

# Colorado Companions for Elderly Entitled to Overtime Pay

By Peter F. Munger

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The minimum wage and overtime pay rules in Colorado's Minimum Wage Order (MWO) apply to companions for the elderly or infirm who work for third-party employers, a federal judge in Colorado has ruled. *Kennett v. Bayada Home Health Care, Inc.*, 14-cv-2005-CMA-MJW (D. Colo. Sept. 24, 2015).

Only companions who are employed directly by the households or families of the elderly or infirm are exempt from the rules, the court said. This is the first court decision in Colorado on this issue.

The home health care company in this class action case employed "home health aides" (HHAs) to provide companion services to company clients in the clients' households. The services included bathing, toileting, making beds, preparing meals, assisting with feeding, preventing falls, and monitoring vital signs.

Colorado's MWO sets minimum wage and overtime pay rules, but exempts from those rules "companions, casual babysitters, and domestic employees employed by households or family members to perform duties in private residences." 7 CCR 1103-1:5.

The company did not pay overtime compensation to its HHAs, but argued the HHAs were exempt from the rules under the companion exemption.

The district court agreed the HHAs were companions, but ruled they were not exempt because they were employed by a third-party – the company – and not by the household or families of clients. The court held that the "household qualifier" in the exemption applied not only to domestic employees, but to companions also.

Federal rules under the Fair Labor Standards Act (FLSA) have long exempted from FLSA minimum wage and overtime pay rules companions employed by third parties, but those rules were changed to disallow the exemption. 29 C.F.R. § 552.109(a) (2015). The new rule disallowing the exemption to such companions was recently upheld in *Home Care Association of America v. Weil*, 2015 U.S. App. LEXIS 14730 (D.C. Cir. Aug. 21, 2015), and will presumably go into effect soon.

Thus, home health care companies in Colorado run a significant financial risk under Colorado law — and soon federal law — if they do not pay the minimum wage or overtime compensation to companions they employ.

Employers should consult with employment counsel to determine whether and how their particular specific organizational needs may be affected by this decision.

Meet the Author



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