# The Impact of Recent Court Decisions Construing the Labor Department's Revised Companionship Services Exemption

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In 2013, the U.S. Department of Labor finalized revisions to the rules governing how employers pay people who provide companionship services. The new rules were scheduled to take effect on January 1, 2015. Because major provisions of the new rules would dramatically impact our industry, threaten the quality and continuity of care for our clients, and are inconsistent with federal law, the Home Care Association of America challenged these revisions in federal court. The federal district court for the District of Columbia issued two separate opinions agreeing with our lawsuit and vacating key provisions of the rule. The Department of Labor appealed these decisions to the U.S. Court of Appeals for the District of Columbia Circuit.

On August 21, 2015, the appeals court overturned the district court decision, finding that the revisions to the regulations were lawful. The court's decision goes into effect as of October 13, 2015.

Unfortunately, there is a lot of confusion regarding the effect of the court's rulings. This paper provides background information about the Labor Department's attempt to change its rules, the different court opinions, and the immediate impact on the home care community.

*This material 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 narrower definition of companionship services and a new restriction preventing the use of the exemption by employers in the business of providing companionship service workers. These changes were scheduled to take effect on January 1, 2015.

### Definition of "Companionship Services"

One of the most significant revisions that the Labor Department has made to the regulations is redefining "companionship services" to include the provision of fellowship and protection, but not care. Under this new definition employers will not be able to use the companionship exemption for any employee who spends more than 20 percent of work time performing services defined as "care." Under the revisions, "care" would include 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).

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

The second very significant change to the regulations concerns what kind of employer can 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, who is in the business of providing companionship workers. The Labor Department's revised 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 will not be able to use the exemption.

### Changes Include Other Modest Revisions

The Labor Department also made relatively minor adjustments to the remainder of the rules governing domestic service workers. For example, the Labor Department changed the recordkeeping requirements for employers of certain employees that meet DOL's definition of live-in domestic employees by requiring that they keep accurate records showing the exact number of hours worked.

## What Are the Practical Impacts of the Revised Rules?

The primary impact of the new rules is that many more caregivers will be covered by the FLSA's regulations. This means that most companion care workers will 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 x 40 hours) + (1.5 x $10 x 10 hours). This change creates a disincentive to employ workers for more than 40 hours in a week. The impact of this disincentive varies 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 Medicaid reimbursement will also be critically important to determining the impact of the rules changes should they go into effect.

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.

## What Have the Federal Courts Said About the Regulations?

A federal law called the Administrative Procedure Act (APA) sets the framework for the procedures that an agency must use in adopting a new regulation or revising an existing regulation. The APA also creates a process by which agency

rules can be challenged in court. HCAOA and its partners filed a lawsuit under the APA arguing that two provisions of the revisions were contrary to the FLSA and were arbitrary, capricious, and an abuse of discretion. We asked that the court vacate these two provisions and that the regulations that had been in place for 40 years remain in place. Our lawsuit was filed in federal district court for the District of Columbia and was assigned to Judge Richard J. Leon.

Judge Leon issued two separate and complementary opinions addressing our challenge. In the first opinion, the court ruled that the provision of the Labor Department's revision that sought to prohibit third-party employers from utilizing the companionship services exemption was unlawful. A second opinion also found that the Labor Department's re-write of the definition of "companionship services" was unlawful. Judge Leon vacated both provisions, preventing them from taking effect.

The Labor Department appealed these decisions to the D.C. Circuit Court of Appeals. On August 21, 2015, the D.C. Circuit issued a decision overturning Judge Leon's opinions. According to the D.C. Circuit, the FLSA gives the Department of Labor sufficient authority to prevent third-party employers from utilizing the companionship services exemption. The D.C. Circuit did not substantively address the Labor Department's new definition of "companionship services," instead finding that since third-party employers cannot utilize the exemption under the new rules neither HCAOA nor its partners may challenge that provision.

The D.C. Circuit's opinion is set to become effective as soon as October 13, 2015, meaning that the revised regulations will go into effect. While HCAOA is preparing to ask the U.S. Supreme Court to review the D.C. Circuit's decision, our request to stay the decision was denied on October 6, 2015.

## What is the Practical Impact of the Court's Opinions?

The most immediate impact of the D.C. Circuit's decision is that employers will be expected to comply with the new regulations immediately. Third-party employers may not use the companionship services exemption. Other employers that may still be able to use the exemption, such as individuals in need of care, may only

utilize the exemption if they conform to the new definition of "companionship services."

The Department of Labor has announced that it will not enforce the new rule until November 12, 2015. From November 12 through December 31, 2015, the Department "will exercise its prosecutorial discretion in determining whether to bring enforcement actions, with particular consideration given to the extent to which states and other entities have made good faith efforts to bring their home care programs into compliance with the FLSA since the" revisions were finalized.

While the Labor Department may not enforce the new requirements right away, it should be emphasized that private plaintiffs can file a lawsuit challenging employer non-compliance at any time. Consequently, employers should immediately take the necessary steps to comply with the rule.

### What about Recordkeeping Requirements?

Many companies have asked whether how the court's decision impacts recordkeeping requirements. While the new regulations made some change to the particular recordkeeping requirements that apply for live-in domestic service workers, the practical impact that will affect most employers of caregivers is the requirement to accurately track hours worked and overtime hours.

### Must We Track and Pay for Travel Time?

The revised rules did not make any changes to the rules about whether specific time is "compensable." However, this area of the law is complicated and employers who have not previously tracked employee work time and compensable travel time due to the companionship exemption may not be familiar with the law's requirements.

In general, travel from home to work, including a client's home, at the beginning of a day is considered commuting time, which need not be tracked or paid. This is also true of travel from work to home at the end of a workday. However, once a workday begins, all travel time is considered compensable and must be accurately recorded. In other words, if an employee cares for multiple clients throughout his

or her workday, the time spent travelling between client homes is considered working time for purposes of minimum wage and overtime requirements.

Sometimes, care workers will have schedules requiring two or more work assignments interrupted by long periods of non-work time. If the break is long enough and if the employee is truly free to utilize the time as he or she sees fit, the time between assignments may not be compensable time. However, employers are cautioned that the Labor Department takes the position that travel time made between the two work assignments is compensable. Employers unfamiliar with the complicated issues concerning whether particular time must be treated as compensable would be wise to consult counsel.

## Next Steps

HCAOA will continue to challenge the Labor Department's revised regulations by asking the U.S. Supreme Court to overturn the decision issued by the D.C. Circuit. The Supreme Court has discretion as to whether it will hear our appeal and, in practice, it rejects most such requests. We are also asking Congress to amend the FLSA to restore the companionship exemption to its original intended scope.

In the mean time, employers of companion care workers need to come into compliance with the revised regulations.

We will continue to aggressively fight these unlawful rules and we will continue to update you as developments warrant.