From: Damon Terzaghi <DTerzaghi@nasuad.org>
To: @nasuanasua@nasuad.org
Date: 1/14/2015 5:04:14 PM
Subject: RE: Update on FLSA Litigation
Attachments: 1 14 15 SJ order.pdf

All recipients Bccd

Good Afternoon –

As a follow-up to the email I sent on Monday, I wanted to make sure that you were aware of the ruling issued today on the revised companionship services definition under the FLSA. Today, Judge Leon issued a ruling that vacated the new definition (i.e. the remainder of the FLSA rule). I have attached the Judge's order for reference.

So, as of this moment, the new regulation is not in effect; however, in the event that the Administration appeals the rulings, Judge Leon's orders could be overturned. So – in summary, the rule has been vacated in the courts; however, it could still go into effect at a later date depending on the outcome of any appeals. We understand that this creates challenges as many of you are in the middle of legislative sessions and working to develop your appropriations packages. We will do our best to provide the most updated information as it becomes available.

We will keep you informed if there are any appeals or further actions on the regulation.

As always, let us know if you have any questions or concerns.
Damon

From: Damon Terzaghi
Sent: Monday, January 12, 2015 1:38 PM
To: @nasua
Subject: Update on FLSA Litigation

Good Afternoon NASUAD Members,

We wanted to provide a quick update on the status of the lawsuits challenging the new Fair Labor Standards Act home care regulation from the Department of Labor. As a brief reminder, the regulation made several changes to FLSA protections for direct service workers – including removing the ability of third parties to claim any FLSA exemption, and altering the definition of "companionship services" for purposes of an exemption from FLSA. The regulation was originally scheduled to go into effect on the first of January; however, two separate rulings in December delayed that implementation. The first ruling, on December 22nd, vacated a portion of the regulation that removed the third-party employer exemption from the FLSA. The second ruling, on December 31st, placed a temporary restraining order on the changes to companionship services in the regulation – preventing the DOL from implementing changes until January 15th.

Last Friday (January 9), the court held a hearing regarding the merits of the challenge against the companionship

services definition. **The presiding Judge has scheduled a second hearing on Wednesday, (January 14) to announce his decision on the issue.** If the judge rules in favor of the plaintiffs, it will lead to a further delay (or possible vacating) of the two major parts of the regulation. Some of the final outcome and timing will depend on whether any appeals are filed. The DOL has not stated whether they intend to appeal the December 22nd ruling, but they have issued statements that strongly disagree with the decision – indicating that there is the possibility of an appeal. Additionally, we note that the Judge has made some technical changes to the process in order to allow for a potential consolidation of the two separate challenges and a more streamlined appeals process (if any appeals are made).

Our understanding of where we currently stand is that third-party employers of home care workers (including States, Counties, MCOs, Fiscal Intermediaries and other Medicaid entities) providing "companionship services" under the 2014 definition can use the minimum wage and overtime exemptions because of the 12/22 ruling on the 3rd party issue along with the 12/31 temporary restraining order granted on the companionship services definitional issue.

As for "live-in" domestic services, the 2013 rule change did not affect the definition of the live-in domestic services exemption, only its application and administration. The application part, excluding third-party employers, is fully addressed in the 12/22 ruling. The administration part, i.e. time recordkeeping, is not. Assuming the live-in services meet the definition of "live-in" and the recordkeeping is compliant with the new standards, third-party employed (or joint-employed) live-ins are exempt from overtime as was the case prior to the rule's promulgation.

These interpretations are based on our reading of the rulings and conversations with our partners and do not represent DOL's position. DOL has not provided formal interpretation of the current status, as there are still outstanding issues in the courts. We encourage you to have your state's legal team analyze the rulings and the implications for your programs if you have not already done so.

You can http://www.dol.gov/whd/homecare/litigation.htm for DOL's statement on the litigation. The Department has been proactive in keeping this page updated, so check back there for any updates over the next several weeks.

We will keep you informed of the next steps, including the outcome the court decision (scheduled to be announced on Wednesday) and whether any appeals are filed.

As always, please let us know if you have any questions or concerns.

Damon

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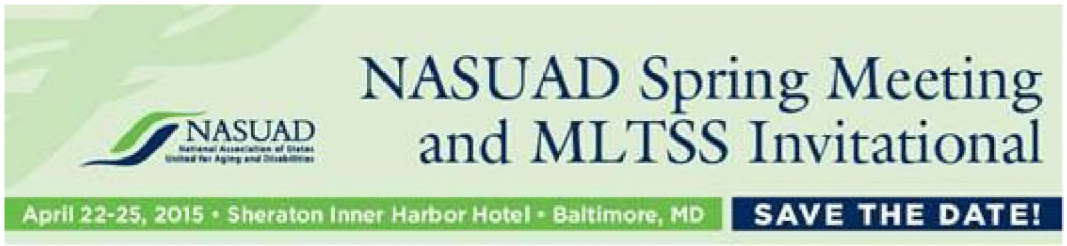

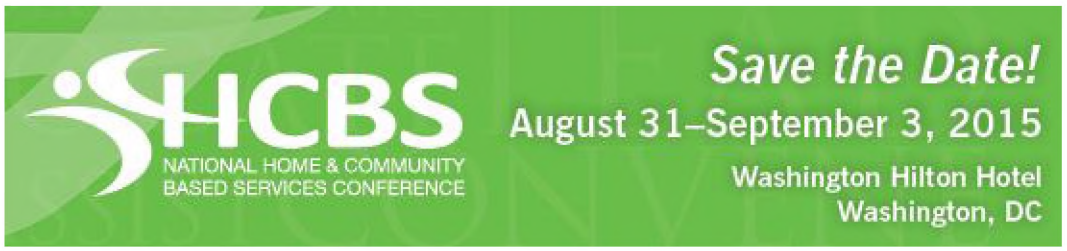
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