How to Comply with the Removal of the Companionship Exemption

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Presented by:

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Introduction

- DOL’s Final Rule eliminates the minimum wage and overtime exemption for home care aides who work for a third-party company
- The Rule is effective January 1, 2015
- Because the Rule requires fundamental changes to the home care business model, employers need to begin preparing for the transition now

Today’s Agenda

- FLSA Companionship Exemption
- Current State Laws
- Impact of the DOL Final Rule
- Preparing for Reclassification
The Companionship Services Exemption

History of the Exemption

- Section 13(a)(15) of the FLSA provides an exemption from the minimum wage and overtime requirements for: “any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.”
  - Created in 1974, when Congress extended FLSA coverage to other “domestic service” workers
  - Congress granted the Secretary of Labor authority to define the terms in the exemption, and DOL exercised that authority in 1975 by issuing the regulations at 29 C.F.R. Part 552
Two Controversial Issues

1. Should the exemption only apply to persons employed directly by the family or household using their services? Or, should it extend to employees of home care companies?

2. What types of activities should be considered “companionship services?”

Third-Party Employment: The 1975 Regulations

- Section 552.109 of the regulations provides that the exemption is available for employees “who are employed by an employer or agency other than the family or household using their services.”
Third-Party Employment: Court Interpretations

- The U.S. Supreme Court upheld this regulation as a reasonable interpretation of the FLSA in *Long Island Care at Home, Ltd. V. Coke*, 551 U.S. 158, 165 (2007).

Third-Party Employment: The 2013 Final Rule

- The Final Rule revises Section 552.109 to deny the exemption to employees of home care companies:
  
  "Third party employers of employees engaged in companionship services within the meaning of § 552.6 may not avail themselves of the minimum wage and overtime exemption provided by section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services."
Companionship Services: 1975 Regulations

- Section 552.6 of the 1975 regulations defines “companionship services” as “services which provide fellowship, care and protection”
  - Includes “household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes and similar services”
  - Includes general household work, not to exceed 20% of total weekly hours worked
  - Does not include activities “which require and are performed by trained personnel, such as a registered or practical nurse”

Companionship Services: Court Interpretations

- Federal courts interpreted the 1975 regulations to allow exempt companions to:
  - Assist with bathing, dressing, cooking, and getting around the home
  - Vacuum, dust, mop, and do laundry
  - Give medications, take vital signs, change catheters, and turn patients in bed
  - Perform simple physical therapy and speech training
Companionship Services: The 2013 Final Rule

- The Final Rule revises Section 552.6 to define “companionship services” as “the provision of fellowship and protection”
  - “Fellowship” means to “engage in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events”
  - “Protection” means “to be present with the person in his or her home or to accompany the person when outside the home to monitor the person’s safety and well-being”

Companionship Services: The 2013 Final Rule

- Under the Final Rule, home care aides who spend more than 20% of weekly hours performing “care” activities are not exempt.
  - Assisting with “activities of daily living” such as dressing, grooming, feeding, bathing, toileting and transferring
  - Assisting with “instrumental activities of daily living” such as meal preparation, driving, light housework, managing finances, taking of medications and arranging medical care.
Companionship Services:
The 2013 Final Rule

- The Final Rule also states that "companionship services" do not include "the performance of medically related services"
  - Services are "medically related" if the services "typically require and are performed by trained personnel such as registered nurses, licensed practical nurses, or certified nursing assistants"

Bottom Line

- Home Care aides will be non-exempt
- Minimum wage is owed for all hours worked
- Overtime is owed after 40 hours of work
- State exemptions no longer apply
- Live-in exemption is gone for home-aide employed through an employer or agency
State Law

Require Minimum Wage Only

6 states currently require payment of the minimum wage, but not overtime

- Arizona
- Washington D.C.
- Nebraska
- North Dakota
- Ohio
- South Dakota
Require Traditional Overtime

14 states currently require overtime at 1 ½ times the employee’s regular hourly rate for hours worked over 40 in a workweek

- California (1/1/14)
- Colorado
- Hawaii
- Illinois
- Maine
- Maryland
- Massachusetts
- Michigan
- Montana
- Nevada
- New Jersey
- Pennsylvania
- Washington
- Wisconsin

Require Less Overtime Than FLSA

New York requires payment of overtime, after 44 hours, but only at 1 ½ times the minimum wage

Minnesota requires payment of overtime after 48 hours
State Law Exemptions

- State law exemptions will be nullified by the new federal regulations:
  - California and Illinois exempt home care aides in state programs
  - Maryland and Wisconsin exempt home care aides employed by non-profit agencies

Impact of the Final Rule
DOL Economic Analysis

<table>
<thead>
<tr>
<th>Average Annual Costs (in millions)</th>
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</thead>
<tbody>
<tr>
<td>Compliance*</td>
</tr>
<tr>
<td>Hiring*</td>
</tr>
<tr>
<td>Travel Pay</td>
</tr>
<tr>
<td>Overtime Pay</td>
</tr>
<tr>
<td><strong>Total</strong></td>
</tr>
</tbody>
</table>

* First year cost only

- **Assumptions**
  - Up to 1.93 million home care workers will be newly eligible for overtime pay
  - Each company will spend only 2 hours to “read and review the new regulation, update employee handbooks and make any needed changes to the payroll systems”
  - Home care aides work an average of 8.8 hours of overtime per week

- **Benefits**
  - Reduced employee turnover from higher wages will save an average of 23.6 million annually

Industry Survey

- **2012 survey of 1,428 home care agencies on potential impacts of eliminating the companionship exemption**
  - Private Duty Homecare Association (an affiliate of the National Associations for Home Care & Hospice)
  - National Private Duty Association (now the Home Care Association of America)

[Home Care Association of America] [Private Duty Homecare Association]
Current Overtime Pay Practices

- 54.2% of surveyed agencies do not pay overtime to employees providing companionship services
- 25.1% of surveyed agencies reported they are required to pay overtime for companionship services
- 5.1% reported that they voluntarily pay overtime

Impact on Business Costs

<table>
<thead>
<tr>
<th>Agency Type</th>
<th>Significant Increase</th>
<th>Moderate Increase</th>
<th>Minimal Increase</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does not pay overtime</td>
<td>76.3%</td>
<td>17.3%</td>
<td>2.9%</td>
<td>96.5%</td>
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<tr>
<td>Required to pay overtime</td>
<td>40.0%</td>
<td>27.8%</td>
<td>24.2%</td>
<td>92.0%</td>
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<tr>
<td>Voluntarily pay overtime</td>
<td>34.0%</td>
<td>34.9%</td>
<td>24.1%</td>
<td>93.0%</td>
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</table>
### Impact on Caregivers

<table>
<thead>
<tr>
<th>Agency Type</th>
<th>Restrict OT Hours</th>
<th>Assign More Employers Per Client/Patient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does not pay overtime</td>
<td>86.2%</td>
<td>77.9%</td>
</tr>
<tr>
<td>Required to pay overtime</td>
<td>62.6%</td>
<td>62.1%</td>
</tr>
<tr>
<td>Voluntarily pay overtime</td>
<td>60%</td>
<td>58.7%</td>
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</tbody>
</table>

### Impact on Clients

<table>
<thead>
<tr>
<th>Agency Type</th>
<th>Increase Billing Cost to Client</th>
<th>Scale Back Services Offered</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does not pay overtime</td>
<td>81.8%</td>
<td>23.7%</td>
</tr>
<tr>
<td>Required to pay overtime</td>
<td>45.2%</td>
<td>10.4%</td>
</tr>
<tr>
<td>Voluntarily pay overtime</td>
<td>47.1%</td>
<td>10.7%</td>
</tr>
</tbody>
</table>
The Double Whammy: The Affordable Care Act

Beginning January 1, 2015, home care employers with 50 or more FTEs must provide health care coverage to employees working 30 or more hours per week (or pay steep penalties) and pay overtime to home care employees working more than 40 hours a week.

Preparing for Reclassification
Change is Coming

- There is little chance of a legislative solution
- Litigation against DOL to change the Final Rule
- Because results of litigation are always uncertain, home care companies need to begin preparing now to reclassify their home care aides as non-exempt

Reclassification Considerations

- Does our current timekeeping system allow accurate time reporting for remote workers?
- Does our payroll system correctly calculate overtime pay?
- How can we control overtime costs?
- Do we need additional wage and hour policies?
- Should we provide wage and hour training to reclassified home care aides and/or their supervisors?
Payment for All Hours Worked

- An employer must pay for all hours the employee is “suffered or permitted” to work.
  - Includes all time employee required to be on duty or on premises or at a particular workplace
  - Includes work off-site, even if not requested, e.g. checking and responding to calls/emails/texts from home
  - Includes certain types of travel time, breaks, on-call time, sleep time, meetings, training, and various off-the-clock work

Travel Time Rules

- Employee travel from home to a fixed office location and return at the end of the day is not work time = regular commute
- An employee who regularly works at a fixed location who is asked to travel to a different city/location, is entitled to treat the excess travel time as work time
- Time spent traveling from job site to job site during the workday is work time
- Travel time that keeps an employee away from home overnight is work time when it occurs during the employee’s workday.
Sleep Time

- An employee required to be on-duty at the worksite for less than 24 hours is working even if he/she can take breaks to sleep or engage in other activities.
- An employee required to be on-duty at the worksite for 24 hours or more may agree to exclude from hours worked bona fide sleeping periods if adequate sleeping facilities are provided and the employee can enjoy an uninterrupted night’s sleep.
- “If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night’s sleep, the entire period must be counted. If the employee cannot get at least 5 hours’ sleep during the scheduled period the entire time is working time.” 29 C.F.R. § 785.22 (b)

Meal/Rest Breaks

- An employee required to be on-duty at the worksite is working even if he/she can take meal/rest breaks to engage in other activities.
- Some states (CA) require a formal On-Duty Meal Period Agreement.
- Only completely off-duty meals are treated as non-working time, e.g. the employee leaves the premises and does not do any work during the meal (carrying a mobile phone or a pager is permissible and does not convert the time into working time, unless a call is taken and work is performed).
On-Call Time

- An employee required to remain on the employer's premises while "on-call" is working.
- An employee who is on-call off-site, but waiting for a call to come back, is not working (in most cases).
- Constraints on employee freedom could require treating the time as compensable.
  - Activity restrictions
  - Time limitations
  - Geographic limitations

Lectures, Meetings & Training

- Mandatory attendance at lectures, meetings or training programs are work time.
- Need not be counted if the four following criteria are met:
  - Outside normal working hours
  - Voluntary
  - Not job related
  - No other work is concurrently being performed
Accurate Record Keeping

- Employers must keep accurate records of the hours worked
  - Start/finish of work day
  - Start/finish of unpaid gaps in pay for personal activities/sleep time
  - Travel time start/finish
  - Off-site/Off-the-Clock Work

Timekeeping System

- Home care companies should evaluate whether their current timekeeping systems allow home care aides to accurately record all hours worked
  - Remotely record time
  - Certification of hours worked
  - Timekeeping rules on rounding
  - Auto-deductions
Payroll System

- Home care employers should review their payroll systems to ensure the regular rate and overtime pay will be calculated correctly for overtime payments.
- Ensure the payroll system is correctly calculating the "regular rate" of pay for non-exempt employees paid:
  - "Regular Rate" is usually the hourly rate, but not if the employee receives other forms of compensation, such as any incentive or bonus compensation in addition to hourly wages.
  - Piece rate (per visit or per day)
  - Salaried non-exempt

Controlling Costs

- The choices:
  - Pass on the cost to clients
  - Limit work hours and hire additional home care aides
  - Restructure compensation to minimize the cost of overtime
  - Eliminate or reduce Live-In care arrangements
What Doesn’t Work

- Conversion to Independent Contractor status
- Different rates of pay for the same kind of work
- Low rates of pay
- Meal and Lodging Credit
- Asking Caregivers to sign away minimum wage or OT rights

Controlling Off-The-Clock Work

- Remote use of electronic devices
- Missed/interrupted meal periods
- Waiting/On-Call time
- Travel time/Different Rate of Pay
- Training time
- Volunteer activities
Wage & Hour Policies

- Off-the-Clock Policy
- Travel Time Policy
- Sleep Time Policy
- Meal & Rest Break Policy
- Reporting/Complaint Mechanism

Training

- Reclassified home care aides, and managers supervising non-exempt employees for the first time, should be provided training on:
  - Activities that are considered "hours worked" for which non-exempt employees must be paid
  - Timekeeping procedures
  - New or revised policies on off-the-clock work, travel time, sleep time, etc.
Final Thoughts on Reclassifying Employees to Non-Exempt

- It is not too early to start planning now, as you need enough time to:
  - Consider and cost out compensation options
  - Implement a new timekeeping system
  - Reprogram your payroll system
  - Revise or prepare new policies
  - Hire more employees
  - Communicate with and train new and existing employees
  - Meet state law requirements for providing notice to employees of pay changes

Questions?
For more information visit www.littler.com for:

The Littler Report: Challenges and Best Practices for Home Care Employers Following the Elimination of the Companionship Exemption