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THE FEDERAL COMPANIONSHIP EXEMPTION REMAINS INTACT:

Steps Home Health Agencies Can Take to Establish Eligibility for the Federal Exemption and Comply with State Wage & Hour Laws

Angelo Spinola, Esq.
Shannon Creasy, Esq.
Littler Mendelson
Atlanta, GA

Federal Court Vacates the Department of Labor's Regulations Eliminating the Federal Exemption for Home Health Workers

On December 22, 2014, in *Home Care Association of America v. Weil*,[1] the U.S. District Court for the District of Columbia struck down portions of the U.S. Department of Labor's ("DOL") Wage and Hour Division's final rule eliminating the Fair Labor Standards Act's ("FLSA") minimum wage and overtime exemptions for home care workers employed by home care agencies and other companies. Finding that the DOL's revised regulation as applied to third-party employers "not only disregard[ed] Congress's intent, but seize[d] unprecedented authority to impose overtime and minimum wage obligations in defiance of the plain language" of the FLSA, the court granted the plaintiffs' motion for summary judgment and vacated that portion of the regulation.[2] One week later, the same court granted plaintiffs' motion for a temporary restraining order seeking to temporarily stay the January 1, 2015 effective date of Section 552.6 of the challenged rule, the section defining the companionship exemption.[3] On January 14, 2015, the court vacated the DOL's new rule that purported to narrow the definition of "companionship services" exempt from overtime under the FLSA.[4] Consequently, the court effectively blocked all of the DOL's attempts to eliminate the minimum wage and overtime exemptions for home care aides, concluding that the DOL overstepped its authority in promulgating both provisions by trying to do through regulation what must be done through legislation.[5] Based on these rulings, the vacated provisions will not take effect unless the decision is reversed on appeal.[6]

The Effect of the District of Columbia Court's Ruling Nationwide

While district courts are not required to follow another district court's ruling, given the unique position the Circuit for the District of Columbia inhabits in review of agency

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action, precedent suggests that courts nationwide may choose to do so in this instance. Indeed, a court that previously concluded it should follow a D.C. court's vacatur of an agency regulation noted that a district court may issue injunctions that bind parties outside its geographic jurisdiction.[7]

In *National Minority Association v. U.S. Army Corps of Engineers*, various plaintiffs' trade organizations, on behalf of their aggrieved members, brought a facial challenge to a regulation promulgated by the Army Corps of Engineers.[8] The district court granted summary judgment for the plaintiffs and entered an injunction prohibiting the Corps and the Environmental Protection Agency from enforcing the regulation anywhere in the United States. In affirming, the D.C. Circuit noted its special position:

> [I]f persons adversely affected by agency rule can seek review in the district court for the District of Columbia, as they often may, our refusal to sustain a broad injunction is likely merely to generate a flood of duplicative litigation. Even though our jurisdiction is not *exclusive*, an injunction issued here only as to the plaintiff organizations and their members would cause all others affected . . . to file separate actions for declaratory relief in this circuit. Issuance of a broad injunction obviates such repetitious filings.[9]

What Should Home Care Employers Do Now?

The DOL has appealed the district court's decisions discussed above.[10] Until the District of Columbia Court of Appeals rules on the DOL's appeal, home care employers may continue to utilize the federal companionship and live-in domestic worker exemptions as they have in the past. However, home care agencies should confirm that they meet the requirements for satisfying these exemptions and are creating a record of the existence of the exemption(s) they are relying upon. Further, home care agencies should independently ensure that they are in compliance with all applicable state wage-hour laws, as some states require an employer to pay minimum wage and/or overtime to domestic service employees who would otherwise be exempt under federal law.

Establishing Applicability of the Federal Exemption – Analysis, Agreements, and Records

As a first step, employers should carefully analyze whether their employees meet the requirements of the available federal exemptions. When it is determined that a particular exemption applies, employers need to ensure that the required agreements and records are created and maintained to support the existence of the exemption. It is particularly important for home care employers to have an understanding of the FLSA's exemptions for domestic service workers who satisfy the requirements of the live-in domestic worker exemption or, alternatively, the companionship exemption.[11]

Live-In Domestic Worker Exemption

Under 29 U.S.C. § 213(b)(21), "an employee who is employed in domestic service in a household and who resides in such household" is exempt from the overtime requirements of the FLSA. In order to be a live-in domestic service worker, a worker must reside on the employer's premises either "permanently" or for "extended periods of time."[12] The DOL has advised that a worker resides "permanently" on an employer's premises seven days a week such that he or she has no other home, and a worker resides on an employer's premises for "extended periods of time" when: (i) he or she lives, works, and sleeps on the premises five days per week and 120 hours or more; or (ii) if he or she spends less than 120 hours working and sleeping on the employer's premises, he or she spends five consecutive days or nights residing on the premises.[13]

The DOL has plainly rejected the classification of caregivers who work 24-hour shifts, but less than the requirements set forth above, as live-ins, explaining that "employees who work 24-hour shifts but are not residing on the employer's premises 'permanently' or for 'extended periods of time' as defined above are not considered live-in domestic service workers and, thus, the employers are not entitled to the overtime exemption. . . . The fact that an individual may need 24-hour care does not make every employee who provides services to that individual a live-in domestic service employee. . . . Employees who work 24-hour shifts but are not live-in domestic service employees must be paid at least minimum wage and overtime for all hours worked unless they are otherwise exempt under the companionship services exemption."[14]

Agreements between Employers and Live-In Employees

Note that true live-in workers who satisfy the requirements of 29 U.S.C. § 213(b)(21) are only exempt from the payment of overtime under the FLSA, not minimum wage.[15] Thus, the employer is required to keep an accurate record of actual hours the live-in works to ensure that all minimum wage obligations are met.[16] However, the DOL permits the live-in and the employer to enter into "any reasonable agreement of the parties which takes into consideration all of the pertinent facts."[17] As such, "*the employee and the employer may exclude, by agreement between themselves, the*

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amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits."[18] For periods of "free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time," and any interruption to any scheduled off-duty time must be counted as hours worked.[19]

In evaluating employer-employee agreements, "there is no single generic test for 'reasonableness' under section 785.23 . . . [and] an agreement reached pursuant to section 785.23 is binding if it is reasonable in light of 'all of the pertinent facts' of the employment relationship."[20] Courts have held that reasonableness requires that, "at a minimum, an agreement must take into account some approximation of the number of hours actually worked by the employee or that the employee could reasonably be required to work."[21] As such, the employer must ensure that the agreement reflects the reality of the hours actually worked by the live-in caregiver.

Employers should note that where the caregiver satisfies the requirements for the live-in domestic worker exemption, but not the separate companionship exemption, the employer has record-keeping obligations and cannot rely upon the reasonable agreement as a substitute for actual hours of work.[22] The regulation provides that "the employer shall keep a copy of the agreement specified by § 552.102 and make, keep, and preserve a record showing the exact number of hours worked by the live-in domestic service employee."[23]

Companionship Exemption

Under 29 U.S.C. § 213(a)(15), "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves" are exempt from the minimum wage and overtime provisions of the FLSA. The companionship exemption specifically requires two fundamental components: (1) the employee must be employed in domestic service employment in a private home, and (2) the employee must provide companionship services, as defined by the DOL, for aged or infirm individuals who cannot care for themselves.[24] An employer that asserts that an employee is exempt from the FLSA's protections bears the burden of establishing that the exemption applies affirmatively and clearly.[25] All exemptions to the FLSA are construed narrowly, in keeping with its remedial purposes.

In order for a domestic service employee to qualify for the companionship exemption, the individual must perform services in a private home. Although "the determination of what constitutes a 'private home' in the context of the FLSA companionship exemption must be made on a case-by case basis," courts will generally consider six factors when evaluating a particular circumstance:[26]

1. Did the client live in the living unit as her private home before beginning to receive services? If so, it is likely a "private home."
2. Who owns the living unit? If the client or her family owns the unit, that is a significant indicator that it is a "private home."
3. Who manages and maintains the residence? If many of the essentials of daily living (rent, utilities, food, etc.) are provided by the client or her family, that weighs strongly in favor of it being a "private home."
4. Would the client be permitted to live in the unit if the client were not contracting with the provider for services? If yes, this factor weighs in favor of the unit being a "private home."
5. What is the relative difference in the cost/value of the services provided and the total cost of maintaining the living unit? If "the cost/value of the services is incidental to the other living expenses, that weighs in favor of it being a "private home."
6. Finally, will the service provider use any part of the residence for the provider's own business purposes? If so, that weighs in favor of the unit not being a "private home."

As for caregivers who on occasion provide care in-facility and not in the private home, resulting in the provision of companionship services to some of the employer's clients and more "substantial medical care" to other clients, all within the same workweek, the DOL has stated that to be eligible for the companionship exemption "all of the employment in the same workweek, for the same employer, must be exclusively within the meaning of 'domestic service employment'" and that on those facts, the worker would not be considered exempt because the individual's work during a workweek "would not be exclusively in domestic service employment."[27] While DOL guidance is not legally binding, it reflects the DOL's narrow view of the companionship exemption. Thus, for the companionship exemption to apply, all of the hours worked by the employee during the workweek must be aggregated and analyzed together, and the exemption may be lost in its entirety for employees who perform some in-facility duties during any portion of the workweek.

Analysis of the applicability of the exemption must include an evaluation of the nature of the employee's work. The DOL defines "companionship services" as "those services which

provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs."[28] Companionship services do not include services performed by trained personnel such as registered or practical nurses.[29] Companionship services includes household work for aged or infirm persons including meal preparation, bed making, clothes washing and other similar services.[30] However, while a caregiver may perform general household work and maintain the exemption, the general household work cannot exceed 20 percent of the total weekly hours worked by the caregiver or the exemption will be lost and the employee must be paid for all hours in compliance with the minimum wage and overtime requirements of the FLSA.[31]

Based on legal authority interpreting the regulations, a conservative approach would be to include any routine household cleaning (dusting, mopping, vacuuming) activities, whether the patient's room or otherwise, in an accounting of general household work. Cleaning patient spills, or any other cleaning that is performed intermittently as the need arises for the patient, need not be included in general household work. While an employer may elect to exclude from an accounting of general household work any routine cleaning limited only to patient areas, there is a risk that a court would find that work to be "general household work." All services performed for other members of the household should be included in an accounting of general household work.

While an employer is not required to keep records pursuant to § 516.2, or § 552.110 for those employees who qualify for the companionship exemption, it is essential to keep accurate records of hours worked and total time spent on general household work to ensure that an employee satisfies the exemption and the employer can potentially defend that position. Further, these records are also necessary for any workweek where the employee fails to meet the exemption (i.e., exceeds 20 percent general household work) and, therefore, is entitled to minimum wage and overtime.

State-Specific Requirements

In addition to considerations of federal law, when compensating home health aides, employers must also navigate varied and complex state statutes. This can be a formidable task, particularly for employers who operate in multiple jurisdictions throughout the United States. Unfortunately, state statutes are too numerous and disparate to fully discuss in this article; however, below are a few examples of some of the state-specific considerations that are illustrative of the types of issues that home care employers may encounter. Due to the complexity of state wage and hour laws, employers should independently review compliance with the specific states' wage and hour laws governing their operations.

New York

24-Hour Home Health Workers Are Not Exempt

Home health agencies in New York must consider a number of issues when determining how to properly compensate their employees. For example, agencies that employ "24-hour home health attendants" need to be aware of certain provisions in the law relating specifically to these workers.[32] First, while the regulations interpreting New York Labor Laws ("NYLL") include a "companionship exemption" for employees who "live in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping," legal authority in New York holds that 24-hour home health attendants are not residential employees.[33] As a result, the exemption does not extend to "sleep-in home attendants employed by...vendor agencies."[34] New York law expressly provides that, even if a 24-hour home health attendant qualifies for exemption under the FLSA, overtime must still be paid under New York law, and must be calculated at a rate of one and a half times the New York minimum wage.[35] The threshold at which overtime becomes due is also determined based on "residential" versus "non-residential" status. Specifically, NYLL regulations provide that "the overtime rate shall be paid for each workweek for working time over 40 hours for non-residential employees and 44 hours for residential employees."[36] Therefore, because 24-hour home health attendants are considered non-residential employees, overtime must be paid to these workers for all hours worked over 40 in a workweek.

Compensability of Sleep Time Under NYLL

New York law regarding sleep time for 24-hour home health attendants is currently in flux after a recent Supreme Court of New York decision which contradicted statutory language, holding that employers cannot deduct sleep time from hours worked by attendants who work 24-hours shifts.[37]

With respect to sleep time, the NYLL regulations provide:

> The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer--shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or (2) at any other time when he or

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she is free to leave the place of employment.[38]

Furthermore, case law and guidance from the New York Department of Labor ("NY DOL"), provides that 24-hour attendants can be paid for a 13-hour workday, as long as, during their shift, they are afforded eight hours of sleep, five hours of which is uninterrupted, and three hours for meals.[39] Despite this authority, in *Andryeyeva v. New York Health Care, Inc.*, the Supreme Court of the State of New York rejected the "13-hour workday" rule, holding instead that 24-hour home care attendants must be paid for each hour of their 24-hour shift and that the entire 24-hour shift period must be considered in calculating overtime.[40] In that case, the court certified a class of 1,000 home care attendants alleging claims of unpaid wages and overtime. Employers should be aware that, although on appeal, the decision is currently good law in New York.

Compensability of Travel Time under NYLL

Travel time may also be compensable under New York law. The New York minimum wage regulations provide that compensable working time includes "time spent traveling to the extent that such traveling is part of the duties of the employee."[41] Furthermore, the NY DOL has interpreted this provision broadly and takes the position that time spent traveling from one job site to another during the work day is compensable if the employee "is not completely relieved from duty and cannot effectively use the time for his own purposes without restrictions."[42] Although normal commuting time at the beginning and end of the workday is not compensable, time spent during the workday traveling from one assignment to another would likely be deemed compensable under New York law unless the temporal gap between assignments is so great that the employee was able to use the time for her own purposes without restriction, such that the time could effectively be characterized as a "split shift."

Massachusetts

In July 2014, Massachusetts signed the Massachusetts Domestic Workers' Bill of Rights into law, which went into effect on April 1, 2015. While most domestic workers are covered by Massachusetts' minimum wage and overtime requirements and laws related to workers' compensation and unemployment insurance, the new law extends anti-discrimination and anti-harassment laws to domestic workers, provides coverage under the Massachusetts Maternity Leave Act, and defines when workers must be paid for meal breaks, rest periods and other off-duty time.[43] Additionally, the law contains many new obligations, including recordkeeping and notice requirements and imposes special obligations on employers who wish to terminate live-in domestic workers without cause, a sharp deviation from the "at-will" employment status of most employees.[44] Additionally, the law also gives domestic workers a right to privacy, a statutory protection which does not exist in Massachusetts for any other class of employees.[45] Among the protections provided, Massachusetts employers should pay particular attention to the considerations discussed below.[46]

Coverage under the Massachusetts Domestic Workers' Bill of Rights

The new law defines a "domestic worker" as "an individual or employee who is paid by an employer to perform work of a domestic nature within a household including, but not limited to: (i) housekeeping; (ii) house cleaning; (iii) home management; (iv) nanny services; (v) caretaking of individuals in the home, including sick, convalescing and elderly individuals; (vi) laundering; (vii) cooking; (viii) home companion services; and (ix) other household services for members of households or their guests in private homes."[47] A covered "employer" is "a person who employs a domestic worker to work within a household whether or not the person has an ownership interest in the household; provided, however, that an 'employer' shall not include a staffing agency, employment agency or placement agency licensed or registered pursuant to chapter 140 or an individual to whom a personal care attendant provides services."[48]

Agencies that directly employ domestic workers are no longer allowed licensure or registration in Massachusetts; therefore, "[d]omestic [e]mployee does not include a person who performs services of a domestic nature as an employee of the business that places him or her."[49] Because home care agencies that directly employ their workers are no longer considered to be employment or placement agencies, home care employers are not exempt from the Domestic Workers' Bill of Rights.[50]

Notice Requirement under Massachusetts Law

One provision under the new law requires that, at the outset of a domestic worker's employment, he or she must be given a notice that "contains all applicable state and federal laws that apply to the employment of domestic workers."[51] Additionally, if the employee works for 16 hours or more in a week, he or she must be provided a detailed 10-point notice, made specifically for that employee. The notice must identify: (i) the employee's rate of pay, including overtime and additional compensation for added duties or multilingual skills; (ii) the employee's working hours, including meal breaks and other time off; (iii) if

applicable, the provisions for days of rest, sick days, vacation days, personal days, holidays, transportation, health insurance, severance, yearly raises and, whether or not earned, vacation days, personal days, holidays, severance, transportation costs and if health insurance costs are paid or reimbursed; (iv) any fees or other costs, including costs for meals and lodging; (v) the responsibilities associated with the job; (vi) the process for raising and addressing grievances and additional compensation if new duties are added; (vii) the right to collect workers' compensation if injured; (viii) the circumstances under which the employer will enter the domestic worker's designated living space on the employer's premises; (ix) the required notice of employment termination by either party; and (x) any other rights or benefits afforded to the domestic worker.

Compensability of Meal, Sleep, and Other Off-Duty Time under Massachusetts Law

Employers should note that the new law also regulates home health workers' meals, sleep and break times. Massachusetts law requires that no employee work for more than six hours during a calendar day without a meal break of at least 30 minutes.[52] Although a meal break may generally be unpaid, under the Domestic Workers' Bill of Rights, "working time" also includes "meal periods, rest periods and sleeping periods unless a domestic worker is free to leave the employer's premises and use the time for the domestic worker's sole use and benefit and is completely relieved of all work-related duties."[53] Domestic workers who are on duty for 24 consecutive hours or more are required to be paid for all meal and rest periods, including time spent sleeping, unless a prior written agreement is made.[54] If a worker agrees to an unpaid "sleeping period," the period can be no more than eight hours per day.[55] In the event that a domestic worker does not reside on the employer's premises, and is on duty for less than 24 consecutive hours, "the employer shall pay the domestic worker for all hours as working time under [the Massachusetts Minimum Wage law] and regulations promulgated under [the Massachusetts Minimum Wage law]."[56] Furthermore, domestic workers who work 40 hours or more in a week must be given at least 24 consecutive hours off each calendar week, and at least 48 consecutive hours off each calendar month. The worker can agree to work during this time off, but the agreement must be in writing, and the worker must be paid time-and-a-half for those hours.

Split Shifts and Travel Time under Massachusetts Law

While not addressed in the Domestic Workers' Bill of Rights, Massachusetts law provides that "an employee required or directed to travel from one place to another after the beginning or before the close of the work day shall be compensated for travel time and shall be reimbursed for all transportation expenses."[57] Additionally, split-shift travel, common in the home care industry, need not be compensated if the employee is off-duty between shifts.[58]

Other Special Protections under Massachusetts Law

The law also provides special protection, upon termination, to a domestic worker who resides in the employer's household. If the employer terminates such an employee without cause, the employee must receive written notice. He or she also will be entitled to at least 30 days of lodging, either on-site or in comparable off-site conditions, or two weeks of severance pay. Notice or severance are not required "in cases involving good faith allegations that are made in writing with reasonable basis and belief and without reckless disregard or willful ignorance of the truth that the domestic worker has abused, neglected or caused any other harmful conduct against the employer, members of the employer's family or individuals residing in the employer's home."[59] Furthermore, a domestic worker can request a written evaluation of his or her work performance after three months of employment and annually thereafter. He or she can also inspect and dispute the written evaluation.[60]

California

In California, Wage Order No. 15 applies to "all persons employed in household occupations whether paid on a time, piece rate, commission, or other basis, unless such occupation is performed for an industry covered by an industry order of the [Industrial Welfare] Commission . . . ."[61] Under the order, "household occupations" include, among other things, companions, practical nurses, and other similar occupations.[62] The Wage Order defines "hours worked" to include "the time during which an employee is subject to the control of an employer, and includes all of the time the employee is suffered or permitted to work, whether or not required to do so."[63]

Domestic Work, Domestic Work Employees, and Personal Attendants

Under California law, "domestic work" means "services related to the care of persons in private households or maintenance of private households or their premises."[64] Domestic work occupations include "childcare providers, caregivers of people with disabilities, sick, convalescing, or elderly persons, house cleaners, housekeepers, maids, and other household occupations."[65] A "domestic work employee" is "an individual who performs domestic work and includes live-in domestic work employees and personal attendants."[66]

A substantial portion of caregivers employed by home care companies may qualify as personal attendants. While personal attendants are exempt from some of the requirements of Wage Order No. 15, on January 1, 2014, California enacted the Domestic Worker Bill of Rights Act, which

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extended overtime obligations to personal attendants.[67] The Act provides: "A domestic work employee who is a personal attendant shall not be employed more than nine hours in any workday or more than 45 hours in any workweek unless the employee receives one and one-half times the employee's regular rate of pay for all hours worked over nine hours in any workday and for all hours worked more than 45 hours in the workweek."[68]

Under the Domestic Worker Bill of Rights, a "personal attendant" is someone who: (1) is employed by a private householder or by any third-party employer recognized in the healthcare industry to work in a private household; (2) supervises, feeds, or dresses a child or person who needs supervision due to advanced age, physical disability, or mental deficiency; and (3) performs these duties at least 80 percent of the time.[69]

An individual who qualifies as a personal attendant is entitled to overtime compensation after nine hours worked in a day or 45 hours worked in a workweek, regardless of whether the personal attendant is also a live-in employee.[70] California law permits a personal attendant to perform general housekeeping duties so long as the time spent on these tasks does not exceed 20 percent of the total weekly hours worked.[71] If an employee performs general housekeeping duties more than 20 percent of the time, the personal attendant status is lost and the employee must be compensated in accordance with the Wage Order, not the new law. This applies whether the employee is a live-in or not.

Compensating Personal Attendants, Live-In Employees, and Non-Live-In Employees

If an employee meets the definition of a "personal attendant," an employer must compensate him or her differently from other domestic employees, whether or not the personal attendant must live with the client. Personal attendants receive 1.5 times the regular rate for hours worked in excess of nine hours in a day or 45 hours in a workweek under the new law.[72]

Under California law, live-in employees who do not fall under the "personal attendant" category are subject to Wage Order No. 15 and are thereunder entitled to time and one-half their regular rate of pay for hours worked over nine in one day.[73] Live-in employees cannot be required to work more than five days in one workweek without 24 consecutive hours of off-duty time, except in emergencies.[74] For the first nine hours worked on the sixth and seventh consecutive day of the workweek, live-in employees are entitled to time and one-half their regular rate of pay, and for all hours in excess of nine on the sixth and seventh consecutive day of a workweek, they are entitled to two times their regular rate of pay. Additionally, for each workday of 24 hours, a live-in employee must have at least 12 consecutive hours of off-duty time, unless the employee has at least three hours of non-duty time during the 12-hour-span of work (these hours need not be consecutive), which is mutually agreed upon by the parties. If the employee is required or permitted to work during scheduled off-duty hours or the 12 consecutive off-duty hours, he or she is entitled to one and one-half times his or her regular rate of pay for such time.

Non-live-in employees are entitled to one and one-half times their regular rate of pay for hours over eight in any workday, for hours over 40 in any workweek, and for the first eight hours worked on the seventh consecutive workday in a workweek.[75] These employees are entitled to twice their regular rate for all hours worked in excess of 12 in any workday and all hours in excess of eight on the seventh consecutive workday in a workweek.[76] However, if a live-in or non-live-in employee can also be categorized as a personal attendant, then an employer must pay 1.5 times the regular rate in excess of nine hours worked in a workday and 45 hours worked in a workweek.

Compensability of Sleep Time Under California Law

As in New York, a recent court decision has called into question whether or not sleep time is compensable under state law. Although historically California home care employers have deducted eight hours of sleep time from hours worked for live-in and 24-hour caregivers, the California Supreme Court's decision in *Mendiola v. CPS Security Solutions, Inc.*,[77] stands for the proposition that California courts will not incorporate a federal standard concerning what time is exempt from compensable time without convincing evidence of the Industrial Welfare Commission's ("IWC") intent to exempt the same. In *Mendiola*, the court concluded that the security guard plaintiffs' "on call" time constituted hours of work, and because the Wage Order at issue in the case (Wage Order No. 4), contained no analog to the federal regulation allowing for the exclusion of sleep time for employees who are on duty for more than 24 hours, the court concluded that there is no evidence that IWC intended to permit the exclusion of sleeping time under that order.[78]

The *Mendiola* court reiterated that the factors considered in determining what constitutes hours of work include whether:

1. there was an on-premise living requirement;
2. there were excessive geographic restrictions on an employee's movements;

3. the frequency of calls was unduly restrictive;
4. a fixed time limit for an employee's response was unduly restrictive;
5. the on-call employee could easily trade on-call responsibilities;
6. the use of a pager could ease the restrictions; and
7. the employee actually engaged in personal activities during "on call" time.

Applying these factors, the court determined that the guards' "on call" time constituted hours worked under California law because the guards were required to stay on the worksite unless the defendant gave them permission to leave.

Critically for home health employers, live-in caregivers' sleep may be interrupted by a call to duty at night, to which the caregivers are required to respond immediately. Furthermore, the employees are generally not permitted to leave without permission and without replacement. Therefore, it seems likely that a court would find that the sleep time in these circumstances would be hours worked and should be compensated under *Mendiola*. Furthermore, Wage Order No. 15 does not explicitly provide for the exclusion of sleep time; therefore, an agreement to exclude sleeping time would likely be found invalid under the *Mendiola* decision in the absence of any California law providing for such an agreement.[79]

Compensability of Travel Time under California Law

Under California law, time spent traveling where an employee is "subject to the control of the employer" is compensable time.[80] In a 1989 opinion letter, the Division of Labor Standards Enforcement ("DLSE") stated that that employees were entitled to compensation for time spent engaged in general work-related travel (via automobile, airplane, etc.), even if they were merely passengers and performed no work because since the employees traveled "at the direction of the employer," the employees were necessarily subject to the employer's control during their travel time and should be compensated.[81] While traditional commute time (commuting to the first jobsite in the morning and home from the last jobsite in the evening) is generally not compensable, more than *de minimis* work during a commute will convert commute time to compensable time.[82]

Conclusion

While the *Home Care Association of America* decision prevented the elimination of the companionship exemption for third-party agencies from taking effect on January 1, 2015, the DOL is appealing the decision and the eventual outcome is not certain. Even if the decisions vacating the Final Rule stand, the DOL has increased its focus on the home health industry in recent years — and that is unlikely to change. To guard against potential challenges to their pay practices, employers should document the steps they take in their analysis when determining the applicability of the exemption. Furthermore, to strengthen their position in the event of a lawsuit, employers should enter into agreements with their employees setting forth the compensation terms and ensuring that the requirements for a reasonable agreement under the regulations are met. A robust recordkeeping practice, including recording hours of work and tasks performed, is also essential to ensure that employees continue to qualify for the exemption and to defend against challenges to it.

In addition to considerations of federal law, employers and their counsel need to be aware of the complex issues that can, and often do, arise under the various states' laws. Because of the complexity of some of these state statutes, and the nuances involved in the interaction of states' laws with the federal laws governing the payment of wages, compliance is difficult, at best. Attorneys advising home health employers should continue to monitor federal and state legal developments regarding these complex and rapidly-changing requirements.

Angelo Spinola is a Shareholder in Littler Mendelson's Atlanta office. Mr. Spinola regularly represents management across the country in collective, class and hybrid actions brought under the Fair Labor Standards Act and various state wage and hour laws. He represents employers in Department of Labor and state agency wage and hour investigations, conducts wage and hour practice audits and develops compliance measures to minimize exposure to wage and hour claims. In addition to his wage and hour practice, Mr. Spinola appears on behalf of employers in federal and state courts and administrative tribunals, litigating discrimination cases, including age, disability, race, national origin, sex, harassment and retaliation. He also litigates issues related to unfair competition, misappropriation of trade secrets, breach of executive employment contract claims, and common law claims under state law. Mr. Spinola's litigation and counseling experience spans multiple industries, including substantial emphasis in the healthcare sector. He may be reached at *aspinola@littler.com*.

Shannon Creasy is an Associate in Littler Mendelson's Atlanta office. Ms. Creasy represents management in collective, class and hybrid litigation brought under the Fair Labor Standards Act and state wage and hour laws. She also conducts audits of company wage and hour practices and provides counseling relating to policies, including exemption and classification issues. In addition, Ms. Creasy represents employers in a broad range of employment matters, including discrimination, harassment, retaliation and misappropriation

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of trade secrets. Ms. Creasy counsels employers to ensure compliance with federal and state laws relating to wage and hour practices, anti-discrimination and anti-harassment policies, restrictive covenants, pre-employment screening and leave of absence matters. She may be reached at *screasy@littler.com*.

Endnotes

1 Littler represented the Home Care Association of America, the International Franchise Association, and the National Association of Home Care & Hospice, the co-plaintiffs in the case.

2 *Home Care Ass'n v. Weil*, Case No. 1:14-cv-00967 (D.D.C. Dec. 22, 2014) (Doc. 21, p. 17).

3 *Home Care Ass'n v. Weil*, Case No. 1:14-cv-00967 (D.D.C. Dec. 31, 2014) (Doc. 26). Although the DOL declared it would not enforce the new regulations until July 1, 2015, this would not have prevented individuals from filing private causes of action. *See* Angelo Spinola and Shannon Creasy, *Preparing for the Elimination of the Minimum Wage and Overtime Exemption for Home HealthCare Aides*, *The* HEALTH LAWYER, vol. 27, no. 2 (Dec. 2014), www.nasddds.org/news/dol-announces-time-limited-non-enforcement-of-home-care-rule.

4 *Home Care Ass'n v. Weil*, Case No. 1:14-cv-00967 (D.D.C. Jan. 14, 2015) (Doc. 32, p. 2).

5 *Home Care Ass'n v. David*, Case No. 1:14-cv-00967 (D.D.C. Dec. 22, 2014) (Doc. 21, p. 17); *Home Care Ass'n . Weil*, Case No. 1:14-cv-00967 (D.D.C. Jan. 14, 2015) (Doc. 32, p. 2).

6 While the main provisions of the Final Rule were vacated by the court, two record-keeping provisions survived the litigation and became effective on January 1, 2015. First, 29 C.F.R. § 516.2(a) identifies the types of information employers must record and retain (including employees' names, addresses, hours worked, etc.). 29 C.F.R. § 552.110 clarifies that an agreement between the employer and the employee cannot replace a record of actual hours worked and that a provider must be paid for all time worked, even if the time worked exceeds the time previously anticipated and set forth in an agreement.

7 *Biggs v. Quicken Loans, Inc.*, 990 F. Supp. 2d 780 (E.D. Mich. 2014); *see also Wyoming v. U.S. Dep't of the Interior*, No. 2:07-cv-00319-CAB at 10-11 (D. Wyo. filed Nov. 7, 2008); *see also* Eric M. Fraser, David K. Kessler, Matthew J. B. Lawrence and Stephen Calhoun, *The Jurisdiction of the D.C. Circuit*, CORNELL J.L. & PUB. POL'Y, vol. 23, no. 1, p. 131 (Dec. 3, 2013) (analyzing the court's unique caseload "disproportionately weighted toward administrative law").

8 *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998).

9 *Id.* at 1409-10 (internal citations omitted) (emphasis in original).

10 *Home Care Ass'n v. Weil*, Case No. 1:14-cv-00967 (Jan. 22, 2015) (Doc. 36). Note: Plaintiffs did not initially challenge Section 552.6, the provision that radically narrowed the definition of "companionship services," because under Section 552.109, the provision eliminating the exemption for third-party employers, plaintiffs were prohibited from seeking any companionship exemption whatsoever. After the court vacated Section 552.109, the DOL rejected plaintiffs' requests to temporarily postpone the effective date of the new rule, thereby requiring plaintiffs to seek injunctive relief from the court regarding Section 552.109.

11 29 U.S.C. § 213(b)(21); 29 U.S.C. § 213(a)(15). A worker may qualify for one or both of these exemptions.

12 Final Rule, 78 Fed. Reg. 60474.

13 Application of the Fair Labor Standards Act to Domestic Workers, 78 Fed. Reg. 60,454, 60,474 (Oct. 1, 2013).

14 *Id.*

15 29 U.S.C. § 206(f).

16 Application of the Fair Labor Standards Act to Domestic Workers, 78 Fed. Reg. 60,454, 60, 480 (Oct. 1, 2013); DOL Wage & Hour Division Fact Sheet, www.dol.gov/whd/regs/compliance/whdfs79b.htm.

17 29 C.F.R. § 785.23.

18 29 C.F.R. § 552.102 (emphasis added).

19 *Id.*

20 *Garofolo v. Donald B. Heslep Assocs., Inc.*, 405 F.3d 194, 199 (4th Cir. 2005) (citation omitted).

21 *Leever v. Carson City*, 360 F.3d 1014, 1019 (9th Cir. 2004) (collecting cases).

22 29 C.F.R. § 552.110. Note that even when a live-in caregiver can separately qualify as an exempt companion, it is still important to have a reasonable agreement as to hours worked and to accurately track actual hours worked. This is because the caregiver may be unable to qualify as an exempt companion in certain workweeks and, therefore, would be entitled to at least minimum wage for all hours worked.

23 Application of the Fair Labor Standards Act to Domestic Workers, 78 Fed. Reg. 60,454, 60, 480 (Oct. 1, 2013). The DOL has reiterated that "[t]he recordkeeping requirements in § 516.2(a) and § 552.110(a) already require employers of nonexempt employees to maintain records such as hours worked each workweek, total wages paid, total additions to or deductions from wages and the basis therefore [sic] (such as board and/or lodging), and the regular hourly rate of pay when overtime compensation is due."

24 *See* 29 C.F.R. § 552.3, 29 U.S.C. 213(a)(15).

25 *See Welding v. Bios Corp.*, 353 F. 3d 1214, 1218 (10th Cir. 2004).

26 *Madison v. Res. For Human Dev.*, 233 F.3d 175, 183 (3d Cir. 2000); *Welding*, 353 F. 3d at 1219-20.

27 Wage & Hour Opinion Letter, WHM (BNA) 99:8203 (Dec. 30, 1998).

28 29 C.F.R. § 552.6.

29 *Id.*

30 *Id.*

31 *McCune v. Oregon Senior Services Division*, 643 F. Supp. 1444, 1450 (D. Or. 1986), *aff'd*, 894 F.2d 1107 (9th Cir. 1990) (considering "general housework" and finding "dusting or cleaning [the client's bedroom or living room] appears to be routine, general household work, rather than work related to the individual. Cleaning a spill by the client in either room, by contrast, would be non-routine care more related to the individual than the general household, and would not be included in the twenty percent figure").

32 Under New York law, "24-hour home attendants" are those care providers that spend 24 hours in the client's residence but are expected to spend part of that shift sleeping.

33 *Severin v. Project OHR, Inc.*, 2010 U.S. Dist. LEXIS 85705, at **16-17 (S.D.N.Y. June 20, 2012) (holding that home attendants who provide 24-hour care in the client's homes are "non-residential employees") (citing *Settlement Home Care, Inc. v. Indus. Bd. of Appeals of the Dep't of Labor*, 151 A.D.2d 580 (2d Dep't 1989)).

34 N.Y.COMP. CODES R. & REGS. tit. 12, § 142-2.14; *Severin*, 2010 U.S. Dist. LEXIS 85707 (citing *Settlement Home Care, Inc.*, 151 A.D.2d 580).

35 If an employee is not exempt under the FLSA, the employee must be paid overtime in accordance with the FLSA, at a rate of one and one-half times the employee's regular rate of pay. N.Y. COMP. CODES R. & REGS. tit. 12, §§142-2.2, 142-3.2. To ensure that a New York employee is properly compensated, a careful analysis should be conducted to determine whether the employee should be compensated at one and one-half times the regular rate under the FLSA or one and one-half times the New York minimum wage (currently $8.75 per hour) under the NYLL.

36 N.Y. COMP. CODES R. & REGS. tit. 12, § 142-3.2.

37 *Andryeyeva v. New York Health Care, Inc. ("NYHC")*, 45 Misc. 3d. 820, 827-28 (N.Y. Sup. Ct. Kings Cnty. Sept. 16, 2014) (rejecting NY DOL's guidance regarding the "13-hour workday" rule, finding it applies only to employees presumed to be subject to an exemption from New York's minimum wage standards by virtue of providing exclusively "companionship services" within the meaning of the FLSA exemption, and specifically excluded "sleep-in home attendants.").

38 N.Y.COMP. CODES R. & REGS. tit. 12, § 142-2.1(b).

39 *Severin v. Project OHR, Inc.*, 2012 U.S. Dist. LEXIS 85705, at **25-26, n.6 (S.D.N.Y. 2012) (finding the DOL interpretation allowing a 13-hour workday should be given deference because it does not conflict with the regulations, is not unreasonable or irrational,

and the interpretation draws upon a federal regulation permitting the exclusion of an eight hour sleeping period during a 24-hour shift); NY DOL Opinion Letter, RO-09-0169 (Mar. 11, 2010) ("[I]t is the opinion and policy of this Department that live-in employees must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals.").

40 *Andryeyeva v. New York Health Care, Inc. ("NYHC")*, 45 Misc. 3d. 820, 827-28 (N.Y. Sup. Ct. Kings Cnty. Sept. 16, 2014). Note: The New York Supreme Court is the lowest court in New York judicial system and its opinions are subject to appeal.

41 N.Y.COMP. CODES R. & REGS. tit. 12, § 142-2.1(b).

42 *See* NY DOL Opinion Letter, RO-10-0068 (May 7, 2010); NY DOL Opinion Letter, RO-09-0023 (Mar. 10, 2009).

43 *See* MASS. GEN. LAWS ch. 149, § 191. Compensable time, or "working time," includes all time in which the employee "is required to be on the employer's premises," all time "required to be on duty," and "any time worked before or beyond the end of the normal scheduled shift. *Id.* § 190(a).

44 Employers are required to keep a record of wages and hours for domestic workers for two years.

45 *Id.* § 190(i) (provides that an employer "shall not restrict or interfere with a domestic worker's means of private communication, monitor a domestic worker's private communications, take any of the domestic worker's documents or other personal effects or engage in any conduct which constitutes forced services or trafficking of a person . . . ." Currently, there are no exceptions in the law for employers who suspect that their employees are engaging in wrongful or unlawful activity, but the Attorney General may clarify this provision of the law when regulations are promulgated).

46 Additional protections include limits on when an employer may deduct a meal or lodging credit. *Id.* § 190(f)-190(g).

47 MASS. GEN. LAWS ch. 149, § 190(a).

48 *Id.* A "personal care attendant" is defined as "an individual who provides personal care attendant services to persons with disabilities or seniors under the MassHealth personal care attendant program or any successor program under sections 70 to 75, inclusive, of chapter 118E."

49 MASS. GEN. LAWS ch. 140, § 46A, 454 MASS. CODE REGS. § 24:02 (home care agencies are no longer employment agencies under these statutes); 454 MASS. CODE REGS. § 24.00; 454 MASS. CODE REGS. § 24:02 ("[d]omestic [e]mployee does not include a person who performs services of a domestic nature as an employee of the business that places him or her.").

50 For this and additional information concerning the change in licensure status, *see generally*, Executive Office of Labor and Workforce Development, *Employment Agency FAQs*, Commonwealth of Massachusetts (Feb. 11, 2015), www.mass.gov/lwd/labor-standards/employment-agency/employment-placement-and-staffing-agencies-program/faqs-about-operating-an-employment-agency-in-ma.html.

51 MASS. GEN. LAWS ch. 149, § 190(m). The state attorney general is expected to publish a form notice in the coming months.

52 *Id.* § 100.

53 *Id.* § 190(a).

54 *Id.* § 190(e).

55 *Id.* § 190(d).

56 *Id.* § 190(c).

57 455 MASS. CODE REGS. §2.03(4)(b).

58 Op. Letter MW-2002-019 (June 29, 2002) ("[T]o determine whether an employee who is free to leave the worksite between shifts is on or off duty, this Office will employ factors used by the U.S. Department of Labor to determine duty status. As a general rule, if: 1.) the employee is completely relieved of all work-related duties; 2.) the employee knows in advance that she or he will have time off between shifts; 3.) the time off is long enough for the employee to effectively use the time as she or he wishes; and 4.) the employee does not have to return to work until a definite, specified time, the employee can be considered off duty and the time is not compensable working time.").

59 MASS. GEN. LAWS ch. 149, § 190(k).

60 *Id.* § 190(j).

61 Wage Order No. 15 § 1.

62 Wage Order No. 15 § 2(I).

63 Wage Order No. 15 § 2(H).

64 CAL. LAB. CODE § 1451(a)(1).

65 *Id.*

66 CAL. LAB. CODE § 1451(b)(1).

67 65 CAL. LAB. CODE § 1454.

68 *Id.*

69 CAL. LAB. CODE § 1451(d).

70 *Id.*

71 These duties include making beds, housecleaning, cooking, laundry, or other duties related to the maintenance of a private household.

72 CAL. LAB. CODE § 1454.

73 *Id.*

74 Emergency is defined as "an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action." Wage Order No. 15 § 2(D).

75 However, if a live-in or non-live-in employee can also be categorized as a personal attendant, then the requirements for personal attendants apply; thus an employer must pay 1.5 times the regular rate in excess of nine hours worked in a work day and 45 hours worked in a workweek.

76 Wage Order No. 15, § 2(N) (Note that employees who do not reside at their place of employment are also entitled to one hour's pay at the minimum wage in addition to the employee's wages for that workday when they work a split shift. The Wage Order defines "split shift" as "a work schedule, which is interrupted by non-paid non-working period established by the employer, other than bona fide rest or meal periods.").

77 *Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal.4th 833 (Cal. 2015).

78 *Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal.4th 833, 848-49 (Cal. 2015).

79 A motion for rehearing has been filed in the *Mendiola* case. The court has until April 8, 2015 to grant or deny the motion. *See Mendiola v. CPS Sec. Solutions*, 2015 Cal. LEXIS 665 (Cal. Jan. 27, 2015).

80 *Id.* at *1.

81 DSLE Opinion Letter (Dec. 7, 1989); *see also Morillion v. Royal Packing Co.*, 995 P.2d 139, 141 n.2 (Ca. 2000); *Rutti v. Lojack Corp.*, 596 F.3d 1046, 1061-62 (9th Cir. 2010).

82 *See Stevens v. GCS Serv.*, 281 F. App'x 670, 673 (9th Cir. 2008) ("if the phone calls were of sufficient length, then they may instead support a conclusion that [the plaintiff] was 'suffered or permitted to work' by [the defendant] during his commute."). *See also* DLSE Opinion Letter (Feb. 15, 1994) (noting that employers in California are permitted to establish a different pay scale, not less than the minimum wage, for travel time as opposed to productive working time.).