

On December 27, 2010, The U.S. Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM) to revise the companionship and live-in domestic worker regulations. The National Employment Law Project supports the DOL's proposed changes to bring baseline minimum wage and overtime to this large and vital group of caregivers.

This fact sheet addresses commonly-asked questions about the proposed changes, and has information about commenting on the rules by the DOL's February 27, 2012 deadline.

### **What is the companionship services exemption?**

In 1974, Congress extended for the first time the Fair Labor Standard Act's minimum wage and overtime protections to almost all domestic service workers. At the same time, it provided a limited exception for workers who performed casual babysitting and for companions for the aged or infirm. Congress also provided for an overtime exemption for domestic workers who live in the household where they work.

Congress left it to the Secretary of Labor to define what functions an exempt companion could perform. The Secretary published companionship regulations in 1975. The rules have remained unchanged since then, while the home care workforce and the industry have undergone dramatic growth and changes. The 1975 companionship regulations are worded so broadly that large numbers of workers have been swept into the exemption, including workers whose duties range from personal care services to housekeeping to paramedical tasks. Around 2.5 million workers are excluded from these baseline minimum wage and overtime rules, including those employed by for-profit corporations and national agencies, and Home Health Aides and Certified Nursing Assistants funded through Medicaid, Medicare and other public funding sources.

### **Why do these rule changes matter?**

Our nation's 2.5 million home care workers provide the vital care that allows older adults and persons with disabilities needing care to remain in their own homes. Growing demand has made home care one of the top five fastest-growing jobs in the country. The exemption has suppressed wages for this workforce, consigning millions of caregivers to working poverty, and has led to higher workforce turnover and increased costs for employers as they try to replace and train their labor pool. Higher turnover also lowers the quality of care received by elders and people with disabilities. While the general level of overtime hours in the home care industry is modest, the exemption has encouraged excessive hours in some segments. Long hours are not only grueling for workers but can contribute to worse care for patients, as caregivers working 60 hours or more a week face fatigue and stress in performing what is a demanding job under any circumstances. These substandard working conditions have created serious employee recruitment and retention problems, generating labor shortages that prevent us from meeting the nation's rapidly growing need for home care.

## **How would the proposed regulations improve conditions in the industry?**

Narrowing the exemption will ensure that most home care workers receive federal minimum wage and overtime protections. Although most of these workers earn the minimum wage or slightly higher for their direct care hours worked, gaining these protections will ensure that home care workers have the right to: time-and-a-half when they work over 40 hours in a week; compensation for time spent traveling between clients' homes; and compensation when workers wake to care for clients on overnight shifts.

The proposed rules would:

1. Help workers who provide home care for older adults and persons with disabilities;
2. Help to stabilize this critical workforce that is now experiencing high turnover because of the abysmal pay and long hours;
3. Help keep elderly and people with disabilities in their homes and out of institutions; and
4. Help improve standards for live-in domestic workers.

## **What group of workers would be affected by the proposed changes?**

The proposed changes to the companionship services regulation would result in the extension of minimum wage and overtime protections to most home care aides. Home care workers today are employed primarily to provide personal care duties, housekeeping services, and medically-related tasks. Workers who provide household services to members of the household other than the elderly or disabled recipient of companionship care or who provide general housekeeping services that are not incidental to companionship care would no longer be exempt. Additionally, workers employed by a third party, such as a home care agency, would be covered. **That means the group of workers who remain exempt would be limited to those who whose primary duties are the provision of fellowship and protection and who perform personal care duties only on an incidental basis, who do not perform work for other members of the household, and who are employed solely by the individual, family member or household.**

## **What specific regulatory changes is the DOL proposing?**

The Department is proposing to make the following changes:

1. Clarify the definition of "domestic service employment" to remove the requirement that the services be performed in the home of the employer and add home health aides, personal care aides to the illustrative list of domestic workers;
2. Narrow the definition of "companionship services";
3. Make clear that employees of third party employers such as staffing agencies are not exempt; and
4. Change the record-keeping requirements for employers of live-in domestic workers to more closely align them with what other employers must do.

## **What changes is the DOL proposing to the definition of companionship services?**

The DOL is proposing to more clearly define the tasks that may be performed by an exempt companion. The **current rule** defines companionship services as 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; it allows for an unlimited amount of household work related to the care of the recipient, such as meal preparation, bed making, washing of clothes and other similar services; and it

allows for the performance of general household work so long as that work is “incidental,” defined as not exceeding 20 percent of the total weekly hours worked. The **proposed definition** of companionship services would limit it to those duties that are *directly related* to the provision of fellowship and protection for a person who, because of advanced age or infirmity, is unable to care for himself or herself. It would allow for the performance of *personal care services* when those services are performed incidental to the core companionship functions and so long as they do not exceed 20 percent of the employee’s time during a work week. Under the new rule, any work benefiting other members of the household, such as preparing meals or performing housekeeping or laundry for other members of the household, would not fall within the allowable incidental duties of an exempt companion.

### **What kind of personal care services could an exempt companion perform?**

The proposed regulation provides an illustrative list of incidental personal care services that may be provided by an exempt companion. The list includes: (1) occasional dressing; (2) occasional grooming; (3) occasional toileting (4) occasional driving to appointments, errands, and social events; (5) occasional feeding, including preparing food eaten by the person while the companion is present; (6) occasional laundry; and (7) occasional bathing when exigent circumstances arise. The proposed rule requires that this work be performed in conjunction with the fellowship and protection of the individual and not exceed 20 percent of the total hours worked by the companion in the workweek.

### **Will employers still be able to claim the companionship exemption when the worker performs general household work?**

The proposed rule would remove the current provision that allows an exempt worker to provide some general housekeeping services if those services make up 20% or less of the employee’s work for the week. The new rule would clarify that an exempt companion may not perform household work benefiting other members of the household, such as general housekeeping, making meals for other members of the household or laundering clothing used by other members of the household. The DOL explains that the intent of this change is to ensure that the companionship services exemption does not apply to an employee who performs general household work, such as vacuuming, washing windows, and dusting.

### **What kind of medically-related tasks could an exempt companion perform and still remain exempt?**

The **proposed rule** would clarify that companionship services do not include the performance of medically-related tasks for which training is typically a prerequisite. The current regulations specifically identify trained personnel such as nurses as outside the scope of the exemption, and the change aims to more clearly identify what constitutes medically-related services. The proposed rule would include examples of medically-related tasks including, but not limited to, catheter and ostomy care, wound care, injections, blood and blood pressure testing, turning and repositioning, determining the need for medication, tube feeding, and physical therapy. An exempt companion, however, would be allowed to remind the aged or infirm person of a medical appointment or a predetermined medicinal schedule.

**What changes is the DOL proposing to make to the rules on third-party employers of domestic workers?**

The DOL's proposed change would disallow both the minimum wage and overtime exemptions to any third-party employers, whether or not the worker's duties otherwise qualified as exempt companionship services. Under the proposed rule, the individual, family, and household employer would still be able to claim the exemption, whether the individual, family, and household employer were a sole or joint employer along with a third-party, but only in those cases where the worker otherwise qualifies as an exempt companion.

**How will this proposed change affect individuals, families, and/or households directly employing the companion?**

The proposed change would continue to allow the individual, family, or household employing the worker's services to claim the companionship exemption if the worker otherwise qualifies as an exempt companion, even as it requires all third-party employers to comply with minimum wage and overtime requirements.

**Would the individual, family or household employing the worker be able to claim the exemption even if it is found to be a joint employer with an agency?**

Yes. The proposed change would continue to allow the individual, family, or household employing the worker to apply the companionship and live-in exemptions but would deny all third-party employers the use of such exemptions.

**Would live-in domestic workers be entitled to overtime pay under the proposal?**

Under the proposed rules, live-in home care and other domestic workers employed jointly or solely by a third-party employer would be entitled to minimum wage and overtime from that third-party employer. The overtime pay exemption would only be available to individuals, families and households employing the live-in domestic worker.

**What changes is the DOL proposing to make to the record-keeping requirements for employers of live-in domestic workers?**

The proposed rules require employers to maintain an accurate record of the actual hours worked by live-in home care and other domestic workers. The current rules allow an employer and live-in domestic employee to enter into an agreement that excludes the amount of sleeping time, meal time, and off-duty time from pay, and allows the employer to use this agreement in place of actual records. The change would require employers to maintain a record of the actual hours of work.

## How would the proposed rules impact the costs of providing home care?

Making the transition to minimum wage and overtime coverage should be limited and manageable for the following reasons:

First, many states already provide minimum wage and overtime coverage to some or all home care workers.<sup>1</sup>

- Fifteen states provide minimum wage AND overtime protection: CO, HI, IL, ME, MD, MA, MI, MN, MT, NV, NJ, NY, PE, WA, WI.
- Twenty one states provide minimum wage protection: AZ, CA, CO, DC, HI, IL, ME, MD, MA, MI, MN, MT, NE, NV, NJ, NY, ND, OH, PA, SD, WA, WI.

In these states, including some with the nation's largest Medicaid home care programs, extension of federal wage laws would result in no or minimal change to employers' responsibilities to workers.

Second, in those states that do not already have minimum wage and overtime protections, the costs of transitioning to coverage would be minimal and could be contained by more evenly balancing work among workers. Many concerns over the costs of a companionship reform have centered on the impact of overtime costs, especially for high-hours cases. But 24-hour and live-in cases are rare. Only about 9% of home care workers nationally report working more than 40 hours/week overtime, and most of those work only slightly more than 40 hours.<sup>2</sup> In fact, most workers are employed part-time, and many would rather work full-time. Where workers are currently working more than 40 hours a week on multiple short-hours cases, employers can cap workweeks at 40 hours and divide cases more evenly among workers, limiting the amount of overtime paid to workers and simultaneously creating more full-time employment. There is no data showing that states with minimum wage and overtime protections for home care workers have higher rates of institutionalization, suggesting that the remaining states should be similarly capable of making this shift without major disruptions to their long-term care systems.

Third, there is evidence that low wages actually impose significant *costs* to the system due to turnover – costs that a reform would help to mitigate. Studies have shown turnover rates among home care workers of between 44 and 65%.<sup>3</sup> And a 2007 National Home Health Aide Survey found that 35% of home health aides intended to quit in the next year. The primary causes of high turnover rates are low wages, insufficient hours, and a lack of reimbursement for travel costs. High turnover imposes a significant financial burden to employers in the form of recruitment, retraining, and administrative costs. Additionally, because workers' annual earnings are so low, many workers rely on public benefits programs – a huge financial burden on state budgets. Raising wages modestly could therefore result in an overall costs savings to Medicaid home care programs and state budgets.

Home care clients would benefit as well from reduced turnover, increased stability and less burnout in the home care workforce, and the resulting improvement in quality of care.<sup>4</sup> Continuity of care means

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<sup>1</sup> See fact sheet "Which states provide minimum wage and overtime to home care workers" at [http://nelp.3cdn.net/6e193991edf8bd0df9\\_o6m6i28s2.pdf](http://nelp.3cdn.net/6e193991edf8bd0df9_o6m6i28s2.pdf).

<sup>2</sup> PHI analysis of the U.S. Census Bureau, Current Population Survey (CPS), 2010 Annual Social and Economic (ASEC) Supplement.

<sup>3</sup> A survey of home care agency staff in Pennsylvania found a turnover rate of 44% (University of Pittsburgh (2007) *The State of the Homecare Industry in Pennsylvania*, Prepared for the PA Homecare Association); a review of 13 state and 2 national studies of in-home care for persons with intellectual and developmental disabilities found an average turnover rate of 65% (Hewitt and Larson (2007); a study of agency-employed home care workers in Maine found a turnover rate of 46% (L. Morris (2009) "Quits and Job Changes Among Home Care Workers in Maine," *The Gerontologist*, 49(5): 635-50).

<sup>4</sup> Dawson, S. L. and Surpin, R., *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care*, Paraprofessional Healthcare Institute (PHI), January 2001

continuity of *services*, not continuity of *worker*. Clients may also have an easier time finding workers if working conditions improve and more workers are attracted to and more likely to remain in the home care field.

### **What effect will the extension of overtime rights have on high-hours and live-in work arrangements?**

Employers that currently employ one worker for more than 40 hours a week will have the option of employing an additional worker (or workers) for hours in excess of 40, which may in turn help ensure continuity in the event that one worker becomes sick or has an emergency. Alternatively, employers may choose to pay time-and-a-half when a worker works more than 40 hours in a week.

It is important to note that, even under the proposed rules, home care workers would still 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 8 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.

### **How would home care agencies respond to increased coverage?**

We don't know exactly how home care agencies would respond to the extension of minimum wage and overtime rules to their workers, but we do know that they *are capable of* managing the transition without raising costs or cutting care. First, as explained above, agencies can manage overtime costs by more evenly distributing work among their workers. Some of the nation's largest home care employers already follow minimum wage and overtime rules, even in states where coverage is not required. Addus HomeCare, for example, has curbed overtime usage and costs through close monitoring of employee workloads and by spreading hours more evenly among its staff. Case studies of other large home care employers demonstrate how they have managed overtime costs through the adoption of modern scheduling programs, by developing systems for staffing high-hours cases with primary and secondary aides, and by maintaining pools of substitute workers (and engaging in sufficient recruitment and training needed to maintain those pools).

Moreover, the home care industry can afford to pay a fair wage without raising costs to consumers. For-profit home care businesses make 30-40% profits in a 70 billion dollar industry.<sup>5</sup> Subsidizing the system by denying these workers a fair wage is unnecessary.

Some for-profit agencies that have publicly opposed a reform to the companionship exemption, such as Home Instead Senior Care, operate in states that already provide minimum wage or overtime protections to workers. Presumably these agencies have been able to cover their operating costs and even make a profit despite being subject to minimum wage and overtime requirements.

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<sup>5</sup> Franchise Business Review (December 2010) *Senior Care and Home Healthcare Franchises*, Special Report. Available at: [http://www.franchisebusinessreview.com/content/files/FBR\\_Senior\\_Care\\_Report2010.pdf](http://www.franchisebusinessreview.com/content/files/FBR_Senior_Care_Report2010.pdf)

NELP is preparing comments to submit to the DOL regarding some aspects of the proposed rules we believe need clarification or do not go far enough to protect workers. Please contact us if you are interested in seeing a copy of our comments, or if you have questions.

Comments are due to the DOL by 2/27/12 and can be submitted through the following portal: <http://www.regulations.gov/#!submitComment;D=WHD-2011-0003-0001>. For more information on how to submit comments, see the Direct Care Alliance's Comment Submissions Guidelines at <http://directcarealliance.org/document/docWindow.cfm?fuseaction=document.viewDocument&documentid=25&documentFormatId=29>.

Other helpful resources and materials on the companionship exemption:

- Links to the proposed rule and background on the issue from the U.S. Department of Labor (<http://www.dol.gov/whd/flsa/companionNPRM.htm>)
- Fair Pay for Home Care Workers *NELP report* (<http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1>)
- End the Exclusion of Home Care Workers from Minimum Wage and Overtime *NELP fact sheet* (<http://www.nelp.org/page/-/Justice/2011/EndExclusionofHomeCareWorkersfromMinimumWage.pdf?nocdn=1>)
- Caring in America *PHI report* ( [www.phinational.org/homecarefacts](http://www.phinational.org/homecarefacts) )
- DCA's Respect for Home Care Workers page (<http://www.directcarealliance.org/flsafix>)
- PHI's Fair Pay for Home Care Workers page ( [www.phinational.org/fairpay/](http://www.phinational.org/fairpay/) )
- The Financial Realities for Direct Care Workers *DCA fact sheet* (<http://blog.directcarealliance.org/wp-content/uploads/2011/06/P7-DCA-Fact-Sheet-The-Financial-Realities-for-Direct-Care-Workers.pdf>)
- Protecting Home Care Workers Under the Fair Labor Standards Act *DCA policy brief* ([http://blog.directcarealliance.org/wp-content/uploads/2009/06/6709-dca\\_policybrief\\_2final.pdf](http://blog.directcarealliance.org/wp-content/uploads/2009/06/6709-dca_policybrief_2final.pdf))
- Minimum Wage and Overtime Protection for All? *DCA policy brief* ([http://blog.directcarealliance.org/wp-content/uploads/2010/12/DCA\\_brief6.pdf](http://blog.directcarealliance.org/wp-content/uploads/2010/12/DCA_brief6.pdf))
- *Value the Care*, a series from PHI on key questions related to the companionship exemption. ([www.phinational.org/fairpay](http://www.phinational.org/fairpay)).

#### About NELP

For more than 40 years, the National Employment Law Project (NELP) has worked to restore the promise of economic opportunity for working families across America. In partnership with grassroots and national allies, NELP promotes policies to create good jobs, enforce hard-won workplace rights, and help unemployed workers regain their economic footing.

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