



MEMORANDUM

TO: NPDA Members

FROM: Kevin Turner, NPDA Executive Director; Kevin Smith, NPDA Director of Chapter Services; Gale Bohling, NPDA Legislative Chair; Dani Kehoe, DBK Consulting – NPDA Lobbyist

At 1:00 p.m. Eastern today (December 15, 2011), DOL released its Notice of Proposed Rulemaking (NPRM) to redefine the companion care exemption. It is a 186-page document that will take some time to read, analyze and summarize. The NPRM contains extensive data and discussion of industry (companion care) history, along with legislative history. The actual proposed changes to the companion care exemption are contained within long sections of history and data presentations.

Attached is the NPRM in pdf format as well as a link to the information online

<http://www.dol.gov/whd/flsa/companionNPRM.htm>

NPDA's initial analysis:

1. The proposal applies to the live-in exception as well as to the companion care exemption.
2. The proposal would deny use of the companion exemption and the live-in exemption to any third-party employer (i.e., it would be available only to family/household employers) of a caregiver --this is based on DOL's reading of the 1974 legislative history that states that FLSA is supposed to apply to domestic service workers whose work is done as a vocation...(i.e., a "breadwinner's job")...as I read this, it means that neither NPDA-model private duty companies nor registries, to the extent any registry may be a "joint employer," could use the companion care or live-in exemption.

That proposal also makes changes to recordkeeping, scope of duties, and hours worked (live-in exception) requirements--but since the proposal eliminates use of either exemption/exception by third-party employers, I question their (current) relevance to NPDA members...

Generally, the proposed changes include:

- Restriction of the live-in and companion care exemptions to only "individual/family or households employing the worker's services".
- Modifies definition of "domestic service worker" to include babysitters and elder sitters/companions -- notes that companions employed by an individual/family/household may still qualify for the companion care (or live-in) exemption, but any employer employing a caregiver whose vocation is caregiving cannot qualify for the companion care exemption.
- Modifies that which constitutes "incidental services" which are allowed--up to a maximum of 20% of hours worked (on a weekly basis) and thus ok within the exemption (food preparation, personal services (such as bathing or assistance w/toileting) that are in connection with "companionship", etc.) Housework not arising from companionship (defined as "fellowship, care and protection") is specifically disallowed (e.g., vacuuming, window washing); medical care is

also specifically disallowed (e.g., changing bandages, any kind of medication situation that exceeds simply reminding the client of a pre-set schedule and dosage of meds to take)...

- Imposes new recordkeeping requirements--e.g., no longer can hours be tracked by use of an employment agreement; under the proposal, records of actual hours worked will be required

There is a 60-day comment period from the date of publication in the Federal Register(which has not yet happened)...but the comment period will run until approximately Feb. 15. The proposal is designated as a "significant regulatory action" w/a projected impact of \$100 million or more on the economy, and thus is subject to the Small Business Regulatory Enforcement Fairness Act (p. 44). DOL acknowledges the cost of its proposal, and also notes that "public funds pay the overwhelming majority of the cost for providing home care services" (DOL states that only 10 percent of payments to home care workers come from private payments)

NPDA will provide a more formal summary/analysis of the proposal to our membership early next week.