

From: Damon Terzaghi <DTerzaghi@nasuad.org>
To: @nasuanasua@nasuad.org
Date: 1/12/2015 1:37:38 PM
Subject: Update on FLSA Litigation



****All recipients Bccd****

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

Damon Terzaghi
Senior Director
NASUAD
1201 15th Street, NW
Suite 350
Washington, DC 20005
www.nasuad.org
Phone: 202-898-2578
Fax: 202-898-2578
E-mail: dterzaghi@nasuad.org



 **NASUAD Spring Meeting
and MLTSS Invitational**

April 22-25, 2015 • Sheraton Inner Harbor Hotel • Baltimore, MD **SAVE THE DATE!**



 **Save the Date!**
August 31–September 3, 2015
Washington Hilton Hotel
Washington, DC