

# One Minute Memo®



## Change to FLSA Companionship Exemption Extends Minimum Wage and Overtime Protections to Home Health Care Aides

By Gena Usenheimer

After almost fourteen months of legal challenges, the U.S. Department of Labor has emerged victorious in its attempt to modify the FLSA's companionship exemption. [On August 21](#), the U.S. Court of Appeals for the D.C. Circuit upheld the DOL's proposed regulations, against a challenge that the regulations exceeded the Department's rulemaking authority.

### The "Old" Versus "New" Rules

Under the FLSA's former "companionship" exemption, set forth in 29 U.S.C. § 213(a)(15), and the implementing regulations, many home health care aides and other such workers were exempt from the FLSA's minimum wage and overtime requirements.

The revised regulations bring the following [key changes](#):

- (1) the exemption from minimum wage and overtime extends only to workers whose "employer" is the individual, family, or household using the services — this eliminates the ability of third-party agencies to avail themselves of the exemption;
- (2) the duties which qualify for the "companionship" exemption have changed, effectively preventing many home health care aides from being covered by the exemption;
- (3) third-party agencies acting as an employer or joint-employer must pay overtime to live-in domestic service employees; and
- (4) all employers of live-in domestic service employees are subject to increased record-keeping requirements.

Assuming no further review by the full D.C. Circuit or the Supreme Court, the newly upheld regulations will require employers in a majority of states to modify their pay practices, including those in the 27 states that currently do not have minimum wage or overtime requirements in place for this category of workers. In New York, this is particularly relevant for home health care agencies and other providers that have been relying on the former companionship exemption to pay overtime at a rate of one-and-one-half times New York State's minimum wage. Once the new regulations become effective, an overtime calculation based on the minimum wage rate will no longer be lawful, and New York employers will be required to pay overtime at one-and-one-half times the employee's regular rate of pay.

## Implementation Date

Although there is no news yet on whether further review is expected or when the newly upheld regulations will go into effect, New York home health care agencies previously relying on the companionship exemption should be prepared to update their overtime practices in short order.

If you have any questions, please contact your Seyfarth attorney, or Gena Usenheimer at [gusenheimer@seyfarth.com](mailto:gusenheimer@seyfarth.com).

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