MEMORANDUM

TO: **Memo Distribution List**

FROM: Hinman Straub P.C.

RE: Changes in FLSA Exemptions for Homecare Agencies

DATE: August 24, 2015

OVERVIEW

On Friday, August 21, 2015, the United States Court of Appeals for the District of Columbia Circuit ("Appeals Court"), reversing the lower court, handed down a decision upholding the United States Department of Labor's October 1, 2013 final rule (hereinafter the "Final Rule") which ended exemptions to the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA") for employees of third-party agencies who provide companionship services and live-in care within a client's home. Currently, in New York third-party employers with employees who are exempt under the FLSA's companionship services and live-in exemptions must pay one and a half times the minimum wage for work in excess of forty (40) hours per week for nonresidential employees and forty-four (44) hours per week for live-in employees. Once the Final Rule goes into effect, these employers will be required to pay one and a half times the employees' regular rate of pay for hours in excess of forty (40) hours per week. With the Appeals Court decision the Final Rule is now slated to go into effect, unless reversed by the US Supreme Court. The Final Rule will result in a considerable increase to the payroll expenses of homecare agencies.

PROCEDURAL BACKGROUND

Since 1975, the FLSA provided an exemption from its minimum wage and overtime provisions for employees of third-party agencies providing companionship and live-in care services to clients in their home. Reversing its prior regulation and years of precedent, the United States Department of Labor ("DOL") issued its Final Rule on October 1, 2013, eliminating the FLSA's companionship services and the live-in worker exemptions for employees of third-party homecare agencies. In fact, under the Final Rule, third-party employers may no longer claim either exemption even when the employee is jointly employed by the third-party employer and the client receiving the services. As you may recall, the Final Rule was to become effective on January 1, 2015.

In response, trade associations challenged the Final Rule by bringing suit in the District Court for the District of Columbia ("D.C. District Court") in June 2014. The D.C. District Court agreed with the trade associations' challenge to the DOL's Final Rule on December 22, 2014 and vacated the DOL's narrowing of the definition of "companionship" and elimination of the exemption for employees of third-party agencies.

However, last week's ruling by the Court of Appeals in *Home Care Association of America v. Weil* reversed the D.C. District Court's decision and upheld the Final Rule. Principally, the Court of Appeals found that the DOL made a reasoned determination that the existing regulation misapplied Congress's original intent of the exemption in the homecare industry and further justified the DOL's reversal in policy due to the transformation of the homecare industry since the exemptions were promulgated in the 1970s. The Court of Appeals remanded the case to the D.C. District Court to enter summary judgment in favor of the DOL. Once entered and provided no further action is taken to stay the effective date of the Final Rule, third-party employers will be required to comply with its provisions immediately.

THE FINAL RULE AND ITS EFFECT IN NEW YORK

Prior to the Final Rule, New York law provided homecare workers overtime pay equal to one-and-a-half times the minimum wage, as opposed to their regular rate of pay. Further, New York Labor Law provides that overtime accrued after forty (40) work hours of work for non-residential homecare employees and forty-four (44) hours of work for live-in homecare employees. Although New York law was more stringent than the FLSA prior to the Final Rule, the Circuit Court's decision that the FLSA's minimum wage and overtime provisions apply to homecare workers means that the New York rule will be preempted and employers must pay one and a half times an employee's regular rate of pay for hours worked beyond forty (40) hours a week for all homecare workers, not otherwise subject to any exemptions under federal or state law.

EFFECTIVE DATE AND NEXT STEPS

Prior to the Final Rule going into effect, the case will be remanded to the D.C. District Court for entry of summary judgment in favor of the DOL. However, we have spoken to the plaintiffs in this matter and a petition to appeal the decision to the United States Supreme Court is likely, if not guaranteed in the next several months. Further, the plaintiffs in the case will likely seek a stay of judgment from the Court of Appeals, and if denied will seek a stay of judgment from the Supreme Court. Unless a stay is granted, the Final Rule eliminating the FLSA exemptions for homecare workers employed by third-party agencies will be effective immediately upon entry of summary judgment in favor of the DOL by the D.C. District Court. Once effective, employers will have no option but to comply with the overtime provisions as it applies to their employees providing companionship services or live-in care services.

Hinman Straub P.C. has also been in contact with the New York State Department of Labor ("NYSDOL") to understand the changes to state Labor Law that may be required based upon the Final Rule and will be working with NYSDOL as it implements the Final Rule in light of this recent decision.

Hinman Straub will provide additional updates regarding any effective date, appeal, or implementation of the Final Rule as available. If you have any questions please contact Sean M. Doolan at 518-436-0751 or sdoolan@hinmanstraub.com.

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