

## Appeals Court Upholds USDOL's New Minimum Wage and Overtime Rules for Home Care Workers Employed by Home Health Care Agencies

### M&E Labor & Employment Law Alert

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Reversing a decision celebrated by employers in the home care industry, the U.S. Court of Appeals has ruled that home health care agencies must comply with the U.S. Department of Labor's ("DOL") 2013 domestic service regulations. Those regulations (which, but for the court challenge, were to become effective January 1, 2015) extend minimum wage and overtime pay requirements to employees of third-party agencies that provide companionship services or live-in care.

DOL policy prior to the 2013 regulations excluded live-in domestic workers, such as home health aides, from the overtime requirements of the Fair Labor Standards Act ("FLSA") regardless of whether they were employed directly by the individuals/families needing care or by a third-party agency. Also, workers providing "companionship services" (as defined by statute) were completely exempt from the FLSA's wage and hour requirements (including minimum wage) regardless of who employed them. The 2013 regulations limited the FLSA exemptions solely to workers employed directly by the individuals needing care or their families.

In December 2014, a federal judge for the District of D.C. ruled that the DOL lacked authority to issue the 2013 regulations, finding that they contradicted the express language of the FLSA. The Court of Appeals for the D.C. Circuit disagreed, holding that the 2013 regulations did not contradict the FLSA and that Congress delegated authority to the DOL to determine whether third-party agencies (e.g., home care agencies) could benefit from the companionship and live-in exemptions. The unanimous appellate court further decided that the DOL's rule excluding third-party agencies from the exemptions was "fully reasonable" and, therefore, must be accepted by the courts. Finally, the Court found that although the DOL's prior policy had been in place for four decades, the DOL's decision to reverse course was "neither arbitrary nor capricious" because of the "dramatic transformation of the home care industry" over that time.

Unless further judicial review is sought (e.g., a petition for rehearing *en banc* by the D.C. Circuit or a petition to the U.S. Supreme Court) or the DOL moves to accelerate the issuance of the Court's mandate, the DOL's 2013 regulations will go into effect on October 12, 2015, 52 days after the Court's August 21, 2015,

decision. As of the time of this writing, no notice of appeal or request for rehearing has been filed by the three associations of home care agencies that mounted the challenge to the 2013 regulations.

If the 2013 regulations become effective, home care agencies will need to ensure that the compensation of companions and live-ins complies with all DOL rules governing minimum wage and overtime. The impact of the ruling will likely be greater for employers of live-in workers, who are often paid a flat daily rate without regard to how the time is spent. Under the new regulations, employers will be required to track/record (and pay for) all hours worked by live-in workers and will, therefore, need to comply with the myriad DOL regulations governing compensable and non-compensable time, as well as the DOL's recordkeeping and timekeeping requirements. Those regulations govern such issues as sleep time, travel time, training time, on-call time, meal periods, etc.

Home care agencies can minimize the impact of the Court of Appeals' ruling by working with knowledgeable employment counsel to develop a strategy that satisfies the DOL regulations while minimizing the impact of the regulations on the agency, the workers, and clients. By proactively developing a comprehensive strategy, home care agencies can minimize loss of business, maximize profit margins, and reduce the risk of litigation.