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DC Court Rejects Unilateral DOL Regulation of Home Care Workers in Sharply Worded Rebuke; DOL to Appeal

Labor, Employment and Workplace Safety Alert

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In a pair of welcomed decisions for third-party employers in the home care industry, Judge Richard J. Leon of the D.C. Federal District Court vacated major provisions of the U.S. Department of Labor's (DOL) Home Care Final Rule, which would have prevented third-party employers from claiming the "companionship services" exemption to the Fair Labor Standards Act (FLSA). The Court's decisions, critical of the DOL, thus preserved the long-standing exemption—at least for now. The DOL continues to stand by its position and has filed an appeal. Whether the FLSA's minimum wage and overtime protections will extend to almost two million more home care workers presently hangs in the balance with the District Court of Columbia Court of Appeals.

Background

When Congress amended the FLSA in 1974 to cover domestic service employees, it simultaneously provided for exemptions from the FLSA's minimum wage and overtime requirements for certain kinds of domestic workers engaged with the elderly and infirm. Employees delivering domestic "companionship services" were exempted from both the overtime and minimum wage requirements, and those employees providing live-in domestic services were exempted from the overtime requirements—regardless of whether the employees were employed by a third-party provider or directly by the consumer. These regulations remained relatively untouched for four decades.

In October 2013, however, the DOL published a new set of domestic service regulations that would bar third-party employers from claiming the long-standing companionship exemption (as well as the exemption for live-in domestic service employees) while also narrowing the "companionship services" definition. As a result, formerly exempt companions would have to begin earning overtime and minimum wage.

Understandably, these new regulations were met with substantial opposition by third-party home care providers, which make up approximately 90% of the home care workers in the U.S. In response, three industry trade associations brought suit in the District of Columbia, asking the court to vacate the new regulations and uphold the long-standing exemptions to the FLSA. They claimed not only that the new regulations were outside the authority of the DOL, but that they would destabilize the industry and hamper access to home care services for millions of recipients.

On December 22, 2014, Judge Leon issued his first opinion and order in *Home Care Association of America v. Weil*, Civil Action No. 14-967 (D.D.C.), vacating the third-party regulation amendment. Weeks later, on January 14, 2015, Judge Leon issued his second

opinion and order vacating the new regulation's revised definition of "companionship services." The Court preserved the long-standing exemptions from the FLSA's overtime and minimum age provisions in two blistering opinions highly critical of the DOL.

The Court's Blistering Opinions

In its reasoning, the Court noted that the original regulations remained substantially unchanged for 40 years after they were initially promulgated. The Court noted that although three consecutive Congressional committees considered several bills seeking to abolish the exemption, none of these bills reached the floor of either house of Congress. The court unequivocally chastised the DOL for attempting to overstep its authority:

> Six bills were introduced—three in the House of Representatives, three in the Senate—over the course of three Congressional sessions, where sponsors were in the majority party of each, yet there was never sufficient support to get any of them to the floor of either house of Congress. This unequivocally represents a lack of Congressional intent to withdraw the exemption from third-party employers. The fact that the Department issued its Notice of Proposed rulemaking after all six of these bills failed to move is nothing short of yet another thinly veiled effort to do through regulation what could not be done through legislation. Such conduct bespeaks an arrogance to not only disregard Congress's intent, but seize unprecedented authority to impose overtime and minimum wage obligations in defiance of the plain language [of the FLSA]. It cannot stand.

The court acknowledged that Congress was concerned with the nature of the services employees were providing—enabling guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them—rather than whether their pay was routed through a third-party employer. The Court found that the DOL's regulations ignored Congress's clear intent and contravened the FLSA's language regarding exemptions, and vacated the portion of the regulation that would have restricted third-party home care providers from taking advantage of the "companionship services" exemption.

On January 14, 2015, Judge Leon issued his second opinion and order, this time vacating the portion of the new regulation that would have imposed a narrower definition upon the type of work considered to fall under "companionship services." Under the new regulation, employers wishing to rely on the companionship exemption would have to ensure (1) that the time caregivers spend performing "care" services, defined as assistance with "activities of daily living" like dressing, feeding and bathing, did not exceed 20 percent of their weekly hours per patient per week, and (2) that caregivers did not perform any general household work. This would have severely restricted most employers' ability to avail themselves of the companionship exemption.

The trade associations argued that this new, narrower definition of companionship services violated the language and legislative intent of the FLSA because it "removes 'care' for all practical purposes, from the regulatory definition."

In the second opinion, the Court echoed its earlier reasoning, observing that the long-standing regulation was left untouched by Congress for 40 years without Congress having "shown one iota of interest in cabining the definition of companionship services…". The

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Court held, "Here, yet again, the Department is trying to do through regulation what must be done through legislation … And, therefore, it too must be vacated."

Conclusion

Whether third-party employers may avail themselves of the FLSA companionship and live-in exemptions in the long run remains to be seen. For now, Judge Leon's decisions are at least a temporary victory for third-party home care employers. Employers should keep in mind, however, that the decisions do not affect state wage and hour laws that affect these same employees.

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