Renewed Attempt To Destroy The FLSA's "Companionship" Exemption

June 26, 2011

By John E. Thompson

Another effort is afoot to limit the federal Fair Labor Standards Act's Section 13(a)(15) "companionship" exemption to the point of non-existence in any practical sense. Last week, apparently-identical bills (S. 1273 and H.R. 2341 -- see currently available version below) were introduced in the Senate and the House which would have precisely this effect. Similar measures were proposed last year, but the newer ones would impose even-narrower restrictions.

The FLSA's minimum-wage and overtime requirements do not apply to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves . . .." "Domestic service employment" refers to services of a household nature the worker performs in or about the private home of the person by whom he or she is employed. The term "companionship services" means providing care, fellowship, and protection to people who cannot care for themselves due either to advanced age or to physical or mental difficulties. Additional U.S. Labor Department regulations and interpretations explain how and to whom the exemption may be applied.

If the proposed amendment becomes law, only an employee employed "on a casual basis" to provide companionship services could be eligible for exemption under Section 13(a)(15). In turn, the phrase "on a casual basis" would be defined so as to make the exemption available only if:

♦ The companionship employment is irregular or intermittent;

♦ The work is not performed by someone whose vocation is to provide companionship services;

♦ The worker is employed only by the family or household using his or her services, rather than by another employer or agency (this is almost certainly designed to exclude even joint-employment arrangements involving, for instance, the worker, a home-healthcare agency, and the service recipients);

♦ The worker's employment by the employer is limited to no more than five hours "per week" (whether a calendar week, a workweek, or some other kind of "week" the bills do not say, nor do they clarify whether the five-hour limit is to be viewed as an average or an each-"week" proposition); and

♦ The worker's employment by the employer may not extend beyond a "time period" of twelve "weeks" in a calendar year.

These last two restrictions are more stringent than was their counterpart in last year's proposed changes.

It is likely that most employees providing companionship services (and apparently *all* such workers employed by home-healthcare agencies and similar organizations) would no longer fall within the amended exemption. It is entirely foreseeable that, instead of improving the circumstances of "direct care workers" and "older adults" whom the amendment purports to help, the changes would expose the interests of both groups to the principle of unintended consequences at the worst-possible time.

The bills have been referred to legislative committees at this point, so it does not appear that there will necessarily be immediate action. Nevertheless, the Service Employees International Union supports the bills, so opponents of these measures should take them seriously and should waste no time in making their views known to their Senators and Representatives.

◊ Have a comment or something else to add? Please use our comment feature below.

S.1273 H.R. 2341.pdf (49.95 kb)