



**National Employment
Law Project**

Ending the DOL Exclusion of Home Care Workers from Minimum Wage and Overtime

Our nation’s 2.5 million home care workers are currently excluded by regulation from the basic minimum wage and overtime protections of the federal Fair Labor Standards Act (FLSA) that most other workers have depended on for decades. Home care workers provide the vital care that allows older adults and persons with disabilities needing care to remain in their own homes. Home care constitutes one of the top five fastest growing jobs in the country¹. The Department of Labor (DOL) has proposed modernizing its outdated rules to extend the FLSA’s coverage to this large group of workers intended to be covered by the Act’s basic minimum standards. The revamped rules would:

- help workers who provide home care for older adults and persons with disabilities,
- help to stabilize this critical workforce that is now experiencing high turnover because of the abysmal pay and long hours, and
- help keep elderly and disabled loved ones in their homes and out of institutions.

History of DOL’s minimum wage and overtime exclusion and its unintended results

Since 1974, home care workers have been excluded from basic minimum wage and overtime protections, as the result of overly-broad DOL regulations². When Congress extended FLSA coverage to domestic workers for the first time in 1974, it carved out two narrow exemptions: one for casual babysitters, and one for those providing “companionship” services. DOL regulations enacted at the time converted what Congress intended to be a very limited exemption for “elder sitters” into a wholesale exclusion of home care workers, which today translates into denying minimum wage and overtime protections to the 2.5 million workers in the home care industry.

The result has been to suppress wages for this workforce, consigning millions of caregivers to working poverty. Lower wages lead to higher workforce turnover and increased costs for employers as they try to replace and train their labor pool. Higher turnover also lowers the quality of care received by consumers.

¹ PHI, “U.S. Home Care Workforce: Basic Facts,” Senate Briefing on Home Care Workers, October 6, 2011. (Hereafter, “PHI Basic Facts”).

² For more background, see NELP, “Fair Pay for Home Care Workers,” August 2011, available at <http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1>.

While the general level of overtime in the home care workforce is modest,³ the exemption has encouraged excessive hours in some segments of the industry. Long hours are not only grueling for workers but can contribute to worse care for patients, as caregivers working 60 hours or more a week face fatigue and stress in performing what is a demanding job under any circumstances. These substandard working conditions have created serious employee recruitment and retention problems, generating labor shortages that prevent us from meeting the nation’s rapidly growing need for home care.

What specific regulatory changes is the DOL proposing?

The Department is proposing to make the following changes:

1. Clarify the definition of “domestic service employment” to remove the requirement that the services be performed in the home of the employer and add home health aides and personal care aides to the illustrative list of domestic workers;
2. Narrow the definition of “companionship services”;
3. Make clear that employees of third party employers such as staffing agencies are not exempt; and
4. Change the record-keeping requirements for employers of live-in domestic workers to more closely align them with what other employers must do.

What group of workers would be affected by the proposed changes?

The proposed changes to the companionship services regulation would result in the extension of minimum wage and overtime protections to most home care aides. Home care workers today are employed primarily to provide personal care duties, housekeeping services, and medically-related tasks. Workers who provide household services to members of the household other than the elderly or disabled recipient of companionship care or who provide general housekeeping services that are not incidental to companionship care would no longer be exempt. Additionally, workers employed by a third party, such as a home care agency, would be covered. The group of workers who remain exempt would be limited to those whose primary duties are the provision of fellowship and protection and who perform personal care duties only on an incidental basis, who do not perform work for other members of the household, and who are employed solely by the individual, family member or household.

A note about the costs of these proposed changes:

- The cost of transitioning to coverage for these workers is likely to be manageable. First, 21 states and D. C. already provide some minimum wage and overtime coverage of

³ PHI Basic Facts.

home care workers⁴. In addition, high overtime usage is concentrated in a tiny fraction of home care cases because most state programs do not pay for high-hours cases.

- A recent study shows that states with minimum wage and overtime protections for home care workers have comparable rates of institutionalization as states without coverage,⁵ suggesting that the remaining states should be similarly capable of making this shift without major disruptions to their long-term care systems.
- Some home care employers—including one of the nation’s largest for-profit home care agencies⁶ -- are already paying overtime despite the federal exemption. These employers’ experiences illustrate how the transition to expanded FLSA coverage can be part of a strategy for modernizing the home care delivery system to provide better quality care and attract a skilled workforce to meet our nation’s growing need for home care in the 21st century.
- The home care industry can afford to pay a fair wage without raising costs to consumers. For-profit home care businesses make 30-40% profits in a 70 billion dollar industry.⁷ Subsidizing the system by denying these workers a fair wage is unnecessary.

⁴ See “Which states provide minimum wage and overtime to home care workers?” <http://www.nelp.org/page/-/Justice/2011/MiniWageOvertimeHomeCareWorkers.pdf>.

⁵ PHI Data Brief, *Institutionalization Rates in States that Extend Minimum Wage and Overtime Protection to Home Care Workers* (January 3012), available at <http://phinational.org/sites/phinational.org/files/research-report/institutionalization-data-brief.pdf>.

⁶ Addus Health Care is one of the five largest multi-state providers of personal care services in the country. It serves 25,000 consumers each week and operates in 19 states. See, Addus profile in NELP, “Fair Pay for Home Care Workers”, available at <http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1>

⁷ Franchise Business Review Special Report, *Senior Care and Home Healthcare Franchises* (December 2010), available at: http://www.franchisebusinessreview.com/content/files/FBR_Senior_Care_Report2010.pdf.