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PROPOSED RULE WOULD MAKE MOST HOME HEALTHCARE WORKERS NON-EXEMPT . . . AND DEADLINE TO COMMENT IS MONDAY

By Falon Wrigley
St. Louis Office

Monday, March 12, is the deadline to comment on the Obama Administration's **proposed rule** that would amend the companionship and live-in worker regulations under the Fair Labor Standards Act. Under the current regulations, companions for the aged and infirm are exempt from the FLSA's minimum wage and overtime requirements, and live-in domestic workers are exempt from the FLSA overtime rules. The thrust of the proposed changes to the regulations is to

- More clearly define the tasks that may be performed by an exempt companion; and
- Limit the companionship exemption to companions employed only by the family or households using the services. That is, third party employers, such as in-home-care staffing agencies, could not claim the exemption even if the employee was jointly employed by the third party and the family or household.

According to the U.S. Department of Labor, "the workers that are employed by in-home care staffing agencies are not the workers that Congress envisioned when it enacted the companionship exemption (i.e., neighbors performing elder sitting), but instead are professional caregivers entitled to FLSA protections." However, a report conducted by the home care industry entitled *Economic Impact of Eliminating the FLSA Exemption for Companionship Services* concluded that the DOL's proposal to eliminate the longstanding overtime exemptions will significantly raise the cost of care for seniors and negatively affect a growing sector of the economy responsible for creating thousands of new jobs.

Bills in Congress that attempted to significantly limit or eliminate the "companionship" exemption under Section 13(a)(15) were stalled (S. 1273 and H.R. 2341), and it is believed that this was the reason for the proposed changes to the regulations.

The Current Rule

A provision of the FLSA exempts from the statute's minimum wage and maximum hours rules "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor])."

A DOL regulation says that this statutory exemption includes those "companionship" workers who "are employed by an employer or agency other than the family or household using their services." In 2007, in *Long Island Care at Home v. Coke*, the Supreme Court was asked whether, in light of the statute's text and history, and a different (apparently conflicting) prior regulation, the Department's regulation was valid and binding. A unanimous court concluded that it was.

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March 9, 2012

Proposed Changes – The Why and How

In the 35 years since this special exemption was defined, the healthcare industry has undergone radical changes. Roles once performed by family or neighbors are now performed by strangers employed as personal care workers – and business is booming. In fact, according to **recent statistics**, the number of Medicare-certified home care agencies expanded from approximately 2,000 in 1974 to more than 9,000 in 2007, and for-profit agencies increased from approximately 50 in 1975 to nearly 5,000 in 2006. As the baby boomer population advances into old age, the pace of these changes will only accelerate. Coupling the boomer generation's huge population with its disinclination for nursing homes, the demand for long-term health and personal care **is expected to increase** by more than 100 percent, and demand for “direct care workers” – including personal companions – is expected to increase by as much as 242 percent by 2050.

So, what does the new rule propose?

- 1) **First, and most importantly, it limits the exemption to *only* those individuals employed exclusively by a family or household. If a third-party employer is involved, even as a joint employer, the worker must be paid minimum wage and overtime.**

Key findings of the industry report on the effect of this change are as follows:

- The average amount of overtime worked by companion care employees in these franchise agencies is three times greater than DOL's estimate.
- More than 4,000 franchise businesses and nearly 340,000 companion care workers in this sector may be negatively affected by the proposed rule changes if enacted.
- The DOL's analysis understates other costs, such as not considering additional management costs for adding staff to avoid the cost of paying overtime.
- The impact of price increases on customers, to cover additional overtime costs, was greatly underestimated.
- Companion care agencies expect that 23 percent of their clients will be forced to seek institutional care or “underground services” from unlicensed providers.
- Many seniors and others who receive companion care services may be negatively affected due to the higher fees and interruptions to the continuity of their care.

- 2) **Even with exempt workers directly employed by families, the rule distinguishes between “exempt” and “non-exempt” duties, and provides that only “companionship services” and tasks incidental to those services are exempt.** Under the proposed rule, “companionship duties” are limited to those involving “fellowship” and “protection.” These duties are envisioned under the proposed rule as card playing, walks in the park and talks over hot cocoa. Where a companion provides personal services, such as dressing, grooming and driving to and from appointments, the exemption from minimum wage and overtime will apply only if those services are incidental (meaning comprising less than 20% of the worker's time in a given week) and performed “attendant to and in conjunction with” recognized companionship services.

- Under the proposed rule, general household work is *not* considered a “companionship duty.” Thus, if an elderly man spills some of the aforementioned hot cocoa on his shirt and counter, a companion is allowed to clean up the mess and toss the shirt in the laundry. However, general cleaning, cooking or laundry services that are not directly tied to companionship and/or benefit the family as a whole are not exempt activities. Performance of these services destroys the exemption - regardless of whether the companion is employed by an agency *or* a private household.

March 9, 2012

How do I comment?

The Wage and Hour Division of the Department of Labor, which was to accept comments on the proposed rule until February 27, recently extended the comment period to Monday, March 12, 2012, in response to requests to allow additional public comment. To comment on line, go www.regulations.gov. "Snail mail" is also accepted and should go to Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3510, 200 Constitution Ave., N.W., Washington, D.C. 20210.

The DOL requests that commenters not send multiple copies of the same comment, or one online and one regular-mail version of the same comment.

If you would like assistance with an FLSA-related issue, please contact any member of Constangy's **Wage Hour Practice Group**, or the Constangy attorney of your choice.

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