



# End of the FLSA 'Companionship'

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In April of 2013, the U.S. Department of Labor (DOL) is scheduled to announce regulations that will almost certainly increase the cost of employing individuals as home care aides who are considered "companions" under the Fair Labor Standards Act ("FLSA"). Currently, employers are not required to pay the federal minimum wage or over- time to such workers when they qualify for the "companionship" exemption under the FLSA. However, the DOL's proposed rules would dramatically limit the exemption. Most significantly, the rules would make the exemption inapplicable to employees employed by third party employers such as home-healthcare agencies. Under the new rule, such organizations would instead be required to pay not less than the federal minimum wage and over- time to employees who they might previously have been treating as exempt.

## THE CURRENT RULE

Since 1974, individuals who are employed in "domestic service employment" to provide "companionship services" to the elderly or infirm have been exempt from the minimum wage and overtime requirements of the FLSA. 29 U.S.C. § 213(a)(15)

- Under the current rule, the following requirements must be satisfied for the ex- emption to apply:
- an employee must perform "companionship services,"
- "incidental" or general household work performed by the employee may not exceed 20 percent of the total weekly hours worked by the employee,
- the work must not be of the type which requires and is performed by nurses, and
- the work must be performed at the aged or infirm individual's private home.

## WHAT DOES IT ALL MEAN?

The proposed regulation would limit the "companionship exemption" to the point of non-existence in any practical sense. The vast majority of employers that currently use the exemption (third party employers) would be required to begin paying the minimum wage and overtime, if they do not already. Moreover, even for families and individuals that would still be able to use the exemption, it is more likely that the exemption would be lost in a significant number of workweeks due to companions' performing services that fall into the expanded "incidental services" category that is subject to the 20 percent cap limitation. All of this means that practically *anyone* who employs these

domestic service companions, including third party employers and families, probably would have higher compensation costs going forward.

Perhaps the last hope for staving off these changes is pending legislation that would block DOL's rule. Arguing that DOL's rule would drive up the cost of in-home care and force families to institutionalize seniors, legislators have proposed bills that would remove the Secretary of Labor's authority to change the exemption. However, given the prevailing gridlock in Congress, employers (other than families and individuals) are probably best served by planning to make the necessary changes to comply with the minimum wage and overtime requirements of the FLSA, rather than counting on a legislative reprieve. Finally, as always, employers should be mindful of any state law requirements that may apply to this area of wage and hour law.

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