



NATIONAL RESOURCE CENTER *for*
PARTICIPANT-DIRECTED SERVICES

What's Next for the FLSA Home Care Rule

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with

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Welcoming Remarks



What's Next for the FLSA Home Care Rule



Status of the Rule: Not Currently In Effect

- ❑ In *Home Care Association of America v. Weil*, D.C. District Judge Richard Leon “vacated” (struck down) the Rule in two parts
 - ❑ Part 1: Third Party Regulations
 - ❑ Part 2: Companionship Exemption/Duties Test
- ❑ Together, these decisions invalidated the entire Rule
 - ❑ DOL plans to appeal in a higher court

Third Party Regulations



Judge Richard Leon

- ❑ **December 22, 2014:** The part of the rule preventing third party employers (e.g., home health agencies) from using the companionship & live-in exemptions was struck down
- ❑ **December 31, 2014** Judge Leon issued a 14-day stay on the entire Rule

Companionship Exemption



- ❑ **January 14, 2015:** Companionship duties test and “20% rule” struck down
- ❑ Combined with the previous judgment, the entire Home Care Rule was thus nullified

Takeaways from *Home Care Assoc. v. Weil*

- ❑ Judge Leon found that Congress intended that some domestic workers be exempt from minimum wage and overtime requirements
- ❑ Historically, proposed legislation to prevent third party employers from using companionship and live-in exemptions had little Congressional support
- ❑ Judge Leon found Congress “has not shown one iota of interest” in changing or constraining the definition of companionship
 - ❑ Thus, found new “duties test” to be out of bounds

Judge Leon's Ruling

- ❑ Found the Home Care Rule was beyond DOL's scope of authority
- ❑ “The Department [of Labor] is trying to do through regulation what must be done through legislation.”
 - ❑ Little evidence of Congressional intent to limit third party use of companionship & live-in exemptions
 - ❑ No evidence of Congressional intent to change the definition of “companionship”
- ❑ “Congress is the appropriate forum in which to debate and weigh the competing financial interests in this very complex issue affecting so many families.”

What does the Rule's annulment mean right now?

- ❑ DOL's non-enforcement period is currently meaningless because the Rule has been struck down
- ❑ The original 1974 definitions of companionship and live-in workers and associated exemptions continue to apply (as they did prior to January 1, 2015)
 - ❑ Third party employers may continue to take the companionship and live-in exemptions when appropriate
- ❑ NRCPPDS is analyzing the full implications of joint employment in the Rule's absence

What is the current definition of “companionship services”?

- ❑ “Services for the care, fellowship, and protection of persons who because of advanced age or physical or mental infirmity cannot care for themselves” (DOL Fact Sheet 25)
 - ❑ Includes meal preparation, bed making, clothes washing and other similar personal services
- ❑ General household work is also included, as long as it does not exceed 20 percent of the total weekly hours worked by the companion
 - ❑ If the 20% threshold is exceeded, minimum wage and overtime apply
- ❑ Does not include services performed by trained personnel such as nurses

What is the current definition of a “live-in worker”?

- ❑ Worker must reside on the employer’s premises either “permanently” or for “extended periods of time”
 - ❑ “Permanently”: when worker lives, works, and sleeps on the employer’s premises 7 days per week and has no home of his or her own other than that provided by the employer
 - ❑ “Extended period of time”: when worker lives, works, and sleeps on the employer’s premises for 5 days a week (120 hours or more)
 - OR if worker spends less than 120 hours per week working and sleeping on employer’s premises but spends 5 consecutive days or nights residing on the premises

Considerations for Joint Employers

- ❑ The Home Care Rule didn't change DOL's longstanding criteria for joint employment under FLSA
- ❑ Though the Rule has been struck down, we are analyzing implications for entities who may be joint third party employers
 - ❑ It's possible that third party employer obligations to pay for travel time and overtime may remain depending on a number of state and program-specific factors
 - ❑ NRCPPDS will share more information on this topic soon

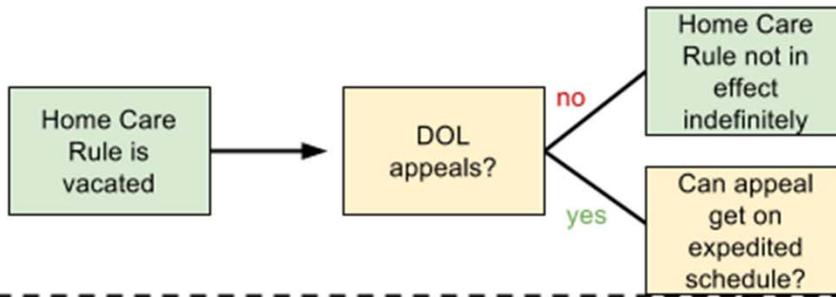
Don't Neglect State Labor Law Compliance

- ❑ State labor laws may not match federal rules
- ❑ Check to make sure that any exemptions you take are legal for your state labor law
 - ❑ A worker may be exempt from minimum wage and overtime for federal purposes but not for state
 - ❑ 16 states require minimum wage and overtime to be paid to otherwise exempt home health workers
 - ❑ 5 states require minimum wage but not overtime to be paid to otherwise exempt home health workers
- ❑ If state and federal rules differ, comply with the more stringent rule

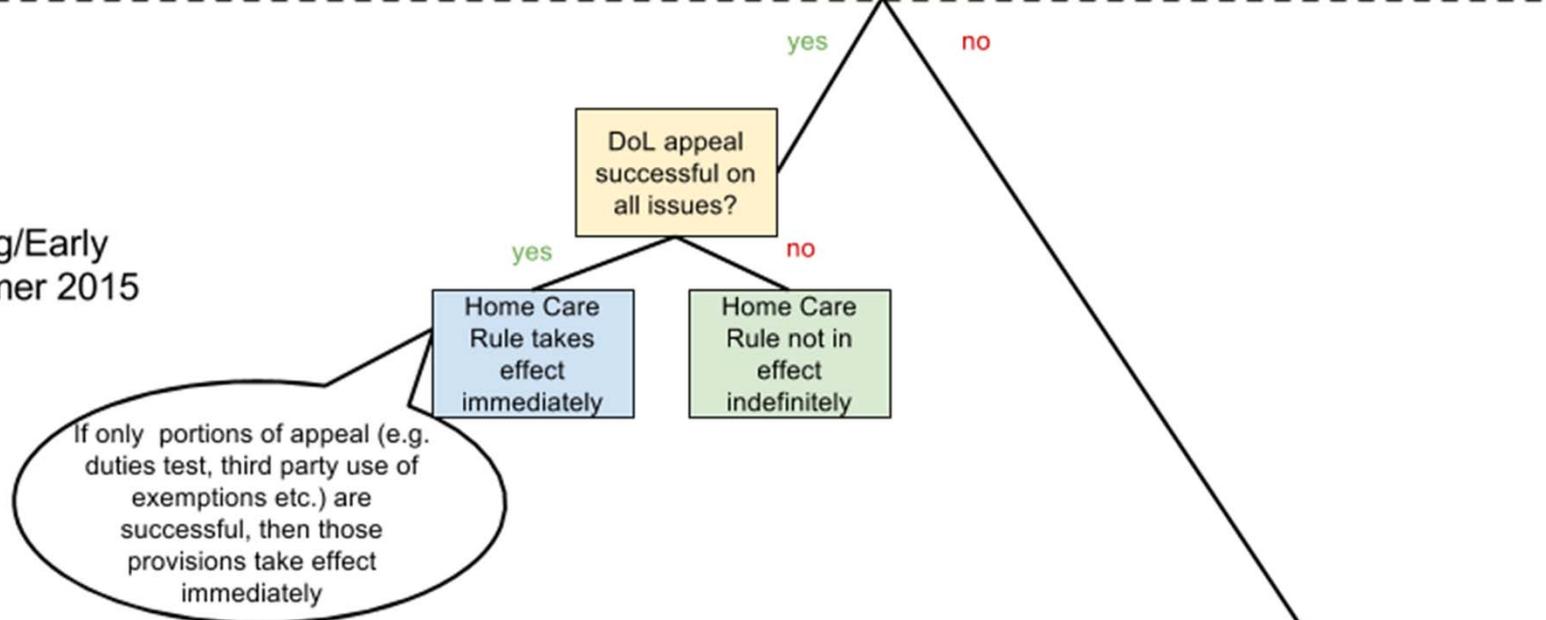
What happens next?

- ❑ DOL is considering all options
 - ❑ Case will almost certainly be brought to the DC Circuit Court of Appeals
 - ❑ Judge Leon's decision can be upheld, reversed in part, or reversed in full (see next slide)

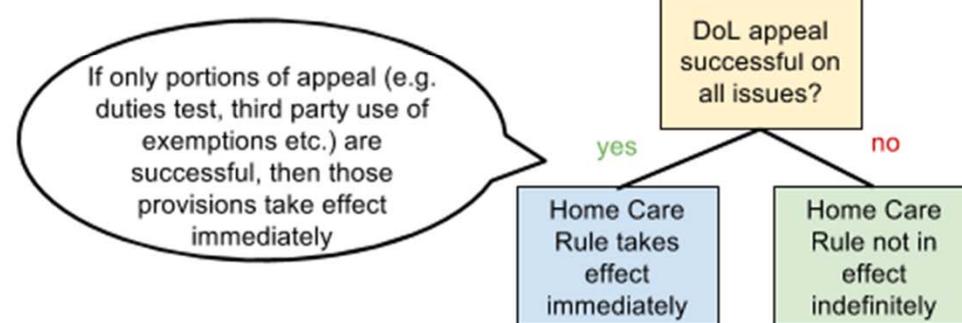
Immediately



Late Spring/Early Summer 2015



Early - Late Fall 2015



Supreme Court

- ❑ If the decision is appealed, depending on the result of the appeal, either the defendants or plaintiffs could then take the issue to the Supreme Court
- ❑ The Supreme Court would then decide whether they would hear the case
 - ❑ If the Supreme Court chooses NOT TO hear the case, the decision of the appellate court stands
 - ❑ If the Supreme Court decides TO hear the case, they will and the Court's ultimate decision will stand

What To Do Now?

- ❑ Analyze your state's labor laws
 - ❑ Does your state include companions and live-ins in its minimum wage and overtime rules?
- ❑ Consider a contingency plan in case the Rule comes back into effect
- ❑ If your state planned to implement caps to worker hours, we advise holding off on implementing caps for now

What To Do Now?

- ❑ As always, know which workers qualify for the 1974 exemptions and which don't
 - ❑ Those who don't likely must be paid minimum wage and overtime for all hours worked, including travel time for a joint employers and aggregated overtime across consumers when working for a joint employer
 - ❑ NRCPDS will offer more analysis on the original 1974 companionship and live-in exemptions

Questions?





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-THANK YOU-

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