

Client Alert

DOL Issues Short Reprieve to Health Care Agency Employers

October 10, 2014

The U.S. Department of Labor (DOL) has announced an unprecedented delay in the enforcement (but not the effective date) of new regulations that expand the coverage of the overtime and minimum wage obligations of the Fair Labor Standards Act (FLSA). The new regulations, issued as a final rule thirteen months ago, narrow the scope of an exclusion from FLSA coverage for home health workers. Many such individuals are currently exempt from FLSA under the "companionship services" exemption, set forth in Section 13(a)(15) of the FLSA, 29 U.S.C. § 213(a)(15). The delay acknowledges the substantial operational and financial burden facing employers, including state and local governments, in trying to comply with the new regulations.

The New Regulations – Expanding FLSA Coverage

The new regulations were formally promulgated as a final rule on October 1, 2013. *See* [78 Fed. Reg. 60453-60557](#) (October 1, 2013). They amend the DOL's existing regulations, codified at 29 C.F.R. § 552.6. The new regulations effectively negate the Supreme Court's 2007 decision in *Long Island Care at Home, Ltd., v. Coke*, 561 U.S. 158 (2007), in which the Court determined that a DOL interpretation of the existing regulation to include individuals employed "by an employer or agency other than the family or household" was reasonable. In the preamble to the final rule, DOL stated that its goal is to ensure that "more domestic service workers will be protected by the FLSA's minimum wage, overtime, and recordkeeping provisions." 78 Fed. Reg. at 60454.

One of the most important features of the final rule is a modification to Section 552.6. This section currently provides:

§ 552.6 Companionship services for the aged or infirm.

As used in section 13(a)(15) of the Act, the term *companionship services* shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however*, that such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

See 78 Fed. Reg. at 60557. The new regulation deletes the word "care" from this definition.

The new regulations also restrict the circumstances in which employees can engage in incidental "care activities," while remaining exempt from FLSA coverage. The final rule stipulates that individuals otherwise eligible for the exemption may not spend more than 20 percent of their time providing "care activities," defined as assisting with "activities of daily living (such as dressing, grooming, feeding, bathing, toileting and transferring)" or with "instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medication, and arranging medical care)." 78 Fed. Reg. at 60557.

The other significant change in the new regulations is to make it clear that the exemption is only available in situations in which home care is provided by family members. The regulations thus modify Section 552.109(a) of the DOL regulations to read:

Third party employers of employees engaged in companionship services within the meaning of § 552.6 may not avail themselves of the minimum wage and overtime exemption provided by section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services.

See 78 Fed. Reg. at 60557.

The practical effect of the new regulations is to eliminate application of the companionship services exemption to any home-healthcare worker employed by an agency, irrespective of the duties performed by such individuals. Professional caregivers employed directly by the household in which they provide services will lose the exemption unless their duties are largely restricted to performing true "elder sitter" duties, such as playing cards, watching television and taking walks.

The Delay in Taking Enforcement Action

DOL's announcement states that the reason for the delay is to give affected employers additional time to implement compliance programs and address funding issues presented by the additional cost of expanding FLSA coverage. *See* [Department of Labor, Wage and Hour Division, Application of the Fair Labor Standards Act to Domestic Service: Announcement of Time-Limited Non-Enforcement Policy, 79 Fed Reg. 60974](#) (October 9, 2014). DOL stated that it will take no enforcement action against employers between January 1 and June 30, 2015, and that the Wage and Hour Division will continue its efforts to provide technical assistance to affected employers during this time period. For the remainder of next year, DOL will "exercise its prosecutorial discretion in a manner that is consistent with" the announcement. The announcement recites concerns expressed by numerous entities, including administrators of federal and state assistance programs (including the National Association of Medicaid Directors) and a number of state governments. These entities expressed concern about the operational difficulties of compliance and the possible adverse impact on individuals who currently receive home health care. They also expressed concern about the need to have more time to make "budgetary, programmatic and operational adjustments." *Id.* at 60975.

Practical Implications

Employers with operations affected by the new regulations should not delay their implementation efforts. The DOL's announcement is an explicit acknowledgement that this expansion of FLSA coverage will be a challenging and expensive proposition. In order to comply, employers will be required to understand a series of often arcane regulations governing issues such as arranging for proper treatment of meal breaks and travel time, and other tasks that may be argued to be "compensable time" under the FLSA. Employers should insure they have accurate timekeeping policies in effect and comply with the FLSA's recordkeeping requirements. For individuals who provide service on a live-in basis, employers should also obtain enforceable agreements to exclude time spent sleeping from the definition of "compensable time." Affected employers should consider trying to work with DOL officials who are offering technical assistance to work through particularly challenging compliance issues. Finally, employers should consider the practical implications, including employee relations considerations, of the delay in enforcement activity, but not the formal effective date of the new regulations.

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