JANUARY 16, 2015

THE EXEMPTION LIVES PART II: WHAT WAS IT AGAIN?

In light of the recent ruling that the *revised* companionship services exemption COULD NOT go into effect and that the long-standing version of the exemption would REMAIN IN EFFECT, we thought it was worth going back over the original exemption requirements so that home care providers can be sure that if they are going to use it, they are using it PROPERLY.

Complying with the exemption is important. The court did not simply rule that certain non-skilled home care workers are exempt from overtime. Instead, it ruled that the Department of Labor's ("DOL") proposed changes to certain definitions could not take effect. This is an important distinction because, like all of the exemptions contained within the Fair Labor Standards Act ("FLSA"), the companionship services exemption has several elements that the employee's job must meet.

THE FLSA AND EXEMPTIONS.

The FLSA, 29 U.S.C. §§ 201, et. seq. requires subject employers to pay all non-exempt employees minimum wage and a premium for hours worked in excess of 40 hours in a workweek. The FLSA includes a number of exemptions that exempt an employee from being entitled to minimum wage, overtime or both. The DOL has also promulgated a number of regulatory exemptions as well. In 1974, Congress passed an amendment to the FLSA that broadened the minimum wage and overtime requirements to include domestic service employees. 29 U.S.C. § 206(f). At the same time, Congress created exemptions for certain employees "employed in domestic service employment" such as casual babysitters, live-in domestic service employees and workers providing companionship services for the aged and infirm. 29 U.S.C. § 213(a)(15).

The exemption of workers providing companionship services for the aged and infirm is an exemption to both the minimum wage and overtime requirements of the FLSA. Home care employees that may fit into this exemption are generally home health aides, hospice aides and private duty attendants/aides and similar non-skilled caregivers. However, it is not the employee's title that determines if they are an exempt companion. **An employee's role must meet all of the requirements of the companionship services exemption for the exemption to apply.**

THE COMPANIONSHIP SERVICES EXEMPTION.

As promulgated and applied, the companionship services exemption has four elements. Each element must be met in order for the employee to be exempted. These elements are:

1. *Companion Services*. The services provided by an employee must be "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";
2. *General Household Work*. The employee may not spend more than 20% of her time each week performing "general household work";
3. *Non-Trained Personnel*. The employee is not providing services relating to the care and protection of the aged or infirm which would otherwise require trained personnel such as a registered or practical nurse; and
4. *In or About the Private Home*. The services must be performed in or about the private home of the client. Section 13(a)(15).

We will discuss each of the four elements in more detail below:

1. *Companionship Services*. Employers who wish to treat employees as exempt employees under this exemption must be sure the employee is providing "companionship services." The DOL defines companionship services as "those 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. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services." 29 C.F.R. § 552.6. **This definition was set to change on January 1, 2015, but the court's ruling in *Homecare Association of America v. Weil* on January 14, 2015 stopped that change from happening.**

For providers in the home care industry, it is not difficult to make the case that many of their employees are providing companionship services for home health, hospice and private duty providers. This is because their employees are going into the patient's/client's home to

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provide care. This is a point on which the district court in *Weil* was quite clear. These services are provided to elderly patients, disabled patients and sick or dying patients who cannot care for themselves. The issue of age, infirmity and patient ability is essentially resolved by the eligibility determination for Medicare, Medicaid and Medicaid waiver. Although all of their caregiving employees provide companionship services, *skilled* caregiving employees are not eligible. Furthermore, as the name implies, this exemption requires the employee to be a caregiver, which means home care providers cannot use this exemption to exempt schedulers, administrative staff or similar office personnel.

2. *General Household Work*. The companionship services exemption will not apply to any employee in any week where the employee spends more than 20% of his or her time performing general household work. There are two key issues in this element. The first is defining what is general household work. The second is tracking employee activity to ensure that they do not spend more than 20% of their time on general household work. This portion of the test removes homemakers and some employees who simply spend their down time cleaning the patient's home from the exemption.

Although the exemption does not apply to employees who spend more than 20% of their time on general household work, it is important to understand this is not prohibition on any household work. For example, the regulation expressly states that companionship services includes services "such as meal preparation, bed making, washing of clothes, and other similar services." 29 C.F.R. § 552.6. This type of work can be provided without limit. For example, if a quadriplegic patient's catheter leaked and soiled the patient's sheets overnight, the companion's efforts to change the sheets and wash the soiled sheets would not be considered general household work. This means it would not count towards the 20% limit on such general household work and that companion is free to provide that type of care without limitation. Other examples of household work that is not considered general household work include "cleaning the patient's bedroom, bathroom or kitchen, picking up groceries, medicine, and dry cleaning would be related to personal care of the patient and would be the type of household work that would be exempt work for purpose of Section 13(a)(15) of the FLSA." *DOL Opinion Letter*, March 16, 1995, 1995 WL1032475.

The regulation allows an exempt companion to provide general household work as long as the amount of time spent on such work in a given week is less than 20% of the companion's total working time for that week. In a 40 hour workweek, this would mean the employee could not spend more than eight hours on general household work. Home care employers need to understand what constitutes general household work. In 1995, the DOL issued an advisory opinion in which it discussed what constituted general household work. This opinion stated that the term general household work included "activities involving heavy cleaning such as cleaning refrigerators, ovens, trash or garbage removal and cleaning the rest of a 'trashy house' and would be subject to the 20% limitation." March 16, 1995 Opinion. It is very important for providers who are relying upon this exemption to be able to prove the hours the employee spent at the client's home were spent not on general household work but on patient-related work. For example, if a companion vacuums all of the carpets in a client's home or washes all of the dishes that the entire family has soiled, they would be engaged in general household work. The companion should not spend more than 20% of their time engaged in this kind of activity.

3. *Non-Trained Personnel*. The exemption does not apply to services that require and are performed by "trained personnel." Determining whether individuals are trained personnel involves a two-part test. An employee is considered to be trained personnel if the individual: (1) received training comparable in scope and duration to a registered nurse or practical nurse; and (2) performed services requiring the training of a registered nurse or practical nurse. *Cox v. Acme Health Services, Inc.*, 55 F.3d 1304, 1310 (7th Cir. 1995). An employee can have training but still qualify as non-trained personnel.

The *Cox* case concluded that although they receive training, Medicare-certified home health aides do not receive training comparable in scope and duration to a nurse and are, therefore, non-trained personnel. The types of employees who may qualify under this exemption are certified home health aides, certified nursing aides, personal care attendants, habilitation providers and others. Home health aides and certified nursing assistants usually require some training prior to certification, but it is not comparable to RNs or LPNs. In some Medicaid waiver programs, the attendants or habilitation provider only needs to have a high school diploma and do not require any additional training other than orientation to a specific client. An employer may argue that a nurse who is providing home health aide services is exempt because the service does not require the skill or training of a nurse to provide, but it is a better practice to rely on other more appropriate exemptions for nurses.

4. *In or About the Private Home*. The final element of the companionship services exemption is the requirement that the services be provided "in or about the private home of the client." To state it simply, if the client is living in his or her own home or apartment or in the home of a relative, he or she is living in a private home. This requirement has been interpreted to mean the exemption is unavailable to

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employees who provide companion services in facilities such as nursing homes or assisted living facilities. When services are provided in a location other than a traditional home or apartment setting, courts have evaluated a number of factors to determine whether the location is a private home.

A residence may be a private home or it may be a facility depending upon a number of factors. Among the factors a court will look at to determine if the services are provided in a private home are: (1) who acquired the residence/signed the lease; (2) does the provider have the ability to control the client's choice of location; (3) who pays the rent or mortgage; (4) how is the determination made regarding which clients to group together in a residence; (5) who has keys to the residence; (6) can the provider control the clients' ability to come and go as they please; (7) did the client live in the residence before receiving services from the provider; and (8) are the client's activities and/or the home's maintenance regulated by state law. There are other factors a court will consider, but determining whether it is a home or a facility is a very fact-specific decision made on a case-by-case basis and no one factor is dispositive.

Home care providers will often need to distinguish between multiple locations, because individual employees may provide services in more than one home or in other facility settings. In cases where an employee services multiple locations, the employer will need to treat the hours spent in a facility as non-exempt and may need to pay overtime. For habilitation providers or providers providing home care in a shared residential setting, careful consideration needs to be made regarding whether the location is a facility or residence.

CONCLUSION.

Now that we know the companionship services exemption survives another day, providers should review their practices and ensure their use of the exemption complies with the federal regulations. **Compliance is not simply a matter of being a home care provider.** Failing to comply with the elements of the regulation will result in being liable for unpaid overtime, liquidated damages and attorney's fees.

If you have any questions regarding the policy change, please contact:

- Robert Markette at (317) 977-1454 or rmarkette@hallrender.com;
- Allison Taylor at (317) 977-1421 or ataylor@hallrender.com; or
- Your regular Hall Render Attorney.

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