The Status of the Department of Labor's Home Health Care Regulations After The *Home Care Association* Ruling: A Mostly Positive Development for the Industry

Henry M. Perlowski and H. Carol Saul

On December 22, 2014, the United States District Court for the District of Columbia issued a ruling striking down a portion of the Department of Labor's ("DOL") proposed regulations issued under the Fair Labor Standards Act (the "FLSA") that applied to the home health care and domestic service industries and had been set to go into effect on January 1, 2015. Specifically, in *Home Care Association of America* et al. v. *David Weil* et al., Case No. 14-cv-967, 2014 U.S. Dist. LEXIS 176307 (D.D.C. Dec. 22, 2014), Judge Richard Leon ruled that the DOL did not have the requisite authority to issue regulations providing that the home health care and domestic service exemptions to the FLSA's overtime regulations did not apply to workers engaged by third-party employers. The importance of this specific ruling cannot be understated to the home health care industry. Without it, only home health care workers who are directly engaged by the recipient of care would have been exempt from the FLSA's overtime regulations. Any worker engaged through a third-party employer – the bulk of the industry – would have been subject to the FLSA's overtime regulations for the first time, thus exposing employers immediately to increased payroll costs and then to the risk of FLSA individual and collective action lawsuits.

As the basis for this ruling, Judge Leon determined that the DOL did not have the authority to conclude that the "any employee" language within the home health care and domestic service exemptions did not apply to persons employed by third parties. Citing concerns about low wages in the industry and the original intent of Congress to exclude "in home" workers engaged by families from FLSA coverage, the DOL's final regulation – 78 Fed. Reg. 60,454 (Oct. 1, 2013) – essentially rewrote the words "any employee" to "any employee directly engaged by the recipient of care." Once the regulation was issued, it was immediately challenged by the industry, first in comments to the DOL and then in the *Home Care Association* lawsuit. Setting aside the policy differences between the DOL and wage advocates, on the one hand, and the industry, on the other hand, Judge Leon held that the words "any employee" were unambiguous. Thus, Congress did not leave a question open for interpretation that then would have permitted the DOL to fill gaps in the FLSA.

Understanding that the DOL could take an appeal, Judge Leon's ruling is correct under the administrative law authority governing judicial review of the regulations. Thus, the home health care industry can take comfort knowing that the FLSA's overtime exemption will apply, at least in the abstract, to all workers engaged in companionship services. Given the alternative, *Home Care Association* is a major victory for the industry and those companies dependent on maintaining current wage structures. With this said, certain language in Judge Leon's opinion indicates that other portions of the DOL's regulations that narrow the FLSA exemption are still available to the industry and will be upheld.

In the *Home Care Association* case, only the portion of the DOL's regulation that attempted to limit the home health care exemption to workers directly engaged by the recipients of care was at issue. In the opinion, however, Judge Leon indicated that the other portions of the regulations also being challenged by the industry likely would be upheld. With respect to the significantly narrowed definitions of "companionship services" and "domestic services" necessary to support exempt status under the FLSA, Judge Leon said, "Congress merely left a number of definitional gaps in the exemptions' statutory language …. The Department, *appropriately*, has filled those gaps through regulations, including revised definitions … in the new rule scheduled to go into effect January 1, 2015." (Emphasis added.)

Based on this language and the broader rationale of Judge Leon's decision, the home health care industry has to assume that the other portions of the DOL final regulation that went into effect on January 1, 2015 will remain in effect "as is." The following is a summary of certain provisions in the regulations that limit the applicability of the FLSA overtime exemptions that remain in effect after the *Home Care Association* decision:

- For the "companionship services" exemption to apply, personal "care" services under Section 552.6(b) – activities of daily living and instrumental activities of daily living (*e.g.*, dressing, grooming, feeding, bathing) – can comprise no more than twenty percent (20%) of the care worker's activities;

- The above twenty percent (20%) limitation is applicable for the care provided to each consumer, as opposed to the total amount worked in each workweek;

- Section 552.6(c) of the final regulation (29 C.F.R. § 552.6(c)) provides that "companionship services" do not include services that benefit other members of a household and that are unrelated to the care given to the intended recipient of companionship services. Illustrating this point, the DOL explained "[i]f a direct care worker performs fellowship and protection for the consumer Monday through Thursday, but spends Friday exclusively performing light housework as a whole, then the exemption is lost for the workweek;"

- Section 552.6(d) excludes medically related services from the exemption, focusing on the services provided and not whether the person performing the services is actually trained to provide them. At the same time, and evidencing its intent to limit the exemption as much as possible, the DOL also stated that the work of CNAs (as well as RNs and LPNs) necessarily lies outside of the exemption; and

- For the related "domestic services" exemption, the DOL announced that only workers who actually reside "permanently" or for "extended periods of time" within a "private home" qualify for the exemption. This limitation effectively means that extended shifts at home (*e.g.*, 24, 48, 72 hours) will not qualify to trigger the exemption.

As this non-exhaustive list of issues presented by the DOL's final regulation illustrates, the DOL, at least for the foreseeable future, is going to be vigilant in attempting to capture overtime pay under the FLSA from employers in the home health care, private duty, and domestic services industries even with the decision in *Home Care Association*. With the changes reflected in the FLSA regulation, we strongly recommend that employers carefully examine whether their day-to-day staffing practices may jeopardize the applicability of either the "companionship services" or "domestic services" exemptions. Now is the time to act because the effective date of the final regulation – January 1, 2015 -- provides ample reason to change existing practices that may be suspect.

Authors and Contributors

Henry M. Perlowski
Partner, Atlanta Office
404.873.8684
henry.perlowski@agg.com

H. Carol Saul
Partner, Atlanta Office
404.873.8694
carol.saul@agg.com

not *if*, but *how*.®

About Arnall Golden Gregory LLP

Arnall Golden Gregory, a law firm with more than 150 attorneys in Atlanta and Washington, DC, employs a "business sensibility" approach, developing a deep understanding of each client's industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal's prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief "not if, but how.®" Visit www.agg.com.

Atlanta Office
171 17th Street NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office
1775 Pennsylvania Ave., NW,
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: **http://www.agg.com/subscribe/**