

Home Care Final Rule

HCBS Conference
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The Final Rule
Joint Employment
Shared Living



U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

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The Final Rule

- The Fair Labor Standards Act (FLSA) is the federal law that requires the payment of minimum wage and overtime.
- It applies to domestic service employees.
 - Except it does not apply to domestic service employees who provide **companionship services**.
 - And its overtime compensation requirement does not apply to **live-in domestic service employees**.
- The Final Rule changes the definitions of these terms such that the FLSA applies to most home care workers.

Two Goals

Our “Twin Principles” in Implementing the Rule

- 1) Expand wage protections for most of the home care workers currently exempt from FLSA protections.
- 2) Ensure that recipients of assistance and their families continue to have access to the critical community services on which they rely and that supports innovative models of care that help them live in the community.

Final Rule:

New Definition of Companionship Services

Final Rule definition of companionship services:

- a) Means the provision of **fellowship and protection**.
- b) Includes the provision of **care** if the care is provided along with fellowship and protection and does not exceed 20% of total hours worked per person per workweek.
- c) Does not include domestic services provided primarily for benefit of other members of the household.
- d) Does not include **medically related services**.

Final Rule:

New Third Party Employment Rule

- Under the Final Rule, third party employers **MAY NOT** claim the 13(a)(15) companionship services exemption from minimum wage and overtime.
- Under the Final Rule, third party employers **MAY NOT** claim the 13(b)(21) live-in domestic services employee exemption from overtime.
 - The exemptions are only available to the consumer or the consumer's family or household. A third party employer is any other employer of a home care worker.

Administrator's Interpretation No. 2014-2 Joint Employment by Public Entities in Consumer-Directed Programs

- Our guidance:
 - **Administrator's Interpretation No. 2014-2** provides background on general joint employment principles and the FLSA's economic realities test, and analyzes the most common questions arising from consumer-directed programs. It also provides seven detailed hypotheticals.
 - **Fact Sheet 79E** also addresses joint employment generally, and consumer-directed programs specifically.

These documents are available at

http://www.dol.gov/whd/homecare/joint_employment.htm

Administrator's Interpretation No. 2014-2

Joint Employment by Public Entities in Consumer-Directed Programs

- Consumer-directed programs can involve several types of entities that might be joint employers.
 - States or state agencies (such as a Medicaid agency, Department of Human Services, Department of Developmental Disabilities, etc.)
 - Private or non-profit agencies (often called “Agency with Choice”) that help administer these programs
 - Fiscal intermediaries (that perform payroll functions on behalf of the consumer)
- Under the Final Rule, any third party employer that, jointly with consumers, employs home care workers along with consumers is responsible for MW and OT.

Administrator's Interpretation No. 2014-2 Joint Employment by Public Entities in Consumer-Directed Programs

Implications of Joint Employment by Public Entities

- States will have to set overtime policies and pay overtime for hours worked over 40.
 - High needs consumers, many of whom have family caretakers, may need to hire additional workers for the first time. This is very troubling to some consumers.
 - States that are joint employers will have to track overtime across multiple consumers.
- States that are joint employers will have to track travel time.

Administrator's Interpretation No. 2014-2 Joint Employment by Public Entities in Consumer-Directed Programs

The AI has three sections.

Economic Realities Test: Background

Court-made
law; requires
a weighing of
all facts and
circumstances

Strong, Moderate, Weak Indicators

Assesses
various
functions of
consumer-
directed
programs

Hypotheticals

Seven
detailed
hypothetical
examples
drawn from
actual
programs

Economic Realities Test

- The “economic realities” test examines a number of factors to determine whether a worker is economically dependent on a purported employer, thus creating an employment relationship.
- The test is not formulaic nor is any single factor determinative.
- The ultimate question is economic dependence.

Economic Realities Test

Some factors to consider in doing an economic realities analysis:

Ability to Hire
and Fire

Setting the Wage
or Reimbursement
Rate

Control over Hours
and Scheduling

Who Supervises,
Directs or Controls
the Work

Who Performs
Payroll and Other
Administrative
Functions

Strong, Moderate, and Weak Indicators

- Our guidance identifies common factors considered by courts in conducting an economic realities analysis and applies those factors to various aspects of consumer-directed programs.
- The AI analyzes whether each of these program variables is a “strong,” “moderate,” or “weak” indicator of an employment relationship.

Strong, Moderate, and Weak Indicators

For example, we looked at “Hiring Decisions” and explained that:

- If a public entity permits the consumer to recruit, interview, and hire any provider who meets basic qualifications that fact **will not weigh in favor** of employer status of the public entity.
- If a public entity runs a registry and permits a consumer to only hire from the closed registry, that fact will be a **moderate-strength** indicator of the entity’s employer status.
- If the public entity must co-interview or approve a provider based on criteria beyond the setting of basic qualifications, those facts should be considered **strong indicators** that the public entity is a joint employer.

Hypotheticals

Consumer and Public Entity as Joint Employers

- One example of a program with a CBA
- One example of a state plan program in which the public entity exercises high control

Consumer as Sole Employer

- One example of a cash and counseling-type program
- One example of a waiver program with high flexibility and autonomy for consumer

Hypotheticals

Consumer and
Private Agency
as Joint
Employers

- One example of an intermediary agency model

Consumer and
Managed Care
Organizations

- One example in which MCO is a joint employer
- One example in which MCO is NOT a joint employer

Administrator's Interpretation No. 2014-1

Shared Living

- Our guidance:
 - **Administrator's Interpretation No. 2014-1** explains how the FLSA applies to shared living arrangements, including describing the analysis of whether the FLSA is relevant in a given context and how to comply with it if it is.
 - **Fact Sheet 79G** summarizes the AI.

These documents are available at:

http://www.dol.gov/whd/homecare/shared_living.htm

Administrator's Interpretation No. 2014-1

Shared Living

- By “shared living,” the Department means arrangements in which the consumer and provider live together.
- This term includes programs often called adult foster care, host home, paid roommate, supported living, life sharing, etc.
 - It does not refer to roommates or family who have no expectation of payment, i.e., provide exclusively natural supports.
 - It does not refer to programs in which services are provided in group homes or via shift work, regardless of whether the programs are called by these names.

Administrator's Interpretation No. 2014-1

Shared Living

- For each shared living arrangement, the relevant questions are:
 1. Does the FLSA apply?
 2. If so, how do employers comply with the FLSA?
- The guidance groups shared living arrangements into two major categories:
 - those that occur in the provider's home (adult foster care/host home) and
 - those that occur in the consumer's home (paid roommate scenarios).

Administrator's Interpretation No. 2014-1

Shared Living

In a provider's home

- The FLSA applies to employees, not independent contractors.
 - A home care provider could be an employee of a consumer and/or of a third party. Only if neither is her employer is she an independent contractor.
- In most shared living arrangements that occur in the provider's home, the provider will be an independent contractor.

Administrator's Interpretation No. 2014-1

Shared Living

In a provider's home

- Why is the provider usually an independent contractor?
 - The provider will not be an employee of the consumer because the provider controls and has invested in the residence.
 - The provider will not be an employee of a third party if the third party oversees the program but is not involved in the work (for example, the third party does not manage the residence or direct the provider regarding how to care for the consumer).
- If the third party is more involved in the provider's relationship with the consumer, it could be an employer.

Administrator's Interpretation No. 2014-1

Shared Living

In a provider's home: Family care providers

- Some state programs allow a family member of the consumer to be an adult foster care provider.
- The provider's status as a family member (as opposed to being unrelated to the consumer) is not determinative of whether the family member is an employee or independent contractor.
- The same economic realities analysis applies to each provider whether he or she is a family member of the consumer or not.

Administrator's Interpretation No. 2014-1

Shared Living

In a consumer's home

- In most shared living arrangements that occur in the consumer's home, the provider will be an employee of the consumer.
 - The consumer controls the residence, sets the schedule, etc.
- The provider may also be an employee of a third party.
- The FLSA will typically apply, although the **consumer** (not any third party employer) may be able to claim an exemption.

Administrator's Interpretation No. 2014-1

Shared Living

In a consumer's home

- To determine if the provider is an employee of a third party, use the economic realities test.
- A major factor to consider is the third party's control over the provider's work.
 - For example, if a provider must ask the third party's permission to be away from the residence or to make a change to the consumer's daily schedule, those facts weigh in favor of a finding that the provider is an employee.
 - On the other hand, if a provider must notify a third party that she will be away from the residence overnight but the third party cannot refuse to grant her request or sanction her for taking the evening off, those facts would not weigh in favor of employee status.

Administrator's Interpretation No. 2014-1

Shared Living

If the FLSA applies

- The FLSA requires that an employer:
 - Pay **minimum wage** for all **hours worked**,
 - Pay **overtime compensation** for all **hours worked** over 40 in a workweek, and
 - Keep employment **records**.
- The shared living guidance addresses how to
 - (1) determine an employee's hours worked and
 - (2) calculate whether the FLSA's minimum wage and overtime requirements are satisfied.

Administrator's Interpretation No. 2014-1

Shared Living

If the FLSA applies: Hours Worked

- Because it can be difficult to distinguish between a live-in employee's on-duty and off-duty time, there are special rules for applying hours worked principles to live-in workers.
- Specifically, an employer and live-in employee may enter a **reasonable agreement** that describes the work the employee is to perform and the time designated as excluded from hours worked.
 - Particularly in the shared living context, a clear and specific reasonable agreement will benefit all parties.

Administrator's Interpretation No. 2014-1

Shared Living

If the FLSA applies: Hours Worked

- It may be permissible for the reasonable agreement between the employer and live-in employee to exclude from hours worked up to eight hours per night of the provider's **sleep time**.
 - The sleep time must be during normal sleeping hours, i.e., overnight.
 - The provider must typically be paid for some hours during non-sleep time. The agreement must be reasonable.

Administrator's Interpretation No. 2014-1

Shared Living

If the FLSA applies: Compliance

- Under certain circumstances, an employer may credit toward minimum wage the fair value of rent, utilities, and/or board (this is called the **section 3(m) credit**).
 - A separate guidance document that explains in detail when an employer may take the section 3(m) credit is forthcoming.

How We Can Help

- We stand ready to provide:
 - **Technical assistance** to states, state Medicaid directors, and other governmental entities.
 - **Public presentations** to help providers, consumer representatives, associations, and other groups understand the Home Care Final Rule and prepare for compliance.
 - **Guidance** to anyone with a question about home care, joint employment, or shared living: Email questions to homecare@dol.gov.