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The Companionship Exemption Remains: D.C. District Court's Most Recent Decision in Home Care Association of America v. Weil Marks Second Victory for Home Care Employers

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On January 14, 2015, Judge Richard J. Leon of the D.C. Federal District Court issued another favorable opinion for home care employers by vacating a Department of Labor regulation that would have narrowed the definition of "companionship services." The decision comes on the heels of another decision by Judge Leon last month in which he vacated another proposed regulation that would have prevented third-party home agencies from applying the companionship exemption to its employees.

By way of background, the FLSA's companionship exemption generally applies to persons in domestic service employment who provide care, fellowship and protection for individuals who, because of age or infirmity, are unable to care for themselves. Home care providers employing exempt companions do not have to pay them overtime or at the minimum wage.

In October 2013, the DOL issued its Final Rule revising its FLSA domestic service employment regulations. The DOL regulations sought to eliminate the "companionship services" exemption for third-party providers of home care services and to narrow the definition of services qualifying as "companionship services." Specifically, the DOL sought to change that definition by limiting the provision of "care," defined as assistance with "activities of daily living" like dressing, feeding and bathing, and "instrumental activities of daily living" to less than 20% of the total hours worked in a week, to qualify for the exemption. Together, these regulations would have all but ended most employer's ability to avail itself of the companionship exemption.

The regulations were originally scheduled to go into effect January 1, 2015. In June 2014, trade associations representing third-party home care providers filed suit challenging both the third-party provider restriction and the changes to the new companionship service definition.

On December 22, 2014, in Home Care Association of America v. Weil, Judge Leon first vacated the portion of the regulation that would have restricted third-party home care providers from taking advantage of the "companionship services" exemption (as well as the exemption for live-in domestic service employees) essentially accusing the DOL of trying to do through regulation what could not be

accomplished through legislation. In its opinion, the Court held that the DOL's regulations ignored Congress's clear intent and contravened the FLSA's language regarding exemptions. While the Court acknowledged the DOL's authority to define and defend the statutory terms in the exemption, it found that the DOL could not manipulate its authority to "effectively rewrite the exemption out of law." More specifically, the Court found that the DOL's attempt to limit applicability of the exemption based on the nature of the employee's employer contradicted the clear language of the exemption, which applied to "any employee" providing companionship services or residing in the household in which he or she performs domestic services. In addition, the Court also considered the fact that Congress had repeatedly declined to alter the exemptions despite revisiting the FLSA many times since they were amended in 1975.

Just two days later, on December 24, 2014, the trade associations asked the Court to also stop the narrowed "companionship services" definition from becoming effecting on January 1, 2015. The Court stayed the January 1, 2015 effective date pending a hearing and last week, on January 14, 2015 issued an order vacating the newly proposed definition altogether. In its opinion, the Court echoed its earlier rationale and observed that "Here, I am once again faced with a long-standing regulation left untouched by Congress for 40 years . . . Congress has made numerous changes to the FLSA exemptions . . . But Congress has not shown one iota of interest in cabining the definition of companionship services, which has been interpreted by the [DOL] the same way for 40 years."

The Court's decisions are a significant victory for third-party home care employers who employ about 90% of the home care workers in the US. While the DOL may appeal, the decision should serve as a warning shot to the Obama Administration as it prepares to revisit the FLSA's white-collar exemptions.

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