



## WHAT'S PROPER PAY FOR HOUSEHOLD COMPANIONS?

Those who care for elderly, infirm exempt from minimum wage laws

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The Fair Labor Standards Act regulates minimum wages and maximum working hours in industries affecting interstate commerce. Under the FLSA, non-exempt employees must be paid for hours worked over 40 hours per week “at a rate not less than one and one-half times the regular rate at which he is employed.” 29 U.S.C. § 207(a)(1). A frequent source of confusion is the precise scope of the FLSA exemption for domestic service employees who provide companionship services. What is “domestic service?” What are the limits of the exemption? This article answers those questions.

The FLSA exempts from overtime and minimum wage rules an “employee employed in domestic service employment to provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves.” The U.S. Department of Labor defines “domestic service employment” as “services of a household nature performed by an employee in or about a private home ... of the person by whom he or she is employed.” Under the Labor Department regulations, the exemption extends to those “companionship” workers “employed by an ... agency other than the family or household using their services.”

The Labor Department has confirmed that “companionship services” and “domestic service employment” are separate elements of the FLSA exemption. Courts have

held that an employee must provide both “companionship services” and be employed “in domestic service employment” for the exemption to apply. *Zachary v. Rescare Oklahoma Inc.*, 471 F.Supp.2d 1183, 1195 (N.D. Okla., 2006). Thus, the applicability of the exemption depends upon both the nature of an employee’s activities (whether they are companionship and domestic services) and the place of their performance (whether they are in or about a private home).

### Companionship Definition

Companionship services are those in which non-skilled care is provided to an elderly or infirm person, with no more than 20 percent of that care devoted to general household work. The Labor Department regulations exclude, and therefore do not exempt, home health aides or “companions” (1) who devote more than 20 percent of their care to general household work or (2) who qualify as “trained personnel.”

The general household work exception (or the “20 percent exception”) grants companionship services employees the full benefits of the FLSA if they spend more than 20 percent of their total weekly work hours performing general, non-patient-related household work which is “incidental” to the care of the individuals they serve. In other words, if the aide spends more than 20 percent of the time cleaning a patient’s house, the FLSA exemption will not apply.

Further, under the FLSA, exemption for

“companionship services” does not extend to services that “require and are performed by trained personnel, such as a registered or practical nurse.” Most courts agree that an employee in domestic service simply means

one who performs household chores of a nature generally usually performed by household members. See *Marshall v. Cordero*, 508 F. Supp. 324 (D.P.R. 1981). Employees of a private agency or health care organization who provide those services may be subject to the exemption. *Long Island Care at Home LTD. v. Coke*, 551 U.S. 158 (2007).

Whether an aide falls within the “companionship services” exemption requires an analysis of the services the aide provides. *Cox v. Acme Health Services Inc.*, 55 F.3d 1304 (7th Cir. 1995). For example, employees who assist clients with dressing, grooming and taking medications and perform household chores for the clients, in addition to training the clients to be more independent with their daily tasks, were determined to be providing “companionship services” and thus were FLSA exempt. *Terwilliger v. Home of Hope Inc.*, 21 F. Supp. 2d 1294 (N.D. Okla. 1998). Finally, in-home certified nursing assistants that perform many essential tasks for the patient, such as



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administering medication, changing catheters, exercising, bathing, dressing, cooking, feeding, transporting, running errands, and assisting with finances, but had only on-the-job training (rather than formal training), were found to be FLSA exempt. *Armani v. Maxim Healthcare Services Inc.*, 53 F. Supp. 2d 1120 (D. Colo. 1999).

### **Domestic Services**

If a companionship aide does not work or reside in a client's "private home," courts hold that the employment does not meet the "domestic service" definition, and the FLSA exemption does not apply. When the services are provided in a "separate and dis-

tinct dwelling maintained by the individual or family in an apartment, house or hotel," there is no question that the FLSA exemption applies. *Lott v. Rigby*, 746 F.Supp. 1084, 1087 (N.D. Ga. 1990). But when the "private home" is an institutional group residence the analysis becomes much more complex.

The determination of whether a particular employee performs services "in or about a private home" requires a case-by-case, fact-specific inquiry. *Madison v. Res. for Human Dev. Inc.*, 233 F.3d 175, 183 (3d Cir. 2000). See, *Welding v. BIOS Corp.*, 353 F.3d 1214, 1218-20 (10th Cir. 2004) (applying a six-factor inquiry to determine whether companionship services are provided in a

private home and noting that such a determination is to be made through an evaluation of the living unit of each person receiving services); *Bowler v. Deseret Village Association Inc.*, 922 P.2d 8 (Utah 1996) (using a four-factor test to hold that a housing facility for mentally and physically handicapped adults was a "private home" for FLSA exemption purposes).

What is evident from these cases is that there is no hard and fast rule for what constitutes a "private home," and "private home" need not be limited to a private, single-family residence. The courts will look at the totality of the circumstances to make the determination. ■