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New DOL Regulations Bring Home Health Workers Into FLSA Framework

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Employers who provide home health services for individuals who (because of age or infirmity) are unable to care for themselves up until now have not been required to pay minimum wage and overtime to their employees. Starting Jan. 1, 2015, that will change. On Sept. 17, 2013, the Department of Labor (DOL) issued a final rule extending the Fair Labor Standard Act's (FLSA) minimum wage and overtime protections to home health workers who were previously categorized as exempt under the FLSA's "companionship" exemption. This change in the law is significant because there are nearly two million home health workers—such as home health aides, personal care aides and certified nursing assistants (CNAs)—and this number is growing quickly.

A. Background of the Companionship Exemption and Promulgation of the Final Rule.

Since 1974, the FLSA has exempted from the minimum wage and overtime rules those "employed in domestic service employment to provide companionship services for individuals … unable to care for themselves." 29 U. S. C. §213(a)(15). The DOL regulation interpreting this exemption provided that the exemption includes those "companionship" workers "employed by an … agency other than the family or household using their services." 29 CFR §552.109(a). Thus not only were workers employed by an individual or household exempted from the FLSA, so, too, were home health workers employed by third party agencies.

In 2007, the U.S. Supreme Court interpreted the DOL regulations related to companionship services in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). Evelyn Coke, a home care worker employed by an agency, sued her former employer seeking minimum wage and overtime. She claimed that the companionship exemption should not apply to her because she was employed by a third party agency. She argued that the DOL's "General Regulations" which define the statutory term "domestic service employment" as "services of a household nature performed by an employee in or about a private home … of the person by whom he or she is employed," intended that only workers who were employed by the household should be exempt. 29 CFR §552.3 (emphasis added).

The district court dismissed the suit, finding the regulation defining "companionship" valid, but the Second Circuit reversed, finding it unenforceable. The Supreme Court reversed the court of appeals and held that it was the prerogative of the DOL to make and interpret its own regulations, and that the language of the companionship regulation made clear that workers "employed by an … agency other than the family or household using their services" were exempt. See 29 CFR §552.109(a). The Supreme Court noted:

> The statutory language [of the FLSA] refers broadly to "domestic service employment" and to "companionship services." It expressly instructs the agency to work out the details of those broad definitions. And whether to include workers paid by third parties within the scope of the definitions is one of those details… . [W]hether, or how, the definition should apply to workers paid by third parties raises a set of complex questions . … Satisfactory answers to such questions may well turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the Department of Labor, possesses.

Coke, 551 U.S. at 167-68. The Supreme Court squarely put the issue of whether third party employers of home health

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workers should be required to pay minimum wage and overtime back into the hands of the DOL. The DOL, with the full support and encouragement of President Obama, rose to this challenge and promulgated the final rule.

B. The DOL's Case for Change.

The DOL highlights in the final rule the legislative history of the 1974 amendments to the FLSA, which it claims were intended to expand the coverage of the FLSA to include all employees whose vocation was domestic service, except those who were employed as “casual babysitters” or who provided “companionship services” as “elder sitters,” and whose primary responsibility was to watch over an elderly or ill person the same way that a babysitter watches over children.

The DOL also emphasizes the significant change in the home health industry since the 1970s when the FLSA was amended. Then, the majority of individuals with significant health care needs lived and received care in institutional settings, rather than at home. Now, the demand for long-term care for the seriously ill and elderly in the home has grown exponentially, which the DOL cites as being a product, in part, of the availability of federal funding assistance for home care. As more and more of the elderly and ill are being cared for in their homes, so, too, has the number of in home caregivers increased, along with the level of care that they provide.

The DOL argues that those providing companionship and fellowship when the regulation was enacted are not performing the same functions as those working directly with clients at home in today's society. The “in home care” position requires a greater degree of skill and training, which far exceeds the original concept of “elder sitting.” These individuals are trained and have entered the field of health care as a profession, and provide services far beyond the typical meal preparation, bed making, social outings and light household work typically associated with a “sitter” job.

C. Who Is Covered and What Are Their Duties?

The final rule amends section 552.109(a) to provide that the companionship exemption is not available to home care workers employed by a third-party company. In addition, the final rule narrows the definition of companionship services, thereby narrowing the exemption even for home care workers directly employed by the individual, household or family receiving the services. The current regulations define “companionship services” as:

> [T]hose services which provide **fellowship, care, and protection** for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs.

(emphasis added). The final rule removes “care” from the definition of companionship service:

> [T]he term companionship services means the provision of **fellowship and protection** for an elderly person or person with an illness, injury or disability who requires assistance in caring for himself or herself. The provision of fellowship means to engage the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events. The provision of protection means to be present with the person in his or her home or to accompany the person when outside of the home to monitor the person's safety and well-being.

(emphasis added). A home health worker employed directly by the individual, family or household can still provide some “care” as long as it does not exceed 20 percent of the time worked. Care activities are defined as assisting with “activities of daily living (such as dressing, grooming, feeding, bathing, toileting and transferring)” or with “instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medication, and arranging medical care).” To the extent that the direct care worker provides “care” for more than **20 percent** of the total hours she worked each week, then the worker must receive minimum wage and overtime.

In reality, because the final rule narrows the definition of “companionship” to exclude the provision of care for more than 20 percent of the time, families hiring workers directly often will not meet the exemption because the entire reason such workers are hired is to aid with the exact kinds of tasks that are now nonexempt as “care,” such as dressing, grooming, feeding, travel to doctor appointments and the like. These tasks likely add up to more than 20 percent of the time worked, and the employee can find ways to extend the time it takes to do those tasks in order to ensure they will be paid overtime. Thus, to the extent a family is considering direct hiring to take advantage of the exemption, the likelihood is that the family will be taking on a greater administrative burden (because the family will have to perform the recordkeeping required under the FLSA), and exposing themselves to the risk of an FLSA violation, when they probably will not be able to meet the test anyway.

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D. What Should Employers Do to Prepare for Jan. 1, 2015?

FLSA violations can be costly, and it is far better for a third party agency to adjust its practices early to work out any kinks than to wait until the final rule is effective in January 2015, and risk mistakes.

- Evaluate how the final rule will affect the business. For example, how many current employees regularly work more than 40 hours a week? How many employees would need to be hired if no current employee were allowed to work overtime?

- The final rule will likely increase the administrative burden on the company. Determine how to handle the increased hiring and scheduling burden and costs. Because more employees will be working fewer hours, more time will need to be spent scheduling caregivers and managing their schedules to avoid overtime. Administrative costs will likely also increase as the cost of screening, background checks, drug screens and the like will increase with the number of new hires.

- If new hires are needed to avoid overtime, start the screening and hiring process right away.

- Let customers and clients know about the upcoming change in the law and how it will affect them. Work with them to determine the best way to handle their case. Would they prefer to avoid overtime costs by increasing the number of workers regularly in their homes, or would they rather pay overtime to lower the number of people providing care to their loved one and improve continuity?

- If employees are already paid above minimum wage, but have not received overtime in the past, consider reducing employee hourly rates to compensate for the hours of overtime expected (while still ensuring minimum wage is met).

- Determine whether the current timekeeping system is sufficient to accurately capture all employee hours worked. Review the payroll systems to ensure overtime pay will be calculated correctly.

- Update your handbook and pay policies to reflect the reclassification of employees under the FLSA. Policies should require employees to accurately record all time worked, prohibit off-the-clock work, and inform employees that they may be subject to discipline for inaccurate time reporting or working off-the-clock or overtime without advance permission.

- Train employees on the transition and any new policies and procedures. Make sure managers and employees understand what activities are considered “work” that must be recorded in the timekeeping system.

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