

## **Senators Press DOL to ‘Close the Loophole’ Exempting Home Health Care Workers from Minimum Wage and Overtime Exemption**

by **Matthew Miklave and Douglas Weiner**

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Fifteen United States senators have stepped forward to urge the U.S. Department of Labor (“DOL”) to repeal a broad exemption from the minimum wage and overtime requirements of the federal Fair Labor Standards Act (“FLSA”) for home health care workers. Under current DOL regulations, home health care aides who perform companionship services for the elderly and infirm are exempt from the FLSA. The exemption applies to all workers in domestic service who provide companionship services for individuals unable to care for themselves. Domestic service is work performed within the residence of the family using the services. Companionship services are those that provide fellowship, care and protection to persons who, because of advanced age or physical or mental infirmity, cannot care for their own needs. Home health care workers, whether employed directly by the family or by an employer or agency other than the household using their services, are exempt from the FLSA’s minimum wage and overtime pay requirements under Section 13(a)(15). 29 C.F.R. § 552.109(a). In 2007, the United States Supreme Court upheld the current rule against a strong legal challenge. *Long Island Care at Home, Ltd. v. Coke*, 549 U. S. 1105, 127 S. Ct. 853 (2007).

Recently, however, 15 senators wrote to U. S. Secretary of Labor Hilda Solis pressing the DOL to close this “loophole.” Citing a \$9 an hour industry-wide average wage, the senators argue in favor of extending federal wage requirements to “thousands of low-wage workers, primarily women, who are doing difficult, dangerous, yet extremely important work.” Secretary Solis has already signaled that the DOL is reviewing this exemption.

Reversing the exemption may have significant consequences for individuals and companies providing or paying for home health care workers for seniors and the disabled. Coupled with an ever-increasing population in need of services, the DOL’s actions could result in an additional strain on scarce resources.

We note that some state laws already narrow the federal exemption or otherwise limit its application. Pennsylvania, for example, exempts only home health care aides employed directly by a family for work performed within their home. New York requires time-and-one-half the minimum wage for overtime hours worked. Wherever a state law provides greater protection to employees than the FLSA, the state law prevails over federal law.

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