

## Home Care Legal Alert

September 2006

### Things Don't Always Go Better With *Coke!*

On August 31, 2006, the Second Circuit Court of Appeals in New York stunned the home care industry once again, by affirming its 2004 decision in *Coke v. Long Island Care at Home*. The court's earlier decision had been vacated by the Supreme Court and remanded for further review in light of a Department of Labor ("DOL") Memorandum on the companionship exemption's coverage of agency-employed home care workers under the Fair Labor Standards Act ("FLSA").

Invalidating this exemption for a second time, the Second Circuit's decision turned on an obscure administrative law point -- the deference owed by the court to the "interpretive regulation" of the DOL that covered the exemption. Did that interpretive regulation carry the force of law or only the power to persuade? The Second Circuit held it was only the latter, and it was not persuaded.

#### **What does this decision mean for a licensed home care agency?**

As stated in our earlier Home Care Alerts -- "*Coke, Is it the real thing?*" (July, 2005) and "*The Aftermath of Coke*" (May, 2006) -- the elimination of the companionship exemption for agency-employed home care workers poses business risks that should be addressed immediately by licensed home care agencies.

- (1) Risk of collective action overtime lawsuits, even if the Second Circuit's decision is appealed to the Supreme Court. Even if an appeal is filed, District Court cases previously stayed may be allowed to proceed.
- (2) Risk of retroactive overtime liability, with interest, both for the agency and for the shareholders of a non-public small business corporation in New York.
- (3) Risk of miscalculating the "regular rate" for purposes of calculating overtime, omitting time that must be considered hours worked under the FLSA, and failing to institute checks and controls to thwart false claims.

*(Please e-mail us for copies of prior Home Care Industry Alerts)*

*Stephen Zweig, a partner in Ford & Harrison LLP, a national labor and employment law firm, has represented home care agencies for 30 years. He is currently representing several licensed home care agencies which have been sued for overtime violations in collective actions under the FLSA. This "Alert" is not intended as legal advice or an exhaustive treatment of the subject mentioned. For more information on how you may protect your agency against the business risks created by the Coke decision, you may contact him at Ford & Harrison's New York office, 100 Park Avenue, New York, New York 10017, 212-453-5906, szweig@fordharrison.com*