

FAQs

The FAQ's below have been developed to assist home care agencies in understanding the changes in federal regulation regarding overtime pay for home care workers.

Q. What is the new Overtime Rule for Domestic Service?

The United States Department of Labor's Wage and Hour Division has released a final rule, which is currently in effect, that extends minimum wage and overtime protections under the Fair Labor Standards Act (FLSA) to home care workers.

Q. What are the significant changes made under these regulations?

A. The Department of Labor's final rule makes two significant changes: (1) the tasks that comprise exempt "companionship services" are more narrowly defined; and (2) the exemptions for companionship services and live-in domestic service employees may only be claimed by the individual, family, or household using the services rather than third party employers such as home health care agencies. The final rule also revises the recordkeeping requirements for employers of live-in domestic service employees. The United States Department of Labor has published several fact sheets explaining the implications of the Final Rule on its website: see <http://www.dol.gov/whd/homecare/factsheets.htm>.

Q. Can third party employers, such as home care or staffing agencies, claim the companionship services and live-in domestic service worker exemptions under the Final Rule?

A. No, third party employers are not entitled to claim either the companionship services or live-in domestic service employee exemptions under this Final Rule.

Q. Will live-in domestic service workers be entitled to overtime pay under the Final Rule?

A. Live-in domestic workers who are employed by a third party must be paid at least the federal minimum wage and overtime pay for all hours worked.

Q. What are the rules for determining how many hours a live-in domestic service worker has worked for purposes of determining pay?

A. A live-in domestic service worker and an employer may make an agreement excluding sleep time, meal time, and other periods of freedom from all duties when the worker leaves the premises or stays on the premises for purely personal matters from compensated hours. However, the live-in domestic service worker must be paid for all hours worked even if those hours deviate from the agreement.

Q. If an employee provides services to multiple individuals during the workday and must travel between these worksites, does that travel time count as work time that must be paid?

A. Yes. Under the FLSA, employees who travel to more than one worksite for an employer during the workday must be paid for travel time between each worksite.

Q. How is the travel time counted if an employee does not travel directly between the homes of two individuals receiving services?

A. Workers who travel to more than one worksite for an employer during the workday must be paid for travel time between each worksite; if the travel is not direct because the employee is relieved from duty long enough to engage in purely personal pursuits, only the time necessary to make the trip must be paid.

Q. For an overnight shift, does the employee have to be paid when he or she is asleep?

A. It depends. Under the FLSA, an employee who is required to be at work for less than 24 hours must be paid even though he or she is permitted to sleep or engage in other personal activities when not busy. All the time is counted as work time that must be paid. If an employee is required to be on duty for 24 hours or more, the employer and employee may agree to not count as hours worked a bona fide regularly scheduled sleeping period of not more than eight hours, provided that (1) adequate sleeping facilities are furnished by the employer, and (2) the employee's time spent sleeping is usually uninterrupted.

Q. Can an agency cap an employee's hours in order to avoid paying overtime costs?

A. Nothing in the final rule prohibits an employer from capping an employee's hours. However, agencies do have an obligation to serve consumers in the most integrated setting appropriate consistent with Olmstead v. L.C., 527 U.S. 581 (1999) and the Americans with Disabilities Act. Any caps would need to account for emergency situations and situations where capping overtime hours would put an individual at risk of institutionalization or segregation. Guidance from the Civil Rights Division of the United States Department of Justice and the Office for Civil Rights of the Department of Health and Human Services regarding capping hours can be found at <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/community/2014hhsdojdearcolleagueletter.pdf>.

Q. Will agencies rates be increased to mitigate increased labor costs from the final rule?

A. OHIP is currently evaluating the need to adjust fee-for-service home care and managed care rates to managed care plans. OHIP will work with managed care plans to ensure that rates to the plans are consistent with costs after evaluating surveys that are currently pending. In the meantime, the Department has decided to expedite rate relief to fee-for-service home care programs and managed care plans.

Q. What should an employee do if they think they are not being paid in accordance with the final rule?

A. The employee should file a complaint with the New York State Department of Labor. If you need additional assistance or want to file a complaint, please call: 1-888-4NYS DOL (469-7365).