To Pay or Not To Pay: The Department of Labor's New Rule On Third-Party Employers

by Lydia Harley

The Fair Labor Standards Act obligates employers to pay covered employees minimum wage and overtime. For domestic service employment, however, Congress specifically excluded any employees who provide companionship services to individuals unable to care for themselves and employees who reside in the households where they provide domestic services. These exclusions are also known as the "companionship services" and "live-in domestic employee exemptions."

In 1975, concerned with definitional gaps in the act, the department implemented regulations clarifying the definitions of "companionship services" and "live-in" workers and specified that these exemptions also apply to workers employed by third-party employers. Focusing on the employees and the nature of employment, the department reasoned that, since these exemptions apply to any employee engaged in the exempt services, the inclusion of third-party employers is "more consistent with the statutory language and prior practices concerning other similarly worded exemptions."

For decades, the two exemptions remained substantially unchanged until the department in 2011published a Notice of Proposed Rulemaking to revise the act's domestic service regulation. The aim was to change the law, effective January 1, 2015, by mandating third-party employers to pay minimum wage and overtime to their home care workers.

Concerned with the associated costs and the consequences of the "New Third-Party Employer Rule," Home Care Association of America, International Franchise Association, and the National Association for Home Care & Hospice, filed suit in the District of Columbia under the Administrative Procurement Act. On December 22, 2014, Judge Richard Leon vacated the department's revised rule, agreeing with the plaintiffs' arguments that the department exceeded its statutory authority under the act and failed to provide adequate justification for the policy reversal.

The decision in Home Care Association of America v. Weil[1] now raises the question whether many health care providers should comply with the new rule and pay overtime to their home care workers or to wait until an appellate court decides this issue. Reading Judge Leon's reasoning and applying the standards set forth in Chevron,[2] it appears that, absent express direction by Congress, the department exceeded its regulatory authority; moreover, the new rule is in direct conflict with both "the plain language and legislative history" of the act.

Notably, the Supreme Court in Coke[3] was very clear on this issue, upholding the validity of the long-standing exemption of companionship service employees paid by third parties. The United States defended the current regulation as amicus curiae. After Coke, several bills were introduced in Congress that sought to abolish the third-party employer exemption (110th, 111th, and 112th). However, according to Judge Leon, none were successful enough to make it to the floor of either house of Congress. It will be interesting to see how an appellate court will decide on this issue, and whether the court will concur with Judge Leon that this case represents a separation of power issue whereby the department tried to accomplish what others failed to achieve through the judiciary or Congress. B

[1] 2014 WL 7272406
[2] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837.
[3] Island Care at Home, Ltd. v. Coke, 551 U.S. 158.

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