Expert Commentary

Wage-Hour Update: Class Actions on the Rise

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The pace of change of wage-hour and wage payment laws continues to accelerate. Most directly affecting the home care industry are challenges to the companionship exemption. These claims are susceptible to class action status, presenting substantial and costly risks.

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Coke v. Long Island Care at Home, Ltd., involved an overtime claim by a companion providing home care through a home care agency. She asserted that the "home care" exemption set forth in Section 213 of the Fair Labor Standards Act was not applicable because she was not employed by the client-patient or family. The employer sought dismissal of the action. The U.S. District Court for the Eastern District of New York dismissed the claim, holding that companions are not entitled to overtime pay under the Fair Labor Standards Act (and, as such, under New York law). Dismissal was appropriate because the U.S. Department of Labor's regulations define the scope of the companionship exemption to include employees of home care agencies *and* companions employed directly by the person receiving the care (or his or her family).

To the surprise of many, the Second Circuit Court of Appeals reversed that order of dismissal and invalidated the regulation extending the exemption to agency-paid companions. The Second Circuit's ruling placed home care agencies at risk of liability for overtime wages at the rate of time and one-half of the regular rate of pay (*not*, for example, time and one-half of the minimum wage as required by New York law). Thus, a companion earning $10 per hour would be entitled to overtime at the rate of $15/hour ($10 x 1½), rather than time and one-half of the minimum wage ($6.75 x 1½) for overtime hours, which would be due under New York law.

The Supreme Court vacated the Second Circuit's ruling in *Coke* and directed the Second Circuit Court of Appeals to reconsider its decision in *Coke* in light of the Department of Labor's position that the exemption should be applied to companions employed by home care agencies. Attached to the Supreme Court's brief ruling was the Department of Labor's Wage and Hour Advisory Memorandum 2005-1 (12/01/05), which is consistent with the position enunciated by the

Department of Labor promptly after the *Coke* ruling was rendered. In its post-*Coke* opinion letter, the U.S. Department of Labor reiterated that the companionship exemption should not be curtailed. The Deputy Administrator wrote in pertinent part that:

> The Division has not changed this regulation or its interpretation thereof as a result of the circuit court's opinion in *Coke v. Long Island Care at Home*, 376 F.3d 118 (2nd Cir. 2004). Therefore, it is still our opinion that employees engaged in companionship services, as defined in 29 CFR 552.6, who are employed by a third party are exempt from the minimum wage and overtime requirements of the FLSA, and you may continue to rely on the August 16, 2002 Opinion Letter signed by former Administrator Tammy McCutchen (copy enclosed) for practices outside states within the jurisdiction of the Second Circuit.

How the Second Circuit will rule on *Coke* is uncertain. While the Department of Labor makes strong and clear arguments in favor of the exemption, the Second Circuit already has rejected many of these issues. As they should have done after *Coke* was decided by the Second Circuit, home care agencies should evaluate their business models in light of the possibility that the Second Circuit again will limit the companionship exemption to bar its use by home care agencies.

Spread of Hours Work Day

Also of concern to employers is the recent decision of the U.S. District Court for the Southern District of New York in *Yang v. ACBL Corp.*, which radically altered New York law with respect to the spread of hours (or "10-hour" day) rule. As District Judge Sands ruled in *Yang*, when an employee's work day (from beginning to end regardless of breaks) exceeds 10 hours, an extra hour must be paid at the minimum wage. As of January 1, 2006, the minimum wage under New York law increased to $6.75.

For many years, the New York State Department of Labor required only that total gross pay was equal to or greater than the minimum wage for all hours of work, including 1 additional hour for each work day of more than 10 hours.[1] District Judge Sands rejected that interpretation of the 10-hour day rule, holding that an extra hour of minimum wage is due, regardless of the employee's regular hourly rate of pay or weekly gross pay. The *Yang* decision was not appealed to the Second Circuit. Whether the New York Department of Labor will revisit this issue, and how it will enforce the provision following *Yang*, is uncertain.

Commission Plans

State laws strictly limit an employer's ability to make deductions from employees' wages. For example, under New York law, deductions from wages for taxes and other deductions are permitted solely if required by law or if made for the benefit of the employee (e.g., insurance premiums, pension, 401k contributions, or union dues); the law prohibits most other deductions. For example, requiring employees to reimburse employers for case shortages or breakages by reducing their salary to recover the loss are expressly forbidden. *See* N.Y. Lab. Law § 193(1); NYCRR 142.210.

To avoid a claim of unlawful wage deductions, employers often define "wages" or "commissions" to include several types of deductions. For example, a commission plan might state that an employee will earn a 6 percent commission on sales, less the costs expended on entertainment and marketing incurred in obtaining the sale. By defining wages to already include specified deductions, as opposed to making deductions after the commissions are calculated, has an employer complied with the antideduction rules? Not so says a recent decision from a federal court in New York, further tightening the restrictions imposed by Labor Law Section 193.

In *Pachter v. Bernard Hodes Group, Inc.*, No. 03 Civ. 10239 (S.D. N.Y. Aug. 25, 2005), the plaintiff, who worked as an account representative, was compensated in the form of commissions based on billings to clients. In defining the commission payment, the Company advised the sales person that the percentage earned on billings would be reduced by various "Charges," including finance charges on clients' unpaid bills; errors made by the employee when placing or purchasing advertising; half of any debt a client was unwilling or unable to pay; a percentage of the salary of an assistant who worked for her; and, miscellaneous costs for travel, entertainment, marketing, and out-of-pocket expenses. The salesperson filed suit, claiming these deductions were improper deductions from wages. The employer argued the deductions were proper because the "wages" to which she was entitled consisted of the commissions less the charges. There was no deduction from that figure. The court rejected the employer's argument, noting that even if the employee consented to this definition of wages, "to allow employer to prove an employment agreement permitting deductions from commissions, other than those expressly permitted by Section 193, would permit employers to do precisely what Section 193 forbids them to do."

In sum, any deduction from an employee's wages must be carefully scrutinized for compliance with Section 193. Here, the employer could not escape liability under Section 193 by deducting from the commissions,

expenses incurred in making the sale. Given this decision, a more prudent approach to avoid Section 193 liability might be simply to give the employee a lower commission rate. While it may be more difficult to attract new employees without the lure of a high commission rate that is subject to deductions, the employer could market the position by focusing on the no-charge resources it makes available to employees to generate the commission (which previously had been deducted from the commission) and the net result for the sales person.

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[1]Pursuant to New York State Wage Orders, New York State employers are required to pay an additional hour at minimum wage to employees (with certain exceptions such as exempt administrative, executive, and professional employees) who work on a workday in excess of 10 hours. This is known as the "Spread of Hours" requirement. Despite the express language of the Wage Orders, the New York State Department of Labor has issued written guidance stating that if weekly wages paid to an employee equal or exceed the total of: (i) 40 hours at the basic minimum wage rate; (ii) overtime paid at the particular employee's overtime rate; and, (iii) one hour's basic minimum wage rate for each day the employee worked in excess of 10 hours, then no additional compensation is due. Thus, in the great majority of situations, this provision was rendered inapplicable to employees earning above the minimum wage. However, in the above decision issued on December 5, 2005, the Honorable Leonard B. Sand did not grant deference to the Department of Labor's longstanding position and, instead, held that the requirement applies regardless of the hourly wage paid to the employee.