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Legal Counsel

MEMORANDUM

TO: Anita Allen, Vice President, Ohio Provider Resource Association

FROM: Suzanne J. Scrutton
Michael F. O'Brien

DATE: October 8, 2015

RE: Supreme Court Declines Request for Delay in Implementation of New Department of Labor Companionship Services Rules

In late August 2015, the District of Columbia Court of Appeals (D.C. Circuit) issued a ruling upholding the new U.S. Department of Labor (DOL) companionship services regulations and overturning the decision of a D.C. federal district court that had struck down those regulations. In late September 2015, the D.C. Circuit denied a request by the Home Care Association of America and other appellees to stay the enforcement of the new regulations pending the filing of an appeal with the U.S. Supreme Court. The appellees then sought a similar stay of enforcement from the Supreme Court.

On October 6, 2015, the U.S. Supreme Court declined to issue a stay of the implementation of the DOL's new companionship services regulations. The D.C. Circuit is currently scheduled to issue a mandate on October 13, 2015, after which the DOL could, in theory, begin enforcement of the new regulations. However, the DOL has indicated that it will not bring enforcement actions until 30 days after the court issues its mandate. The DOL has indicated that, from mid-November through the end of 2015, it will use "prosecutorial discretion" to determine whether to bring enforcement actions against employers, based on employers' good faith efforts to bring their home care programs into compliance with the new rule. Regardless of the DOL's enforcement plans, providers should be aware that there is also a potential for liability for non-compliance with the new rule through private actions filed in court. Consequently, providers who are still taking advantage of the companionship services exemption would be well advised to stop using it on or before October 13th.

While providers have lost the battle, they have not yet lost the war. The attorney for the provider organizations that filed the lawsuit challenging the DOL's new companionship services regulations has indicated that they are still planning to file an appeal with the U.S. Supreme Court of the D.C. Circuit's decision upholding the new regulations. Once the appeal is filed, the Supreme Court has discretion to hear the appeal or to decline to hear it.

We will continue to keep OPRA updated regarding any new developments in this area.