AGENDA ITEM 9A
November 13, 2018
Action

MEMORANDUM

November 9, 2018

TO: County Council

FROM: Josh Hamlin, Legislative Attorney

SUBJECT: Bill 34-18, Human Rights and Civil Liberties – County Minimum Wage – Definitions - Employer

PURPOSE: Action - Council roll call vote required

Health and Human Services Committee recommendation (2-0): enact Bill 34-18.

Bill 34-18, Human Rights and Civil Liberties – County Minimum Wage – Definitions - Employer, sponsored by Lead Sponsor Council President Riemer and Co-Sponsors Councilmember Hucker and Councilmember Leventhal, was introduced on October 2, 2018. Bill 34-18 would modify the definition of "employer" in the County's minimum wage law, so that employers of "1 or more persons in the County in addition to the owners" would be required to pay the County minimum wage. The Bill does not change the rate of the minimum wage, nor does it change any of the scheduled increases under the existing law.

A public hearing was held on October 23 at which there were two speakers, Nick Katz on behalf of CASA and Ana Maria Gaverrete. Both speakers testified in support of the Bill, primarily because of the positive impact it would have on domestic workers who are the sole employee of a household.

The Health and Human Services Committee met on November 1 and recommended (2-0)[1] enactment of the Bill as introduced.

Background

In 2013, the Council enacted Bill 27-13, which established a County minimum wage for private sector employees working in the County, unless the State or federal minimum wage is higher. The County minimum wage established under Bill 27-13 was phased in over several years, up to $11.50 per hour on July 1, 2018. On November 7, 2017 the Council enacted Bill 28-17, which provided for further increases in the minimum wage to $15.00 per hour over a period of

[1] Councilmember Berliner was temporarily absent when the Committee voted on its recommendation, but indicated that he would have voted in support of the Committee recommendation.

years, with annual increases thereafter based on inflation. The phasing in of the increases under Bill 28-17 includes scheduled increases for three tiers of employers, based primarily on the number of employees.[2] The County minimum wage law applies to employers with 2 or more employees in the County.[3]

Subsequent to the enactment of the initial County minimum wage law, on June 23, 2015, the Council enacted the County Sick and Safe leave law, which required employers of "1 or more persons in the County in addition to the owners"[4] to provide their employees with earned sick and safe leave for work performed in the County.

As noted above, Bill 34-18 would amend the definition of "employer" to expand applicability of the County minimum wage to workers who are the only non-family-member employee of their employer. As the current law requires employers of 2 or more persons to pay the County minimum wage, these workers currently must be paid the State minimum wage of $10.10 per hour. This change would align the definition of "employer" in the minimum wage law with that definition in the County's sick and safe leave law.

The draft Bill includes an effective date of July 1, 2019, to coincide with the next scheduled increase in the County minimum wage. With that effective date, an employee that would then be covered would, as of July 1, 2019, have to be paid $12.50 per hour as an employee of a "small employer" under the phase-in provisions of enacted Bill 28-17.

Issues for Council Consideration

Why was the "two-employee threshold" included in the definition of "employer" in the existing law?

As noted above, the current law's requirement to pay the County minimum wage generally applies to an employer of two or more persons in the County. This definition was included in enacted Bill 27-13, which first established the County minimum wage. While there was much discussion about *exemptions* from the County minimum wage requirement during the consideration of Bill 27-13, the definition of employer was not the subject of debate. The current two-employee threshold in the definition of "employer" was included primarily to avoid imposing a requirement on a sole practitioner to pay the minimum wage to him or herself. At the time of Bill 27-13's consideration, there was not any discussion of the potential impact of this provision on domestic workers who are the sole employee of a household. As a result, those employees are not entitled to payment of the County minimum wage. They are however, entitled to the State

[2] A table showing the phase-in provisions of Bill 28-17 is at: https://www.montgomerycountymd.gov/humanrights/Resources/Files/Minimum_Wage_Transition_Table.pdf

[3] Under County Code §27-67(b), "Employer" means any person, individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity operating and doing business in the County that employs 2 or more persons in the County. Employer includes the County government, but does not include the United States, any State, or any other local government.

[4] Under County Code §27-76(b), "Employer" means any person, individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity operating and doing business in the County that employs 1 or more persons in the County in addition to the owners. Employer includes the County government, but does not include the United States, any State, or any other local government.

minimum wage, as State law generally[5] requires all employers, regardless of the number of employees, to pay the State minimum wage. During the consideration of Bill 27-13, the Council and staff became more fully aware of the myriad exemptions from the Federal Fair Labor Standards Act (the "Federal Act") and State law (discussed further below), and Staff believes the initial motivation for the two-employee threshold was not necessary.

Should the County's domestic worker contract law be amended?

In 2008, the Council enacted Bill 2-08, which requires an employer of a domestic worker to offer the worker a contract setting forth several terms and conditions of the employment (see ©4-7 for the law, codified in the Consumer Protection Chapter of the County Code at §11-4B). While the law recognizes that domestic workers are entitled to certain legal protections under State law, including the minimum wage, it makes no reference to the County minimum wage, which did not exist at the time it was enacted. At the public hearing on Bill 34-18, Councilmember Leventhal suggested that the issue of applicability of the County minimum wage *specifically* to domestic workers might be addressed by amendment to §11-4B. While domestic workers may be the primary target of the Bill, staff believes that an amendment to the County minimum wage law, making it consistent with State and federal definitions of employer, is more appropriate.

Amending the County minimum wage law, as this bill would do, would simplify enforcement done by the State Department of Labor, Licensing and Regulation, by eliminating the discrepancy between State and County applicability to sole employees. Also, concerns about potentially implicating casual, irregular employment of baby-sitters and lawn-mowers are addressed through exemptions in the existing law, as discussed below. Finally, staff believes that an amendment to §11-4B would require a separate Bill.

How do federal "domestic work" provisions affect minimum wage requirements?

The United States Department of Labor (USDOL) revised its regulations in 2013 to extend federal minimum wage and overtime requirements to cover significant numbers of previously exempted domestic workers. The 2013 changes (1) eliminated provisions that exempted third-party employers (*e.g.*, home care agencies and state Medicaid programs) from paying the minimum wage and overtime to domestic workers providing "companionship services" and (2) tightened the definition of "companionship services" under which all employers can claim an exemption to minimum wage and overtime requirements. The background of the application of the Fair Labor Standards Act to domestic work, from the USDOL fact sheet on the issue (©8-11) is below.

> The Fair Labor Standards Act (FLSA or Act) was passed in 1938 to provide minimum wage and overtime protections for workers, to prevent unfair competition among businesses based on subminimum wages, and to spread employment by requiring employers whose employees work excessive hours to compensate employees at one-and-one-half times the regular rate of pay for all hours worked over 40.

[5] There are, of course, several exemptions under the State and Federal law, which will be discussed later in this memorandum.

The FLSA did not initially protect workers employed directly by households in domestic service, such as cooks, housekeepers, maids, and gardeners. However, the FLSA's minimum wage and overtime compensation provisions did extend to domestic service workers employed by enterprises covered by the Act, such as gardeners employed by covered landscaping companies or a cook employed by a covered caterer, even if their work was in or about a private household.

Congress explicitly extended FLSA coverage to "domestic service" workers in 1974, amending the Act to apply to employees performing household services in a private home, including those domestic service workers employed directly by households or by companies too small to be covered as enterprises under the Act.

While Congress expanded protections to "domestic service" workers, the 1974 amendments also exempted certain domestic service workers from the FLSA's minimum wage and overtime provisions. Under this exemption, casual babysitters and domestic service workers employed to provide "companionship services" (such as companions for elderly persons or persons with an illness, injury, or disability) are not required to be paid the minimum wage or overtime pay. Congress also created an exemption only from the overtime pay requirement for live-in domestic service workers.

This packet also contains USDOL fact sheets that provide information on "companionship services" which are exempt from the FLSA (©12-14) and live-in domestic service workers, who are in some cases exempt from the FLSA's overtime provisions only (©15-17). Under the revised regulations, the term "companionship services" means the provision of fellowship and protection for an elderly person or a person with an illness, injury, or disability who requires assistance in caring for himself or herself. "Companionship services" also includes the provision of care, when the care is provided attendant to and in conjunction with the provision of fellowship and protection, and does not exceed 20 percent of the total hours worked per client and per workweek. "Household work" – domestic services performed primarily for the benefit of other members of the household – is excluded from the definition of "companionship services," as are medically related services. Examples of "household work" include doing laundry, cooking dinner, and general cleaning for the entire family in a household.

Live-in domestic service workers who reside in the employer's home and are employed by an individual, family, or household must be paid at least the federal minimum wage. However, they are exempt from the FLSA requirement of one and a half times the regular rate of pay for all hours worked over 40 in a workweek. Live-in domestic service workers employed by a third-party employer are not subject to this overtime exemption.

What are the federal payroll tax implications, if any, of the Bill?

At the public hearing, Councilmember Floreen pointed out that there are federal tax requirements associated with being an "employer." This Bill would not directly impact any employer's *status* with regard to federal tax obligations, since the requirements for "household

employers" are set in federal law and regulation.[6] "Household work" is work done in or around the employer's home. Some examples of workers who do household work are: babysitters, butlers, caretakers, cooks, domestic workers, drivers, health aides, house cleaning workers, housekeepers, maids, nannies, private nurses, and yard workers. In general, household employers who pay cash wages of $2,000 or more in a calendar year to any one household employee must withhold and pay social security and Medicare taxes.[7] Also, employers who pay total cash wages of $1,000 or more in any calendar quarter to household employees must pay the federal unemployment tax.[8]

Bill 34-18 would have an impact on employers' tax responsibilities in that it would increase the amount paid to the employees, so the required percentages would result in greater withholding and payment amounts. It could also have an impact to the extent that paying the County minimum wage, rather than the already-required State minimum, raises the amount that must be paid to an employee *above one of the thresholds* triggering the social security/Medicare and unemployment tax obligations. However, this incremental increase from State to County minimum wage is unlikely to affect a large number of employers.

Will this Bill require payment of the County minimum wage to teenagers hired to babysit or mow lawns?

At the public hearing, Councilmembers asked about the possible impact of Bill 34-18 on households paying young people to babysit or mow lawns. Because of exemptions to the minimum wage requirements in the County, State, and federal laws, it is unlikely that change proposed would have any impact in these situations. Under County Code §27-68(c), the County minimum wage does not apply to an employee who: (1) is exempt from the minimum wage requirements of the State or Federal Act; or (2) is under the age of 19 years and is employed no more than 20 hours per week. The second of these would likely eliminate most occasionally employed teenagers, regardless of the type of work performed. The exemptions from the State and Federal minimum wage laws (see ©18-20) which are incorporated by reference in the County law may also impact some of these situations. Primarily, however, it is the age-based exemptions in the County and State laws, as well as the federal "casual babysitting" exemption, that are implicated in these situations.

Age-based exemptions:

As mentioned above, the County minimum wage requirement does not apply to an employee under age 19 who works 20 hours or less per week. State law contains a similar exemption, but only exempts workers under 16 years old. Because each wage law functions like a separate hourly wage "floor," with the County's being the highest, followed by the State, and then the federal, each situation must be examined to determine the highest "floor" that applies. For example, a 17 year-old, working less than 20 hours per week, would be exempt from the County minimum wage, but not the State minimum wage, and therefore must be paid the State minimum wage (currently $10.10 per hour). A 15 year-old worker doing the same work for the same number

[6] See IRS Publication 926 for a detailed discussion of federal tax obligations of "household employers": https://www.irs.gov/forms-pubs/about-publication-926

[7] Social Security and Medicare taxes are currently 15.3% of cash wages, with responsibility divided equally (7.65% each) between employer and employee.

[8] The federal unemployment tax is equal to 6% of cash wages for up to $7,000 a year per employee.

of hours, however, would be exempt from both the County and State law. Because there is no age-based exemption from the federal minimum wage, this worker would have to be paid at least the federal minimum wage of $7.25 per hour.

Federal casual babysitting exemption:

Many babysitters, *regardless of their age*, are not subject to the County minimum wage requirements, because "babysitting services on a casual basis" are exempt from the FLSA, and because the County law expressly excludes from its provisions an employee who "is exempt from the minimum wage requirements of the State or Federal Act." The operative FLSA provision is at 29 U.S.C. § 213 (pertinent parts below):

29 U.S. Code § 213 – Exemptions

(a) Minimum wage and maximum hour requirements. The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

* * *

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or 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 (as such terms are defined and delimited by regulations of the Secretary); or

* * *

The FLSA exemption is explained in regulations (29 CFR 552.104 and 29 CFR 552.5):

§ 552.104 Babysitting services performed on a casual basis.

(a) Employees performing babysitting services on a casual basis, as defined in § 552.5 are excluded from the minimum wage and overtime provisions of the Act. The rationale for this exclusion is that such persons are usually not dependent upon the income from rendering such services for their livelihood. Such services are often provided by (1) Teenagers during non-school hours or for a short period after completing high school but prior to entering other employment as a vocation, or (2) older persons whose main source of livelihood is from other means.

(b) Employment in babysitting services would usually be on a "casual basis," whether performed for one or more employees, if such employment by all such employers does not exceed 20 hours per week in the aggregate. Employment in excess of these hours may still be on a "casual basis" if the excessive hours of employment are without regularity or are for irregular or intermittent periods. Employment in babysitting services shall also be deemed to be on a "casual basis" (regardless of the number of weekly hours worked by the babysitter) in the case of individuals whose vocations are not domestic service who accompany families for a vacation period to take care of the children if the duration of such employment does not exceed 6 weeks.

(c) If the individual performing babysitting services on a "casual basis" devotes more than 20 percent of his or her time to household work during a babysitting assignment, the exemption for "babysitting services on a casual basis" does not

apply during that assignment and the individual must be paid in accordance with the Act's minimum wage and overtime requirements. This does not affect the application of the exemption for previous or subsequent babysitting assignments where the 20 percent tolerance is not exceeded.

(d) Individuals who engage in babysitting as a full-time occupation are not employed on a "casual basis."

§ 552.5 Casual basis.

As used in section 13(a)(15) of the Act, the term casual basis, when applied to babysitting services, shall mean employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting. Casual babysitting services may include the performance of some household work not related to caring for the children: Provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total hours worked on the particular babysitting assignment.

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Bill No. 34-18
Concerning: Human Rights and Civil Liberties – County Minimum Wage – Definitions - Employer
Revised: 09/14/2018 Draft No. 3
Introduced: October 2, 2018
Expires: April 2, 2020
Enacted:
Executive:
Effective: July 1, 2019
Sunset Date: None
Ch. ____, Laws of Mont. Co. ____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Council President Riemer
Co-Sponsors: Councilmembers Hucker and Leventhal

AN ACT to:

(1) modify the definition of an employer required to pay the County minimum wage; and
(2) generally amend the laws governing the minimum wage

By amending
Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Article XI. County Minimum Wage
Section 27-67

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec 1. Section 27-67 is amended as follows:

27-67. Findings and definitions.

* * *

(b) *Definitions.* As used in this Article:

Director means the Executive Director of the Office of Human Rights and includes the Executive Director's designee.

Employ means to engage a person to work for compensation.

Employee means any person permitted or instructed to work or be present by an employer in the County and who is an employee subject to the minimum wage requirements of the Federal Act or the State Act.

Employer means any person, individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity operating and doing business in the County that employs [2] 1 or more persons in the County in addition to the owners. Employer includes the County government, but does not include the United States, any State, or any other local government.

Federal Act means the federal Fair Labor Standards Act of 1938, as amended.

State Act means the Maryland Wage and Hour Law, as amended.

Wage means all compensation that is due to an employee for employment.

Sec. 2. Effective Date.

This Act takes effect on July 1, 2019.

LEGISLATIVE REQUEST REPORT

Bill 34-18

Human Rights and Civil Liberties – County Minimum Wage – Definitions – Employer

DESCRIPTION: Bill 34-18 would modify the definition of an employer required to pay the County minimum wage to include workers who are the only non-family-member employee of their employer.

PROBLEM: Workers who are the only employee of an employer are not entitled to payment of the County minimum wage.

GOALS AND OBJECTIVES: Require payment of the County minimum wage to workers who are the sole employee of their employers and make the applicability of the County minimum wage consistent with the County Sick and Safe Leave law.

COORDINATION: Office of Human Rights

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Josh Hamlin, Legislative Attorney, 240-777-7892

APPLICATION WITHIN MUNICIPALITIES: To be researched.

PENALTIES: Class A civil citation and equitable relief.

Print

Montgomery County Code

Sec. 11-4B. Domestic Workers - Written Employment Contracts.

(a) *Legislative findings.*

(1) Domestic workers are entitled to legal protections under State employment laws including, but not limited to:

(A) minimum wage;

(B) payment for all hours worked;

(C) payment of wages in United States dollars twice per month;

(D) overtime pay of 1.5 times the regular wage rate for hours worked in excess of 40 hours per week; and

(E) worker's compensation.

(2) The County Council Committee on Health and Human Services sponsored a study of domestic workers in the County which was released on May 10, 2006. The study found that:

(A) domestic workers in the County have limited access to information concerning the legal protections available to them;

(B) many domestic workers in the County are paid less than the minimum wage;

(C) many domestic workers in the County do not receive overtime pay for work in excess of 40 hours per week;

(D) few domestic workers in the County have written employment contracts setting forth the terms and conditions of their employment;

(E) domestic workers in the County who live in their employer's residence are generally paid less and work longer hours than domestic workers who do not live at their employer's residence; and

(F) domestic workers in the County are often isolated and unable to experience the peer to peer networking that is necessary for organized labor movements.

(3) The Council finds that legislation is needed to ensure that domestic workers in the County receive the legal protections they are entitled to under State law, as well as the right to a written employment contract governing the terms and conditions of employment.

(b) *Definitions.* In this Section, the following words have the meaning indicated:

Au pair means an individual who performs childcare services pursuant to the program administered by the State Department of the United States in a private home of the person by whom she is employed.

Disclosure statement means a document confirming that:

(1) an employer presented a written employment contract signed by the employer to a domestic worker after offering to negotiate the terms and conditions of employment; and

(2) the worker voluntarily chose not to sign the contract.

Domestic service means, when primarily performed in a home of a recipient of the service located in the County:

(1) caring for a child;

(2) serving as a companion to a sick, convalescing, disabled, or elderly individual;

(3) housekeeping;

(4) cooking;

(5) cleaning; or

(6) laundry.

Domestic worker means an individual who performs domestic service for wages in the County. Domestic worker does not include:

(1) a registered nurse, licensed practical nurse, or certified nursing assistant who is licensed or certified by the Maryland Board of Nursing;

(2) a child, parent, spouse, or other member of the immediate family of the employer;

(3) an au pair; or

(4) an individual who primarily serves as a companion to a disabled or elderly individual who is unable to care for himself or herself, and who is not employed by an agency.

Elderly means an individual who is 67 years old or older.

Employment contract means a written agreement signed by a domestic worker and an employer which governs the terms and conditions of employment.

Employer means a person who hires a domestic worker to perform at least 20 hours of work each week during any period that is 30 days or longer. An employer may include an agency that hires a domestic worker to perform domestic service in the home of the recipient of the service.

Hours of work means the time during any 7-day period that a domestic worker is on duty.

Paid time off means time for which a domestic worker receives wages without working, including any holiday, vacation, or sick leave.

Unpaid time off means time during the normal hours of work when the domestic worker may be absent without receiving wages.

Wages means any compensation which a domestic worker receives, including any bonus, commission, fringe benefit, or other payment.

(c) *Employment Contract.* In order to employ a domestic worker, the employer must obtain either a written employment contract signed by both the employer and the domestic worker or a disclosure statement signed by the domestic worker. Each employer must present a proposed

written employment contract to a domestic worker and offer to negotiate the terms and conditions of employment. Once a final contract is agreed upon, the employer must sign and give the domestic worker a copy. If the domestic worker is employer by an agency, the employment contract must be between the agency and the employee. Each written employment contract must specify the following terms and conditions of employment:

(1) days and hours of work;

(2) wages;

(3) paid time off;

(4) unpaid time off;

(5) frequency of payment of wages;

(6) deductions from wages;

(7) eligibility for and calculation of overtime wages;

(8) duties;

(9) right of the employer, if any, to require the domestic worker to perform duties that are not specified in the contract;

(10) living accommodations provided by the employer, if any, including deductions for rent;

(11) meals provided by the employer, if any, including deductions for meals;

(12) time allowed for breaks and meals during work hours;

(13) required notice, if any, before the employer or domestic worker terminates the contract;

(14) severance wages, if any, if the employer terminates the contract before the end of the contract period;

(15) contract period;

(16) reimbursement for work-related expenses; and

(17) notice of employment rights under State law.

(d) *Living accommodation.* Any dwelling unit that includes living accommodations for a domestic worker must meet all minimum standards for a dwelling unit in Chapter 26 and the worker must have:

(1) a private room for sleeping with a door that can be locked;

(2) reasonable access to a kitchen;

(3) reasonable access to a bathroom;

(4) reasonable access to laundry facilities.

(e) *Model Contract.* The Director, after consulting with the Commission for Women, must draft and make available a model employment contract and a model disclosure statement which

an employer may use to comply with this Section. The model contract and the model disclosure statement must be published in English, French, and Spanish.

(f) *Retaliation.* An employer must not retaliate against a domestic worker who:

(1) requests a written contract required under this Section;

(2) seeks to enforce the terms of a written employment contract; or

(3) files a complaint or testifies, assists, or participates in any manner in an investigation, proceeding, or hearing to enforce this Section.

(g) *Complaint.* If an employer does not comply with this Section, a domestic worker may file a complaint under Section 11-6. (2008 L.M.C., ch. 27, § 1.)

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(September 2013)

Fact Sheet: Application of the Fair Labor Standards Act to Domestic Service, Final Rule

Major Provisions of the Final Rule

The Department's Final Rule concerning domestic service workers under the Fair Labor Standards Act (FLSA) brings important minimum wage and overtime protection to the many workers who, by their service, enable individuals with disabilities and the elderly to continue to live independently in their homes and participate in their communities. The Final Rule, effective January 1, 2015[1], contains several significant changes from the prior regulations, including: (1) the tasks that comprise "companionship services" are more clearly defined; and (2) the exemptions for companionship services and live-in domestic service employees are limited to the individual, family, or household using the services; and (3) the recordkeeping requirements for employers of live-in domestic service employees are revised. The major provisions affected by the Final Rule are summarized below.

Minimum Wage and Overtime Protections. This Final Rule revises the Department's 1975 regulations to better reflect Congressional intent given the changes to the home care industry and workforce since that time. Most significantly, the Department is revising the definition of "companionship services" to clarify and narrow the duties that fall within the term and is prohibiting third party employers, such as home care agencies, from claiming the companionship or live-in exemptions. The major effect of this Final Rule is that more domestic service workers will be protected by the FLSA's minimum wage and overtime provisions.

Companionship Services. The term "companionship services" means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. Under the Final Rule, "companionship services" also includes the provision of "care" if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek. The Department believes it is appropriate for "companionship services" to be primarily focused on the provision of fellowship and protection, with an allowance for certain care services in order to support consumers in living independently in their homes. For additional information, see Fact Sheet #79A: Companionship Services Under the Fair Labor Standards Act (FLSA).

Fellowship and Protection. Under the Final Rule, "fellowship" means to engage the person in social, physical, and mental activities. "Protection" means 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. Examples of fellowship and protection may include: conversation; reading; games; crafts; accompanying the person on walks; and going on errands, to appointments, or to social events with the person.

Care. The definition of companionship services allows for the performance of "care" services if those services are performed attendant to and in conjunction with the provision of fellowship and protection and if they do not exceed 20 percent of the employee's total hours worked in a workweek per consumer. The companionship

[1] See Fact Sheet #25: The Home Health Care Industry Under the Fair Labor Standards Act (FLSA) for information on the current "companionship services" exemption applicable until January 1, 2015.

services exemption is not applicable when the employee spends more than 20 percent of his or her workweek performing care; in such workweeks, the employee is entitled to minimum wage and overtime.

In the Final Rule, "care" is defined as assistance with *activities of daily living* (such as dressing, grooming, feeding, bathing, toileting, and transferring) and *instrumental activities of daily living*, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

Household Work. The Final Rule limits household work to that benefitting the elderly person or person with an illness, injury, or disability. Household work that primarily benefits other members of the household, such as making dinner for another household member or doing laundry for everyone in the household, results in loss of the companionship exemption and thus the employee would be entitled to minimum wage and overtime pay for that workweek.

Medically Related Services. The definition of companionship services does not include the provision of medically related services which are typically performed by trained personnel. Under the Final Rule, the determination of whether a task is medically related is based on whether the services typically require (and are performed by) trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants. The determination is not based on the actual training or occupational title of the worker performing the services. Performance of medically related tasks during the workweek results in loss of the exemption and the employee is entitled to minimum wage and overtime pay for that workweek.

Live-In Domestic Service Employees. Live-in domestic service workers who reside in the employer's home permanently or for an extended period of time and are employed by an individual, family, or household are exempt from overtime pay, although they must be paid at least the federal minimum wage for all hours worked. Live-in domestic service workers who are solely or jointly employed by a third party must be paid at least the federal minimum wage and overtime pay for all hours worked by that third party employer. See Fact Sheet 79B: Live-In Domestic Service Employment Under the Fair Labor Standards Act (FLSA) for additional information. Employers of live-in domestic service workers may enter into agreements to exclude certain time from compensable hours worked, such as sleep time, meal time, and other periods of complete freedom from work duties. (If the sleep time, meal periods, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked.) Under the Final Rule, these employers must also maintain an accurate record of hours worked by live-in domestic service workers. The employer may require the live-in domestic service employee to record his or her hours worked and to submit the record to the employer. See Fact Sheet 79C: Recordkeeping Requirements for Individuals, Families, or Households Who Employ Domestic Service Workers Under the Fair Labor Standards Act (FLSA) for additional information.

Third Party Employers. Under the Final Rule, third party employers of direct care workers (such as home care staffing agencies) are not permitted to claim either the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim either exemption even when the employee is jointly employed by the third party employer and the individual, family, or household using the services. However, the individual, family, or household may claim any applicable exemption. Therefore, even if there is another third party employer, the individual, family, or household will not be liable for unpaid wages under the FLSA provided the requirements of an applicable exemption are met..

Paid Family or Household Members in Certain Medicaid-funded and Certain Other Publicly Funded Programs Offering Home Care Services. In recognition of the significant and unique nature of paid family and household caregiving in certain Medicaid-funded and certain other publicly funded programs, the Department has determined that the FLSA does not necessarily require that once a family or household member is paid to provide some home care services that all care provided by that family or household member is part of the employment relationship. Where applicable, the Department will not consider a family or household member

with a pre-existing close personal relationship with the consumer to be employed beyond a written agreement developed with the involvement and approval of the program and the consumer (or the consumer's representative), usually called a plan of care, that reasonably defines and limits the hours for which paid home care services will be provided. The preamble of the rule contains a discussion of the analysis to be used. See Fact Sheet 79F: Paid Family or Household Members in Certain Medicaid-Funded and Certain Other Publicly Funded Programs Offering Home Care Services Under the Fair Labor Standards Act (FLSA) for additional information.

Provisions Not Affected by this Rulemaking

Hours Worked. This rule makes no changes to the Department's longstanding regulations concerning hours worked which are contained in 29 CFR 785.10-.45. See Fact Sheet 79D: Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act (FLSA) for information on when the employee must be paid for time spent waiting, sleeping, and traveling.
Also unaffected by this rulemaking are the definition of private home and the application of FLSA "joint employment" principles. See Fact Sheet #79: Private Homes and Domestic Service Employment Under the Fair Labor Standards Act (FLSA) for information about what is a private home for the purpose of domestic service employment under the FLSA.

Further Background on the Fair Labor Standards Act Provisions Governing Domestic Service Employment

The Fair Labor Standards Act (FLSA or Act) was passed in 1938 to provide minimum wage and overtime protections for workers, to prevent unfair competition among businesses based on subminimum wages, and to spread employment by requiring employers whose employees work excessive hours to compensate employees at one-and-one-half times the regular rate of pay for all hours worked over 40.

The FLSA did not initially protect workers employed directly by households in domestic service, such as cooks, housekeepers, maids, and gardeners. However, the FLSA's minimum wage and overtime compensation provisions did extend to domestic service workers employed by enterprises covered by the Act, such as gardeners employed by covered landscaping companies or a cook employed by a covered caterer, even if their work was in or about a private household.

Congress explicitly extended FLSA coverage to "domestic service" workers in 1974, amending the Act to apply to employees performing household services in a private home, including those domestic service workers employed directly by households or by companies too small to be covered as enterprises under the Act.

While Congress expanded protections to "domestic service" workers, the 1974 amendments also exempted certain domestic service workers from the FLSA's minimum wage and overtime provisions. Under this exemption, casual babysitters and domestic service workers employed to provide "companionship services" (such as companions for elderly persons or persons with an illness, injury, or disability) are not required to be paid the minimum wage or overtime pay. Congress also created an exemption only from the overtime pay requirement for live-in domestic service workers.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

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U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(September 2013)

Fact Sheet # 79A: Companionship Services Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information regarding the companionship services exemption under the FLSA.

Background

The FLSA is the federal law that establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, state, and local governments. The current Federal minimum wage is $7.25 per hour. The Wage and Hour Division of the U.S. Department of Labor administers and enforces the FLSA with respect to domestic service employment performed in or about private homes.

In 1974, Congress extended FLSA coverage to workers who perform "domestic service." Domestic service employment means services of a household nature performed by a worker in or about a private home (permanent or temporary). The term includes services performed by workers such as: companions, babysitters, cooks, waiters, maids, housekeepers, nannies, nurses, janitors, caretakers, handymen, gardeners, home health aides, personal care aides, and family chauffeurs. This listing is illustrative and not exhaustive.

The law also exempts certain domestic service workers from the FLSA's minimum wage and overtime provisions. Casual babysitters and domestic service workers employed to provide "companionship services" for an elderly person or a person with an illness, injury, or disability are not required to be paid the minimum wage or overtime pay if they meet certain regulatory requirements described below.

Companionship Services

The Department of Labor amended its regulations to revise the definition of companionship services that are exempt from FLSA protection. Under the revised regulations, effective January 1, 2015[1], the term "companionship services" means the provision of **fellowship** and **protection** for an elderly person or a person with an illness, injury, or disability who requires assistance in caring for himself or herself. Such individuals are sometimes referred to as "consumers" in this fact sheet. The term "companionship services" also includes the provision of care, when the care is provided attendant to and in conjunction with the provision of fellowship and protection, and does not exceed 20 percent of the total hours worked per consumer and per workweek.

Fellowship and Protection

- The provision of "fellowship" means to engage the person in social, physical, and mental activities, such as conversation, reading, games, crafts, accompanying the person on walks, on errands, to appointments, or to social events.

- The provision of "protection" means to be present with the person in their home, or to accompany the person when outside of the home, and to monitor the person's safety and well-being.

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[1] See Fact Sheet #25: The Home Health Care Industry Under the Fair Labor Standards Act (FLSA) for information on the current "companionship services" exemption applicable until January 1, 2015.

Care

The provision of "care" means assisting the person with:

- *Activities of Daily Living* (ADLs) such as dressing, grooming, feeding, bathing, toileting and transferring;

  and

- *Instrumental Activities of Daily Living* (IADLs) which are tasks that enable a person to live independently at home, such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care.

The companionship services exemption is not applicable when the employee spends more than 20 percent of his or her workweek performing care services; in such workweeks, the employee is entitled to minimum wage and overtime pay.

Tasks That Are Not Companionship Services

Household work: The term "companionship services" excludes domestic services performed primarily for the benefit of other members of the household. Household work that primarily benefits other members of the household, such as making dinner for the entire family or doing laundry for another member of the household, results in a loss of the exemption, and the employee is entitled to minimum wage and overtime for that workweek.

- For example, if an employee provides fellowship and protection for an elderly person Monday through Thursday, but spends Friday exclusively performing housework for the household as a whole, then the exemption is lost for the workweek. The employee cannot perform general household services for the entire household and still maintain the companionship services exemption during that workweek. In this example, the employee must be paid not less than the Federal minimum wage for all hours worked and overtime pay at time and one-half of the regular rate of pay for all hours worked over 40 in a workweek.

Medically related services: The definition of companionship services does not include the performance of medical tasks which typically require training and are performed by medical personnel such as registered nurses, licensed practical nurses, or certified nursing assistants. The determination of whether a task is medically related is based on whether the services *typically* require and are performed by trained personnel, and is not based on a worker's actual training or occupational title. Direct care workers who perform these services are excluded from the companionship services exemption. The performance of any medically related services that typically require training results in a loss of the exemption during the workweek in which they are performed. In such a case, the minimum wage and overtime pay requirements apply to all hours worked during the workweek.

- Medically related services that typically require training by medical personnel include invasive or sterile procedures, or procedures that otherwise require the exercise of medical judgment; examples include but are not limited to catheter care, turning and repositioning, ostomy care, tube feeding, treating bruising or bedsores, and physical therapy.

Who Can Claim the Exemption?

Under the revised regulations, the exemption is only available to the individual, family, or household solely or jointly employing the worker, and only if the companionship services duties test set forth above is met.

Third party employers of direct care workers (such as home care staffing agencies) are not permitted to claim the exemption for companionship services. Third party employers may not claim the exemption even when the employee performs companionship services and is jointly employed by the third party employer and the individual, family, or household using the services. Accordingly, third party employers must pay their workers the Federal minimum wage for all hours worked and overtime pay at time and one-half of the regular rate of pay for all hours worked over 40 in a workweek.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

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U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(September 2013)

Fact Sheet #79B: Live-in Domestic Service Workers Under the Fair Labor Standards Act (FLSA)

This fact sheet explains which workers are live-in domestic service employees under the FLSA, including when an employer may claim the FLSA's overtime compensation exemption for such workers.

Who Is a Live-In Domestic Service Worker?

Domestic service workers provide services of a household nature in or about a private home. (See Fact Sheet # 79: Private Homes and Domestic Service Employment Under the Fair Labor Standards Act (FLSA) for information about what qualifies as a private home.) Domestic service workers include companions, babysitters, cooks, waiters, maids, housekeepers, nannies, nurses, caretakers, handymen, gardeners, home health aides, personal care aides, and family chauffeurs.

Persons employed in domestic service in private homes are covered by the FLSA; they must be paid at least the federal minimum wage for all hours worked and overtime pay at time and a half the regular rate of pay for all hours worked over 40 in a workweek, unless they are subject to an exemption. (See Fact Sheet #79A Companionship Services Under the Fair Labor Standards Act (FLSA) for information about the "companionship services" exemption.) Domestic service workers who reside in the employer's home (and thus are "live-in" domestic service workers) may be exempt from the FLSA's overtime pay requirement..

In order to be a live-in domestic service worker, a worker must reside on the employer's premises either "permanently" or for "extended periods of time."

- A worker resides on the employer's premises permanently when he or she lives, works, and sleeps on the employer's premises seven days per week and therefore has no home of his or her own other than the one provided by the employer under the employment agreement.

- A worker resides on the employer's premises for an extended period of time when he or she lives, works and sleeps on the employer's premises for five days a week (120 hours or more). If a domestic worker spends less than 120 hours per week working and sleeping on the employer's premises, but spends five consecutive days or nights residing on the premises, this also constitutes an extended period of time.

    - Example: An employee who resides on the employer's premises five consecutive days from 9:00 a.m. Monday until 5:00 p.m. Friday (sleeping four consecutive nights on the premises) is residing on the employer's premises for an extended period of time.

    - Example: A worker who resides on the employer's premises five consecutive nights from 9:00 p.m. Monday until 9:00 a.m. Saturday (sleeping four straight days on the premises) is considered to reside on the employer's premises for an extended period of time.

Employees who do not meet this definition are not considered live-in domestic service workers and must be paid at least the federal minimum wage for all hours worked and overtime pay at one and a half times the regular rate of pay for all hours worked over 40 in a workweek.

- Workers who work temporarily for the household for only a short period of time, such as two weeks, are not considered live-in domestic service workers, because residing on the premises of the household implies more than temporary activity. The employer, in this case, cannot claim the overtime pay exemption and must pay overtime at one and a half times the regular rate of pay for all hours worked over 40 in the workweek.

- Workers who work 24-hour shifts but are not residing on the employer's premises "permanently" or for "extended periods of time" are not considered live-in domestic service workers and, thus, the workers must be paid overtime at one and a half times the regular rate of pay for all hours worked over 40 in the workweek.

Who Can Claim the Exemption?

Domestic service workers who reside in the employer's home and are employed by an individual, family, or household are exempt from the overtime pay requirement, although they must be paid at least the federal minimum wage for all hours worked.

The Department of Labor amended its regulations governing the employment of live-in domestic service workers. Under the revised regulations, effective January 1, 2015, third party employers, such as home care agencies, may not claim the overtime exemption for live-in domestic service workers, and must pay such workers at least the federal minimum wage for all hours worked and overtime pay at one and a half times the regular rate of pay for all hours worked over 40 in a workweek, even if the worker is jointly employed by the household.

What are the FLSA Requirements Regarding Live-In Domestic Service Workers?

Employers must pay live-in domestic service workers at least the federal minimum wage, currently $7.25 per hour, for all hours worked. (The worker may be entitled to a higher hourly wage under state law requirements.) When a live-in worker engages in typical private pursuits such as eating, sleeping, entertaining, and other periods of complete freedom from all duties, he or she does not have to be paid for that time. For a live-in domestic service employee, such as a live-in home health aide or a nanny, the employer and worker may agree to exclude the amount of time spent during a bona fide meal period, sleep period, and off-duty time. If the meal periods, sleep time, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked. In these circumstances, the Department will accept any reasonable agreement of the parties, taking into consideration all of the pertinent facts. However, the employer must still track and record all hours worked by domestic service workers, including live-in employees, and the workers must be compensated for all hours actually worked notwithstanding the existence of an agreement.
(See Fact Sheet # 79D Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act (FLSA).)

The employer must maintain a copy of the agreement discussed above. If the number of hours actually worked consistently differs from the existing agreement, the employer and live-in domestic service worker must enter into a new written agreement that reflects the actual hours worked by the worker. Under the Department's revised regulations, effective January 1, 2015, the employer is also required to keep records showing, among other things, the exact number of hours worked by the live-in domestic service worker. The employer may do this, however, by requiring the worker to record his or her actual hours worked and to submit that record to the

employer. *See* 29 CFR § 516.2(a) and § 552.110. Some employers may develop recordkeeping forms that, for example, require the worker to identify what tasks were performed and the hours spent in various activities; others may simply require employees to keep notes by hand of their hours worked; and, of course, employers may decide to record the hours themselves. In any case, the employer's failure to keep accurate record of hours worked may result in back wage liability. (See Fact Sheet #79C: Recordkeeping Requirements for Individuals, Families, or Households Who Employ Domestic Service Workers Under the Fair Labor Standards Act (FLSA), for more information.)

Where to Obtain Additional Information

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Exclusions from the State Act

The State Act does not apply to an individual who:

- is employed in a capacity that the Commissioner defines, by regulation, to be administrative, executive, or professional;
- is employed in a nonadministrative capacity at an organized camp, including a resident or day camp;
- is under the age of 16 years and is employed no more than 20 hours in a week;
- is employed as an outside salesman;
- is compensated on a commission basis;
- is a child, parent, spouse, or other member of the immediate family of the employer;
- is employed in a drive-in theater;
- is employed as part of the training in a special education program for emotionally, mentally, or physically handicapped students under a public school system;
- is employed by an employer who is engaged in canning, freezing, packing, or first processing of perishable or seasonal fresh fruits, vegetables, or horticultural commodities, poultry, or seafood;
- engages in the activities of a charitable, educational, nonprofit, or religious organization if:
    - the service is provided gratuitously; and
    - there is, in fact, no employer-employee relationship;
- is employed in a cafe, drive-in, drugstore, restaurant, tavern, or other similar establishment that:
    - sells food and drink for consumption on the premises; and
    - has an annual gross income of $400,000 or less;
- is employed in agriculture if, during each quarter of the preceding calendar year, the employer used no more than 500 agricultural-worker days;
- is engaged principally in the range production of livestock; or

- is employed as a hand-harvest laborer and is paid on a piece-rate basis in an operation that, in the region of employment, has been and customarily and generally is recognized as having been paid on that basis, if:
    - the individual:
        - commutes daily from the permanent residence of the individual to the farm where the individual is employed; and
        - during the preceding calendar year, was employed in agriculture less than 13 weeks; or
    - the individual:
        - is under the age of 17;
        - is employed on the same farm as a parent of the individual or a person standing in the place of the parent; and
        - is paid at the same rate that an employee who is at least 17 years old is paid on the same farm.

Exclusions from the Federal Act

The Federal Act does not apply to:

- Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and certain skilled computer professionals (as defined in the Department of Labor's regulations)
- Employees of certain seasonal amusement or recreational establishments
- Workers with disabilities
- Employees of certain small newspapers
- Switchboard operators of small telephone companies
- Seamen employed on foreign vessels
- Employees engaged in fishing operations
- Employees engaged in newspaper delivery
- Farm workers employed on small farms (i.e., those that used less than 500 "man-days" of farm labor in any calendar quarter of the preceding calendar year)
- Casual babysitters
- Persons employed as companions to the elderly or infirm