

Labor & Employment Law E-Alert

Vorys, Sater, Seymour and Pease LLP

AGENCY-EMPLOYED COMPANIONSHIP WORKERS ARE EXEMPT FROM FLSA, SUPREME COURT HOLDS

The Fair Labor Standards Act (FLSA) exempts from the statute's minimum wage and overtime pay rules "any employee in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor]." Companies or agencies who are in the business of supplying individuals to provide companionship services in the homes of the elderly or sick relied upon this exemption to avoid overtime pay obligations to the individuals they employed. These employees sued arguing that the scope of the exemption applied only to those employed directly by the elderly or sick person, and not by a third party company or agency.

The source of the dispute arose from the DOL's own definitions. The DOL defined "domestic service employment" as "services of a household nature performed by an employee in or about a private home ... *of the person by whom he or she is employed.*" Consequently, the literal interpretation of this provision is that the FLSA exemption does not apply to anyone employed by someone living outside of the person's home for whom he is caring, i.e., someone employed by an agency or the parent/child of an invalid.

However, in a later subsection of its regulations, the DOL defined "companionship services" to include those "employed by an employer or agency other than the family or household using their services" ("third party regulation"). Therefore, this section states that the FLSA exemption does, in fact, apply to those employed by third parties.

The Supreme Court observed that Congress expressly instructed the DOL to "fill in the gaps" of the statute. Thus, the Court reasoned, because the FLSA did not answer the third-party-employment question, the DOL had authority to adopt a regulation stating whether or not workers paid by third parties fell within the exemption.

Given the Congressional grant of authority to the DOL and the DOL's rule-making power, the Supreme Court concluded that the DOL's third-party regulation was legally binding. Therefore, domestic service employees providing companionship services who are employed by a third party are exempt from the FLSA's minimum wage and overtime pay requirements.

If you have any questions about this or any other employment-related issue, please contact your Vorys lawyer.

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