

9/19/13 REUTERS LEGAL 10:00:04

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Thomson Reuters

September 19, 2013

Far-off deadline for home health worker wage rule aids industry

By Amanda Becker

(Reuters) - The U.S. Department of Labor on Tuesday said it will extend federal minimum wage and overtime protections to home health workers, but not until January 2015 - a long transition period.

The delay reflects sensitivity at the department about concerns voiced by the home care industry, said Laura Fortman, a principal deputy administrator in the Labor Department's Wage and Hour Division, during a conference call with reporters.

Rather than a more normal 60-day phase-in, groups that supply home-based personal care aides and certified nursing assistants, as well as the individuals and families who employ them directly, will have more than a year to ensure workers are being paid according to the Fair Labor Standards Act (FLSA).

"There is still a lot of confusion and concern about the disruption this new rule is going to cause, and I think the long lead time was a recognition of that," said Littler Mendelson lawyer Ilyse Wolens Schuman, who co-chairs the firm's Workplace Policy Institute.

The new rule has been in the works for 21 months, since the department first proposed redefining "companionship services," which are FLSA exempt, to exclude home health workers.

The U.S. Supreme Court concluded in 2007 in a case brought by a home health worker that assisting the disabled and elderly in their homes was considered companionship care, and therefore not protected by the federal wage law.

1.9 MILLION WORKERS

The Labor Department estimates there are roughly 1.9 million home-based "direct care" workers, who are typically employed by third-party agencies. Their median pay in 2010 was \$9.70 per hour, or about \$20,000 per year. The federal minimum wage is \$7.75 per hour.

The new, final rule states that third-party agencies must pay these workers the federal minimum wage, plus an overtime rate beyond 40 hours per week.

Individuals or employees who employ such workers directly must do the same if more than 20 percent of their work goes beyond "fellowship and protection" activities such as reading, going for a walk or simply providing company.

Caregiving tasks such as bathing, feeding and grooming patients are not fellowship and protection, but are medically related, according to the new rule.

Attorneys who advise employers on compliance said the new requirements and the work settings where they must be implemented will present challenges for employers and employees.

Alexander Passantino, an attorney in the wage-and-hour practice at Seyfarth Shaw, said home health workers are in a diffuse workforce with no on-site management, so tracking hours and the type of work performed will be challenging.

"Ordinarily, you can train your managers to train the workforce to comply with FLSA obligations," Passantino said.

EMPLOYER CHALLENGES

Individuals and families who employ such workers directly also face liability. They must either ensure that those assisting relatives do not cross the 20 percent threshold or they must provide FLSA wage benefits.

"How many people out there are going to know whether the person they hired to care for their parent can't provide care unless you provide them overtime?" Passantino said.

Even though third-party agencies must pay home workers a minimum wage and overtime whether they cross the 20 percent threshold or not, it would be wise for them to still track the division of labor since the agency and family are considered joint employers, attorneys noted.

"Employers and employees are going to need to understand this 20 percent threshold and get an appropriate strategy and new systems in place," Schuman said. "Those that are affected are going to be affected enormously."

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