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NEW FEDERAL DOMESTIC WORKER REGULATIONS

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HISTORY OF DOMESTIC WORKERS UNDER THE FLSA

According to USDOL (U.S. Department of Labor), when Congress enacted the Fair Labor Standards Act (FLSA) in 1938, it exempted workers employed directly by households in domestic service, such as cooks, housekeepers, maids, and gardeners. In 1974, Congress generally extended the FLSA's coverage to include domestic service workers, but also exempted casual babysitters and workers employed to provide "companionship services" from its minimum wage and overtime provisions. It also exempted live-in domestic workers from its overtime pay requirements.

For more information on federal minimum wage and overtime requirements for domestic workers, see: http://www.dol.gov/whd/homecare/.

ISSUE

This report describes recent changes to federal regulations on domestic workers, legal challenges and subsequent federal court decisions on them, and their impact on Connecticut's minimum wage and overtime laws. The Office of Legislative Research is not authorized to issue legal opinions and this report should not be considered one.

SUMMARY

In 2013, the U.S. Department of Labor (USDOL) revised its regulations regarding minimum wage and overtime requirements for certain domestic workers to (1) eliminate provisions that exempted third-party employers (e.g., home care agencies and state Medicaid programs) from paying the minimum wage and overtime to domestic workers providing "companionship services" and (2) tighten the definition of "companionship services" under which all employers can claim an exemption to minimum wage and overtime requirements. In general, these changes extended federal minimum wage and overtime requirements to cover significant numbers of previously exempted domestic workers.

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The revisions were originally scheduled to take effect at the start of 2015, but a group of trade associations representing third-party agencies delayed their implementation by challenging them in federal court. In August 2015, the U.S. Court of Appeals upheld the revised regulations in *Home Care Association of America v. Weil*, (No.15-5018) which subsequently took effect on October 15, 2015.

Because Connecticut's minimum wage and overtime law for domestic workers is tied to federal law, the court's decision will entitle more domestic workers in Connecticut to minimum wage and overtime pay. (This could change if the U.S. Supreme Court considers an appeal and subsequently overturns the decision.) To a large extent, however, this must be determined on a case-by-case basis, subject to the type of employer employing the domestic worker and the worker's duties. Third-party employers, individual consumers or their families ("consumer employers") who employ domestic workers, joint employers, and home care registries may all have roles as employers that require case-specific determinations of their status under the new regulations.

REVISED REGULATIONS

The federal Fair Labor Standards Act (FLSA) generally sets federal minimum wage and overtime pay requirements that all states must at least meet. However, the FLSA does not require (1) minimum wage and overtime pay for domestic workers who provide "companionship" or (2) overtime pay for live-in domestic workers. Domestic workers who do not qualify for the "companionship" or "live-in" exemptions must be paid minimum wage and overtime pay regardless of who their employer is (unless they are considered bona fide independent contractors or casual babysitters).

In 2013, the USDOL issued revised regulations that (1) eliminate the companionship and live-in exemptions for third-party employers and (2) tighten the definition of "companionship services" under which an employer could claim the companionship exemption (29 CFR Part 552). USDOL indicated that the revisions reflect changes in the homecare industry and workforce since the regulations were originally issued in 1975.

Under the new definition, "companionship services" means the provision of fellowship and protection to an elderly person or a person with an illness, injury, or disability who requires assistance in caring for him or herself. Companionship can include providing assistance with activities of daily living (e.g., preparing meals, driving, light housework, managing finances, assisting with medications, and intimate personal care such as dressing or bathing) as long as it does not exceed

20% of the total hours worked per week. It cannot include (1) general domestic services performed primarily for the benefit of other household members or (2) medically-related services typically performed by trained personnel (e.g., registered nurses, licensed practical nurses, or certified nursing assistants).

COURT CHALLENGES

The revised regulations were scheduled to take effect on January 1, 2015; however the Home Care Association of America challenged the regulations in court. In December 2014 and January 2015, a U.S. District Court issued two rulings in favor of the association and vacated the revised regulations. The USDOL appealed.

Court of Appeals Decision

On August 21, 2015, the U.S. Court of Appeals, District of Columbia Circuit, ruled in favor of the USDOL and reversed the district court's decision. It found that in 2007, the U.S. Supreme Court acknowledged the USDOL's discretion whether to apply the FLSA's companionship and live-in exemptions to third-party employers. Thus, the agency did not overstep its bounds (as the district court had ruled) and its interpretation of statute was not arbitrary or capricious.

Following the decision, the home care association asked the U.S. Supreme Court to stay the lower court's decision. However, on October 8th the Supreme Court denied the request and the revised regulations subsequently took effect on October 15, 2015. The association filed an appeal with the U.S. Supreme Court in November, but the Court has not yet announced whether it will hear the case.

Implementation

The USDOL indicates that until January 1, 2016, it will exercise prosecutorial discretion in determining whether to bring enforcement actions and give particular consideration to the extent to which states and other entities have made good faith efforts to comply with the revised regulations since they were finalized in October 2013.

WHAT THE DECISION MEANS FOR CONNECTICUT

Connecticut's minimum wage and overtime laws cover "employees," which include:

> any individual employed or permitted to work by an employer, but shall not include any individual employed…in domestic service in or about a private home, except any individual in domestic service employment as defined in the regulations of the federal Fair Labor Standards Act (CGS § 31-58).

This definition means that domestic workers who must be paid the minimum wage and/or overtime under the FLSA must be paid the state's minimum wage and overtime. Domestic workers who are exempt from the FLSA's minimum wage and overtime requirements are also exempted from Connecticut's minimum wage and overtime requirements.

Thus, unless the U.S. Supreme Court ultimately overturns the *Home Care Association of America v. Weil* decision, domestic workers who must be paid minimum wage and/or overtime under the new regulations must also be paid under the state's minimum wage and overtime requirements. However, the status of the worker's employer and the worker's duties each play important roles in determining (1) whether the worker must be paid minimum wage and overtime and (2) who must pay. Third-party employers, consumer employers, joint employers, and home care registries may all have roles as employers that require case-specific determinations of their status under the new regulations.

Third-Party Employers

Third-party employers that directly employ domestic workers will no longer be able to claim the companionship exemption to minimum wage and overtime requirements or the live-in exemption to overtime requirements. Thus, they must pay their domestic workers the state minimum wage and time-and-a-half for weekly hours worked beyond 40.

Now that the federal regulations are effective, CGS § 31-76b allows third-party employers and their employees who provide companionship services to agree to exclude a regularly scheduled sleep period from the work hours used to determine the employee's overtime pay if (1) the employee is required to be present at a worksite for at least 24 consecutive hours, (2) adequate on-site sleeping facilities are provided to the employee, and (3) the employee receives at least five hours of sleep time. Thus, under such an agreement, the employee's sleep time would not be included when determining whether the employee qualified for overtime pay and the employee would not have to be paid overtime for their sleep time.

Existing law also allows for meal period exclusions unless an employee is required or permitted to work during the meal period (CGS § 31-76b).

Consumer Employers

Consumer employers who employ a domestic worker to provide "companionship services" remain exempt from minimum wage and overtime requirements. However, the tightened definition of "companionship services" will presumably make it more difficult for consumer employers to qualify for the exemption. Such

employers will have to ensure that their domestic workers (1) spend 20% or less of their work time providing care to the consumer, (2) do not perform any services that primarily benefit other household members, and (3) do not perform any medically related services typically performed by trained personnel.

Consumer employers who employ a live-in domestic worker do not have to pay overtime rates, but must meet federal and state minimum wage requirements (unless the worker qualifies for the companionship exemption).

Consumer employers who employ a domestic worker who does not qualify for the companionship or live-in exemptions must pay the worker the state minimum wage and overtime requirements unless the worker is a bona fide independent contractor or casual babysitter.

Joint Employers

Under the new regulations, joint employers are considered third-party employers and cannot claim the companionship or live-in exemptions. However, consumer employers can still claim these exemptions even if they are joint employers with a third-party. Thus, if a consumer and a state agency are deemed joint employers of the same worker providing companionship services, the consumer would not have to pay the worker minimum wage and overtime pay, but the state agency would.

Under the FLSA, "joint employment" occurs when a single individual is considered an employee of more than one employer for the same employment. The regulations do not state a clear rule for making such a determination, but instead refer to federal case law, which makes determinations on a case-by-case basis by examining and weighing all the facts in a particular case and assessing the "economic realities" of the work relationship at issue. The factors considered include:

1. whether the third-party can direct, control, or supervise the worker or the work being performed;

2. whether the third-party can hire or fire, modify employment conditions, or determine pay rates or payment methods;

3. the degree of permanency and duration of the relationship;

4. where the work is performed and whether the tasks require special skills;

5. whether the work performed is an integral part of the third-party's overall business operation;

6. whether the third-party undertakes responsibilities that are commonly performed by employers;

7. whose equipment is used; and

8. who performs payroll and similar functions.

The following USDOL example illustrates an instance when a public entity (i.e., the state) would be considered a domestic worker's joint employer:

> *Example:* In a consumer-directed program, a public entity collectively bargains with a union representing home care providers. The public entity exercises control by providing extensive required training, offering paid time off, furnishing equipment, creating grievance procedures, setting wage rates, and offering benefits. The public entity also retains some control over hiring and firing by completing performance evaluations and reserving the right to terminate a worker for poor performance. A fiscal intermediary processes payroll and tax withholding but would not be considered a joint employer.

It appears that this example presents a situation similar to that of domestic workers employed as personal care attendants in various state-funded Medicaid waiver programs. If so, the state would be deemed the workers' joint employer and thus subject to state minimum wage and overtime requirements.

Home Care Registries

The new regulations do not specifically address home care registries, which generally operate under a business model that refers domestic workers to consumers and sees the workers as either independent contractors or the consumer employer's employees. However, under existing law, a registry could be deemed a domestic worker's employer or joint employer using the same case-by-case test applied to joint employers above. A registry deemed a third-party employer or joint employer would be required to meet state minimum wage and overtime requirements. A consumer employer who employs a domestic worker referred by a registry could claim the companionship or live-in exemptions.

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