

Federal Overtime Ruling Throws Home Care System Off Balance

November 22, 2004 - A federal judge's decision that the Fair Labor Standards Act (FLSA) applies to tens of thousands of Northeastern home care workers who had been exempt is causing providers to rethink the way they provide home care services.

The July 22 ruling in *Evelyn Coke v. Long Island Care at Home, Ltd., and Maryann Osborne* found that home care workers who are employed by agencies or other third parties are entitled to overtime pay if they work more than 40 hours a week. In addition, the workers are covered by minimum wage laws and other FLSA requirements, such as compensation for travel time. The ruling does not apply to workers who are employed directly by the consumers they serve.

The decision was made by the U.S Second Circuit Court of Appeals, which covers New York, Connecticut, and Vermont, but – assuming it is upheld throughout the appeals process – it could affect rulings in other states. "This is a very respected court of appeals, and it was a unanimous decision by judges who were appointed by both political parties," says Craig Becker, associate general counsel for the Service Employees International Union and the attorney who represented the plaintiff. "I think it will definitely influence what happens elsewhere."

For more than a quarter century, home care agencies in the region have been operating under an exemption to an amendment that extended the FLSA to cover domestic workers. This year's ruling overturned that exemption. "Clearly this category of workers is one that Congress intended to cover when it extended the act in the 1970s," says Becker. "It's certainly a segment of the workforce that needs the protections of the FLSA, both the maximum hour [overtime] and the minimum wage protections."

Plaintiff Coke, a home health care attendant who worked for a small for-profit agency, was being paid less than minimum wage. "I think that's rare," says Carol Rodat, executive director of the Home Care Association of New York State (HCA). "New York City's worker wages are pretty low," she acknowledges, but not generally low enough to be affected by the FLSA's minimum wage laws, since most of home care agencies in the city pay home care attendants about \$7 an hour.

But the overtime requirement is another matter. "Very few of the workers that we know of nationwide receive overtime, even though they very frequently work over 40 hours a week," says Becker.

The additional funds needed to cover overtime and travel time and comply with other FLSA standards is expected to amount to about 90 cents an hour more for

every hour of service provided. In New York, the city estimates that the ruling would affect about 30,000 workers in its Medicaid-funded personal care program, increasing the cost of that program by \$263 million a year. "The cost to the agencies is sufficient that it would put them out of business – unless, of course, the city or the state decide to cough up all the money," Rodat says. And that's unlikely to happen, since New York is expecting a \$6 billion deficit next year.

"This ruling has the potential to be nuclear for home care," says Rodat. "When there's a ruling like this, there's the potential for two years of back liability. If you can prove that the employer willingly attempted to circumvent the law, you can get a third year. And attorneys' fees, and then if the Department of Labor decided to go after you on a separate action, it could double everything. So this decision puts the home care workers and the patients and the state and the city all in an ambiguous position. They could have a huge liability sitting out there that could take the entire system down. And then the question becomes, what would you do with all those people [who need home care]?"

Attorneys for the defendant, who were supplied by HCA, are asking the Second Circuit court to rehear the case. That's unlikely to happen, says Rodat, but the federal court may reconsider "a piece of the decision." If not, the association intends to ask the U.S. Supreme Court to take the case. Meanwhile, the appeal has delayed execution of the order, and even if the courts refuse to rehear the case, it will probably take at least another year for it to wind its way through the system. During that time, says Rodat, "the system will begin to restructure itself." Many agencies, she adds, are already assuring compliance with the ruling by assigning workers no more than 40 hours of work a week.

But with wages still low, avoiding overtime just creates a new set of problems, she says. Some employers can't find enough people to do the work. Consumers who are accustomed to relying on just one or two care providers are being forced to adjust to more, and workers who counted on extra hours to piece together a living are going home with less pay.

"I'm personally opposed to having workers out there sleeping in these people's homes and not being paid minimum wage," says Rodat. "But it is always better to have planning than to impose chaos on a system – certainly a system that includes 20 or 30 thousand people at risk. We really do need to think about how to organize our system better. The counties are up in arms. They have had it with Medicaid increases; they're looking for savings."

The answer, says Becker, is not to take money from the pockets of workers. "It's a perverse argument to say that this social need should be met by underpaying the workers, as opposed to providing sufficient public resources to meet it," he says.