HOT TOPIC: ***Long Island Care at Home, Ltd. v. Coke, ___ S.Ct. ____ (2007)***

A. Introduction

This case presents a question about the Fair Labor Standards Act ("FLSA") coverage of a "companionship services" worker who is employed by a third party, as opposed to those employed by the family or household of the "companionship services" recipient.

B. The Facts

Evelyn Coke sued her former employer, Long Island Care at Home, Ltd., for failure to pay her minimum wages and overtime wages to which she alleged she was entitled under the FLSA. Ms. Coke provided "companionship services" to elderly and infirm men and women in their homes.

Long Island Home Care argued that Ms. Coke was an exempt employee under a regulation promulgated by the United States Department of Labor ("DOL"), and was not entitled to such wages. The United States District Court for the Eastern District of New York granted Long Island Care at Home's motion for judgment on the pleadings, and Ms. Coke appealed to the Court of Appeals for the Second Circuit.

C. The Legal Question

The question that the Second Circuit addressed was whether Ms. Coke was covered by an FLSA exemption for persons "employed in domestic service employment to provide companionship services for individuals . . . unable to care for themselves." 29 U.S.C. § 213(a)(15). Under a regulation promulgated by the DOL, this exemption includes those "companionship workers" "employed by an . . . agency other than the family or household using their services. 29 CFR § 552.109(a). This regulation is known as the "third-party regulation." However, DOL's "General Regulations" also define the term "domestic service employment" as

"services of a household nature performed by an employee in or about a private home . . . *of the person by whom he or she is employed*." 29 CFR § 552.3 (emphasis added).

The Second Circuit found that the DOL's third-party regulation was unenforceable because, *inter alia*, it fell outside the scope of Congress' delegation to the DOL, it was inconsistent with the more general DOL regulation, and is an "interpretive" regulation not warranting judicial deference.

D. The Supreme Court

The Supreme Court reversed the Second Circuit and held that the third-party regulation is valid and binding. Specifically, the Supreme Court found that the FLSA explicitly leaves gaps as to the scope and definition of its "domestic service employment" and "companionship services" terms, and empowers the DOL to fill these gaps through regulations. As such, the third-party regulation did not fall outside the scope of Congress' delegation to the DOL.

Moreover, although the literal language of the third-party regulation conflicts with the "General Regulation," the third-party regulation is the more specific regulation with respect to the coverage of the type of employees at issue, and therefore governs.

Finally, the Court rejected the argument that the third-party regulation was merely an "interpretive" regulation because the DOL employed full notice-and-comment procedures when promulgating the regulation (which are not required to be used when producing an "interpretive" rule) and the DOL has consistently treated the regulation as a legally binding exercise of its rulemaking authority for the past 30 years.

E. From the Employer's Perspective

The Court's unanimous decision preserves the interpretation of the third-party regulation that the DOL has utilized for nearly 30 years. It is no surprise that the Court did not find Ms.

Coke's argument that the third-party regulation was merely interpretive compelling, because the DOL used the rather onerous notice-and-comment rulemaking procedure (which is not required for "interpretive" regulations) when it promulgated this regulation. In light of that fact, it is clear that the DOL intended the third-party regulation to be a legally binding exercise of its rulemaking authority. Moreover, the Court employed generally accepted canons of statutory interpretation by holding that the more specific third-party regulation (which directly addresses the issue before the Court) takes precedence over the more general "General Regulation." This ruling is consistent in every way with prior decisions concerning executive agency rulemaking authority and proper statutory interpretation.

Most importantly, the Court's decision fosters confidence in the ability of employers to rely on the plain language of FLSA-related regulations and the interpretations of those regulations by the agency charged with enforcing them. If the Court had ruled to the contrary, employers would face an uncertain situation when making employment related business decisions, which would have a highly detrimental impact on an employer's ability to conduct its business. Fortunately, this situation was avoided by the Court's decision in this case.

E. From the Employee's Perspective

This decision is horrendous for employees. The Supreme Court here held that no domestic services employees are protected by the FLSA, whether their employer is the individual for whom they care, or a multi-million dollar corporation. Thus, under the Court and the DOL's interpretation of the statute, employers can now get away with paying workers who provide companionship and domestic services to the elderly or infirm, at any rate they choose, and for as many hours per week as they like. As long as these services are provided in the home, the

employers are exempted from the FLSA, and they do not have to abide by its regulations concerning minimum wages and overtime wages.

Such a rule is untenable and unreasonable. This is critically important from the employee's perspective as the Court left open issues surrounding the reasonableness of the regulation itself.

> Finally, the ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of "gap-filling" authority. Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, ***and where the rule itself is reasonable,*** then a court ordinarily assumes that Congress intended it to defer to the agency's determination. See *Mead*, *supra*, at 229–233.
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> Long Island Care at Home v. Coke, 551 U.S. ___ (2007), *citing* United States v. Mead Corp., 533 U. S. 218, 232 (emphasis added)

Thus, there is a ray of hope for employees, as the Court's interpretation and the DOL interpretation render the rule completely unreasonable. Large corporations that receive large profits from the services of these home healthcare workers, can pay them a pittance and avoid paying them overtime when they work more than forty hours per week.

Employees can thus hope that this ruling creates an uproar which results in a change to the regulation, or action by Congress.