Key Components for Comment in Department of Labor Fair Labor Standards Act Companionship Exemption Proposed Rulemaking

The complete Notice of Proposed Rulemaking can be found here:
http://www.dol.gov/whd/flsa/CompanionshipNPRM.pdf

1. Primary goals of this proposed rulemaking include:
    a. Revising the definition of "domestic services".
    b. Revising the definition of "companionship services".
    c. Clarifying the type of activities and duties that may be considered "incidental" to the provision of companionship services.
    d. Amending the regulation to disallow third party employers (employers other than an individual, family or household receiving services, such as agencies) from using the companionship exemption.
    e. Amending the recordkeeping requirements for live-in domestic workers.
2. Proposed rule updates and clarifies the definition of a domestic service employee in order to reflect profound changes in the domestic workforce and expansion of the home health care market since 1974. (Section 552.3, page 181)
    a. The rule removes outdated professions, e.g. footmen, grooms, and governesses, and updates with newer professions, such as nannies, home health aides, and personal care aides. However, the new list of domestic service employees is intended to be illustrative, NOT exhaustive.
        i. Illustrative list of examples:
            1. Companions
            2. Babysitters
            3. Cooks
            4. Waiters
            5. Butlers
            6. Valets
            7. maids
            8. housekeepers
            9. nannies
            10. nurses
            11. janitors
            12. laundresses

13. caretakers
14. handymen
15. gardeners
16. home health aides
17. personal care aides
18. chauffeurs of automobiles for family use

ii. Note that this list is illustrative of job titles that qualify as *domestic service*, not necessarily those that qualify for the companionship exemption. In fact, many of the above titles explicitly will not qualify for the companionship exemption, based on the duties performed. Specifically, home health aides and personal care aides, based on the duties that most individuals with these titles perform.

3. Proposed rule specifies which work may be considered "companionship services" and "incidental to companionship services". (Section 552.6, page 182)
   a. The original rule intended for the companionship exemption only to apply to those workers for whom their "sitting" services were a casual form of employment, rather than a vocation.
   b. The Department is concerned that the current regulatory definition of "companionship services" allows for the denial of minimum wage and overtime pay protection to workers who work in private homes and routinely perform general household work or provide medical care, and who may also provide fellowship and protection as an incidental activity to the household work or medical care (Page 15, paragraph 2).
   c. In general, "the performance of duties that are not for fellowship and protection of the aged or infirm person, or incidental to the provision of fellowship and protection, are not "companionship duties," and therefore, any performance of general household work would result in the loss of the exemption for the week." (page 182)
   d. The proposed rule will divide Section 552.6 into four paragraphs.
      i. Proposed § 552.6(a) – (page 182):
         1. Defines "companionship services" as "the provision of fellowship and protection for a person who, because of advanced age or physical or mental infirmity, is unable to care for themselves" and adds language that defines the terms "fellowship" and "protection."
         2. Fellowship and protection are described as including duties such as "sitting" with [an infirm parent]; providing "constant attendance;" and rendering "services similar to a babysitter", i.e., "someone to be there and watch an older person," an "elder sitter.""
         3. Fellowship is defined as: "to engage the person in social, physical, and mental activities, including conversation, reading, games, crafts, walks, errands, appointments, and social events" (page 182)

4. Protection is defined as: "to be present with the person in their home or to accompany the person when outside of the home to monitor the person's safety and well-being." (page 182)

ii. Proposed § 552.6(b) – (page 182):
   1. Explains that companionship services may include "intimate personal care services", provided they are "incidental to the provision of fellowship and protection for the aged or infirm person."
   2. The incidental duties that are not strictly fellowship and protection must be performed exclusively for the individual (i.e. not for other members of the household).
      a. Illustrative examples of this incidental work include:
         i. Help with dressing.
            1. Provide it is incidental (e.g. changes in weather, soiling clothes).
         ii. Occasional grooming.
         iii. Toileting and activities associated with toileting, including using toileting equipment and supplies and/or "diaper changing."
         iv. May occasionally drive the aged or infirm person to "appointments, errands and social events."
            1. This should not represent the work of a driver or chauffer.
            2. This should be included in the incidental work and must, with other incidental work, be less than 20% of the weekly work hours.
            3. While driving must be limited and incidental, "accompanying" an individual on errands etc. (but not driving) is considered acceptable and part of the companionship services.
         v. Occasional assistance with feeding and meal preparation.
            1. For food preparation to qualify, the prepared food must be eaten while the companion is present.
         vi. "Light laundry", including putting clothing worn by the individual in the hamper, putting soiled clothes in the washer/dryer and folding and putting away clothing.
         vii. Bathing, in certain exigent circumstances.
            1. An example is when an unexpected toileting accident occurs and bathing is necessary.

2. The Department believes that, generally, bathing can be scheduled to not coincide with the companion's hours .

b. Not more than 20% of the week's work hours can be spent doing incidental work.

c. If more than 20% of the week's work hours are spent doing incidental work, the companionship exemption cannot apply for that week and minimum wage and overtime must be paid for that week.

3. Is 20% the right amount of incidental services?
4. Is the list of examples of incidental services appropriate?

iii. Proposed § 552.6(c) - (page 183):

1. Work benefitting other members of the household (other than the individual receiving the companionship services) is not permitted in order to use the exemption.
2. General household services not included in the "incidental services" (§ 552.6(b)) are not allowed.
    a. This is a change from the current regulation.
    b. General household work that is not allowed includes vacuuming, window washing, dusting or other work a maid or housekeeper might do.

iv. Proposed § 552.6(d) – (page 184):

1. Excludes from the definition of "companionship services" medical care that is typically provided by personnel with specialized training.
2. If training is typically a pre-requisite for the duty, it cannot be considered companionship services.
3. The illustrative list of medically-related duties that cannot be performed include:
    a. Taking vital signs.
    b. Routine foot, skin and back care.
    c. Assistance with physical therapy.
    d. Determining whether prescription medications should be taken.
4. Reminders of medical appointments are permitted.
5. Tasks performed by the following should not qualify for the companionship exemption:
    a. Licensed nurses
    b. Certified nursing assistants
    c. Certified nursing aides

e. *Further Questions for Review from this Section*

        1. Does the proposed rule appropriately reflect medical care tasks currently performed by home health aides or personal care aides (which are not intended to use the companionship exemption)?
        2. Is the list of minor health-related examples that could be performed as part of the companionship exemption appropriate?

4. Live-In Domestic Service Employees (§§ 552.102 and 552.110)
    a. Current § 552.102 allows the employer and employee to enter into an agreement that excludes the amount of sleeping time, meal time, and other periods of complete freedom from duty when the employee may either leave the premises or stay on the premises for purely personal pursuits.
    b. The proposed rule would limit the application of the overtime exemption contained in § 13(b)(21) of the Act to the individual, family or household employing the live-in domestic worker. (page 185)
        i. Third-party employers would no longer be entitled to claim the exemption.
    c. Proposed § 552.102(b) would no longer allow the employer of a live-in domestic employee to use the agreement as the basis to establish the actual hours of work in lieu of maintaining an actual record of such hours. (page 185)
        i. Instead, the employer will be required to keep a record of the actual hours worked.
    d. Paragraph 552.102(b) of the current rule allows an employer and employee who have such an agreement to establish the employee's hours of work in lieu of maintaining precise records of the hours actually worked.
        i. Proposed § 551.102(b) requires entering into a new written agreement whenever there is a significant deviation from the existing agreement. (184 and 185)
    e. Paragraph 552.110(b) of the current rule provides that records of actual hours worked are not required for live-in domestic employees; instead, the employer may maintain a copy of the agreement referred to in § 552.102. (page 185)
        i. The proposed rule requires that the employer maintain a copy of the agreement and maintain records showing the exact number of hours worked by the live-in domestic employee.
        ii. Employers of live-in employees may not maintain a simplified set of records for live-in domestic employees who work a fixed schedule.
    f. As with other employees, the employer is responsible for making, keeping, and preserving records of hours worked and ensuring their accuracy.
    g. The proposed rule still does not require records for casual babysitters as defined by § 552.5 (page 186)
5. Third Party Employment (CFR§552.109)
    a. Under the proposed rule:
        i. An employee employed by a third party cannot ever use the companionship exemption. (page 184)

ii. The companionship exemption can only apply "to the individual, family or household employing the companion or live-in domestic worker, regardless of whether the family member employing the companion or live-in domestic worker resides in the home where the services are performed."

1. I.e. Employees employed by home-health care agencies cannot qualify for the companionship exemption under the proposed rule.

6. Preliminary Regulatory Impact Analysis of the Proposed Revisions to the Companionship Regulations

a. *This section is over 140 pages long and includes a variety of information and data that the Department of Labor used in their analysis of these proposed rules. We have included verbatim language that we believe warrant comments. Other language may also warrant comments and we encourage you to review the section. See the tables attached at the end of this document for further information*

b. "The Department has found no data to support an estimate of the number of families that directly hire independent providers." (page 86)

c. "Under the consumer-directed model, the consumer or his/her representative has more control than in the agency-directed model over the services received, and when, how, and by whom the services are provided. The approaches to delivering services under this model range from the more formal state-organized systems to informal arrangements coordinated through word-of-mouth between care recipients. In the public version of this model, the care is funded either by Medicaid, directly by states, or through programs or grants administered by the HHS Centers for Medicare & Medicaid Services (CMS)." (page 67)

d. "However, consumer-directed employment is sometimes referred to as a "grey market;" that contains an element of "over-the-back-fence network of women [who are] usually untrained, unscreened, and unsupervised, but more affordable without an agency's fee, less constrained by regulations and hired through personal recommendation." The term "grey market" is sometimes used to suggest that at least some of these private arrangements are designed to avoid applicable labor laws; the extent to which care recipients use private arrangements for this purpose is unclear; there is very little information available about this segment of the market for home health services. It is also possible, and likely, that care providers who are employed by an agency or who provide services through a state registry also occasionally provide services through informal arrangements. The Department's best estimate of consumer-directed employment is summarized in the previous paragraph, and we are unable to estimate the extent to which the group of providers described above participates in the informal market. We are also unable to characterize the extent to which other providers not included in this estimate participate in the "grey market."" (page 68)

e. "There is no consolidated source of data on state consumer-directed programs; however, PHI offers an overview of what programs are offered: seven states have no

publicly- funded consumer-directed program, 38 states offer options under one or more Medicaid Waivers, seven states offer options under Medicaid Home Health programs, and 12 states offer consumer/participant-directed options under Medicaid Personal Care Option." (page 68)

f. "Of those states that do offer a consumer-directed program, some have implemented a "public authority" model. In this model, a public authority or some other governmental or quasi-governmental entity plays a role in setting compensation and other employment terms for the service provider, who is compensated through public funds, acts as the "employer-of-record," and may provide training, and create and maintain registries of providers. Service providers in this system have the option to select representatives for collective bargaining with the state. Six states (California, Massachusetts, Michigan, Oregon, Washington, and Wisconsin) have fully implemented a public authority, and Missouri is in the process of doing so. Several states have implemented a consumer- directed program without creating a public authority, they include: Illinois, Iowa, Maryland, and Ohio." (page 69)

g. "To be eligible for the overtime wage premium, an independent provider would have to work more than 40 hours per week for the same employer (i.e., family); an agency- employed caregiver is eligible if he or she works more than 40 hours for the agency regardless of the number of families visited. Thus, the Department believes that independent providers are much less likely to be eligible for the overtime premium than agency-employed workers; those independent providers who work more than 40 hours per week are likely to be employed by more than one family." (page 92)

h. "By assuming that the proportion of independent providers earning less than the federal minimum wage is identical to that for agency-employed caregivers, the Department implicitly assumes independent providers work in similar patterns as agency-employed caregivers. That is, independent providers are distributed across states in the same proportion as agency-employed caregivers, and are as likely to earn less than minimum wage as those employed by agencies." (page 92)

i. "Based on available data on the number of hours worked by PCAs and HHAs, drawn from several nationally representative surveys, the Department judges that 35 hours per week is a reasonable upper-bound assumption of the average number of hours worked per week." (page 94)

j. "As described above, the Department does not expect independent providers to be affected by overtime provisions. It expects few, if any, of these caregivers work more than 40 hours per week for the same family." (page 98)

k. "The Department has been unable to find evidence concerning how many workers routinely travel as part of the job, the number of hours spent on travel, or what percentage of that travel time currently is compensated." (page 101)

l. "For example, anecdotal evidence suggests that home health care workers in rural areas might have to travel further between clients, but their typical caseload patterns and total travel time are unknown. A survey of 131 home health care workers in Maine found companions traveled between 0 to 438 miles per week for an average unreimbursed mileage of 45 miles per week. One survey participant's comment was compelling: "I had to give up my other clients because the price of gas and low wages I wasn't making ends meet." (page 101)

m. "The Department expects no independent providers will be affected by the travel time provision. Although the FLSA requires that employees who travel to more than one worksite during the workday be paid for travel time between each worksite, in the case of independent providers, any travel between work sites most likely represents travel from one employer to another, not travel between sites for the same employer. Therefore the Department anticipates independent providers will not be eligible for travel costs." (page 102)

n. "The Department specifically invites comments and data on the number of live-in domestic workers and their employers who may be subject to this rule." (page 104)

o. "Although increased payments to workers associated with minimum wage, travel, and overtime provisions of the proposed rule are considered transfer effects from a societal perspective, the Department expects agencies will try to pass these transfers through to Medicare and Medicaid. Under the three overtime scenarios examined, average annualized payments range from $41.5 to $226.0 million depending on how home health care agencies respond to overtime requirements. If Medicare and Medicaid continue to pay 75 percent of home health care costs, roughly $31.1 million to $169.5 million in costs might be incurred by these government programs. These costs compose 0.06 to 0.29 percent of total HHS and state outlays for home health care programs ($58.1 billion)." (page 122)

p. "The extent to which home health care agencies choose to spread employment (hire more companions) rather than pay overtime may cause an increase in the number of caregivers for a client; the client may be less satisfied with that care, and communication between caregivers might suffer, affecting the quality of care for the client." (page 132)

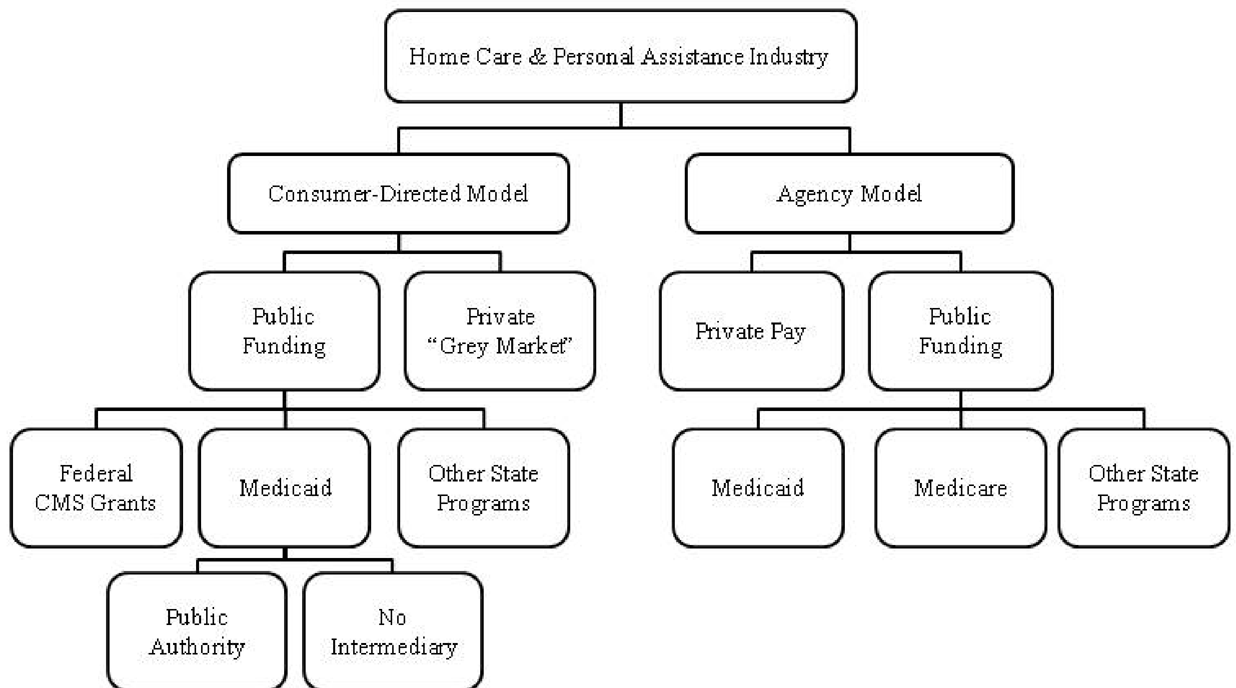
Please note that there are three items attached at the end of this document, drawn from the Proposed Rules. We would like to call your attention to the figure on page 64 and the tables on pages 75-76 and 89-90.

Employers and Funding Sources

This section focuses on the employers of workers who are currently classified as companions and common sources of funding for the services they provide; the next section describes the workers and the work they do. Services in the home health care industry are provided through two general delivery models: agencies and consumer-directed (which often use independent providers and family caregivers).

Figure 2 provides a visual overview of the home care and personal assistance industry and the two primary models for service provision, which are discussed in more detail in the sections that follow.

Figure 2. Overview of the Home Health Care Industry and Funding Sources



Agency Model

home health care patients not also covered by Medicaid. Also, states with low Medicaid spending appear to shift costs to the Medicare home health program spending.[48] Most of the public matching registries listed in Appendix A are funded by the state, with a few receiving federal dollars through reimbursement for Medicaid administrative costs or receiving initial funding through federal Medicaid Systems Transformation grants.[49]

Table 2-2. Summary of Home Health Care Service Payers and Service Coverage

Payer	Description	Eligibility	Home Health Service Coverage
Public			
Medicare	Federal government program to provide health insurance coverage, including home health care, to eligible individuals who are disabled or over age 65. The program pays a certified home health agency for a 60 day episode of care during which the agency provides services to the beneficiary based on the physician approved plan of care.	Individual is under the care of a doctor and receiving services under plan of care; has a certified need for intermittent skilled nursing care, physical therapy, speech-language pathology services, continued occupational therapy; and must be homebound. HHA providing services is Medicare-certified; services needed are part-time or intermittent, and are required <7 days per week or <8 hours per day over 21 day period.	Intermittent skilled nursing care, physical therapy, speech-language pathology services, continued occupational therapy. Does not cover 24hr/day care at home; meals delivered to home; homemaker services when it is only service needed or when not related to plan of care; personal care given by home health aides when it is only care needed.
Medicaid	A joint federal-state medical assistance program administered by each state to provide coverage for low income individuals. The program pays home health agencies and certified independent providers.	Eligibility and benefits vary by state. In general, states must cover individuals who receive federally assisted income maintenance payments such as Social Security, individuals who are eligible for Temporary Assistance for Needy Families and to other individuals defined as "categorically needy."	Coverage of home health services must include part-time nursing, home care aide services, medical supplies and equipment. Optional state coverage may include audiology; physical, occupational, and speech therapies; and medical social services. Coverage is provided under: Medicaid Home

[48] Center for Medicare & Medicaid Services (CMS). 2011b. Home Health Study Report: Literature Review, available at http://www.cms.gov/HomeHealthPPS/Downloads/HHPPS_LiteratureReview.pdf. p.16.
[49] Seavey & Marquard, 2011.

Table 2-2. Summary of Home Health Care Service Payers and Service Coverage

Payer	Description	Eligibility	Home Health Service Coverage
			Health, State Plan Personal Care Services benefit, and Home and Community-Based state plan services and waivers.
Older Americans Act	Provides federal funding for state and local social service programs that provide services so that frail, disabled, older individuals may remain independent in their communities.	Must be 60 yrs of age or older.	Home care aides, personal care, chore, escort, meal delivery, and shopping services.
Veterans Administration	Home health care services provided through the VA's network of hospital-based home care units.	Veterans who are at least 50% disabled due to service-related conditions.	Home health care. Does not include nonmedical services provided by HCAs.
Social Services Block Grant	Federal block grants to states for state-identified service needs.	Varies by state.	Often includes program providing home care aide, homemaker, or chore worker services.
Community organizations	Some community organizations provide funds for home health and supportive care.	Varies by program.	Covers all or a portion of needed services. Vary by program.
Private			
Commercial Health Insurance Companies	Many policies cover home care services for acute, and less often, long-term needs.	Varies by policy.	Varies by insurance policy.
Medigap Insurance	Covers some personal care services when a Medicare beneficiary is receiving covered home health services.	Varies by policy.	Focused on short-term personal care services in support of Medicare covered home health care skilled nursing services.
Self-Pay	The individual receiving the services pays "out of pocket."	Individuals who are not eligible for covered services under third-party public or private payers.	Services that do not meet the eligibility criteria of other payers.

Sources: National Association for Home Care. 1996. Who Pays for Home Care Services? Available at URL: www.nahc.org/consumer/wpfhcs.html; Centers for Medicare and Medicaid Services (CMS). Medicare and Home Health Care. Available at URL: http://www.medicare.gov/publications/pubs/pdf/10969.pdf

Home Health Care Workers

without overtime pay used in the more detailed calculations described below. By definition, the Department assumes that 100 percent of PCAs and HHAs working as independent providers work in the home setting.

Table 3-2. Summary of Industries Employing HHAs and PCAs in 2008 and Likelihood of the Aide Working in a Home or Facility.

Industry	HHA		PCA	
	Employment (1000)	Facility or Home	Employment (1000)	Facility or Home
Total, All workers [a]	**1**	**100%**	**1**	**100%**
Home	*0.449172577*	*45%*	*0.801039861*	*80%*
Facility	*0.550827423*	*55%*	*0.198960139*	*20%*
Total, All workers	100	Home	100	Home
Accounting, tax preparation, bookkeeping, and payroll	0.06	Facility	0.15	Facility
Activities related to real estate	NA	NA	0.06	Facility
Child day care services	0.07	Facility	0.41	Facility
Civic and social organizations	NA	NA	0.11	Facility
Community care facilities for the elderly	15.34	Facility	NA	NA
Community food and housing, and emergency and other relief services	0.1	Facility	0.28	Facility
Educational services, public and private	0.25	Facility	0.18	Facility
Employment services	2.16	Facility	1.84	Facility
Fitness and recreational sports centers	NA	NA	0.01	Facility
Grant making and giving services	NA	NA	0.28	Facility
HHCS	30.94	Home	27.9	Home
Hospitals, public and private	2	Facility	0.61	Facility
Hotels, motels and other traveler accommodations	NA	NA	0.03	Facility
Lessors of real estate	0.04	Facility	0.2	Facility
Local government, excluding education and hospitals	1.33	Facility	NA	NA
Management of companies and enterprises	0.14	Facility	0.54	Facility
Management, scientific, and technical consulting	NA	NA	0.04	Facility
Nursing care facilities	5.73	Facility	0.39	Facility
Offices of all other health practitioners	0.06	Facility	0.06	Facility
Offices of mental health	0.04	Facility	0.01	Facility

practitioners (except physicians)				
Offices of physical, occupational, and speech therapists, and audiologists	0.11	Facility	0.05	Facility
Offices of physicians	0.24	Facility	0.07	Facility
Other ambulatory health care services	0.05	Home	NA	NA
Other financial investment activities	NA	NA	0.03	Facility
Other investment pools and funds	NA	NA	0.02	Facility
Other personal services	NA	NA	0.41	Home
Other residential care facilities	2.18	Facility	0.4	Facility
Outpatient mental health and substance abuse centers	0.27	Facility	0.22	Facility
Personal care services	NA	NA	0.07	Home
Residential mental health and substance abuse facilities	2.16	Facility	0.24	Facility
Residential mental retardation facilities	16.9	Facility	3.04	Facility
SEPD	12.3	Home	28.12	Home
Social advocacy organizations	0.05	Facility	0.97	Facility
State government, excluding education and hospitals	1.91	Facility	NA	NA
Unpaid family workers	NA	NA	0.05	Home
Vocational Rehabilitation	1.92	Facility	3.78	Facility

Source: BLS 2008 National Employment Matrix; note that employment does not sum to the total provided by BLS, the percent of the occupation employed in the home versus a facility is calculated based on the actual sum of the number appearing in the table.
[a] Note: this excludes self-employed workers and those employed in private households because they will be added to the population of affected workers separately.

It is important to note that the determination of whether the industry is home- or facility-based is an estimate; some industries that appear to provide services primarily in a nursing facility, for example, may employ a few aides who provide services in the homes of clients to assist with transitioning of the client from the facility back to their home. Also, some industries that appear to provide services primarily in the home, HHCS for example, may also employ aides that work primarily in facilities.

Next, the workers in the states with minimum wage and overtime pay are, in general, already receiving at least the minimum wage and some form of overtime premium for