Wage and Hour Issues in Home Health—The Impact of Proposed Changes in the Companionship Exemption

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Introduction

According to the U.S. Department of Labor (Department or DOL), the number of freestanding entities providing home healthcare services (those not associated with a hospital, rehabilitation facility, or skilled nursing facility) increased tenfold to almost 5,000 over a thirty-year period through 2006.[1] A significant component of this growth has been with respect to companionship services provided by third-party employers to the elderly and infirm. By virtue of regulations promulgated by DOL in 1975, third-party employers have benefited due to the fact that their employees who perform companionship services are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA).[2] Changes to FLSA's domestic service employee regulations proposed on December 15, 2011,[3] would eliminate, however, the third-party employer exception and could materially increase the cost of providing these services, and/or affect the way the services are provided.

The Companionship Exemption

In 1974, Congress extended the minimum wage and overtime premium pay requirements of the FLSA to "domestic service" employees.[4] Under current FLSA regulations, domestic service employment is defined as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed."[5] At the same time Congress brought domestic service employees within FLSA's coverage, it also created an exception for employees who provided *companionship services* for individuals who (because of age or infirmity) were unable to care for themselves.[6]

In DOL regulations, the DOL Secretary defined companionship services as:

> Those services which provide fellowship, care and protections, 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. They may also include the performance of general household work.[7]

Third-Party Employer Exclusion

As noted above, domestic service employees, according to DOL regulations, included not only employees employed directly by the family or household using their services, but also employees employed by service providers, typically home health agencies.[8] This broad definition of domestic service employee was challenged in a number of court cases on the basis that the application of the companionship exemption to employees of third-party employers conflicted with the regulations requiring that services be provided in a private home. This issue ultimately was decided in favor of third-party providers by the U.S. Supreme Court in *Long Island Care at Home, LTD v. Coke*,[9] which concluded the third-party regulation was valid and binding.

Proposed Regulatory Changes

DOL now is proposing to revise the companionship exemption. Among other changes, the Department is seeking to more clearly define (and limit) the tasks that may be performed by an exempt companion[10] and limit the companionship exemption only to individuals employed by the family or household using the services.[11] With respect to this latter change, third-party employers, such as in-home care staffing companies, would not be able to claim the exemption, even if the employee is jointly employed by the third party and the family or household.

While the proposed change goes against the Supreme Court's decision in *Coke*, the Court's decision did not foreclose such a possibility. Indeed, the Court acknowledged the statutory text and legislative history left gaps as to the scope and definition of "domestic service employment" and "companionship services," and stated DOL had the power to fill those gaps.[12] In explaining its new position, DOL referred to the significant changes in the home care industry in the thirty-five years since the original regulations went into effect and concluded the regulations, as currently written, "had expanded the scope of the exemption beyond those employees Congress intended to exempt when it enacted §§13(a)(15) and 13(b)(21) of the FSLA."[13]

Public Comment Opportunity

Upon publication of the proposed rules in the *Federal Register* (which as of the date this article was submitted had not occurred), interested parties will have sixty days to submit written comments.Information regarding the public comment process can be obtained via the Federal eRulemaking Portal at www.regulations.gov.

Going Forward—Preparing for a Possible New Future

On a number of occasions following the Supreme Court's decision in *Coke*, third-party employers were required to defend not paying overtime to workers performing home care services. For the most part, these challenges centered around the issue of whether the employees were performing duties that took them

outside the companionship exemption. If the proposed changes to the regulations are implemented, third-party homecare employers should expect close scrutiny of their practices; this time, however, on the basis of whether they are in compliance with the FLSA's minimum wage and overtime requirements. If employees performing companionship services for third-party employers are no longer exempt from the overtime provisions of FLSA, they must receive overtime pay for all hours worked in excess of forty in a work week, at a rate not less than time and one-half their regular rates of pay.[14] There are two elements to the determination of whether an employee has been paid the correct amount of overtime: (1) whether the employer correctly determined the number of hours worked ("work time" issue); and (2) whether the employer correctly calculated the employee's regular rate (regular rate issue).

Work Time

All time spent by an employee performing activities that are job related count as hours worked and must be included in determining whether an employee is entitled to overtime pay. In addition to work performed by an employee during the time the employee is considered to be "on the clock," depending on the circumstances, time spent working "off the clock" also may have to be counted, even if the work was not assigned. A number of common work time issues are discussed below.

Travel Time

Ordinarily, where an employee commutes to and from the work site from his/her residence, the travel time is not considered as hours worked. This is the case even if the employee must travel to different work sites on different days.[15] If, however, an employee is required to start or end his/her day at a home office to pick up or deliver supplies or equipment, or to receive instructions or submit reports, travel time from the home office to a work site, or from a work site to the office, is considered hours worked.[16] Time spent by an employee in travel during the employee's normal work hours must be counted as hours worked. This would include, for example, travel time between clients.[17]

Rest and Meal Periods

Rest periods of short duration, usually twenty minutes or less, must be counted as hours worked.[18] A bona fide meal period of sufficient duration, when the employee is completely relieved from duty, is not work time. Meal periods must be counted as hours worked unless all three of the following conditions are met: (1) the meal period generally is at least thirty minutes; (2) the employee is completely relieved of all duties during the period—if, for example, the employee must sit at a desk and answer the telephone during the break, the time would be compensable; and (3) the employee is free to leave their assigned station or work area (there is no requirement, however, that the employee be allowed to leave the premises).[19]

Rounding Hours Worked

FLSA allows an employer to round employee time to the nearest quarter hour. However, an employer may violate the FLSA minimum wage and overtime pay requirements if the employer always rounds down. Employee time from one to seven minutes may be rounded down, and thus not counted as hours worked, but employee time from eight to fourteen minutes must be rounded up and counted as a quarter hour of work time.[20]

Pre- and Post-Shift Work and Other Work Outside Normal Hours

Many FLSA lawsuits have involved employers failing to include as hours worked time spent by employees performing work activities, both immediately before and after the employee's designated work hours and during off hours. Some examples that might occur in the home care industry include:

- Employees attending to a client's needs either before their shift begins or after it ends;
- Time spent setting up equipment before the official shift start time, or cleaning equipment or organizing supplies after the end of the shift;
- In some circumstances, the time spent donning and doffing required gear is considered time worked when done at the work site; and
- Work performed by employees at home to complete a report, prepare for the next day, or discuss matters with the client or employer.

Sleeping Time

An employee who is required to be on duty for less than twenty-four hours is working even though the employee is permitted to sleep.[21]

On-Call Time

If an employee is required to be on call for a specified period of time, the hours in question will be considered as hours worked if the employee is so restricted that s/he cannot use the time effectively for her/his own purposes. An employee who is merely required to leave word at his home or with company officials where he may be reached is not working while on call.[22] While the regulations do not provide detailed guidance on the issue, a number of courts have weighed in, finding the following factors to be relevant to the determination: (1) the extent of geographic restrictions on the employee's movements; (2) the frequency of calls; (3) the length of time the employee must make him/herself available, (4) the ease with which the employee is able to trade on call responsibilities; (5) the ability of the employee to use a pager; and (6) the ability of the employee to engage in personal activities during on-call time.[23]

Unauthorized or Unassigned Work

Employees who, without direction or permission, perform work outside their normal work hours are considered to be engaged in compensable working time if the work is with the knowledge or acquiescence of their employer. The reason for the work is immaterial; as long as the employer "suffers or permits" employees to work on its behalf, proper compensation must be paid.[24] Essentially, this means that if an employer knows, or has reason to believe that the employee is working, the time is considered hours worked. This is true whether the work is being performed at or away from the employee's work site.

Training

Attendance at lectures, meetings, training programs, and similar activities are viewed as working time unless all of the following criteria are met: (1) attendance is outside of the employee's regular working hours; (2) attendance is voluntary; (3) the course, lecture, or meeting is not directly related to the employee's job; and (4) the employee does not perform any productive work during such attendance.[25] Time spent in training that benefits the employer is counted as hours worked.

Regular Rate

The rate at which a non-exempt employee must be paid overtime is not less than time and one-half the employee's regular rate. Except for certain types of payments that are specified in the statute, an employee's regular rate must include all payments made by the employer to, or on behalf of, that employee. Payments that are not part of the regular rate include pay for expenses incurred on the employer's behalf; premium payments for overtime work, or the true premiums paid for work on Saturdays, Sundays, and holidays; discretionary bonuses; gifts and payments in the nature of gifts on special occasions; and payments for occasional periods when no work is performed due to vacation, holidays, or illness.[26]

Additions to the Regular Rate

Certain lump sum payments must be taken into consideration in determining an employee's regular rate. Examples include: (1) on-call pay; (2) bonuses promised for accuracy of work, good attendance, continuation of the employment relationship, incentive, production, and quality of work; (3) retroactive salary increases; (4) shift differentials; and (5) longevity pay.[27]

Retroactive Calculation of Regular Rate

When an employee receives a lump-sum payment in addition to the employee's weekly pay, and the payment covers a period greater than a single work week, it must be apportioned back over the workweeks of the period during which the payment was earned by the employee. Then, the employer must examine every workweek in that period and calculate the additional overtime pay owed the employee with respect to any week in which the employee worked more than forty hours, based upon the retroactive increase in the employee's hourly rate.[28] If, however, the payment was based upon a percent of an employee's entire compensation for a certain period, the above calculation is not necessary and the employee is not entitled to any additional compensation, as this method takes into account overtime compensation.

Payment of Two Different Rates

Where an employee in a single workweek is paid at different rates for different assignments, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together, and this total is then divided by the total number of hours worked at all jobs. An alternative method of calculating overtime pay, allowed under certain circumstances, is paying overtime based on one and one-half times the hourly rate in effect when the overtime work is performed.[29]

Minimizing Overtime Costs

Third-party employers can take a number of steps to minimize their overtime costs if the proposed regulations are implemented. Four that are not available, however, are: (1) requesting that employees waive their right to overtime; (2) giving employees compensatory time off, in lieu of overtime; (3) allowing employees to "volunteer" a number of hours; and (4) averaging an employee's hours over more than one work week to take advantage of weeks in which an employee works less than forty hours.

Steps that would not be prohibited by the Act or regulations to minimize overtime, or otherwise keep costs down, include: (1) creating scheduling modules that limit employees to forty-hour weeks; (2) increasing the hours of part-time employees to avoid having full-time employees work overtime; (3) requiring exempt employees to fill in when necessary (this must be done in a manner that does not compromise the employee's exempt status); (4) reducing the hourly rate of employees performing companionship services to help offset the increase cost resulting from overtime pay; (5) sending employees home early in any week in which they worked more than their scheduled hours earlier in the week so that they work no more than forty hours total; (6) likewise, scheduling an employee for a "short day" early in the week, if it is known the employee will need to work extra time later in the week; (7) giving employees time off under a "time-off plan" (discussed below); and (8) paying employees on a "fluctuating salary" workweek basis (discussed below).

Time-Off Plan

While DOL does not permit the use of compensatory time in the private sector, it does allow employers the use of so-called time-off plans under limited circumstances. Time off is similar to compensatory time, but involves leave taken during the same pay period. Time-off plans are only allowed under the following conditions: (1) the pay period is more than a week long; (2) the employee must get time off *at time and one-half* for all

hours more than forty worked in a week; (3) the employee must take the compensatory time off *during the same pay period* in which it was accrued;[30] and (4) the employee is paid for forty hours in the week in which the time off is taken. For example, an employee who works fifty hours the first week of a two-week pay period can take off, or be ordered off, for fifteen hours (ten overtime hours times one and one half) and, accordingly, only work twenty-five hours the second week without any overtime premium. In this case, the employee would be paid for eighty hours times and work seventy-five. If the fifty-hour week occurs in the second week of the pay period, then the overtime premium must be paid.

Fluctuating Workweek

FLSA regulations permit employers to pay non-exempt employees a fixed salary for a fluctuating workweek and to compensate them for their overtime hours on a "half-time" basis.[31] Under this method of compensation, the salary covers straight-time pay for all hours worked. The employee's hourly rate will vary week to week depending on the number of hours worked since the hourly rate is determined by dividing the salary by the number of hours worked. Once the hourly rate is determined, the employee must be paid one half times that rate for all hours worked in excess of forty hours in that week. Deductions are not allowed for absences of less than a week, whether for illness, personal business, vacation, holidays, or failure to provide sufficient work. The amount of the half-time payment will necessarily vary depending on the number of hours worked in excess of forty hours in the workweek.

The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the statutory minimum hourly wage rate, and unless the employee clearly understands that the salary covers whatever straight-time hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones.[32] It is recommended that the plan be in writing and agreed to by the employee.

Employers should consult counsel before instituting a fluctuating work week payment plan as DOL's position on the appropriateness of such a plan appears to be changing, or to discuss other possible salary arrangements for non-exempt employees allowed under FLSA that might be applicable.

Conclusion

Third-party employers of employees who provide companionship services will almost certainly be a target for aggressive plaintiff lawyers if the proposed DOL regulations go into effect in their current version. This is so for at least three reasons: (1) the healthcare industry is currently, and has been for some time, an attractive target; (2) mistakes in calculating hours worked and the employee's regular rate are likely during a transition period; and (3) there are a large number of employees affected. Affected employers should start planning now for the possibility that the proposed changes will, in fact, go into effect, and have rules and systems in place to ensure compliance.

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1 DOL Notice of Proposed Rulemaking, p.8 (December 15, 2011).
2 29 C.F.R. § 552.109(a).
3 DOL Notice of Proposed Rulemaking (December 15, 2011).
4 29 U.S.C. §§ 206(f), 207(l).
5 29 C.F.R. § 552.3.
6 29 U.S.C. § 213(a)(15).
7 29 C.F.R. § 552.6.
8 29 C.F.R. § 552.109(a).
9 *Long Island Care at Home, Ltd. V. Coke*, 551 U.S. 158 (2007).
10 The proposed regulations limit a companion's duties to fellowship and protection. Examples of activities that fall within fellowship and protection may include playing cards, watching television together, visiting with friends and neighbors, taking walks, or engaging in hobbies. The proposed regulations provide some allowance for certain incidental intimate personal care services, such as occasional dressing, grooming, and driving to appointments, if this work is performed in conjunction with the fellowship and protection of the individual, and does not exceed 20% of the total hours worked by the companion in the workweek. DOL Notice of Proposed Rulemaking, pp. 16-17 (December 15, 2011).
11 DOL Notice of Proposed Rulemaking, p. 25 (December 15, 2011).
12 *Coke*, 551 U.S. at 167-168.
13 DOL Notice of Proposed Rulemaking, p.2 (December 15, 2011).
14 A number of states already extend minimum wage and overtime coverage to most third-party-employed home care workers who may otherwise fall under the federal companion exemption. DOL Notice of Proposed Rulemaking, pp. 29, 53-53, 87 (December 15, 2011).
15 29 C.F.R. § 785.35.
16 29 C.F.R. § 785.38.
17 *Id.*
18 29 C.F.R. § 785.18.
19 29 C.F.R. § 785.19.
20 29 C.F.R. § 785.48(b).
21 29 C.F.R. § 785.21.
22 29 C.F.R. § 785.17.
23 *Owens v. Local 169*, 971 F.2d 347 (9th Cir. 1992).
24 29 C.F.R. § 785.11.
25 29 C.F.R. § 785.27.
26 29 U.S.C. § 207(e).
27 *See* for example, 29 C.F.R. §§ 778.208, 778.223, and 778.303.
28 29 C.F.R. § 778.209.
29 29 U.S.C. § 207(g)(2); 29 C.F.R. §§ 778.115 29 C.F.R. § 778.419.
30 *Dunlop v. New Jersey*, 522 F.2d 504 (3rd Cir. 1975), *vacated on other grounds*, 427 U.S. 909 (1976); *see also* Wage and Hour Opinion Letter (Dec. 27, 1968).
31 29 C.F.R. § 778.114(a).
32 29 C.F.R. § 778.114(c).

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