Regulation Proposed to Limit FLSA's "Companionship" Exemption

Insights
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As we suspected, efforts to eviscerate the federal Fair Labor Standards Act's Section 13(a)(15) "companionship" exemption have now formally moved to the regulatory arena. The U.S. Labor Department has proposed a regulation that would limit the exemption to a far-narrower segment of those employees who work as in-home caregivers. This move no doubt reflects a political judgment that legislative measures to amend the FLSA itself (about which we wrote in June) would not emerge from Congress.

The Proposed Limitations Are Substantial

The exemption provides that the FLSA's minimum-wage and overtime requirements do not apply to employees "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves . . .." One of DOL's stated goals is to limit this exemption to companions employed *only* by the individual, family, or household using the worker's services. Under the proposal, third-party employers, such as those companies existing for the purpose of providing companionship services, apparently could not assert the exemption for their employees engaged in this work. This would be true even if the employee is jointly employed by both the third party and the individual/family/household.

The proposed regulations would also reduce the scope of exempt activities from "fellowship, care, and protection" to "fellowship and protection". DOL's examples of what would qualify as "fellowship and protection" include walks, watching television, and "incidental, personal care services, such as dressing and grooming." However, if the companion provided "incidental, personal care services" to an extent that exceeded 20 percent of his or her total hours worked in a workweek, the exemption would be lost for that workweek. "[G]eneral household work", such as vacuuming and laundry, would also destroy the exemption for the workweek in which it occurs.

So What's The Justification?

Congress authorized DOL to "define[] and delimit[]" the exemption. However, DOL's two principal rationales for the proposal appear to have more to do with legislative considerations falling within Congress's bailiwick than with appropriate interpretative rulemaking.

First, DOL says that the earnings of in-home caregivers have not grown commensurately with those of the in-home-care services industry generally since the exemption was promulgated in 1975. In addition, DOL predicates its changes upon a perception that today's in-home workers are more properly characterized as professional caregivers as compared to their predecessors in the 1970s, when the statutory exemption was enacted.

Objections Must Be Registered Promptly

Many believe that the proposal will have significant negative consequences. If the revision is adopted, they say, this will substantially increase labor costs for third-party employers who can no longer rely upon the exemption. In turn, this will translate into an far-greater financial burden for individuals, families, and households who have been depending upon those service providers. Both developments are likely to result in an appreciable drop in companionship jobs and employment opportunities – in other words, the revision would by no means be a job-creator.

Anyone wanting to comment on or object to this proposal should act quickly. Submissions must be tendered within 60 days following the proposed rule's publication in the Federal Register.

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