



Alerts

Labor Department's Expanded Overtime and Minimum Wage Coverage For Home Health Care Workers is Revised

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Health Law Alert

On August 21, 2015, the U.S. Court of Appeals for the District of Columbia in *Home Care Association of America v. Weil* reversed a lower court decision and upheld the U.S. Department of Labor's (DOL) [2013 regulatory change](#) regarding domestic service workers who provide companionship services or live-in care.

Workers engaged in this line of work provide care to elderly, ill, or disabled consumers who require assistance in caring for themselves. Under the rule change, these employees are entitled under the federal Fair Labor Standards Act (FLSA) to minimum wage and overtime pay when they are employed by a third-party agency. Prior to the regulatory change, these employees fell under the general companionship or live-in domestic service exemption, and they were not entitled to minimum wage or overtime pay under the FLSA.

Accordingly, third-party home health service providers such as home health care agencies or personal care agencies can no longer rely upon the general exemption, and those employers are now required to pay their employees at least minimum wage and overtime at 1.5 times their regular rate of pay for all hours worked over forty (40) hours in a workweek.

Background

Weil was brought by three associations of home care agencies challenging the 2013 rule change. The appellate court decision overturned an earlier district court decision in the case, which held that the DOL's regulatory change was contrary to the language of the FLSA and blocked the DOL from enforcing the change.

The 2013 rule change—and the D.C. Circuit's preservation of the rule's narrowed exemption— mark a significant shift in the application of the FLSA. As a reminder, the FLSA generally requires employers to pay minimum wage and requires overtime to be paid at 1.5 times the normal pay for weekly work hours beyond forty (40) hours. Certain classes of workers are [exempt](#) and therefore not entitled to minimum wage or overtime.

Domestic service workers were placed under the requirements of the FLSA in 1974. From 1974 through 2013, DOL regulations had exempted all providers of companionship services and live-in workers, including individuals who were employed directly by the family or household using their services *and* those

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workers who were employed by third-party agencies. The removal of the third-party agency exemption was a long-time effort of the DOL: since 1993, there had been three unsuccessful proposals to remove the exemption.

The DOL supported its 2013 rule change by arguing that a dramatic transformation of the home care industry had taken place since 1974. Specifically, the industry had changed from what Congress envisioned in 1974 as "elder sitters" employed directly by households, to professional health care workers employed by third parties, providing services at the customers' homes instead of in institutional settings. The *Weil* Court—after finding that the DOL had the authority to limit the exemption—found the DOL's arguments to be a "reasoned explanation" for its departure from 40 years of agency practice.

This regulatory change will affect approximately two million workers who will no longer be exempt. The DOL estimates that these workers, as currently calculated, work an average of 31-34 hours per week, that very few of them work overtime, and that the national average wage is \$9.67. Despite the DOL's statistics, there will be additional costs and considerations that will greatly increase the costs associated with this change: issues like 24-hour live-in schedules, on-call procedures, and time spent traveling between consumers, all of which may contribute to hours quickly exceeding 40 per week and necessitating overtime payment when it was not required before. Added up, the DOL estimates a total potential transfer cost in the hundreds of millions of dollars.