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CLIENT ADVISORY

October 9, 2015

No Further Delay: Enforcement of Updated FLSA Rules Begins November 12, 2015

Earlier this week, the U.S. Supreme Court denied an emergency request to postpone federal wage rules that will extend overtime and minimum wage protections to an estimated two million home care workers. The Court's decision is the latest significant development in a two year legal battle between the U.S. Department of Labor (DOL) and three home care agency associations over a change to a longstanding agency interpretation of the Fair Labor Standards Act (FLSA).

The FLSA, Home Care Workers, and Federal Regulatory Changes

The FLSA generally requires employers to pay employees at least a minimum hourly wage as well as overtime compensation during any work week in which the employee works more than 40 hours. However, certain categories of employees, including individuals employed in "domestic service" to provide "companionship services" for those unable to care for themselves, have not been covered by these requirements for decades. Similarly excluded have been any persons employed in "domestic service in a household" who reside in such household. The FLSA required these live-in domestic service providers to be paid at least the minimum wage, but did not require their employers to pay them at the overtime rate during work weeks longer than 40 hours. These exclusions applied even if the individuals were employed by third-party agencies, rather than directly by the patient or their family.

In 2013, the DOL proposed regulations that would eliminate these exclusions. The agency justified their proposal by noting that providers of home care services had become more prevalent and home care workers' duties had become more complicated.

The regulations provide that minimum wage and overtime exemptions do not apply to third party employers of companionship service workers. The new regulations also restrict the definition of companionship services to include only "provision of care" that does not "exceed 20 percent of the total hours worked per person and per workweek." Provision of care means assistance with activities of daily living (such as dressing, grooming, feeding) and instrumental activities of daily living (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care.) The regulations also restore overtime protections for live-in domestic service employees of a third party employer.

Three home care agency associations filed suit challenging the proposed regulations in the fall of 2014. The basis of their challenge was that the DOL overstepped its authority in promulgating the rules. A U.S. District Court agreed with the associations and threw out the regulatory changes. In August of this year, the U.S. Court of Appeals for the D.C. Circuit concluded the elimination of the third party employer FLSA exemption was a reasonable exercise of the DOL's authority and upheld the regulations. Additionally, because its ruling completely prevented home care agencies from utilizing the companionship services exemption, the D.C. Circuit concluded that home care agency associations bringing suit had no standing to continue it and the revised definition of companionship services remained intact.

The home care agency associations filed an emergency request for the U.S. Supreme Court to delay the new regulations while they prepared and filed an appeal from the D.C. Circuit's decision. The Supreme Court declined to step in, and the decision of the appellate court will take effect on October 13.

Action for Home Health Agencies

Home health agencies should act quickly to ensure that they are in compliance with federal wage and hour laws if they have not already done so. Home health agencies must begin paying employees who provide companionship services at a rate at least equal to the minimum wage as well as overtime compensation. Additionally, home health agency employees providing live-in domestic services must be paid at least the federally required overtime rate. These employees should have already been receiving at least the minimum wage for hours worked.

The current federal minimum wage is \$7.25 per hour worked, though this rate may vary based on state law. FLSA overtime requirements require payment of wages at the 1.5 times the “regular rate of pay” for any time worked over 40 hours in a single workweek. Home health agency employer should review available DOL guidance clarifying what counts as compensable “hours worked”. Some frequently applied principles include the following:

- Normal travel from home to work and back to home at the end of the work day generally does not count as time worked.
- Time traveling as part of a day’s work, including travel between job sites, should be compensated.
- When a shift is less than 24 hours, an employee must be paid for any time on duty, including time spent sleeping or time spent engaging in personal activities when not busy unless the employee is completely relieved from duty. If a shift is for 24 or more hours, the employer and the employee may agree to exclude from time worked meal periods and up to eight hours of time spent sleeping if adequate sleeping facilities are provided and uninterrupted sleep can be enjoyed.

The DOL has indicated that it will not begin enforcement of the new regulations until November 12, and that from November 12 through December 31 it will exercise “prosecutorial discretion” in determining whether to bring enforcement actions. However, aggrieved employees will not be stopped from bringing private legal action against non-compliant employers.

If you have questions or need assistance regarding compliance with FLSA requirements and other employment laws, please contact Kimberly Daniel or Jonathan Sumrell at (866) 967-9604, kdaniel@hdjn.com, or jsumrell@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm’s website, www.hdjn.com.

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