WAGE AND HOUR QUARTERLY

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UNITED STATES SUPREME COURT HOLDS THAT HOME HEALTH WORKERS EMPLOYED BY THIRD-PARTY AGENCIES ARE EXEMPT FROM FLSA COVERAGE. HOWEVER, HOME HEALTH WORKERS STILL MAY BE COVERED BY MORE GENEROUS STATE WAGE AND HOUR LAWS.

On June 11, 2007, the Supreme Court issued its long-anticipated decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (June 11, 2007), holding that home health aids are exempt from the Fair Labor Standards Act's ("FLSA's") minimum wage and overtime provisions. The unanimous decision, authored by Justice Breyer, dealt a blow to hundreds of thousands of home health workers who assist client's with daily living activities such as dressing, bathing, housecleaning, and cooking. Trial lawyers and other workplace justice advocates expressed disappointment with the ruling. According to Gerry Hudson, Vice President of the Service Employees International Union, the decision "is a serious blow to efforts to ensure quality home care in America and underscores how unprepared we are to care for the millions of seniors who will want to live at home instead of institutions."

Impact on the FLSA's Companionship Exemption

The Supreme Court's June 11 decision resolved a split in the circuit courts regarding whether the FLSA's "companionship exemption" applied to home health aids who are not employed by the family or household using their services. Under the companionship exemption, the FLSA exempts from its minimum wage and overtime pay requirement "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 . . . ." 29 U.S.C. §213(a)(15). Federal Department of Labor ("DOL") regulations have provided that this exemption extends to workers "who are employed by an employer or agency other than the family or household using their services." Id. at §552.109(a).

The Second Circuit Court of Appeals had twice refused to enforce the DOL's regulation extending the companionship exemption to home health aids employed by third-party providers. *See Coke v. Long Island Care at Home, LTD*, 462 F.3d 48 (2d Cir. 2006); *Coke v. Long Island Care at Home, LTD*, 376 F.3d 118 (2d Cir. 2004). According to the Second Circuit, the regulation was hopelessly inconsistent with the FLSA's statutory and regulatory framework.

The Supreme Court disagreed, holding that the DOL acted within its administrative authority in enacting regulations that extend the companionship exemption to home health workers employed by an outside employer or agency.

Impact on Pennsylvania Law

The FLSA merely provides a federal floor for workers' wage and hour rights, and some states, including Pennsylvania, have enacted more generous wage and hour laws and regulations. Thus, even in the wake of *Coke*, home health aids employed by third-party employers might seek refuge under the Pennsylvania Minimum Wage Act ("PMWA"), 43 P.S. §§260.1, et seq. The PMWA exempts from its minimum wage and overtime provisions "[d]omestic services in or about the private home of the employer." 43 P.S. §§260.5(a)(3). However, PMWA's regulations define "domestic services" as "[w]ork in or about a private dwelling for an employer in his capacity as a householder . . . ." 34 Pa. Code §231.1(b).

The PMWA and its accompanying regulations lack any indication that the PMWA's domestic services exemption extends to workers not employed by the homeowner. In fact, such an interpretation of the exemption would seem to contradict the PMWA's regulatory framework.

Based on the above, The Winebrake Law Firm is pursuing litigation on behalf of Pennsylvania home health aids who have been denied overtime pay.

If you represent a Pennsylvania home health aid who works for a third party provider and does not receive overtime pay, you should consult with an attorney who concentrates on wage and hour law to determine whether litigation is warranted.

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WORKERS MISCLASSIFIED AS "INDEPENDENT CONTRACTORS" CONTINUE TO REAP VALUABLE FLSA OVERTIME BENEFITS

The overtime pay requirements of the Fair Labor Standards Act ("FLSA") cover millions of American workers, including thousands of workers who have been misclassified as "independent contractors." If you represent workers who have been designated as independent contractors, you should be aware of the "striking breadth"[1] of FLSA coverage. As one appellate court has observed, the FLSA contains "the broadest definition [of employment] that has ever been included in any one act."[2]

Whether an employer truly is an independent contractor exempt from overtime coverage depends on the "economic realities" of her work experience, not the language of her employment contract. The Third Circuit Court of Appeals has instructed Pennsylvania district courts to apply a six-factor test to determine whether a worker has been properly classified as an independent contractor.[3] The six factors include:

(1) the extent of the company's control over performance of the work;
(2) the worker's opportunity for profit or loss depending upon her managerial skill;
(3) the worker's investment in equipment or materials required for her task and her employment of helpers;
(4) whether the service rendered requires a special skill;
(5) the permanence of the working relationship; and
(6) whether the service rendered is an integral part of the company's business.

Recent court decisions demonstrate the continued viability of FLSA independent contractor cases. For example, in April 2007, a Florida district court granted summary judgment in favor of a worker hired to provide maintenance services at trailer park facilities, reasoning that the defendant company exerted substantial control over the plaintiff's work, which required no special skill.[4] Likewise, in March 2007, a Texas district court granted summary judgment in favor of a group of insurance agents who alleged that they were misclassified as independent contractors, reasoning that the agents "did not exercise any meaningful control over the insurance business they allegedly ran" and that the insurance company "retained control over major variables that determined [the agents'] ability to make profit, held them captive to the business, and made them dependent on [the company] for their success."[5] Even more recently, a Nevada district court conditionally certified an FLSA collective action brought on behalf of a class of commercial painters, observing that "the labels parties use in contract documents do not control whether overtime pay is required by the FLSA."[6]

The Winebrake Law Firm has successfully fought for workers allegedly misclassified as independent contractors. For example, in May 2007, a Pennsylvania district court approved an FLSA settlement on behalf of thirteen clients who sought overtime pay, alleging that they were misclassified as independent contractors. Likewise, in *In re. FedEx Ground Package System, Inc. Employment Parctices Litig.*, MDL 1700 (N.D. Ind.), The Winebrake Law Firm, working with co-counsel throughout the country, seeks to recover overtime benefits on behalf of FedEx delivery workers who allege they were misclassified as independent contractors.

If you represent workers who you believe may have been misclassified as independent contractors, you should contact a law firm with experience litigating wage and hour cases.

1 *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).
2 *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 69 (2d Cir. 2003).
3 *See Martin v. Selker Brothers, Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991) (citing *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985).
4 *See Robinson v. Riverstone Communities*, LLC, 2007 U.S. Dist. LEXIS 31438 (S.D. Fla. Apr. 30, 2007);
5 *See Hopkins v. Cornerstone America*, 2007 U.S. Dist. LEXIS 23571 (N.D. Tex. Mar. 30, 2007).
6 *Lemus v. Burnham Painting & Drywall Corp.*, 2007 U.S. Dist. LEXIS 46785 (D. Nev. June 2007).

REMINDER: FEDERAL MINIMUM WAGE INCREASE BECOMES EFFECTIVE JULY 24, 2007

Effective July 24, 2007, the federal minimum wage increased from $5.15/hr. to $5.85/hr. In May 2007, the Democratic Congress passed the increase over the objections of the usual cast of special interest groups opposed to fair wages and workplace justice.

Since this is the first federal minimum wage increase in almost ten years, it is difficult to predict whether employers will promptly comply with the law. If you represent workers and their families, make sure they are receiving the new minimum wage of $5.85/hr.

WINEBRAKE LAW FIRM OBTAINS FEDERAL COURT APPROVAL FOR OVER $2.4 MILLION IN SETTLEMENTS FOR MEAT WORKERS IN FLSA "DONNING AND DOFFING" LAWSUITS

On May 29, 2007, and July 26, 2007, federal judges in the United States District Courts for the Eastern and Middle Districts of Pennsylvania approved settlements totaling over $2.4 million in FLSA "donning and doffing" lawsuits brought on behalf of current and former meat processing workers. In each case, Attorney Pete Winebrake of The Winebrake Law Firm was appointed by the federal judge to serve as lead plaintiffs' counsel.

FLSA "donning and doffing" lawsuits have become increasingly prevalent in federal courthouses throughout the United States. In these types of cases, workers generally contend that they are entitled to compensation for time spent performing various pre-shift and post-shift activities associated with the wearing and maintenance of sanitary/safety gear required by their jobs. These items can range from relatively elaborate gear such as protective armor to more common gear such as aprons and hairnets. In order to be compensable under the FLSA, the workers' activities must be an "integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). Workers also seek compensation for time spent traveling between the changing area and their place on the production line. In November 2005, the United States Supreme Court held in *IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 521 (2005), that workers are entitled to be paid for such travel time.

Donning and doffing lawsuits involve complex issues of law and fact and present the trial lawyer with many litigation pitfalls. The Winebrake Law Firm serves as co-counsel in some of the most prominent donning and doffing lawsuits pending in the federal court system, including multi-plant lawsuits against Tyson Foods and Pilgrim's Pride. In another case, The Winebrake Law Firm recently obtained conditional certification on behalf of thousands of Mississippi chicken workers. *See King v. Koch Foods of Mississippi, LLC*, 2007 U.S. Dist LEXIS 26746 (S.D. Miss. Apr. 10, 2007).

Trial lawyers representing workers in the beef and poultry industries should inquire whether their clients are being paid for time spent performing work-related activities before and after their paid shift.

"QUARTERLY QUOTE"

"A self-supporting and self-respecting demo cracy can plead no justification for the existence of child labor, no economic reason for chiseling worker's wages or stretching workers' hours."

President Franklin D. Roosevelt, May 24, 1937.

FLSA "WHITE COLLAR" MISCLASSIFICATION LAWSUITS CONTINUE TO BE FERTILE GROUND FOR LITIGATION

Effective August 2004, the Department of Labor ("DOL") implemented new regulations defining the FLSA's executive, administrative, and professional exemptions became effective in August 2004. *See* 29 C.F.R. §§541.0, et seq. Under these "white collar" exemptions, companies can avoid paying overtime to workers who receive a weekly salary of over $455 and perform executive, administrative, and professional duties. The regulations generally sought to expand the scope of the exemptions, leaving fewer workers with FLSA overtime benefits.

Fortunately, the revised regulations have not deterred trial lawyers from protecting the wage and hour rights of salaried workers who are managerial in job title only. For example, The Winebrake Law Firm recently has obtained federal court settlements for various salaried employees who alleged that they were misclassified as exempt under the white collar exemptions. These workers include: a "store manager" who spent much of her time stocking shelves and working the cash register; an "assistant hotel manager" who spent most of her time working at the hotel's front desk; four "sales managers" who spent most of their time performing pest extermination duties; an "assistant engineer" who spent most of his time performing manual labor; and a "chef" who spent most of his time performing routine kitchen duties.

Notwithstanding the DOL's recent attempt to expand the white collar exemptions, the law remains clear that, in deciding whether a salaried worker is exempt, the court's analysis must extend beyond the worker's job title. *See* 29 C.F.R. §541.2. Moreover, under the FLSA, exemptions must be "narrowly construed against the employers seeking to assert them." *Arnold v. Ben Kanowski, Inc.*, 361 U.S. 388, 392 (1960). Recognizing this, trial lawyers continue to challenge companies' use of the white collar exemptions to deny overtime pay to workers with few real managerial responsibilities. According to Bob DeRose, a Columbus, Ohio trial lawyer concentrating in wage and hour law: "Trial lawyers should not be deterred by the 2004 regulatory amendments because, in the end, judges are likely to apply a fact-specific and common sense approach in evaluating white collar misclassification."

Workers deserve to get paid for all time spent working, and most workers are entitled to valuable overtime pay when they work over 40 hours in a workweek. Yet, every year, millions of American workers are cheated out of their full pay because they do not understand their rights under the Nation's complex wage and hour laws.

The Winebrake Law Firm believes workers pursuing their wage and hour rights are entitled to the same high quality legal representation enjoyed by big corporations. Wage and hour law violations hurt working families. When a company violates the law, it should be held accountable. No one is above the law.

The Winebrake Law Firm goes to Federal Court to fight for workers who have been deprived of full regular pay and overtime pay in violation of the federal Fair Labor Standards Act ("FLSA") and similar state wage and hour laws. Attorney Pete Winebrake has negotiated settlements in federal wage and hour lawsuits worth millions of dollars to workers and their families.

The wage and hour laws are complicated. Don't hesitate to contact The Winebrake Law Firm for a free consultation if you believe the wage and hour rights of you or one of your clients may have been violated. Workers never pay a fee unless they recover.

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