Understanding the Department of Labor Homecare Rule Non-Enforcement Policy

Mollie Murphy, FMS Lead
National Resource Center for Participant-Directed Services (NRCPDS)
What is Non-Enforcement?

- “Time-Limited Non-Enforcement Policy” affecting the Homecare Rule
- Announced by the Department of Labor on October 7
- Information available at http://www.dol.gov/whd/homecare/
- Does not delay the Homecare Rule’s effective date
  - Rule goes into effect on January 1, 2015
  - But, the DoL will not enforce Homecare Rule violations for a limited time
- Applies to all employers of homecare workers (public and private)
First Half of 2015

- DoL will not bring enforcement actions against employers violating the Rule for the first 6 months (January 1, 2015 - June 30, 2015)
  - DoL “will not investigate, supervise settlements, or file lawsuits regarding such potential violations”
- “[A]ny information received during this time period suggesting non-compliance with FLSA requirements will be used as an opportunity to provide additional technical assistance to States and other potential employers”
Second Half of 2015

- DoL will exercise prosecutorial discretion and decide on a case-by-case basis whether to bring enforcement actions against an employer for the subsequent 6 months (July 1, 2015 - December 31, 2015)

- In deciding whether to bring an enforcement action, DoL will give “strong consideration” to:
  - The employer’s efforts to make any adjustments necessary to implement the Final Rule
  - The state’s efforts to bring its publicly funded homecare programs into FLSA compliance
What are the Limitations of the Non-Enforcement Policy?

- Does not apply to practices that violated the FLSA even before the Homecare Rule went into effect, such as:
  - Applying the companionship exemption to registered nurses (because the companionship exemption never applied to services that “require and are performed by trained personnel, such as a registered or practical nurse”)
  - FLSA violations for work performed in nursing homes, group homes or other institutions (because the Homecare Rule does not apply in such settings)

- Does not protect from private lawsuits (private rights of action)
Risk of Private Lawsuits

- DoL non-enforcement does not preclude private rights of action for violations of the FLSA (including Homecare Rule)
  - Back wage liability starts accruing on January 1, 2015
- Lawsuits might also be brought based on state laws that mirror the FLSA
- Providers may have contracts that require compliance with all federal and state regulations
  - Possible breach of contract if the provider does not comply with the Homecare Rule, even during the non-enforcement period
Who May be at Risk?

- Anyone who is an employer (alone or jointly) of direct care workers under Department of Labor rules and delays compliance with the Homecare Rule

- Possible employers at risk:
  - States
    - Somewhat limited risk because of “sovereign immunity”
  - Counties, municipalities and other state subdivisions
  - Public and private agencies
  - FMS providers
  - MCOs
  - Consumers
    - Potentially lower risk because consumers can claim the companionship and live-in worker exemptions when applicable, even if there is a third party joint employer
Risk to States

- Somewhat limited risk of damages because of “sovereign immunity”

- What is sovereign immunity?
  - A legal doctrine that says states are immune from having to pay damages in certain kinds of lawsuits

- It can be difficult to know if sovereign immunity will provide complete protection in any particular case
  - Seek legal counsel
Limits of Sovereign Immunity

- Only applies to certain kinds of claims
  - No protection from claims under state (rather than federal) labor law
    - State whose labor laws mirror the FLSA may be liable for non-compliance with state law
- Some states have statutes waiving their sovereign immunity, or allowing damages up to a certain cap
- Sovereign immunity does not extend to state subdivisions like counties or municipalities
- Usually only protects states from having to pay damages, not from being forced to comply with the Rule
  - A Court could force the state to comply with the Rule even during the non-enforcement period
- Does not protect private employers like consumers or FMS providers
How Great is the Risk?

- Likelihood of private FLSA action is unclear
- Factors that make private action unlikely:
  - Homecare back wages may not be high enough to offset the expense of a lawsuit
  - States may be protected by sovereign immunity
  - Consumers with limited assets are not attractive targets for lawsuits
- Factors that may encourage private action:
  - FLSA statute provides double damages for private litigants who prove FLSA violations
  - Successful litigants can recover legal fees and expenses under the FLSA
  - Class action lawsuits can be brought for FLSA violations
Opinions on Homecare Rule Non-Enforcement

“The FLSA provides a private right of action. The Department’s notice does nothing with respect to these private enforcement actions, and non-compliant employers unfortunately may have to find that out the hard way.”

– DOL Ties Its Own Hands—and Only Its Own Hands—on Companionship Services, Wage & Hour Litigation Blog by Seyfarth Shaw LLP
Opinions on Homecare Rule Non-Enforcement

“[T]he Fair Labor Standards Act allows workers to enforce the law for themselves. They do not need the Wage & Hour Administration. The law permits what lawyers call a “private right of action” meaning lawsuits brought by private parties without the involvement of the government. So, when wage and hour law changes on January 1 to include home health workers, these workers will be able to file their own lawsuits against their employers to collect unpaid wages and overtime.”

– Blog post by Seth Harris, former Acting Secretary of the DoL
Opinions on Homecare Rule Non-Enforcement

“By removing the threat of federal penalties, we believe DOL mitigates some of the concerns states would otherwise have had as they rushed to meet the deadline while also endeavoring to minimize the impact on Medicaid enrollees. [...] However, we want to be clear that hurdles still exist. There is uncertainty that private citizens may pursue legal action against states.”

– Joint Statement of The National Association of Medicaid Directors (NAMD), the National Association of State Directors of Developmental Disability Services (NASDDDS), and the National Association of States United for Aging and Disabilities (NASUAD)
Opinions on Homecare Rule Non-Enforcement

“PHI is disappointed by the Obama Administration's decision to delay enforcement of the new Department of Labor rule extending minimum wage and overtime protections to home care workers. [...] We call on the Administration, states, and the home care industry to move quickly to implement the new rule and guarantee a fair wage for home care workers.”

- Statement from PHI President Jodi M. Sturgeon on the U.S. Department of Labor's Decision to Delay Enforcement of New Rule to Extend Home Care Workers Basic Labor Protections
Opinions on Homecare Rule Non-Enforcement

- “[T]he changes to the Companionship Exemption need to be delayed for at least 18 months, to give advocates and states the time they needed to create an appropriate plan to comply with the changes without harming people with disabilities and attendants!

Some states are already receiving notices about attendant hours being limited to 40 hours per week, cutting attendants’ hourly rate and reducing or eliminating services, such as “sleep cycle support” to HCBS consumers.”

- National Council on Independent Living (NCIL)
Opinions on Homecare Rule Non-Enforcement

“We are pleased Secretary Perez has indicated that implementation will proceed apace. Now attention turns to the states, and we will focus during the Department of Labor's non-enforcement period on working with state leaders to fully implement the new rules. Now is the time to accord this work the dignity and fair wage it has so long deserved -- and we are confident that, continuing to work with the states, we can and will make this happen.” - Statement by SEIU President Mary Kay Henry on Regulatory Changes for Home Care Workforce
Risk Mitigation Actions You Can Take

- Identify whether you could be a joint employer in any program
  - NRCPDS’ FLSA Home Care Rule Tool Kit includes a tool called *Indicators of Joint Employer Status*
- If you are a joint employer, you will be responsible for overtime & travel time not attributable to consumers
- Even if you are not compliant during non-enforcement, it is critical to work toward compliance
- Estimate the costs involved in paying additional overtime and travel time
Risk Mitigation Actions You Can Take

- Consider how overtime and travel time will be tracked and paid
  - Ensure resources are available for the administration costs involved in tracking and paying travel time
- Plan your FY16 budgets now!
- Consider how FMAP will be obtained on travel time and overtime not attributable to a consumer
  - Refer to CMS guidance *Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes* for information about FLSA compliance in a self direction context
- Consider how providers will claim for travel time and overtime not attributable to a consumer
  - Will MMIS adjustments be required?
- NRCPDS can provide further assistance to stakeholders
Questions?