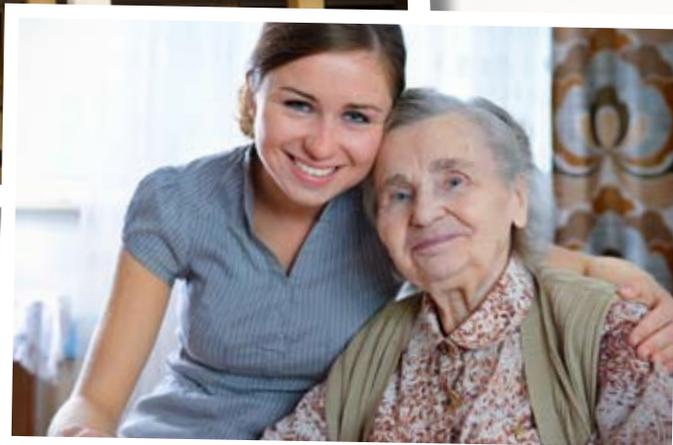


THE UNINTENDED CONSEQUENCES OF THE DEPARTMENT OF LABOR'S MOVE TO CHANGE THE COMPANIONSHIP EXEMPTION FOR THIRD-PARTY EMPLOYERS



BY BOB ROTH

As the title implies, there are several unintended consequences in the battle to amend the companionship exemption and it's hard to see who will benefit from the change.

When looking at the recently proposed amendment, it is also hard not to take a stance about the decision to repeal the exemption that has been in place since 1974.

TO UNDERSTAND THIS BETTER, YOU REALLY NEED TO UNDERSTAND THE HISTORY.

The Fair Labor Standards Act (FLSA) was enacted in 1938 to regulate minimum wages, maximum working hours, and child labor within interstate commerce. In 1974, domestic service employees were added to the categories of employees covered by amendments to the FLSA that also provided for minimum wages and maximum hours. These amendments, however, also created the *companionship services exemption*, which excludes from the FLSA's minimum wage and overtime requirements those domestic service employees who provide companionship services to the elderly in their homes.

The decision to create the companionship services exemption was based on important public policy considerations. Caregivers who are exempt from the FLSA can provide lower-cost services and thus enable more elderly and disabled people to receive needed services that they otherwise would not be able to afford. For some of these individuals, institutionalization would be the only alternative to receiving care and companionship services at home.

There were several legislative attempts in the late '90s to expand the FLSA coverage applied to "companions for the elderly and infirm." The proposed amendments included the following:

- Change the definition of companionship services to deny the application of the exemption if the employee was employed by someone other than a member of the family in whose home he or she works;

- Revise the duties that would qualify for the exemption; and
- Clarify the criteria to be used to determine whether employees qualify as "trained personnel" who are not exempt under the companionship services exemption.
- None of the legislation was enacted. As the law currently stands — particularly in view of the secretary of labor's withdrawal of his proposal to limit the exemption — the companionship exemption continues to apply to home health aides unless there is an exception.

The exemption was most recently challenged on June 11, 2007, in *Long Island Care at Home, Ltd., et al. v. Evelyn Coke*, No. 06-593, U.S. Sup. At the time, the U.S. Supreme Court overturned the appellate court and upheld the limited companionship exemption. Our very own Bill Dombi, NAHC vice president for law, represented the opposition to uphold the exemption, and he was successful in preserving the companionship exemption. In its decision, the Supreme Court referred the matter to Congress for a legislative remedy, and up until now there has been little to no activity.

HERE ARE THE EVENTS THAT HAVE OCCURRED OVER THE LAST MONTH:

On December 15, 2011, the U.S. Department of Labor (DOL) announced that it was filing a notice of proposed rulemaking (NPRM) regarding its regulations pertaining to the exemption for companionship services and live-in domestic services. Section 13(a)(15) of the FLSA exempts from the minimum wage and overtime provisions domestic



service employees who are employed “to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).” Section 13(b)(21) of the law also exempts from the overtime provision any employee employed “in domestic service in a household and who resides in such household.”

These FLSA exemptions, enacted in 1974, were complemented in 1975 by regulations promulgated by the DOL in 1975. Those regulations have not been amended or changed since then, though the DOL has noted that there have been “significant changes in the home health care industry” and “workers who today provide in-home care to individuals are performing duties and working in circumstances that were not envisioned when the companionship services regulations were promulgated.” It has noted, too, that the “number of workers providing these services has also greatly increased, and a significant number of these workers are being excluded from the minimum wage and overtime protections of the FLSA under the companionship services exemption.”

Therefore, the DOL decided to reduce the scope of the exemption by amending its regulations to revise the definitions of “domestic service employment” and

“companionship services.” The DOL also proposed to clarify the type of activities and duties that may be considered “incidental” to the provision of companionship services. In addition, the DOL proposed amending both the recordkeeping requirements for live-in domestic workers and the regulation pertaining to third-party employment of companions and live-in domestic workers. These changes would continue to allow the individual, family, or household directly employing the worker to apply the companionship and live-in exemptions but would deny all third-party employers of such workers the use of the exemptions.

WHAT DOES THIS MEAN FOR HOME CARE AGENCY OWNERS?

The great impact of the proposal is that it eliminates exemptions for third-party employers. But first, let’s define the term companionship services as they are described in Section 13(a)(15) of the act. The section provides as follows:

“Companionship services shall mean those services which provide 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. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work, *provided, however*, that such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked. The term *companionship services* does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.”

On December 15, 2011, the DOL’s Wage and Hour Division released an NPRM that would prevent any third-party employer from using both the companion care and live-in exemptions to the FLSA. The NRPM also redefines “domestic service” work, and tightens the definition of “companion care” and the work “incidental” to companion

care for the individuals/families/households that could still qualify to use the exemptions if these rules are finalized. Generally, the NPRM would:

- Restrict use of the FLSA section 13(a)(15) companionship care exemption from minimum wage and overtime rules: The restriction prevents any third-party employer or joint employer (e.g., an agency that is a co-employer of a caregiver with a family or individual) from using the exemption. The restriction also narrows the circumstances under which an individual (family or household) can qualify for the companionship exemption.
- Prevent any caregiver who is a caregiver “by vocation” from qualifying for the exemption.
- Restrict use of the FLSA section 13(b)(21) exemption from minimum wage and overtime rules for live-in caregivers: This restriction also eliminates the ability of a third-party employer (or joint employer) to qualify for this exemption.
- Redefine “domestic service employment”: This provision modifies the definition of “domestic service employment” (for purposes of making such work subject to FLSA rules) by deleting the current-rule requirement that the services be performed in the home of the employer. It also updates the “illustrative” (not comprehensive) list of domestic workers covered by the FLSA. The update adds home health aides and personal care aides to the list.
- Redefine “companion care”: The proposal would define companion care as “fellowship and protection for a person who, because of advanced age or physical or mental infirmity, is unable to care for themselves.” The new definition excludes “care” from the current rule’s “fellowship, care and protection” definition.
- Modify the definition of work “incidental” to companion care: This proposed change would modify the current rule that allows work “incidental” to companion care, so long as that incidental work takes no more than 20 percent of the time the caregiver works (per week).
- The proposal excludes general housework from the definition of “incidental work,” although housework connected to companion care would continue to qualify as “incidental work.” The proposal includes a “non-exhaustive list” of permissible incidental services — including dressing, grooming, toileting, driving to appointments, feeding, laundry, and bathing so long as the tasks are performed while providing “fellowship and protection.”
- The proposal also specifically excludes any task that contains any discretion (or need for training) relative to administering medicine, although it would allow a caregiver to remind a client to take medicine pursuant to a predetermined time and dosage schedule. Such “medical” tasks as changing bandages (dressings) that require training are also excluded from “incidental” work.
- Increase recordkeeping requirements for live-in caregivers: The proposal will require employers to track actual hours worked rather than relying on an agreement between the caregiver and the employer, as under current law. This new requirement specifically refrains from specifying the method an employer must use to track actual hours worked.

The NPRM also contains an extensive economic analysis section. It acknowledges that this rule is a “significant regulatory action” (one that will impact the economy by \$100 million or more, and thus subject to the Small Business Regulatory Enforcement Fairness Act). It also contains considerable discussion of the legislative history of the FLSA, along with the demographics and dynamics





of the current in-home care industry.

The Wage and Hourly Division justifies its elimination of third-party employers as entities entitled to use the companion care and live-in exemptions by citing a history of FLSA legislation in which exemptions were not intended for workers who engage in in-home caregiving “as a vocation.” The agency also provides information on patterns of compensation, hours worked, and industry standards in the fast-growing, in-home caregiving industry.

The Wage and Hourly Division has posted the NPRM at <http://www.dol.gov/whd/flsa/companionNPRM.htm>. The site also contains extensive additional information, including a side-by-side chart that compares the current rules to the proposed changes, a fact sheet, the economic impact analysis, and an FAQ document. For a comparison of current vs. proposed companionship regulations, see chart on page 10. The proposal will be open for public comments until Monday, February 27.

WHAT DOES THIS MEAN FOR CAREGIVERS AND HOW WILL THIS AFFECT CARE RECIPIENTS?

It is really difficult for us to measure how this is *helping* home care workers. In the end they will definitely be getting less hours through a third-party employer like a home care agency.

Live-in and sleep-over time is vitally important as a critical safety net, especially for our dementia and Alzheimer’s clients. It often provides respite to family caregivers. Because this is the **ONLY** solution for our clients and their families, the additional cost will make overtime pay difficult to justify under these circumstances. The cost

of overtime, combined with the number of caregivers who will be caring for the client, will certainly not help home care agencies in preserving continuity of care. This rule change will be devastating for the care recipients and will leave them with only one choice: placement in an institution, which is undoubtedly more costly in the end.

In a 24-hour care example, an agency will employ one caregiver for a 24-hour shift. If the overtime exemption is eliminated, the agency will instead staff this case with multiple workers in eight-hour shifts. The workers’ pay will drop and the care recipient will lose continuity of care and have multiple caregivers coming in and out of their home.

In the end, the loss of an affordable in-home, non-medical care solution will force many aged and disabled persons out of their homes and into skilled nursing or assisted living communities that are often paid for through Medicare, Medicaid, or another government program. This will put an even bigger burden back on the taxpayers – which is something they wanted to avert in the first place.

Care recipients needing home care services will no longer be able to afford the trained, caring professionals they have come to rely on through home care agencies, and will have no option but to hire independent contractors. By doing so, they will put themselves at risk for substandard care, theft (no background checks or drug screening), no coordination of care, and susceptibility to elder abuse. Lastly, our federal and state governments will lose tax revenue, while caregivers will lose important employee protections.

This is certainly a problem that we know is not going to go away. America is aging and on January 1, 2011, the first of the 78 million baby boomers turned 65. As the years pass, more and more Americans are going to need some kind of affordable home care. While no one is opposing fair and adequate wages for caregivers, we must also be mindful of the needs of care recipients dealing with aging issues. It is critical to ensure affordable care for those afflicted by disease, illness, injury, acute pain, and memory loss.

If a client has dementia or Alzheimer’s and is in need of 24-hour care, the family is currently allowed to pay home aides at a flat rate. Now, if the exemption is removed, then overtime rules will apply. As a result, the cost of care would nearly triple, and many families would not be able to afford home care as an option.

Most home care providers are small businesses with

limited resources. Eliminating the companionship exemption would reduce the availability of care to seniors and the disabled, and increase the costs of service delivery with no corresponding increase from third-party payers, such as Medicaid. Federal and state programs are already stretched and in a deficit relative to their budget needs. They are not in a position to increase their payment rates to meet the added costs of overtime compensation.

ASK YOURSELF, WHO BENEFITS IN THE END?

There is no doubt that this issue is a very “slippery slope.” How can we as Americans **not** be advocating workers’ rights to fair wages? In general, we should. But in the case of the companionship exemption there are circumstances that must be considered before making a “broad brush” decision that will negatively affect millions of workers and their families.

The one issue that clouds the discussion is the mere fact that we have five states — Louisiana, Tennessee, South Carolina, Alabama, and Mississippi — with no state minimum wage laws. These states are the ones that President Obama is referring to when he talks about home care workers not getting minimum wages or overtime. But when our president is speaking, it comes across that **ALL** home care workers are not getting minimum wage or overtime.

So what effect will this have on care recipients? They are now going to pay more for services and have more people going in and out of their homes than ever before. They will be left with only two options: being placed in a long-term care facility or hiring an independent contractor, thus putting themselves at risk.

And what effect will this have on caregivers? They will get less hours per week and will consider becoming independent contractors. Taking on this role will not protect their rights, and it will put them and the care recipients in a dangerous position. Also, who will be making sure that they pay taxes?

And lastly, how about the home care agencies? They will lose good caregivers who decide to find a place that will offer them additional hours beyond 40 per week. They will lose care recipients who find more affordable solutions



through registries or independent contractors.

Amending the companionship exemption isn’t beneficial to caregivers, care recipients or agencies. So why is this decision being contemplated? Is this decision *truly* intended to help home care workers? Or was this a political move? I will let you decide.

The federal government has given us until Monday, February 27, to give them our feedback on this initiative. I would encourage you to be active on this issue and make sure that you have a seat at the table and are being heard.

Also, take a few minutes and contact your representatives in Washington, DC. Let them know how these changes will negatively impact your family and your community. It could make all the difference in the world.



About the Author: *Bob Roth Managing Partner. Bob Roth helped found Cypress HomeCare Solutions with his family in 1994. Cypress is dedicated to providing the highest quality, compassionate home care services to families with loved ones that are chronically ill, disabled, or aged. With 28 years of consumer products, health care, and technology experience, Bob is considered an innovator of technologies used to enhance communication and effectively support customers and peers. He can be reached at bobroth@cypresshomecare.com.*