

Federal minimum wage & overtime protections for home care workers

The new Department of Labor home care rules significantly narrow the “companionship exemption” that has long excluded home care workers from basic federal wage and hour protections. The reforms correct a decades-old injustice that has fueled poverty wages and destabilized an increasingly vital industry.

On September 17, 2013, the U.S. Department of Labor issued final regulations applying the federal minimum wage and overtime protections of the Fair Labor Standards Act to most of the two-million-plus home care workers in the United States, and these rules were set to take effect January 1, 2015. On August 21, 2015, following a legal challenge by home care industry leaders, the DC Circuit Court of Appeals upheld the rules, which are expected to go into effect soon, pending any further appeals by the industry. This fact sheet outlines the major regulatory changes and their effects on workers, the industry, and the states.

Brief History of the Companionship Exemption

In 1974, Congress extended the minimum wage and overtime protections of the Fair Labor Standard Act to almost all domestic service workers. At the same time, it created limited exemptions from the law for casual babysitters and companions for the aged or infirm. But Labor Department regulations issued the following year defined “companionship” overly broadly, so that home care workers were included in the companionship exemption. The impact of this overly broad exemption grew as the home care industry, barely in existence four decades ago, ballooned into a major component of our nation’s healthcare system.

President Obama announced proposed rules to reform the Labor Department’s regulations in December 2011, to bring the scope of the exemption in line with Congressional intent and to reflect changes in the industry. The proposed rules received an overwhelmingly supportive response during the Labor Department’s twice-extended open comment period.ⁱ In August 2015, the law was upheld in the U.S. District Court of Appeals.ⁱⁱ The Department of Labor has offered technical assistance to states and employers as they take meaningful steps to implement the rule.ⁱⁱⁱ

Summary of the Final Rules

The revised rules make two main changes to the companionship regulations. First, they clarify and narrow what constitutes exempt “companionship services.” Second, they provide that third-party employers, such as home care agencies, will no longer be able to claim either

the minimum wage or overtime exemption. In the revisions, the Labor Department also strengthened the record-keeping requirements for employers of live-in domestic workers.

A. Narrowing of Companionship Services

The final rules define “companionship services” as the provision of fellowship and protection. Companionship services may also include the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection.^{iv} The rule defines “fellowship” as engaging the person in social, physical, and mental activities, and “protection” as being present with the person in his or her home or to accompany the person outside of the home to monitor his or her safety and well-being. Examples of fellowship and protection include conversation, reading, games, crafts, and accompanying the person on walks, on errands, to appointments, or to social events.

Under the new rules, an exempt companion is also allowed to provide certain care services but only if the care is limited to assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs), and only if the time spent providing such care is no more than 20 percent of the companion’s weekly work hours per care recipient. ADLs include dressing, grooming, feeding, bathing, toileting, and transferring. IADLs include meal preparation, driving, light housework, managing finances, assistance with taking medications, and arranging medical care.

An exempt companion is not allowed to perform domestic services primarily for the benefit of other household members. Medically-related services also fall outside the exemption if the services typically require and are performed by trained personnel, such as registered nurses (RNs), licensed nurses (LNs), or certified nurses’ assistants (CNAs), whether the worker actually has such an occupational title or training.

B. Third-Party Employers Cannot Claim Exemption

Under the final rules, third-party employers of domestic workers, including home care agencies, and any state intermediary entity found to be an employer, will not be able to claim either a minimum wage or overtime exemption.

Who will now be covered by federal minimum wage and overtime protections?

Workers employed by third-party employers, such as home care agencies, will now be covered, whether they are employed solely by the third party or jointly along with the care recipient, recipient’s family member, or private household—no matter what their duties are. This will result in coverage for the roughly 70 percent of the workforce employed by agencies, as well as others employed by state entities or other intermediaries.

Workers who spend more than 20 percent of their weekly work hours per care recipient on ADLs and IADLs will now be covered. Workers who perform any housekeeping primarily for the benefit of other household members or any medically-related services will also be covered. This will result in coverage for much of the remaining home care workforce, including hundreds of thousands of workers employed in Medicaid “Independent Provider” programs.

Who will be exempt?

A worker will be exempt only if he or she is (1) employed solely by a home care recipient, that person's family member, or private household, and (2) meets the new duties test—that is, primarily provides fellowship and protection and spends 20 percent or less of her weekly work hours per care recipient on ADLs and IADLs.

Impact of the reforms

The companionship rules change will benefit workers, the people for whom they care, the industry, and the nation.

Benefit to Home Care Workers

Narrowing the exemption will ensure that most home care workers receive federal minimum wage and overtime protections. Although most home care workers earn the minimum wage or slightly higher per hour for their direct care hours worked, they will now be entitled to the federally-protected right to time-and-a-half of their regular hourly wage when they work over 40 hours in a week; compensation for time spent traveling between clients' homes; and compensation when they wake to care for clients on overnight shifts.

The application of overtime rules, in particular, will encourage employers to spread work more evenly among their workforce, addressing two common industry problems simultaneously: excessive work hours for some, and lack of full-time jobs for workers who want them. While home care workers need and deserve much more, the extension of federal wage and hour protections is a crucial and necessary step towards raising wages and addressing some of the worst conditions in the industry.

State-by-State Impacts

The impact of the federal companionship rules reform will vary from state to state. Home care workers in 29 states (plus Puerto Rico) will have minimum wage and overtime protections for the first time: AL, AK, AR, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MO, MS, NH, NM, NC, OK, OR, RI, SC, TN, TX, UT, VT, VA, WV, and WY.

Home care workers in 13 states (plus the District of Columbia) will be covered by a state minimum wage rate higher than the federal minimum wage: AZ, CA, CO, CT, FL, IL, ME, MA, MI, MO, NV, OH, and WA. Two of these states, CT and FL, will newly cover home care workers at the higher state rate because their laws incorporate federal definitional changes to the exemption.

In six states (plus the District of Columbia), home care workers will have overtime protections for the first time: AZ, CA, NE, ND, OH, and SD.

In all states, workers will gain an added level of protection through coverage under federal laws and access to the Labor Department and federal courts.

Reducing Turnover, Improving Quality of Care

Low wages, insufficient hours, and a lack of reimbursement for travel costs have driven turnover rates among home care workers to between 44 and 65 percent.^v High turnover imposes a significant financial burden to employers in the form of recruitment, retraining,

and administrative costs. High turnover has also generated labor vacancies that prevent the nation from meeting the rapidly growing need for home care. Improving conditions can thus curb industry costs related to turnover while fostering longer job tenure and a more stable workforce, which can improve the quality of care for home care recipients.

Effect of Overtime Rules on High-Hours and Live-in Work

Much of the concern about the reform has focused on the impact of overtime costs, especially for high-hours cases. Nationally, only about 9 percent of home care workers work more than 40 hours a week, and most of those work only slightly more than 40 hours.^{vi} For this relatively small portion of the workforce, employers will have the option of employing an additional worker (or workers) for hours in excess of 40, which may in turn help ensure continuity in the event that one worker becomes sick or has an emergency. Alternatively, employers may choose to pay time-and-a-half when a worker works more than 40 hours in a week for one employer.

It is important to note that home care workers will continue to be subject to federal rules that allow sleeping and on-call time to be unpaid under certain circumstances. Employers of home care workers employed on shifts of 24 hours or more will be allowed to exclude up to eight hours of sleep-time from pay if the worker agrees to the arrangement; is provided with adequate sleeping facilities; and is usually able to get an uninterrupted night's sleep.^{vii} These rules apply to all employees. And individuals and private households that employ home care workers on a live-in basis will be able to continue to claim the overtime exemption for live-in domestic workers, further limiting their costs.

Impact on the Home Care Industry

The rules reform's impact on home care employers should be limited and manageable. Fifteen states have already covered some or all home care workers under their minimum wage and overtime laws,^{viii} while another six and D.C. have provided only minimum wage protections. Employers in these states will not need to make changes. Employers in the uncovered states should be able to contain costs by more evenly balancing work among workers. In fact, most workers are employed part-time, and many would rather work full-time. Employers can divide cases more evenly among workers, limiting the amount of overtime paid to workers and simultaneously creating more full-time employment. Alternatively, employers can choose to absorb the overtime costs for those few who do work more than 40 hours in a week. For-profit chains, which rake in 30 to 40 percent in profits in a \$100 billion industry, should be particularly well-situated to pay their workers minimum wage and overtime.^{ix}

Paid Family Members in Publicly-Funded Programs

Some Medicaid and other publicly-funded home care programs allow recipients to select a family or household member as their paid care provider. The Labor Department has taken the position that, where there is both a familial and employment relationship between the worker and the care recipient, only hours worked within the scope of the employment relationship are covered by the Fair Labor Standards Act. A Labor Department fact sheet explains that the employment relationship is limited by a "plan of care" or other written agreement developed with or by the program, but only if the agreement reasonably defines the hours for which paid care services will be provided and the program does not reduce the number of paid hours in a plan of care because the care provider is a family member. Also,

this interpretation of the rules generally does not apply to relationships that do not involve preexisting family ties.

Impact on Institutionalization Rates

A recent study shows that states with minimum wage and overtime protections for home care workers have comparable rates of institutionalization as states without coverage.^x This research suggests that the remaining states should be similarly capable of making the shift to minimum wage and overtime coverage without major disruptions to their long-term care systems. ⑤

Additional Resources and Contact Information

- [New Federal Protections for Home Care Workers](#)
NELP's webpage with analysis of the rules change, highlighting the state impacts
- [State-by-State Home Care Worker Rights](#)
Home care worker rights, state by state, after the federal companionship rules change
- [Report: Fair Pay for Home Care Workers \(NELP\)](#)
On the rule's history & case for reform
- [U.S. Department of Labor](#)
Website on companionship rules reform
- [PHI Campaign for Fair Pay](#)
Website with data briefs, stories, FAQs, more

For more information, please contact:

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For more information on the companionship rules change, visit:
<http://www.nelp.org/campaign/implementing-home-care-reforms/>

Endnotes

ⁱ Submitted comments can be viewed on the www.regulations.gov Web site, docket ID WHD-2011-0003.

ⁱⁱ HCAA, et al. vs David Weil, et al. Appeal from the United States District Court for the District of Columbia. Argued May 7, 2015. <http://www.dol.gov/whd/homecare/0821appealdecision.pdf>

ⁱⁱⁱ U.S. DOL "Time-Limited Non-Enforcement Policy" webpage accessed on September 30, 2015. http://www.dol.gov/whd/homecare/non-enforcement_policy.htm

^{iv} Application of the Fair Labor Standards Act to Domestic Service; Final Rule, 78 Federal Register 60454 (Oct. 1, 2013)(amending 29 C.F.R. part 552), available at <https://www.federalregister.gov/articles/2013/10/01/2013-22799/application-of-the-fair-labor-standards-act-to-domestic-service>.

^v A survey of home care agency staff in Pennsylvania found a turnover rate of 44% (University of Pittsburgh (2007) The State of the Homecare Industry in Pennsylvania, Prepared for the PA Homecare Association); a review of 13 state and 2 national studies of in-home care for persons with intellectual and developmental disabilities found an average turnover rate of 65% (Hewitt and Larson (2007); a study of agency-employed home care workers in Maine found a turnover rate of 46% (L. Morris (2009) "Quits and Job Changes Among Home Care Workers in Maine," The Gerontologist, 49(5): 635-50).

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- ^{vi} PHI analysis of the U.S. Census Bureau, Current Population Survey (CPS), 2010 Annual Social and Economic (ASEC) Supplement.
- ^{vii} See 29 C.F.R. § 785.20-23. These regulations apply to all workers and will not be changes by the proposed rule change.
- ^{viii} See fact sheet “Which states provide minimum wage and overtime to home care workers” at http://nelp.3cdn.net/6e193991edf8bd0df9_o6m6i28s2.pdf.
- ^{ix} PHI Data Brief, Growing Home Care Industry Can Afford Basic Labor Protections for Workers (January 2015), available at <http://phinational.org/sites/phinational.org/files/flsafacts2-04202015.pdf>
- ^x PHI Data Brief, Institutionalization Rates in States that Extend Minimum Wage and Overtime Protection to Home Care Workers (January 2012), available at <http://phinational.org/sites/phinational.org/files/research-report/institutionalization-data-brief.pdf>.

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