MEMORANDUM

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| TO: | Ohio Provider Resource Association |
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| FROM: | Suzanne J. Scrutton  Nelson D. Cary  Michael F. O'Brien  Robin P. Amicon |
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| DATE: | September 24, 2013 |
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| RE: | Department of Labor Changes to FLSA Companionship Services Exemption |
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**The Companionship Services Exemption**

Many OPRA provider agencies currently utilize the “companionship services” exemption provided under the Fair Labor Standards Act (“FLSA”) pertaining to minimum wage and overtime payments for their employees. Recent revisions to federal regulations, however, will prevent such agencies from taking advantage of these minimum wage and overtime exemptions. If an agency has never utilized the “companionship services” exemption, the recent changes to federal law would not apply. However, if an agency is utilizing the “companionship services” exemption, it will no longer be able to do so in 2015. Specifically, beginning January 1, 2015, such agency providers will be required to begin paying the applicable minimum wage and overtime to their employees, if they do not do so already.

1. **Current Law**

Under current law, workers employed to provide “companionship services” are not required to be paid the minimum wage or overtime pay if their employment meets certain regulatory requirements. For example, the workers must provide the services to individuals in their own or their family’s home, and the workers may not spend more than 20% of their total weekly hours performing general non-patient related household work that is incidental to the care of the individual(s) they are serving.

1. **Changes and Other Considerations**

Once the new regulations take effect on January 1, 2015, OPRA provider agencies may not claim the companionship services minimum wage and overtime exemption for any of their employees, regardless of the circumstances**. In other words, as of 2015, OPRA member agencies that employ direct care workers must pay those employees at least the federal minimum wage and overtime pay for hours in excess of forty (40) a week, unless some other minimum wage or overtime exemption applies.**

Although not an “exemption,” the FLSA does have regulations regarding the time an employee spends sleeping that may be of assistance to a provider faced with the new compliance landscape. These regulations determine whether and to what extent an employer must count time an employee spends sleeping as compensable hours worked under the FLSA. The FLSA’s sleep time regulations are not affected by the new companionship regulations. For those OPRA members who, until now, have not had to incur minimum wage and overtime pay expense for their “companionship” employees, the “sleep time” regulations may be able to limit the expense of compliance. Thus, beginning in 2015, those OPRA members will need to be sure that they understand and are complying with the “sleep time” regulations for all of their employees, including those who formerly were eligible for the companionship services exemption. The “sleep time” regulations are complex and may require fact-specific analysis to determine their applicability.

**Challenges and Next Steps for Providers**

For OPRA providers that utilize the “companionship services” exemption, this change in the federal regulations is going to present quite a challenge. Providers that take advantage of this exemption will need to assess the impact that the changes will have on their business, as such changes will effectively drive up the cost of care. The delayed implementation of the changes until 2015 is intended to provide time to states to consider the additional costs of the changes and to address the systemic costs to Medicaid providers. OPRA will be working at the state level to discuss additional funding options for providers. Providers, too, should start assessing and planning now for the 2015 changes. For instance, such changes should be addressed at upcoming 2014 ISP meetings, so that plans can be made for individuals’ future care needs. OPRA will be listening to providers’ concerns and will hold trainings if OPRA members desire to learn more about the implementation of the new requirements.

To determine whether these changes apply or to answer any questions about the changes or the use of the sleep time regulations, providers may want to consult with legal counsel. As a reminder, OPRA members are entitled to two (2) free hours of legal services per year with the Vorys law firm as part of their annual member benefit. Please feel free to contact Nelson Cary, a member of Vorys Labor and Employment Group, at 614-464-6396, or Suzanne Scrutton, a member of Vorys Health Care Group, at 614-464-8313.

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*Disclaimer: This memorandum is for general information purposes and should not be regarded as legal advice. As always, please let us know if you want more information or have questions about how these developments apply to your situation.*