

THE NEW ERA OF EXECUTIVE ACTION

PROTECTING WAGES FOR HOME CARE WORKERS

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Background

The 1.9 million home care aides in the United States are among the nation's most poorly paid workers, earning an average hourly wage of \$10.30, which amounts to \$3,000 less annually than a family of four needs to stay even with the poverty level. This is not entirely by happenstance. Unlike virtually all other workers, home care aides are generally not entitled to the minimum wage and overtime protections guaranteed by the Fair Labor Standards Act (FLSA)—the consequence of regulations that have not been updated since the 1970s.

In 1974, Congress extended FLSA protections to all “domestic service” workers, the broad category of household employees to which home care aides belong. (Previously, the rights to the minimum wage and time-and-a-half pay for weekly work in excess of forty hours did not apply to domestic service workers employed by private individuals or small firms.) However, Congress concurrently created a “companionship” exemption, subsequently codified in Department of Labor regulations issued in 1975, that precluded workers primarily providing fellowship (that is, socialization) and protection (that is, supervision) from receiving the FLSA guarantees.

The companionship exemption, and another like it excluding “live-in” workers from overtime protections, applied to third-party employers as well, which meant home care providers were not required to pay staff minimum wages or overtime if they met the regulatory exception. Although the exemption was intended to cover “elder sitters” serving as the functional equivalent of babysitters for older adults or those with illnesses, injuries, or disabilities, its effect in the intervening years has been to suppress the earnings of nearly all home care workers, as courts have interpreted the companionship provision broadly. Nearly all of these slighted workers are women (92 percent), and a substantial share are racial minorities (nearly 50 percent)—two groups that have historically faced labor market

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discrimination. In part as a result of their wages, two-in-five home care workers depend on public benefits, such as food stamps, to make ends meet.

Against this sweeping and static regulatory backdrop, the home care industry has undergone a profound transformation during the past four decades. Escalating nursing home costs, together with medical advances and a cultural backlash against institutionalization, have led to a rapid expansion of community-based care for the elderly and disabled. The number of Medicare-certified home health agencies increased nearly ten-fold between 1967 and 2009, to 10,600. Similarly, the home care workforce tripled between 1988 and 1998, and then doubled again by 2008. As of 2013, some 12 million Americans could not live independently due to age or disability; four out of five of them receive the long term services and supports they require in community settings.

According to the Congressional Budget Office, Americans spent \$58 billion on community-based care in 2011, while also generating four times that (\$234 billion) through care provided through informal arrangements, such as adult children caring for their parents. Industry estimates of home care spending are even higher, to the tune of \$72 billion as of 2009. And defined most broadly, as consisting of two BLS-designated industries, Home Health Care Services (HHCS) and Services for the Elderly and Persons with Disability (SEPD), the home care sector consists of some 89,400 establishments with \$90.8 billion in revenue as of 2011. Medicare and Medicaid account for about half the expenditures, with state and local governments financing another 20 percent and private insurance picking up 12 percent. Out-of-pocket spending accounts for just a tenth of industry revenues.

To meet this growing demand for increasingly sophisticated in-home services, the domestic service workforce has professionalized considerably. Indeed, “home care” is a broad label encompassing several related occupations, including home health aides, personal care aides, certified nursing assistants, caregivers, and others whose distinctions are not always clearly drawn. What is clear, though, is that many such practitioners require advanced skills and training. As a result, the modern home care professional bears little resemblance to the companions Congress envisioned in 1974.

The trend toward professional in-home care is only expected to intensify in the years ahead as the population ages. By 2050, there will be 84 million Americans age 65 years and older, double the number today. Two-thirds of them will require assistance conducting daily activities at some point in their lives; at any given time, about a quarter of older Americans living in the community experience functional limitations.

The home care industry is expected to expand commensurately, with the number of home care practitioners increasing by 49 percent (to 3.1 million) by 2022. To put this in context: the two occupations that comprise most home care jobs, personal care aide and home health aide, are the first- and fourth-fastest growing professions, respectively, according to the Bureau of Labor Statistics. By 2050, demand for services will require as many as 6.6 million home care professionals.

A note on terminology: labels for both home care workers and the industry as a whole are subject to a wide degree of definitional imprecision. Several related terms are regularly employed interchangeably to describe the industry and its workforce. “Home care,” “in-home services and supports,” and “long term services and supports” are the most generic labels. Both home health aides and personal care aides assist clients with activities of daily living (eating, bathing, dressing) and instrumental activities of daily living (cooking, shopping, managing money), but the former, who typically work for certified home health agencies, may also provide basic medical care, subject to strict regulations and under the supervision of medical professionals such as registered nurses.

Action

On December 15, 2011, President Barack Obama announced at a press conference held jointly with Labor secretary Hilda Solis a proposed rule by the Department of Labor to update FLSA regulations, narrowing the companionship exemption in light of the modern home care industry.

The home care initiative was part of the president’s larger “We Can’t Wait” campaign, which, through a series of executive actions in 2011 and 2012, aimed to stimulate job growth in the absence of congressional action. Like many of the “We Can’t Wait” measures, the home care initiative was not accompanied by a formal executive order.

The Department of Labor issued a notice of proposed rulemaking on December 27, 2011, and twice extended the comment period, through March 2012. The final rule, formally titled “Application of the Fair Labor Standards Act to Domestic Service,” was published in the Federal Register on October 1, 2013, with an effective date of January 1, 2015.

What It Does

The final rule makes three important changes to the regulations regarding the application of the FLSA (29 USC Chapter 8) to domestic service (29 CFR Chapter V, Part 552). Together, these revisions clarify and narrow the companionship services and live-in exemptions, affording home care workers minimum wage and overtime protections under the FLSA, in accordance with the professionalization of the industry and the skilled duties they are primarily required to perform.

- Redefining companionship. Companionship is defined to be “the provision of fellowship and protection for an elderly person or a person with illness, injury, or disability who requires assistance in caring for himself or herself.”
- In turn, fellowship refers to engaging in social, physical, and mental activities, which include things like conversation, games, exercise, errands, or social events. Protection refers to monitoring an individual’s safety and well-being.
- Companionship services can include the “provision of care” (i.e., the core work of home care aides, such as assistance with ADLs and IADLs) if such care does not account for more than 20 percent of an employee’s workweek.

- In addition, companionship services do not include housework performed primarily for other household members, nor does it include medical services.
- Taken together, the components of this definition of companionship limit the scope of the companionship exemption considerably, making explicit that work that primarily involves care (assistance with ADLs and IADLs) or medical services cannot be exempted from FLSA protections.
- Eliminating exemptions for third-party employers. Third-party employers, such as home health agencies, can no longer claim the companionship or live-in domestic service exemptions for employees engaged in these activities (even when the employee is jointly employed by the household receiving services).
- Thus, companionship and live-in domestic service employees of third-party employers are entitled to both minimum wage and overtime protections. However, private household employers may still claim all applicable exemptions.
- Recordkeeping for live-in domestic service employees. Employers of live-in domestic servants must keep records of exact hours worked (previously, the terms of the employment agreement would suffice).

Status

The effective date of the new regulations was set fourteen months after the publication of the final rule, so as to give the industry and consumers adequate time to adapt. However, this schedule was deemed by some as too aggressive, and concerns from states and other involved parties led the Department of Labor, in October 2014, to announce a non-enforcement policy until July 1, 2015. In addition, during the following six months, the department would exercise prosecutorial discretion in deciding whether those targeted with enforcement actions made good faith efforts to comply with the law.

In the meantime, industry groups challenged the new rules in federal court. On December 22, 2014, in *Home Care Association of America v. Weil*, District Court Judge Richard Leon vacated the new rule prohibiting third-party employers from claiming FLSA exemptions. Then, on January 14, 2015, after a temporary two-week stay of the new rules, he struck down the entirety of the extension of minimum wage and overtime protections to home care workers, on grounds that a change in the definition of companionship services required legislative action.

The Department of Labor filed an expedited appeal, which was granted by the Court of Appeals for the D.C. Circuit two weeks later. The case will be fully submitted in May 2015.

Impact

The main effect of applying FLSA protections to home care workers is to transfer income from employers to employees. During the next ten years, the Department of Labor projects that home care workers will receive an additional \$322 million annually in wages, mostly due to overtime pay (\$218 million) and compensation for travel time (\$104 million). The majority of this transfer will come from provider profits, though part of it is expected to be passed on to consumers (and insurers) in the form of higher prices for services. The extension of minimum wage protections is expected to have no impact, since nearly all home care workers already receive more than the minimum wage. Twenty-one states already extend minimum wage rights to home care workers; fifteen of these also offer overtime guarantees.

In addition to the transfers, the new regulations will create economic costs and benefits.

Third-party and household employers will, on a yearly basis, incur \$6.8 million in additional costs associated with familiarizing themselves with the new regulations, hiring extra workers (so as to avoid overtime pay). Deadweight loss (allocative inefficiencies resulting from consumers and employers paying more for services than they would in the absence of regulations) is expected to be minimal, as the demand for home care services tends to be relatively unresponsive to modest price increases. This allocative inefficiency will result in the loss of about 1,100 jobs—a tiny fraction of the home care workforce.

The new wage protections are expected to reduce worker turnover and associated recruitment and training costs, to the tune of \$24 million annually. Better paid workers are also likely to perform better on the job, improving service delivery. Thus, on balance, the Department of Labor projects a net societal benefit of the new regulations of \$17 million annually over the next decade.

Response

The new regulations have generated significant attention, with passionate interests organized on both sides of the debate.

Workers' rights advocacy groups, unsurprisingly, are strongly in support of FLSA protections for home care workers, as are those concerned with consumer well-being and home care services. Among the most prominent supporters are the Paraprofessional Healthcare Institute (PHI), Caring Across Generations, the SEIU, the AFL-CIO, the ACLU, AARP, and the National Employment Law Project. Also in support are fifty Democratic members of Congress and the State Attorney Generals of New York, Illinois, Massachusetts, and New Mexico.

Equally unsurprisingly, the new regulations are vehemently opposed by industry groups, including the Home Care Association of America, the International Franchise Association, and the National Association from Home Care and Hospice.