

## HOME CARE WORKERS, MORE THAN JUST COMPANIONS: THE FINAL RULE AND THE FIGHT FOR HOME CARE STABILIZATION

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*In recent years, elderly individuals have increasingly chosen to “age in place.” This phenomenon refers to elders choosing to age at home and receive in-home care, creating a demand for home health aides. Traditionally, these workers have been excluded from benefits provided by the Fair Labor Standards Act; however, in 2013, the Department of Labor included home health aides in its regulations. This Note explores the trend toward home health care amongst the elderly and the important role homecare workers play in maintaining the quality of life for an elderly person, examining applicable rules promulgated by the Department of Labor to ensure the growing elderly population continues to receive necessary care.*

### I. Introduction

In recent years, elderly individuals have opted to age in their own homes and communities due to the astronomical cost of living facilities. Scholars have termed this phenomenon as “aging in place.” As a result of the baby boomers preference for in-home care, the demand for home health aides has increased. Traditionally these workers have been excluded from the benefits provided by the Fair Labor Standards Act (“FLSA”), due to their status as domestic service workers. In 2013, however, the Department of Labor (“DOL”) revised its regulations so that, after thirty-eight years of exclusion, millions of

home health care aides for the elderly will benefit from the overtime pay and minimum wage requirements granted under the FLSA.<sup>1</sup>

Part II of this Note will explore the trend toward home health care amongst the elderly and the important role homecare workers play in maintaining the quality of life for the elderly. Part II will also provide an overview of the expansion of FLSA coverage to domestic workers, with a specific focus on the final rule promulgated by the Department of Labor regarding the “companionship services” exemption under the FLSA. The final rules extend FLSA coverage such as the federal minimum wage and overtime pay to domestic service workers. Part III of this Note will examine the way in which the final rules will affect the third party employers, home health aide and the elderly. Finally, Part IV of the Note will provide recommendations that when coupled with the final rule, will ensure that the growing elderly population will receive the home care they need. These regulations propose that while the DOL’s sweeping regulations are the baseline mechanisms to ensure long-term home health care for the elderly; home health care employees and patients must also urge their state and local officials to implement the final rule in a way that is fair to both patients and home health care workers.

## II. Background

### A. The Trend Toward Home Health Care

This vast elderly population has chosen to “age in place” rather than living out their lives in large in-home living institutions.<sup>2</sup> Aging in place refers to the desire of elderly people to live in their own housing and communities as long as possible.<sup>3</sup> The elderly population’s trend toward home health care is due to many factors.<sup>4</sup> The increase in the elderly population coupled with the shift in cultural attitudes toward home health care has played a significant role in its popularity

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1. U.S. DEP’T OF LABOR: WAGE AND HOUR DIV., RIN 1235-AA05, APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERV.; ANNOUNCEMENT OF TIME-LIMITED NON-ENFORCEMENT POL’Y (2015) [hereinafter APPLICATION TO DOMESTIC SERV.].

2. Jon Pynoos et al., *Aging in Place, Housing, and the Law*, 16 ELDER L.J. 77, 78 (2008) [hereinafter Pynoos et al.].

3. *Id.*

4. Elizabeth Riordan, *Where The Heart Is: Amending The Fair Labor Standards Act To Provide Wage and Overtime Pay Protection To Agency-Employed Home Health Aides*, 85 ST. JOHN’S. L. REV. 837, 840-42 (2014).

among the elderly. The baby boomer population is living longer due to medical advances that increase life expectancy and also allows individuals with chronic conditions to live longer.<sup>5</sup> Finally, the shift in cultural attitudes in addition to federal policies away from institutionalization toward home health care has placed home health care in high demand.<sup>6</sup> Thus, the elderly are increasing demand for home health care workers to help maintain the standard of living and care that they need.<sup>7</sup>

The most significant factor driving the demand for home health care is the increased elderly population.<sup>8</sup> In 2010, forty million people were sixty-five and older, which amounted to thirteen percent of the population.<sup>9</sup> By 2030, it is projected that seventy-two million Americans comprising twenty percent of the population will be sixty-five or older.<sup>10</sup> The climb is due to age progression of the baby boomer generation.<sup>11</sup> The first wave of baby boomers turned sixty-five in 2011 and will reach age eighty-four in 2030.<sup>12</sup> Although many elderly individuals lead healthy lives, chronic health problems such as Alzheimer's disease and dementia<sup>13</sup> create a need for long-term care.<sup>14</sup> Furthermore, the need for formal elder care stems from elderly individuals that need long-term care but live alone or lack family members that can provide assistance.<sup>15</sup>

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5. *Id.* ("A shift in cultural attitudes and federal policy away from institutionalization toward home health care services has placed home health aides in high demand. In recent years, the federal government has implemented formal efforts toward "rebalancing' ... the expansion of home—and community-based services relative to those provided in institutional settings, such as nursing homes..." Under The Older Americans Act, the federal government has provided funding to support states' rebalancing programs to "divert people from nursing homes" by using Medicaid funds to support "consumer-directed models of service delivery that enable a person receiving ... [funds] to ... hire [a person] of their choice" and enter "community-based long-term care programs or receive at-home care.")

6. *Id.* at 841.

7. *Id.* at 840.

8. Peggie R. Smith, *Mitchell Lecture Essay: Who Will Care for the Elderly?: The Future of Home Health Care*, 61 *BUFF. L. REV.* 323, 323 (2013) [hereinafter Smith].

9. *Id.* at 325.

10. *Id.*

11. *Id.* at 326.

12. *Id.*

13. *Long-Term Care: Aging Baby Boom Generation Will Increase Demand and Burden on Federal and State Budgets: Testimony before the S. Special Comm. on Aging*, 107th Cong. 3 (2002) (statement of David M. Walker, Comptroller General of the United States).

14. Smith, *supra* note 8, at 326.

15. *Id.* at 327.

In addition to the increase in the elderly population, cultural attitudes regarding elderly long-term care have shifted away from institutionalization toward home health care.<sup>16</sup> The home plays a crucial role in the lives of many elderly adults.<sup>17</sup> It is often near familiar places, such as restaurants and shops, which foster a connection between the elderly individual and their environment.<sup>18</sup> The desire many elderly individuals feel to remain in their homes stems from the connections that they have with their homes and the neighborhoods in which they have lived for many years.<sup>19</sup> Furthermore, in recent years, the government has implemented formal efforts toward “rebalancing” the expansion of home based service relative to those provided in institutional settings.<sup>20</sup> Under the Older Americans Act, the federal government has provided funding to support state programs that incentivize the elderly to remain in their homes.<sup>21</sup> The Act uses Medicaid funds to support “consumer-directed models of service delivery” that allow an elderly individual receiving funds to receive home health care.<sup>22</sup> State reports indicate that programs like these have worked to reduce the number of nursing home residents and increase the number of elderly persons receiving at home care.<sup>23</sup> About eighty percent of elderly people receiving assistance are living at home rather than in living facilities or institutions.<sup>24</sup> Furthermore, between 2008 and 2018, the number of people working as home care aides is expected to increase by forty-six percent to nearly 1.2 million, and the number of people working as home health aides is expected to increase by fifty percent to nearly 1.4 million, increasing the total number of home care jobs by over 800,000 to over 2.5 million.<sup>25</sup> Therefore, in order to accommodate the demand for in home health aides for the elderly, there needs to be a push to-

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16. Riordan, *supra* note 4, at 841.

17. Pynoos et al., *supra* note 2, at 79.

18. *Id.*

19. *Id.* (“Attachment to place is a reflection of the emotional, cultural, and spiritual connection between a person and their environment.”)

20. Riordan, *supra* note 4, at 841.

21. *Id.* at 843.

22. *Id.* at 841.

23. *Id.* (The distribution of health care workers between private residences and institutional facilities reflects the impact of “rebalancing” and the increased demand for home health aides. “Nationally there are now more [home health] aides providing supports and services in people’s homes . . . than in nursing care facilities . . .”).

24. *Id.*

25. *Id.*

ward increasing the number of in home health aide workers.<sup>26</sup> The best way to ensure that the elderly receive the home health care services they require is to ensure that there are enough workers to provide in-home care services.<sup>27</sup>

Unfortunately, current data indicates that the future availability of home health aides does not look promising.<sup>28</sup> Job satisfaction is low amongst homecare workers due to the physically and emotionally draining character of the job.<sup>29</sup> Homecare workers face a wide range of hazards including issues of “hygiene and infection, manual handling, aggression and harassment, domestic and farm animals, fleas and safety of home equipment.”<sup>30</sup> Homecare workers are subjected to aggression and harassment including physical attacks.<sup>31</sup> Furthermore, the extremely low wages that homecare workers receive deter the amount of individuals needed to provide in-home care for the elderly.<sup>32</sup> Homecare workers rank near the bottom of wages earned by employees in the service industry.<sup>33</sup> The best way to ensure that the elderly receive the home health care services they require is to ensure that there are enough workers to provide services.<sup>34</sup> In 2009, the average hourly wage of home-care workers was less than \$10.00.<sup>35</sup> This places a significant percentage of workers below the poverty line.<sup>36</sup> As a result of these low wage earnings, close to forty percent of homecare workers rely on public assistance such as Medicaid and food stamps.<sup>37</sup> Furthermore, homecare workers typically do not receive benefits such as health insurance, medical leave, and retirement plans.<sup>38</sup>

Turnover rates of homecare workers are high, ranging between twenty and sixty percent, due to the inadequate pay and poor work-

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26. Smith, *supra* note 8, at 326.

27. *Id.* (Arguing that a comprehensive answer to the question, “Who Will Care for the Elderly?” must represent the interests of elderly individuals who need care and their families, as well as the interests of home care workers, as workers, who should be fairly compensated and provided workplace benefits.)

28. *Id.*

29. *Id.*

30. Brian J. Taylor & Michael Donnelly, *Risks to Home Care Workers: Professional Perspectives*, 8 HEALTH, RISK & SOC’Y 239, 245 (2006) [hereinafter Taylor].

31. *Id.*

32. *Id.*

33. *Id.*

34. Smith, *supra* note 8, at 326.

35. Taylor, *supra* note 30, at 245.

36. *Id.*

37. *Id.*

38. *Id.*

ing conditions.<sup>39</sup> In turn, the high turnover causes diminished quality of in-home care services because elderly clients experience a disruption in care and have difficulty adapting to a new worker.<sup>40</sup> These increased rates of turnover can lead to hospitalization or premature institutionalization of elderly individuals receiving in-home care services.<sup>41</sup> While the new DOL regulations were promulgated in large part to provide better compensation and work place conditions for homecare workers,<sup>42</sup> the DOL also estimates that the final rule will decrease the rate of turnover amongst homecare workers.<sup>43</sup>

#### **B. The Treatment of Home Health Care Workers Under the Fair Labor Standards Act**

The Fair Labor Standards Act was enacted in 1938 as a part of the New Deal.<sup>44</sup> The purpose of the legislation was to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for the benefit of workers.”<sup>45</sup> The FLSA established what is known today as the federal minimum wage and time and a half compensation for hours worked in excess of forty hours a week.<sup>46</sup> While the enactment of the FLSA was the cornerstone of the New Deal,<sup>47</sup> its enactment did not apply to “domestic service work.” Much of the reason for the exclusion of domestic workers from the federal minimum wage protection was a result of the ideological separation of the private home and the workplace.<sup>48</sup> The home was thought of as a separate sphere from the market place; thus, domestic workers engaged in household work were deemed to be outside the reach of Congress, as they were not engaged in interstate commerce.<sup>49</sup> Therefore, domestic service workers and caretakers were not able to take

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39. Julia Lippitt, *Protecting the Protectors: A Call for Fair Working Conditions for Home Health Care Workers*, 19 *ELDER L.J.* 219 (2011) [hereinafter Lippitt].

40. *Id.*

41. *Id.*

42. APPLICATION TO DOMESTIC SERV., *supra* note 1.

43. *Id.*

44. *Id.*

45. Riordan, *supra* note 4, at 843.

46. *Id.*

47. *Id.*

48. *Id.*

49. Smith, *supra* note 8, at 323.

advantage of the federal minimum wage or the overtime benefits supplied under the FLSA.<sup>50</sup>

It was not until 1974 that the FLSA extended coverage such as the federal minimum wage and overtime pay requirements, to “domestic service” workers.<sup>51</sup> As was the case when the FLSA was first enacted, much of the argument surrounding the 1974 amendment of the FLSA was whether the amendment could cover home health domestic service workers.<sup>52</sup> Opponents of the amendment again argued that because domestic workers’ primary work was completed in the home, their work was beyond the reach of Congressional legislative power.<sup>53</sup> Furthermore opponents of the amendment argued that the ad hoc nature<sup>54</sup> and personal component of domestic service work, illustrated that this work did not need regulation, and therefore, should not be covered under the FLSA.<sup>55</sup>

As a part of a bipartisan compromise, Congress created the “Companionship Exemption” in conjunction with the 1974 amendment to extend FLSA coverage to domestic workers.<sup>56</sup> The “companionship services exemption” exempted from the federal minimum wage and overtime pay requirement, “any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.”<sup>57</sup> Congress intended this exemption to exclude causal babysitters or “elder sitters” from wage and hour law protections due to the ad hoc nature of these employment relationships.<sup>58</sup>

Congress granted the Secretary of the DOL authority to define the terms in the exemption through regulation.<sup>59</sup> In 1975, the DOL issued its first regulations defining the scope of the Companionship Exemption.<sup>60</sup> The DOL scope of domestic service employment ranged

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50. Deborah F. Buckman, Annotation, *Validity and Construction of “Domestic Service” Provisions of Fair Labor Standards Act*, 29 U.S.C.A. §§ 201 et seq., 165 A.L.R. Fed. 163 (2015).

51. *Id.*

52. Riordan, *supra* note 4, at 843.

53. *Id.*

54. *Id.*

55. See Lippitt, *supra* note 39.

56. Riordan, *supra* note 4, at 844.

57. 29 C.F.R. § 552.109 (1975).

58. Riordan, *supra* note 4, at 843.

59. Angelo Spinola & Shannon Creasy, *Preparing For The Elimination Of The Minimum Wage And Overtime Exemption For Home Healthcare Aides*, 27 HEALTH L. 37, 37 (2014) [hereinafter Spinola].

60. *Id.*

from babysitting to home health care of the elderly.<sup>61</sup> The 1975 DOL regulations established that the exemption applied to domestic service employees, employed by a third party provider “who are engaged in providing companionship services” and “who are employed by an employer or agency other than the family or household using their service.”<sup>62</sup> In section 552.6, the DOL defined “companionship services” as:

[H]ousehold work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work; *Provided however*, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked.<sup>63</sup>

Traditionally, home health care workers are employed through a third party provider, such as a home health care agency, or by the individual family for whom they provide services.<sup>64</sup> Under the 1975 DOL regulations, the Companionship Exemption may be claimed by third party providers and individual family households that employ home health care aides for an elderly individual.<sup>65</sup> At issue today is the definition of companionship services as provided by the DOL.

### C. The Final Rules

For the past thirty-nine years, the Companionship Exemption has undergone very minimal changes since it was issued in 1975.<sup>66</sup> The Department of Labor recognized, however, that the home care industry has undergone dramatic expansion in the past several decades since the companion services exemption was promulgated.<sup>67</sup> Unlike the elderly sitters that Congress envisioned when enacting the companionship services exemption, home health care workers today are professional caregivers conducting increasingly skilled duties.<sup>68</sup> Generally, home health care workers perform a wide variety of services, including bathing, running errands, administering medications, and

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61. *Id.*

62. 29 C.F.R. § 552.109.

63. 29 C.F.R. § 552.6 (1975).

64. *See Spinola, supra* note 59, at 37.

65. Lippitt, *supra* note 39, at 227.

66. Spinola, *supra* note 59, at 37.

67. *Domestic Service Final Rule Frequently Asked Questions (FAQs)*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/homecare/faq.htm#g2> (last visited Nov. 17, 2016) [hereinafter *FAQs*].

68. *Id.*



helping with prescribed exercises.<sup>69</sup> On October 1, 2013, the DOL published its final rules, altering the scope of the companionship definition.<sup>70</sup> The final rule is the result of several attempts over the years to revise the companionship services exemption in order to reflect the need for FLSA protections for home health care workers.<sup>71</sup>

The DOL's final rule of the companionship services exemption changed the exemption in two significant ways.<sup>72</sup> First, the final rule amends section 552.109(a) to provide that the Companionship Exemption is only available to individuals or families that employ home health workers:

Third party employers of employees engaged in companionship services within the meaning of Section 552.6 may not avail themselves of the minimum wage and overtime exemption provided by section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services.<sup>73</sup>

This means that home-care agencies will no longer be eligible to claim the Companionship Exemption.<sup>74</sup> The revised regulations would mean that millions of direct care workers, such as certified nurses aides, home health aides, and personal care aides will receive the full protections of the FLSA which include federal minimum wage and overtime pay.<sup>75</sup> Currently, home health care agencies employ about ninety percent of home health and live-in care aid workers.<sup>76</sup> As a result of the revised regulations, ninety percent of home health and live-in care aid workers will be eligible for minimum wage and overtime pay mandated under the FLSA.<sup>77</sup>

Second, Section 552.6, which includes the tasks that comprise exempt "companionship services," is now more narrowly defined.<sup>78</sup> The final rule also removes the term "care" from the companionship ser-

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69. Lippitt, *supra* note 39, at 221.

70. Spinola, *supra* note 59, at 37.

71. *Id.*

72. FAQs, *supra* note 67.

73. 29 C.F.R. § 552.109(a) (2015).

74. FAQs, *supra* note 67; see also Joseph Mulherin, *Unpacks DOL Final Rule Revising FLSA Domestic Service Regulations and Guidance on Shared Living Arrangements*, BLOOMBERG BNA (June 17, 2014), <http://www.bna.com/joseph-mulherin-unpacks-n17179891347/>.

75. Spinola, *supra* note 59, at 37.

76. See *Home Care Ass'n of America v. Weil*, 78 F.Supp. 3d 123, 130 (D.D.C. 2015).

77. *Id.*

78. 29 C.F.R. § 552.6.

vices definition.<sup>79</sup> Care activities under section 552.6 are defined as activities that assist with daily life, such as dressing, grooming, feeding, bathing, toileting, and transferring, or with “instrumental activities of daily living, such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medication, and arranging medical care.”<sup>80</sup> Although care has been removed from the definition of companionship service a home-care worker may provide some care as long as it does not exceed twenty percent of the time worked.<sup>81</sup> If a home-care worker provides “care” type services for more than twenty percent of the total time worked, the employer will not be eligible to claim the companionship services exemption.<sup>82</sup> These changes make it harder for employers, like third party employers of live in aid workers and private family employers of homecare workers, to claim the exemption.<sup>83</sup>

The revised definitions come as a salient victory for those fighting on behalf of domestic service workers. However, the fight is not quite over. The DOL’s revised definitions of “companionship services” were to take effect on January 1, 2015.<sup>84</sup> In December 2014 and January 2015, however, the U.S. District Court for the District of Columbia struck down both aspects of the revised definition.<sup>85</sup> In *Home Care Ass’n of America v. Weil*, the District Court ruled that the DOL had over-stepped their bounds by attempting to do through regulation “what must be done through legislation.”<sup>86</sup> In the case before the court, the plaintiff—Home Care Association of America (HCAA)—argued in part that DOL’s final rule conflicted with the plain language and the legislative history of the FLSA.<sup>87</sup> The HCAA also argued that the DOL was manipulating its authority to define the companionship services exemption in order to eliminate the exemption entirely.<sup>88</sup>

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79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*; see also FAQs, *supra* note 67.

84. FAQs, *supra* note 67.

85. *Weil*, 78 F.Supp. 3d at 130; Jerrold F. Goldberg & Francis J. Serbaroli, *Court Voids Labor Department’s Overtime Requirement and Narrowing of the ‘Companionship’ Exemption*, NAT’L L. REV. 1, 1 (Feb. 6, 2015) [hereinafter Goldberg].

86. See *Weil*, 78 F.Supp. 3d at 130.

87. *Id.*

88. *Id.*

In its opinion, the court focused on both significant changes to the final rule.<sup>89</sup> The court found that the first change of the companion services definition, which narrowed the definition of “companionship services,” was an attempt by the DOL to “write out of the exemption the very ‘care’ the elderly and disabled need.”<sup>90</sup> In the analysis of the second change, which prohibits third party employers from utilizing the “Companionship Exemption,” the court asked whether Congress had addressed this issue and whether Congress had delegated authority to the DOL to determine this issue.<sup>91</sup> The court found that while the DOL had the authority to define the terms of “companionship services” and “domestic service employment,” it did not have the authority to make a distinction between whether a third party or a family could be eligible for the exemption.<sup>92</sup> For these reasons, the court vacated the DOL’s regulations.<sup>93</sup>

Subsequently, the DOL filed a direct appeal to the Court of Appeals for the D.C. Circuit.<sup>94</sup> On August 21, 2015, the Court of Appeals issued a unanimous opinion affirming the validity of the Final Rule.<sup>95</sup> The court held that Congress gave the DOL the authority to “work out the details’ of the companionship-services exemption, and the treatment of third-party-employed workers is one such detail.”<sup>96</sup> The court also held that the DOL’s final rule was based on its understanding of Congressional intent for the FLSA and was therefore fully reasonable.<sup>97</sup> For these reasons, the Court of Appeals affirmed the validity of the Final Rule and reversed the district courts orders to vacate the revisions.<sup>98</sup>

The decision of the Court of Appeals will not become effective until fifty-two days after the opinion was issued.<sup>99</sup> Furthermore, the Home Care Association asked the Court of Appeals and the Supreme Court to delay the date in which the opinion becomes effective even further while they seek review by the Supreme Court. Both requests

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89. *Id.*

90. *Id.*

91. Goldberg, *supra* note 85, at 2.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See* Home Care Ass’n of America v. Weil, 799 F.3d 1084, 1084 (D.C. Cir. 2015).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

were subsequently denied.<sup>100</sup> The DOL has decided that it will not begin enforcement of the final rule until thirty days after the Court of Appeals issued its mandate, which was October 13, 2015.<sup>101</sup> Therefore, the DOL did not begin enforcement of the final rule until November 12, 2015. From November 12, 2015 through December 31, 2015, the DOL was in the second phase of the time-limited non-enforcement policy.<sup>102</sup> During this time, the DOL had exercised prosecutorial discretion on whether to bring enforcement actions against particular home health employers.<sup>103</sup>

#### D. The Landscape of In-Home Care

Providers of in home care services come in several different forms.<sup>104</sup> Two sources of home services are Home Health Agencies, and Home Care Agencies (Non-Medical Home Care Agency).<sup>105</sup> Although they are similar in name, these two types of providers are distinctly different in the way they employ home health workers and provide services to clients.<sup>106</sup> Home Health Agencies are the oldest and most familiar provider of home care services.<sup>107</sup> The Home Health Agency is licensed and usually Medicare certified.<sup>108</sup> Medicare certification means that the agency has met specific federal guidelines and criteria regarding patient care. Home Health Agencies focus more on the skilled medical aspects of care.<sup>109</sup> Their workers include nurses physical and occupational therapists and social workers.<sup>110</sup> Because of the skilled medical workers they employ, Home Health Agencies were not allowed to claim the Companionship Exemption under the FLSA prior to the promulgation of the final rule because skilled work-

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100. *U.S. Court of Appeals Unanimously Upholds DOL Rule*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/homecare/litigation.htm> (last visited Nov. 17, 2016).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Types of Home Care Agencies*, CARE PATHWAYS, <http://www.carepathways.com/HC-types-of-agencies.cfm> (last visited Nov. 17, 2016) [hereinafter *Types of Home Care Agencies*].

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

ers were not conducting the types of work listed under the definition of “companionship services.”<sup>111</sup>

Home Care Agencies consist of non-medical home care.<sup>112</sup> These agencies generally provide home care services, which are not considered to be skilled care.<sup>113</sup> These agencies provide what is considered companionship services under the DOL regulations or what is termed non-skilled supportive custodial care.<sup>114</sup> Workers such as Certified Nursing Assistants (CNAs), non-certified nurse aides, homemakers, and companions provide services such as dressing, grooming, feeding, and running errands, which are defined as “companionship services” under the DOL regulation.<sup>115</sup> Hence, those Home Care Agencies that could claim the Companionship Exemption prior to the implementation of the final rule are the home care providers most affected by the implementation of the final rule.<sup>116</sup>

For the purposes of this note, third party-employers will refer to Home Care Agencies once eligible for the companionship services exemption.

### III. Analysis

#### A. The Effect of the Final Rule on Third Party Providers

The final rule promulgated by the DOL will have a dramatic impact on a majority of home health care workers precisely because of limits the rules impose on third party use of the Companionship Exemption.<sup>117</sup> Opponents of the final rule argue that it discriminates against third party employers and will adversely affect access to home health care services for millions of citizens that rely on these services, such as the elderly.<sup>118</sup> The primary effect of the final rule is “the transfer of income from home care agencies (and payers because a portion of the costs will likely be passed through via price increase) to direct care workers, due to more workers being protected under the

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111. See *Application of the FLSA to Domestic Service*, DEP’T. OF LABOR: Wage & Hour Division, [https://www.dol.gov/whd/homecare/final\\_rule.pdf](https://www.dol.gov/whd/homecare/final_rule.pdf) [hereinafter *Application of the FLSA*].

112. *Types of Home Care Agencies*, *supra* note 104.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Spinola, *supra* note 59, at 37.

118. *Id.*

FLSA.”<sup>119</sup> The DOL estimates four categories of costs to home care companies: compliance cost, hiring costs, travel pay, and overtime pay.<sup>120</sup> The DOL predicts that employers will spend \$6.9 million in the first year to come into compliance with the final rule.<sup>121</sup> Some experts view this figure as a gross underestimate of the cost, in part because the DOL assumes that each company will only spend two hours to “read and review the new regulation, update employee handbooks, and make any needed changes to the payroll systems.”<sup>122</sup> Third party employers argue that reclassification of employees to non-exempt can take months to complete because it requires employers “to review current compensation structures, implement new timekeeping systems, reprogram payroll systems, adopt new pay policies, and train the newly non-exempt employees and their managers on the new policies and procedures.”<sup>123</sup>

The DOL predicts that the costs, benefits, and transfer effects of the final rule depend on the actions of employers, decision-makers in the federal and state programs that provide funding for home care services, consumers, and workers.<sup>124</sup> Although other factors play a role, the actions of third-party employers have the most significant effect on whether the final rule will have any meaningful affect on providing the compensation needed to increase the number of home health aides needed to care for the elderly population.<sup>125</sup> Hence, the DOL predicts that the benefits of the final rule to home health workers depend largely on “whether employers choose to continue current work practices, rearrange worker schedules, or hire new workers.”<sup>126</sup>

#### **B. The Effect of the Overtime and Minimum Wage Requirements on Third-Party Employers**

The final rule eliminates third party use of the companionship services exemption.<sup>127</sup> Therefore, third party employers are required to

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119. *Application of the FLSA, supra* note 111, at 9.

120. *Id.*

121. Tammy McCutchen et al., *Challenges and Best Practices for Home Care Employers following the Elimination of the Companionship Exemption*, LITTLER REPORT (Jan. 2014), [https://www.littler.com/files/press/pdf/WP\\_Home\\_Care\\_Companionship\\_Exemption\\_1-27-14\\_0.pdf](https://www.littler.com/files/press/pdf/WP_Home_Care_Companionship_Exemption_1-27-14_0.pdf) [hereinafter McCutchen].

122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.*; Spinola, *supra* note 59, at 38.

126. *Application of the FLSA, supra* note 111.

127. *Id.* at 6-8.

pay home health care workers the federal minimum wage as mandated under the FLSA.<sup>128</sup> This aspect of the revised definition, although dramatic, is likely to have little economic impact on third party employers.<sup>129</sup> The DOL's Wage and Hour Division has predicted that the requirement to pay the minimum wage will have no effect because wage data suggests that few home health workers are paid below the minimum wage.<sup>130</sup> The current Federal Minimum wage is \$7.25.<sup>131</sup> According to the DOL, the median wage for home care workers is between \$9.67 and \$9.94 per hour, with less than ten percent earning below \$7.55 per hour.<sup>132</sup> Hence, it is unlikely that the application of the federal minimum wage requirement will have any economic impact on third party employers.

Unlike the federal minimum wage mandate, which is already received by over ninety percent of homecare workers employed by third party employers,<sup>133</sup> homecare workers that receive federal overtime vary from state to state.<sup>134</sup> Therefore, the federal overtime pay requirement will have the biggest impact on homecare workers. Some predict that the federal overtime requirements will have only minimal impact on employers.<sup>135</sup> This is because in fifteen states, including California, Colorado, Pennsylvania, and Illinois, third party employers are already required to pay overtime to home care aides at one-and-a-half times their regular rate of pay.<sup>136</sup> However, in states such as Arizona, Nebraska, North Dakota, South Dakota, Ohio, and under the law of the District of Columbia, home health employees of third party employers receive the state's minimum wage but are not entitled to receive overtime pay.<sup>137</sup> Hence, under the final rule third-party providers will have to pay overtime at a rate of one-and-one-half times the employee's regular rate of pay.<sup>138</sup> Likewise, third-party employers in New York will have to alter their compensation schemes.<sup>139</sup> Under

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128. *Id.*

129. *Id.* at 9.

130. *Id.*

131. *Wage and Hour Division (WHD): Minimum Wage*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/minimumwage.htm> (last visited Nov. 17, 2016) [hereinafter *WHD*].

132. McCutchen, *supra* note 121, at 3.

133. *Id.*

134. *Id.* at 3-4.

135. *Id.* at 4.

136. *Id.* at 3-4.

137. *Id.*

138. *Id.* at 2.

139. *Id.* at 4.

New York state law, third-party employers are only required to pay overtime in the amount of one-and-one-half times the state's minimum wage as opposed to the employee's regular hourly wage under the FLSA.<sup>140</sup> Furthermore, in states like Maryland and Wisconsin, non-profit agencies are exempt for the state wage and overtime pay requirements.<sup>141</sup> The final rule would nullify this exemption, because employers are required to apply either the state or federal law, according to which is most favorable to the employee.<sup>142</sup> Hence, it is likely that the impact on third-party employers regarding the new federal overtime requirement will range depending on where the employer is located within the country.<sup>143</sup> In those states that do not require employers to pay overtime, the cost of compliance will range depending on the actions of the employer.<sup>144</sup>

### C. Compliance Measures for Third-Party Employers

In order to comply with the final rules, third-party employers will have to reclassify their employees to non-exempt status.<sup>145</sup> There are ranges of options third-party employers may use to reclassify their employee's from exempt to non-exempt.<sup>146</sup> Angelo Spinola, having represented management across the country in collective, class, and hybrid actions brought under the FLSA and various state wage and hour laws at Littler Mendelson P.C., provides several options third-party employers may use to reclassify employees and comply with the final rules federal wage and overtime pay requirements.<sup>147</sup> Spinola recommends that employers focus on reducing cost through alternative compensation models and developing a comprehensive compliance program in order to comply with the DOL's final rule.<sup>148</sup>

Homecare workers, like most non-exempt employees, are paid by the hour.<sup>149</sup> While the FLSA and most state laws require an employer to pay an employee overtime at one-and-a-half times their regular rate, Spinola points out that there are other compensation options

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Application of the FLSA, supra* note 111, at 11.

145. Spinola, *supra* note 59, at 37-38.

146. *Id.* at 38-40.

147. *Id.*

148. *Id.* at 38-43.

149. *Id.*



that permit overtime pay at a half-time rate.<sup>150</sup> Also, in many states, an employee's overtime pay rate can be legally reduced if the regular rate is calculated by dividing the salary by the actual hours worked by the employee each week rather than dividing by forty hours.<sup>151</sup> Spinola gives several examples of compensation models that utilize these alternative ways of fulfilling the FLSA overtime requirement without paying homecare employees the full overtime rate of one-and-a-half times their actual pay.<sup>152</sup> Pay per visit, day rate pay, and fixed salary compensation are a few of the many recommendations to comply with the final rule.<sup>153</sup> Each of these options will be explored with more detail below.

### 1. PAY PER VISIT MODEL

The pay per visit compensation model would require an employer to pay a homecare worker on a per-visit basis, where the employee receives a fee for each patient they visit and all visit related activities.<sup>154</sup> Under the FLSA overtime regulations, such a model is known as paying on a "piece rate."<sup>155</sup> The compensation involves a lump sum payment for all activities in connection with the visit to the patient.<sup>156</sup> Pay per visit compensation involves not only the time involved in direct patient care but for travel time, charting, and communication with the patient's family as well as the patient's physician and other health care providers.<sup>157</sup> Advocates of the pay per visit compensation model assert that this model is an attractive pay arrangement for home care workers, patients, and third-party employers.<sup>158</sup> Third-party employers may find this method attractive because it encourages and rewards increased productivity in terms of the number

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150. *Id.*; see also, *Handy Reference Guide to the Fair Labor Standards Act*, DEP'T. OF LABOR: WAGE & HOUR DIVISION, <http://www.dol.gov/whd/regs/compliance/wh1282.pdf> [hereinafter *Handy Reference Guide*].

151. McCutchen, *supra* note 121, at 5.

152. *Id.* at 5-7.

153. *Id.*

154. *Handy Reference Guide*, *supra* note 150, at 12.

("The regular rate of pay for an employee paid on a piecework basis is obtained by dividing the total weekly earnings by the total number of hours worked in that week. The employee is entitled to an additional one-half times this regular rate for each hour over 40, plus the full piecework earnings.")

155. McCutchen, *supra* note 121, at 5.

156. *Id.* at 5-6.

157. *Id.* at 6.

158. *Id.* at 5-6.

of visits completed in a set time period.<sup>159</sup> Proponents also argue that it provides an opportunity for income substantially in excess of what would normally be available if the employee were paid on a salary basis or at an hourly rate of pay.<sup>160</sup> Furthermore, due to the increased productivity, proponents claim that patients and public will receive reductions in health care costs.<sup>161</sup>

Although the pay per visit rate seems attractive at first glance, the problem with this compensation model arises when attempting to calculate the overtime rate in compliance with the final rule.<sup>162</sup> The FLSA refers to the calculation of overtime rate using the pay per visit compensation rate as “piece rate” overtime compensation.<sup>163</sup> The FLSA provides an example of “piece rate” compensation:

Example: An employee paid on a piecework basis works forty-five hours in a week and earns \$405. The regular rate of pay for that week is \$405 divided by forty-five, or \$9.00 an hour. In addition to the straight-time pay, the employee is also entitled to \$4.50 (half the regular rate) for each hour over forty—an additional \$22.50 for the five overtime hours—for a total of \$427.50.<sup>164</sup>

Under this model, an employer need only pay an employee overtime at half their hourly rate.<sup>165</sup> While this compensation model may decrease the amount of overtime paid, it has an increased risk of overtime violations under the FLSA if not implemented correctly.<sup>166</sup>

There are several hurdles an employer could possibly face to successfully implement the pay per visit compensation method.<sup>167</sup> First, the per-visit rates must be enough to ensure that the employee receives at least the federal and state minimum wage.<sup>168</sup> Second, a piece rate employee must also accurately list the type of work conducted.<sup>169</sup> Since the final rule also enacted more stringent time keeping provisions, a homecare worker is responsible for keeping accurate time worked and the tasks completed.<sup>170</sup> Finally, and most importantly for third-party employers, the overtime calculation itself is more com-

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159. *Id.* at 9.

160. *Id.*

161. *Id.* at 3-4.

162. *Id.* at 2.

163. *Handy Reference Guide, supra* note 150, at 12.

164. *Id.*

165. *Id.* at 12-13.

166. McCutchen, *supra* note 121, at 5.

167. *Id.* at 8-11.

168. *Id.* at 8.

169. *Id.*

170. 29 C.F.R. §§ 552.102, 110 (2015); *see* Interview with Joseph K. Mulherin, Shareholder, Vedder Price, in Chicago, Ill. (June 17, 2014).

plex for a piece rate/pay per visit model employee.<sup>171</sup> In the homecare context, calculation of an employee's piece rate compensation would include "dividing the sum of all straight-time earnings in the week—all per-visit earnings, other hourly earnings, any incentive pay, etc.—by the total number of hours worked in that workweek."<sup>172</sup> Because of the complex calculation involved in determining piece rate compensation per employee, the administrative costs are very high and there is an increased risk of errors when implementing this compensation model.<sup>173</sup>

Hence, the pay per visit model may not be a viable option for third-party employers because of the risks of overtime pay violations and the increased potential for administrative errors.<sup>174</sup>

## 2. DAY RATE PAY MODEL

Some third-party employers may choose to utilize the day rate pay compensation model, as the FLSA and most states allow this model for home care aides.<sup>175</sup> Under this compensation model, employers are paid a flat sum for a day's work regardless of the number of hours worked in the particular day.<sup>176</sup> Similar to the pay per visit compensation model, which allows for "piece rate" overtime compensation, only the additional half-time premium is due on overtime hours.<sup>177</sup> Therefore, the same complexities and risks associated with pay per visit compensation also apply to day rate compensation.<sup>178</sup> The day rate paid to each employee must be at least the same as, or more than, the federal or state minimum wage for all hours worked.<sup>179</sup> The following is an example of a calculation of day rate pay that requires overtime as mandated by the FLSA:

Technician Tom is due additional FLSA overtime premium pay for his ten overtime hours worked, despite how his day-rate payment was established. The overtime amount is calculated this way:

$(\$1,100 \text{ Day-Rate Pay}) \div (50 \text{ Hrs.}) = \$22.00 \text{ Per Hr. Regular Rate}$   
 $(\$22.00 \text{ Per Hr.} \times 50\%) = \$11.00 \text{ Per Hr. OT Premium Rate}$

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171. McCutchen, *supra* note 121, at 12.

172. *Id.* at 6.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

$(\$11.00 \text{ Per Hr.}) \times (10 \text{ OT Hrs.}) = \$110.00 \text{ OT Premium Due.}$ <sup>180</sup>

In the example, because Tom has worked over forty hours that day he must be paid half his hourly rate.<sup>181</sup> Therefore, employers can limit the amount of overtime by simply decreasing the amount of overtime or by using day rate model that only allows for overtime at half the rate of the workers hourly wage.<sup>182</sup>

Also, because home care employees' work hours change every week, the regular rate and overtime pay rate must be recalculated separately for each week in order to comply with federal and state minimum wage laws as well as the final rules implementation of overtime pay.<sup>183</sup> Although the complexities of this model are very similar to the pay per visit model,<sup>184</sup> day rate compensation is slightly unique in that all activities performed by the home care aide in the course of the day are covered under a day rate.<sup>185</sup> While employers may find this beneficial, employees may suffer as most home care workers already make the federal minimum wage.<sup>186</sup> This is because by the day rate payment cannot "include" or "build-in" any FLSA overtime premium pay no matter how the day rate sum was set.<sup>187</sup> Thus, if employers decide to increase the number of hours worked to a rate that would reduce what would be hourly pay to federal minimum wage, home care workers would receive a substantial pay cut to their already low wages.<sup>188</sup>

### 3. FIXED SALARY FOR FIXED HOURS

The final comprehensive compensation model recommended by Spinola is the Fixed Salary for Fixed Hours compensation model.<sup>189</sup> Under this compensation model, the employer and home care employees agree that a fixed salary will cover the straight-time pay for a predetermined number of hours each week.<sup>190</sup> Similar to both the pay per visit and day rate compensation models, the fixed salary must be

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180. John Thompson, *Quick Quiz Answer: Day-Rate Pay Plans*, FISHER & PHILLIPS (May 15, 2013, 3:48 PM), <http://wage-hour.net/post/2013/05/15/Quick-Quiz-Answer-Day-Rate.aspx> (last visited Nov. 17, 2016) [hereinafter Thompson].

181. *Id.*

182. McCutchen, *supra* note 121, at 6.

183. *Id.* at 7.

184. *Id.* at 5.

185. *Id.*

186. *Id.*

187. Thompson, *supra* note 180.

188. McCutchen, *supra* note 121, at 4.

189. *Id.* at 7.

190. *Id.*

high enough to assure that an employee's average hourly earnings from their salary will fall below the minimum wage in any given week.<sup>191</sup> Furthermore, the predetermined number of hours must be reasonably related to the actual number of hours the employee is expected to work.<sup>192</sup> Therefore, the fixed hours cannot be set at fifty if the employee usually works only forty-five hours per week.<sup>193</sup> Also, the fixed hours must be set and cannot fluctuate from week to week.<sup>194</sup> Furthermore, employees must receive their full salary, even if they have worked less than the agreed number of weekly hours.<sup>195</sup> This aspect of the fixed rate model would be the biggest deterrent for third-party employers because it requires employers to pay workers for hours they have not worked since the hours are set and cannot fluctuate.<sup>196</sup> Although this feature of the compensation model is unfavorable for third-party employers, the benefit of the fixed salary model is that the calculation for overtime is much simpler than the pay per visit or the day rate models.<sup>197</sup> Although the overtime calculation for this method is less complicated, Spinola acknowledges that the overtime calculation method would not be compliant in states like California and Pennsylvania because these states require that non-exempt employee wages always be divided by forty hours for purposes of calculating the regular rate and overtime pay.<sup>198</sup> Hence, this compensation model, although the least complicated in terms of calculating overtime pay, will have limited implementation depending on the laws of the particular state.<sup>199</sup>

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 6. ("...The employee receives the same fixed weekly salary every week, without reduction if the employee does not work her full schedule and never supplemented with bonuses, incentive pay, or any other earnings;

3. The salary is sufficiently high to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum wage. . . .").

197. *Id.* at 7.

198. *Id.*

199. *Id.* ("This method likely would not be compliant in states such as Alaska, California, Connecticut, Hawaii, Pennsylvania, and New Mexico, which require that a non-exempt employee's salary always be divided by forty hours for purposes of calculating the regular rate and overtime pay. Again, home care employers should seek legal assistance before implementing a fixed salary for a fixed hours pay plan.").

Each of the three compensation models presented by Spinola come with their own complexities and risks in terms of complying with the final rule. Spinola advises all third-party providers to seek legal assistance before implementing any of these compensation models.<sup>200</sup> The reclassification of employees from exempt to non-exempt is not an easy task, let alone implementing a new compensation model. Furthermore, the reclassification of employees from exempt to non-exempt will also require employers to implement new timekeeping systems, re-program payroll systems, adopt new pay policies, and train the newly non-exempt employees and their managers on the new policies and procedures.<sup>201</sup> Hence, Spinola estimates that employers will need at least six months to implement the reclassification process.<sup>202</sup> While the process will take time for employers to implement and will be complex, it ultimately will ensure that third party providers are adequately complying with the final rule.

#### **D. The Effect of the Final Rule on Elderly Home Care Patients**

As a result of the reclassification process that third-party providers will have to undergo, it is expected that home care patients will experience an increase in the rate of their services.<sup>203</sup> The DOL estimated in its initial report regarding the effects of the final rule that “some of the costs will pass on to patients.”<sup>204</sup> Hence, the DOL estimates the additional transfer costs in a preferred scenario of market response to overtime will be about \$113 million, which is equal to 0.27 percent of wages (spread over all workers) and about 0.15 percent of average industry revenues.<sup>205</sup> These figures illustrate a modest increase in market response to overtime rates based on the fact that home care workers do not work a lot of overtime hours to begin with.<sup>206</sup> Many opponents of the final rule argue however that the DOL analysis significantly underestimates the amount of overtime currently worked by home

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200. *Id.*

201. *Id.* at 12.

202. *Id.*

203. Application of the Fair Labor Standards Act to Domestic Service, Final Rule, 29 C.F.R. § 552; 78 Fed. Reg. 60,454, 60,458 (Oct. 1, 2013).

204. 78 Fed. Reg. 60,454, 60,456.

205. *Economic Impact of Eliminating the FLSA Exemption for Companionship Services*, IHS GLOBAL INSIGHT, 1, 15 (Feb. 21, 2012), <http://emarket.franchise.org/CompanionCareReport.pdf> (last visited Nov. 17, 2016) [hereinafter IHS].

206. *Id.* at 17.

care workers.<sup>207</sup> However, in 2011, the Paraprofessional Healthcare Institute (PHI) issued a report on direct care workers for the year.<sup>208</sup> Data from that study showed that in 2009, forty-eight percent of direct care workers are employed part-time throughout the year.<sup>209</sup> Direct care workers include home care aides, nurses, and personal aides.<sup>210</sup> Furthermore, of the fifty-eight percent of homecare workers that work full-time, many of these workers only worked full time for part of the year.<sup>211</sup> Hence, a large percentage of home care workers do not receive overtime but rather work on part-time or full-time basis during certain parts of the year, suggesting that the DOL's estimates are more accurate than opponents will concede.

Spinola argues that the transfer costs estimated by the DOL are entirely too low.<sup>212</sup> He states that third-party providers are likely to pass a fee increase of about twenty percent along to their customers.<sup>213</sup> It is important to note that the twenty percent figure given by Spinola will vary amongst states, as some states already require third party providers to pay some form of overtime pay to home care workers while others do not require any type of overtime pay.<sup>214</sup> Furthermore, the twenty percent figure was taken from data collected by the IHS Global Insight group, which surveyed the franchise-operator sector of the home care industry, a sector that may be more significantly impacted by the DOL's final rules than other types of providers.<sup>215</sup> Hence, the twenty percent estimated increase in customer cost, if ac-

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207. McCutchen, *supra* note 121, at 15 (“The DOL estimates four categories of costs to home care companies: First, the DOL estimates that employers will spend only \$6.9 million in the first year to come into compliance with the new regulations. Many experts view this as a gross underestimate of the cost, as the DOL assumes that each company will spend only two hours to “read and review the new regulation, update employee handbooks and make any needed changes to the payroll systems.”); *see also*, IHS, *supra* note 205, at 15.

208. *Facts 3*, PHI: QUALITY CARE THROUGH QUALITY JOBS 1, 2 (Feb. 2011), [http://www.phinational.org/sites/phinational/files/clearinghouse/PHI%20FactSheet3\\_singles.pdf](http://www.phinational.org/sites/phinational/files/clearinghouse/PHI%20FactSheet3_singles.pdf) (last visited Nov. 17, 2016).

209. *Id.*

210. *Id.*

211. *Id.* at 2. (“A significant proportion of the direct-care workforce is employed part time. In 2009, forty-eight percent of direct-care workers worked less than full-time, year-round. Over half of Personal Care Aides (fifty-eight percent) worked part time or full time for only part of the year. Part-time hours reduce overall earnings; thus in 2009, median annual earnings for direct-care workers were \$16,800”).

212. McCutchen, *supra* note 121, at 3.

213. *Id.* at 5.

214. *Id.*

215. IHS, *supra* note 205.

curate, would apply to customers obtaining home care services through the franchise operator sector.<sup>216</sup> Moreover, the twenty percent increase was estimated by a hypothetical question to franchise operators regarding what the DOL's proposed rule changes before they were actually implemented.<sup>217</sup> Now that the final rule is in place, providers will likely look at alternative ways to reduce the amount they passed on to customers rather than risk losing clients.

In addition to the increase in costs passed on to consumers, opponents of the DOL's final rule argue that the rule will adversely affect the stability of the home care industry.<sup>218</sup> Those in opposition of the final rule argue that patients will receive a decrease in the overall adequacy of their home care services, which will cause many home care customers to resort to nursing home care.<sup>219</sup> This argument stems from the idea that third-party providers will force patients to accept a greater number of rotating caregivers into their homes or to forego the necessary care they need in excess of forty hours a week in order to reduce overtime costs.<sup>220</sup> This argument assumes that patients have little to no power over their home care services. As stated previously, the amount of home care workers that work in excess of forty hours per week is minimal.<sup>221</sup> Despite this fact, patients (more specifically elderly patients) of home care services are very involved in their care.<sup>222</sup> Hence, third-party providers that have clients receiving in excess of forty hours per week will need to look to other options in addition to adding additional workers for clients so that they can retain clients that bring in more money to the agency because they have a large amount of hours. Furthermore, some states have already required overtime pay for home care workers, and in these states the institu-

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216. *Id.*

217. *Id.*

218. Joseph W. Gagnon, *Home Companionship Industry Will Feel FLSA Exemption Fix*, LAW 360 (Nov. 17, 2014, 11:43 AM), <http://www.law360.com/articles/596834/home-companionship-industry-will-feel-flsa-exemption-fix> (last visited Nov. 17, 2016) ("Critics of the rule change, however, contend that eliminating the exemption will increase costs, which will be passed along to the consumer. Conversely, to avoid increased labor costs, some home companion companies will reduce work hours, which in turn can affect the quality of service provided. For example, if a home companion company reduces work hours to avoid any overtime obligation, it may require sending more than one companion to a client's home. This lack of continuity and disruption of routine can be particularly stressful or disconcerting to an elderly person.").

219. *Id.*

220. *Id.*

221. See generally McCutchen, *supra* note 121.

222. See generally Pynoos et al., *supra* note 2.



tionalization rate is not higher than states that have not extended the minimum wage and overtime pay to home care workers.<sup>223</sup> Moreover, data collected by the PHI indicated that in 2010, approximately twenty-four percent of persons reporting a self-care difficulty (a proxy for the number of individuals who require long-term services and supports), resided in a nursing home regardless of whether the state extended workforce protections to home care and personal assistance aides.<sup>224</sup>

Overall, the benefits of the final rule far outweigh the inconvenience of increased customer related costs. When given the protections of the minimum wage and overtime pay, workers are likely to stay with one company longer, which leads to increased attentiveness and tighter bonds with those they care for.<sup>225</sup> This will allow for a more stable workforce, as historically the home care industry has experienced high turnover due to comparatively low wages for long hours worked.<sup>226</sup>

## IV. Recommendation

### A. The Final Rule: A Step in the Right Direction

The DOL's final rule, once fully implemented, will serve as a foundation for the protection of home care workers. As stated previously, ninety percent of home care workers receive more than the federal minimum wage and most home care workers work less than forty hours a week. Therefore, the implementation of the final rule will only affect a handful of third party providers in terms of compliance with minimum wage and overtime requirements. Although the final rule is a step in the right direction, more must be done to mitigate the issues within the home care industry and ensure the stability of home health

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223. *DATA BRIEF: Institutionalization Rates in States that Extend Minimum Wage and Overtime Protection to Home Care Workers*, PHI: QUALITY CARE THROUGH QUALITY JOBS, 1, 1 (2013), <http://phinational.org/sites/phinational.org/files/research-report/institutionalization-data-brief.pdf> [hereinafter *DATA BRIEF*].

224. *Id.*

225. *Are You Prepared for the Changes in Home Care?* TEAM SELECT HOME CARE, <http://teamselectth.com/are-you-prepared-for-the-changes-in-home-care/> (last visited Nov. 17, 2016) (“[w]ith minimum wage and overtime pay, workers are likely to stay with one company longer, which increases attentiveness and tighter bonds with those they care for.”).

226. *Id.*

care for the elderly. The next few sections include recommendations that will allow home care workers to improve their plight as domestic workers thereby improving the stability of home health care industry. First, elderly individuals that rely on Medicaid for long-term home health care funding should use the Medicare and Medicaid reimbursement rates to decrease the costs of home health care. Second, home care workers employed directly by the state may unionize to obtain collective bargaining rights for home care workers, which will help stabilize wages for home care workers, stabilizing the entire system. Finally, both home health care workers and patients should push their local and state officials to oversee that the implementation of the final rule is fair for both consumers and patients.

### B. Medicare and Medicaid Reimbursement Rates

The two major public funding sources for long-term care and subsequently home health care are Medicare and Medicaid.<sup>227</sup> Julia Lippitt argues in *Protecting the Protectors: A Call for Fair Working Conditions for Home Health Care Workers* that “if increased costs from a rise in workers’ wages were to threaten the solvency of home care agencies, the government could avoid any potential disruption of services by increasing the Medicare and Medicaid reimbursement rates.”<sup>228</sup> Hence, because so many elderly individuals rely on the government’s Medicare and Medicaid programs for funding their home health costs, the reimbursement rates are one way to decrease the costs passed on to elderly clients receiving services.

The Center for Medicare & Medicaid Services (CMS) has issued guidance to states on how Medicaid federal matching dollars can be used to pay for overtime and travel costs without impacting individual access to services.<sup>229</sup> The final rule mandates that home care workers

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227. Brian O. Burwell & William H. Crown, *Public Financing of Long-Term Care: Federal and State Roles*, U.S. DEPT. OF HUM. HEALTH & HUM. SERVS. (Sept. 1994) 2, <https://aspe.hhs.gov/basic-report/public-financing-long-term-care-federal-and-state-roles> (last visited Nov. 17, 2016) (“Medicare and Medicaid are the two major public funding sources for long-term care, although the circumstances under which elderly persons receive long-term care assistance under each of these programs is very different.”); *DATA BRIEF*, *supra* note 223 (nearly half of all direct-care workers (forty-six percent) live in households that receive one or more public benefits such as food stamps; Medicaid; or housing, child care, or energy assistance).

228. Lippitt, *supra* note 39.

229. *Action Steps for Consumers and Advocates Regarding the DOL Home Care Rule: How to Prevent Service Cuts and Protect Consumer-Directed Programs*

receive at least the federal minimum wage of \$7.25 an hour,<sup>230</sup> however, home care workers should be paid upwards of twelve dollars an hour to incentivize quality workers to enter the home care field. Increasing the Medicare and Medicaid reimbursement rates will allow workers to advocate for increased wages while reducing the costs elderly patients will have to absorb to supplement these wage increases.<sup>231</sup> Furthermore, Medicare and Medicaid reimbursement will allow consumers to reduce the amount they pay workers on overtime so that they can pay for the actual hours they need for home care services.<sup>232</sup>

### C. Unionizing

While the final rule was a major victory for home care workers, acquiring collective bargaining rights within states has resulted in tangible benefits for home health care workers, including increased wages, health benefits, and paid leave. Although unionizing home health care workers is quite complicated, it has worked in states where the political climate for unionization is favorable.<sup>233</sup> For example, in states like California, Oregon, Vermont, Missouri, and Washington, independent home care workers who receive their pay through government programs have the right to collectively bargain with the state as public employees.<sup>234</sup> Massachusetts, for example, recently announced that its independent home health care workers would get a fifteen dollars per hour wage,<sup>235</sup> while Minnesota raised its pay floor to eleven dollars per hour and gave full-time workers five days per year of paid time off.<sup>236</sup> Over half of all unionized home health care workers come from these seven states, and in them, unions

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<http://www.aapd.com/what-we-do/health/home-care-rule-action-steps.pdf> (to help consumers and advocates take action, we created a guide, *Action Steps for Consumers and Advocates Regarding the New Home Care Rule: How to Prevent Service Cuts and Protect Consumer-Directed Programs*) [hereinafter *Action Steps*].

230. WHD, *supra* note 131.

231. *Action Steps*, *supra* note 229.

232. *Id.*

233. *Id.*

234. *Id.*

235. Leigh Ann Schiriever, *The Home Health Care Industry's Organizing Nightmare*, CENTURY FOUNDATION (Aug. 18, 2015), <https://tcf.org/content/commentary/the-home-health-care-industrys-organizing-nightmare/> (last visited Nov. 17, 2016) [hereinafter Schiriever].

236. *Id.*

have played a big role in raising workers' pay and benefits<sup>237</sup>—though privatized workers in these states still continue to suffer.<sup>238</sup>

Although unions have led to increased wages for home care workers employed by the state, private employers have been able to practically eliminate unions from the private sector by employing union-busting strategies that effectively prevent organizing.<sup>239</sup> Also, many states recognize a difference between workers who are employed through private agencies and those working directly for the client.<sup>240</sup> Private agencies are viewed as independent contractors for legal purposes throughout many states.<sup>241</sup> Hence, for those home care workers employed by a private third-party employer, unionizing is not a viable option. On the other hand, for independently employed home health workers (those workers hired directly by the patient), situations regarding unionization vary dramatically from state-to-state.

#### **D. Push for Fair Implementation**

Finally, the final rule was a major victory in the fight for home care workers. However, in order to get the best outcomes for both home care workers and home care patients, consumers and advocates must be knowledgeable about the rule and advocate to ensure every state implements it in a way that helps consumers and the important workers.<sup>242</sup> Consumers and advocates should urge state officials to analyze the impact of the rule on the states' consumer-directed and shared living programs.<sup>243</sup> Workers and consumers should ask state officials if they have at least begun an analysis of how many home care workers are working overtime (including overtime by workers providing services to more than one consumer in the program). Advocating early while the state is implementing its budget for the fiscal year can help ensure that the state uses Medicaid to cover overtime costs without impacting individual access to services and ensure that

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237. *Id.*

238. *Id.*

239. *Action Steps*, *supra* note 229.

240. Schiriever, *supra* note 235.

241. *Id.*

242. *Action Steps*, *supra* note 229 (arguing that home health care workers and patients should push their state officials to focused on this new rule, push them to do an analysis of the impact now).

243. *Id.*

states do not take compliance actions that can harm consumers and workers.<sup>244</sup>

#### IV. Conclusion

Implementation of the final rule is a crucial step in creating a more stable home health care system for the elderly and home health care workers.

Home health care is one of the fastest growing industries in the United States, and its stability greatly impacts the elderly population. Hence, the final rule is the best way to ensure that the home health care industry is operational and that there are enough workers to take care of the elderly.

Given the above recommendations, it is imperative that home health care workers stay involved in the effort to increase wages for home care workers. The final rule is simply the foundation upon which workers can push their state and local legislatures to provide a fair implementation of the rule. Furthermore, patients should advocate for increased wages for their workers, whether from a third-party provider or a worker that is hired directly by the patient. This will decrease turnover, which will provide patients with the best possible care.

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244. *Id.*

