USDOL Guidance Released On "Adult Foster Care", "Shared Living Arrangements"

Insights
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We reported earlier that the U.S. Labor Department has issued a Final Rule re-stating the requirements for and limitations upon the federal Fair Labor Standards Act's Section 13(a)(15) "companionship exemption". The changes are effective in January 2015. As has been widely discussed, this exemption will then no longer be available to third-party employers under the new regulations.

These regulations will also affect the Section 13(b)(21) overtime exemption for so-called "live-in domestics", that is, employees employed in domestic service in a household who reside in that household. Beginning in January, third-party employers will not be able to rely upon the exemption for these employees.

Changes Provoked "Shared Living" Questions
USDOL's revisions prompted many stakeholders to voice concerns about other FLSA-related nuances of "shared living" arrangements. The agency recently responded with Administrator Interpretation No. 2014-1, which addresses how the FLSA applies to "adult foster care" or "shared living arrangements".

The guidance focuses upon living arrangements in which one or two "consumers" of services and a "provider" of those services share a home, as opposed to group-home settings or facilities having multiple workers and shifts. In its illustrations of typical shared-living arrangements, USDOL gives the example of a "college student moving into the extra bedroom in a home owned by an 80 year old man who needs assistance with bathing and dressing in the mornings . . .." The student would be the service "provider", and the homeowner would be the "consumer" of those services.

USDOL gives another example of a "consumer [who] moves into the home of the provider and becomes part of the provider's family, sharing in family meals and activities . . . [and] the provider provides constant care and attention to the consumer, including by transporting him to his doctor's appointments . . .." Here, the tenant is the "consumer" of services, while the homeowner is the service "provider".

Is The Provider An FLSA "Employee"?
Particularly noteworthy is the analysis of whether an employment relationship exists in the shared-living arrangement:

- Between the provider and the consumer, or
- Between the provider and a third-party who facilitates the arrangement.

As a part of that evaluation, USDOL provided some "rules of thumb" centering on the *location* of the living arrangement.

The Interpretation suggests that, when the consumer moves into the provider's home, in "most circumstances" USDOL is likely to deem the provider not to be the consumer's employee. USDOL's rationale is that the provider typically determines the schedule and routine within his or her own home so as to control the conditions of work, that is, the provider is not taking direction from the consumer. Conversely, the guidance suggests that it will "often . . . be the case that a provider who moves into the home of a consumer is the consumer's employee."

The factors for determining whether a provider is an employee of a third-party facilitator include things like:

- The degree of oversight the third-party exercises over the arrangements and other surrounding circumstances;
- Whether the arrangement occurs in the provider's house (which might tend to favor a finding of non-employment) or a separate location (which might tend to favor a finding that the provider is employed by the third-party); and
- Whether the provider must seek the third-party's permission for vacations, days off, or other absences, instead of simply providing notice of these occurrences.

The Bottom Line
The Administrator Interpretation provides further insight into how USDOL will analyze certain aspects of shared-living arrangements. It might even influence how courts view them.

But the guidance is by no means exhaustive or conclusive. For one thing, litigation about whether someone is an independent contractor under the FLSA will not abate anytime soon, and courts are not bound by what USDOL says.

Instead, whether a provider is found to be an FLSA employee is ultimately going to depend upon of a variety of factors under the less-than-precise "economic reality" test. For instance, the location of the services provided could be outweighed by other considerations in particular situations. Even USDOL's guidance itself is hedged with qualifiers such as "generally", "often", "most circumstances", and so on.

Providers subject to the FLSA who are non-exempt employees must be paid in compliance with that law's minimum-wage, overtime, and timekeeping requirements. Some such providers employed by third-parties might be exempt from those requirements today but no longer will be in January.

Employers of such providers should immediately evaluate what they must do or plan to do ensure FLSA compliance. This analysis should take into account unique ways in which the FLSA affects these relationships, such as how to determine hours worked generally, how to treat sleep-time, and many other considerations.

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