

PRESENTED AT

28th Annual Health Law Conference

April 21-22, 2016
Houston, Texas

Key Labor and Employment Issues in the Healthcare Sector

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KEY LABOR AND EMPLOYMENT ISSUES IN THE HEALTHCARE SECTOR

I. DEPARTMENT OF LABOR GUIDANCE AND INITIATIVES

A. Companionship Services Exemption

In 1974, Congress extended the Fair Labor Standards Act (“FLSA”) to workers who perform “domestic service,” but exempted employees employed in “domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.”¹ Likewise, the revised FLSA exempted “any employee who is employed in domestic service in a household and who resides in such household.”²

Prior to 2013, the Department of Labor (“DOL”) explicitly interpreted both of these exemptions to apply without regard to the identity of the employer. For example, with respect to the exemption for companionship services, the DOL explained,

The text of the FLSA makes the applicability of the companionship exemption dependent upon the nature of an employee’s activities and the place of their performance, without regard to the identity of the employer. Section 13(a)(15) exempts “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). This language is naturally read to exempt any employee who provides companionship services to an aged or infirm individual in a private home. The statute does not draw any distinction between companions who are employed by the owners of the homes in which they are working and companions who are instead employed by third party employers.³

The U.S. Supreme Court upheld this broad application of the exemption by the DOL, because “the text of the FLSA does not expressly answer the third-party-employment question” and there is no “clear answer in the statute’s legislative history.”⁴

In October 2013, citing changes in the home health care industry, the DOL reversed course and issued new regulations specifying that third-party employers of home health care workers could not make use of either exemption, even if they jointly employed the home health care or live-in domestic service worker with the household receiving the home health care.⁵ The DOL also clarified the meaning of “domestic service employment” and narrowed the scope of “companionship services” that qualify for exemption.⁶

The new regulations were scheduled to go into effect on January 1, 2015, and the DOL estimated they would effectively eliminate the exempt status of approximately two million home care

¹ 29 U.S.C. § 213(a)(15); U.S. Department of Labor Wage and Hour Division, Fact Sheet #79A.

² 29 U.S.C. 213(b)(21).

³ Wage and Hour Advisory Memo No. 2005-1 (Dec. 1, 2005).

⁴ *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 168 (2007).

⁵ Final Rule, 78 F.R. 190, 60557 (Oct. 1, 2013).

⁶ *Id.*

workers and bring those workers within the protections of the minimum wage and overtime provisions of the FLSA.⁷ Not surprisingly, home care companies were alarmed, with Lenny Verkogla, CEO of Executive Care, going so far as to claim, “[t]he impact of the DOL regulation could be so severe that live-in home care might cease to exist within two years.”⁸ Accordingly, before the rules became effective, three home care associations challenged the new regulations before the U.S. Federal District Court for the District Court, which vacated the DOL’s regulation barring third-party employers from using the companionship and live-in domestic worker exemptions in December 2014 and vacated the DOL’s revised definition of “companionship services” in January 2015.⁹ In August 2015, however, the U.S. Court of Appeals for the D.C. Circuit reversed the district court and affirmed the validity of the new regulation on both issues.¹⁰ In short, the Court of Appeals concluded the U.S. Supreme Court had held the DOL could decide how to define “companionship services” and *whether* to allow third-party employers to make use of the exemption.¹¹ The Court of Appeals order became effective on October 13, 2015 and the DOL began enforcing the new regulations 30 days later, on November 12, 2015.¹²

The DOL’s new regulations include several significant changes, most importantly (1) preventing third-party employers of home health care workers from using the exemptions for companionship services and live-in domestic service employees; (2) narrowing the scope of “companionship services” that qualify for exemption; and (3) revising the recordkeeping provisions for live-in domestic service employees.¹³ Each of these changes is discussed briefly below:

Limiting Exemptions to Household Employers

As noted above, the new regulations prevent third-party employers of employees from using the minimum wage and overtime home health care exemption, even if the home health care employee is jointly employed by the individual or household receiving the services.¹⁴ Similarly, third-party employers of live-in domestic service employees may no longer use the live-in domestic service employee overtime exemption, even if the employee is jointly employed by the individual or household using the services.¹⁵ This represents a 180-degree turn from the DOL’s prior position, which explicitly provided that third-party employers could make use of both of these exemptions.¹⁶

⁷ Department of Labor, <http://www.dol.gov/whd/homecare/litigation.htm>, last accessed on March 16, 2016.

⁸ Tim Mullaney, Home Health Care News, DOL Wage Rule Takes Effect, Provider Reaction Mixed (October 13, 2015), available at <http://homehealthcarenews.com/2015/10/dol-wage-rule-takes-effect-provider-reaction-mixed/>.

⁹ *Home Care Association of America v. Weil*, 76 F.Supp.3d 138 (D.D.C. Dec 22, 2014); *Home Care Association of America v. Weil*, 78 F.Supp.3d 123 (D.D.C. Jan 14, 2015).

¹⁰ *Home Care Association of America v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015).

¹¹ *Id.* at 1091-92.

¹² Department of Labor, <http://www.dol.gov/whd/homecare/litigation.htm>, last accessed on March 16, 2016.

¹³ Final Rule, 78 F.R. 190, 60557 (Oct. 1, 2013).

¹⁴ 29 C.F.R. 552.109(a).

¹⁵ 29 C.F.R. 552.109(c).

¹⁶ See e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (companionship exemption).

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First appeared as part of the conference materials for the
28th Annual Health Law Conference session

"Key Labor and Employment Issues in the Healthcare Sector"