

COMPANIONSHIP AND LIVE-IN WORKER EXEMPTION: FINAL RULE OVERVIEW

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At the National Resource Center for Participant-Directed Services (NRCPDS), housed at Boston College, our mission is to infuse participant-directed options in all home and community-based services. We have more than two decades of experience making participant direction a reality, and we provide national leadership, technical assistance, training, education, and research that improves the lives of people of all ages with disabilities.

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Introduction

The U.S. Department of Labor has released the final rule modifying the companionship and live-in worker exemptions. The full text of the rule is available at: <http://www.dol.gov/whd/homecare/>. The new rule will go into effect on January 1, 2015. The following is a summary of the new companionship exemption rule.

The New Companionship Exemption Rule

The companionship rule exempts certain direct care workers from the Fair Labor Standard Act's minimum wage and overtime requirements. The new rule narrows the companionship exemption in several ways.

Narrowed Definition of Duties that Qualify as Companionship

First, the rule narrows the services that a worker can perform in order to qualify as a companion. A companion's primary duties must be limited to offering fellowship and protection to a care recipient. Apart from offering fellowship and protection, up to 20% of the worker's hours can also be spent providing "care services," defined as assistance with activities of daily living such as "dressing, grooming, feeding, bathing, toileting, and transferring," and with instrumental activities of daily living, meaning "tasks that enable a person to live independently at home, such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care." If more than 20% of the worker's hours are spent providing such care services in a workweek, then the companionship exemption cannot be claimed for that week.

Tasks that Cannot Be Performed by Companions: Household Work for Other Household Members, and Medically Related Services

The companionship exemption cannot be claimed if the worker performs any household work for other members of the household, or any medically related services. Household work for other members of the household means work that primarily benefits persons other than the care recipient. The companionship exemption can still be claimed if some members of the household benefit incidentally from the worker's activities, so long as the activity primarily benefits the care recipient. For example, a worker who prepares a meal for the care recipient can still claim the exemption even if another member of the household eats the leftovers. However, a worker who prepares meals for the entire household does not qualify for the exemption.

Medically related services are defined as any services that would typically require training by medical personnel and would typically be performed by trained healthcare workers such as nurses. A worker who performs any medically related services in a workweek cannot claim the companionship exemption during that week. It does not matter whether the worker actually has medical training. The rule looks at whether the services would typically require training, not at

the level of training or occupational title of the worker. Examples of medically related services include "invasive or sterile procedures, or procedures that otherwise require exercise of medical judgment" such as "catheter care, turning and repositioning, ostomy care, tube feeding, treating bruises or bedsores, and physical therapy."

However, first aid care performed in an emergency and not on a regular basis does not disqualify the worker from claiming the companionship exemption. For example, a worker who performs CPR in an emergency can still claim the companionship exemption for that week. Also, requiring workers to undergo first aid or CPR training does not disqualify them from claiming the companionship exemption.

Exemption Can Be Claimed Only by Individuals and Households

The second major way in which the rule narrows the exemption is to narrow who can claim the exemption. Only the individual or household employing the worker can claim the companionship exemption. Agencies or third party employers cannot claim the exemption even if the worker is jointly employed by an agency and the care recipient or household. The economic realities test will be used to determine who is considered an employer.

The preamble to the rules states that a Fiscal/Employer Agent would generally not be considered the employer of workers, so long as it has "no power to hire or fire, direct, control, or supervise the worker and cannot modify the pay rate or modify the employment conditions." Thus, workers in an F/EA program should be able to qualify for the companionship exemption so long as all other conditions are met.

The preamble also explains that in a Public Authority program, "the state or county agency is likely to be an employer of the direct care workers" in a sample scenario where the agency decides the method of payment, reviews worker time sheets, determines what tasks each worker may perform, and sets the wage rate. In such a scenario, the agency would not be able to claim the companionship exemption for the direct care workers. In addition, the public authority would be an employer of the workers even if a private third party agency is found to also be an employer in the program. In such a case, both the public authority and the third party agency would be liable for the direct care workers' wages.

The rules do not explicitly state whether workers in Agency with Choice programs would qualify for the exemption. They acknowledge that the Department of Labor is aware of the existence of the Agency with Choice model of participant direction, but then state that the economic realities test will determine who is an employer, not the designation given to the program. We expect that agencies using the Agency with Choice model would be considered employers for purposes of the companionship rule, and that therefore workers employed by such agencies would not qualify for the companionship exemption. We will keep our subscribers updated on any further guidance from the Department of Labor on this issue.

Limited Definition of Employment for Family and Household Members Acting as Paid Caregivers

The Department of Labor recognized that some Medicaid and certain other publicly-funded programs allow care recipients to employ family and household members as caregivers, and that the new companionship rules may pose unique challenges in such situations. Therefore, as part of the new rules, the Department of Labor issued a new interpretation of what constitutes "employment" in the limited context of a worker who provides paid home care services to a member of the worker's family or household. Such a worker is considered to be an employee only during the hours that are agreed upon in a plan of care or other similar agreement developed with the program. In other words, the existence of the program does not turn all care provided by the family member into employment. A family member who provides unpaid care outside of the hours paid by a program is doing so because of the family relationship, not because of an employment relationship. Therefore, such unpaid care is not considered employment and is not covered by the FLSA. This interpretation applies even if an agency or other third-party is considered the employer of the caregiver.

The Department of Labor gives as an example the situation of a father providing unpaid assistance to his disabled adult son. The care provided arises out of a familial relationship, not an employment relationship. If the son then enrolls in a Medicaid-funded program that pays for eight hours of care per day, and the father becomes the chosen caregiver in that program, then the father and son have an employment relationship that extends only to the eight hours per day contemplated in the plan of care. If the father provides care to his son outside of those eight hours, he is doing so because of the family relationship and not the employment relationship, and therefore the additional hours do not have to be paid.

The limited definition of employment generally only applies to caregivers who had preexisting family or household ties with the recipient before the need for care arose. A worker who is not a household member but who becomes "like family" after being hired to provide care, or who becomes part of the household after being hired as a live-in employee, would nevertheless not qualify as a family or household member and has to be paid for all hours worked. As an exception to this rule, a caregiver who enters into a new family relationship with the recipient during the course of employment, for example by marriage or civil union, can qualify as a family member after that point.

In order for a program to take advantage of this limited definition of employment, the program cannot treat family members differently from other employees when determining the plan of care and assessing how many hours of care the recipient should receive. For example, the program cannot reduce the number of paid hours in a plan of care because selected caregiver is a family or household member, and cannot increase the number of hours of unpaid care expected to be performed by family members in order to reduce the number of paid hours of care.

The New Live-in Worker Exemption Rule

The live-in worker exemption will also be affected by the new rule. Under the live-in worker exemption, domestic service workers who live on the employer's premises are exempt from overtime, although they still have to be paid minimum wage. The new rule limits who can claim the exemption. The live-in worker exemption, like the companionship exemption, will only be claimable by the individual or household employing the worker, not by agency or other third-party employers. The rule also imposes new record keeping requirements. The employer will have to maintain records of the exact number of hours worked each day, whereas under the old rules it was sufficient to have an agreement defining regular working hours. The employer may assign the worker the task of keeping track of his or her hours and submitting the records to the employer. However, the employer is ultimately responsible for ensuring that the records are completed and maintained.

We will keep members updated with any further guidance issued by the Department of Labor regarding the new Companionship and Live-in Worker Rules. Please contact us with any questions or concerns.