American Network of Community Options and Resources

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To: **ANCOR Membership**
From: **Katherine Berland, Esq., Director of Public Policy**
Date: **February 5, 2015**
Re: **The Impact for Providers of the Court Rulings in Home Care Association of America v. Weil (Case No. 14-cv-967) Regarding the Department of Labor Final Rule RIN 1235-AA05, Application of the Fair Labor Standards Act to Domestic Service (Home Care Rule)**

OVERVIEW/SUMMARY

The purpose of this memorandum is to update ANCOR members on the current status of specific litigation challenging key portions of the DOL Home Care rule and to provide guidance on which portions of the rule are, and which are not, impacted by recent court rulings that vacated the third-party prohibition from using the companionship exemption as well as the narrowed definition of companionship services. This document should not be construed or relied upon as legal advice on any specific facts or circumstances. Providers should consult an attorney familiar with employment law at the federal, state, and local level to determine their obligations under the law in their jurisdiction.

This memorandum is comprehensive and will give providers a fuller understanding of what the impact of the rulings are, why they have that impact, and what the next steps are in the legal process. For a high-level summary which can serve as a quick reference guide to the rulings and information on the current status of provisions in the rule unaffected by the rulings, please see the accompanying ANCOR document "Legal Developments Regarding the Department of Labor Home Care Rule".

INTRODUCTION

On September 17, 2013, the Department of Labor (DOL) issued final rule 1235-AA05, which alters the application of the Fair Labor Standards Act (FLSA) to domestic service. The rule

had an effective date of January 1, 2015. The rule contains several key provisions of interest to ANCOR members, including the narrowing of the "companionship exemption", which permits certain individuals who provide companionship services from wage and overtime laws that apply to other workers. The rule includes new record keeping and timekeeping provisions. It also clarifies, without changing the law, information regarding third-party and joint employment relationships, independent contractors, and other areas such as sleep time. The DOL has issued several guidance documents that further clarify provisions in the rule.[1]

ANCOR has been engaged with the DOL in regards to this rule dating back to its initial issuance as a notice of proposed rulemaking (NPRM). In addition to submitting formal comments as part of the notice-and-rulemaking process, ANCOR has participated in listening sessions and met with key DOL Wage and Hour policymakers multiple times. Shortly after the publication of the final rule, ANCOR developed an analysis of the rule[2] and held several sessions to educate and inform members on the rule at various national and local conferences. ANCOR has also reported to members frequently on major developments impacting the implementation of the rule, including an announced delay of federal enforcement activities.[3] ANCOR also worked closely with the DOL as it developed guidance regarding shared living arrangements, and spearheaded the development of a model shared living contract.[4]

HISTORY OF THE COMPANIONSHIP EXEMPTION UNDER THE FLSA

In order to better understand the challenge to the rule and the impact of the court's ruling, a brief overview of the companionship exemption is helpful. The Fair Labor Standards

[1] The Department of Labor has made links to the Final Rule as well as guidance and other documents are available at http://www.dol.gov/whd/homecare/finalrule.htm.
[2] The analysis is available free of charge to ANCOR members and may be requested at http://www.ancor.org/resources/publications/ancor-analysis-dol-final-rule-rin-1235-aa05-application-fair-labor-standards.
[3] Though not related to the litigation, it is worth noting that in October 2014, the DOL announced a policy of limited non-enforcement of the rule, which has an effective date of January 1, 2015. This non-enforcement would include an initial six-month period during with DOL would not conduct any enforcement activities, followed by another six-month period during which it would enforce FLSA actions selectively according to its discretion. As the non-enforcement policy is limited to federal DOL enforcement activities, it did not and does not bar private enforcement of labor law. *See* WICs article, "DOL Delays Enforcement, But Not Implementation, of Home Care Rule," October 10, 2014.
[4] The model shared living contract is available at http://www.ancor.org/resources/best-practices.

Act of 1938, often called the "Wages and Hours Bill", established a federal minimum wage, guaranteed overtime paid at one-and-one-half the normal wage rate for certain jobs, prohibited child labor, and established a 40-hour seven-day workweek as a maximum before overtime must be paid. The FLSA has undergone several amendments over the decades.

Significant to this memorandum was the addition of the companionship exemption, which was created in a 1974 amendment to the FLSA. The main purpose of the amendment was to include domestic workers in wage and hours protection under the law. The amendment created specific exemptions for "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 (as such terms are defined and delimited by regulations of the Secretary)." The new law exempted companions from both wage and overtime protections, and exempted live-in workers from overtime (but not wage) protection. According to the legislative history of the 1974 act, "the changes were intended to expand the coverage of the FLSA to include all employees whose vocation was domestic service, but to exempt from coverage casual babysitters and individuals who provided companionship services".

LEGAL CHALLENGE TO THE RULE

On June 6, 2014, three national trade organizations that represent national associations of service providers (Plaintiffs) filed a lawsuit against the DOL challenging the home care rule and seeking injunctive relief from the implementation of certain provisions of the rule. ANCOR was not a party to the litigation. The case was filed in the United States District Court for the District of Columbia and is known as *Home Care Association of America v. Weil* (Case No. 14-cv-967).[5] Specifically, the Plaintiffs argued that the rule departed from the plain language of the FLSA and that the DOL exceeded its rulemaking authority when it created a prohibition from the use of the companionship exemption by third-party employers and was overly prescriptive in defining "companionship services" permitted under the companionship exemption.

[5] The Plaintiff's complaint is available at http://www.medicaidcouncil.org/briefings/NAHCcompanionshipLawsuit.pdf.

United States District Judge Richard Leon heard oral arguments on November 19, 2014 regarding the third-party prohibition, and heard additional oral arguments on December 31, 2014 regarding the revised companionship services definition. Judge Leon, in two separate rulings, vacated both portions of the rule, as will be detailed below.

LEGAL STANDARD

Understanding the legal reasoning the court applied is critical to understanding the ruling in this case. The court applied a legal standard known as the "Chevron Doctrine", which was established in the Supreme Court case *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The doctrine lays out a two-step analytical framework a court is to apply when determining whether a federal agency has properly promulgated rules pursuant to laws enacted by Congress.

When Congress enacts a statute, it may delegate the responsibility for promulgating federal regulations to implement the law to an appropriate federal agency. The interpretation of regulations promulgated by the federal agency is generally given deference by the courts, unless the regulations or their interpretation is contrary to the plain language of the statute or Congressional intent.

Chevron Step I

The first step under *Chevron* analysis is to determine whether Congress spoke directly to the issue in contention in the plain language of the statute, or in legislative history surrounding the statute (which could include the Congressional record or relevant committee reports, for example). If Congress has spoken directly to the issue, any regulation contrary to Congressional intent will be deemed to be an improper exercise of the promulgating agency's authority and further analysis is not required.

Chevron Step II

If the first step of the *Chevron* analysis determines that Congress did not speak directly to the issue in the plain language of the statute or in legislative history, the court moves on to

the second step of analysis. The second step of analysis looks to whether Congress has expressly or implicitly delegated authority to the agency to implement a statutory provision or fill a statutory gap. In other words, did Congress purposely leave parts of the statute open to interpretation and delegate the authority to the agency to interpret them? Or, did Congress remain silent on a provision (purposeful or not), with the expectation that the appropriate agency would address the provisions through the promulgation of regulations?

If the authority to fill in statutory gaps has been properly delegated to an agency that will promulgate regulations, those regulations will be given deference unless they are "arbitrary, capricious, or manifestly contrary to the statute". Under this step of analysis, the court determines whether a regulation is permissible. Generally the agency will be given deference for any regulation so long as it is permitted and reasonable. A reasonable interpretation need not be the *best* interpretation, it need only be permissible. If the regulation is deemed to be an unreasonable construction of the statute, it is not permissible, and the court will determine the regulation is not an appropriate exercise of the authority delegated to the agency.

THIRD-PARTY PROHIBITION

The Plaintiffs argued that Congress was clear when creating the companionship and live-in exemptions within the FLSA that it intended for the exemption to be applicable to individuals performing certain functions, and that Congress never intended a distinction to be drawn based on the employer rather than on service activities. The court agreed, and vacated the portion of the rule that prohibits third-party employers from availing themselves of either the companionship exemption or the live-in domestic service worker exemption.

Applying the *Chevron* analysis, the court determined that Congress was clear on the face of the statute by noting that the language of the FLSA states that the companionship exemption is to be applied to "*any* employee" who is employed to provide companionship services. The court said, "If an employee's work is encompassed within the statutory terms as defined by the regulations, the employer is not obligated to pay overtime and/or minimum wage. The court provided additional examples of Congressional intent that it says show clearly that Congress

intended the exemption to be applied based on the activities of the worker, not on the basis of who the employer is. The court specifically noted that Congress did draw employer-based distinctions in other sections of the law, and that by declining to draw those distinctions in this section, it clearly expressed its intention that those distinctions not apply to the use of the companionship exemption.

The court noted that the issue of third-party employers availing themselves of the companionship exemption has been extensively litigated, and courts have consistently upheld the ability of third-party employers to use it. In response to a Supreme Court ruling in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), several bills were introduced to attempt to abolish the third-party employer exemption. However, none of those bills ever gained support sufficient to pass through Congress or be signed into law. The court characterized the DOL rule as an attempt "to try to do administratively what others had failed to achieve in either the Judiciary or the Congress".

Based on its application of the *Chevron* analysis, the court concluded that the rule's prohibition against third-party employers availing themselves of the companionship or live-in domestic service worker exemptions is an improper exercise of agency authority, and vacated that portion of the rule.

DEFINITION OF COMPANIONSHIP SERVICES

The Plaintiffs argued that the rule's narrowed definition of "companionship services" exceeded the scope of authority delegated to the Department of Labor to promulgate regulations. The court agreed and vacated the part of the rule that excluded from the definition of "companionship services" assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs) that exceed 20% of the time a worker spends with an individual. In other words, the rule said that if ADLs and IADLs accounted for more than one-fifth of the worker's time in a given week, the exemption would be lost for that week.

The court applied the same *Chevron* analysis that it applied when deliberating on the third-party exemption piece of the case. The court determined that Congress did explicitly delegate authority to the Department of Labor to define the term "companionship services".

According to the doctrine governing regulatory deference, such delegation does not "grant [the agency] a blank check" to define the term "in a way that contradicts the Act itself", the court noted.

Reasoning that the statutory language is clear in creating the companionship exemption for the provision of services to elderly and disabled individuals who "are unable to care for themselves", the court determined that any regulation that seeks to write out of the exemption the concept of "care" is of no practical use, and therefore not a reasonable construction of the statute by the promulgating federal agency. The court said that, "The exemption clearly targets workers who provide services to those who need care. Indeed, what services could possibly be required more by those 'unable to care for themselves' than *care* itself?"

The court also noted that Congress specifically declined to limit the companionship services exemption to services provided on a "casual basis", as it had for the babysitter exemption contained in the same statute. A basic tenant of statutory interpretation is that if Congress explicitly speaks to an issue in one instance, that its silence on that issue in another instance can be used to infer that it intended the issues to be treated differently. In this case, the court concluded that if Congress had intended the companionship exemption to be limited to "casual" caregivers, it would have made that explicit as it had for babysitters. The court bolstered its interpretation of Congress' intent by noting that over the past forty years, it has never sought to introduce statutory language that would alter the longstanding agency interpretation of the activities that comprise "companionship services".

Based on its analysis of Congressional intent, the court concluded that the rule's revised, narrowed definition of companionship services was not an appropriate exercise of authority by the Department of Labor, and vacated that portion of the rule as well.

JURISDICTION AND SCOPE

The challenge to the rule was brought by three national trade associations that represent service providers: Home Care Association of America, the International Franchise Association, and the National Association for Home Care and Hospice. The Plaintiffs represent constituents from multiple states. The Defendants in the case are David Weil, in his official

capacity as Administrator of the U.S. DOL's Wage and Hour Division, Thomas Perez, in his official capacity as the Secretary of the DOL, and the Department of Labor. The case was filed in the United States District Court for the District of Columbia, a federal trial court which has jurisdiction over federal matters within its district. The federal agency is represented by the Department of Justice, as is appropriate for actions of this nature.

Neither party to the litigation or the court has challenged the district court's jurisdiction in this case. A district court verdict generally is only binding and enforceable within that jurisdiction. The next level of court, the United States Court of Appeals for the District of Columbia Circuit, is binding on the lower district court within its jurisdiction. The relationship of the federal district court to other jurisdictions is an important one to understand in order to understand how this rule impacts providers and workers outside of the court's jurisdiction.

The issue at the heart of this case is whether portions of the rule were properly promulgated by the federal agency. The court's order vacating portions of the rule was directed to the Secretary of Labor and the Wage and Hour division without any geographic limitation. Plaintiffs and the Defendants, through their arguments presented and motions filed with the court, have shown that they both are operating under the understanding that this ruling has nationwide scope and is not limited to the boundaries of the district court's jurisdiction.

As the federal agency is under the court's jurisdiction, and as the court vacated key portions of the regulation, those portions of the regulation are likely not enforceable by that agency unless or until a higher court overturns the ruling of the district court. The DOJ has not explicitly acknowledged that it concurs with the conclusion that these portions of the regulation are not enforceable by the Department of Labor pending appeal, nor has it challenged the ruling specifically on this issue.[6]

The legal issue presented in this case has not, to date, been presented in other federal court jurisdictions which would also have authority to hear a case of this nature. Hypothetically, another federal district court could issue a conflicting ruling. Additionally, a private entity could seek to enforce the rule through private action in a different court, which could come to a

[6] As noted in footnote 3, the Department of Labor announced a limited non-enforcement policy for the rule for up to 12 months after the rule's effective date of January 1, 2015.

differing conclusion about the rule's validity and application. If this were to happen, the question of scope would remain unresolved unless or until a higher court which has jurisdiction over both courts ruled definitively. Though considered persuasive authority, federal appeals court decisions are not binding on one another. Conflicting decisions rendered at the federal appeals court level may be resolved by the U.S. Supreme Court, which would settle the question of nationwide applicability.

Until the final disposition of the case, providers, states and stakeholders should be aware that there is uncertainty about potential liability through private enforcement of the home care rule.

NEXT STEPS IN THE LEGAL PROCESS

On January 22, 2015, the Department of Justice filed a motion with the U.S. Court of Appeals for the District of Columbia Circuit to appeal the ruling. The DOJ asked for an expedited process, including a proposed schedule of dates that briefs are due, so that the Court of Appeals would hear oral arguments prior to recessing for the summer. This would potentially result in a ruling prior to the expiration of the DOL's policy of limited non-enforcement of the rule. The Court of Appeals has ordered that the appeal proceed on an expedited schedule,[7] which calls for briefing to be completed by early April, and could result in a decision as early as June, though it is likely a decision would be made later in the summer or early fall.

WHAT REMAINS OF THE HOME CARE RULE?

Though the district court's ruling vacates two key elements of the home care rule, it is important to understand that the rule is not vacated in its entirety, and that certain elements remain that impact providers. Except for the third-party employer prohibition and the narrowed definition of companionship services, the rule stands as law. Key provisions that remain in effect are summarized below.

[7] The Department of Labor noted the order for an expedited schedule on its website http://www.dol.gov/whd/homecare/litigation.htm (February 4, 2015).

RECORDKEEPING

The rule revised the recordkeeping requirements for live-in domestic service employees. Prior to the new rule, employers were not required to keep records of the actual hours these employees worked, but could instead maintain a copy of an employment agreement that set forth agreed-upon hours. Any variance from the agreement was required to be recorded, reflecting the actual hours over or under worked.

The rule permits employers to delegate the recording of hours to the employee, which must then submit an accurate record of actual hours worked. The employer may also record hours rather than delegate responsibility. Records of hours worked must be maintained by the employer.

JOINT EMPLOYMENT

Though the portion of the rule that prohibited third-party employers from availing themselves of the companionship and live-in domestic service worker exemptions is no longer in effect, there are other aspects of the rule that impact third-parties that are in joint employment relationships. The rule did not change existing definitions or processes for determining when a joint employment relationship exists. The rule's preamble does go into a fair amount of detail and explanation about what the law is. The DOL makes clear that the standard for determining any employment relationship under the FLSA is the "economic realities test", which is a different standard than that under other statutes, including the Internal Revenue Code and many state laws. In other words, whether a person earns income or doesn't for tax purposes does not factor into whether the person is an "employee" for purposes of the FLSA.

Subregulatory guidance issued after the final rule was published highlights an issue that could impact providers that are deemed to be in a joint employment situation with their state Medicaid agency. Depending on the amount of control a state Medicaid agency exerts over a worker, the agency could be considered in a joint employment relationship with the worker, which would mean that if that worker works a combined total of hours (even between separate provider agencies and/or self-directing consumers) in excess of forty hours a week, the

Medicaid agency could be considered to be the common, joint employer, and be responsible for paying overtime wages and compensate for time travelled between work sites.

SLEEP TIME

The rule does not change existing sleep time rules. However, because the DOL received many comments and questions from stakeholders regarding the application of the FLSA to sleep time for domestic service workers, including several that conflated live-in employees with employees working one or more 24-hour shifts, it sets forth clarifications in the rule on existing law.

SHARED LIVING

The DOL issued subregulatory guidance on the issue of shared living. There are many service delivery models that fall under the broad definition of "shared living", which can include adult foster care, host homes, and paid roommates. In order to assist providers and individuals better understand when these types of arrangements will be considered "employment" under the FLSA, the DOL issued two pieces of guidance in March 2014.

The guidance breaks down models into three basic types of shared living: 1) Where an individual goes to live with a person or family in the person or family's existing home, 2) Where an individual controls his or her residence and brings someone else in to live and provide supports, and 3) Where the individual served and the support provider create a new shared residence.

In the first scenario, where the individual moves into an existing, established home, the DOL said that, generally, an employment relationship would not exist. In the second scenario, where the individual controls the residence, the DOL said that, generally, an employment relationship would exist. In the third scenario, where a new residence is established, the DOL said that whether an employment relationship exists will depend on which participant in the living arrangement exerts the most control over the residence.

If the court ruling stands, some paid roommates will remain properly classified as companions. Because there is a possibility that the ruling could be reversed on appeal, participants and providers in shared living situations should consider the array of options available to them to comply with the law. ANCOR worked to develop a model shared living contract for the use of providers entering into independent contractor relationships, which is one possible course of action for compliance.[8]

CONCLUSION

The court rulings in this case vacate two key provisions in the home care rule: the third-party prohibition against taking the companionship or live-in domestic service worker exemptions, and the revised definition of companionship services. For now, these provisions may not be enforced by the Department of Labor, but providers should be aware that this may change as the case works its way through the appeals process, and should seek legal advice to assess employer obligations. Providers should also continue to work closely with appropriate state agencies to ensure that contingency plans are in place to address funding and structural changes that may become necessary should the Department of Justice prevail in its argument.

If the final disposition of the case determines that the rule was not properly promulgated, the Department of Labor would have several courses of action available to it. It could choose to focus on other priorities and not pursue further revisions to the companionship exemption. Or, it could enter into a new notice-and-rulemaking cycle to promulgate a rule that is consistent with the court's ruling that still meets its goals of increasing wages for home care workers and modernizing the definition of companionship services.

ANCOR is committed to providing its members timely, accurate information regarding federal policy changes that impact providers. Members may contact Katherine Berland, kberland@ancor.org for more information on this rule or other policy-related matters.

[8] See footnote 4.