

CAUTION - PAY NO MIND TO THE DEPARTMENT OF LABOR'S TEMPORARY NON-ENFORCEMENT POLICY RELATING TO THE COMPANION SERVICES EXEMPTION

In the October 9, 2014 Federal Register, the Department of Labor ("DOL") indicated it will delay enforcement of the Companion Services Rule ("Rule") until June 30, 2015 (the "Notice"). The DOL suggests this delayed enforcement is meant to assist the provider community with implementing changes in the Rule. In its commentary, the DOL suggests that non-enforcement means it will not bring actions against employers for alleged violations of the obligations resulting from these changes. Additionally, it will not investigate potential violations, supervise settlements for unpaid wages owed under the act or file suit in federal court to recover such wages. The DOL indicates that when it receives a complaint during this non-enforcement period, it will go to the employer and "work to educate the employer further on the requirements of the new regulation."

After the initial 6 month non-enforcement period, the DOL intends to use "prosecutorial discretion" during the next 6 months (until December 31, 2015) when determining whether to prosecute alleged violations. The DOL states that it will make this determination on a case-by-case basis, and in making the assessment whether to prosecute, the DOL will consider the employer's efforts in order to implement the regulation, a state's efforts to make adjustments in order to implement the regulation, a state's efforts to bring its publicly funded homecare programs into compliance, and based on these things, it will determine whether or not prosecution is appropriate.

CAUTION: Despite the Notice, it is prudent of employers to meet the Rule's requirements as of January 1, 2015. Nothing in the Rule or Notice prevents a plaintiff's attorney from pursuing civil litigation against employers for violation of the Fair Labor Standards Act. The bottom line for providers is that your home health aides, hospice aides and similar companionship workers will cease to be companionship workers on January 1, 2015. Here are a few things you should be doing now to prepare for the new year:

- Implement very specific scheduling processes and procedures to ensure caregivers are not working over 40 hours a week. This process should identify and alert you ahead of time when the 40 hour limit is approaching. Electronic tracking processes are ideal.
- Take steps now to be prepared to limit hours, if/when necessary.
- Review existing policies on travel time, meal periods, weekend/night differentials, remote work, etc. These all must be addressed and accurately reflected when tracking caregivers' hours.
- Make sure policies relating to caregiver work hours are consistent and uniform.
- Recruit more caregivers now.

If you have any questions regarding the Notice or how to prepare for the upcoming changes, please contact:

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