JAN 22, 2015

FHIweekly

Volume VI | Issue 4

Home Health Care Industry, Pay Close Attention: The Dept. of Labor Changes to the Companionship Exemption Will Affect You

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Monday, 19 January 2015 00:00

Recently, the Department of Labor (DOL) revised one of its overtime and minimum wage exemptions to the Fair Labor Standards Act of 1938 (FLSA), which pertains directly to the home health care industry. The “companionship services” exemption, which has been around since 1974, was modified to provide greater protection to individuals providing home care services, whether it is nurses, nurse aides, home health care aides and other individuals providing home care services. According to the DOL, the rule change is effective beginning January 1, 2015, but the DOL delayed its enforcement until June 30, 2015.

As of January 1, 2015, there is a 20 percent limitation on the amount of housework (i.e. meal preparation, driving, grooming, bathing, and similar activities) that can be performed by anyone who provides companionship services in order to preserve the exemption. This part of the change will make a lot of formerly exempt workers entitled to overtime compensation.

The second major change to the exemption is that a third party, such as a home health care agency can no longer assert the exemption. Under the revised regulations, the exemption is only available to the individual, family, or household solely or jointly employing the home care worker. Accordingly, third party employers must pay their home care workers the federal minimum wage for all hours worked and overtime pay at time and one-half of the regular rate of pay for all hours worked over 40 in a workweek.

This part of the change will have a direct impact on third party employers who have been previously asserting the exemption for the last 41 years and were potentially able to offer low rates to customers partially as a result of not having to pay their workers overtime compensation.

Critics argue that the change will result in third party employers raising the rates for their employees to adjust to the increased cost associated with now having to pay overtime wages. Many question whether such a rate increase will continue to keep in-home care as an affordable option.

Furthermore, there is a concern that clients might be forced to alter their arrangement so that a home care worker is not subject to working more than 40 hours and receiving overtime compensation. In turn, the home care worker might see a reduction in wages and a resulting disruption in the relationship between the individual receiving services and his or her home health care worker. The risk is that clients may no longer receive the amount of care they need and the continuity they deserve by having personal relationships with their in-home workers.

Proponents (primarily the DOL) argue that covering home care workers under the FLSA is an important step in ensuring that the home care industry attracts and retains qualified workers. According the DOL’s Final Rule, direct care workers, who are typically employed by private home care agencies, are the type of professional workers whose

vocation merits minimum wage and overtime protections. The thought for many is that increased wages will result in an increased quality of in-home workers.

The DOL changes coincide with an increased demand of home care workers due to an aging baby-boomer population. According to the Bureau of Labor Statistics (Bureau), employment of home health care workers is projecting an increase of 48 percent from 2012 to 2022, making the home health care industry one of the fastest growing occupations. The Bureau succinctly states, “As the baby-boom population ages and the elderly population grows, the demand for home health aides to provide assistance and companionship will continue to increase.”

In an effort to nip one of the proposed changes in the bud, the Home Care Association of America, the International Franchise Association and the National Association for Home Care & Hospice got together and filed a lawsuit against David Weil, in his official capacity as Administrator of the U.S. Department of Labor’s Wage and Hour Division and Thomas E. Perez, in his official capacity as the Secretary of the Department of Labor and the Department of Labor itself alleging that the new regulation is an “arbitrary and capricious exercise of authority inconsistent with Congress’s language and intent.”

On December 22, 2014, the court held that the DOL lacked the authority to rewrite the companionship exemption in such way as to distinguish its application on the basis of who employs the home health care worker. The court stated that the contemplated change to the exemption (i.e. taking away the exemption from third-party employers) needs to come from Congress. The court acknowledged that in the past, there was a lack of sufficient support regarding proposed changes to the exemption from Congress. The court held that this “unequivocally represents a lack of Congressional intent to withdraw this exemption from third-party employers.”

On December 31, 2014, the judge entered an order staying the enforcement of the “companionship” definition change to the new rule for two weeks. The home care associations are pushing for a further delay to provide time for the courts to rule on the definition's legality.

The entire home care industry is and should be paying close attention to this case as employers are scrambling to alter their arrangements with their employees and the individuals receiving services in order to comply with these new changes and maintain price points that make these companies competitive.

Although this case may be appealed, it is important to know what your legal obligations are if the DOL changes become effective.

If you have any questions or need assistance with any of these topics, including an update on the referenced case, please contact Adam D. Kemper at 954-491-1120 or by email at adam.kemper@gmlaw.com.

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