U.S. Department of Labor
Wage and Hour Division

(September 2013)

Fact Sheet: Application of the Fair Labor Standards Act to Domestic Service, Final Rule

Major Provisions of the Final Rule

The Department's Final Rule concerning domestic service workers under the Fair Labor Standards Act (FLSA) brings important minimum wage and overtime protection to the many workers who, by their service, enable individuals with disabilities and the elderly to continue to live independently in their homes and participate in their communities. The Final Rule, effective January 1, 2015[1], contains several significant changes from the prior regulations, including: (1) the tasks that comprise "companionship services" are more clearly defined; and (2) the exemptions for companionship services and live-in domestic service employees are limited to the individual, family, or household using the services; and (3) the recordkeeping requirements for employers of live-in domestic service employees are revised. The major provisions affected by the Final Rule are summarized below.

Minimum Wage and Overtime Protections. This Final Rule revises the Department's 1975 regulations to better reflect Congressional intent given the changes to the home care industry and workforce since that time. Most significantly, the Department is revising the definition of "companionship services" to clarify and narrow the duties that fall within the term and is prohibiting third party employers, such as home care agencies, from claiming the companionship or live-in exemptions. The major effect of this Final Rule is that more domestic service workers will be protected by the FLSA's minimum wage and overtime provisions.

Companionship Services. The term "companionship services" means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. Under the Final Rule, "companionship services" also includes the provision of "care" if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek. The Department believes it is appropriate for "companionship services" to be primarily focused on the provision of fellowship and protection, with an allowance for certain care services in order to support consumers in living independently in their homes. For additional information, see Fact Sheet #79A: Companionship Services Under the Fair Labor Standards Act (FLSA).

Fellowship and Protection. Under the Final Rule, "fellowship" means to engage the person in social, physical, and mental activities. "Protection" means to be present with the person in their home or to accompany the person when outside of the home to monitor the person's safety and well-being. Examples of fellowship and protection may include: conversation; reading; games; crafts; accompanying the person on walks; and going on errands, to appointments, or to social events with the person.

Care. The definition of companionship services allows for the performance of "care" services if those services are performed attendant to and in conjunction with the provision of fellowship and protection and if they do not exceed 20 percent of the employee's total hours worked in a workweek per consumer. The companionship

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[1] See Fact Sheet #25: The Home Health Care Industry Under the Fair Labor Standards Act (FLSA) for information on the current "companionship services" exemption applicable until January 1, 2015.

services exemption is not applicable when the employee spends more than 20 percent of his or her workweek performing care; in such workweeks, the employee is entitled to minimum wage and overtime.

In the Final Rule, "care" is defined as assistance with *activities of daily living* (such as dressing, grooming, feeding, bathing, toileting, and transferring) and *instrumental activities of daily living*, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

Household Work. The Final Rule limits household work to that benefitting the elderly person or person with an illness, injury, or disability. Household work that primarily benefits other members of the household, such as making dinner for another household member or doing laundry for everyone in the household, results in loss of the companionship exemption and thus the employee would be entitled to minimum wage and overtime pay for that workweek.

Medically Related Services. The definition of companionship services does not include the provision of medically related services which are typically performed by trained personnel. Under the Final Rule, the determination of whether a task is medically related is based on whether the services typically require (and are performed by) trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants. The determination is not based on the actual training or occupational title of the worker performing the services. Performance of medically related tasks during the workweek results in loss of the exemption and the employee is entitled to minimum wage and overtime pay for that workweek.

Live-In Domestic Service Employees. Live-in domestic service workers who reside in the employer's home permanently or for an extended period of time and are employed by an individual, family, or household are exempt from overtime pay, although they must be paid at least the federal minimum wage for all hours worked. Live-in domestic service workers who are solely or jointly employed by a third party must be paid at least the federal minimum wage and overtime pay for all hours worked by that third party employer. See Fact Sheet 79B: Live-In Domestic Service Employment Under the Fair Labor Standards Act (FLSA) for additional information. Employers of live-in domestic service workers may enter into agreements to exclude certain time from compensable hours worked, such as sleep time, meal time, and other periods of complete freedom from work duties. (If the sleep time, meal periods, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked.) Under the Final Rule, these employers must also maintain an accurate record of hours worked by live-in domestic service workers. The employer may require the live-in domestic service employee to record his or her hours worked and to submit the record to the employer. See Fact Sheet 79C: Recordkeeping Requirements for Individuals, Families, or Households Who Employ Domestic Service Workers Under the Fair Labor Standards Act (FLSA) for additional information.

Third Party Employers. Under the Final Rule, third party employers of direct care workers (such as home care staffing agencies) are not permitted to claim either the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim either exemption even when the employee is jointly employed by the third party employer and the individual, family, or household using the services. However, the individual, family, or household may claim any applicable exemption. Therefore, even if there is another third party employer, the individual, family, or household will not be liable for unpaid wages under the FLSA provided the requirements of an applicable exemption are met..

Paid Family or Household Members in Certain Medicaid-funded and Certain Other Publicly Funded Programs Offering Home Care Services. In recognition of the significant and unique nature of paid family and household caregiving in certain Medicaid-funded and certain other publicly funded programs, the Department has determined that the FLSA does not necessarily require that once a family or household member is paid to provide some home care services that all care provided by that family or household member is part of the employment relationship. Where applicable, the Department will not consider a family or household member

with a pre-existing close personal relationship with the consumer to be employed beyond a written agreement developed with the involvement and approval of the program and the consumer (or the consumer's representative), usually called a plan of care, that reasonably defines and limits the hours for which paid home care services will be provided. The preamble of the rule contains a discussion of the analysis to be used. See Fact Sheet 79F: Paid Family or Household Members in Certain Medicaid-Funded and Certain Other Publicly Funded Programs Offering Home Care Services Under the Fair Labor Standards Act (FLSA) for additional information.

Provisions Not Affected by this Rulemaking

Hours Worked. This rule makes no changes to the Department's longstanding regulations concerning hours worked which are contained in 29 CFR 785.10-.45. See Fact Sheet 79D: Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act (FLSA) for information on when the employee must be paid for time spent waiting, sleeping, and traveling.
Also unaffected by this rulemaking are the definition of private home and the application of FLSA "joint employment" principles. See Fact Sheet #79: Private Homes and Domestic Service Employment Under the Fair Labor Standards Act (FLSA) for information about what is a private home for the purpose of domestic service employment under the FLSA. See Fact Sheet #79E: Joint Employment in Domestic Service Under the Fair Labor Standards Act (FLSA) for information about the FLSA joint employment principles.

Further Background on the Fair Labor Standards Act Provisions Governing Domestic Service Employment

The Fair Labor Standards Act (FLSA or Act) was passed in 1938 to provide minimum wage and overtime protections for workers, to prevent unfair competition among businesses based on subminimum wages, and to spread employment by requiring employers whose employees work excessive hours to compensate employees at one-and-one-half times the regular rate of pay for all hours worked over 40.

The FLSA did not initially protect workers employed directly by households in domestic service, such as cooks, housekeepers, maids, and gardeners. However, the FLSA's minimum wage and overtime compensation provisions did extend to domestic service workers employed by enterprises covered by the Act, such as gardeners employed by covered landscaping companies or a cook employed by a covered caterer, even if their work was in or about a private household.

Congress explicitly extended FLSA coverage to "domestic service" workers in 1974, amending the Act to apply to employees performing household services in a private home, including those domestic service workers employed directly by households or by companies too small to be covered as enterprises under the Act.

While Congress expanded protections to "domestic service" workers, the 1974 amendments also exempted certain domestic service workers from the FLSA's minimum wage and overtime provisions. Under this exemption, casual babysitters and domestic service workers employed to provide "companionship services" (such as companions for elderly persons or persons with an illness, injury, or disability) are not required to be paid the minimum wage or overtime pay. Congress also created an exemption only from the overtime pay requirement for live-in domestic service workers.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).