

Navigating the Minefield

Minimum Wage and Overtime Rules for Hiring Domestic Workers, Home Health Care Aides and Caregivers

By Bennett Pine

Given the well-documented aging of America, it is increasingly common for individuals to hire caregivers, home health care aides or companions, or to have a family member do so for them. Whether the individual hired is entitled to receive minimum wage, overtime and other employee benefits turns on a myriad of factors, including the type of services rendered, the number of hours worked, whether or not the employee lives in and whether they are hired directly or through an agency/third party.

As a general proposition, under the Fair Labor Standards Act (FLSA), the federal law governing wages and hours, most domestic workers, including home health care workers, are entitled to receive the minimum wage for all hours worked, as well as overtime. This means that such workers are entitled to be paid at least \$7.25 per hour, which is the current federal minimum wage (or be paid the higher applicable state minimum wage), as well as one and a half times their hourly rate for all hours worked in excess of 40 in a workweek.

Exemption for “Companionship Services”—In 1974, Congress extended FLSA coverage to employees who provide “domestic service.” However, as of January 1, 2015, the Labor Department amended the regulations to clarify that employees who provide certain “companionship services” to elderly persons or persons with illnesses or disabilities are exempt from the FLSA’s otherwise applicable minimum wage and overtime requirements.

The definition of companionship services is quite limited. Under the regulation, companionship services means “the provision of fellowship and protection for an elderly person or a person with an illness, injury or disability who requires assistance in caring for himself or herself.” The provision of “fellowship” means to engage the

person in social, physical and mental activities such as conversation, reading, games, crafts; and accompanying the person on walks, on errands, to appointments, or to social events. The provision of “protection” means to be present with the person in his or her home, or to accompany the person when outside of the home, and to monitor the person’s safety and well-being.

There is a significant limitation. Under the regulations, the companionship services exemption is *not* applicable if the caregiver spends *more* than 20 percent of their workweek performing “care services.” Care services are defined as assisting the patient with activities of daily living (including dressing, feeding, bathing, toileting, transportation, meal preparation, light housework, managing finances, taking medication, and providing or arranging for medically related services). In addition, caregivers who perform tasks for the entire household (e.g., meal preparation and laundry) do not fall under the companionship exemption, and are entitled to minimum wage and overtime for the workweek.

Medically related services include medical tasks that typically are performed by medical personnel such as registered nurses and licensed practical or certified nursing assistants. Examples listed include invasive or sterile procedures, catheter care, turning and repositioning, ostomy care, tube feeding, treating bruising or bedsores, physical therapy or other procedures that require the exercise of medical judgment.

Hiring Through an Agency—If the home care or companionship employee is not hired directly by the individual, family member or household, but is instead hired through a third party, such as an employment or home health care agency, the companionship exemption is not available.





who's who

Bennett Pine is a shareholder in Anderson Kill's New York and Newark offices

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In such case, the *agency* must comply with FLSA requirements, including payment of minimum wage and overtime.

Rules for "Live-In" Domestic Care—Domestic service workers who reside in their employer's residence are treated somewhat differently. If the live-in caregiver is hired directly, the caregiver is entitled to minimum wage, but is *not* entitled to overtime pay. Under the FLSA, in order to qualify as a "live-in," the employee must either (i) live at the employer's home full time or (ii) spend at least 120 hours or five consecutive days or nights in the client's home per week.

It should be noted that caregivers who live with clients will not be considered to be "working" the entire time they are in the home. As such, they do not need to be paid for time spent sleeping, eating meals or other "free" time spent off-duty. Live-in domestic workers employed by or through a third-party employer also are entitled to overtime pay.

Family Providers—The Labor Department recognizes that family members may be hired as caregivers. If they are, the same rules regarding minimum wage and overtime apply. Thus, if a hired family member spends more than 20 percent of their work time providing non-companionship "care" services, the companionship exemption is lost. The Labor Department thus strongly recommends that a written care plan be put into effect describing hours and duties when hiring a family member, in order to delineate between work and free/personal/family hours. In any event, it is a good idea, whether the caregiver is a family member or an outside employee, to have a written agreement specifying the caregiver's anticipated duties, schedule and compensation.

Enhanced State Law Protections—Employers of home health care, housekeeping and other domestic employees must also be cognizant of applicable state laws that mandate protections and benefits to domestic workers greater than that mandated by the FLSA. So-called Domestic Workers Bills of Rights have been adopted in New York, California and Massachusetts, and presently are pending in Illinois and elsewhere.

The New York law, for example, grants domestic workers: the right to overtime pay at time-and-a-half after 40 hours of work in a week, or 44 hours for live-in workers; a full day of rest every seven days, or overtime pay if they agree to work on that day; three paid days of rest each year after one year of work with the same employer; protection against discrimination under the New York state Human Rights Law; a special cause of action for domestic workers who suffer sexual or racial harassment; and workers' compensation and disability benefit insurance.

Conclusion

It is important, whether hiring a caregiver for yourself or for a loved one, to comply with applicable federal (and state) wage-hour laws. Failure to do so may result in liability, including liquidated or double damages under the FLSA.

We are experienced in drafting employment agreements for various types of domestic, home care and companionship employees and are available to assist you in navigating the rules of the road for such employees. ▲

