DOL Issues Final Rule on Companionship Exemption

The US Department of Labor (DOL) has released its final rule implementing a new, narrowed interpretation of the Companionship Exemption to the wage and hour requirements of the Fair Labor Standards Act (FLSA). Most significantly, DOL is revising the definition of “companionship services” to clarify and narrow the duties that fall within the term; in addition third party employers, such as home care agencies, can no longer claim either the companionship exemption to wage and hour rules or the exemption from the FLSA’s overtime provision for domestic service employees who reside in the household in which they provide services. The final rule indicates that any direct care worker who is employed by a third party can no longer be considered a companion for purposes of the FLSA and must be paid according to federal minimum wage and overtime requirements. DOL has confirmed that the rule applies to individuals who receive stipends or difficulty of care payments, such as in shared living or other similar arrangements, as well as shift workers.

The new regulatory text precludes third party employers (e.g. home care agencies) from claiming the exemption for companionship services or live-in domestic service employees. The Final Rule also updates the definition of “companionship services” to restrict the term to encompass only workers who are providing “limited, nonprofessional services” DOL believes Congress envisioned when creating the exemption. Specifically, the rule provides that “companionship services” means “the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself.” It also defines “fellowship” as “engaging the person in social, physical, and mental activities” and “protection” as “being present with the person in his or her home, or to accompany the person when outside of the home, to monitor the person’s safety and well-being.” Under the 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. “Care” is defined as assistance with activities of daily living and instrumental activities of daily living. The term “companionship services” does not include general domestic services performed primarily for the benefit of other members of the household, or medically related services. The determination of whether the services performed are medically related is based on “whether the services typically require and are performed by trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants, regardless of the actual training or occupational title of the individual providing the services.”

Third Party Employment

The regulation addresses questions about determining whether there is a third party employer, or joint employment, by referring to “long-standing case law from the U.S. Supreme Court and other federal appellate courts interpreting the language of the FLSA and applying the ‘economic realities’ test.” Factors to consider under the test, DOL says, “may include whether an employer has the power to direct, control, or supervise the
worker(s) or the work performed; whether an employer has the power to hire or fire, modify the employment conditions or determine the pay rates or the methods of wage payment for the worker(s); the degree of permanency and duration of the relationship; where the work is performed and whether the tasks performed require special skills; whether the work performed is an integral part of the overall business operation; whether an employer undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, whose equipment is used, and who performs payroll and similar functions.” An economic realities test, the rule stresses, does not depend on “isolated factors but rather upon the circumstances of the whole activity.”

In response to concerns submitted to DOL by NASDDDS, the rule directly addresses how a home care services scenario may be assessed utilizing the economic realities test by providing a hypothetical example in which an individual is part of a self-direction program that allows them to hire a direct care worker through an entity that has contracted with the state to serve as the “fiscal/employer agent” for program participants who employ direct care workers. In the scenario, the “fiscal/employer agent” performs tasks similar to those that commercial payroll agents perform for businesses, such as maintaining records, issuing payments, addressing tax withholdings, and ensuring that workers’ compensation insurance is maintained for the worker, but “is not involved in any way in the daily supervision, scheduling, or direction of the employee,” and the individual “has complete budget authority over how to allocate the funds she receives under the Medicaid self-direction program, negotiates the wage rate with the direct care worker, is wholly responsible for day-to-day duty assignments, and has the sole power to hire and fire her direct care worker.” In this scenario, DOL indicates, the fiscal/employer agent is likely not an employer of the direct care worker, and the consumer is likely the sole employer, and, assuming the other requirements are met, may use the companionship exemption in regard to this employee. However, the rule does not directly address the likelihood that there is a Medicaid rate, determined by the state, for the services that the employee has been hired to provide. It is unclear whether DOL would consider setting the Medicaid reimbursement rate equivalent to setting the wage rate for the employee, since the individual might have the theoretical authority to offer the employee additional remuneration that would not be reimbursed by Medicaid; nor does it make clear how this different distribution of authority might impact the determination that there is no third party employer. DOL does stress that “any change in the specific facts of this scenario…may lead to a different conclusion regarding the employer status of the fiscal/employer agent.” In a second example, “the state has a ‘public authority model’ under which the state or county agency exercises control over the direct care workers’ conditions of employment by deciding the method of payment, reviewing worker time sheets and determining what tasks each worker may perform. The agency also exercises control over the wage rate either by setting the wage rate.” Here, DOL says, the state or county agency is likely an employer of the direct care workers under the FLSA.

DOL also addresses the concept of joint employment (again to be determined by the economic realities test), offering as an example that “an individual who hires a direct care worker or live-in domestic service worker to provide services pursuant to a
Medicaid-funded consumer directed program may be a joint employer with the state agency that administers the program.” Under the revised regulation, in joint employment situations “the individual, member of the family or household employing the direct care worker or live-in domestic service worker will be able to claim an exemption provided that the employee meets the duties requirements for the companionship services exemption or the residence requirements for a “live-in” domestic service worker exemption,” but “the third party employer will not be able to claim that exemption.” The practical implications for this in terms of wage and hour requirements are not yet clear. It appears to mean that “the family or household member would not be subject to joint and several liability” for back wages, but the third party employer would.

Shared Living

In response to NASDDDS’ concerns, DOL also directly addresses shared living and other similar service arrangements, although the rule points out that “the Department cannot address all shared living arrangements raised in the comments because the circumstances are different under countless factual scenarios.” However, the rule provides guidance “regarding how these established rules will likely apply under the most commonly raised shared living arrangement – live-in roommates.” DOL describes this arrangement as one in which “the consumers appear to be living in their own home and a roommate moved in to the consumer’s home in order to provide services on an as needed basis;...the person receiving services owns the home or leases the home from an independent third party,” rather than the state or agency providing the services maintaining the residences or otherwise providing the essentials of daily living. DOL describes that “the cost/value of the services does not appear to be substantial based on the comments that suggested that live-in roommates provide only intermittent or infrequent care services, “and are therefore “a small portion of the total costs of maintaining the living unit.” DOL also specifies that in this scenario, “the consumer hires the roommate and determines who will live in his or her home and is free to come and go as he or she pleases.” Under this very specific fact pattern, DOL says, “the live-in domestic service employee overtime exemption will likely be available to the individual, family, or household using the worker’s services.” Moreover, to the extent the live-in roommate meets the duties test for the companionship services exemption, that exemption will likely also be available to the individual, family, or household using the worker’s services. Crucially, however, neither exemption would be available to a third party employer of the live-in roommate, rendering the above considerations moot in a great many instances of shared living, where a provider agency employs and/or provides a stipend or other payment to the live-in roommate.

The rule also indicates that “it is possible that certain shared living arrangements may fall within the Department’s exception for foster care parents.” According to the rule, “individuals in foster care programs are typically wards of the state; the state controls where the individuals will live, with whom they will live, the care and services that will be provided, and the length of the stays.” Only if an individual scenario meets those specifications, the arrangement might be covered by Wage and Hour Opinion Letter WH-298, in which the Wage and Hour Division (WHD) concluded that “where a husband
and wife agree to become foster parents on a voluntary basis and take a child into their
home to be raised as one of their own, the employer-employee relationship would not
exist between the parents and the state where the payment is primarily a
reimbursement of expenses for rearing the child."

**Paid Family Caregivers**

DOL suggests that “in most circumstances a paid family caregiver is providing services
in a private home.” In the circumstances where the paid family caregiver lives with the
consumer, the overtime exemption will be available to the individual, family, or
household. If employed, jointly or solely, by a third party, the paid family caregiver would
be entitled to overtime compensation for all hours worked over 40 from the third party
employer. However, DOL stresses that “not all time spent on the premises is
necessarily considered hours worked,” and also points out that “there may be
circumstances where the third party will not be considered a joint employer of the paid
family caregiver because the third party is not engaged in the factors that indicate an
employer-employee relationship exists,” as indicated in the above discussion of third-
party employment and the economic realities test.

According to a fact sheet accompanying the Final Rule, “when a paid care provider is a
family or household member of the person receiving home care services, the decision to
hire the family or household member does not turn all care provided into employment.”
DOL recognizes “both a familial or household relationship and an employment
relationship, and only hours worked within the scope of the employment relationship are
covered by the FLSA.” In these circumstances, the employment relationship is limited
by a plan of care or other written agreement developed with the involvement and
approval of the Medicaid-funded or other program “if that agreement reasonably defines
the hours for which paid care services will be provided.” The determination of whether
such an agreement is reasonable, the rule states, “includes consideration of whether it
would have included the same number of paid hours if the paid care provider had not
been a family or household member of the consumer.” This interpretation “does not
generally apply to relationships that do not involve preexisting family ties or a
preexisting shared household,” according to the fact sheet. If the consumer and
caregiver enter into a new family relationship during the course of an employment
relationship, however, then the FLSA employment relationship would be limited even
though the family relationship did not predate the employment relationship.

The Department also recognizes in the rule “that some paid or unpaid caregivers who
are not family but are household members, meaning they live with the person in need of
care based on a close, personal relationship that existed before the caregiving began—
for example, a domestic partner to whom the person is not married—are the equivalent
of family caregivers.

**Effective Date**
The rule will become effective on January 1, 2015. DOL “believes that this extended effective date takes into account the complexity of the federal and state systems that are a significant source of funding for home care work and the needs of the diverse parties affected by this Final Rule (including consumers, their families, home care agencies, direct care workers, and local, state and federal Medicaid programs) by providing such parties, programs and systems time to adjust.” In the rule, DOL commits to “work closely with stakeholders and the Department of Health and Human Services to provide additional guidance and technical assistance during the period before the rule becomes effective, in order to ensure a transition that minimizes potential disruption in services and supports the progress that has allowed elderly people and persons with disabilities to remain in their homes and participate in their communities.”

FMI: The final rule and accompanying FAQs and Fact Sheets are available at http://www.dol.gov/whd/homecare/finalrule.htm.