

COMPANIONSHIP EXEMPTION: KNOW THE RULES

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Months after its April 2013 target date, the U.S. Labor Department issued its final rule restating the requirements for and limitations upon the “companionship exemption” in the federal Fair Labor Standards Act’s (FLSA’s) Section 13(a) (15). The changes are significant.

THE CURRENT RULE

Since 1974, individuals who are employed in “domestic service employment” to provide “companionship services” to the elderly or people with infirmities have been exempt from the minimum wage and overtime requirements of the FLSA.

“Domestic service employment” refers to services of a household nature the worker performs in or about the private home of the person by whom he or she is employed.

“Companionship services” are currently defined as follows: “Those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services.”

Companionship services do not include services relating to the care of the aged and infirm that “require and are performed by trained personnel, such as a registered or practical nurse.” However, the exemption does permit the

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performance of general household work, such as bed making, so long as this work is incidental to the “fellowship, care, and protection” of the aged or infirm person and does not exceed 20 percent of the total weekly hours worked by the employee. Thus, the incidental household work is permissible, but is subject to the 20 percent cap.

THE CHANGES

Under the final rule, which becomes effective January 2015, third-party employers, such as home-care staffing agencies, will no longer be able to assert the exemption. According to the Department of Labor (DOL), this will be true even when the employee is jointly employed by both the third-party provider and the family or individual receiving the employee’s services.

Beginning January 2015, only the individual, household, or family employing a companionship worker will be able to utilize the exemption.

Another change is that the scope of the phrase “companionship services” is narrowed considerably, and companions are now limited in the amount of incidental “care” services that they can perform each work week. This reflects DOL’s view that “care” services should be secondary to the “fellowship and protection” services that should be the companion worker’s primary focus.

These “care” services include meal preparation, driving, grooming, bathing, and similar activities. Under the final rule, if the companion spends more than 20 percent of his or her total hours performing such incidental “care” services in a given work week, the exemption will be lost for that work week.

HOUSEHOLD WORK RESTRICTED

Another change relates to a companionship worker’s performance of “domestic services” that benefit other members of the household. Under the final rule, the exemption will be lost in any work week in which the companionship worker performs domestic services that are “primarily for the benefit of other members of the household.”

Examples provided by DOL include a companionship worker washing the laundry of other members of the household or cooking meals for the entire household (as opposed to just for the aged or infirmed individual). According to DOL, the exemption would be lost in any work week under either of these scenarios.

Similarly, if the companionship worker spends Monday through Thursday providing fellowship and care to the aged or infirmed individual, but spends Friday exclusively performing housework for the household as a whole, the exemption would be lost for the work week. Determining whether the housework “primarily” (as opposed to “tangentially”) benefits other members of the household is bound to be a difficult, fact-intensive inquiry.

THE BOTTOM LINE

In DOL’s view, the individuals who provide in-home care today are not the type of workers that Congress intended to exempt when it passed the “companionship exemption” in the 1970s. According to DOL, Congress intended to exempt “neighbors performing elder sitting” from the FLSA requirements—not the “professional direct care workers” in today’s world.

The final rule reduces the “companionship” exemption to the point of nonexistence in any practical sense. The vast majority of employers that currently utilize the exemption (third-party employers) are now required to begin paying the minimum wage and overtime.

According to DOL’s estimate, nearly 1.9 million companionship workers will be affected by the changes in the final rule.

Moreover, even for families and individuals that will still be able to utilize the exemption, it is more likely that the exemption will be lost in a significant number of work weeks due to companions’ performing services that fall into the expanded incidental “care” services category that is subject to the 20 percent cap, or due to a companion performing work that is deemed “primarily for the benefit of other members of the household.”

In order to properly treat companionship workers as nonexempt under the FLSA, home care staffing agencies

and other third-party employers will need new compensation plans, timekeeping systems, and other related policies. Employers will also need to ensure that companionship workers and their managers are properly trained on the new policies.

[Ted's article first appeared on Provider Magazine's website.](#)