

“New FLSA Regulations”
State Bar of Texas Labor & Employment Section:
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I. Changes for Home Care Workers

On October 13, 2015, the U.S. Department of Labor’s final home care rules went into effect, extending the federal minimum wage and overtime protections of the Fair Labor Standards Act (FLSA) to millions of home care workers in the United States. Under the DOL regulations, the exemption will now be limited to workers who are employed solely by a consumer, household or family member, and who primarily provide fellowship and a limited amount of assistance with daily activities.

Home care workers go by many different titles: companion, personal care attendants, certified nursing assistants, home health aides, personal care aides, caregivers.

Background

In October 2013, the Department of Labor announced new rules remedying the overbroad application of the companionship exemption to home care workers, with an effective date of January 1, 2015. 29 CFR §552.

While the DOL initially delayed enforcement of the new regulations, the rules were delayed further by lawsuits filed by various industry groups that employed home care workers. A lawsuit was filed in the District of Columbia District Court, which held that the federal companionship regulations were invalid. On appeal, the U.S. Court of Appeals for the D.C. Circuit vacated the lower court’s decision and reinstated the rules. Plaintiffs filed a petition for cert with the Supreme Court, and on June 27, 2016 the Court issued an order denying Plaintiffs’ request for review. *See Home Care Assn. of America v. Weil*, SCOTUSblog (June 27, 2016). The DOL now enforces the new federal companionship regulations.

The “New” Regulation

1. all third-party home care employers are now categorically covered by FLSA, and
2. all home care workers employed solely or jointly by a third-party employer are protected by FLSA’s minimum wage and overtime rules.
3. In addition, most home care workers employed solely by an individual or private household have gained coverage because their work duties do not fall within the new definition of exempt “companionship” services;
4. Very few home caregivers will now be excluded for providing “companionship services”.
5. The Exemption will now apply only to workers who primarily provide fellowship & protection. If worker spends more than 20% of weekly work

hours per client on assistance with daily activities, or does any general housekeeping or medical tasks, she's covered by minimum wage & overtime.

Duties Test

A duties test will be taken in order to determine if the worker is covered under the new rules. Exemption may apply for workers that spend 80% or more of their time (per client) providing fellowship conversation, reading, games, etc., and being present with the person to monitor his or her safety and well being.) If a home care worker is spending more than 20% of the time cooking, feeding, dressing, bathing, combing or providing other assistance with daily needs or do any housekeeping then they are not exempted. Even before the new Department of Labor regulations went into effect, homecare workers who otherwise would have been exempt from FLSA protections were covered by the FLSA if more than 20% of their work was general household work,¹ or if they were performing medically related services and were trained personnel.² Homecare workers may be excluded from FLSA protections by exemptions apart from the companionship exemption, including the learned professional exemption.²⁹ C.F.R. § 541.301 *et. seq.* US Department of Labor: <http://www.dol.gov/whd/homecare/>

The record keeping requirement

The ramification of this regulations is that employers will need to keep track of specific duties and time spent on each duty in the event it becomes necessary to determine exemption from the new rules. Employers must now keep actual records of the hours worked by domestic service employees.

Sleep time for Home Care workers

The Home Care Final Rule did not alter any of the Department's longstanding guidance concerning sleep time. Employers of live-in employees, including live-in domestic service employees, may exclude sleep time from those employees' hours worked provided certain conditions are met: (1) the employer and employee have a reasonable agreement to exclude sleep time, 29 C.F.R. 785.23, and (2) the employer provides the employee "private quarters in a homelike environment," 1988 Memo.

Shifts of 24 hours or more Some employees who do not qualify as "live-in" employees under the FLSA work for shifts of 24 hours or more. As to those employees, including domestic service employees who work at private homes for shifts of 24 hours or more, an employer may exclude the employee's sleep time from hours worked if certain requirements—similar to but distinct from those for live-in employees. These requirements are that (1) the employee be provided "adequate sleeping facilities," (2) she "can usually enjoy an uninterrupted night's

¹ 29 C.F.R. § 552.6(b)

² 12 29 C.F.R. § 552.6(d)

sleep,” and (3) the parties have an “expressed or implied agreement” to exclude the sleep time. 29 C.F.R. 785.22(a); see also FOH § 31b12(a).

The second element is important in that it requires the employer who deducts for sleep time must provide the employee the usual ability to enjoy an uninterrupted night’s sleep. The second requirement in 29 C.F.R. 785.22(a) for excluding the sleep time of an employee who works shifts of 24 hours or more is whether that employee “can usually enjoy an uninterrupted night’s sleep.” This requirement is intended to limit the sleep time exception to those employees who are not required to perform work during a reasonable sleeping period the majority of the time. As a reminder, WHD’s sleep time regulations are an exception to the well-established general hours worked principles. FIELD ASSISTANCE BULLETIN No. 2016-1 https://www.dol.gov/whd/FieldBulletins/fab2016_1.pdf

The DOL has summarized the rules for when an employer may deduct sleep time for home care workers.

	Live-in employee		Shifts of 24 hours or more	Shifts of fewer than 24 hours
	Extended periods of time	Permanent		
Requirements for excluding an employee's sleep time from hours worked	<ul style="list-style-type: none"> • Reasonable agreement to exclude sleep time • Employer must provide private quarters in a homelike environment 		<ul style="list-style-type: none"> • Employer provides adequate sleeping facilities • Employee can usually enjoy an uninterrupted night's sleep (5 consecutive hours) • Express or implied agreement to exclude sleep time 	Sleep time may not be excluded
Maximum number of hours that can be excluded	Up to 8 hours per night as long as the employee is paid for at least 8 hours during the 24-hour period	Up to 8 hours per night as long as the employee is paid for some other hours during the workweek	Up to 8 hours, in a fixed period, in each 24-hour shift	Sleep time may not be excluded
Limitations on exclusion on a particular night	<ul style="list-style-type: none"> • Any interruption to sleep time must be paid • If during any night the employee does not get reasonable periods of uninterrupted sleep totaling at least 5 hours, the employer may not exclude any sleep time 			

<https://www.dol.gov/whd/regs/compliance/whdfs79d.htm>

Effect on Texas employers.

Texas minimum wage law exempts persons covered by the FLSA. Tex. Lab. Code § 62.151. It also exempts persons performing domestic service in or about a private home, and persons living in a private home and furnishing personal care for a resident of that home. Tex. Lab. Code § 62.154(2). As a result, home care workers in Texas must rely on the FLSA for minimum wage and overtime protection.

II. New Changes to the White Collar Exemption

The DOL's final rules for "white collar" exemption will go into effect on December 1, 2016. Section 29 CFR Part 541 of the FLSA contains exemptions for certain executive, administrative, professional, outside sales, and computer employees. This exemption is referred to as the FLSA's "EAP" or "white collar" exemption. To be considered exempt, employees must meet certain minimum tests related to their primary job duties and be paid on a salary basis at not less than a specified minimum amount.

The standard salary level required for white collar exemption is currently \$455 a week (\$23,660 for a full-year worker) and was last updated in 2004. The salary level is one of three tests for determining whether employees employed as executive, administrative, or professional employees are exempt from the FLSA's minimum wage and overtime requirements. See 29 U.S.C. 213(a)(1); 29 CFR Part 541. The Final Rule does not include any changes to the duties tests, which also affect the determination of who is exempt from overtime. Section 541.601(d) still applies:

This section (white collar exemption) applies only to employees whose primary duty includes performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be. 29 C.F.R. § 541.601(d).

For guidance on these issues or for additional information on the Final Rule visit dol.gov/whd/overtime/final2016/.

New Minimum Salary Level

When the new FLSA rules go in effect on December 1, 2016, the new FLSA rules will go into effect, the salary basis test will change from \$455/week (\$23,660 per year) to \$913/week (\$47,476 per year).

The minimum salary to satisfy the "highly-compensated" exemption under the FLSA will be increased from \$100,000 to \$134,004 per year.

Future Increases in Minimum Salary for Exemptions

Unlike the 2004 regulations, the Final Rule also establishes a mechanism for automatically updating the salary and compensation levels every three years. The first increase in the minimum salary for the white collar exemption will take effect January 1, 2020, with future increases set to take effect on January 1

every three years. The DOL will publish the new rates in the *Federal Register* at least 150 days before the updated salary levels go into effect. 1.

III. Effect on Highly compensated employees:

The Final Rule also made changes to the highly compensated employee exemption and how bonuses are treated for purposes of determining an employee's exempt status. When the Final Rule goes in effect on December 1, 2016, it will raise the minimum salary for highly compensated employees (HCE) from \$100,000 to \$134,004 annually. To qualify for the HCE exemption, an employee must "customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee." 29 C.F.R. § 541.601(a). Highly compensated employees are subject to a more minimal duties test as long as they are paid a higher minimum salary.

The Final Rules permit employers to use certain other forms of compensation (such as nondiscretionary bonuses, incentive payments and commissions) to satisfy up to 10% of the new \$134,004 minimum salary requirements.

There are some restrictions and pitfalls associated with using other forms of payments to meet the minimum salary requirement:

- The pay exempt employees at least 90% of the minimum salary level per workweek. \$821.70 per workweek or \$42,728.40 per year;
- Additional compensation is limited up to \$4,747.60 per year, or \$1,186.90 per quarter;
- The payment must be paid at least quarterly;
- If, at the end of a quarter, the average of the salary plus 10% of the additional compensation does not equal \$913 per workweek, the final rule permits a one-time payment to be made up the shortfall;
- The shortfall payment must be paid no later than the first pay period following the end of the quarter;
- The shortfall payment must satisfy the minimum salary for the preceding quarter, covering a 13-week period;
- The shortfall payment applies only to the preceding quarter and cannot be counted towards the salary requirements for the current quarter in which it is paid;
- The pitfall is that if a shortfall payment is not made, then the minimum salary level for the pay quarter and overtime is then owed for hours worked over 40 per workweek in that quarter.

Take away:

- Employers should review their job profile for white collar every annual and the payroll profile at least every 3 years
- Salaried white collar employees paid below the updated salary level are generally entitled to overtime pay, while employees paid at or above the salary level may be exempt from overtime pay if they primarily perform certain duties.
- HCE pay should be evaluated to determine if bonuses are paid according to the final rules