

# A NEW HEADACHE FOR HOME CARE AGENCIES: THE NEW YORK DOMESTIC WORKERS' BILL OF RIGHTS

*Wage & Hour Alert*  
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Home care agencies in New York are acutely aware that the U.S. Department of Labor's recent Final Rule eliminated the companionship exemption for home care agencies. But agencies may not be aware of another important—albeit unintended—consequence of the Final Rule's elimination of the companionship exemption: the New York Domestic Workers' Bill of Rights likely now applies to home health aides in New York State.

As we previously reported, the Domestic Workers' Bill of Rights, which became effective November 29, 2010, extended various employment protections to “domestic workers.” A “domestic worker” is an individual who is employed in a home or residence for the purpose of caring for a child, serving as a companion for a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose. As enacted, however, the Domestic Workers' Bill of Rights expressly excluded aides who were employed by an agency to provide “companionship services” as defined by the FLSA.

In addition to eliminating the companionship exemption for home health agencies, the Final Rule significantly narrowed the definition of “companionship services.” Previously, “companionship services” included the provision of fellowship, protection and care for an elderly person or a person with an illness, injury, or disability. Under the Final Rule, however, an aide can only provide “care” if it is provided “attendant to and in conjunction with” the provision of fellowship and protection, and then only if it does not exceed 20 percent of the total hours worked by the aide in a workweek per consumer. An aide who spends more than 20 percent of his or her workweek performing “care” is not providing “companionship services.” “Care” is broadly defined to include 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).

The significant narrowing of the definition of “companionship services” under the FLSA means that most home health aides in New York are likely now covered by the Domestic Workers' Bill of Rights given the amount of “care” that such aides provide.

## Attorneys

Peter Godfrey  
John Godwin  
Emina Poricanin

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Importantly, however, the Domestic Workers' Bill of Rights still does not apply to any aide a) working on a casual basis, **or** b) who is a relative through blood, marriage, or adoption of: 1) the employer, or 2) the person for whom the worker is delivering services under a program funded or administered by federal, state, or local government.

For covered aides, the Domestic Workers' Bill of Rights requires that employers provide them with up to three (3) paid days off each year, depending on the average number of hours they work per week. Aides are eligible for this benefit after one year of employment with the same employer. These paid days off must be paid at an aide's "regular rate of compensation" for the average number of hours he or she works on a normal workday. In guidance previously issued, the New York State Department of Labor indicated that the requirement to provide paid days off was effective immediately upon the Domestic Workers' Bill of Rights' enactment. So, with the elimination of the companionship exemption under the FLSA, effective October 13, 2015, employers should assume that the requirements under the Domestic Workers' Bill of Rights began to apply to eligible employers on October 13, 2015.

Additionally, the Domestic Workers' Bill of Rights requires employers to provide covered employees with one full day (24 consecutive hours) of rest each week. This "day of rest" should, whenever possible, coincide with the traditional day reserved by the domestic worker for religious worship. An aide may voluntarily agree to work on his or her "day of rest," but he or she must be paid overtime for all hours worked that day, **regardless of whether he or she otherwise worked 40 hours that week.**

Home care agencies should carefully review their compensation practices with respect to home health aides and ensure that they are compliant with the Domestic Workers' Bill of Rights. Please contact any one of the attorneys on our home care team should you have any questions.