

LABOR LAW CHANGES FOR HOME CARE WORKERS

Effective January 2015

On January 1, 2015, new regulations take effect from the Department of Labor's Wage and Hour Division regarding the application of the Fair Labor Standards Act (FLSA) to home care workers. The final rule essentially eliminates the minimum wage and overtime exemption for home care workers employed by an agency or other third party and more narrowly defines "companionship services" for purposes of the exemption. Many "direct" home care workers (i.e., those workers directly employed by individuals, families, and households as opposed to an agency or third party) were previously excluded from minimum wage and overtime protections under the FLSA. Previously exempt workers included those providing "companionship services" to persons with disabilities or elderly persons. Although the full impact and related nuances of the new regulations remain to be seen, the change will require analysis of employment arrangements, compensation structures, and type of duties undertaken by home care workers.

Generally, domestic service workers are either employed by a third party or directly by individuals, families, and households. As a result of the new regulations, workers employed by a third party employer such as a home health care agency are no longer exempt from minimum wage and overtime requirements. As of January 1, 2015, only individuals, families, and households may claim the exemption for a home care worker providing "companionship services" if certain more limited *duties* restrictions are met.

Under the old rule, the "companionship services" exemption applied to all home care workers who provided "fellowship, care, and protection." The new rule limits the exemption to "fellowship" and "protection." Although what constitutes these activities is nuanced, "fellowship" generally means to engage the person receiving services in social, physical, and mental activities. "Protection" generally means to monitor a person's safety and well-being either at home or outside the home. Examples of protection include conversation, reading, playing games as well as accompanying a person on walks, errands, or to appointments.

Activities that constitute "care" relate to both the activities of daily living (i.e., dressing, feeding, bathing, toileting, and transferring, etc.) and instrumental activities of daily living, which are tasks that allow for independent living such as preparing food, driving, or managing finances. Activities constituting care must be limited to no more than 20% of a direct home care worker's time during a workweek. Otherwise, the direct home care worker is not providing companionship services. Under the new rule, if care activities constitute more than 20% of hours worked, then the companionship services exemption does not apply and the direct home care worker is entitled to minimum wage and overtime.



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In light of the new parameters, prospective employment situations should take the rules into account and existing arrangements may also need to be revisited. These analyses may be further complicated in arrangements involving live-in domestic service employees, who are required to be paid minimum wage, but are not necessarily entitled to overtime unless employed by a third party. Additionally, if a direct home care employee is currently paid a salary, as opposed to an hourly fee, compensation should correlate to minimum wage and overtime requirements associated with the breakdown of hours and duties. For instance, if a home care worker not employed by an agency or other third party usually works 45 hours a week, do those hours mainly involve activities constituting fellowship and protection, or do care activities largely dominate the home care worker's time? Timesheets may need to be kept and court orders authorizing and directing payments to home care workers may need to be read in light of the new rules to ensure compliance.

We encourage you to review your home care worker pay practices and recordkeeping practices with your attorney, to ensure that you will be in compliance with the new federal law as well as any state laws that may be applicable to home care workers in your state. Please contact your Northern Trust relationship manager if we can assist your further.

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