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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# Gutting The Companion-Care Exemption

Law360, New York (January 18, 2012, 1:27 PM ET) -- On the heels of the White House's Dec. 15, 2011, announcement that the U.S. Department of Labor's Wage and Hour Division intends to narrow the companionship and live-in worker regulations under the Fair Labor Standards Act (FLSA), the DOL published its Notice of Proposed Rulemaking on Dec. 27, 2011.

The notice seeks to end the exemption to FLSA overtime and minimum wage requirements for employees who provide companion care to the elderly.

**Current Law**

Congress amended the FLSA in 1974 to extend minimum wage and overtime protections to the vast majority of domestic service workers, including cooks, maids and housekeepers.

In extending these protections to most domestic service workers, Congress simultaneously created narrow exemptions, including for those employed "to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves."

The scope of this companion-care exemption is currently controlled by federal regulations which define "companionship services" as the provision of "fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs."

The exemption does not apply if the companion-care provider either (a) performs more than 20 percent of incidental general household work, e.g., meal preparation, bed making, or (b) performs services which require trained personnel, such as a registered or practical nurse.

**The DOL Seeks to Eliminate the Exemption for 1.59 Million Employees of Third Parties and Significantly Narrow the Exemption With Respect to an Estimated 206,000 Employees of Private Households**

For those companion-care providers employed by third parties — rather than employed directly by a private household – the exemption will be eliminated altogether. The DOL estimates there are currently 1.59 million personal care aides and home health aides currently employed by agencies.

With respect to the estimated 206,000 companion-care providers employed by private households, the exemption will not be eliminated but it will be significantly narrowed. The proposal seeks to achieve this by strictly defining companionship services to include — and exclude — certain enumerated activities.

Companionship services will be defined to include playing cards, watching television together, visiting with friends and neighbors, taking walks, engaging in hobbies, and providing assistance with mobility.

Exempt employees will no longer be allowed to provide medical services, e.g., changing bandages, checking vital signs, managing medication.

The new rule also enumerates a list of several incidental duties that may only be performed occasionally by an exempt employee and may not constitute more than 20 percent of total duties. These incidental duties consist of grooming, toileting, driving, eating, light laundry, bathing and dressing the elderly or infirm.

## The DOL Proposal and Congressional Intent

The notice goes to great length to align its objectives with the intent of Congress, as expressed in the 1974 amendments, committee reports and floor debates. In this respect, the notice is persuasive in some respects but unpersuasive in others.

For example, the DOL persuasively explains the exemption was never intended to impact companion-care providers who are "regular bread-winners" or "those responsible for their family's support," and whom the DOL contends are presently impacted by current federal regulations interpreting the 1974 amendments.

While the proposed changes arguably fulfill Congress's intent to protect "bread-winners," they appear to contradict congressional intent in other respects.

For example, Congress expanded FLSA coverage to domestic service employees to reverse a one-million reduction in the number of domestic employees in the decade preceding the 1974 amendments. The proposal seeks to align its changes with this objective of attracting employees by claiming that the rule changes are necessary to "attrac[t] and retai[n] qualified workers."

Yet the DOL admits that the number of employees who have chosen to be employed under the exemption has dramatically increased, tripling from 1988 to 1998 and doubling from 1998 to 2008, under the current rule.

By the DOL's own admission, the home health care industry has succeeded in attracting large numbers of employees despite the companion-care exemption, and in contrast to the industry's inability to attract employees in the decade leading up to the 1974 amendments.

## The Notice Provides Further Support for Cost Criticisms

Critics, such as Rep. Tim Walbert, R-Mich., and the International Franchise Association, have criticized the proposed rule changes as leading to higher costs for seniors and taxpayers. The notice in many ways corroborates these concerns.

For example, the notice acknowledges that total costs and transfers from the rule will range from $52.7 million to $289 million per year, and that Medicare and Medicaid will reimburse the majority of these costs; Medicaid and Medicare accounted for 75 percent of home health care services revenue in 2008.

The notice contends that the cost issue is somehow "negate[d]" by the fact that 21 states have enacted similar provisions; although this may explain why there will be no further costs imposed in those states where the minimum-wage and overtime payment are already being made, the notice does not address the impact these provisions have had on state and federal budgets as a result of these 21 state enactments.

The notice also acknowledges the proposed changes will impose costs on employers — both companies and private households — to familiarize themselves with the new rule changes. But the amount of these costs appears to be underestimated.

The notice anticipates third-party employers will incur a mere "two hours of an HR staff person's time to read and review the new regulation, update employee handbooks and make any needed changes to the payroll system."

For private households, the notice projects a mere "one hour on regulatory familiarization" to determine which tasks their companion-care providers may perform, e.g., card-playing, which tasks can no longer be performed, e.g., changing bandages, and which tasks can only be performed incidentally to companion-care, e.g., assisting with bathing.

## Going Forward

The proposal is open to public comment until Feb. 27, 2012. In the meantime, Rep. Lee Terry, R-Neb., has proposed legislation — the Companionship Exemption Protection Act — that would supersede the DOL's proposed rule changes, including by ensuring that third-party providers are incorporated into the exemption and defining companionship services to include activities such as laundry and grooming that are deemed incidental under the DOL's proposal.

--By Jeremy C. Wooden, Foley & Lardner LLP

*Jeremy Wooden is an associate with Foley & Lardner LLP in the firm's Los Angeles office and a member of the firm's labor & employment and business litigation & dispute resolution practices.*

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