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in this issue:

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The Supreme Court decides home healthcare workers are not entitled to minimum wage and overtime because the Fair Labor Standards Act's "companionship services" exemption applies to home healthcare agencies and other third party employers.

Supreme Court Gives a Helping Hand to Home Healthcare Agencies in Upholding the FLSA's Companionship Exemption to Third-Party Employers

By Gregory B. Reilly, Rachel A. O'Driscoll, and Lisa M. Brauner

On June 11, 2007, the United States Supreme Court decided *Long Island Care at Home Ltd. v. Coke*, U.S., No. 06-593. In a significant victory for third-party employers of companionship workers, the Court held that the Fair Labor Standards Act's companionship services exemption properly applies to third-party employers such as home healthcare agencies.

The Companionship Services Exemption

The companionship services exemption in section 13(a)(15) of the FLSA exempts from the federal minimum wage and overtime requirements employees who provide in-home companionship services to individuals who are unable to care for themselves. Under the Department of Labor's (DOL) regulations, the exemption applies to employees who are employed either by the individuals for whom they provide services or by third-party employers. Accordingly, for over 30 years the DOL and the courts have applied the exemption to third-party employers. However, the Second Circuit Court of Appeals found that the DOL's regulation was inconsistent with the express terms of the FLSA and the exemption should not apply to third-party employers. Upon review, the Supreme Court held that the DOL's regulatory exemption of third-party employers was valid and reversed the Second Circuit's decision.

The Supreme Court's Opinion

The unanimous Supreme Court opinion, written by Justice Breyer, an administrative law expert, focused on the degree of deference owed to two 1975 DOL regulations. The Court also resolved an apparent conflict between the regulations. The first regulation indicates the exemption applies to those employees who work in the home "of the person by whom he or she is employed." 29 C.F.R. § 552.3. In contrast, the second regulation states that the exemption applies to employees "who are employed by an employer or agency other than the family or household using their services." 29 C.F.R. § 552.109.

Acknowledging that sections 552.109 and 552.3 literally conflict, the Court resolved the inconsistency based, in part, on the simple rule that the "specific governs the general." The Court noted section 552.3's primary purpose is to describe the *kind of work* that must be performed by someone to qualify for the exemption, while the *sole purpose* of section 552.109 is more specifically to explain that the companionship services exemption applies to third-party employers. Thus, the Court found the specific third-party exemption in section 552.109 trumped section 552.3.

In response to the argument adopted by the Second Circuit that the third-party exemption in 552.109 is unenforceable because it fell outside of Congress's delegation of authority, the Court noted an administrative agency, such as the DOL, has the power to formulate policy and make rules to fill gaps left by Congress. And when such gap-filling is reasonable and in accordance with procedural requirements, the courts will accept the result as legally binding. The Court found that in 1974, Congress left it to the DOL to decide whether workers employed by third parties would fall within the scope of the com-

panionship services exemption. Even though the inclusion of third-party employers in the companionship services exemption in section 552.109 was issued in 1975 as an "interpretive" regulation, the Court determined it was a legally binding application of the DOL's rulemaking authority because the DOL promulgated it through notice-and-comment rulemaking procedures, the rule set forth important individual rights and duties, the DOL focused fully and directly on the issue, the rule fell within the DOL's statutory grant of authority, and the rule was reasonable. Therefore, the Court found the DOL's interpretation of the statute is entitled to judicial deference.

While the Court reversed the Second Circuit's invalidation of the exemption, the Court also remanded the case back to the Second Circuit. It is anticipated that the Second Circuit will fully adopt the Court's ruling. However, given the significant amount of attention this case has received from unions, home healthcare agencies, and government officials, Congress may act to modify, or even eliminate, the companionship services exemption as applied to third party employers.

Recommendations for Employers

Even though the decision is a victory for third-party employers of companionship workers, state law may nonetheless require the payment of minimum wage and overtime. Employers should also keep in mind that the federal companion services exemption has certain limitations. To qualify for the exemption, employees providing companionship services may not spend more than 20% of their weekly time performing nonexempt general household work such as dusting, vacuuming, washing floors or windows, cleaning refrigerators and ovens, or shoveling snow. Employees may provide household work related to "care" such as preparing meals, washing dishes, sweeping the floor after meals, making a bed, washing clothes, or scrubbing the bathtub after a bath. Moreover, such services must be performed by non-trained employees, (*i.e.*, not registered or licensed practical nurses), and must be provided in a private home.

Employers should consider these practical tips if they intend to apply the companionship services exemption.

- Contact employment counsel to determine whether state law requiring payment of the minimum wage and overtime applies regardless of the FLSA's companionship services exemption.
- Ensure that employee job descriptions and personnel policies clearly set forth the type of household work an employee may do without invalidating the exemption.
- Include provisions in contracts with employees, client-families and state agencies that prohibit the employees from performing nonexempt general household work.
- If nonexempt general household work will inevitably occur, consider requiring employees to prepare time sheets logging the time spent on general household work and household work related to the care, separately. Monitor the time sheets to ensure that time spent on nonexempt general household work does not exceed 20% of each employee's weekly time.
- If a client-family desires nonexempt general household work to be performed, consider designating certain employees for that type of work and pay them at least the minimum wage and overtime. Consider using part-time employees and/or ensure such employees are scheduled to avoid overtime situations.

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