

COMPANIONSHIP SERVICES EXEMPTION: STAY DENIED - WHAT DOES THIS MEAN?

BACKGROUND

Employers continue to await information regarding the effect of the Department of Labor's ("DOL's") proposed changes to the companionship services exemption under the Fair Labor Standards Act. As previously reported, the DOL issued a new rule significantly changing the scope of the companionship services exemption. Though the new rule was scheduled to take effect in January 2015, a group of trade associations promptly filed legal action to block the new regulation from taking effect. The trial court ruled in favor of the plaintiffs and struck down the regulations.

As reported in a previous alert, the Court of Appeals reversed the trial court and ruled that the proposed changes could go into effect. The court's mandate will be effective 52 days after the ruling. The plaintiffs filed a motion asking the court to stay the ruling, pending an appeal to the U.S. Supreme Court. At the same time, the DOL filed a motion requesting the ruling become effective sooner. While the rulings were pending, the DOL published guidance in which it stated that it would refrain from bringing enforcement actions until 30 days after the Court of Appeals issued its mandate.

PROCEDURAL UPDATE

On September 18, the Court of Appeals for the D.C. Circuit denied both the DOL's motion to expedite the court's mandate and the National Association for Home Care and Hospice's ("NAHC's") motion to stay the mandate. NAHC and the other plaintiffs have petitioned the United States Supreme Court for a stay of the ruling so that the plaintiffs can submit a petition for the Supreme Court to review the decision. If the Supreme Court does not grant the petition, the court's ruling will take effect 52 days after the date it was issued, which would mean the mandate could take effect as early as October 13, 2015.

At this time, it is not at all certain that the Supreme Court will grant the plaintiffs' emergency petition. This puts providers who are relying on the companionship services exemption in a difficult position. Because the Court of Appeals ruling will result in third-party employers no longer being able to rely upon the companionship services exemption, home health aides, hospice aides and private duty aides/attendants who are employed by agencies and were previously treated as exempt from overtime and minimum wage under the companionship services exemption will be entitled to overtime and minimum wage on October 13 unless the Supreme Court issues a stay. Because we cannot predict whether the Supreme Court will issue a stay pending its review of the petition for review of the Court of Appeals decision, home health, hospice and private duty providers who rely upon this exemption must start planning for October 13 to ensure they are prepared to comply with minimum wage and overtime provisions as needed. If the Supreme Court grants the stay, agencies may maintain their current practices while the appeal continues to move forward. Despite the difficulties posed by this uncertainty, it is better for agencies to be prepared than to have the Supreme Court deny the request for a stay and be unprepared on October 13.

PREPARING YOUR ORGANIZATION

There are a number of things providers can be doing now to prepare. First, communicate with your staff. If they are not already aware of the litigation, you may want to educate them. The impact of this rule will likely be very significant for your staff and they need to understand you are acting to comply with the rules imposed by the DOL that may or may not go into effect.

Second, evaluate your current scheduling practices and determine how many of your currently exempt "companions" work more than 40 hours a week. These employees will be entitled to 1.5 times their regular rate of pay for all hours worked over 40 during a workweek if the ruling takes effect. Organizations that cannot afford this overtime will need to consider reducing employee hours to bring companion workers to forty hours or less.

Third, employers should evaluate travel time policies and practices. Many home care providers do not track travel time for their non-skilled companionship employees. This does not create wage and hour violations when the employees are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act. However, if the mandate stands and is not further delayed by a court-issued stay, these exempt companions will no longer be exempt but will be entitled to overtime and minimum wage as soon as October 13. Without the benefit of the exemption, failure to track and compensate travel time, as required by state and federal law, could potentially result in

overtime and minimum wage violations. It is therefore critical to consider now whether you have the necessary processes in place to accurately track and compensate your companion workers for their travel time.

Fourth, similar to travel time, compensation of employee mileage or travel expenses was not an issue while those non-skilled employees were exempted under the companionship services exemption. Should that exemption cease to apply to these workers rendering them eligible for minimum wage and overtime, unreimbursed travel expenses may lead to allegations of minimum wage and overtime violations because unreimbursed expenses incurred by employees in performing tasks on behalf of the employer are treated as encumbrances on wages and result in a reduction of the overall wage being paid. For employees who drive significant numbers of miles (i.e., employees serving rural home health patients), this uncompensated mileage expense can result in a reduction of the employees' wages to a level that is below the requisite minimum wage when the unencumbered wages are divided by the employees' total working time during the workweek.

These are only a few examples of areas employers need to be thinking about and planning for as we approach October 13. While the Supreme Court may ultimately issue a stay pending the plaintiffs' petition for review, employers of companion employees need to consider these issues now in order to adequately prepare in the event compliance becomes necessary on October 13.

If you have any questions regarding this post, please contact:

- Robert Markette at (317) 977-1454 or rmarkette@hallrender.com;
- Jennifer Gonzalez at (248) 457-7840 or jgonzalez@hallrender.com; or
- Your regular Hall Render attorney.

Please visit the Hall Render Blog at <http://blogs.hallrender.com/> or click [here](#) to sign up to receive Hall Render alerts on topics related to health care law.