A Timely Analysis of Legal Developments

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Department of Labor Eliminates the Minimum Wage and Overtime Exemption for Most Home Care Aides

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On September 17, 2013, the Department of Labor's Wage and Hour Division (DOL) announced a final rule eliminating the Fair Labor Standard Act's (FLSA) minimum wage and overtime exemption for home care workers employed by home care agencies and other companies. The new regulations, which go into effect on January 1, 2015, also significantly narrow the exemption for home care workers employed directly by the individuals or families receiving home care services.

History of the "Companionship Exemption"

In 1974, when extending FLSA coverage to "domestic service" workers, Congress also created an exemption from the minimum wage and overtime requirements for "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves."[1] Congress granted the Secretary of Labor authority to define the terms in the exemption through regulation. The DOL exercised that authority in 1975 by issuing the regulations at 29 C.F.R. Part 552 to define the scope of this "companionship exemption." Section 552.109 of the 1975 regulations established that the exemption applies to employees "who are engaged in providing companionship services" and "who are employed by an employer or agency other than the family or household using their services."

Since 1975, numerous attempts have been made to narrow the scope of the companionship services exemption. Most focused on limiting the exemption to cover only those home care workers employed directly by the individual or family receiving the home care services. The DOL proposed regulatory changes to limit the exemption in 1993, 1995 and 2001. None of these proposed changes became final. Bills have been introduced in Congress, but have failed to pass. In 2007, the U.S. Supreme Court rejected a challenge to section 552.109, finding reasonable and valid the DOL's interpretation that the companionship exemption extends to home care workers employed by "an employer or agency other than the family or household using their services."[2]

The New Regulations

In the 39 years since Congress enacted the companionship exemption, home care workers employed by home care agencies and other employers (rather than directly by the individual or

1 29 U.S.C. § 213(a)(15).

2 *Long Island Care at Home, Ltd., v. Coke*, 551 U.S. 158 (2007).

household receiving the services) have been exempt from the FLSA minimum wage and overtime requirements. That is all about to change. The DOL acknowledges that most home care workers already earn above the minimum wage, but, beginning January 1, 2015, employers must also begin paying such employees overtime at one-and-a-half times their regular rate of pay for all hours worked over 40.

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. The revised section 552.109(a) will read:

> Third party employers of employees engaged in companionship services within the meaning of § 552.6 may not avail themselves of the minimum wage and overtime exemption provided by section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services.

In addition, and equally important, the final rule amends section 552.6 to narrow 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. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, that such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

The final rule amends section 552.6 to remove "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.

While "care" has been removed from the definition of companionship services, providing some care is still allowed as long as the care activities do 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)." Under the final rule, the exemption will no longer be available for home care workers who spend more than 20 percent of their working hours engaged in such activities.

Impact of the New Regulations

The DOL estimates the new regulations will affect approximately 1.9 million home care workers in the United States. The DOL contends the primary effect is "the transfer of income from home care agencies (and payers because a portion of costs will likely be passed through via price increases) to direct care workers, due to more workers being protected under the FLSA." While described by the DOL as a "transfer of income," in actuality the DOL's numbers are the estimated annual cost to the home care agencies as a result of the new regulations. With respect to annual costs incurred for minimum wages, travel wages and overtime, the DOL estimates home care agencies will pay an average of $210.2 million the first year of implementation, increasing each year to an estimated $468.3 million on average by year 10. For annual regulatory familiarization, hiring costs (based on overtime hours needed to be covered by newly hired employees), and deadweight loss, the DOL projects home care agencies will incur $20.7 million on average in the first year, decreasing to an average of $5.1 million in year 10.

However, a March 2012 Navigant Economics Study: E*stimating the Economic Impact of Repealing the FLSA Companion Care Exemption* suggests a much higher cost to home care agencies. Although Navigant studied the economic analysis published by the DOL in the 2011 Notice of Proposed Rulemaking (NPRM), the study continues to suggest that the DOL has underestimated the compliance costs of the new regulations. According to Navigant, the DOL has: disregarded the impact on live-in workers, a group the study contends are disproportionately more likely to incur extended periods of pay at the overtime wage under the new regulations; underestimated the cost of paying home care workers for travel time; and underestimated the increased cost to the home care agencies for compliance with the minimum wage protection afforded by the FLSA. Ultimately, the study concludes the annual cost to home care agencies is significantly higher than the DOL has predicted.

This new regulation will unquestionably alter the face of the home care industry, which is likely why it does not go into effect until January 1, 2015. Some industry experts are predicting: increased Medicare and Medicaid costs; increased costs to families that use home care services; an increase in institutionalized care; fewer jobs as the industry contracts because more families opt to institutionalize ailing parents rather than seek home care services; and/or fewer work hours for home care employees as home care employers limit employee hours to under 40 per week. While all the repercussions are still unclear, affected employers would be wise to begin planning now.

What Should Home Care Employers Be Doing to Prepare for the Change?

Although a legal challenge to the final rule is likely, employers should not adopt a "wait and see" approach to compliance with the new regulations. Any legal challenge will be difficult and time-consuming, with uncertain results. Thus, home care employers need to start preparing for the transition now.

Reclassifying employees from exempt to non-exempt may seem an easy task, but it is not. Reclassifications can take months to complete, requiring employers to review current compensation structures, implement new timekeeping systems, reprogram payroll systems, adopt new pay policies, and train the newly non-exempt employees and their managers on the new policies and procedures. Following are some recommendations for reclassification of home care workers from exempt to non-exempt:

- *First*, home care employers should determine the increased labor overtime costs if the current compensation structure continues after the home care employees become non-exempt, and consider options for controlling or passing on those costs. Employers may need to plan to hire additional home care workers in order to ensure none of them works over 40 hours per week, and consider whether overtime costs could be controlled through paying on a piece rate or paying a salary under the fluctuating workweek method. Employers also may need to begin preparing customers for price increases. At the very least, discussion of the financial impact of the final rule should be part of budget planning for 2015.
- *Second*, employers should explore transitioning their home care employees to an electronic timekeeping system, allowing employees to accurately record their daily and weekly hours, including clocking out for unpaid lunch periods. Employees should be required to certify the accuracy of their reported time. Ideally, the employer should have the employees transitioned to a new timekeeping system by July 1, 2014, six months prior to the new regulations taking effect, to allow time to work out any issues with the home care providers not understanding how to record their time properly.
- *Third*, employers should review their payroll systems to ensure overtime pay will be calculated correctly. Overtime calculation errors are easily made, especially for home care workers who will continue to be paid on a salary or per visit basis, or continue to receive incentive compensation, after reclassified as non-exempt. Employers should also consider transitioning home care workers paid semi-monthly to a bi-weekly or weekly payroll in order to simplify the overtime pay calculation.
- *Fourth*, home care employers should begin updating or adopting new pay policies and procedures. For example, a policy on timekeeping and hours worked should require that employees accurately record all work time, prohibit off-the-clock work, and inform employees that they may be subject to discipline for inaccurate time reporting or working off-the-clock. Home care employers should consider specifically listing the various types of activities for which time should be recorded to provide the employees with a clear understanding of what activities constitute work. Additional policies to consider include policies outlining the rules for travel, training time and meal and rest breaks. Employers should also ensure that pay issues are covered under existing employee complaint and investigation procedures and prohibit retaliation.

- *Fifth*, for direct care workers who work 24 hours or more at a time, home care employers will need to enter into agreements with such employees to exclude sleep time—a period not more than eight hours—from hours worked. In order to properly exclude this time from the hours worked, the employer must provide adequate sleeping facilities and the employee's time sleeping must usually be uninterrupted. Of note, a live-in domestic employee need not be compensated for normal personal activities such as eating, sleeping or other periods of complete freedom from all duties. However, even when an express agreement provides these activities will be uncompensated, if during this free time the employee is interrupted by a call to duty, the interruption must be counted as hours worked and included in the time the employee reports for hours worked that day.
- *Sixth*, home care employers should provide training before the January 1, 2015 transition to reclassified home care workers and their managers regarding the new policies and procedures. Many overtime violations can be avoided if both non-exempt employees and their managers understand what activities are considered "work" that must be recorded in the timekeeping system and are aware of their role in ensuring accurate timekeeping.

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