



D.C. Appeals Court Upholds Overtime Pay Requirement for Home Care Workers Employed by Third Parties

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Third-party employers of home companionship or care workers may soon be required to pay those workers overtime pay under the federal Fair Labor Standards Act (FLSA). Last week, the United States Court of Appeals for the District of Columbia Circuit issued a ruling upholding the U.S. Department of Labor's ("DOL's") Final Rule on the Application of the Fair Labor Standards Act to Domestic Service (the "Final Rule"). As a result, domestic service workers employed by third parties may soon be subject to FLSA overtime pay requirements.

The Final Rule

The DOL's Final Rule was issued some time ago and eliminates the overtime pay exemption that previously existed under the FLSA for workers employed by third parties who provide either companionship services or live-in care for the elderly, ill, or disabled. Prior to issuing the Final Rule, the DOL interpreted the FLSA's statutory overtime exemptions for companionship and live-in services to cover workers employed directly by a home care recipient, the care recipient's family members, or by a third-party provider who placed the worker at a care recipient's home. The new Final Rule, however, limits this exemption to companionship and live-in care workers employed directly by the care recipient, the recipient's family, or the household using the services. The Final Rule also contains other legal changes, including a narrower interpretation of the types of tasks that qualify as "companionship services" and revised recordkeeping requirements for employers of live-in domestic employees.

The Final Rule was supposed to take effect on Jan. 1, 2015, and the DOL had announced that it would delay enforcement for a six month transition period to allow employers to prepare for the legal change. Third-party providers got a reprieve, however, when the federal District Court for the District of Columbia ruled in December 2014 that the DOL had exceeded its authority in extending the FLSA overtime pay requirements to third-party employers. The District Court found that the Final Rule's focus on third-party employers contravened the plain terms of the FLSA and was, therefore, invalid.

Unfortunately for third-party employers, the D.C. Circuit Court of Appeals has reversed the lower court's ruling in *Home Care Association of America v. Weil*. A unanimous Court of Appeals found that the DOL had the discretion, based on its general rulemaking authority, to extend FLSA overtime pay requirements to domestic companionship and care workers employed by third parties. In addition, the Court noted that the Final Rule is consistent with "Congress's evident intention to 'include within the coverage of the [FLSA] all employees whose vocation is domestic service,'" in contrast to the "type of assistance provided by a 'neighbor' or an 'elder sitter.'" The Court also took notice of the DOL's reliance on changes in the homecare industry that have taken place since the prior DOL rule was published in 1975.

What's Next?

At this time, it is unclear when the Final Rule will become effective. The Court of Appeals has remanded the *Weil* case to the D.C. federal district court for entry of summary judgment in favor of the US DOL. If either party to the case seeks further legal review, however, (such as a petition for rehearing by the Court of Appeals or review by the U.S. Supreme Court), an enforcement stay might be issued pending this further review. In addition, the DOL could elect to voluntarily defer enforcement for a transition period. Given this uncertainty, third-party providers of home-care services need to stay tuned for further developments and announcements from the DOL.

Should the Final Rule become effective, affected employers will need to either start paying overtime pay to covered home care workers for overtime hours or take steps to prevent these workers from working overtime hours. Employers may lawfully have policies that prohibit overtime hours without advance approval. Should an employee violate this type of policy, an employer typically must still provide overtime pay for the worked overtime hours but may discipline or fire an employee for the policy violation. Where an employer elects to allow overtime work and to pay overtime pay, the employer will need to take the following steps to ensure compliance with the FLSA's overtime pay requirements:

- Covered workers will need to be instructed to record all time worked so employers can determine if overtime hours have been worked in a given week and, if so, how much overtime pay is due.
- Under the FLSA, an employee subject to FLSA overtime pay rules must be paid 1.5 times the employee's regular rate of pay for all hours worked over 40 hours in the employer's seven day work week. An employee's regular rate of pay includes any regular hourly rate of pay, plus any additional pay made pursuant to a contractual or guaranteed pay arrangement such as bonus or commission pay.
- Recent years have seen an uptick in wage and hour claims, including claims by workers that they have been forced to work "off the clock" time for which they should have been paid. Employers subject to the new overtime pay requirements should, therefore, ensure that they are familiar with the rules around counting



time worked for overtime purposes, including pre-shift or post-shift work, remote work, on-call time, and travel time.

- State and local laws can supplement the FLSA. As such, employers should always check the state and local laws where the employee resides or works to determine if additional overtime pay requirements apply.

Because wage and hour law is detailed and can be complex, employers may want to work with legal counsel to get prepared to comply with the Final Rule in the event it becomes effective. Our experienced lawyers at Gray Plant Mooty would be happy to assist you in your efforts. Please contact a member of the firm's health law or employment law teams if you have questions or need assistance.