



## **Companion Care Exemption**

### **Position**

The Home Care Association of America (HCAOA) opposes the U.S. Department of Labor's proposed rule, issued on December 27, 2011, which seeks to effectively eliminate the exemption for companion services from the Fair Labor Standards Act (FLSA). The HCAOA is concerned that the effective elimination of this exception will increase the cost of and decrease access to non-medical companion home care services for seniors and individuals with disabilities.

The Office of Management and Budget (OMB) recently received a final version of the Labor Department's final rule, which it now has under review. The HCAOA asks that you contact the OMB and express support for the existing companion care services exemption as it applies to private pay home care services.

### **Background**

Congress amended the FLSA in 1974 to include coverage for domestic workers. However, at the same time, it included an exemption for employees providing companionship services for individuals who are unable to care for themselves. Legislative history indicates that Congress included the exemption because it was concerned about the potential costs of companion care to individuals who may be least likely to afford it. Shortly after passing the amendments, the Labor Department promulgated implementing regulations.

In December 2011, the Department proposed significantly narrowing the regulation so that the companion care exemption will only apply if the individual hires the caregiver directly, rather than through a company that specializes in providing home care services. The Department also proposed several other modifications that limit the types of services a caregiver may provide.

### **Impact on Medicaid**

A 21-state sample of Medicaid personal care reimbursement rates showed an average hourly rate of \$15.94 with a low rate of \$10.04. State Medicaid rates are not negotiable and do not take into consideration costs of overtime. Medicaid hourly rates only reimburse for contact time and do not take into account travel time between locations.

Waiver models like “Live In Companion” are dependent on the Companionship Exemption. This model is analogous to foster care except the caregiver lives in the individuals’ home. This model will not be sustainable with loss of exemption nor will you be able to take into consideration the value of room and board for the live in caregiver.

Also, twenty-four (24) hour respite is an important waiver option for families that need to get away for a weekend or week for a break; it holds families together. States typically pay this at a day rate. For example, Arizona basis their day rate on 12 hours times the hourly rate. The provider is not compensated for hours worked over the 12-hour basis. This option is dependent on the exemption.

### **Impact on Access & Cost**

Private pay non-medical home care allows the client to avoid institutionalization, something that is very important to our seniors and individuals with disabilities. In-home private pay care is considerably more cost-effective to society as a whole than institutional care that is usually paid for through Medicaid or some other government program.

Affordability is a primary consideration of the individuals and families the HCAOA members serve. Striking the wrong balance means individuals who cannot afford private pay home care may turn to institutional options which, while less expensive for them, are more costly for society.

In-home non-medical care providers will face increased cost, as they would be required to pay overtime. For example, in 2007 the City of New York estimated that were the exemption not available, companion care costs borne by federal, state, as well as the city government would have increased by \$250 million.<sup>1</sup>

Cost increases will especially impact caregivers who provide periodic 24-hour support or live-in companion care. This requirement, coupled with new burdensome reporting requirements, will force employers to limit caregivers’ hours, creating the need for multiple caregivers to work segmented shifts through the day, thus drastically harming the client’s quality of care. If in-home care becomes economically unfeasible for families, a greater number of those in need of care will be more likely to utilize public programs, such as Medicaid, leaving taxpayers responsible for the cost of caring for the needy.

### **Impact on Quality**

Disqualification of third-party employers for companion care exemption could lower the quality of available in-home care providers. Under current law, in-home care providers who are employed by third-party companies are exempt from the standard minimum wage and overtime requirements. The Labor Department proposes to make companion

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<sup>1</sup> Steven Greenhouse, *Justice to Hear Case on Wages of Home Aides*, THE NEW YORK TIMES, March 25, 2007.  
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care exemptions to the FLSA unavailable for caregivers who are employed by a third party entity and severely modifies the definition of personal care service for caregivers employed by the client or their family. Should this rule be put into place, to keep cost affordable, third party employers will need to limit caregiver hours to 40 in a given week for those who require periodic support. That will mean less continuity of care as a result of more caregivers coming into the home.

As the costs of care rise, clients may be forced away from insured, bonded, licensed in-home care providers, opting instead for unskilled workers in the underground “grey market.” These independent employees often come without background checks or home-care training and are uninsured; leaving families without recourse should a crisis arise. Ultimately, small business non-medical private home care employers, which are labor-intensive and low-margin operations, will be forced to change their business model in ways that do not benefit those they support or their home care staff.

If you would like more information on this matter or have questions please contact Patrick Cooney at [Patrick@federalgrp.com](mailto:Patrick@federalgrp.com) or by calling (202) 347-0034 x101. You may also contact Michael Eastman at [meastman@ntll.com](mailto:meastman@ntll.com) or by calling (202) 629-5625.

*The Home Care Association of America (HCAOA) is the nation's first association for providers of private-pay home care. HCAOA was founded on the principle that quality private duty home care has one model of care and that model is to employ, train, monitor and supervise caregivers, create a plan of care for the client and work toward a safe and secure environment for the person at home.*