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# Home Care Workers Entitled to Minimum Wage and Overtime

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Agencies that provide companionship or live-in care services for the elderly, ill, or disabled will now have to pay their home care workers minimum wage and overtime pay under the Fair Labor Standards Act (FLSA). Reversing a lower court decision, the Court of Appeals for the District of Columbia upheld the U.S. Department of Labor's (DOL's) new regulations that removed those employees from the "domestic service" exemption. The Court also struck down the challenge to the DOL's revised definition of companionship services which now places a duty restriction on workers who may be considered exempt.

## **Extension of FLSA Protections Is Reasonable**

For years, individuals who provide companionship or live-in care services were exempt from the minimum wage and overtime rules under the FLSA, even if those individuals were employed by a third party. In 2013, however, the DOL reversed its prior interpretation of the domestic service exemption, adopting new regulations stating that third-party employers of companionship-services and live-in employees could no longer use the exemption to avoid paying minimum wage and overtime pay to their home care workers. The new regulations also narrowed the definition of companionship services: a worker providing exempt services can spend no more than 20 percent of his or her total hours worked on the provision of care, including meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care.

Before the new rules went into effect, trade associations representing third-party agencies that employ home care workers challenged the DOL's new regulations in court and the district judge declared them invalid. The lower court ruled that the DOL's decision to exclude a class of employees from the exemption because they were employed by a third-party agency contravened the plain terms of the FLSA. The court also threw out the DOL's revised definition of companionship services, with its 20 percent limit on care-related tasks, as contrary to both the text and intent of the statutory exemption.

On August 21, 2015, the Circuit Court of Appeals for the District of Columbia disagreed and upheld the new regulations. The appellate court found that the FLSA exemption did not specifically address the third-party employment question, and therefore, the DOL had the authority to create rules and regulations to fill in the gap.

The court also determined that the DOL's new interpretation was "entirely reasonable." The DOL explained that its change in policy was due to the

change in the market for home health care. In the 1970s, professional care for the elderly and disabled was primarily provided in hospitals and nursing homes so that services in the home were largely that of an “elder sitter” or companion. More recently, however, individuals needing a significant amount of care were now receiving that care in their own homes, provided by professionals employed by third-party agencies rather than by workers hired directly by care recipients or their families. These changes, as well as Congress's intent to bring more workers within the FLSA's protections, convinced the court that the DOL's changed interpretation was reasonable.

### **Potential Adverse Effects of FLSA Coverage Unfounded**

The third-party agencies challenging the DOL's regulations argued that requiring minimum wage and overtime pay for home care workers would raise the cost of their services, making home care less affordable, and creating a “perverse incentive for re-institutionalization of the elderly and disabled.” The DOL countered by pointing to fifteen states where minimum wage and overtime protections already extend to most third-party-employed home care workers and noted that there was no reliable data that these pay protections led to increased institutionalization or a decline in the continuity of care. The DOL also cited the industry's own survey, which indicated that home care agencies operating in those fifteen states had a similar percentage of consumers receiving 24-hour care to those agencies in non-overtime states.

The DOL further argued that the new rules would improve the quality of home care services, thus benefitting consumers, because the revised regulations would result in better qualified employees and lower turnover. It would also reflect the reality that home care workers employed by third-party agencies are professional caregivers, many of whom have training or certifications and whom work for agencies that profit from their employees' services. The appellate court found the DOL's position reasonable, upholding its regulations.

### **No Standing to Challenge Narrowed Definition of Companionship Services**

By ruling that the third-party agencies could not use the domestic services exemption, the court removed the ability of those agencies to use the companionship services definition to exempt home care workers from minimum wage and overtime protections. As a result, the trade associations' members challenging the new, narrowed definition of companionship services would not be directly harmed by the revised definition. Because they would not suffer any injury from the narrowed definition, the challengers lacked standing to oppose the revision, denying the court of jurisdiction to resolve that issue. Consequently, the court ordered that judgment be entered in favor of the DOL.

### **Practical Effect for Home Care Employers**

Pending any appeals, the DOL's new regulations removing the ability of third-party home care agencies to exempt their home care workers from FLSA minimum wage and overtime pay will go into effect. Employers of

home care workers should take steps now to ensure that they comply with the FLSA minimum wage requirement for all hours worked as well as paying an overtime premium for all hours worked over 40 per week. In addition to updating your pay practices, be sure to revise any affected policies and statements in your employee handbook, operational manual, timekeeping procedures, job advertisements, and recruiting materials.

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