

CHANGES TO MINIMUM WAGE AND OVERTIME REQUIREMENTS FOR HOME CARE WORKERS EFFECTIVE JANUARY 1, 2015

By Attorney Laura A. Goldstein

The United States Department of Labor reports that there are almost 2,000,000 home care workers in this country. On January 1, 2015, the wage and overtime requirements for these employees and their employers will undergo significant changes.

In 1938, Congress passed the Fair Labor Standards Act to provide minimum wage and overtime for eligible employees. The minimum wage laws were expanded in 1974 to include most domestic service workers. However, employees offering companionship services to elderly people or people with illnesses, injuries, or disabilities were still excluded from the wage laws. Congress left the definition of this companionship exemption up to the Department of Labor. The Department of Labor's companionship regulations issued in 1975 defined companionship services broadly. Because of the way the services were defined, many home care workers were included in the companionship exemption, resulting in these employees receiving no minimum wages or overtime. Although the scope of home care services evolved over the years, these regulations were substantially unchanged until October 1, 2013, when the United States Department of Labor issued a 358 page Final Rule which becomes effective on January 1, 2015.

The Final Rule will have a significant impact on home care workers, and individuals, businesses, and government agencies utilizing the services of home care workers. The major changes are (1) a more narrow definition of companionship services for purposes of the exemption from the minimum wage and overtime laws, (2) the elimination of minimum wage and overtime exemptions for third party employers of companions and the elimination of overtime exemptions for third party employers of live-in domestic employees, and (3) more rigorous record keeping requirements for employers of live-in domestic employees.

The Final Rule defines "companionship services" as 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. "Fellowship" is defined as engaging the person in social, physical, and mental activities, and "protection" is defined as being present with the person in his or her home or to accompany the person outside of the home to monitor the person's safety and well-being. Some examples of fellowship and protection include conversation, reading, games, crafts, and accompanying the person on walks, on errands, to appointments, or to social events. Under the Final Rule, companionship services may also include "care" if the care is provided attendant to and in conjunction with the provision of fellowship and protection of the person and does not exceed 20% of the total hours worked in a workweek. Care services are defined as assistance with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with taking medications, and arranging

medical care). Any household work that primarily benefits other members of the household will result in the loss of the companionship exemption. Furthermore, performance of medically related tasks, typically requiring and performed by trained personnel such as registered nurses, licensed practical nurses, or certified nursing assistance, will result in a loss of the companionship exemption in any work week that such tasks are performed.

The second major change is that third party employers will not be eligible to receive the companionship exemption from minimum wage or overtime requirements, or the exemption from overtime requirements for live-in domestic employees. Under the current laws, employers of live-in domestic employees are not required to pay overtime to individuals who fall within the definition of live-in domestic employee. A live-in domestic employee is a worker who resides in a private home where he or she works on a permanent basis (seven days per week) and has no home of his or her own, or who resides in the private home where he or she works for an extended period of time (meaning he/she works and sleeps on the employer's premises for five days a week for a total of 120 hours or more per week, or works and sleeps on the employer's premises for five consecutive days or nights). As of January 1, 2015, third party employers, such as home care agencies, will not be able to utilize the exemptions.

The last major change affects record keeping for live-in domestic service workers. Employers are already required to keep time and wage records for employees covered by the wage laws, but the Final Rule specifically requires all employers to maintain an accurate record of the actual hours worked and wage records for live-in domestic service employees. While the employee may be required to create and submit the records, it is up to the employer to maintain the records for three years. Although individuals, families, and households employing a worker who qualifies for the companionship services exemption are not required to keep records under the Fair Labor Standards Acts, it is recommended that they do so, in case a question arises regarding whether a worker is entitled to minimum wage or overtime pay.

The Final Rule will impact all of the States, including Connecticut. It is important to note that Connecticut will apply its minimum wage (\$9.15 per hour as of January 1, 2015), because it is higher than the Federal minimum wage. Connecticut has also started its own movement toward addressing wage issues affecting domestic employment. In June, 2014, the Connecticut Legislature established a Domestic Workers Taskforce pursuant to Special Act No. 14-17. The Task Force will study issues involving domestic workers in Connecticut and make recommendations for legislative initiatives to provide outreach and education services to domestic workers and employers of domestic workers in the State. The Task Force is charged with submitting a report on its findings and recommendations no later than October 1, 2015. The United States Department of Labor created a new web portal in 2013, www.dol.gov/whd/homecare/ in light of the release of the Final Rule, which includes fact sheets, webinars, and questions and answers. Further guidance from the Connecticut Task Force will be important, as the Final Rule has created an immediate need for home care employees and employers to become familiar with applicable wage and overtime laws.