

## DEATH OF AN INDUSTRY....WHEN GOVERNMENTAL INTERVENTION BECOMES INTRUSION

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What would happen if your loved one had surgery and could not recover properly without the assistance of a caregiver in the home? Maybe that loved one purchased an insurance policy, called a long term care insurance policy (LTC), when they were younger and paid premiums on it for a decade or more until that fateful day arrived. Then, in the moment of truth, they attempted to obtain care in the home, and discovered their policy will not cover all the care they need.

It turns out that your loved one needs more than forty hours a week of care and their policy doesn't pay for overtime. Under new rules by the U.S. Department of Labor (DOL), the caregiver your loved one wants must be paid overtime (at 1 ½ times the regular rate) for any hours worked during a week over forty. But that additional money is not covered under the policy your loved one purchased. In fact, when they purchased this policy with their hard earned money ten years ago, federal law would not have required the payment of overtime in these circumstances. Now what? Does your loved one get a revolving door of caregivers and now have to worry about managing the schedules of all these caregivers rather than recovering?

What if a loved one had been receiving care from one caregiver for the last 10 years and now, since that caregiver works 60 hours a week earning well above minimum wage, must pay overtime for those 20 hours a week or forgo the extra 20 hours of care because he or she can't afford to pay the additional overtime? What happens then? Does the family all chip in and pay the overtime? If not, does that caregiver get her hours cut and make significantly less because he or she now works fewer hours? In reality, the caregiver seldom gets the overtime because most clients cannot afford to pay it, and the LTC policy does not pay the overtime either.

These are just some of the realities of the newly revised DOL rules governing the companion exemption to the Fair Labor Standards Act ("FLSA"), which relates to overtime pay in private duty home health care. This does not affect Medicare services, because Medicare (via CMS) does not cover long-term assistance with activities of daily living (ADLs), such as bathing, dressing, transferring from the bed to the couch or couch to bathroom, driving, dressing or a myriad of other similar types of actions. No, these services are what the private home health care industry provides through the services of caregivers.

People pay for these services either privately or through a long term care insurance policy. Services can range from a few hours a day to around the clock care or even live-in care. The costs, depending upon where the care is delivered, can range from \$15-\$20 an hour in the South, to \$25-\$28 an hour in the North East. It's very easy to do the math and see the cost of a 10-20-hour day of care. The costs for this care have traditionally been such a high ticket item that Congress, over forty years ago, created an exemption to the FLSA, which allowed our Nation's elderly and those with infirmity to be able to afford the cost of private care without being penalized with having to pay overtime for services. This is known as the companion exemption to the FLSA.

Recently, however, the Obama Administration charged the DOL with redefining the definition of companion care and in essence eliminating the companion exemption. The DOL accomplished this through the issuance of revised regulations. As a result, the protection against overtime that the Congress enacted for this vulnerable population no longer exists. To illustrate the effect of this change, using the rates described above, under the new rules, a \$20 an hour rate could jump as high as \$30 an

hour for hours 41 and up during a week. This has left many clients, caregivers and companies scrambling.

Clients are forgoing care because they cannot afford the additional hours of care, while caregivers are getting fewer hours to work and therefore actually making less money. Small businesses and larger companies alike are scrambling to deal with this reduction in services available to provide to clients, along with a higher demand for additional caregivers in an industry with a preexisting caregiver shortage. Some businesses will close their doors rather than deal with these headaches. Some already have. And economics aside, it is no secret the baby boomer generation has already added millions of people in need of private duty home health care, and will continue adding more in the next decade. How is the home care market to deal with the constraints placed on it by these DOL changes, along with an industry wide caregiver shortage it currently faces?

The President and the DOL had one goal in mind with these changes, which was to get caregivers more money through overtime. However, what they did not factor in is that not only were they making care unaffordable to those who desperately need the care, the actual workers they sought to protect are now earning less than before the changes, through working less hours on cases on which they would normally have worked more hours. Although the caregiver in home health care is not the highest paid profession, caregivers tend to earn an hourly rate well above the Federal minimum wage. Our country is designed to promote advancement in the work environment through additional education and training. So someone today who works as a home health aide, may attend school and eventually become a nurse, who may eventually become a physician. There is a hierarchy of earnings in home health care, not unlike most professions out there. By taking away the incentive to achieve higher earnings through professional advancement, the government has limited the growth potential in health care as a professional job choice. What the government sought to achieve by eliminating the companion exemption has instead caused a massive intrusion and injustice on our nation's elderly and those with infirmity, along with the workers they sought to protect.

The DOL rules, as they are, punish all home care providers and their clients. Do we sacrifice affordable home health care for the millions and millions of elderly that need it, with the hopes of extra pay for caregivers, who actually earned more before these rules were in place? What about those with infirmity who depend upon affordable care when they cannot effectively do ADL's on their own? It's no secret that 14 States banned together through their Medicaid Directors to protest these changes, cautioning that the rules were impossible to implement, based upon lack of funding.... yet the rules were implemented and now are in place.

The companion exemption was in place for over 40 years because our elected Members of Congress sought to protect our elderly and those with infirmity, and treat caregivers respectfully by facilitating their ability to work for the same client for as many hours as they chose. The new rules accomplish the opposite. They make home care unaffordable for many, and require a caregiver to work for multiple clients in order to continue earning the same amount. To allow these recent changes to remain in place undermines decades of protections and will destroy a business sector at the same time. Many of these businesses are small businesses. They supply care or refer caregivers to millions of clients and create job opportunities for millions of caregivers.

If the private industry of home health care can be brought to its knees by governmental intrusion, the question all of us need to ask is what other industry is next? The cost of home health care has not decreased since the implementation of the original companion exemption; it has become costlier. The

new changes by DOL just made home care even more costly. By enacting a companion exemption to FLSA, Congress chose to balance the affordability of private duty home health care for seniors and those people with illnesses, injuries or disabilities, against excessive caregiver costs; yet still allowing caregivers the freedom to work more hours and earn additional income. The recent changes to long standing Congressional policy decision, undermine this balance and will force those who need care the most to forgo that care. In some instances, foregoing the needed care will cause those individuals to be placed in institutional settings. And in the end, the caregivers for whom this change was designed, will actually earn less. It should be noted that the Medicare and Medicaid systems were not created to, and are not able to, absorb these costs. These new changes to the companion exemption are hurting those who need the care, reducing caregiver wages and, ultimately, could destroy an entire industry of small businesses. Tell your U.S. Senators and Representatives that you want the old companion exemption to be restored and to end this nightmare.