

System Wide Communication - Update on Companion Exemption Services

Franchise Owners (Copy ARs)

On December 22, 2014, a federal Court in the District of Columbia vacated (i.e., invalidated) the provisions in the U.S. Department of Labor's new rules scheduled to take effect January 1, 2015 that excluded third party employers from using the companionship services exemption and the live-in domestic employee exemption. Although the decision is clearly an important win for home care, **IT IS IMPORTANT TO UNDERSTAND THAT THE ENTIRE REGULATION HAS NOT BEEN VACATED.** The Home Care Association of America (HCAOA) states that because the recently announced ruling is written vaguely, and because it only affects a part of the overtime requirements, they are recommending that home care agencies continue with the plans to pay caregivers overtime wages for live-in assignments that exceed 40 hours, charging clients accordingly. Of course, remember to check your state regulations for over-time laws (California). The HCAOA is still in the process of interpreting the rule and they will get clearer communication out to its members in the immediate future, hopefully, in time for the January 1st change.

Most significantly, the narrowed definition of "companionship services" still goes into effect January 1, 2015. Consequently, for a caregiver to fall within the companionship services exemption, the services performed by the caregiver must meet the following requirements:

(1) Be primarily fellowship and protection. "Fellowship" means conversation, reading, games, crafts or accompanying the client on walks, errands and the like. "Protection" means to be present with a client to monitor the client's safety and wellbeing.

(2) Not more than 20% of the total hours worked per person and per workweek may be used for providing "care." "Care" includes providing assistance with ADLs and IADLs such as feeding, dressing, bathing, toileting, assisting with taking medication, housework, transportation, and money management.

(3) No domestic services may be performed primarily for the benefit of other members of the household. Domestic services include laundry, preparing meals and the like. At this time, there is no guidance on how to interpret the word "primarily" in this context.

(4) No medically related services are permitted that require trained personnel (i.e., RNs, LPNs and CNAs). Medically related services include catheter care, tube feeding, bed turning or repositioning, or physical therapy.

If these requirements are met, the caregiver will be exempt from minimum wage and overtime pay under the FLSA effective January 1, 2015. Further, agencies that employ live-ins who **permanently** reside with clients (i.e., have their mail delivered to the client's home or use the client's address on their driver's license, for example) or who reside with clients for an **extended** period of time, are exempt from paying overtime under the live-in domestic employee exemption effective January 1, 2015. The DOL considers an extended period of time to mean working and sleeping at the client's residence for 5 days a week (i.e., for at least 120 hours) or to work and sleep there 5 consecutive days or nights, regardless of hours.

Although the Plaintiffs in the case against the US Department of Labor are still seeking to invalidate the narrowed definition of "companionship services." It is uncertain when a decision will be made on this issue.

As we learn more, we will communicate it to you. Again, at this time, based on conversations with the HCAOA, it is recommended that agencies proceed with plans to pay over-time on live-in assignments, charging clients accordingly.