



Legal Alert: Overtime for Home Care Workers: On the Horizon?

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Home care workers are currently exempt from overtime under federal law. That exemption faces significant new challenges from proposed legislation and administrative rulemaking which, if successful, will require third party employers and home health care agencies to pay overtime to home care workers. **The current exemption:** In *Long Island Care at Home, Ltd. v. Coke*, 549 U.S. 1105 (June 11, 2007), the Supreme Court unanimously held that home care workers employed by third party employers or agencies are exempt from overtime under the "companionship exemption" to the Fair Labor Standards Act (FLSA). Non-profit agencies in New York that timely filed Statements of Non-Profitmaking Institution with the NYS Department of Labor are also exempt from paying overtime under New York State law.

New challenges to Coke: Congressional lawmakers and Obama administration rulemakers are challenging the overtime exemption under *Coke*. On July 28, 2010, Rep. Linda Sanchez (D-Calif.) introduced the Direct Care Workforce Empowerment Act of 2010 (H.R. 5902), which would amend the FLSA to require that home care workers employed by third party employers or agencies be paid overtime. Sen. Casey (D-Penn.) introduced a companion bill in the Senate on August 3. If the bills are signed into law, the Supreme Court's ruling in *Coke* will be overruled, and the DOL will be required to issue new regulations consistent with the bill's amendments to the FLSA. In addition, as indicated on April 26, 2010 in its Semiannual Regulatory Agenda, the DOL plans to propose new regulations reinterpreting the FLSA to extend overtime protection to home care workers as soon as October 2011 (effectively repealing the same regulations that were upheld in *Coke*). Thus, even if H.R. 5902 fails to be enacted into law, new DOL regulations granting new overtime protections to home care workers are on the horizon — regulations that the Supreme Court has said will be entitled to deference by courts under *Coke*.

How this could affect agencies: If overtime is required for home care workers, whether by legislation or regulatory change, agencies will have to adopt the necessary controls for insulating against wage and hour risks. Workers' schedules may need to be revised. Differential pay for weekend or night shifts, which affects a worker's "regular rate" of pay on which overtime is computed, will have to be monitored closely. Overtime litigation will 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 have any questions regarding this Legal Alert, please contact the

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