EXEMPT NO MORE; APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERVICE

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On October 1, 2013, the United States Department of Labor (the "Department") issued important new regulations that significantly modified the long-standing companionship services exemption under the Fair Labor Standards Act (the "FLSA"). The regulations, which were titled "Application of the Fair Labor Standards Act to Domestic Service; Final Rule" (the "Final Rule"), were intended by the Department and by President Obama to bring as many as two million domestic service workers under the protection of the FLSA's minimum wage and overtime provisions. However, the Final Rule also prohibits third party employers, such as home care agencies, from claiming the companionship or live-in exemptions after the effective date, January 1, 2015. Full enforcement of the new regulations began on January 1, 2016.

The Final Rule instituted sweeping changes to the minimum wage and overtime protections afforded to domestic workers, and marked the first changes to the companionship services exemption in 38 years. Although the FLSA did not originally protect workers employed directly by households in domestic service, Congress extended FLSA coverage to these "domestic service" workers through an amendment to the FLSA in 1974 and through regulations that followed in 1975. However, the 1974 amendments included an exemption for certain domestic service workers. Under this exemption, domestic service workers employed to provide "companionship services" to elderly persons or persons with illnesses, injuries, or disabilities were not required to be paid the minimum wage or overtime pay otherwise required by the FLSA.

Between 1975 and January 1, 2015, the effective date of the Final Rule, the Department permitted agencies (along with individuals and families) employing domestic service workers to benefit from the companionship exemption and defined "companionship services" broadly to include an unlimited amount of ordinary housework and personal services so long as such work was related to the care of the elderly or ill persons.

SUMMARY OF CHANGES[1]

The Final Rule, effective January 1, 2015, contains several significant changes from the prior regulations:

1. **Minimum Wage and Overtime Protections.** The Final Rule revised the Department's regulations to clarify and narrow the duties that fall within the term "companionship services" and to prohibit third party employers, such as home care agencies, from claiming the companionship or live-in exemptions. The major effect of the Final Rule is that as many as two million domestic service workers are now protected by the FLSA's basic minimum wage and overtime provisions.

2. **Companionship Services.** The term "companionship services" is defined as including the provision of fellowship and protection for an elderly person or a person with an illness, injury, or disability who requires assistance in caring for himself or herself. Under the Final Rule, "companionship services" also includes the provision of "care" if the care is provided

attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek. "Fellowship" means to engage the person receiving services in social, physical, and mental activities. "Protection" means to be present with the person receiving services in his or her home or to accompany the person when outside of the home to monitor the person's safety and well-being. Examples may include: conversation; reading; games; crafts; and accompanying the person on walks, on errands, to appointments, or to social events.

3. **Care.** The definition of "companionship services" allows for the performance of "care" services so long as those services are performed attendant to and in conjunction with the provision of fellowship and protection and if such services do not exceed 20 percent of the total hours worked in a workweek. In the Final Rule, "care" is defined as assistance with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

4. **Household Work.** The Final Rule limits household work to that work which benefits the elderly person or person with an illness, injury, or disability. By comparison, household work that primarily benefits other household members, including making dinner for another household member or doing laundry for everyone in the household, results in loss of the companionship exemption to the FLSA.

5. **Medically Related Services.** The definition of companionship services does not include medically related services. These services are usually performed by trained medical personnel such as registered nurses, licensed practical nurses, or certified nursing assistants. The determination is not based, however, on the actual training or occupational title of the worker performing the services. The performance of medically related tasks during the workweek results in loss of the FLSA exemption and employees performing such tasks are entitled to minimum wage and overtime pay as set forth in the FLSA.

6. **Live-In Domestic Service Employees.** Live-in domestic service workers who reside in the employer's home permanently or for an extended period of time and are employed by an individual, family, or household are exempt from overtime pay, although they must be paid at least the federal minimum wage for all hours worked. Live-in domestic service workers who are solely or jointly employed by a third party must be paid at least the federal minimum wage and overtime pay for all hours worked by that third party employer. Employers of such workers may agree to exclude certain time from compensable hours worked, such as sleep time and meal time. Under the Final Rule, these employers must also maintain an accurate record of hours worked by live-in domestic service workers by requiring that the employee record his or her hours worked and submit the record to the employer.

7. **Third Party Employers.** Finally, under the Final Rule, third party employers (such as home care staffing agencies) are not permitted to claim either the FLSA exemption for companionship services or the FLSA exemption for live-in domestic service employees. Even when the employee is jointly employed by the third party employer and the individual, family, or household using the services, neither exemption can be claimed. Only individuals, families, or households may claim an applicable FLSA exemption.

STEPPED-ENFORCEMENT

Although the effective date of the Final Rule has now passed, the Department implemented a unique, time-limited, non-enforcement policy. For the initial six months, from January 1, 2015 to June 30, 2015, the Department pledged not to bring enforcement actions against any employers in violation of FLSA obligations resulting from the Final Rule. For the following six months, from July 1, 2015 to December 31, 2015, the Department pledged to exercise "prosecutorial discretion" when determining whether to bring enforcement actions against employers. The Department offered to give particular consideration to States and other entities which had made good faith efforts to bring their home care programs into compliance with the FLSA.

OUTCOME OF LITIGATION[2]

The Final Rule was also the subject of litigation. Before and just after the Final Rule's effective date, January 1, 2015, a Federal district court judge in Washington, D.C. held in *Home Care Association of America, et al. v. David Weil, et al.*, Civil Action No. 14-967, that major provisions of the Final Rule were invalid. The plaintiffs in that case challenged the Department's legal authority to make such sweeping changes to the FLSA's application. The plaintiffs specifically challenged the new rule's effect on the application of the companionship services and live-in domestic service employee exemptions to third-party employers. The district court judge vacated the Department's third-party employer regulation, and later stayed the effectiveness of the narrowed definition of "companionship". In a subsequent order, the judge vacated the Final Rule's revised definition of "companionship" altogether.

However, the Department appealed in the U.S. Court of Appeals for the District of Columbia Circuit and the Final Rule was upheld in a unanimous decision by that circuit issued on August 21, 2015.[3] The U.S. Court of Appeals opinion became effective on October 13, 2015, but the Department did not begin enforcement of the Final Rule until 30 days after that date, November 12, 2015. Even then, from November 12 through December 31, 2015, the Department exercised discretion in keeping with the second phase of the time-limited, non-enforcement policy.

Now that the non-enforcement policy period has expired and the Final Rule has survived its legal challenges, the time for home care agencies and other third parties to act has unquestionably arrived. Employers are no longer permitted to claim the previous FLSA exemptions for companionship services and for live-in domestic service employees, meaning that employees are now protected by the FLSA's minimum wage and maximum hour components.

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1 http://www.dol.gov/whd/regs/compliance/whdfsFinalRule.htm
2 http://www.dol.gov/whd/homecare/litigation.htm
3 http://www.dol.gov/whd/homecare/0821appealdecision.pdf