



Home Companionship Industry Will Feel FLSA Exemption Fix

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Although announced in the latter part of 2013, the U.S. Department of Labor rule changes affecting the companionship exemption in the Fair Labor Standards Act are finally set to take effect on Jan. 1, 2015. The changes will significantly impact the home companionship industry, which currently employs about 2 million people. With the rule change imminent, home companion companies only have a few weeks remaining to ensure compliance.

The Current Rule

Since 1974, and until the end of 2014, individuals who are employed in domestic service employment and provide companionship services to the elderly or those who have infirmities are exempt from the minimum wage and overtime requirements of the FLSA.

Domestic service employment refers to household services the companion performs in or about the private home of the person by whom he or she is employed.

Currently, companionship services means services for the care, fellowship and protection of persons who, because of age or infirmity, cannot care for themselves. Such services include household work such as meal preparation, bed making, clothes washing and other similar personal services.

General household work does not eliminate the exemption, 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 companion.

Medical-related services, or other care provided to the elderly or infirm by trained personnel such as a registered or practical nurse, does not qualify as companionship services.

The New Rule

When the new rule takes effect on Jan. 1, 2015, third-party companionship providers, such as home companion staffing companies, will no longer be able to assert the exemption. Nor will families that employ a companion jointly with a third-party provider. Only an individual, household or family that directly employs a companion may qualify for the exemption.

Beyond severely limiting those who may rely on the exemption, the new rule also significantly narrows the definition of companionship services. Under the new rule, the term companionship

narrows the definition of companionship services. Under the new rule, the term companionship services is stated as the provision of fellowship and protection for an elderly person or person with an illness, injury or disability who requires assistance in caring for himself or herself. It also includes the provision of the term care, so long as it is incidental to the provision of fellowship and protection, and does not exceed 20 percent of the total hours worked during the work week.

Fellowship is defined as engaging the person in social, physical and mental activities.

Protection is defined as being present with the person in their home or accompanying the person away from the home in order to monitor his or her safety and well-being.

Care is defined as assistance with the activities of daily living which enable a person to live independently at home. The DOL offers several examples of care, including dressing, grooming, feeding, bathing, toileting, performing light housework, driving, preparing meals, arranging for medical care, assisting with the taking of medication and managing of finances.

With respect to housework, the exemption only applies if it benefits the elderly or infirm person receiving the companionship services. That is, if the housework, such as preparing meals or doing laundry, primarily benefits other members of the household, the exemption is lost for that work week. Two examples cited by the DOL involve doing laundry or cooking meals for the entire family. What constitutes a primary benefit, as opposed to a tangential or incidental benefit to other members of the household will be fact-intensive and is the likely source of future litigation.

Divergent Views

The net effect of the rule change is to eviscerate the companionship exemption. Home companion companies may no longer rely on the exemption and will be required to pay their companion employees for overtime. Families may choose to hire a home companion directly, but they may only rely on the exemption within the confines of the much more narrow definition of companionship services. It will be difficult for families to compartmentalize, not to mention monitor and document, the home companion's work in a way that leaves the exemption available to them. An elderly individual will be in far worse position than a home companion company to defend, much less prevail against, a wage-and-hour claim or lawsuit.

Proponents of the rule change contend that the exemption was never intended to apply to employees of third-party home companion companies. Rather, they argue that the exemption was intended to apply to a much more limited class of individuals, such as friends and neighbors who care for an elderly or infirm person.

Moreover, the DOL maintains that the home companionship industry has traditionally experienced high turnover due to comparatively low wages for long work hours. Eliminating the ability of these companies to rely on the exemption, the DOL argues, will help to stabilize the workforce in this industry.

Critics of the rule change, however, contend that eliminating the exemption will increase costs, which will be passed along to the consumer. Conversely, to avoid increased labor costs, some home companion companies will reduce work hours, which in turn can affect the quality of service provided. For example, if a home companion company reduces work hours to avoid any overtime obligation, it may require sending more than one companion to a client's home. This lack of continuity and disruption of routine can be particularly stressful or disconcerting to an elderly person.

Many of these critics predict an even bleaker outcome, suggesting that the increased costs will drive many home companion companies out of business, as consumers seek to hire help directly or, alternatively, forego independent living and move into a nursing home. Those who directly hire home companions will be far less equipped than home companion companies to conduct background checks, monitor and control the quality of the services provided, and properly document and record hours worked and duties performed.

To Enforce or Not To Enforce

The DOL has announced that, although the rule takes effect on Jan. 1, 2015, it will not begin bringing enforcement actions until June 30, 2015. Then, for the six months thereafter, the DOL will exercise prosecutorial discretion on a case-by-case basis and first determine whether the employer made a good faith effort to comply with the new rule.

This has led many to conclude that there is no need to comply with the new rule by the end of 2014. However, this is incorrect, as the lack of direct DOL enforcement will not prevent a home companion from bringing a private cause of action as of Jan. 1, 2014. In addition, when the DOL attempts to determine whether a good faith effort has been made to comply with the rule, it will most certainly look at when an employer began compliance.

With only a few weeks remaining before the new rule takes effect, it is imperative that home companion providers prepare and implement new compensation plans for its companion employees, and in particular consider ways to save costs while remaining compliant. For example, a fluctuating work week is one potentially viable alternative compensation arrangement. In addition, new timekeeping systems and payroll processes should be in place and ready to go on Jan. 1, 2015. Finally, managers and companions must be aware of the rule changes and their respective responsibilities.

Conclusion

As noted, approximately 2 million people are employed in the home companion industry. Moreover, the federal government estimates that 6 million Americans over age 65 depend on some form of daily care in order to live at home rather than in a nursing facility. Given these numbers, and the substantive revisions to the exemption, the home companionship industry is about to experience significant change. Employment counsel will be busy guiding clients through this new compliance

minefield, litigating the grey areas of the rule, and potentially assisting individuals who directly engage home companions.

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