

By John L. Roberts, CELA

Part 1

Sustainable Home Care

Help your clients comply with wage and hour laws, taxes, and insurance requirements.

If you have a client who is facing a dementia or Alzheimer's diagnosis, be prepared if the family wants to talk about caring for their loved one at home. If their plan includes hired caregivers, you'll need to understand:

1. Your state's wage and hour laws and the regulations issued by the U.S. Department of Labor;
2. IRS and your state's income tax reporting and withholding requirements; and
3. Reasons why they must protect themselves and their caregiver with unemployment insurance and workers' compensation coverage.

Wage and Hour Laws

Prior to 2015, home care agencies in most states could use wage and hour exemptions to pay less than minimum



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wage to caregivers who lived in their customers' homes. "They can't get away with that anymore without paying overtime," says Tom Breedlove of MyHomePay.com, a domestic employee payroll service based in Austin, Texas. "Now, the family may need four or five caregivers a week, and that's fine if grandma only needs care for several weeks after breaking her hip. But for long-term cognitive cases, it's a real issue," Breedlove says. The family may end up deciding, "this doesn't work for

Dad. He doesn't know all these different caregivers."

Dementia and Alzheimer's patients can become anxious and disoriented by a parade of new and different caregivers they don't recognize. The patient needs to know the caregiver's face and manner.

"Meaningful gestures and feelings are easier to express when people understand and value each other."¹ The caregiver needs to know that the patient can't always express what is going on. For families who need the continuity of a single caregiver, Breedlove says "home care agencies are now giving customers a choice: accept a revolving door of caregivers, because the agency has to schedule around overtime, or pay a higher rate that can cover time-and-a-half."

Homecare agency economics were rocked by the 2015 *Weil* decision, which ordered summary judgment in favor of the U.S. Department of Labor (DOL) and the DOL's amended Fair Labor Standards Act (FLSA) regulations that require minimum wage pro-

1 Sharon M. Keigher, *The Interests Of Three Stakeholders In Independent Personal Care For Disabled Elders*, 23 *Journal of Health and Human Services Administration* 136, 156 (Fall 2000) (reporting 1996–1997 survey of care workers, disabled elders, and their family members). https://www.jstor.org/stable/25780944?seq=1#page_scan_tab_contents.

tection and overtime pay for caregivers and companions who are employed by third-party agencies.²

Home care agencies predicted that ending their FLSA minimum wage and overtime exemptions would “make home care less affordable, and create a perverse incentive for reinstitutionalization of the elderly and disabled.”³ They argued that change “would harm home care workers and recipients, [i]ncentivize employment through informal channels,” rather than homecare agencies,⁴ and accelerate “turnover due to reduced work hours per shift.”⁵

But the end of wage and hour exemptions for home care agencies does not necessarily mean the end to flexible and creative home care arrangements. “Many families are now trying to figure out how to hire one caregiver, or maybe two, providing consistent care with a small team,” Breedlove says. The care plan may be more affordable if the family becomes the caregiver’s employer, since families can still use the Companionship Services Exemption (see Sidebar 1), and the Live-In exemption (see Sidebar 2).

If they don’t understand these exemptions, families may feel their only option is to go to the underground economy and pay under the table.

Concierge Model

To provide management services that help families figure out their role as the employer, some home care agen-

2 *Home Care Association of America, et al. v. Weil*, 799 F.3d 1084, 1095 (D.C. Cir. 2015), cert. denied 136 S.Ct. 2506 (2016).

3 *Id.*, at 1095, quoting Appellees’ Brief at 44.

4 *Id.*, at 1095 quoting 78 Fed. Reg. at 60,481.

5 *Id.* at 1095.

Sidebar 1

The Companionship Services Exemption for Minimum Wage and Overtime Hours

Minimum wage and overtime rules don’t apply to domestic service employees who provide companionship services for people who, because of age or infirmity, are unable to care for themselves. 29 U.S.C. § 213(a)(15)

Companionship services means providing fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself.

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

Provision of protection means to be present with the person in his or her home or to accompany the person when outside of the home to monitor the person’s safety and well-being. 29 C.F.R. § 552.6(a).

But the **Companionship Services Exemption** does not apply if the employee is also providing care (in conjunction with the provision of fellowship and protection) that exceeds 20 percent of the total hours worked per person and per work week.

Provision of care means assisting the person 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). 29 C.F.R. § 552.6(b) (2015)



Companions hired privately by a family may be exempt from overtime if their provision of care is 20 percent or less of hours worked.

cies are reinventing and transitioning their business to a concierge model. Breedlove reports that innovative home care agencies “tell their customers they will help them find a caregiver, do all the vetting, background checks, and provide a care manager service that takes care of back-up care when your caregiver calls in sick, do the payroll and tax, maybe provide some technology to help the ADL tracking, and see that all these things have been done every day.”

If the child lives in Chicago and Dad is in Arizona, the agency will find somebody who does the retrofitting of Dad’s home. That changes the dynamics from: “I’ll provide a caregiver in the home,” to “I’ll be your partner to take care of Dad.”

The Department of Labor looks at a caregiver’s wage and hour exemption on a week-by-week basis, so the category of that caregiver can switch from week to week. Breedlove explains how “this week they could work 120 hours

Sidebar 2

The Live-In Exemption for Overtime Hours

29 U.S. Code § 207 sets a maximum workweek of 40 hours; the employee must receive compensation for overtime hours at a rate not less than one-and-one-half times the regular rate at



Permanent live-in employees who work directly for a family can be exempt from overtime, but check your state's laws.

which he is employed.

However, 29 U.S. Code §213(b)(21) grants exemptions to that maximum work week requirement for overtime pay, including any employee who is employed in domestic service in a household and who resides in such household.

29 CFR § 552.102(a)

explains the rules for a live-in caregiver's hours. Domestic service employees who reside in the household where they are employed are entitled to the minimum wage for all the hours worked.

But 29 U.S. Code § 213(b)(21) exempts the employee from overtime pay.

The employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, mealtime, and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits.

For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. If the sleeping time, meal periods, or

other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked. See 29 U.S. Code §785.23.

To be a live-in domestic service employee, the worker must reside in their employer's home "permanently" or for "extended periods."

Permanently means they work and sleep on the employer's premises seven days per week and have no home other than the one provided by the employer.

Extended periods of time means they either:

- Work and sleep on the employer's premises for five days a week (120 hours or more); or
- Work and sleep on the employer's premises for five consecutive days or nights (for example, from 9:00 a.m. Monday until 5:00 p.m. Friday).

Live-in employment does not include:

- 24-hour assignments if the employee does not reside permanently or for extended periods of time in the employer's home. (Employees who work 24-hour shifts but are not live-in domestic service employees must be paid at least the federal minimum wage and overtime pay for all hours worked unless they are exempt under the companionship services exemption.); or
- Temporary assignments for only a short period of time, such as for a period of two weeks.

Application of the Fair Labor Standards Act to Domestic Service: Final Rule, 78 Fed. Reg. 60454, 60474.

But remember, because of state laws, the live-in exemption for home health employees is not absolute or universal. There are many state law exceptions and nuances you must be familiar with.

with only 20 percent of the time spent on ADLs [activities of daily living]," and therefore be considered a companion. The following week, "more hours are needed for dressing, grooming, feeding, bathing, toileting, and transferring, so the caregiver would not be within the companionship services exemption, and have to be paid overtime."

A family may mistakenly think their caregiver does not have to be paid

overtime if the caregiver is paid a salary (see Sidebar 3). By working with an agency that monitors the employment arrangement, the home care plan can be kept compliant as cognitive disease progresses and the hours and intensity of care increase. When the family realizes that Dad needs help with everything now, care is not going to fit within the companion services exemption anymore. So, the professional can look at the schedule and reclassify.

"If we have the companion move in and qualify for the live-in exemption, we won't have to pay overtime and we can exempt sleep time up to 8 hours per day as long as the caregiver agrees to it in writing and can sleep 5 hours. Tremendous savings come into play," says Breedlove, whose firm maintains a 50-state summary of caregiver law.⁶

⁶ "Nanny Tax" Requirements in Your State, Care.com, <http://www.myhomepay.com/>

Sidebar 3

Caregiver Contracts Won't Work Without Planning for Wage and Hour Law Compliance

In a typical example recounted by Tom Breedlove of MyHomePay.com, the family hired a caregiver and offered to pay a salary of \$720 per week for a 45-hour work week ($\$720/\text{week} \div 45 \text{ hours} = \$16/\text{hour}$). The employee is happy, and occasionally the employer family asks the employee to work some "extra hours" for overnight stays. They agree that these hours would be paid at the same \$16/hour rate.

In reality, it's not the salaried employment agreement and salaried pay structure that will determine overtime requirements; it's the occupation and the work duties. In this case example, there was no planning to qualify the caregiver's work for the *Companionship Services Exemption*, and because she didn't live in the home, the *Live-In Exemption* could not apply.

The employment agreement in this example is not compliant with wage and hour law. The compliant way would be to separate regular and overtime rates of pay within the caregiver's employment agreement (40 hours at a regular rate of \$15.16/hour and 5 hours at an overtime rate of \$22.74/hour).

Two years after she left the family, the caregiver in this example lost her next job and began collecting unemployment. She read a blog talking about overtime pay and realized the family had not paid her correctly. She filed a wage dispute seeking payment of \$7,880, based on 985 hours of overtime during her employment.

The family tried to defend themselves by reminding the caregiver that she had agreed to a flat salary of \$720 per week and \$16/hour for extra hours. They even emailed a copy of the employment agreement showing the caregiver that they had lived up to their end of the agreement.

After getting legal counsel, the family realized the caregiver was right and they paid her the \$7,880. The results can be much worse if the family doesn't comply with income tax reporting requirements, and disastrous if they don't buy a workers' compensation policy to cover a caregiver who suffers a workplace injury.

Be familiar with laws in your state. For example, home care agencies and individual employers in California cannot exempt any sleep time.

Several states don't allow privately employed live-in caregivers to be exempt from the time-and-a-half requirement for overtime. For exam-

ple, in New York, overtime kicks in at 44 hours in a week.

New York state courts ruled that "meal periods and sleep time by home care aides who work shifts of 24 hours" had to be counted as "hours worked" for purposes of New York state minimum wage.⁷ That prompted the New

York State DOL to issue emergency regulations clarifying "that hours worked may exclude meal periods and sleep times for home care aides who work shifts of 24 hours or more,"⁸ and that a caregiver who "lives on the premises of the employer" shall not be deemed to be working during the employee's "normal sleeping hours solely because he or she is required to be on call."⁹

NAELA member Ronald Fatoullah, CELA, reported that the shifting rules, combined with the closing of managed long-term care plans that had covered thousands of members in Westchester County, New York, and on Long Island, created "home care chaos."

Income Tax, Social Security, and Medicare

Domestic workers are household employees, not independent contractors. The employer must withhold the employee's Social Security and Medicare contributions and pay a matching portion. At the end of the year, the employer is responsible to provide their employee with a Form W-2 reporting wages paid and taxes withheld.

Violations of the FLSA can surface when the IRS or state Department of Revenue catches a family's failure to file employment taxes. In one case described by Breedlove, the family found their ideal caregiver, who assured them she would take care of taxes on her own, using a Form 1099 issued by a family member.

When she brought the Form 1099 to her accountant, he decided she was misclassified as an Independent Contractor. He filed Form 8919, which reports the individual's share of uncol-

Answers/RequirementsByState (accessed Jan. 24, 2018).

⁷ Department of Labor Rule Making Activities, NYS Register, Oct. 25, 2017, at 5 <https://docs.dos.ny.gov/info/register/2017/oct25/rulemaking.pdf>.

⁸ *Id.*

⁹ *Id.*, at 6.

lected Social Security and Medicare taxes, giving the caregiver credit for Social Security quarters corresponding to her wages. The Form 8919 named the family member as the responsible employer.

The IRS sent a notice to the family member demanding taxes plus penalties for late filing. Stress on the family's financial resources tainted their relationship with their caregiver, and within months, the relationship ended.

Your client has the best chance for structuring a sustainable home-care plan by setting up a payroll system that complies with tax reporting laws.

Unemployment Insurance and Workers' Compensation

FLSA wage and hour violations can also show up after the caregiver files an unemployment insurance claim. Even if the family did comply with unemployment insurance contribution requirements, the caregiver may still be motivated to go back and check on how wages were paid (see Sidebar 3).

More severe consequences befall a family if their caregiver is injured and there is no workers' compensation coverage.

Workers' compensation coverage is not mandatory in some states, so families may think they don't need it. Breedlove recalls the Texas family that paid \$30,000 in medical bills plus lost wages after their caregiver was injured and couldn't work for six months. He says "a family may call their insurance agent and ask: 'if someone gets injured are we covered by our homeowner's policy?' Because they don't ask the right questions, they aren't told their policy is written to cover only guest workers like the plumber or electrician, not caregiver employees."

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During a struggle with a combative Alzheimer's patient in California, a kitchen knife slashed the wrist of a home care worker. The caregiver lost feeling in several fingers, and now suffers recurring pain. Trial and appeals courts ruled that the caregiver couldn't collect damages for her injury from the family because payments from the workers' compensation policy covered the home care agency that employed her.¹⁰

¹⁰ *Gregory v. Cott*, Court of Appeal of the State of California, B237645 (Jan. 28, 2013) <http://www.courts.ca.gov/opinions/revpub/B237645.PDF>.

The family in the California case had a defense to their caregiver's appeal: the caregiver had assumed the risk of a combative Alzheimer's patient.¹¹ The California Supreme Court affirmed the summary judgment for the defendant family.

But beware, one dissenting Justice on the Court argued against allowing families to use the assumption-of-risk defense to counter the claims of injured homecare workers who are covered by workers' compensation.¹²

If your client decides to become an employer explain the many risks of injury. "The only solution for an employer is to have adequate insurance."¹³ Liability coverage and legal defense services are well worth the premiums paid for a workers' compensation policy.

Conclusion

Compliance with legal requirements is the foundation for the family that wants a sustainable home care plan for their loved one.

In the next issue, Part 2 will explain how a reasonable and compliant employment relationship protects the health and safety of the caregiver and the elder they are caring for. ■

¹¹ *Gregory v. Cott*, Answer Brief of Defendants and Respondents, California Supreme Court, S 209125 (August 22, 2013); <http://www.courts.ca.gov/documents/4-s209125-resps-answer-brief-merits-082213.pdf>.

¹² *Gregory v. Cott*, 59 Cal.4th 996,176 Cal. Rptr.3d 1, 331 P.3d 179 (2014); https://scholar.google.com/scholar_case?case=3504153793166163941&hl=en&as_sdt=40000006

¹³ Frolik & Brown, *Advising the Elderly or Disabled Client*, ¶16.12 *Private Caregivers Thomson Reuters/WG&L* (2017).