

Fair Labor Standards Act

Colorado Home Care and Hospice Agencies

Webinar for Providers

July 28, 2015

Presented by:



COLORADO
Department of Health Care
Policy & Financing



COLORADO
Department of
Labor and Employment



COLORADO
Department of Public
Health & Environment

House Keeping

- If you are having trouble accessing the webinar - exit and re-connect
- Please use chat box for questions
- Question and Answer period at end of presentation
- FAQ document of all Q&A will be distributed at a later date
- We are recording this session
- Recording and Presentation will be available online
 - www.colorado.gov/hcpf/long-term-services-and-supports-training

Introductions

- Representatives from 3 State Departments
 - Colorado Department of Health Care Policy and Financing
 - Colorado Department of Labor and Employment
 - Colorado Department of Public Health and Environment
- Presenting today: Leslie Hendrickson

Purpose

- Key points of new Federal regulations on fair labor standards
 - Briefly mention key points of new regulations
 - Encourage providers to complete survey
- Three State Departments working together to ensure Colorado is ready
 - Need provider input to help understand the potential impact which will help drive policy development
 - Provider Survey

New Federal Regulations

- Main purpose of new rules is to bring home care workers under protection of FLSA.
- One hundred pages of regulations. United States Department of Labor (USDOL) had roughly 26,000 comments from the public on the rules.
- Rules contain historical policy analysis of need for wage protection by USDOL.
- Multiple documents explaining new rules were created by USDOL. [See examples in references section](#)

Litigation About New Rule

- Department of Labor (USDOL) lost in lower court on two key issues:
 - Agencies cannot use a companionship exemption to exempt employees from minimum wage and overtime requirements.
 - Definition of “companionship” specified to say must be 80% fellowship and protection.
- Oral arguments heard in federal appeals court in May 2015. No date announced for decision.

Minimum Wage and Overtime Before New Rule

- Before the new rule, some home care workers may not have been eligible for minimum wage and/or overtime because of:
 - companionship services exemption, and
 - live-in domestic service employee exemption
- Companionship - Colorado definition followed Federal pre-FLSA definition at 29 C.F.R. § 552.6
 - Services which provide fellowship, care and protection for a person, who due to advanced age or physical or mental conditions cannot care for his or her own needs. Such services may include meal preparation, bed changing, washing of clothes, and other similar services. ..”

Minimum Wage and Overtime After New Rule

- Under new USDOL rules, companionship exemptions may no longer be available to third-party employers.
- Under the new rule, if a home care worker is employed by an agency or non-profit organization (or any other third party), they ARE entitled to minimum wage and overtime compensation, REGARDLESS of their duties.
- Narrowing definition of exemptions means under the new rule, most home care workers will be entitled to minimum wage AND overtime compensation.

Some Policy Did Not Change

- Some existing federal policy did not change. FLSA rule has extensive discussion of “hours worked” and how this is to be defined.
- However, these discussions of travel, sleep and off duty time, and meal periods are mainly restatements of existing federal labor policy.
- FLSA tightened requirements on time keeping.

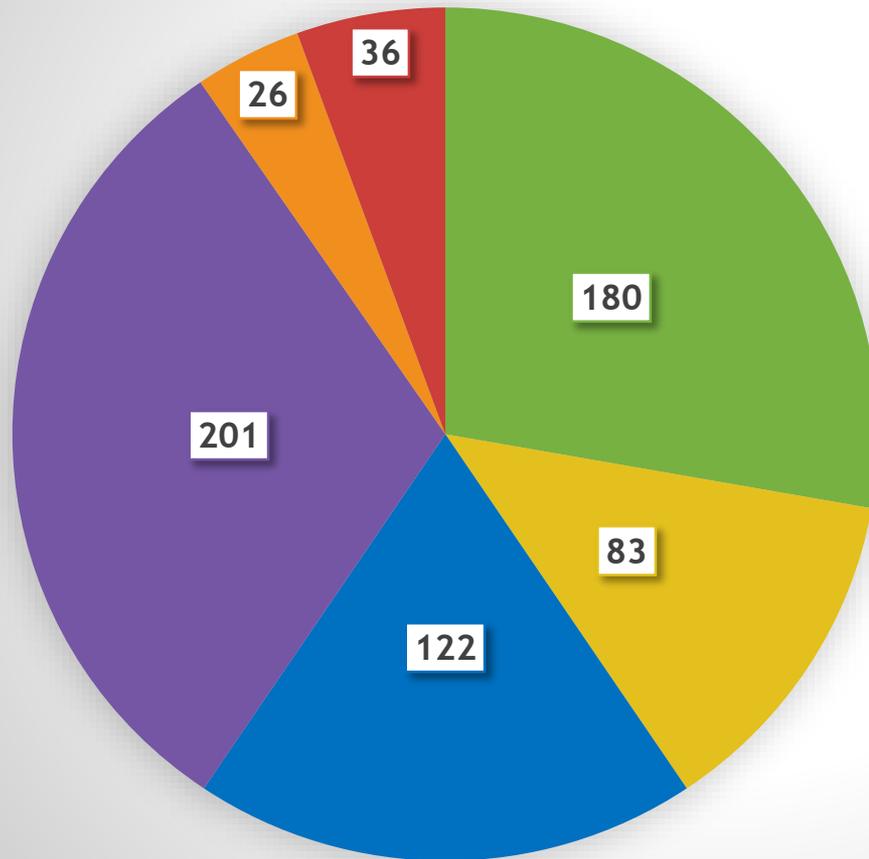
How does this apply to Home Care and Hospice Agencies?

- Would impact any home care or hospice agency currently claiming a companionship exemption. “Companionship” definition has been sharpened and now no more than 20% can be spent on providing personal care/ADL-related services.
- Policy unchanged around “medically related services.” Nurses are still exempt from the FLSA’s wage requirements where their time is spent in the performance of the duties of a nurse and are paid on a salary or a “fee basis” as defined by Regulations 29 CFR Part 541.

How will this effect Minimum Wage and Overtime in my Agency?

- Effect will vary by Agency depending on current practices, e.g. does agency currently pay for travel time between clients?
- In-Home Support Services (IHSS) agencies already pay overtime. We are not anticipating this will impact these 26 agencies.
- Agency environment is complex in Colorado.
- Over 600 agencies

Colorado Home Care Agencies January 2015

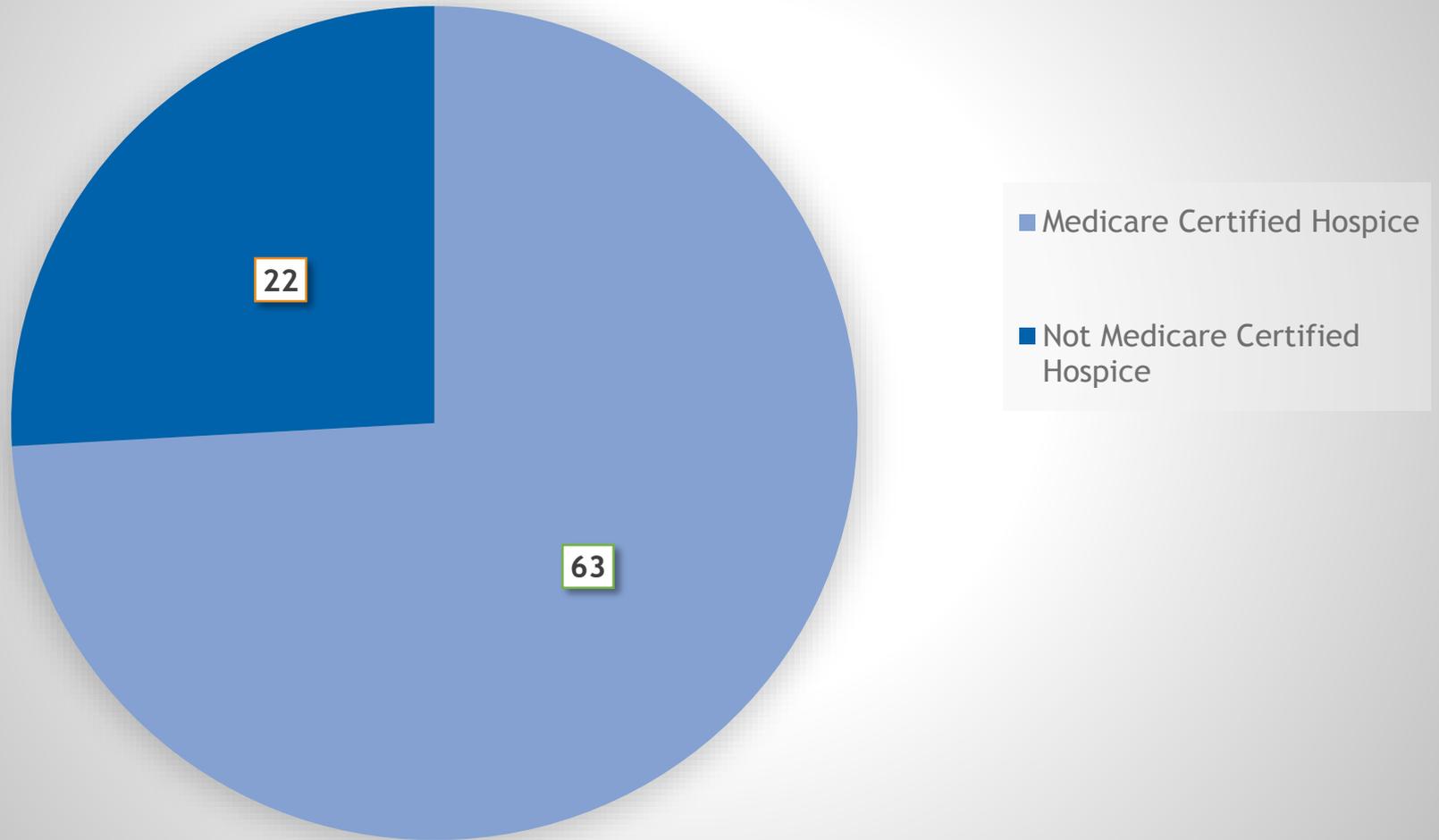


- Medicare/Medicaid License
- HHA Medical License Only
- HCA Non-Medical License Only
- HCA certified Personal Care Homemaker
- HCA certified In-Home Support Services
- HCA certified Intellectual/Developmental

Types of Home Care Agencies

- Home Health Agencies (HHA)
 - Provide medical services in the home
 - Class A agency
- Home Care Agencies (HCA)
 - Provide non-medical services in the home
 - Class B agency
- Colorado's home care agencies hire a broad range of occupational specialties
 - Home care workers, nurses, nurse's aides, physicians, social workers, other specialized staff. For example: clergy, counselors, pharmacists.

Colorado Hospices May 2015



How Do We Prepare for This?

- USDOL via telephone calls and March 20, 2015 letter to Governors says, states must prepare a plan to implement the new rules and mitigate problems to individuals.
- State needs your help to provide good data which will help inform policy decisions.
 - Good data on minimum wage, overtime, and independent contracting and travel time are hard to find.
- Information is necessary because:
 - Without better data, the impact of these federal rules on Colorado is difficult to understand and constrains data-based policy.

Useful Data - Overtime

- Need data on number of agencies impacted by FLSA.
- Useful agency data includes:
 - Overtime paid
 - Wage amounts paid
 - Use of independent contractors
 - Number of agency workers/employees considered ineligible for overtime
 - Number of agencies not paying overtime or amounts that need to be paid
- Are any agency workers paid less than minimum wage because they are deemed “companions?”

Useful Data-Independent Contractors

- Need data to understand fiscal impact of reclassifying workers.
- Because of FLSA, how many agencies are considering hiring more employees instead of independent contractors?
- How many agencies are considering hiring more independent contractors instead of employees?

Independent Contracting Potential Risk for Agencies

- Old issue, precedes new FLSA rules.
- There is a common tendency by employers generally to say that if employee status is a problem let's make them Independent Contractors. Not recommended unless substantive justification exists.
- Has possible greater impact on hospices since they use wider range of occupational specialties.
- Multiple independent tests to determine if someone is an Independent Contractor: IRS, USDOL, CDLE. [See references](#)

Perceived as Tax Fraud

- Perspective of Department of Labor and Internal Revenue Service is that when employers misclassify employees as independent contractors it is tax fraud.
- Widespread problem. [See McClatchy report](#)
- Enforcement sporadic, but in September 2014, USDOL awarded \$10.2 million to 19 states. “\$10.2M awarded to fund worker misclassification detection, enforcement activities in 19 state unemployment insurance programs.”
- Colorado was not one of the 19.

Next Steps

- Complete online Provider Survey to help us create a better policy and understand how these national issues affect persons in Colorado!
 - Click or copy the link below to access online survey www.surveymonkey.com/r/FLSAWebinar
- Your input will have a direct effect on policy development!

Federal References

- Information on Final Rule
 - www.dol.gov/whd/homecare/finalrule.htm
- Fact Sheet #25: Home Health Care and the Companionship Services Exemption Under FLSA
 - www.dol.gov/whd/regs/compliance/whdfs25.pdf
- Workers covered by minimum wage and overtime pay protections
 - www.dol.gov/whd/homecare/workers-am-i-covered.htm
- Final rule - Frequently Asked Questions
 - www.dol.gov/whd/homecare/qa.htm
- News release - September 2014 re: \$10.2 million awarded
 - www.dol.gov/opa/media/press/eta/ETA20141708.htm

Federal References cont.

- Fact Sheet # 79D: Hours Worked Applicable to Domestic Service
 - www.dol.gov/whd/regs/compliance/whdfs79d.htm
- Final rule itself has systematic discussions of each topic such as what is fellowship, what is protection, why not more than 20% ADL
 - <http://webapps.dol.gov/Federalregister/PdfDisplay.aspx?DocId=27104>

Other References

- McClatchy report on independent contractors
www.mcclatchydc.com/static/features/Contract-to-cheat/
- Colorado minimum wage
www.colorado.gov/pacific/sites/default/files/Proposed%20Wage%20Order%2031%20Rules%209-30-14.pdf
- Colorado Division of Labor's Advisory Bulletins and Resource Guide - March 31, 2012
 - Page 70 - Colorado definition of companionship
 - Page 71 - Exemption for Community Centered Boards from Colorado Wage orderswww.colorado.gov/pacific/sites/default/files/Advisory%20Bulletins.pdf
- CDLE independent contractor tests
www.colorado.gov/cdle/independent-contractors

Example -- Independent Contractor Tests Mentioned by USDOL

1. Extent to which services rendered are an integral part of the principal's business.
2. Permanency of the relationship.
3. Amount of the alleged contractor's investment in facilities and equipment.
4. Nature and degree of control by the principal.
5. Alleged contractor's opportunities for profit and loss.
6. Amount of initiative, judgment, or foresight in open market competition with others required for success of the claimed independent contractor.
7. Degree of independent business organization.

Contacts

- Email with “FLSA Question” in subject line to:
 - hcpftrainers@state.co.us
- All Q&A from today’s webinar will be documented and distributed at a later date
- This presentation and a recording of today’s webinar will be posted online
 - www.colorado.gov/hcpf/long-term-services-and-supports-training



COLORADO

Department of Health Care
Policy & Financing



COLORADO

Department of
Labor and Employment



COLORADO

Department of Public
Health & Environment