



HCAOA Supports Companion Care Exemption

Position

The Home Care Association of America (HCAOA) asks you to be an original cosponsor of the “**Ensuring Access to Affordable Home Care for Seniors and the Disabled Act,**” which will be introduced soon by Rep. Tim Walberg (R-MI) in the U.S. House and Senator Pat Roberts (R-KS) in the U.S. Senate. This legislation is needed to restore long-standing interpretations of the Fair Labor Standards Act (FLSA) to ensure seniors and individuals with disabilities have unfettered access to affordable non-medical home care services to assist them in maintaining the highest level of independence, remaining in their homes, and avoiding institutionalization

Background

Since 1974, individuals who are employed in “domestic service employment” to provide “companionship services” to the elderly or people with disabilities have been exempt from the minimum wage and overtime requirements of the FLSA.

“Domestic service employment” refers to services of a household nature the worker performs in or about the private home of the person by whom he or she is employed. For four decades, “companionship services” were defined 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.”

Companionship services have never included services relating to the care of the aged and infirm that “require and are performed by trained personnel, such as a registered or practical nurse.” However, the exemption has always permitted the performance of general household work, such as bed making, so long as this work is incidental to the “fellowship, care, and protection” of the aged or infirm person and does not exceed 20 percent of the total weekly hours worked by the employee. Thus, the incidental household work is permissible, but is subject to the 20 percent cap.

However, the U.S. Department of Labor (DOL), has now changed its long-standing interpretation of the companionship exemption. DOL’s changes narrow the exemption so

that third-party employers, such as home-care staffing agencies, would no longer be able to use the exemption. According to the DOL, this will be true even when the employee is jointly employed by both the third-party provider and the family or individual receiving the employee's services. The new rule states that only the individual, household, or family employing a companionship worker will be able to utilize the exemption.

Another change is that DOL has narrowed the scope of the phrase "companionship services" considerably, and companions are now limited in the amount of incidental "care" services that they can perform each work week. This reflects DOL's view that "care" services should be secondary to the "fellowship and protection" services that should be the companion worker's primary focus.

These "care" services include meal preparation, driving, grooming, bathing, and similar activities. Under the final rule, if the companion spends more than 20 percent of his or her total hours performing such incidental "care" services in a given work week, the exemption will be lost for that work week.

DOL's new rules were to take effect on January 1, 2015, but HCAOA and other stakeholders challenged the revisions in federal court.

Status of HCAOA et al v Weil

On June 6, 2014, HCAOA and other stakeholders filed suit in Federal District Court against the DOL to stop the regulation from going into effect. On December 22, 2014, the U.S. District Court for the District of Columbia vacated the rule that excluded third-party employers from utilizing the companionship exemption. In a separate decision on January 14, 2015, the Court vacated the rule's definition of companionship services.

DOL appealed the rulings to the U.S. Circuit Court of Appeals for the District of Columbia. On August 21, 2015, the Court of Appeals reversed the District Court's opinion and upheld the new rules. HCAOA and other stakeholders are now asking the U.S. Supreme Court to review the matter. In the event the Supreme Court does not take up the case or rules in support of the DOL it will be necessary to enact statutory changes to ensure seniors and individuals with disabilities can maintain access to affordable home care services.

If you would like more information on this matter or have questions please contact Patrick Cooney at Patrick@federalgrp.com or by calling (202) 347-0034 x101.

The Home Care Association of America (HCAOA) is the nation's first association for providers of private-pay home care. HCAOA was founded on the principle that quality private pay home care service has one model of care and that model is to employ, train, monitor and supervise caregivers, create a plan of care for the client and work toward a safe and secure environment for the person at home.