

# New Rule Requires Home Care Employers to Pay Minimum Wage, Overtime to Their Direct Care Employees

By Felice B. Ekelman, Evan M. Rosen and Eric P. Simon

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Altering the home care business model that has existed for nearly 40 years, the U.S. Department of Labor has issued a new rule limiting the use of the Fair Labor Standards Act's "companionship" exemption to home care workers employed directly by members of a household rather than by a third-party employer. Home care companies that rely on the "companionship" exemption to the federal minimum wage and overtime requirements need to reexamine their pay practices with respect to their direct care employees in the wake of the new rule, which becomes effective January 1, 2015.

At present, home care companies could apply the companionship exemption to their certified nursing assistants, home health aides, and other direct care workers. Subject to state law, the exemption is applicable to any employee who provides services for the care, fellowship, and protection of persons who, because of advanced age or physical or mental infirmity, cannot care for themselves. The exemption covers employees engaged in a wide variety of job tasks, including meal preparation, bed making, clothes washing, and other personal services. It even encompasses general household work as long as that work does not exceed 20 percent of the total weekly hours worked by the companion worker.

Under the new rule, however, that will change. The exemption will apply only to individuals employed directly by the household. As a result, in a little more than a year, home care companies can expect a considerable increase to their payroll expenses. DOL estimates that the rule change will affect approximately two million home care workers.

According to the DOL, significant changes in the home care industry and the prevalence of the home care business over the past few decades prompted the rule change. Certified nursing assistants, home health aides, and other employees of third-party employers perform duties to assist the elderly or infirm in the home. Traditionally, parents, family members, or members of the community performed those duties. Moreover, direct care workers providing similar duties in a nursing home or assisted living facility, rather than in an individual's home, have long received minimum wage and overtime pay under federal law, the DOL reasoned. Thus, the rule change, DOL explained, is a way to provide parity to home care workers.

The final rule poses significant wage and hour risks to home care employers. Because plaintiffs often bring wage and hour claims on a collective or class basis, the potential liability, including back pay and penalties, can cripple a business. Accordingly, home care employers should evaluate the impact the final rule will have on their operations to limit possible liability under wage and hour law. Failure to modify pay practices to comply with the new rule may make an organization an enticing target for plaintiffs' attorneys and the DOL.

## Recommended Employer Actions

Employers should consult with their labor and employment counsel and human resources professionals to ensure compliance with the final rule and all applicable wage and hour laws. Employers should consider the following actions:

- Pay home care workers at least \$7.25 an hour (or higher, depending on applicable federal or state law at the time) and overtime at time-and-a-half the regular rate of pay for all hours over 40 in a

## Meet the Authors



[Felice B. Ekelman](#)

Principal  
New York Metro  
New York City 212-545-4005  
[Email](#)



[Evan M. Rosen](#)

Principal  
Atlanta 404-525-8200  
[Email](#)



[Eric P. Simon](#)

Principal  
New York Metro  
New York City 212-545-4014  
[Email](#)

## Practices

[Wage and Hour](#)

workweek, effective January 1, 2015.

- Modify time tracking policies and procedures to account for employees' time in transit between home visits during the continuous workday.
- Review overtime calculations to ensure the regular rate includes all non-discretionary forms of payment, such as bonuses.
- Revise the company's employee handbook, policies and procedures to address overtime, off-the-clock, time-keeping, safe harbors, and other wage and hour issues.
- Audit the company's time-keeping practices to ensure hours are accurately recorded (consider having employees sign an affirmation stating they have accurately recorded all time worked and have received compensation for all such hours).
- Review pay practices with respect to travel time, in-service training, and overnight shifts.
- Ensure compliance with applicable state law.

Jackson Lewis attorneys are available to discuss the final rule and the impact it will have on your business, as well as other workplace law issues.

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