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Home Care Industry Faces Increased Threat of Litigation After Elimination of FLSA Exemption

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When the U.S. Department of Labor modifies its interpretation of existing federal law, the change often provides fertile ground for claims and enforcement actions by the DOL and the plaintiffs' bar. The DOL's recent elimination of the exemptions afforded the home care industry under the Fair Labor Standards Act will likely prove no different.

Effective October 13, 2015, home care agencies and third-party employers of home care workers (e.g., health aides, personal care attendants, homemakers, companions, and sitters) may no longer take advantage of the minimum wage and overtime exemptions they have enjoyed for more than 40 years. Employers operating within the home care industry now face the increased costs and administrative burdens associated with federal wage and hour compliance. Those slow to comply face the possibility of debilitating legal action.

History of the Exemption for Home Care Workers

Prior to 1974, the FLSA's minimum wage and overtime protections generally did not extend to domestic service workers. That changed in 1974 when Congress extended FLSA coverage to all domestic service workers, including "cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use" working in private homes. 29 C.F.R. § 552.3 (defining "domestic service employment"). At the same time, Congress exempted from the FLSA's minimum wage and overtime protections "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 (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15) (emphasis added). In 1975, the DOL promulgated regulations defining "companionship services" as "fellowship, care, and protection," including "household work . . . such as meal preparation, bed making, washing of clothes, and other similar services," provided such household work did not exceed "20 percent of the total weekly hours worked." 29 C.F.R. § 552.6.

These regulations remained unchanged for the next four decades. During that time, the home care industry experienced tremendous growth. Home care agencies and similar third-party employers began hiring home care workers as employees and offering their services to consumers. With the blessing of the DOL and favorable federal court decisions, these entities were able to take advantage of the companionship services exemption, which allowed them to operate at a lower cost, often times passing that savings along to the consumer or to third-party payors.

By 2013, the home care industry employed more than 2 million individuals. And with those individuals lacking minimum wage and overtime protections, the DOL began to push for change.

The DOL Changes Course

In 2007, the U.S. Supreme Court issued a landmark opinion for the home care industry in *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158 (2007). In that case, a domestic companionship worker sued her former employer for violations of the FLSA minimum wage and overtime provisions, claiming the companionship services exemption did not apply to those

individuals employed by third-party home care entities. The Supreme Court disagreed. The text of the statute was silent as to third-party employers, and thus, the DOL could lawfully exercise its rulemaking authority to fill the statutory gap. And because the DOL's interpretation of the exemption was reasonable and procedurally proper, the regulation was valid and binding.

Though the *Long Island Care* decision offered a victory to the home care industry in the short term, it also reaffirmed the DOL's power to "fill statutory gaps" where appropriate. Most importantly, the ruling confirmed the DOL's discretion about whether to apply the companionship services exemption to those individuals working for third-party employers.

Seizing the opportunity, the DOL proposed new regulations in 2013 that abolished its 40-year interpretation of the companionship services exemption as applied to third-party employers. Under the Final Rule, the exemption is no longer available to third-party employers.

Home Care Industry Challenges the DOL's Final Rule

A consortium of home care industry associations filed a challenge to the DOL's Final Rule in 2014 and scored an early victory in the case of *Home Care Ass'n of Am. v. Weil*, 78 F. Supp. 3d 123 (D.D.C.), where the district court invalidated the DOL's elimination of the companionship services exemption for third-party employers. The victory was short-lived. The Court of Appeals for the District of Columbia reversed the district court's decision on August 21, 2015, finding the DOL's Final Rule was reasonable given the dramatic changes that had taken place in the home care industry since the exemptions were originally enacted in 1975. *Home Care Assoc. of America v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015).

The *Home Care* plaintiffs are now challenging the Final Rule before Supreme Court. Both the Circuit Court and Supreme Court denied the *Home Care* plaintiffs' requests to stay implementation of the Final Rule pending appellate review. The petition for certiorari remains pending.

The Final Rule

The DOL's Final Rule took effect October 13, 2015. Agency enforcement of the Final Rule began 30 days later. Home care agencies now face the significant challenge of modifying business practices that have been in place over 40 years. To comply, home care employers must pay their previously-exempt employees at least $7.25 per hour ($8.00 per hour in Arkansas), plus overtime at 1.5 times the regular rate for all hours worked over 40 in a given workweek. The final rule also requires employers to comply with the DOL's time tracking and recordkeeping mandates. Finally, the industry faces the significant threat of DOL enforcement actions and private litigation, including costly class and collection actions, should employers fail to timely comply with the new regulations.

The thanks of the AADC go out to Scott Jackson of Kutak Rock for drafting this article.

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