An Existential Problem for Caregiver Registries

Under the
Notice of Proposed Rulemaking
Addressing the Application of the
Fair Labor Standards Act to Domestic Service
Regulatory Information Number (RIN) 1235-AA05

The Private Care Association[1] is the national association representing caregiver registries. Caregiver registries facilitate the consumer-directed model for home care, where the consumer self-directs the consumer's own home-care arrangement.

A caregiver registry's principal role is to enhance the safety of consumers, by providing access to pre-background screened and pre-credential verified caregivers on a just-in-time basis. A registry also provides administrative support to a home-care relationship.

Once a consumer and caregiver agree to work together, those two parties determine all aspects of the home-care relationship, e.g., the hours of work, the pay rate, the specific types of services to be provided, the location of the work and when to end the relationship. A caregiver registry is not a decision maker on any substantive aspect of a home-care relationship.

Nonetheless, the consistent audit position taken by the U.S. Department of Labor has been to treat a caregiver registry as an employer or joint employer of caregivers for purposes of the Fair Labor Standards Act ("FLSA"). This has not been a problem to date, however, because of the *companionship* exemption, section 13(a)(15) of the FLSA, and the *live-in* exemption, section 13(b)(21) of the FLSA.

A repeal of these exemptions relative to third-party employers would expose caregiver registries to potential liability for overtime and/or minimum wage with respect to caregivers with respect to whom the registry has no control over the *hours worked* or the *pay rate* – which are the key factors for determining an employee's right to overtime and minimum wage. Thus, caregiver registries would be exposed to potential liabilities under the FLSA without any means to manage or mitigate that exposure.

Proposed Clarification

To address this specific dilemma for caregiver registries, PCA respectfully urges that – if the proposed changes to the third-party employer regulations are adopted – the regulations make clear that an employer that does not set the rate of pay to a caregiver and does not set the hours worked by the

[1] Since 1977, the Private Care Association, http://www.privatecare.org, has been the voice of private duty home care. PCA's membership is made up of home care registries that refer self-employed caregivers to provide assistance with activities of daily living such as bathing, dressing, lifting/transferring, continence care, feeding/meal preparation, companion care, homemaker services and nursing services in the client's home. The consumer-directed model of care is based on the idea of consumer choice in home care options and gives consumers the right to make decisions and direct the care needed. The principal advantages of consumer-directed care are that it costs less to the consumer, the caregivers typically earn more, it allows consumers to individually select caregivers, it provides greater continuity in caregiver relationships, and it supports caregiver entrepreneurship.

caregiver is not a joint employer or third-party employer of the caregiver. The following is a proposed clarification for your consideration.

> Sec. 552.109 Third Party Employment.
>
> (a) Third party employers of employees engaged in companionship services within the meaning of Sec. 552.6 may not avail themselves of the minimum wage and overtime exemption provided by section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption, if the employee meets all of the requirements of Sec. 552.6. For these purposes, an employer that does not determine an individual's rate of pay and does not determine the individual's hours of work shall not be treated as a joint employer or third party employer of the individual.
>
> (b) * * *
>
> (c) Third party employers of household workers engaged in live-in domestic services within the meaning of Sec. 552.102 may not avail themselves of the overtime exemption provided by section 13(b)(21) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption. For these purposes, an employer that does not determine an individual's rate of pay and does not determine the individual's hours of work shall not be treated as a joint employer or third party employer of the individual.

PCA has previously submitted comments setting forth its general opposition to the proposed changes to the companionship and live-in exemptions and also joined in support of the economic analysis prepared by economist Jeffrey A. Eisenach and his colleague Kevin W. Caves in *Estimating the Economic Impact of Repealing the FLSA Companion Care Exemption* (March 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017109. PCA continues to oppose the proposed changes for the reasons stated.

If you have any questions or would like additional information concerning the foregoing, please let us know.