FLSA HOME CARE RULE TOOL KIT SUPPLEMENT: AN OVERVIEW OF THE NON-ENFORCEMENT PERIOD

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Acknowledgements

The National Resource Center for Participant-Directed Services (NRCPDS) would like to thank the Administration for Community Living (ACL) for support in developing this resource.

Introduction

On October 9, 2014, the Department of Labor (DOL) published a “Time-Limited Non-Enforcement Policy” affecting the Home Care Rule. Under this policy, the Department will not bring enforcement actions against employers violating the Home Care Rule during the first six months that the Rule is in effect (from January 1, 2015 to June 30, 2015). During the subsequent six months (from July 1, 2015 to December 31, 2015), the Department will exercise prosecutorial discretion and take into account an employer’s efforts to comply with the Rule when deciding whether to enforce violations. While some states and other employers may find that this policy gives them time to come into compliance with the Rule and to make adjustments that will not be punitive for employees or consumers, the Home Care Rule’s effective date of January 1, 2015 remains unchanged.

Private Enforcement Options

The Non-Enforcement Policy protects employers from enforcement actions brought by the Department of Labor, but it does not prevent private actors from bringing enforcement actions on their own. Some of the grounds for private actions could be violations of the Fair Labor Standards Act (FLSA) including the Home Care Rule, violations of state statues that mirror FLSA, or breach of contract if a provider of home care or other services agreed in a contract to comply with all applicable laws and regulations. The liability for unpaid back wages due under the Home Care Rule starts accruing on January 1, 2015—the date on which the Rule goes into effect.

The FLSA creates a private right of action for violations of the statute1 and offers incentives for litigation in several ways. It allows class action lawsuits, and lets successful litigants recover attorney’s fees and expenses. Also, litigants can recover “liquidated damages” equal to the actual damages sustained, in addition to the actual damages. This means that the damages awarded in an FLSA lawsuit can be twice the amount of unpaid wages that the employer owes.

Impact of Non-Enforcement on States

Most states that are FLSA employers of home care workers could have more time to come into compliance as a result of DOL’s non-enforcement policy. States will not have a risk of enforcement by DOL during the first half of 2015. In addition, the risk of private enforcement

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actions against states is also somewhat mitigated by the doctrine of sovereign immunity, which shields states from being liable for damages in some lawsuits. However, sovereign immunity may not completely eliminate the risk to states for several reasons. First, states may choose to give up sovereign immunity, and some states have enacted laws that eliminate sovereign immunity for certain causes of action or allow damages up to a certain cap. Also, the protection of sovereign immunity does not apply to all types of claims. For example, sovereign immunity does not protect against claims made under state law, so a state whose labor laws mirror the FLSA may be liable for non-compliance with state law. States may also waive their sovereign immunity for contract claims, either by statute or by the act of entering into a written contract. Such states can be subject to breach of contract claims under Medicaid Provider Agreements or collective bargaining agreements that require the state to comply with all laws and regulations as part of the agreement. Finally, sovereign immunity is not a barrier to suits that seek to compel the state to comply with the Rule, which means that a court could decide that a state has to comply with the Rule even while the Department of Labor non-enforcement policy is still in effect.

State subdivisions such as counties or municipalities are not protected by sovereign immunity and could therefore be at risk if they are employers in non-compliant programs.

**Impact on Private Entities**

The risk of litigation may be greatest for private entities that are FLSA employers of home care workers, because such entities are not protected by sovereign immunity and can never claim the companionship or live-in worker exemptions under the new Home Care Rule. Home health agencies and other agencies that provide direct care workers to consumers fall in this category.

**Impact on Consumers**

The risk to consumers of a private enforcement action is mitigated by two factors. First, consumers are likely to have limited resources and would therefore not be attractive targets for lawsuits. Second, consumers may be able to claim the companionship and live-in worker exemptions even if a third-party employer cannot, so long as the conditions for those exemptions are met by the nature of the work performed. For example, in a situation where a consumer and a third party employer are jointly employing a worker whose work qualifies for the companionship exemption, the consumer can claim the exemption and only the third-party employer remains liable for paying minimum wage and overtime. However, the consumer is still at risk if the nature and conditions of the services provided by the worker do not qualify the worker as a companion or live-in worker. In that situation both the consumer and the third-party employer would be liable for non-compliance with the FLSA. We expect that based on the nature of the work, most workers would not qualify as companions, meaning consumers would at least theoretically have risk of private enforcement action.
Best Practices for Employers of Home Care Workers

The Home Care Rule Time-Limited Non-Enforcement Policy protects against Department of Labor enforcement actions for the duration of the policy, but leaves open the possibility of private lawsuits against employers of home care workers who do not comply with the Home Care Rule. The Non-Enforcement Policy does not delay the date on which the Home Care Rule goes into effect. While some states may have extra time to come into compliance because of the protections of sovereign immunity and various waiver provisions, such protections can only be assured after consultation with the state’s Attorney General. Non-state employers of home care workers should consult with legal counsel too. A safe course of action for all employers of home care workers is to make every effort to comply with the Home Care Rule as of its effective date of January 1, 2015.