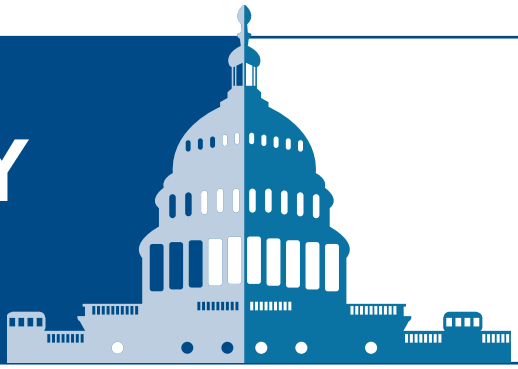
FEDERAL POLICY UPDATE



AMERICAN SENIORS HOUSING ASSOCIATION
Living Longer Better

November 23, 2016

DOL OVERTIME RULE GRANTED PRELIMINARY INJUNCTION

For the second time in a week, a Department of Labor (DOL) regulation was blocked by a federal court. Last week it was the "persuader" rule (see below) and yesterday was the highly anticipated "overtime" rule which is just days away from its implementation date. Beginning December 1, employers are obligated to pay overtime to employees making up to $47,476 a year when they work more than 40 hours a week. This doubles the current income threshold of $23,660 and is estimated to impact 4 million workers nationwide.

In response to an emergency motion for preliminary injunction filed by twenty-one states, a US District Judge for the Eastern District of Texas granted the motion on Tuesday, November 22, 2016. As a result, until a final decision is made, the current law remains in effect. However, DOL is likely to challenge this decision. ASHA will continue to monitor further action on this rule.

DOL PERSUADER RULE PERMANENTLY BLOCKED

On Wednesday, November 16, a Texas judge permanently blocked a Department of Labor (DOL) rule to significantly expand the reporting requirements when employers hire labor relations consultants for union organizing matters. Scheduled to become effective in July, the rule was already temporarily stalled by the same judge on June 27, 2016 in response to a challenge by the NFIB, the Chamber of Commerce, the ABA and several other business organizations. This latest decision appears to have sealed its fate.

At issue are DOL rule changes interpreting the Labor Management Reporting and Disclosure Act (LMRDA) relative to direct and indirect communications with employees about union organizing and collective bargaining rights. Under current law, when a consultant directly communicates or "persuades" with employees about the pros and cons of union organizing, this activity, nature of the agreement and associated expenditures is reportable to the federal government. This information lets the employee know that the consultant works for the employer and is not a "neutral" party, thus allowing them to make decisions accordingly. This area of the law is clear and has not changed with this ruling. The law also provides a bright line exemption from disclosure for legal "advice" about persuader activities when there is no direct communication between the consultant and employee.

The final rule narrowed this advice exemption and would have triggered disclosure under many scenarios that otherwise were exempt such as hiring a consultant to develop materials for dissemination to employees, deliver presentations to supervisors, develop personnel policies for the employer, etc. This reform has replaced the bright line test with confusion and creates unnecessary liability in the attorney/client relationship. Such disclosures would chill and seriously undermine an employer's ability to secure legal assistance for labor relation purposes since most lawyers would not want to disclose otherwise confidential information about clients.

Judge Sam Cummings of the U.S. District Court for the Northern District of Texas wrote in his preliminary injunction, "DOL's new rule is not merely fuzzy around the edges, rather the new rule is defective to its core because it entirely eliminates the LMRDA advice exemption." In his November 16 ruling, Judge Cummings rejected the government's motion to set aside the preliminary injunction and granted the NFIB's motion for permanent injunction with nationwide effect.

For further information, please contact Jeanne McGlynn Delgado, ASHA's VP of Government Affairs.

jeanne@seniorshousing.org | (202) 885-5561