



White Paper

The Companionship Exemption: A Home Health Agency's Guide to Complying with the New Department of Labor Employee Mandate

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Background

In 1974, the United States Department of Labor (DOL), through the Fair Labor Standards Act (FLSA), extended minimum wage and overtime coverage to workers who perform “domestic service.” However, a subset of the domestic labor force was deemed exempt from the FLSA. Domestic workers engaged in “companionship services” to the elderly and disabled, assuming they met certain requirements, were not required to be paid minimum wage or overtime.

In 2013, the DOL amended the requirements for exempt companionship services. The new guideline, which was initially targeted to become effective on January 1, 2015, focuses on three terms. They are:

- Fellowship
- Protection
- Care

Fellowship, relates to engaging the senior or disabled person in, among other things, social, physical and mental activities. Examples of fellowship are conversation, reading, walks and errands.

Protection means to monitor the person’s safety and well-being. This is applicable either inside or outside of their home.

Care has to do with helping a person with two main issues: activities of daily living (ADLs) and instrumental activities of daily living (IADLs). ADLs primarily consist of dressing, bathing, toileting, etc. IADLs are more geared toward meal preparation, assistance with financial matters, arranging medical care and the like.

The DOL's new guideline states, "The companionship services exemption is not applicable when the employee spends more than 20 percent of his or her workweek performing care services; in such workweeks, the employee is entitled to minimum wage and overtime."¹ Furthermore, the guideline indicates that home care staffing agencies cannot claim the exemption. It is only available to the individual or family employing the worker and only if the worker meets the new companionship services duties test.

The projection of losing what the home health industry commonly called the "companionship exemption" was met with severe resistance. Multiple home care associations sued the DOL. The corresponding legal maneuvering made its way to the U.S. Supreme Court. The industry trade groups sought an Application for a Stay of the legislation. This request was in response to a prior ruling by the District of Columbia Circuit Court of Appeals that the legislation could move forward.

On October, 6, 2015, Supreme Court Chief Justice John Roberts denied the industry trade request. Hence, Roberts' determination paved the way to extend FLSA minimum wage and overtime coverage to approximately two million home care workers who were previously exempt. The new DOL rule became effective October 13, 2015.

Effect of the New Legislation on the Home Health Industry

General

The enactment of the new companionship exemption legislation has material consequences for home health staffing agencies. Those primarily affected are known as "private duty" agencies.

Many private duty agencies are comprised of nothing but companionship workers. Several national home care franchise chains base their business model solely on supplying companionship workers. Accordingly, before the new legislation, these employers were not required to pay their workers either minimum wage or overtime. That has all changed. Now, a companionship worker allocating over 20 percent of their field efforts to the provision of care, must be paid both minimum wage and overtime.

Agency owners now face significant payroll increases if they allow companionship workers to exceed a 40-hour workweek. Many owners will choose to hire additional part-time staff in order to eliminate the additional pay requirement associated with overtime work. This path brings another ownership challenge to the forefront: finding quality employees.

Some owners feel implementing more astute scheduling procedures is a solution to keep their existing employees' hours under 40. Here, the owner continues to face the task of calculating all the different forms of work an employee conducts in order to stay below the 40-hour threshold. Determining the allocation between time spent in client encounters, drive time to and from client locations and other business-related tasks poses a formidable undertaking.

¹ United States Department of Labor (2013). Wage and Hour Division. *Fact Sheet #79A: Companionship Services Under the Fair Labor Standards Act (FLSA)*. Retrieved from www.dol.gov/whd/regs/compliance/whdfs79a.htm

Since contractors are excluded from the new legislation, agency owners question whether it is advisable to move their employees to “independent contractor” status to avoid the new mandate. Industry advocates, such as the Home Care Association of Florida (HCAF), tend to caution agencies about taking this route. HCAF states, “Although independent contractors do not legally need to receive overtime pay or minimum wage, HCAF strongly cautions providers to assess how they treat these workers on a day to day basis. Many experts suggest that you start paying these individuals the minimum wage including overtime just to protect your agency from a wide reaching class action lawsuit.”²

Home care agencies have identified aspects of the industry that are more heavily impacted by the legislation than others. Live-in care is one of the branded areas. For the most part, live-in care has been paid on a per-day basis. The new mandate will move that into an hourly payment model. Providers feel this will eventually double the cost for around the clock home care services.³

With the new mandate, it is essential for agency owners to be abreast of three salient issues affecting their company’s operation. They are:

- Understanding overtime and corresponding employee wage calculation
- Identifying the minimum wage in the agency’s jurisdiction
- Understanding what is included in an employee’s “work”

Overtime is classified as all hours over 40 in a workweek. The DOL indicates, “An employee’s workweek is a fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods.”⁴ For those hours exceeding 40, an employee is to be paid time and one-half of their regular wage. For example, if an employee earns \$10.00 per hour and works 42 hours in a workweek, the two hours over 40 would be compensated at \$15.00 per hour.

The minimum wage calculation is not as straightforward as the overtime determination. More specifically, the federal minimum wage is currently \$7.25 per hour. However, there are states where the minimum wage is different from the federal number. Where federal and state law have different minimum wage rates, the higher standard applies.⁵

Home health agency owners must be very familiar with what “work” counts toward an employee’s workweek calculation. The FLSA states, “All time spent by an employee performing activities which are job-related is potentially ‘work time.’ This includes the

² Homecare Association of Florida (HCAF) (2015). HCAF Highlights. *Overtime Pay Federal Court Decision: How Should Florida Home Health Agencies Move Forward?*

³ Mullaney T. (2015). Home Health Care News. *DOL Wage Rule Takes Effect, Provider Reaction Mixed*. Retrieved from homehealthcarenews.com/2015/10/dol-wage-rule-takes-effect-provider-reaction-mixed/

⁴ United States Department of Labor (2008). Wage and Hour Division. *Fact Sheet #23: Overtime Pay Requirements of the FLSA*. Retrieved from www.dol.gov/whd/regs/compliance/whdfs23.htm

⁵ United States Department of Labor (2015). Wage and Hour Division. *Minimum Wage Laws in the States – January 1, 2015* Retrieved from www.dol.gov/whd/minwage/america.htm

employee's regular 'on the clock' work time, plus 'off the clock' time spent performing job-related activities (which benefit the employer)."⁶

Record Maintenance

Judicious record keeping is essential in complying with the mandate. The DOL notes, "Every employer covered by the FLSA must keep certain records for each covered, nonexempt worker."⁷ The DOL further states, "...the records must include accurate information about the employee and data about the hours worked and the wages earned." Many in the home health industry view the record keeping requirement associated with a mobile workforce as one of its biggest hurdles.

Tracking Employee Time

Tracking employee hours is complex. According to Ron Marquis, assistant director of the DOL's Wage and Workplace Standards Division, "The timekeeping law requires that time records be 'true and accurate.'"⁸ Marquis further points out that, "The least-accurate form of tracking is a time sheet filled out by the employee."

Unfortunately, the majority of agencies providing companionship services continue to use employee-generated time sheets: even though they are both archaic and susceptible to error and bias. This is due, in part, to the mobile nature of companionship caregivers. Recent advances in technology, especially mobile technology, now provides agency owners the ability to forego manual time sheets in favor of more accurate electronic time tracking.

Tracking Drive Time

Until the new legislation was enacted, both employers and employees primarily focused on tracking encounter time with clients. Drive time, on the other hand, was not usually viewed with the same importance. If tracked at all, it was typically done so for Internal Revenue Service purposes. More specifically, and depending on the worker's compensation understanding, a mileage log may have been kept for worker mileage reimbursement and/or company vehicle maintenance. Neither of these uses have comprehensive utility when addressing worker time.

Travel time is now very significant in calculating a companionship worker's workweek. The FLSA guidelines indicate, "...as a general rule, 'home to work' and 'work to home' travel time is not work time..." and, "Travel time which is 'all in a day's work' is work time." This means companionship workers must be paid for the drive time associated with traveling between a day's appointments. This is the case even if a company car is provided.

⁶ Fair Labor Standards Act (FLSA) (nd). *FLSA Overtime*. Retrieved from www.flsa.com/overtime.html

⁷ United States Department of Labor (nd). *Wages. Recordkeeping & Reporting*. Retrieved from www.dol.gov/dol/topic/wages/wagerecordkeeping.htm

⁸ Susca, D. (2008). The Journal of the Connecticut Business & Industry Association. *Accurate timekeeping essential for nonexempt employee wages*. Retrieved from https://www.cbia.com/cbianews/2008/01/200801SB_AccurateTimekeeping.htm

There are two general scenarios that are indicative of the industry's manner of caregiver travel. Both have a rule of thumb relating to employee compensation. The scenarios are:

Scenario 1: If a caregiver is required to report to the office to begin the day and then proceeds to a client's location, the caregiver is not paid for driving to the office. However, the time spent driving from the office to the client's location is counted toward the employee's hours. If a return trip is required to the office at day's end, that time is also to be compensated. The leg from the office back to home does not have to be compensated.

Scenario 2: When a caregiver begins their day from home and travels directly to the client's location, the travel time to the client's location does not have to be compensated. Accordingly, if, at day's end, the caregiver leaves the client's location and travels home, the travel time back home is not compensated.

With the nature of companionship caregivers frequently visiting multiple clients in a day, travel between daily appointments is to be compensated. Hence, agency owners must have a plan in place to track the employee's drive time. Otherwise, the agency may be subject to wage-based penalties and/or lawsuits.

Employer Penalties for Wage Payment Inaccuracy

The government takes the topic of employee wages seriously. If an employee has not been paid according their actual hours of work, the FLSA has several remedies it uses. One of the most common is "back pay." It is the difference between what an employer pays a worker and what the worker was actually entitled to be paid. The methods employed by the FLSA for recovering unpaid minimum and/or overtime wages are:⁹

1. The Wage and Hour Division may supervise payment of back wages.
2. The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages.
3. An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs.
4. The Secretary of Labor may obtain an injunction to restrain any person from violating the FLSA, including the unlawful withholding of proper minimum wage and overtime pay.

Implications Summary

The new mandate has far-reaching implications for the industry. There is consensus about two things relating the legislation. First, agencies will have to modify their operations to comply with the mandate. Some agencies have prepared for the legislation, while others have not.

⁹ United States Department of Labor (nd). Wages. *Back Pay*. Retrieved from www.dol.gov/dol/topic/wages/backpay.htm

Second, agency operational prices will increase. This in turn will cause their prices to the consumer to rise.

The Prompt and Inexpensive Solution to Complying with the Mandate

There are two electronic systems specifically designed for the home health industry that combine as a powerful way for an agency to comply with the new DOL mandate. The systems are Validation Point and Mobile Time Clock. They are Internet-based and operate in conjunction with Averlent Corporation's Safety Notice mobile app. Validation Point, Mobile Time Clock and Safety Notice, along with LifePatient, currently comprise the Averlent Technology Suite.

A key feature to the two systems is they act as "Plug Ins" to an agency's existing business systems. This is important because agency staff can continue to use the tools they are accustomed to working with on a daily basis. Validation Point and Mobile Time Clock fully integrate into the current systems and bring powerful, new data to the forefront. The new information, along with the unique manner relating to how it is captured and processed, provides the industry an unparalleled tool for mobile caregiver management.

The combination of Validation Point and Mobile Time Clock has proven to be an easy and inexpensive way for an agency to:

- Comply with the mandate
- Assure accurate, unbiased tracking of employee hours
- Insulate the agency from payroll-based lawsuits
- Withstand the utmost scrutiny from a governmental-based audit

Solution Number 1 – Accurate Tracking of Caregiver Time with a Client

Mobile Time Clock eliminates the inaccuracy and bias associated with employee-generated time sheets. It tracks the employee's time electronically through using the technology found in Safety Notice's HIPAA-compliant mobile app.

In the standard smartphone operation, when an employee arrives at a client's location, the employee touches the green "Arrival" button on the app (Figure 1). This activity essentially "clocks in" the employee.

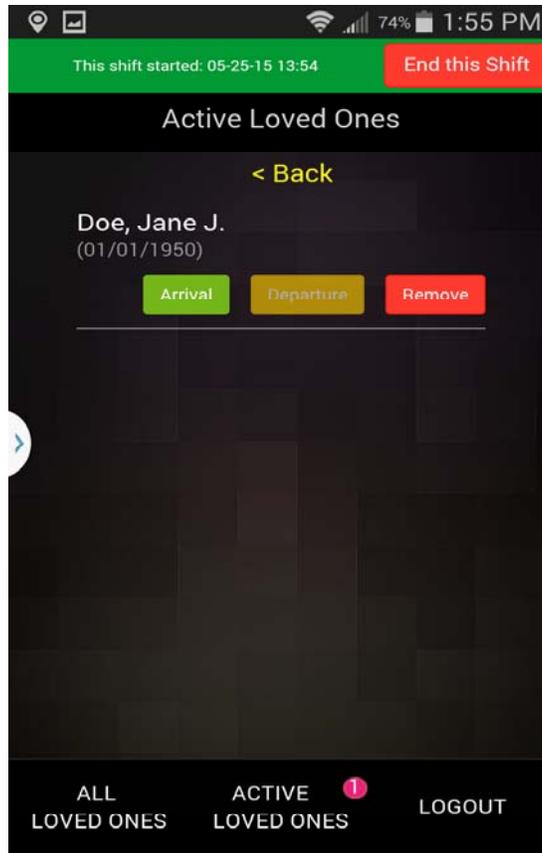


Figure 1

When the client encounter has been completed, the employee touches the yellow “Departure” button (Figure 2). Touching Departure “clocks out” the employee.

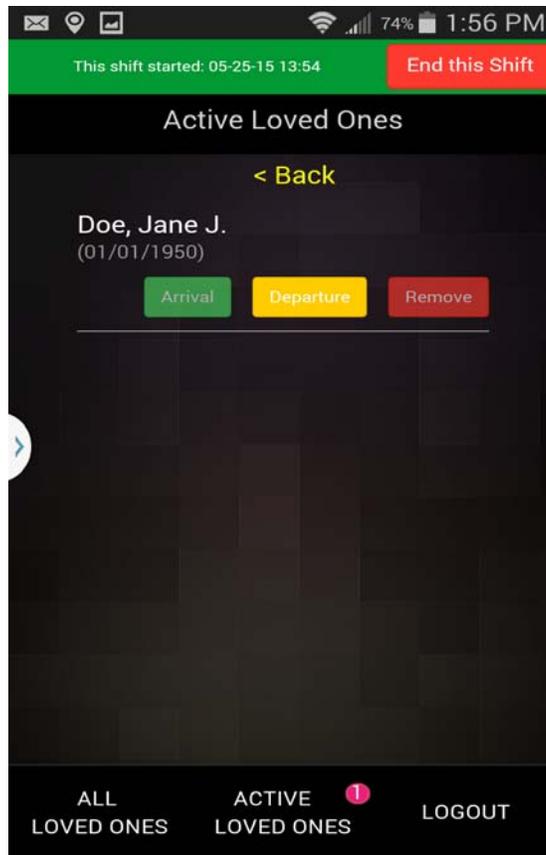


Figure 2

The system also works without the use of the mobile app. Agency administrative personnel can conduct the Arrival and Departure function on behalf of the remote employee. This is accomplished by using the agency's dedicated Internet portal.

The act of touching Arrival and Departure brings the employer additional important management information. This includes the ability to:

- Separate client interaction time from other employee work classifications, such as drive time
- Immediately identify when an employee is late for an appointment
- Immediately determine if an employee clocks in too early for an appointment
- Identify the employee's physical address during the client interaction

Solution Number 2 – Accurate Tracking of Caregiver Drive Time

Use of the mobile app not only enables the employer to track employee time with clients, but it also tracks employee drive time between client locations. The combination of client interaction

time and drive time, and the ability to view them separately or together, presents as a very useful management tool.

Additional management data provided by Validation Point includes:

- The ability to track each caregiver's location throughout the business day
- The ability to track mileage without the use of a mileage log
- Display the most efficient route used between client locations
- Determine if enough drive time is allocated between client appointments when creating the employee's schedule

Solution Number 3 – Accurate Record Keeping

The DOL requires employers to maintain exceptional records of employee wages. All data captured while using Validation Point and Mobile Time Clock is stored for the agency's benefit in an encrypted, cloud-based server that is recurrently backed up. The agency has access to the data at all times via the Internet portal. Furthermore, the system offers a multitude of reporting and printing capabilities for hard-copy reference.

Solution Number 4 – Prompt Employee Payment Gateway

Mobile Time Clock operates as a plug in. The employee hours captured by the technology are easily transferred into the agency's existing payroll system. The process takes under 30 seconds. The system's data export function also eliminates the agency's necessity to manually enter employee hours: a task typically required with employee-created time sheets. This is a key feature to increasing administrative productivity and simultaneously reducing the possibility of human error.

In summary, sound business principles dictate agency owners make use of two vehicles in their quest to conform to the new mandate. The first is to obtain both professional legal and accounting advice. The second is to utilize new technology for capture, management and storage of required information. Validation Point and Mobile Time Clock provide this technology and are a robust solution for an agency's path to compliance with the legislation.

About Averlent Corporation

Averlent Corporation is a technology firm supporting the senior care industry. The company is based in Florida's Tampa Bay area. Its phone number is 727-448-0000. The company's website is Averlent.com and its email address is Contact@Averlent.com.