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# U.S. Department of Labor Home Care Rule: What's next?

*This brief is designed to provide workers, consumers, employers, and states with an understanding of what implementation of the home care rule will mean to them.*

## Department of Labor Home Care Rule

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The Department of Labor (DOL) issued the Home Care Final Rule (the “Rule”) on October 1, 2013. It was scheduled to go into effect, extending the federal protections of the Fair Labor Standards Act (FLSA) to home care workers, on January 1, 2015, but a lawsuit<sup>1</sup> brought by industry groups challenging the Rule delayed its implementation. On August 21, 2015, following an appeal by the US Department of Labor as represented by the Department of Justice, the U.S. Court of Appeals for the District of Columbia Circuit upheld the Rule. The Rule will go into effect after the appellate court’s mandate issues. That is most likely to be in mid-October, although further legal proceedings could impact that date.

The Rule contains two major changes. First, it clarifies and narrows what constitutes FLSA-exempt “companionship services.” Second, it excludes third-party employers, such as home care agencies, states, and other public entities that solely or jointly employ home care workers, from claiming either the exemption from minimum wage and overtime that applies to the narrowly defined occupation of “companions” or the overtime exemption that applies to live-in domestic workers. Through these changes, the Rule extends the Fair Labor Standard Act’s federal minimum wage and overtime protections to most home care workers. (For more information on the Rule see NELP’s September 2015 revised version of [Fact Sheet](#) and PHI’s [campaign page](#).)

## What the appeals court ruling means

A three-judge panel on the U.S. Court of Appeals for the District of Columbia Circuit unanimously upheld the DOL’s changes to the Rule. Although the plaintiffs plan to ask the Supreme Court to review the decision, the Rule is most likely here to stay. Therefore, states and employers should take steps now to comply with the Rule in a way that provides fair worker protections to home care workers and does not harm consumers of home care services.

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<sup>1</sup> *Home Care Association of America, et al vs. Weil, et al*

## The Court Decision

The Court upheld the Rule in its entirety. It ruled that DOL acted within its authority in only allowing home care consumers (and their households) to use FLSA's companionship and live-in exemptions and disallowing third-party employers (like states, agencies, or fiscal intermediaries) from doing so. The Court also rejected plaintiffs' challenge to the revised definition of companionship services, holding that because they are third-party employers, they do not have standing to challenge that part of the Rule. Therefore, employers of home care workers will need to comply with the Rule as issued by DOL.

Home care employers and states must prepare now to implement the new Rule in a way that is fair to workers and meets consumers' needs. The Department of Labor and other federal partners (including the Centers for Medicaid & Medicare Services) have said they stand ready to provide technical assistance and guidance, as have several organizations actively working to assist states and state-level advocates to understand and adapt to the new rules (See "Contacts & Resources" at the end of this document).

## What the new Rule means to employers

### Most home care employers will no longer be able to claim the companionship exemption

The Rule narrows the definition of services that qualify a worker as a "companion" who is exempt from the FLSA's minimum wage and overtime protections. Workers are not considered "companions" exempt from FLSA's protections if they spend more than 20 percent of their time per workweek providing "care," or assistance with Activities of Daily Living (ADLs) such as dressing, grooming, feeding, bathing, toileting, and transferring, and/or Instrumental Activities of Daily Living (IADLs) such as meal preparation, driving, light housework, assisting with medications, and arranging medical care.<sup>2</sup> In addition, if any worker provides any medical-related services or domestic services benefiting other members of the household during a workweek, the employer cannot claim the companionship exemption from FLSA for any time worked in that week.<sup>3</sup> Because Medicaid home care services typically cover assistance with ADLs and IADLs, it is very unlikely that this exemption will apply to Medicaid-funded home care services.

The Rule defines companionship services that are still exempted from FLSA as "fellowship and protection." Examples of fellowship and protection include: conversation, reading, games, crafts, and accompanying the person on walks, on errands, to appointments, or to social events, providing doing so does not require performing ADL or IADL services.<sup>4</sup>

The Rule also says that only individual and household employers can claim the companionship exemption. This means that joint employers<sup>5</sup>, such as agencies, fiscal intermediaries or states, cannot claim the exemption even if their employees otherwise meet the definition for a companion, as described above. In other words, a homecare worker is only excluded from FLSA if the worker is employed solely by a consumer or private

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<sup>2</sup> See NRCPSD *Companionship and Live-In Worker Exemption: Final Rule Overview*, August 2014.

<sup>3</sup> Department of Labor, Fact Sheet #79A, September 2013, <http://www.dol.gov/whd/regs/compliance/whdfs79a.htm>

<sup>4</sup> Department of Labor, Fact Sheet #79A, September 2013, <http://www.dol.gov/whd/regs/compliance/whdfs79a.htm>

<sup>5</sup> Department of Labor, Fact Sheet #79E, June 2014. <http://www.dol.gov/whd/regs/compliance/whdfs79e.htm>

household; spends less than 20 percent of her weekly work hours on ADL or IADL services; and provides no medical-related services.

All third-party employers of home care workers, such as home care agencies, states and other public entities that qualify as employers or joint employers, must comply with federal wage and hour rules, even if their employees are also jointly employed by an individual or if they perform exempt companionship services. And other workers whose duties might place them within the exemption will no longer be exempt if they are employed by a third-party employer.

### **What the new Rule means for travel time**

As described above, most employers of home care workers will not be able to claim the companionship exemption.<sup>6</sup> That means employers must pay for time traveled between work shifts for two different consumers. Travel between consumers during the workday qualifies as compensable hours worked. When there is a third-party employer, that employer will now be responsible for ensuring that travel time between consumers is paid. Normal travel from home to work (that is, a consumer's home) and return at the end of the workday is not paid work time.<sup>7</sup>

### **What the new Rule means for overtime for high-hour and live-in work**

For the relatively small portion of home care workers who work more than 40 hours per week, employers may choose to pay time-and-a-half when a worker exceeds 40 hours in a week for one employer. Alternatively, third-party employers will have the option of employing an additional worker (or workers) to provide services for consumers who require more than 40 service hours, which may help ensure continuity in the event that one worker becomes sick or has an emergency.

Home care workers will continue to be subject to federal rules that allow sleeping and on-call time to be unpaid under certain circumstances. Employers of home care workers employed on shifts of 24 hours or more will be allowed to exclude up to eight hours of sleep-time from pay if the worker agrees to the arrangement; is provided with adequate sleeping facilities; and is usually able to get an uninterrupted night's sleep.<sup>8</sup> A worker should be compensated for any time spent working during the planned 8 hours of sleep time. These rules apply to all employees. And individuals and private households that employ home care workers on a live-in basis will be able to continue to claim the overtime exemption for live-in domestic workers, further limiting their costs.<sup>9</sup>

### **What the new Rule means for record-keeping**

The Rule also imposes new record-keeping requirements. The employer will have to maintain records of the exact number of hours worked each day, whereas under the old

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<sup>6</sup> In the rare occasion when the companionship exemption does apply, under FLSA, travel time does not need to be compensated; however, there may still be an obligation depending on the state or local laws or contractual agreement.

<sup>7</sup> Department of Labor, Travel Time guidance, [http://www.dol.gov/whd/homecare/travel\\_time.htm](http://www.dol.gov/whd/homecare/travel_time.htm)

<sup>8</sup> See 29 C.F.R. § 785.20-23. These regulations apply to all workers and will not be changed by the proposed rule change.

<sup>9</sup> From the DOL AI on shared living: A live-in domestic service employee is one who resides in the private home of the person receiving services. 29 C.F.R. § 552.102. For this purpose, "reside" means to live in the home on a "permanent basis," i.e., to stay there seven nights a week and have no other home, or for "extended periods of time," i.e., to work and sleep there for five days a week (120 hours or more) or five consecutive days or nights (regardless of the total number of hours). 78 Fed. Reg. 60,474

rules it was sufficient to have an agreement defining regular working hours. The employer may assign the worker the task of keeping track of his or her hours and submitting the records to the employer. However, the employer is ultimately responsible for ensuring that the records are completed and maintained.<sup>10</sup>

### **What the new Rule means for paid family caregivers in publicly funded programs**

Some Medicaid and other publicly funded home care programs allow recipients to select a family or household member as their paid care provider. The Labor Department has taken the position that, where the worker and the care recipient share both a familial and employment relationship, the Fair Labor Standards Act covers only hours worked within the scope of the employment relationship. A Labor Department fact sheet<sup>11</sup> explains that the employment relationship is limited by a “plan of care” or other written agreement developed with or by the program, but only if the agreement reasonably defines the hours for which paid care services will be provided and the program does not reduce the number of paid hours in a plan of care because the care provider is a family member.

### **What the new Rule means for existing state laws that cover home care**

The impact of the federal reform will vary from state to state, depending on the state’s current laws and protections. The Fair Labor Standards Act sets a floor for minimum wage and overtime provisions, but does not override state statutes that provide additional protections to employees.<sup>12</sup> In all states, workers will gain an added level of protection through coverage under federal laws and access to the Labor Department and federal courts.<sup>13</sup> Employers will need to ensure they are complying with both their state and federal laws. In addition, many states use the FLSA definition of companionship services to determine which homecare workers are entitled to state minimum wage and/or overtime protections. This means that as the definition of protected workers has narrowed, some homecare workers may now be entitled to additional state employment protections. States will need to review their laws relating to homecare workers.<sup>14</sup>

## **What the new Rule means for your state’s Medicaid program**

### **How is Medicaid connected to home care?**

Medicaid is the primary public payer for home care services. States provide home care services through a variety of Medicaid programs, including most commonly through home and community-based services (HCBS) waivers or state plan services.

### **Can Medicaid funding be used to pay for overtime and travel time obligations in Medicaid-funded home care programs?**

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<sup>10</sup> NRCPS, Companionship and Live-In Worker Exemption: Final Rule Overview, [http://www.bc.edu/content/dam/files/schools/gssw\\_sites/nrcpds/FLSAmaterials/Companionship%20and%20Live-in%20Worker%20Exemptions%20-%20Final%20Rule%20Overview.pdf](http://www.bc.edu/content/dam/files/schools/gssw_sites/nrcpds/FLSAmaterials/Companionship%20and%20Live-in%20Worker%20Exemptions%20-%20Final%20Rule%20Overview.pdf)

<sup>11</sup> Department of Labor, Fact Sheet #79F, June 2014. <http://www.dol.gov/whd/regs/compliance/whdfs79f.htm>

<sup>12</sup> NRCPS Policy Alert, February 2015, <http://www.bazelon.org/LinkClick.aspx?fileticket=M80p6bkeSVs%3d&tabid=135>

<sup>13</sup> NELP, Federal Minimum Wage & Overtime Protections for Home Care Workers, October 2013, Rev. September 2015, <http://www.nelp.org/content/uploads/2015/03/NELP-Fact-Sheet-Companionship-Rules-Reform.pdf>

<sup>14</sup> NELP, Home Care Worker Rights in the States After the Federal Companionship Rules Change, September 2013. <http://nelp.org/content/uploads/2015/03/Home-Care-State-by-State.pdf>

The Centers for Medicaid & Medicare Services (CMS), which is the federal agency that administers the Medicaid program, has issued guidance<sup>15</sup> that states can use Medicaid to pay for overtime and travel time costs, meaning that the federal government will pay its share (typically around 50 percent) of the costs. The guidance also says that overtime and travel time generated across consumers should not be paid from individual consumers' service budgets. CMS proposed several funding options that states can use, depending on the structure of their Medicaid home care programs, and has said it is willing to provide technical assistance.

## **What the new Rule means for advocates who want to ensure successful implementation**

### **What can I do to make sure my state expands its Medicaid budget to cover additional costs related to these changes?**

Right now, many state agencies are preparing their initial requests for the Fiscal Year 2017 budget. It is absolutely critical that you advocate now for the additional funding necessary to comply with the Rule in your state's Fiscal Year 2017 budget. You should ask your state whether it has included anything in its Fiscal Year 2016 budget on the overtime and travel costs, and if it is not, push officials to include it. Even if the state has not completed its analysis of the projected costs, you should suggest that your state include at least an estimate in its Fiscal Year 2017 budget plans or a placeholder budget concept while final numbers are being developed.<sup>16</sup>

### **What can I do to address my state's current fiscal year budget?**

The Rule is estimated to go into effect in the fall of 2015, which is in the middle of most states' Fiscal Year 2016 budgets. If your state did not budget funds (and most did not), you should explore in your state any possible vehicle to add money for these costs even though the regular budget cycle is closed. Does your state have a reserve fund to tap? Do the relevant state agencies have any savings they could apply? When your state legislature comes into session early next year, do they have any way of doing an early appropriation to cover these costs during Fiscal Year 2016, even before the Fiscal Year 2017 budget is completed?<sup>17</sup>

### **How do I ensure my state is not taking restrictive approaches that could harm consumers or workers?**

Reducing costs through restrictive approaches such as strict caps on workers' hours with limited or no exceptions, or prohibitions on workers serving more than one consumer per day, may compromise services consumers need to remain in their communities. These restrictive measures could violate Title II of the Americans with Disabilities Act (ADA) and *Olmstead v. L.C.* (1999), a Supreme Court decision interpreting the ADA's requirements, which prohibit state policies that place people at serious risk of institutionalization, as well as states' due process requirements.

### **How can I make sure my state is collecting the right data?**

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<sup>15</sup> Centers for Medicare and Medicaid Services, CMCS Informational Bulletin, July 3, 2014

<http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf>

<sup>16</sup> Adapted from Action Steps for Consumers and Advocates Regarding the New Home Care Rule, page 3,

[http://www.bazelon.org/LinkClick.aspx?fileticket=yU9Q2al\\_Dvw%3D&tabid=40](http://www.bazelon.org/LinkClick.aspx?fileticket=yU9Q2al_Dvw%3D&tabid=40)

<sup>17</sup> Adapted from Action Steps for Consumers and Advocates Regarding the New Home Care Rule,

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If your state officials are not focused on the new Rule, push them to do an analysis of the impact now. States should have a mechanism by which to collect data on workers, hours worked, travel time, and overtime.

### **Once the Rule goes into effect, how will it be enforced?**

Workers, consumers, and employers should know and understand their rights and responsibilities. The Department of Labor has a hotline available to provide technical assistance and address enforcement issues.<sup>18</sup> Additionally, state labor offices can be a resource and are a good point of contact.<sup>19</sup>

### **When will the Rule go into effect?**

The Rule will go into effect once the US District Appeals Court issues the mandate. This is expected to be in mid-October. The Department of Labor has stated that it will refrain from enforcing the Rule until 30 days after the mandate issues.<sup>20</sup> Updates can be found on the DOL website and other resources listed below.

## **Contacts & Resources**

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If you have any questions, please contact:

- National Employment Law Project (NELP), Sarah Leberstein ([sleberstein@nelp.org](mailto:sleberstein@nelp.org)) or Caitlin Connolly ([cconnolly@nelp.org](mailto:cconnolly@nelp.org)), 202-683-4814, <http://www.nelp.org/campaign/implementing-home-care-reforms>
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- PHI, Robert Espinoza, ([respinoza@phinational.org](mailto:respinoza@phinational.org)), (718) 928-2085, [www.phinational.org/fairpay](http://www.phinational.org/fairpay)
- Department of Labor, <http://www.dol.gov/whd/homecare>, 1-866-487-9243
- A list of State Labor Offices can be found on the US DOL Wage and Hour website: [http://www.dol.gov/whd/contacts/state\\_of.htm](http://www.dol.gov/whd/contacts/state_of.htm)

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<sup>18</sup> The Department of Labor contact info can be found at <http://www.dol.gov/whd/homecare>, 1-866-487-9243

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<sup>20</sup> Although DOL will not begin enforcement against states until mid-November, workers can bring private litigation against employers as soon as the rules go into effect, although they can't sue a state for money damages.