and transferring) as well as instrumental activities of daily living (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care). Companionship services do not include performing household work (work that primarily benefits other members of the household) or medically related services.

Use of Exemption by Employers in the Business of Providing Companionship Services

The second very significant change concerns what kind of employer is eligible to use the companionship exemption. Under prior interpretations, the companionship exemption applied equally without respect to whether the actual employer of the companionship worker was the individual in need of care, his or her family, or another employer, sometimes referred to as a third-party employer, whose business is providing companionship workers. The new rules only allow household or family employers to use the exemption. In other words, any third-party employer or agency in the business of providing companionship workers can no longer use the exemption.

What are the Consequences of the Rules Changes?

The new rule changes mean that many more caregivers will now be covered by the FLSA's regulations. As a practical matter, the most important impact is that these employees will now be entitled to premium pay for all hours worked over 40 in one week. For example, a companion care employee hired at the rate of \$10 per hour who works for 50 hours in one week would be entitled to \$550 in pay ($(\$10 \times 40 \text{ hours}) + (1.5 \times \$10 \times 10 \text{ hours})$). This change creates a disincentive to employ workers for more than 40 hours in a week. The impact of this disincentive will vary considerably depending on the business model of the employer and the states in which it operates. In addition to state and local employment laws, which may have more stringent requirements than federal rules, a state's approach to Medicare reimbursement will also be critically important to determining the impact of the rules changes in a majority of cases.

However, cost is not the only consideration. In addition to the overtime premium, coverage by the FLSA carries with it important paperwork and recordkeeping responsibilities. While most of these requirements are not new, they may be new to employers who have previously utilized the companion care exemption and may not have experience with these detailed requirements, especially as they apply to individuals who work in a client's home where monitoring time worked may be more difficult.

Over the next few pages, this Guide provides a summary of the FLSA's most important recordkeeping requirements and provides a few examples of how the rule changes may impact particular types of companionship arrangements and considerations with which employers and consumers of companionship services should be aware.

What Are the Most Important Recordkeeping Requirements?

Once an employee is covered by the FLSA, the employer has the responsibility to accurately track the hours that employee works to ensure that he or she is properly compensated. Employees providing companionship typically work in a client's home and not in an office, presenting particular challenges for employers responsible for accurately calculating hours worked. Employers will want to be sure that they understand how the federal rules classify break and meal time, sleep time, and travel time to ensure that they accurately account for all work time that must be paid.

Employers are also reminded that state and local rules can be more stringent than federal rules. Consequently, it is very important that employers understand both the federal rules and any rules that apply in the states and localities in which they operate.

Break Time and Meal Time

The federal rules generally require that time that employees take for short breaks must be paid. However, employers are generally allowed to treat meal time as unpaid. In order for an employer to exclude meal time, the employee must be completely excused from duties. If an employee on meal time is interrupted and called back to duty, this can have the effect of treating the entire time as working time. Another issue that frequently raises questions is the type of restrictions the employer may put on the employee during meal time. Generally, the employer may place some restrictions on the employee (such as remaining on the premises). However, the more restrictions the employer puts on the employee, the more likely the meal time will be considered working time.

Sleep Time

If an employee is on duty for less than 24 hours, then the federal rules do not permit any deduction for time spent sleeping. If an employee is on duty 24 hours or

more, an employer may agree with an employee to exclude up to 8 hours as sleep time provided certain conditions are met. One of the conditions in order to exclude 8 hours of sleeping time is that the time spent sleeping usually be uninterrupted. Additional rules address when an employee who is interrupted must be paid. Importantly, if an employee does not get 5 hours of uninterrupted sleep time then all of the time for that sleeping period may be treated as working time.

If the employee resides on the premises permanently or for extended periods of time (such as a regular schedule from Monday morning through Friday afternoon) other rules come into play. Because the regulations acknowledge that employees living with a client will have some time free from duties and able to engage in “normal pursuits” (including eating, sleeping, entertaining, and off-premises activities), the rules allow the employer and employee to reach an agreement on which time is working time.

Travel Time

Federal rules generally do not treat normal commuting time as working time that must be paid. However, time spent traveling after beginning the work day must be considered working time. In other words, a home care worker who drives to a client’s home to report to work need not be paid for that time. However, once starting his or her work day any additional travel, such as driving to another client’s home, is considered paid time until the end of the working day. In addition, there are rules that can convert even a normal commute into working time if the employee spends time at home working before or after his or her shift.

What are Some Specific Examples of How the New Rules May Impact Companionship Services?

Because the FLSA’s overtime requirements will apply to most companionship service employees after January 1, 2015, there will be a significant financial disincentive to employ workers for more than 40 hours in a week. In some states this will be even more complicated by rules that require payment of overtime for working in excess of 8 hours in one day.

The new wage mandates must also be considered in conjunction with reimbursement rates that many times simply do not contemplate premium pay for

overtime or may not account for employee travel time. The following are some specific examples of how the rules may impact specific situations.

Continuity of Care Threatened

For many individuals who need companionship services, it is critically important that the caregivers be well known, trusted, and that there be as few people as possible performing companionship services. This is especially true for individuals with conditions such as dementia, who may not respond well when caregivers do not appear familiar. This is often also true for individuals who need assistance with very personal tasks such as bathing or toileting and prefer the assistance of a known and trusted individual.

The new rules mean that the cost of care will increase significantly if employees work more than 40 hours in a week creating an incentive to limit employees to no more than 40 hours of weekly work. This means that an individual needing care for 100 hours a week will now likely require three caregivers instead of two. Someone needing constant care would now require five caregivers if none were to work more than 40 hours in a week. An individual needing care 10 hours a day during the workweek would now likely need two caregivers instead of one.

Of course, there will be some individuals willing to pay the extra amount representing overtime, but this cost will likely be prohibitive for most. In addition to raising serious continuity of care issues for those needing services, employees are likely to see shorter shifts and ultimately smaller paychecks as a result of the rule.

Wage Mandate May Exceed Medicaid Reimbursement Rate

A large number of individuals in need of companionship and other home care services receive needed services through a state Medicaid waiver program. These programs establish the maximum rate that the Medicaid program will pay for certain services. These rates vary considerably among states. It is common for states to pay an hourly rate for home care services, but switch to a day rate when shifts are longer than a set limit, such as 10 or 12 hours. For example, a state may provide reimbursement at the rate of \$12 per hour, but for shifts longer than 10 hours provide a reimbursement at the day rate of \$125. When governed by FLSA overtime regulations, an employee earning \$12 per hour would exceed the reimbursement rate by working a 12 hour shift. An employee earning the federal

minimum wage of \$7.25 per hour would exceed the reimbursement rate after a 14 hour shift. Under such a model, there would be simply no way that the reimbursement will accommodate a 16 hour or a 24 hour shift.

Many companionship service models that utilize longer shifts will need to be re-examined in light of the new rules. If reimbursement rates are not significantly increased, providers will need to re-evaluate whether these types of services can continue to be offered.

Travel Time May Decrease Full-Time Companionship Jobs to Part-Time

As described above, once the workday starts an employee must be compensated for travel time between client locations. If travel time is not reimbursable through a program such as Medicaid, then employers will have an incentive to assign employees to fewer clients. For example, today an employee may work with one client for four hours in the morning and drive an hour to another client's home and work for four more hours. If the FLSA's rules are applied to this situation, the employer would be required to pay for five hours of overtime premium pay per week. This creates an incentive for the employer to assign each client to a separate, part-time caregiver.

What Are the Best Practices That Employers Should Be Considering Now?

Because the new rule will impact every situation differently, it is important that providers of companionship services carefully consider just how the new rules are likely to impact the way in which their business is conducted. For some organizations, who are organized primarily in states that already apply state wage and hour rules to those providing companionship services, there may be comparatively little impact. However, for most employers the impact is likely to be more significant. Specific steps that employers may wish to take include:

Ensuring that payroll and recordkeeping systems are able to accurately track and record hours worked by companion care workers and that employees are properly trained in using these systems;

Considering changes to employment policies to ensure, as so far as possible, effective management of problems caused by conversion of commuting time, meal time, or sleep time into working time; and

Exploring whether there are changes in the employer's business model that may be necessary to ensure compliance, such as hiring more employees, reducing hours, or restricting certain services.

What Are Some Consequences if an Individual or Family Becomes the Employer?

If an individual who needs companionship services or his or her family is considered an employer of the caregiver, there are several significant consequences. First, the family or employee will be responsible for compliance with all applicable federal, state, and local employment laws. This includes properly keeping records of hours worked and calculating accurate pay. An individual or family employer would also be responsible for complying ensuring employment eligibility under immigration law and compiling with tax laws, such as properly withholding and submitting payroll and income tax to the Internal Revenue Service. In addition, compliance with state laws including workers compensation and disability insurance will also be the responsibility of the family or individual in need of care. Homeowners insurance policies should also be reviewed and may need to be supplemented to include additional coverage for domestic service workers.

If an individual or family were willing to assume all of these responsibilities then it is possible that the family, as an employer, could utilize the companionship exemption and be relieved of complying with the FLSA's requirements. However, the family would need to constantly monitor the employee to ensure that he or she spends at least 80 percent of working time providing fellowship or protection and not performing care because, as discussed above, the new rules do not allow the exemption to be used where the employee spends more than 20 percent of his or her time assisting with activities of daily living or instrumental activities of daily living.

Are There Additional Resources Available to Help Understand the New Regulations?

The U.S. Department of Labor has published many resources related to compliance with the FLSA and the new companionship services regulations. The following are some of the more helpful resources that are available on-line.

Companionship Services Exemption Fact Sheet:

<http://www.dol.gov/whd/regs/compliance/whdfs79a.pdf>.

Companionship Services Frequently Asked Questions:

<http://www.dol.gov/whd/flsa/companionNPRM-FAQ.htm>.

Labor Department web site focused on home care:

<http://www.dol.gov/whd/homecare/>.

Live-In Domestic Service Workers Fact Sheet:

<http://www.dol.gov/whd/regs/compliance/whdfs79b.pdf>.

Labor Department “Administrator’s Interpretation” on the FLSA and Shared Living Arrangements:

http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_1.pdf

FLSA Recordkeeping Fact Sheet:

<http://www.dol.gov/whd/regs/compliance/whdfs21.pdf>.

Domestic Service Employment and Hours Worked Fact Sheet:

<http://www.dol.gov/whd/regs/compliance/whdfs79d.pdf>.

To read the entire federal rule and the Labor Department’s justification and analysis, see the official notice published in the Federal Register at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-10-01/pdf/2013-22799.pdf>.