CLIENT UPDATE: U.S. Department of Labor Issues Guidance on New FLSA Domestic Service Regulations

In anticipation of new regulations covering domestic service workers that become effective on January 15, 2015, the Wage Hour Division of the U.S. Department of Labor ("DOL") last month issued "Administrator's Interpretation No: 2014-1," on the application the Fair Labor Standards Act ("FLSA") "to home care services provided through shared living arrangements."

The original domestic service regulations, which date back to the 1970's, exempted certain domestic workers from FLSA coverage if they met either the "companionship service" or "live-in domestic service" tests. New regulations, entitled Application of the Fair Labor Standards Act to Domestic Service, 29 C.F.R. §552, substantially narrow both exemptions. To qualify for the new companionship services exemption, an employee will be required to provide "fellowship" or "protection" for at least 80 percent of the workweek. To qualify for the live-in service overtime exemption, a worker will need to live and sleep in the client's home for five consecutive days of the week. Moreover, third party employers, such as home care agencies, will not be able to claim either exemption.

Because most domestic care workers generally receive the minimum wage, the DOL suggests that employers will not bear additional costs in the form of higher hourly wages; however, employers will have to comply with other provisions of the FLSA, including requirements that employers compensate certain employee travel time and pay employees for time worked beyond forty hours. At present, only about fifty percent of employers utilizing the domestic service exemption pay care providers for travel from one job site to another; however, such travel must be compensated (unless a regulatory exception applies). Determining whether the new regulations apply, prompting additional compensation and necessary additional record-keeping, will require a fresh analysis of the employer-employee relationship and the new exemption tests.

Is the Care Provider an Employee of the Consumer?

The FLSA requires that an employer pay its employees in accordance with the provisions of the law. Often, the putative employer is a patient or health care "consumer" who engages the domestic care giver or companion directly. The FLSA applies to a care provider who is an employee of the consumer or a third party. *Bona fide* independent contractors are not covered by the law. Whether a worker is an employee or independent contractor under the FLSA is analyzed using the DOL's long-standing "economic realities test," which includes consideration of the degree of control exercised by an employer and the employer's financial investment in the employee, among other issues. According to the DOL's guidance, in shared living situations, a care provider will likely be considered an employee when he or she resides in the home of a consumer, but is likely to be an independent contractor when the consumer moves into the worker's home. The DOL cautions, however, that it is always necessary

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to conduct an analysis of the so-called economic realities test because there are many variations in possible living arrangements.

Domestic Service Employment

The FLSA does not cover many small employers with gross annual revenue of $500,000, or where the employee in question is not engaged in interstate commerce. However, due to a special exception for domestic service employment, the FLSA will usually apply to a care giver living in the private home of a consumer. Domestic service employment, performed in a consumer's home, is covered if the employee earns at least $1,900.00 annually or performs domestic service in one or more households for more than eight hours a week.

Companionship Services

Although employees performing "companionship services" remain exempt from the minimum wage requirement and employees who reside in households in which they work are not subject to overtime rules, these exemptions are narrower than before the regulatory changes. After January 1, 2015, companionship services will be defined as the provision of "fellowship" and "protection." Fellowship is defined as the engagement of a person in "social, physical, and mental activities." Protection is defined as accompanying the person to monitor their "safety and well-being." The exception can apply so long as the employee does not provide care for more than twenty percent of the time worked in any given week. Providing care includes activities related to daily living, such as cooking, bathing, and other forms of assistance.

Alternatively, a live-in domestic service employee does not need to be paid for any hours in a work period worked beyond 40, if she resides in the consumer's home. Residing in the consumer's home requires that a provider stays in the home seven nights a week and has no other home or a provider works and sleeps at the home for five nights a week, totaling 120 hours or more. Third party employers or agencies cannot claim either exemption. In addition, consumers and their families are considered joint employers with those third party employers can continue to claim the exemption, if applicable.

Preparing for Implementation and the Importance of Written Agreements

The Interpretation is meant to clarify the new regulations, but it does not provide guidance on the full "spectrum of shared living arrangements." Aside from the general guidelines provided by the DOL, the Interpretation recommends that employers use a "reasonable agreement" that describes the expected hours worked and the general requirements of an employee engaged in a live-in care taking arrangement. An agreement is important to ensure that employers clarify that they are not agreeing to be responsible for paying live-in employees for entire 24-hour periods. The DOL and courts will give deference to these documents when calculating the hours worked by a live-in provider. Employees do not need to be paid for *bona fide* eight hour sleeping periods or for personal time spent relieved of responsibility, but these non-compensatory periods must be defined in writing.

Finally, the long implementation period for the new regulations is designed to give consumers and third parties time to modify their payroll practices and consult with legal counsel to ensure

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compliance. During this transition period, consumers and third party agencies implement changes in their scheduling and documentation of home care services, through both employment agreements and modern payroll systems. Employers of domestic caregivers are encouraged to contact their MBJ attorneys for assistance in complying with the new regulation.

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