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Battle Wages On Over Home Care Workers' Wage-and-Hour Exemptions: Court Defers to DOL, Narrows Exemptions for Live-In and Companionship Employees

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The status of live-in home care workers and companionship employees under the ***Fair Labor Standards Act (FLSA)*** has become a moving target in recent years, and the most recent move spells big changes for the home care industry.

If you are still operating under the prior status quo, where live-in home care workers and employees were exempt from certain FLSA protections regardless of who employed them, you will want to review this issue again. According to the Court of Appeals for the D.C. Circuit in its recent decision of ***Home Care Association of America v. Weil*****,** these exemptions can be (and were) narrowed by the ***U.S. Department of Labor (DOL)*** to exempt only those qualifying domestic workers who are employed directly by the person for whom they care or that person's family. The court reached this decision despite the clear language of the FLSA exempting "***any*** *employee employed in domestic service employment* to provide companionship services for individuals who . . . are unable to care for themselves," and "***any*** *employee who is employed in domestic service* in a household and who resides in such household."

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This ruling is a sea change for businesses that employ workers who reside in the home of the person they care for because these workers now likely are entitled to overtime pay under the FLSA—*i.e.*, one and a half times the regular rate of pay for hours worked over 40 per week. This ruling equally affects businesses whose employees provide "companionship" services to the elderly or infirm, as defined (and also recently narrowed) by the DOL because such workers now must be paid at least the federal minimum wage *and* overtime pay by their third-party employers.

To reach its decision and overturn the district court's holding, the D.C. Circuit stated that it was bound by the U.S. Supreme Court's 2007 decision in *Long Island Care at Home, Ltd. v. Coke*. There, the high court held that the DOL's authority to implement the FLSA encompassed the authority to interpret its companionship exemption. The DOL's longstanding stance (since 1975 when it first interpreted the exemptions) was that third-party-employed workers were included. This interpretation was challenged in *Coke* when a companionship worker sought overtime and minimum wage pay from her third-party employer despite qualifying as exempt. The U.S. Supreme Court reviewed the agency rule under the *Chevron* standard and found that the FLSA's companionship exemption was silent as to workers employed by third parties; thus, the DOL had authority to fill the gap, which it did reasonably by including such workers in the exemption. Accordingly, in *Coke*, the Supreme Court upheld the DOL's longstanding position that companionship workers employed by third parties could qualify for exempt status under the FLSA.

Relying heavily on the Supreme Court's findings in *Coke*, the D.C. Circuit's panel of judges concluded in *Weil* that the DOL had authority to determine the boundaries of the FLSA exemptions, and that the DOL's new rule, a 180-degree switch from its previous position, was reasonable, and not arbitrary and capricious. Thus, the court upheld the DOL's new exclusion of employees from the domestic service exemptions when they are not directly employed by the person receiving the care or their family members.

Although the court in *Weil* was bound by the Supreme Court's decision in *Coke*, the circuit court followed *Coke* even where it was not required to do so. Notably, the *Coke* decision was limited to the companionship exemption, and the circuit court could have found that the same analysis did not apply to the live-in exemption. For example, while both exemptions came with a broad grant of authority "to prescribe necessary rules, regulations, and orders with regard to the amendments made by the Act," only the companionship exemption came with a specific grant of authority for the DOL to "define and delimit" its terms. Along the same lines, the live-in exemption is clearer on its face. It is relatively easy to determine whether a domestic services employee "resides in such household" where they provide services. It is more difficult to determine whether an employee engages in "companionship services" to fit within that exemption. Furthermore, while the companionship exemption lifts workers from the FLSA's overtime and minimum wage protections, the live-in exemption only exempts workers from the overtime requirements. This makes sense, as the distinction between work time and break time can be a very difficult line to draw when a worker lives on-site, regardless of who employs the worker (but especially difficult for an employer that is not present on-site—a practical reason for third-party-employed workers to remain within the exemption). Yet, the court in *Weil* disregarded such differences.

Significantly, the court also believed there was a need for change because, according to the DOL, health care professionals are now providing professional services more frequently in patients' homes. Yet, the DOL already addressed such concerns by narrowing the definition of "companionship" services. Prior to the DOL's new regulations, "companionship services" were defined to include "fellowship, care, and protection" which "may include household work related to the care of the person." Such work could "include general household work . . . that is incidental, *i.e.,* not to exceed 20 percent of the total weekly hours worked." The DOL's new definition, on the other hand, is more limited to "fellowship and protection," and only "care" that is "provided attendant to and in conjunction with the provision of fellowship and protection and . . . does not exceed 20 percent of the total hours worked per person and per workweek." However, the D.C. Circuit did not review the narrowed definition in *Weil* because, having upheld the DOL's exclusion of third-party employers from the companionship exemption, the definition of "companionship services" no longer affected the plaintiffs, who represented third-party employers.

The decision in *Weil* notwithstanding, it remains to be seen whether the changes summarized above will have the DOL's intended effect of increasing the wages of many domestic workers. Home care agencies and other third-party employers can, and likely will, restructure their wage and hour arrangements to avoid significant increases in labor costs.

Nonetheless, home care agencies and other third-party employers of domestic workers will need to implement systems for tracking hours worked and calculating overtime pay for employees who are no longer exempt. Employees no longer exempt under the companionship exemption are now also entitled to the federal minimum wage, if not already protected under state minimum wage laws. Families of the elderly or infirm who, for tax or other reasons, employ home care workers through their own business entities such as LLCs may still qualify for the exemption if they can show that their business is owned by the recipient of the services or his or her family. Questions remain (*i.e.,* will the court enable the regulation to become effective thirty days after October 13, 2015, as scheduled, or will the court grant a stay that delays the rule's implementation while the Home Care Association seeks review?). But given the DOL's broad discretion, as reaffirmed by the D.C. Circuit, the new rule is likely here to stay. Home care agencies and other third-party employers are well advised to audit their current practices to ensure compliance with the DOL's new interpretations and guidance.