

The VOICE

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NPDA
NATIONAL PRIVATE DUTY ASSOCIATION
The Voice of Private Duty Home Care



Overtime Requirements for Home Healthcare and the Companionship Exemption

By Ashley Winsky

JANET HAS HAD A LONG DAY. Taking care of Mrs. Ellie is hard work. She whispers “good night” to Mrs. Ellie and tiptoes upstairs to her living quarters. Janet changes into her pajamas, brushes her teeth, and climbs into bed. Her head hits the pillow and cha-ching—Janet is now earning time-and-a-half.

Earning overtime in her sleep would be something new for Janet, but it is a definite possibility under currently proposed legislation. At present, live-in home care workers are paid at a daily rate and not subject to the overtime requirements of the Fair Labor Standards Act (“FLSA”). Typically, employees covered by the FLSA must receive overtime compensation at a rate of at least one and one-half times their regular rate of pay for any hours worked in excess of 40 hours in a week. There are, however, exceptions to the rule. One such exception is made for certain home care workers.

The companion exemption provides that “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 ...” is exempt from minimum wage and maximum hour laws, regardless of where they reside. 29 U.S.C. § 213 (a)(15). Section 13(b)(21) provides only an overtime exemption for domestic service employees who reside in the household in which they are employed. The Department of Labor (“DOL”) defines the statutory term “domestic service employment” to include “services of a household nature performed by an employee in or about a private home ... of the person by whom he or she is employed.” 29 CFR § 552.3. Nurses and caretakers are listed as examples of domestic service employees.

Companionship services 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.” 29 CFR § 552.6. Services include household work such as meal preparation, bed making, laundry, and similar tasks performed in the home. General housework can be included as long as it does not exceed 20 percent of the total weekly hours worked.

Most live-in domestic service employees are paid at a daily rate. If the live-in employee is paid on an hourly basis, it is up to the employer and the employee to reach an agreement as to which hours will be compensated. They may exclude “the amount of sleeping time, meal time, and other periods of complete freedom.” 29 CFR § 552.102. If the employee’s free time is interrupted by a “call to duty,” such time must be counted as hours worked.

Often home healthcare agencies employ companion workers for the specific purpose of placing them in various homes needing care. The agency becomes responsible for the financial aspects of the relationship, providing the worker's compensation and covering payroll taxes and the like. This arrangement simplifies the complexities of home healthcare for individuals requiring care.

Controversy has arisen over whether third-party agencies are governed by the FLSA's overtime exemption. The text of the FLSA does not expressly answer the third-party employment question, but the DOL has stated that exempted companionship workers include those "who are employed by an employer or agency other than the family or household using their services." 29 CFR 552.109(a). Moreover, the Supreme Court of the United States has ruled on this issue. In *Long Island Care at Home, Ltd. v. Coke*, a unanimous court confirmed that the overtime exemption applied to companionship workers employed by an agency other than the family requesting care. 551 U.S. 158 (2007).

Home healthcare agencies may use the companionship exemption at present, but legislation proposed by Rep. Linda Sanchez (D-Calif.) would effectively overrule the Supreme Court's decision in *Coke*. On July 28, 2010, Rep. Sanchez introduced the Direct Care Workforce

Empowerment Act of 2010 (H.R. 5902) ("Act"). If passed, the Act would extinguish the companionship exemption and entitle home care workers to overtime pay for any hours worked in excess of 40 hours per week.

Home healthcare agencies will likely react to the legislation by shielding themselves from any risk of overtime exposure. They may revise employees' schedules or hire additional workers to ensure that no one works more than 40 hours a week. Not all risks can be hedged against, and overtime litigation likely will increase as workers bring suit for compensation for their time spent traveling, eating meals, training, and even sleeping.

Increased litigation means increased costs for those needing care. For some, the costs of home healthcare may rise too high. They may need to eliminate their overnight caregiver or make the move to institutional care. In addition, the aged or infirm will likely be exposed to many different home care workers, as agencies attempt to lower their overtime expenditures. Thus, while Janet dreams of riches, Miss Ellie tosses and turns over losing the comforts of home.

Some agencies may attempt to avoid the overtime requirement by classifying their companionship workers as independent contractors, because independent contractors are excluded from overtime requirements. Also, employers

do not have to withhold or pay taxes on independent contractors. These agencies should tread lightly.

Employers can face liability for back wages, overtime pay and taxes that should have been paid for an employee improperly classified as an independent contractor. In addition, the Internal Revenue Service ("IRS") assesses extra penalties for noncompliance. These penalties can be enforced even if an employer's noncompliance was inadvertent.

The IRS has a 20 factor test to identify independent contractors who should be classified as employees. The inquiry is complex, and no one factor is controlling. Indeed, it is possible for a worker not to be classified as an employee for IRS purposes, yet still be subject to overtime requirements, because the definition of employee is more expansive under the FLSA than under the IRS rules and regulations.

In summary, the companionship exception allows home healthcare agencies to avoid the FLSA's overtime requirements. The exception, however, may be eliminated in the near future. Home healthcare agencies that employ companionship workers should stay abreast of this legislation as it works its way through the Congress. If the Act passes, these agencies should perform a detailed analysis of their employees' status before reacting. [VOICE](#)

ASHLEY WINSKY focuses her practice on labor and employment litigation where she advises and represents employers relating to anti-discrimination laws, wage and hour laws, and wrongful discharge. Ms. Winsky also assists employers in drafting agreements, policies, and handbooks and conducting training. Ms. Winsky is also involved in various commercial litigation matters. In particular, Ms. Winsky represents the local transit authority in matters related to casualty and worker's compensation claims.