LEGAL HOT TOPIC:

Home Care Wins Back Federal Overtime Exemptions!
But For How Long?

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This issue’s legal hot topic focuses on home care winning back federal overtime exemptions. Find out the status of this important litigation and certain inherent risks, travel time and mileage reimbursement, and a quick review of basic requirements for the exemptions.
Home Care Wins Back Federal Overtime Exemptions! But For How Long?

These legal victories for home care mean agencies that used the federal companionship services exemption and live-in domestic services exemption in 2014 may continue using these exemptions the same as in the past. However, the DOL’s appeal against the court’s decision, creates uncertainty and risks for using the exemptions while the appeal is pending.

In recent months, a federal district court threw out the U.S. Department of Labor’s ("DOL") revised wage and hour rules barring home care’s use of federal overtime exemptions for caregivers’ wages. These legal victories for home care mean agencies that used the federal companionship services exemption and live-in domestic services exemption in 2014 may continue using these exemptions the same as in the past.

However, DOL has already filed its appeal against the district court’s decisions, which creates uncertainty and risks for using the exemptions while the appeal is pending.

This article will review the status of this important litigation and certain inherent risks it now entails. It will further review when and how agencies should pay travel time and mileage reimbursement when caregivers do not qualify for minimum wage exemptions. Finally, with the exemptions under increased scrutiny, this article provides a quick review of the basic requirements for the exemptions.

Litigation Overview:

Since late 2013, many home care and hospice agencies had been struggling with the dilemma of how to pay caregivers and live-ins for overtime to meet the DOL’s announced revisions to wage and hour regulations that were to take effect January 1, 2015.

DOL’s revised regulations, which it called Home Care’s “Final Rule,” essentially barred home care and hospice agencies from using the popular companionship services exemption from minimum wage and overtime...
pay and the lesser-known live-in domestic service exemption from overtime pay. (Both of these exemptions are briefly described in sidebars within this article.)

In promoting its revised rules, DOL further published troubling expectations that agencies were to pay their non-exempt caregivers for all travel time between clients in a workday – even when there were long breaks between client visits.

Many in home care who were using the companionship services exemption to avoid paying minimum wage and overtime pay (and travel time pay) to caregivers predicted dire financial outcomes for their agencies, caregivers and clients alike with the prospect of incurring these new payroll expenses.

Then, in the summer of 2014, three Plaintiffs representing the home care industry filed a legal challenge against DOL's Final Rule in the federal district court of the District of Columbia. (See footnote 1.) On December 22, 2014, Judge Leon ruled in favor of home care and vacated the Final Rule's prohibition against agencies from using the companionship services exemption and the live-in domestic service exemption.

On January 14, 2015, Judge Leon ruled in favor of home care again and threw out DOL's revised “companionship services” definition that would have prevented home care from using the companionship services exemption as a practical matter.

**DOL is appealing Home Care’s victories – what now?**

As expected, DOL is appealing the district court’s two decisions in favor of home care. Industry experts close to this litigation are saying a decision from the appellate court may come as early as June 2015 or as late as October 2015.

While DOL’s appeal is pending, agencies may at least use the federal exemptions as they have in the past until the appellate court makes its decision in June 2015 or later months. Of course, an appeal creates inherent risks and uncertainty for home care. What follows is a brief summary of the potential outcomes and risks for agencies that choose to continue using the exemptions during this appeal process.

**What happens if DOL loses on appeal?**

1. Agencies may continue to use the exemptions as they have in the past.

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1 The case is known as Home Care Association of America, et al., v. David Weil, et al. Plaintiffs in this case are Home Care Association of America, International Franchise Association and National Association for Home Care & Hospice. Defendant David Weil is the Administrator of the U.S. Department of Labor’s Wage and Hour Division.
2. But beware - DOL will likely further appeal any loss at the appellate court level up to the United States Supreme Court.

Further appeal will take many more months, if not years. A final decision out of the U.S. Supreme Court may come as early as 2016, but it could be years later. This means the risks and uncertainty about the use and validity of the exemptions will continue, as well.

What happens if DOL wins one or both issues on appeal?

1. Agencies will need to comply with DOL’s revised regulations to the extent the appellate court reverses the district court’s decisions.

For example, the appellate court may uphold the district court’s December 22, 2014 decision to vacate DOL’s prohibition of third party employers using the Companionship Services Exemption and Live-In Domestic Service Exemption. However, the appellate court could still reverse the district court’s January 14, 2015 decision vacating DOL’s narrowed definition of “companionship services.”

Under this example, agencies could use the live-in domestic service exemption if it applies. However, agencies that want to use the companionship services exemption will likely not qualify because the narrowed definition of “companionship services” is difficult to meet under most home care services. (For an overview of the Final Rule’s revisions to the companionship services exemption, see Home Care & The Law article: “Companionship Services Exemption Revoked,” dated October 2013.)

If the appellate court reverses both federal court decisions, then agencies cannot use either the companionship services exemption or live-in domestic service exemption.

2. Even if the DOL wins on appeal, the litigation on these issues will not likely end. Industry experts close to this litigation say that Plaintiffs will appeal a DOL win at the appellate court level up to the U.S. Supreme Court. As stated earlier, further appeal will take many more months if not years, with ensuing uncertainty for home care.

What are your risks during this appeal process?

If the appellate court reverses both federal court decisions, then agencies cannot use either the companionship services exemption or live-in domestic service exemption.

If you decide to use the companionship services exemption or live-in domestic service exemption during this appeal process, there are risks involved. What follows is an overview of some of these risks.

Risk #1. Will you owe retroactive minimum wage and overtime pay?

Courts have the discretion to apply its decisions retroactively or prospectively. Thus, if either the appellate court or the U.S. Supreme Court
rules in favor of the DOL and applies DOL’s Final Rule retroactively, caregivers would be entitled to minimum wage and overtime pay for all hours worked over 40 in a workweek as of January 1, 2015.

Because liability for unpaid wages under a retroactive application of DOL’s Final Rule could potentially shut down many agencies using the exemptions during the appeal process, industry experts close to the litigation are hoping that a court would apply the Final Rule prospectively, if at all, to avoid such a fall out.

This article is not intended to scare agencies into paying caregivers for overtime during this appeal process. However, it is important to remember that the Fair Labor Standards Act allows for agency owners, officers, principal shareholders, and individuals in management to be held personally liable for unpaid wages in a private lawsuit. It may be prudent for agency owners, principal shareholders, and other management personnel who decide to use the federal exemptions during this appeal process to check with estate planning professionals and other legal advisors to safeguard their personal assets if they are concerned about personal liability.

Deciding to pay caregivers for overtime to avoid potential liability during this appeal’s process also has inherent risks. Competitors who are not paying overtime may offer more attractive wages and service fees for your caregivers and clients, respectively. As a result, you could lose caregivers and clients by trying to avoid the potential liability of a retroactive application of DOL’s Final Rule. And, in the event Home Care ultimately wins this litigation, you have paid significant overtime costs not required under the federal exemptions.

Risk #2. Do your caregivers meet existing exemption requirements?

During this appeal process, it would not be surprising if DOL increases its investigations of home care and hospice agencies for compliance with existing exemptions. Unfortunately, DOL has home care in its cross hairs and will likely make a point of pursuing violations as a means of fulfilling its stated mission for increasing caregivers’ wages.

DOL is entitled to initiate investigations on its own accord. In other words, DOL does not need a caregiver to complain about your wage payment

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2 Personal liability is typically only raised in private lawsuits. Individuals of an agency can be held liable if they exercise significant control over the company’s operations. To make this determination, courts have considered whether the managers have the power to hire and fire employees, the power to determine wages and other signs of operational control over significant aspects of the agency’s day-to-day functions.
practices to knock on your doors for a wage and hour audit or investigation.

Agencies who are using either exemption need to ensure that they can prove their caregivers and live-ins actually qualify for the exemptions to avoid violations under current wage and hour rules. To review basic requirements for proving these exemptions, see the sidebars included with this article. This article cannot address all compliance requirements. If you have any questions or concerns about your current use of the federal exemptions, you should seek legal advice.

Risk # 3. Should you pay for travel time between clients?

It is also likely that DOL will aggressively seek compliance with travel time pay given its focus on this issue when promoting its Final Rule. Indeed, home care has experienced an increase in lawsuits involving travel time pay in recent years. For example, an Illinois home care agency recently settled a case for $180,000.00 in which approximately 30 caregivers alleged failure to pay travel time between clients. Another agency in Pennsylvania settled a class action lawsuit alleging failure to pay for travel time for more than $2 million.

If your agency can prove that your caregivers fall under the companionship services exemption, then paying for their travel time between clients is a non-issue. Your caregivers are exempt from minimum wage and overtime pay for all hours worked related to the performance of companionships services, including travel time.

However, if your caregivers do not qualify for the companionship services exemption or are entitled to at least minimum wage under the live-in domestic service exemption, these caregivers must be paid at least minimum wage for all hours worked, including travel time.

If travel is not direct because the employee is relieved from duty long enough to engage in purely personal pursuits, only the time necessary to make the trip between clients must be paid.

**Travel Between Clients:**

The basic rule is that travel during the workday from client to client is working time.

**Long Breaks Between Client Visits:**

What if the time between client visits exceeds the time it takes to travel between clients? For example, what if one client visit ends at 10:00 a.m. and the next visit does not begin until 2 p.m.? How much of that time between 10:00 a.m. and 2 p.m. is compensable working time?

DOL’s answer to this question in its Frequently Asked Question forum has taken many agencies by surprise:

*If travel is not direct because the employee is relieved from duty long enough to engage in purely*
personal pursuits, only the time necessary to make the trip between clients must be paid.

DOL has not explained how agencies or caregivers are to determine, calculate or record this fictional travel time as “actual” hours worked. Most in the industry suggest that caregivers use or agree to MapQuest calculations or other driving estimates from similar websites to calculate hours worked in this regard.

More importantly, neither DOL nor the regulations have addressed if travel time pay is required for “as needed” caregivers who typically have significantly long breaks between client visits, and who can accept or reject client visits in any given workday. The safest option is to pay the estimated direct travel time for “as needed” caregivers because this pay will be what DOL’s investigators and plaintiffs’ attorneys will be arguing is owed.

Likewise, the safest option is to pay for the estimated direct travel time for caregivers who visit with the same client multiple times in the same workday. Most agencies facing this dilemma have decided to use the caregivers’ home addresses for calculating the direct travel time in these circumstances.

**How do you prove travel time pay?**

There are two ways agencies can prove that they paid travel time:

1. Agencies can show caregivers’ time sheets recording actual travel time and estimated travel time, and show its payroll records for having paid at least minimum wage for all travel time; or

2. Agencies that do not pay travel time directly, may use the following formula to argue its compliance with wage and hour requirements:

   (a) add up all wages paid in a workweek;
   
   (b) subtract caregivers’ transportation costs that were not paid (agencies’ obligation for paying these transportation costs is discussed, below); and
   
   (c) divide this amount by all hours worked, including travel time.

If payment for all hours worked equal at least minimum wage and all overtime premiums are paid according to DOL’s overtime premium calculations (i.e., using 1.5 times the employee’s regular rate of pay for all hours worked over 40 in a workweek), then agencies using this formula have shown that they paid at least minimum wage and the correct amount of overtime for all actual hours worked in a workweek.

Most courts will likely allow agencies to use this formula for proving wage and hour compliance matters. The author knows of only one district court outside of Indiana that ruled employers had to show that they paid minimum wage by the hour, and not by the workweek.

Obviously, option 2 has serious and variable consequences if a caregiver’s
hourly pay falls below minimum wage in some weeks, or if overtime is not paid in full according to DOL’s overtime premium calculations. Remember, DOL and courts can look back up to three years for wage and hour violations.

More importantly, disgruntled caregivers who feel they should be paid for travel time may still file suit against an agency for knowingly not paying for this working time. These types of cases are becoming more common, as stated earlier.

Agencies have the burden of proving and defending travel time pay. Telling caregivers that you will not pay for their travel time and not keeping any records for caregivers’ travel time poses liability risks in this heightened period of home care scrutiny. The safest practice is to have non-exempt caregivers and live-in domestic service caregivers record their travel time and pay at least minimum wage accordingly.

**Do you have to reimburse caregivers their transportation expenses?**

Here is a brief summary of how the FLSA regulations address your obligation for reimbursing caregivers’ mileage expenses:

**Federal wage requirements will not be met where the employee “kicks back” to the employer for the employer’s benefit, either directly or indirectly, any wages received. Employees must receive their wages free and clear of any kickbacks that benefit the employers.** (See 29 CFR §531.35.)

**Transportation charges where such transportation is an incident of and necessary to the employment is an item primarily for the benefit or convenience of the employer.** (See 29 CFR §531.32.)

In short, by not reimbursing your caregivers their transportation expenses, these expenses may be subtracted from the wages you paid your caregivers in any DOL investigation or private lawsuit as an improper kickback. If the amounts subtracted from wages result in the caregivers receiving less than minimum wage or receiving less than what they are owed for overtime premium pay in a workweek, you have violated wage and hour rules.

Similar to proving travel time pay, agencies have two options for proving transportation expense reimbursement compliance. (See these two options explained above for travel time pay.) The safest option would be to reimburse caregivers for their transportation expenses related to work travel.

The regulations state that expense reimbursements should reasonably pay for the actual costs your caregivers incur. The simplest method for reimbursing caregivers who incur transportation expenses using their own vehicles for work travel (i.e., gas expenses and wear and tear on their vehicles) is to use a mileage rate. But what is a reasonable mileage rate?
There is nothing definitive in the regulations answering this question.

The DOL’s field operations handbook for investigating wage and hour violations suggests that employers should use the federal mileage rate, which is 57.5 cents per mile in 2015, to cover employees’ gas and other vehicle expenses. However, this federal rate may be excessive in some cases, and is therefore not reasonable. It would be helpful to assess the gas prices and road conditions in your agency’s geographic areas when determining a reasonable mileage rate for reimbursement purposes.

Some agencies that already reimburse mileage expenses use MapQuest or other similar driving websites to calculate the miles needing reimbursement. Others require caregivers to track their odometers for calculating these expense reimbursements. Under either method, it is helpful to have the caregivers sign and validate the accuracy of the miles your agency uses for reimbursement purposes.

**CONCLUSION**

Home Care has succeeded in winning back its federal overtime exemptions and nothing in this article is intended to take away the kudos and excitement for agencies that rely upon these exemptions! The companionship service exemption and live-in domestic service exemption are still alive and well at this time and can be relied upon by agencies if they are prepared to prove their requirements. While the future of these exemptions holds uncertainties during DOL’s appeal process, agencies can still make good business decisions knowing the facts and risks ahead.

**(SIDEBAR 1:) The Companionship Services Exemption**

The companionship services exemption is a popular exemption used by agencies to avoid paying minimum wage and overtime pay to their caregivers. There are four basic requirements for caregivers to qualify for this exemption:

1. The services provided must constitute “companionship services,” which is defined as follows:

   “...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 CFR § 552.6

2. General household work cannot exceed 20% of the total weekly hours worked.

For example, if a caregiver works 60 hours in a workweek, not more than 12 hours can be used for general household work or the exemption is lost for this caregiver. It is not clear what “general household work” means.
An unpublished opinion letter by DOL said that household work related to the client’s care is not limited by the rule, such as scrubbing the tub or washing the counter after preparing a meal. However, other work in a client’s home, such as “dusting furniture, vacuuming, washing floors and windows, or cleaning refrigerators and ovens,” which is work not directly related to the client’s care, is limited by the 20% rule.

3. The caregivers must be “non-trained” personnel.

The exemption is not available for employees whose duties require the training of a registered nurse or a licensed practical nurse. The typical training of an attendant, a personal care aide, a home health aide, a CNA, a sitter, or a companion has not been a problem in the past.

4. The services must be provided in or about the private home of the client.

The exemption does not apply to services being provided in a hospital, nursing home, group home, or other institutional type facility. The exemption has also not applied in certain cases involving assisted living facilities or communities.

Agencies have the burden of proving that their caregivers qualify for this exemption. Important documents used for proving this exemption include the caregivers’ job descriptions and time sheets allocating hours spent performing different work tasks in a workweek if necessary to demonstrate that only 20% of all hours worked was used for general household work.

(SIDEBAR 2:) The Live-In Domestic Service Exemption

DOL does not use the term “live-in” the same as it is used in home care. When DOL refers to a live-in employee, it means a caregiver who resides (i.e., lives) with the client on a “permanent basis” or for “extended periods of time.”

The live-in domestic service exemption is a complete exemption from overtime pay for caregivers who meet its requirements. Unlike the companionship services exemption, live-in domestic service employees must be paid minimum wage for all hours worked in a workweek.

Temporary or short-term client assignments do not meet this exemption’s requirement that the caregiver “reside” with the client.

To fall within this exemption, three basic requirements must be met:

1. The caregiver must be a domestic services employee.

Typically, this requirement is not difficult. Your companions, personal service aides, and home health aides have been described as “domestic service employees” in Wage & Hour Fact Sheet #79B.
2. The caregiver’s services must be provided in the private home of the employer.

DOL does not consider a nursing home, residential treatment facility, residential care home or facility, or other similar residence a private home.

Because the caregiver must provide services in the private home of the “employer,” the client and your agency must be deemed a joint employer to meet this requirement. Clients or the clients’ family members will need to exercise some control over the caregiver to be considered a joint employer.

3. The caregiver must reside on the employer’s premise either “permanently” or “for an extended period of time” and not temporarily.

The caregiver resides on the employer/client’s premises permanently when he or she lives, works, and sleeps in the client’s home 7 days a week and therefore, has no home of his or her own other than the one provided by the client. For example, the caregiver uses the client’s address for his or her driver’s license.

The caregiver resides on the employer/client’s premises for extended periods of time when he or she lives, works, and sleeps in the client’s home for five days a week (120 hours or more). If the caregiver spends less than 120 hours per week working in the client’s home, but spends five consecutive days or nights residing in the home, this also constitutes an extended period of time.

DOL recognizes that caregivers who live with clients may have varying amounts of free time that is not necessarily compensable hours worked. DOL recommends that agencies and live-in caregivers enter into agreements for the amount of sleeping time, meal time and other periods of complete freedom from all duties when the caregiver may either leave the home or stay in the home for purely personal pursuits. All hours worked must still be paid at least minimum wage, including calls to duty during the free time periods identified in the caregivers’ agreements.

The live-in domestic service exemption has not been used much, if at all, by home care and hospice agencies. This article does not address all of the nuances for qualifying for this exemption. If an agency desires to explore this exemption for avoiding paying overtime for its live-in caregivers, it should seek legal advice for its specific circumstances.

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