

Suggested Points for Opposing DOL Proposed Changes to FLSA Companionship Exemption
Specific questions and concerns can be directed to membership@privatecare.org

Background

High level overview of the FLSA's companionship exemption

- The “companionship exemption” exempts a covered caregiver from the overtime and minimum-wage requirements imposed by the federal Fair Labor Standards Act (“FLSA”)
- Virtually all caregivers currently receive the minimum wage; the principal effect of the proposal would be to subject caregivers who are no longer covered by the *revised* companionship exemption to the FLSA’s overtime requirements

The proposed regulations by the U.S. Department of Labor (“DOL”) would modify the companionship exemption...

- By denying the FLSA’s companionship exemption to any third-party firm
- By re-defining “companionship” services
 - to exclude general housekeeping that benefits anyone other than the care recipient and
 - to permit personal care only if limited to 20% of the total weekly hours worked
- By expanding the recordkeeping duties imposed on the employer of a live-in caregiver

Suggested Points in Opposition to the DOL’s Proposed Changes

- **Proposed changes would affect a vulnerable population**
 - Elderly
 - Disabled
 - They did not choose to be in their circumstance
 - Caregivers can choose to obtain overtime, by working in a facility (the companionship exemption generally does not apply to facility based care)
- **Proposed Narrowed definition of “companionship” services would disproportionately affect the disabled**
 - The proposed new definition for companionship services would exclude home care arrangements in which more than 20% of the time worked during a week is devoted to personal care
 - This would disqualify from the companionship exemption most home-care arrangements for the disabled – even if no third-party firm is involved
- **No money to pay overtime**
 - LTC insurance generally provides capitated payments, *i.e.*, a fixed amount per day or week – the capitated amount is set by contract and will not be increased if the proposals are adopted
 - Government programs generally also pay capitated amounts and are already financially strained
 - Private resources have diminished due to the troubled economy and low interest rates
- **Proposed changes could cause**
 - Elderly and disabled...
 - To obtain caregivers without a third party firm and be vulnerable to exploitation or to being without care if a caregiver does not show up
 - To receive fewer hours of care, due to the higher cost of care when overtime is required
 - To receive care from multiple caregivers – depriving the care recipient of continuity of care
 - especially harsh for the most vulnerable
 - To unknowingly violate FLSA overtime rules when they engage caregivers directly, due to the proposed new narrowed definition of companionship services
 - To move to a facility/institution
 - Caregivers...
 - To perform care for multiple clients within a week

- Denied the luxury of working for only one client for an entire week
 - To work fewer total hours, and earn less, if unable to find multiple clients who need care at times sufficiently synchronized to permit a caregiver to work for them all
- **Critical role of third-party firms**
 - Provide important safety protections to consumers through background-screening and credential verification
 - Enable individuals to remain independent by offering just-in-time access to caregivers
 - Make the home-care market function efficiently
 - Provide convenient means for freelance caregivers to learn about client opportunities
- **Registries Would be in an Untenable Circumstance**
 - Registries are mere conduits
 - Clients pay caregivers either directly or through a registry or a registry sponsored escrow account
 - Registries charge a transaction/referral fee
 - If a caregiver works 30 hours during a week for each of two clients referred by a registry, and if the registry is determined to be a “joint employer” of the caregiver, the caregiver would be entitled to 20 hours of overtime, but neither client would pay overtime because neither client received more than 40 hours of services