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In *Bayada Nurses, Inc v. Department of Labor and Industry*, the Pennsylvania Supreme Court unanimously held that a home health agency cannot rely on the “domestic services” exemption to avoid paying overtime to its home health aides because the exemption is only applicable to those employing domestic service workers in their own home.

## Pennsylvania Overtime Exemptions for Domestic Services Differ from Federal Law – Agency Home Care Aides Must Be Paid Overtime

By Thomas Benjamin Huggett

Pennsylvania’s minimum wage law requires that an employee who works in excess of 40 hours in a workweek be paid overtime at the rate of 1½ times the employee’s regular rate of pay. The law exempts “[d]omestic services in or about the private home of the employer” from the minimum wage and overtime requirements. In a recent case, *Bayada Nurses, Inc v. Department of Labor and Industry*,<sup>1</sup> the Pennsylvania Supreme Court held that a home health agency cannot rely on the “domestic services” exemption to avoid paying overtime to its home health aides because the exemption is only applicable to those employing domestic service workers in their own home.

As noted by the court, Bayada Nurses employs over 1,000 workers from 38 office locations in Pennsylvania. It offers a range of home care services including aides who assist infirm individuals perform activities associated with daily living and who provide general companionship. Bayada’s householder clients are billed for each hour of service provided by an aide. The rate includes the aide’s hourly rate of pay, and an additional amount to cover workers’ compensation, insurance, taxes, and Bayada’s overhead. Bayada, however, does not charge clients for overtime or pay its aides overtime.

In accordance with a 2007 decision by the U.S. Supreme Court, *Long Island Care at Home, Ltd. v. Evelyn Coke*,<sup>2</sup> federal wage law (the Fair Labor Standards Act (FLSA)) exempts home care agencies, such as Bayada, from having to pay overtime. The *Coke* case involved conflicting regulations interpreting a provision of the FLSA that exempted from overtime domestic service employees who provided companionship services for “individuals who (because of age or infirmity) are unable to care for themselves.” The law did not mention aides employed by third parties. To fill this gap, in 1975 the Department of Labor (DOL) issued two conflicting regulations. The first, like the Pennsylvania law and regulation discussed below, defines the statutory 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.”<sup>3</sup>

The second regulation exempted companionship aides “who are employed by an employer or agency other than the family or household using their services . . . [whether or not] such an employee [is assigned] to more than one household or family in the

same workweek . . .”<sup>4</sup> After analyzing the two conflicting regulations the Supreme Court held that the second regulation was valid and binding because, among other things, it was more specific with respect to the third-party-employment question.

The Pennsylvania Supreme Court reached a different result, however, regarding Pennsylvania’s wage law, which specifically exempts from overtime only “[d]omestic services *in or about the private home of the employer*.”<sup>5</sup> In addition, regulations enacted by the Pennsylvania Department of Labor and Industry (DOLI) state that the Pennsylvania Minimum Wage Act exempts only the services of aides who are hired directly by the householder, but not the services of aides who work for a third-party agency. Following the *Coke* decision, the DOLI notified employers in the state, including Bayada, that it intended to continue to enforce its regulation and sent a letter to Bayada requesting records relating to payment of overtime to aides.

Following the DOLI notification, Bayada initiated a declaratory judgment action seeking to establish that it was entitled to claim the domestic services exemption because the agency and the householder jointly employ the aides. In the alternative, Bayada asked the court to find that the federal FLSA overtime pay rules should govern, exempting aides from overtime.

The Pennsylvania Supreme Court unanimously rejected Bayada’s arguments and upheld state DOLI’s regulations. After finding the case was ripe for review even though no fines, penalties, or backpay orders had yet been issued against Bayada, Justice Debra McCloskey Todd wrote that the regulations were reasonable and consistent with the Legislature’s intent in the Pennsylvania Minimum Wage Act of 1968. She noted, “Under the department’s regulation, working for the householder employer permits an exemption from overtime requirements. Working for a third-party agency employer does not.” Acknowledging the difference between federal and state law, Justice Todd wrote, “the federal statute establishes only a national floor under which wage protections cannot drop, but more generous protections provided by a state are not precluded.” Thus, “Pennsylvania may enact and impose more generous overtime provisions than those contained under the FLSA which are more beneficial to employees.”

The decision means that, in Pennsylvania, home health agencies must now pay overtime to aides who work more than 40 hours in a workweek. The decision also has broader implications for any employer relying on the domestic services exemption. To come within the domestic services exemption: (1) the worker must be providing domestic services in or about a private home; and (2) the work must be performed in the home of the employer, not a third party. Employers in the state should carefully review their overtime exemptions and be sure that they are not erroneously relying on FLSA provisions where there are differing Pennsylvania requirements.

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<sup>1</sup> 2010 Pa. LEXIS 2585 (Nov. 17, 2010).

<sup>2</sup> 551 U.S. 158 (2007).

<sup>3</sup> 29 C.F.R. § 552.3 (emphasis added).

<sup>4</sup> 29 C.F.R. § 552.109(a).

<sup>5</sup> 43 PA. STAT. § 333.105(a)(2) (emphasis added).