



E-Alliance Extra

Missouri Alliance for Home Care

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Telephony Regulation Update

The Division of Senior and Disability Services (DSDS) has indicated that the Telephony (EVV) Rule should be published in the next MO Register. That could be as soon as Sept. 15th or October 1st. Once published as a proposed Rule, providers will have an opportunity to review and make comment. MAHC will provide you with information once it is published in the MO Register.

NAHC Overtime Lawsuit Update: Parties Submit Competing Motions to Court of Appeals

As indicated earlier, the National Association for Home Care & Hospice's (NAHC) lawsuit challenging the validity of US Department of Labor (DOL) rules regarding minimum wage and overtime compensation for personal care and live-in aides is headed to the U.S. Supreme Court. As a first step in that effort, NAHC and the other association plaintiffs have filed a Motion for Stay with the U.S. Court of Appeals that had earlier reversed the favorable lower court ruling that had vacated the challenged rules. At the same time, the US Department of Justice, representing DOL, filed a Motion for Expedited Issuance of the Mandate. Presently, the Court of Appeals decision is scheduled to take effect on October 13 with an order that the lower court issue a decision in favor of DOL.

NAHC and its co-plaintiffs see the Motion for Stay as a key step in the appeal to the Supreme Court. If a stay is not granted, the rules will go into effect on or about October 13 (depending on the speed of the lower court's action) even if there is an appeal pending before the Supreme Court. In the event that the Court of Appeals denies the stay request, NAHC intends to seek a stay through the Supreme Court itself. Such a request would be handled by Chief Justice Roberts as he is responsible for such matters involving the District of Columbia appellate circuit.

In its Motion, NAHC and the co-plaintiffs argue that a stay is necessary to protect the interests of consumers, workers, home care businesses, and state Medicaid programs while the Supreme Court considers whether to take on the appeal. If the Court of Appeals ruling goes into effect, Plaintiffs argue that consumers will face access to care problems, loss of continuity of care with the workforce shifting to part-time employees, and a risk that quality of care deteriorates when multiple caregivers replace a single one with a patient/client. As NAHC has held for many years, the rule change also creates a risk of irreparable harm to workers who are likely to lose income when they are relegated to part-time work. Further, it is very clear that state Medicaid programs have not and will not increase payment rates sufficient to cover the costs of overtime. All of these impacts ultimately causes harm to home care businesses that have operated under the overtime exemption for 40 years.

The DOL competing Motion seeks to have the Court of Appeals ruling take effect earlier than the October 13 date. The DOL motion does not specifically suggest an earlier date. However, DOL indicates that it will not bring enforcement actions against any employer until 30 days after the court's mandate issues. DOL instituted a similar "non-enforcement" policy as the challenged rules were about to take effect on January 1, 2015. Such a policy has very limited value to employers as it would not stop employees and their attorneys from enforcing the rules in a private action.

The Court of Appeals has ordered that each party submit a response to the competing motions by September 14, 2015. It is expected that the Court will issue its rulings on the motions quickly thereafter. In the meantime, NAHC and its co-plaintiffs are preparing to file a Petition for Writ of Certiorari requesting that the US Supreme Court hear the appeal. Supreme Court review is discretionary. NAHC will argue that the importance of the issue to thousands of home care businesses, millions of patients/clients, and hundreds of thousands of workers warrants the Court's review. NAHC had earlier litigated related overtime issues successfully at the Supreme Court in 2007.

DOL Announces Home Care Rule Enforcement Will Begin November 13

The US Department of Labor announced last week that [Home Care Rule enforcement will begin 30 days after the appellate court decision's effective date of October 13.](#)

Therefore, the Home Care Rule will be enforced beginning November 13, 2015. Participant direction stakeholders should prepare for compliance now. Legal experts agree that further court action related to the Home Care

Rule litigation is unlikely, so it is unlikely that the effective date and enforcement date will change.

Before Judge Richard Leon temporarily struck down the Rule, [DOL had previously announced a period of selective enforcement](#) from July 1 to December 31, 2015. "Selective enforcement" means that DOL plans to "exercise prosecutorial discretion in determining whether to bring enforcement actions, with particular consideration given to the extent to which States and other entities have made good faith efforts to bring their home care programs into compliance with the FLSA since promulgation of the Final Rule."

After Judge Leon's decision, DOL stated that it would maintain its original enforcement timeline should the Rule be upheld by a higher court. Therefore, November 13 - December 31, 2015 should remain a period of selective enforcement. During this time, DOL will take stakeholders' attempts to comply with the Rule into consideration when deciding whether to take action for noncompliance.

The National Resource Center for Participant-Directed Services will host two webinars to help stakeholders understand and comply with the Home Care Rule prior to November 13.

Webinar 1: Understanding the Home Care Rule and Litigation

Wednesday, September 9, 2015, 3 PM EST

This webinar will provide an analysis of the Home Care Association of America v. Weil litigation and appellate court decision. The analysis will include timelines and likelihoods for the litigation's potential outcomes to help stakeholders best position their organizations for timely compliance. This webinar will also help stakeholders understand the key aspects of the Home Care Rule, including the narrowed companionship exemption, the third-party regulation, and overtime and paid travel time responsibilities of joint employers. Time for Q&A will be included.

Register now for Webinar 1:

<http://nrcpds.adobeconnect.com/e35uw8xa07j/event/registration.html>

Webinar 2: Home Care Rule "How-To" Webinar: Operational Strategies for Compliance Success

Date TBA

This in-depth webinar will build upon the information provided in Webinar 1 to provide stakeholders with the operational strategies they need to comply with the Home Care Rule. Topics covered will include tax filing procedures, Medicaid claiming, and FMAP reimbursement for payers who make third-party overtime

and travel time payments. How to calculate third-party overtime and travel time will be explored in depth. Time for Q&A will be included.

HAVE YOU ACCESSED HOSPICE PEPPERS?

The current release (version Q4FY14) of the Program for Evaluating Payment Patterns Electronic Report (PEPPER) for hospices has been available for download through the PEPPER Resources Portal since April 9, 2015. As of August 24, 2015, about 55% of the hospice PEPPERS have been accessed.

Have you obtained your PEPPER(s)? If you haven't, the Chief Executive Officer, President, Administrator or Compliance Officer should:

1. Review the [Secure PEPPER Access Guide](#)
2. Review the instructions and obtain the information required to authenticate access, which includes a **medical record number or patient control number from a claim for services (“from” or “through” date) between September 1-30, 2014 for hospices**
3. Visit the [PEPPER Resources Portal](#)
4. Complete all the fields

About PEPPER

PEPPER is an educational tool that summarizes provider-specific data statistics for Medicare services that may be at risk for improper payments. Providers can use the data to support internal auditing and monitoring activities. Visit [PEPPERresources.org](#) to access [resources](#) for using PEPPER, including user's guides, recorded web-based training sessions and sample PEPPERS. PEPPER is distributed by TMF® Health Quality Institute under contract with the Centers for Medicare & Medicaid Services.

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