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ALERT

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# Court Voids Labor Department's Overtime Requirement and Narrowing of the 'Companionship' Exemption

In two forcefully-worded opinions by Judge Richard J. Leon, the U.S. District Court for the District of Columbia on Dec. 22, 2014, and Jan. 14, 2015, struck down a U.S. Department of Labor (DOL) regulation[1] that would have required third party employers of employees engaged in companionship services or live-in domestic service employment to pay minimum wages and overtime, and would have further narrowed the scope of the "companionship" exemption to the overtime requirements.

**Background**

The federal Fair Labor Standards Act (FLSA) requires employers to pay employees covered by the Act minimum wages for all hours worked, and overtime wages for hours worked in excess of 40 per week. In 1974, Congress amended the FLSA to require payment of minimum wages and overtime pay to domestic service employees. However, in doing so, Congress specifically exempted from the law:

- From both the minimum wage and overtime requirements, "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" and
- From the overtime requirements, "any employee who is employed in domestic service in a household and who resides in such household"

In 1975, the DOL issued regulations implementing the FLSA. These regulations included a provision defining these exemptions as including companions and live-in domestic service workers employed by a third party, such as a home health agency or similar service providers. Thirty years later, this exemption, as applied to third party employers, was challenged in the courts, and in 2007 the U.S. Supreme Court

[1] 76 Fed. Registration 60,454 (October 1, 2013).

ruled in *Long Island Care at Home Ltd. v. Coke*[2] that the DOL's extension of the exemption to third party employers was valid and binding.

Bills were introduced in three consecutive Congresses to amend the FLSA by withdrawing the third party exemption, but none ever made it to a vote. Then, in 2011, the DOL issued a Notice of Proposed Rulemaking that would have revised the regulations to limit the exemption to only those workers employed directly by the family or household using the services, but not those employed by third party employers. The DOL published this as a Final Rule Oct. 1, 2013[3], and it was scheduled to go into effect Jan. 1, 2015.

The DOL's Final Rule would also have narrowed the scope of the companionship exemption generally, so that it would not apply to any person spending more than 20 percent of their time on traditional "care" activities such as dressing, bathing, feeding, and/or assisting with medications.

The Home Care Association of America and other plaintiffs filed a suit seeking to void the Final Rule, arguing among other things that the new rule conflicts with the plain language and legislative history of the FLSA, and that the DOL was manipulating its authority to define terms in an attempt to eliminate the 40-year old exemption from the law.

In its analysis of the "third party employer" issue, the court looked at two questions: whether Congress has already addressed the question at issue, and whether Congress has expressly or implicitly delegated authority to the DOL to proceed with *supplementing* a statutory provision or otherwise fill a "gap" in a statute. The Court found that while Congress authorized the DOL to define the terms "companionship services" and "domestic service employment,"

> Congress surely did not delegate to the [DOL] here the authority to issue a regulation that transforms defining statutory terms into drawing policy lines based on who cuts a check rather than what work is being performed.

Next, the Court noted that, by the DOL's own numbers, approximately 90 percent of home health aides and personal care aides, including those providing companionship services, are employed by third parties rather than by individuals or families. The Court declared that Congress had created the statutory exemptions for a reason, and therefore the DOL had no authority to "gut" them. The Court also noted that Congress' failure to act during three consecutive sessions on bills that would have adjusted the statutory language of the companionship exemption "unequivocally represents a lack of Congressional intent to withdraw this exemption from third party employers." Accordingly, the Court vacated the DOL's regulation.

In its second decision, the Court found the limitation of traditional care activities to be illogical, noting that the DOL was attempting to "write out of the exemption the very 'care' the elderly and disabled need, unless it was drastically limited in the quantity provided so as to be of little practical use." The court again concluded that the DOL was attempting to do through regulation "what must be done through legislation."

[2] 551 U.S. 158 (2007).
[3] 78 Fed Register 60,557 (October 1, 2013).

**What the Decisions Mean**

The DOL has already filed an appeal of this decision to the Court of Appeals for the D.C. Circuit. It should be noted that while the DOL continues to insist on the propriety of the regulation, the DOL had already issued a notice stating that the first six months during which the regulation would be effective, that is, until June 30, 2015, would be considered a non-enforcement period during which no enforcement actions would be commenced. Nonetheless, that period may not be long enough for the appellate court to hear arguments and issue its decision. On appeal, the District Court's decision could be upheld or reversed, and a further appeal to the Supreme Court is not out of the question. Higher courts may either agree that the DOL was usurping Congress' authority, or may find that the DOL was merely acting within its authority to issue regulations interpreting the statutory provisions of the FLSA.

**What Third Party Employers Should Do**

While third party employers need not comply with the DOL's regulation effective Jan. 1, 2015, it would be prudent, given the possibility of reversal on appeal, for third party employers to revise their pay practices (or at least notify patients of the potential need to do so retroactively) in order to reserve the additional funds that they would need to pay as of the effective date of the regulation, pending final resolution of its validity in the courts.

This *GT Alert* was prepared by **Jerrold F. Goldberg and Francis J. Serbaroli.** Questions about this information can be directed to:

- Jerrold F. Goldberg | +1 212.801.9209 | goldbergj@gtlaw.com
- Francis J. Serbaroli | +1 212.801.2212 | serbarolif@gtlaw.com
- Or your Greenberg Traurig attorney

**Albany**
518.689.1400

**Amsterdam**
+ 31 20 301 7300

**Atlanta**
678.553.2100

**Austin**
512.320.7200

**Boca Raton**
561.955.7600

**Boston**
617.310.6000

**Chicago**
312.456.8400

**Dallas**
214.665.3600

**Delaware**
302.661.7000

**Denver**
303.572.6500

**Fort Lauderdale**
954.765.0500

**Houston**
713.374.3500

**Las Vegas**
702.792.3773

**London***
+44 (0)203 349 8700

**Los Angeles**
310.586.7700

**Mexico City+**
+52 55 5029.0000

**Miami**
305.579.0500

**New Jersey**
973.360.7900

**New York**
212.801.9200

**Northern Virginia**
703.749.1300

**Orange County**
949.732.6500

**Orlando**
407.420.1000

**Philadelphia**
215.988.7800

**Phoenix**
602.445.8000

**Sacramento**
916.442.1111

**San Francisco**
415.655.1300

**Seoul∞**
82-2-369-1000

**Shanghai**
+86 21 6391 6633

**Silicon Valley**
650.328.8500

**Tallahassee**
850.222.6891

**Tampa**
813.318.5700

**Tel Aviv^**
+03.636.6000

**Tokyo¤**
+81 (0)3 3216 7211

**Warsaw~**
+48 22 690 6100

**Washington, D.C.**
202.331.3100

**Westchester County**
914.286.2900

**West Palm Beach**
561.650.7900