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LEGAL ALERT



## Legal Alert: Overtime Issue for Home Care Workers is Alive as Senators Press to Have US DOL Regulations Altered or Reinterpreted

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**What Happened Two Years Ago...** In *Long Island Care at Home, Ltd. v. Coke*, 549 U.S. 1105 (June 11, 2007), the Supreme Court deferred to the U.S. Department of Labor's interpretation of its own regulations and unanimously held that home care workers employed by third party employers or agencies were exempt from overtime under the "companionship exemption" to the Fair Labor Standards Act. Coupled with the overtime exemption available to non-profit agencies in New York (where Medicaid funded home care can be 24/7) who had timely filed a Statement of Non-Profitmaking Institutions with the NYS Department of Labor, this fully exempted those agencies, in particular, from overtime pay to home care workers.

**What Happened Afterwards...** The focus of class or collective overtime actions in the home care industry changed from claims of non-exemption to claims based on an exception to the exemption – home care workers performing general household work for more than 20% of their weekly work hours are not eligible for the exemption. (Despite the fact-specific nature of these claims, our firm recently won a motion to dismiss such a claim on its face, because none of the general household cleaning alleged was unrelated to the care of the client, and no other general household cleaning was performed. *Torres v. Ridgewood Bushwick Senior Citizen Home Care Council, Inc.* (08-CV-3678, U.S.D.C., E.D.N.Y.) (April 22, 2009)).

**What Is Happening Now...** On June 11, 2009 a group of fifteen Democratic Senators led by Sen. Tom Harkin urged U.S. Secretary of Labor Hilda Solis to alter or reinterpret the companionship exemption so that it would not apply to workers who are employed by an employer or agency other than the family or household using their services. The press reported the following day that Solis shared the lawmakers' concerns: "I intend to fulfill the department's mandate to protect America's workers, including home health care aides, who work demanding work schedules and receive low wages," she said.

**How This Affects Your Agency...** If the U.S. Department of Labor were to alter or reinterpret the companionship exemption to exclude third party employers and agencies, overtime would be required for their home care workers. Overtime litigation would likely increase, with additional claims, as well, for travel time between assignments, meal periods when the worker is not completely relieved of duties, waiting time when it is part of a worker's job responsibilities, on-call time, training time, and sleeping time when the worker does not receive at least five hours of sleep during a scheduled sleep period. If you would like our article on "**Ways To Minimize Wage and Hour Risks**",

please e-mail Stephen Zweig, at Ford & Harrison's New York office, 100 Park Avenue, New York, New York 10017, 212-453-5906, [szweig@fordharrison.com](mailto:szweig@fordharrison.com). This "Alert" is not intended as legal advice.