Practical Impact of Recent Regulatory Changes to Employers of Live-In Domestic Service Workers

This document briefly summarizes the practical impact that the Department of Labor's October 2013 revisions to its domestic service regulations will have on employers that employ live-in domestic service workers. Please note that the information below is not legal advice and that employers seeking legal advice should consult with a competent attorney. In addition, there may be state laws and regulations that are more restrictive than federal law and should also be considered.

Background

The nation's fundamental law governing how people are paid in the workplace is the Fair Labor Standards Act (FLSA). The FLSA was enacted in 1938 and has been amended many times. Among other things, the FLSA establishes a federal minimum wage and the requirement that most employers pay overtime premium pay to most employees who work more than 40 hours in one week. The FLSA includes numerous exceptions to its minimum wage and overtime provisions. The U.S. Department of Labor has the responsibility for issuing implementing regulations that interpret the FLSA. The law is enforced both by the Department of Labor and through private lawsuits.

In 1974, Congress expanded the FLSA to include domestic service employment. However, it also added new exemptions for particular types of domestic service employees. One of those exemptions was for employees hired to provide companionship services to individuals who are unable to care for themselves. Employees meeting the companionship services exemption are exempt from both the minimum wage and overtime requirements of the FLSA. Another exemption added in 1974 is for live-in domestic service workers. Individuals qualifying as live-in domestic service workers are exempt from the FLSA's overtime provisions, but not from its minimum wage provisions.

Shortly after the 1974 amendments, the Department of Labor issued regulations implementing these exemptions. The regulations made it clear that these exemptions applied to caregivers without regard to whether they were employed directly by the individual needing care, by the individual's family, or through an employer in the business of providing companionship service employees, often referred to as third-party employers. As a practical matter, under these long-standing regulations live-

in companion care workers were exempt from overtime and minimum wage requirements under the companion care exemption, making it unnecessary for employers to consider the more limited domestic service exemption that applied to live-in workers.

These interpretations remained unchanged for nearly 40 years.

Major Changes Made by Revised Rules

On October 1, 2013, the Department of Labor finalized significant revisions to the domestic service regulations under the FLSA.[1] These charges are scheduled to go into effect on January 1, 2015.[2] Most significantly, the Labor Department modified the regulations to prevent third-party employers from utilizing either the companion care exemption or the domestic service exemption. The rules were also modified by significantly limiting the scope of activities considered to be companionship services and by modifying the recordkeeping requirements for live-in domestic service employees.

For employers of live-in domestic service workers, the practical impact of these changes is that employees will now be entitled to minimum wage and premium pay for overtime under the FLSA. In addition, employers will need to re-familiarize themselves with the FLSA's recordkeeping requirements and its rules for determining whether time is compensable. These issues are described in more detail below.

Elimination of Exemption for Third Party Employers

For nearly 40 years, the FLSA's domestic service regulations were applied by examining the tasks that a worker performed. If that worker's tasks were consistent with the regulation's interpretation of companionship services or domestic service, then the relevant exemption would apply, regardless of whether the employer was an individual needing care, his or her family, or a third party employer. However, the revised regulations expressly state that third-party employers "may not avail themselves" of either exemption. As a result, such employees will be entitled to the minimum wage and overtime premium pay for hours worked in excess of 40 in a week.

Determining Compensable Time for Live-In Domestic Employees

With the effective elimination of the overtime exemption for third party employers of live-in domestic service employees, and the effective elimination of the companionship exemption, employers may wish to refresh themselves with the FLSA's rules for determining whether time is compensable and what records must be kept.

The FLSA requires that employers pay employees for all hours worked. Employees need not be compensated for off-duty time and meal time where they are relieved of all duties. The Labor

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[1] Final Rule, Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (October 1, 2013).
[2] As discussed more fully below, the Labor Department has adopted a non-enforcement policy for the first six months of 2015. However, employers must still comply by January 1.

Department's regulations permit an employer and its live-in workers to enter into an agreement about how much time will be spent on-duty, and therefore compensable. The Department states that it will accept any reasonable agreement made between the parties, taking into consideration all relevant facts. However, employees must be paid for all hours worked, regardless of what is actually included in the agreement. If there is significant deviation from the initial agreement reached and the time worked, the revised regulations state that the parties should reach a new agreement that reflects the actual facts of the hours worked by the employee.

Sleep time and meal time

In the case of live-in domestic service workers, the regulations recognize that employees are not considered working all the time that they are on the premises, but instead have time for purely private pursuits, including eating, sleeping, entertaining, and other periods of complete freedom from all duties. The regulations thus permit an employer and employee to exclude sleep time provided certain conditions are met. In order to exclude eight hours of sleeping time, the regulations require that the time spent sleeping usually be uninterrupted. If an employee is interrupted, additional rules apply. Importantly, if an employee does not get five hours of uninterrupted sleep time then all of the time for that sleeping period may be treated as working time.

The employer and employee may also agree to exclude break and meal times. In order for an employer to exclude meal time, the employee must be completely excused from duties. If an employee on meal time is interrupted and called back to duty, this can have the effect of treating the entire meal time as working time. Another issue that frequently raises questions is the type of restrictions the employer may put on the employee during meal time. Generally, the employer may place some restrictions on the employee (such as remaining on the premises). However, the more restrictions the employer puts on the employee, the more likely the meal time will be considered working time.

Recordkeeping

The FLSA's recordkeeping requirements require employers of domestic service employees to keep records including employee names, social security numbers, addresses, total hours worked each week, total wages paid, premium pay for hours worked over 40 in a week, among other things. These records must be kept for a minimum of three years. There is no requirement to keep the records in any particular form.

For live-in domestic service workers, the employer must also maintain a copy of any agreement entered into with employees regarding expected working time and off-duty time. The new regulations also require employers to make, keep, and preserve a record showing the exact number of hours worked by live-in domestic service employees. While the employer is ultimately required to make and retain records of hours worked, it may require employees to record their hours worked and submit them to the employer.

Compliance Deadline

The new rule changes are scheduled to go into effect on January 1, 2015. On October 9, 2014, the Labor Department published a policy statement announcing that it would not bring any enforcement actions against any employer as to FLSA violations resulting from the newly revised regulations until June 30, 2015.[3] While the Labor Department is delaying its enforcement of the new regulations, it is important to emphasize that the Labor Department has not delayed the effective date of the regulations. Because the FLSA is also enforced through private litigation, employees and their representatives, such as labor unions or plaintiffs' lawyers, could seek to enforce the new rules and recover backpay and liquidated damages by filing their own lawsuits on or after January 1, 2015.

Conclusion

As the January 1, 2015 compliance deadline is approaching rapidly, employers may wish to take steps now to ensure that they have the systems and processes in place to accurately track and record hours worked for any live-in domestic services employees or other workers newly covered by the FLSA's requirements. Employers may also wish to determine whether the revisions to the new regulations will require changes in price structure or the manner in which care is provided, such as by additional caregivers, to determine whether and how to prepare customers and clients for any necessary modifications.

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[3] Policy statement, Application of the Fair Labor Standards Act to Domestic Service; Announcement of Time-Limited Non-Enforcement Policy, 79 Fed. Reg. 60,974 (October 9, 2014).