End of Companionship Exemption?

Insights
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In April, the U.S. Labor Department (DOL) is scheduled to announce regulations that will almost certainly increase the cost of employing individuals as home care aides who are considered "companions" under the Fair Labor Standards Act (FLSA). Currently, employers are not required to pay the federal minimum wage or overtime to such workers when they qualify for the companionship exemption under the FLSA. But DOL's proposed rules would dramatically limit the exemption.

Most significantly, the rules would make the exemption inapplicable to persons employed by third-party employers such as home-healthcare agencies. Under the new rule, such organizations would instead be required to pay not less than the federal minimum wage and overtime to employees who they might previously have been treating as exempt.

The Current Rule
Since 1974, individuals who are employed in "domestic service employment" to provide "companionship services" to the elderly or infirm have been exempt from the minimum wage and overtime requirements of the FLSA.

"Domestic service employment" refers to services of a household nature that the worker performs in or about the private home of the person by whom he or she is employed. "Companionship services" are currently defined to 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."

Companionship services do not include services relating to the care of the aged and infirm which require and are performed by trained personnel, such as a registered or practical nurse. But the exemption does include the performance of "general" household work, such as making beds and washing clothes, so long as this work is incidental to the "fellowship, care and protection" of the aged or infirm person and does not exceed 20% of the total weekly hours worked by the employee. Thus the "incidental" work is permissible, but is subject to the 20% cap.

In sum, under the current rule, the following requirements must be satisfied for the exemption to

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apply:

- an employee must perform “companionship services”;
- “incidental” or general household work performed by the employee may not exceed 20% of the total weekly hours worked by the employee;
- the work must not be of the type which requires and is performed by nurses; and
- the work must be performed at the aged or infirm individual’s private home.

DOL’s Rationale for the New Rule
In the DOL’s view, the individuals who provide in-home care today are not the type of workers that Congress intended to exempt when it passed the “companionship” exemption in the 1970s. According to the DOL, Congress intended to exempt “neighbors performing elder sitting” from the FLSA requirements and not the “professional caregivers” in today’s world.

The exemption would no longer be available to third-party employers. One of the biggest changes within the proposed rule is that third party employers such as home-healthcare agencies or third-party staffing agencies would no longer enjoy the exemption. Instead, the exemption would only be available to the individual, family or household employing the companion.

This change in particular would have a dramatic impact. According to the DOL, 70% of home-healthcare workers are employed by third party agencies. Going forward, these third-party employers would have to completely change the compensation model for these employees.

More duties would be deemed “incidental” and subject to the 20% cap. The other significant change in the proposed regulation is the number of duties that would no longer constitute “protection and fellowship.” Many of these duties would instead be considered “incidental” or “general household” work and therefore subject to the 20% cap limitation.

For example, washing and folding laundry would be considered an non-companionship duty. Similarly, driving an aged or infirm individual to appointments or errands would become an incidental duty and subject to the 20% cap. Meal preparation would also be restricted. It would remain an “incidental” activity, but only if the meal is eaten when the companion is present – preparation of a week’s worth of meals would not be an exempt activity if the meals are eaten when the companion is not present.

Bathing would also be deemed “incidental” and subject to the 20% cap. Moreover, if a companion performed any of these duties for another member of the household, the exemption would be lost.

The significance of the expanded “incidental services” category is that if the companion’s provision of these incidental services exceeds 20% of the employee’s total hours worked in any work week, the exemption is lost for that employee for that work week and the companion must be paid not less than the FLSA minimum wage plus any overtime due for that workweek.

What Does It All Mean?

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The proposed regulation will limit the "companionship exemption" to the point of non-existence in any practical sense. The vast majority of employers that currently utilize the exemption (third-party employers) will be required to begin paying the minimum wage and overtime, if they do not already.

Moreover, even for families and individuals that will still be able to utilize the exemption, it is more likely that the exemption will be lost in a significant number of work weeks due to companions' performing services that fall into the expanded "incidental services" category that is subject to the 20% cap limitation. All of this means that practically anyone who employs these domestic service companions, including third party employers and families, probably will have higher compensation costs going forward.

Perhaps the last hope for staving off these changes is pending legislation that would block DOL's rule. Arguing that DOL's rule would drive up the cost of in-home care and force families to institutionalize seniors, legislators have proposed bills that would remove the Secretary of Labor's authority to change the exemption.

But given the prevailing gridlock in Congress, employers (other than families and individuals) are probably best served by planning to make the necessary changes to comply with the minimum wage and overtime requirements of the FLSA, rather than counting on a legislative reprieve. Finally, as always, employers should be mindful of any state law requirements that may apply to this area of wage and hour law.

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