

Federal & State Labor Updates

August 3, 2017

Agenda for Today

- Review status of FLSA Home Care Rule
- Review recent developments across the country related to state & federal labor law
- Time for Q&A

FLSA Home Care Rule: A Recap

- Rule expands overtime and minimum wage protections for home care workers
 - Narrows the definition of a “companion” for the purposes of the “companionship exemption” from minimum wage & overtime
 - Prohibits “third party employers” from using companionship exemption and live-in exemption
 - Third party employers must always pay at least minimum wage and overtime for hours worked over 40
 - Led to new questions about FLSA joint employment
- Rule has been in effect since October 13, 2015
 - DOL enforcement formally began January 1, 2016

The Home Care Rule Today

- The Trump Administration has not released any formal statement on the Home Care Rule
- However, DOL representatives at the Self Direction Conference reiterated DOL's commitment to education and technical assistance
- Two big things to remember:
 - DOL can bring enforcement actions at its discretion
 - Employees can pursue private rights of action if they feel they were not paid in accordance with the FLSA
- As always, don't forget about state labor law
- ASD is available to help

MYTH:

The Home Care Rule is no longer in effect.



Fact: The Home Care Rule is still in effect.

- The Home Care Rule remains on the books and cannot be immediately revoked
 - Notice of Proposed Rulemaking would be required – an extensive process
- The narrowed companionship exemption is still in effect
- The live-in exemption can still be used for eligible live-in workers
- The Home Care Rule’s “third party” regulation that prevents third party employers from using the companionship and live-in exemptions is still in effect
- Rules relating to overtime and paid travel time are still in effect

Fact: The Home Care Rule is still in effect.

- Recently, DOL revoked Administrator's Interpretations No. 2015-1 and No. 2016-1
 - These documents related to independent contractors and joint employment, respectively
 - Neither of these were specific to self direction or even home care
 - The revocation does not affect existing case law pertaining to independent contractors and joint employment under the FLSA
- Administrator's Interpretation No. 2014-2, which pertains specifically to self direction, is still in effect

MYTH:

The Home Care Rule may technically be “on the books”, but enforcement won’t happen.

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Fact: Enforcement can happen at any time.

- This DOL's actions have already surprised experts by their unpredictability
 - For example, DOL just released an RFI seeking input on a forthcoming “white collar” overtime rule that is likely to be at least somewhat similar to that set forth by the Obama administration
 - Any “white collar” overtime rule for salaried employees is unlikely to affect self direction in a substantial way because workers in self direction are generally not salaried
- In the meantime, a private right of action is always available to any worker who believes they were not paid in accordance with the FLSA (including the Home Care Rule)

MYTH:
**State labor law doesn't
matter.**



Fact: While state labor laws vary in strength, many states have powerful labor laws of their own.

- While some states have no overtime or minimum wage protections for home care workers, other states have stronger overtime and minimum wage rules for home care workers than the Home Care Rule does
- For example, two recent New York lawsuits have dramatically narrowed the use of the live-in exemption for New York workers providing 24-hour care (*Tokhtaman v. Human Care, LLC*; *Andreyeva v. New York Home Attendant Agency*)
- State labor law continues to evolve across the country

Where can I research rules for home care workers in my state?

- The National Employment Law Project (NELP) recently updated their state-by-state breakdown of state labor law rules related to home care
 - Find it here: http://www.nelp.org/content/uploads/State-chart-on-companionship-regs_revised_August-2016_Final.pdf
- ASD is always available to assist your organization with questions related to how federal and state labor law may affect self direction in your state
 - As always—we are not attorneys!

Questions?

