FLSA, Companionship Services Exemption, and Identifying the Employer

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Fair Labor Standards Act (FLSA)

- Changes to FLSA Companionship Services and Domestic Live-in exemptions
  - Redefines “companionship services”
  - Eliminates application of FLSA exemptions to 3rd party employers of companionship services and live-ins
- Department of Labor issues interpretations on “joint employment” in home care
  - Fact Sheet 79E: [http://www.dol.gov/whd/regs/compliance/whdfs79e.htm](http://www.dol.gov/whd/regs/compliance/whdfs79e.htm)

Minimum Wage and Overtime:

COMPANIONSHIP SERVICES/LIVE-IN FLSA EXEMPTIONS
- DoL rule effectively eliminates minimum wage and overtime exemption
  - Eliminates exemption for 3rd party employment
  - Changes definition of companionship services
  - Excludes 3rd party employers from live-in exemption
  - Medicaid and disability rights advocates opposition
  - Primary impact is on Medicaid and private pay services
Companionship Services Defined

- New Standard
  - Effective October 13, 2015
  - “fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself”
  - 29 CFR 552.6
- Fellowship and protection
  - limited personal care
  - Housekeeping allowed only for direct benefit to the individual receiving the personal care

Companionship Service Defined

- “Fellowship” defined
  - “engage the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social activities
- “protection” defined
  - “to be present with the person in his or her home or to accompany the person when outside the home to monitor the person's safety and well-being”
Companionship Services Defined

- Personal care limitation
  - “if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek.”
  - “care” means ADL and IADL assistance (including light housekeeping)
  - does not include domestic services for the benefit of other household members
  - does not include medically related services
    - Trained personnel generally excluded

Companionship Services Definition: Implications

- Private pay services can, but usually do not fit the new definition
- MediCal benefits do not cover the redefined “companionship services”
  - Personal care option benefit
    - Physician plan of care
    - Nurse supervision
    - Personal care in excess of 20% of time
  - Medicaid home health services
    - Home health aide functions
  - HCBS waiver/option
    - Housekeeping
    - Personal care
Live-In Exemption

- Major Impact on industry
- Live-in standards tightened
- Difficulty in continuing use of per diem charges and compensation
  - All work hours must be counted and compensated
  - Likely involves overtime
  - Sleep/break time risks
- Restructuring to avoid employer status is risky
- Need to also focus on whether worker is a live-in versus a 24 hour care provider
- Consider value of bed and board

State Wage & Hour Law Issues

- State law can provide greater worker protections than federal FLSA
- Varying “employer” definition
- Higher minimum wage
- Break time standards
- Travel time standards
- Sleep time standards
IMPACT

• DoL sees limited impact
  – Transfer of dollars from employer/payer at $232M annually
• Industry sees greater impact
  – Increased staff recruiting
  – Higher staff turnover
  – Shift to part-time workers
  – Limited MediCal rate support
  – Lower customer satisfaction

Litigation

    • 12/22/14 Court invalidates the exclusion of 3rd party employers from using the exemptions
    • 1/14/15 Court vacates “companionship services” definitional rule change
    – Reverses District Court
    – Finds DoL had authority to interpret which employees the exemptions apply to
    – Avoids ruling on definition of “companionship services” finding that home care companies do not have standing
    – Decision took effect October 13
Litigation Update

- Appeal to U.S. Supreme Court (HCOA v. Weil, No. 15-683)
  - Stay denied
  - Petition for Certiorari submitted
  - Expect SCOTUS decision on whether case will be heard in April or May
  - If heard, it will be post-October 2016
- New rules took effect on October 13, 2015
- DoL temporarily held off on enforcement
- Private enforcement not affected

Fallout

- Post-lawsuit actions/forecast
  - ACTIONS
    - Industry retrenches to limit worker hours and establish new delivery models
    - Limited state Medicaid program support
    - CMS encourages states to protect patients/clients
    - States firm up “non-employer” status
    - MLTSS MCOs scramble to avoid liability risk
  - FORECAST/Actual Impact
    - Private parties sue state Medicaid programs, MCOs, and home care companies to enforce rules
    - Turnover increases
    - Client satisfaction diminishes
    - Home care company costs increase
    - Client costs increase with some reducing care levels
Relevance???

- Agencies need to understand the FLSA standards on who is the employer in determining whether the care delivery model triggers liabilities
- States may be looking at new options for consumer directed care that create opportunities for agencies
- MCOs may have risks that agencies can address

Economic Realities Test

- Multi-factor analysis focused on right to control ad economic dependence of worker in determining who is the employer
  - Possibilities of multiple employers
- Power Factors
  - Hire and fire
  - Supervision ad control of work
  - Rate and method of payment
  - Maintain employment records
  - Place of work
  - Whether work is an integral part of business
Medicaid (MediCal) Home Care Applications

- Agency model: always the employer for FLSA purposes
- Registry: possible joint employer with consumer
- Consumer-directed care: potential joint employers among consumer, public entity, private agency, fiscal intermediary, managed care organization
  - Fact-dependent

DoL Economic Realities Factor Weights

- Power to hire and fire
  - Provider qualifications: weak indicator
  - Hiring decision
    - Open registry/full consumer choice: weak
    - Closed registry: moderate
    - Approval power: strong
  - Firing decision
    - Exclusion for fraud: weak
    - Fire for cause: strong
DoL Economic Realities Factor Weights

- Control over wages and benefits
  - Setting wage rate: STRONG
  - Reimbursement rates
    - No correlation to wage rate: weak
    - Rate=wage: strong
  - Cap or wage range: weak/strong
    - Must be meaningful discretion
    - Choice on use of unspent funds

DoL Economic Realities Factor Weights

- Hours and Scheduling
  - Consumer complete control: weak
  - Public entity sets explicit number of hours while consumer controls schedule: moderate
  - Public entity specifies certain hours or schedule: strong
DoL Economic Realities Factor Weights

- Supervises, Directs, or Controls the Work
  - Consumer sole control: weak
  - Entity identifies permissible tasks, conducts on-site visits, quality management activities: moderate
  - Entity specifies permissible tasks and time allocated for performance, tracks time, handles grievances: strong

DoL Economic Realities Factor Weights

- Other administrative functions
  - Fiscal management (payroll agent): weak
DoL Home Care Hypothetical Applications

- High Control Public Entity
  - Public entity
    - Collective bargaining with workers
    - Extensive worker training
    - Paid time off
    - Handles grievances
    - Sets wage rate
    - Provides benefit package
  - Fiscal agent: payroll and tax withholdings
  - Consumer: all else
  - DoL Conclusion: Public entity and Consumer are joint employers; Fiscal agent is not an employer

DoL Home Care Hypothetical Applications

- Cash and Counseling Program
  - Public entity
    - Sets minimal worker qualifications
    - Establishes a flexible budget for consumer
    - Sets cap on wages
    - Acts as fiscal intermediary
  - Consumer
    - Controls hiring, firing, training, supervision, wage rate
  - DoL Conclusion: No joint employment
DoL Home Care Hypothetical Applications

- State Plan Program
- Program
  - Approves hires
  - Regular performance reviews
  - Power to fire
  - On-going training requirements
  - Set reimbursement rate
- Consumer
  - Chooses worker
  - Day-to-day supervision
  - Power to fire
- Fiscal agent: payroll management
- DoL Conclusion: Program (state entity) and consumer joint employers

DoL Home Care Hypothetical Applications

- Intermediary Agency model
- Entity
  - Sets reimbursement rates
  - Worker qualifications
  - Does not supervise, set schedule, or control conditions of employment
  - Contracts with agencies for services and provides bundled payment
  - Assesses agency performance
- Consumer
  - Recruit and select worker (hired by agency)
  - Right to fire
  - Daily supervision
  - Set schedule
  - Determine how and when tasks are performed
- Agency
  - Recruit workers
  - Right to fire
  - Handle disciplinary issues
  - Train workers
  - Administrative functions
- DoL Conclusion: Agency and Consumer are joint employers; state not employer
DoL Home Care Hypothetical Applications

- Managed Care Organization
- Public entity
  - Contracts with MCO
  - Capitated rate
- MCO
  - Contracts with provider network (agencies)
  - Bundled payment
- Agencies
  - Set wage rates
  - Authorize service levels
  - Pays health insurance, workers comp, and UI premiums
  - Authorizes overtime
- Consumer
  - Hire and fire own workers
  - Set schedule
  - Day-to-day supervision
- DoL Conclusion: Agency and consumers are joint employers; MCO and Public entity are not

DoL Home Care Hypothetical Applications

- Managed Care Organization
- Public entity
  - Contracts with MCO
  - Capitated rate
- MCO
  - Contracts with providers including agencies
  - Bundled payment rate
  - Establishes a required worker wage rate
  - Comprehensive worker qualifications
  - Direct training
- Agencies
  - Authorize worker hours
  - Pays employee benefits, workers comp, and UI
  - Helps consumers resolve grievances
  - Provides back-up workers
  - Authorize overtime
- Consumers
  - Hire and fire
  - Set schedules
  - Day-to-day supervision
- DoL Conclusion: MCO, agencies, and consumers joint employers
DoL Home Care Hypothetical Applications

- Waiver program
- Public entity
  - Sets basic hiring requirements
  - Limited right to remove worker (Fraud or abuse)
  - Sets wage rate range approved by CMS
- Consumer
  - Hire and fire
  - Budget and financials
  - Set schedule, tasks, performance, and supervision
  - Approves payroll
  - Selects fiscal intermediary
- DoL Conclusion: Consumer sole employer

CMS Guidance

- Recognizes the need for state-specific programmatic changes
  - May pay overtime or higher reimbursements
  - May limit overtime costs and compensable travel
    - Cumulative hours should be considered
  - Address budgets of consumers for costs outside their control (multiple client workers travel and overtime costs)
- Potential options
  - Financial service management agency
    - Actual service costs incurred for client specific overtime
    - Per member/per month service to cover overall overtime and travel costs
  - Allocation of overtime and travel time costs to all beneficiaries
    - Not deducted from consumer budget
  - Pay a unit service rate that includes overtime and travel time costs across all beneficiaries where state sets rates and hours of service
  - Use a tiered payment rate or rate modifiers to a base rate
  - Incorporate cost into consumer budget where sole employer
Conclusion

- Federal rule change has CA and Nationwide impact
- Still awaiting Medicaid actions in most states with California more active than others
- Counting hours is key!
- Non-employer model brings risks
- Anticipate continuing upward pressure on wages
- Prepare customers for increased charges
- Balance your business reaction for best bottom-line results
- Consumer demand will continue to rise so long as there is care quality and nursing home/assisted living much higher costs

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