



Legal Alert: U.S. Department of Labor Does an About-Face on Overtime and Minimum Pay Rates for Home Care Workers Employed By Third Party Agencies

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Executive Summary: On Thursday, December 15, 2011, The U.S. Department of Labor ("DOL"), announced plans to revise the companionship exemptions under the federal Fair Labor Standards Act ("FLSA"). The revisions would significantly change the way many home care agencies currently do business, exposing them to liability for overtime claims at one and one-half the worker's "regular rate of pay," and claims for failure to pay wages for all hours worked (including intra-day travel time, etc.) at the federal minimum wage rate. Although some states already require overtime pay and minimum wage rates, requirements vary significantly across the country. Agencies with operations in states without overtime requirements, or with overtime based on a state minimum wage rate instead of the employee's regular rate of pay, should immediately review their policies and procedures and consider ways to adapt them. **Ford & Harrison is preparing a "white paper" on the proposed changes, and the actions home care agencies can take to minimize the risk of overtime class actions. If you would like a copy of this white paper when issued, please email us at szweig@fordharrison.com.**

Background: The DOL's proposed revisions to the companionship exemption are a dramatic change from the position it took before the U.S. Supreme Court in *Coke v. Long Island Care at Home, Ltd.* (2007), where it said that the companionship exemption applied to home care workers employed by third party agencies who were assigned to patients in their homes. Recognizing this about-face, the DOL concedes in the preamble to the proposed rule: "upon further consideration of the purposes and objectives behind the 1974 Amendments (to the FLSA) the Department is no longer convinced that our prior reading is the best one...."

Highlights: The DOL's proposed revisions would have the following effect:

- Home care agencies would have to pay at least the federal minimum wage, and overtime at a home care worker's regular rate of pay for all hours worked over 40 hours in a work week, and the companionship exemption would no longer apply to their workers even if jointly employed with an individual, family or household.
- Only true companions employed by an individual, family or household may

continue to qualify for the companionship exemption, and if the companion performs general household work or medically-related duties, with limited exceptions, the exemption is lost.

Contact Person:

Although the DOL's Notice of Proposed Rulemaking ("NPRM") has not been officially published in the Federal Register, a version approved by the Office of Management and Budget is available [here](#). If you have any questions regarding this Alert, please contact Stephen Zweig at szweig@fordharrison.com, the Managing Partner of our New York City office, who has extensive experience representing home care agencies in overtime class actions.