

# Home Care Final Rule

HCBS Conference  
September 18, 2014

The Final Rule  
Joint Employment  
Shared Living



U. S. DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION

1-866-4US-WAGE  
[WWW.DOL.GOV/WHD](http://WWW.DOL.GOV/WHD)

# 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](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](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](mailto:homecare@dol.gov).

# Guidance on FLSA Implementation in Self-Directed Programs



Dianne Kayala  
Acting Senior Policy Analyst, DEHPG  
Technical Director, DLSS  
Center for Medicaid and CHIP Services

# Definitions

- Self-Directed Program (consumer-directed)
  - Self-directed Medicaid services means that participants, or their representatives if applicable, have decision-making authority over certain services and take direct responsibility to manage their services with the assistance of a system of available supports.
- Fair Labor and Standards Act (FLSA)
  - Legislation providing legal rights and protections to many workers nationally including rights around minimum wage, overtime, and travel compensation. The regulation underwent changes that will be effective on January 1, 2015.

# FLSA Impact Areas on Medicaid

- There is a more stringent definition of Companionship Services – has an effect on many agency-based and self-directed services
- When there is a third party employer (anyone other than the user of services or their family/household), the companionship and live-in exemptions can not be used – has an effect on many programs considered by Medicaid to be self-directed
- Travel time between work sites counts as work time under a third party employer
- States may need to develop plans to address this change and to preserve the ability of individuals to self-direct services

# Third Party Employers

- DOL guidance on determining if workers have a third party employer in [Administrator's Interpretation No. 2014-2](#)
- Test of employment relationship is based on the economics reality test, which examines a number of **factors regarding the employment relationship"**
- States and other potential joint employers should review DOL guidance and consult legal counsel



# FLSA and Medicaid Self-Direction Program for States

- Need to ensure compliance with FLSA
- May incorporate the provisions for overtime and travel into their self-direction program structures & policies when needed.
- May also implement policies to limit the use of overtime and/or to minimize compensable travel time
- If implementing limitations on overtime or the use of **compensable travel time, must protect individuals'** access to the services and supports authorized in their person-centered plans

# Program Issues

- Two major cost issues facing 3<sup>rd</sup> party employer
  - Cumulative hours of OT not attributable to any one beneficiary
  - Travel time between beneficiaries
- Cannot be considered Medicaid administrative costs
- Must be allocated only as reasonable costs of delivering covered Medicaid services
- Overtime **and travel costs beyond an individual's control** should not be deducted from the self-directed budget

# Potential Reimbursement Option One – Individual Budgets

- Situation: 3<sup>rd</sup> party employer & individual beneficiary are both employers
- Financial management services agency submits claims for each self-directed consumer including:
  - Actual individually controlled Service Costs- deducted from self-directed budget
  - A per member/ per month (PMPM) service fee to cover expected overtime and travel costs, but is not deducted from the individual budget
    - This amount may be a projected average over time – risk negotiated

# Potential Reimbursement Option One – Individual Budgets

- Individuals continue to control their self-directed budget
- Rate development of the shared overtime/travel component similar to agency-based service rates that include this component
- This may incent the **FMS to restrict some individuals'** preferences for workers in order to keep costs within fees
- May use PMPM methodology

# Potential Reimbursement Option Two – Individual Budgets

- Allocate accrued compensable overtime and travel costs across all the beneficiaries – actual costs of these elements are reimbursed
- These costs are not deducted from individual self-directed budgets and not billed as an administrative cost
- This system may be easier than discretely allocating costs to specific individuals sharing a worker
- Budgeting for the program is less predictable for the state with this actual cost reimbursement

# State Sets Rates and Hours: Option One

- FMS or other entity receives a unit service rate that **includes FMS activities and workers' pay with overtime** and travel compensation
- A flat unit rate across all beneficiaries
- Consistent with home health agency unit payment methodology
- FMS may restrict some beneficiary preference for workers where they will be at risk for costs exceeding reimbursement

# State Sets Rates and Hours: Option Two.

- State develops tiered payment rates or modifiers to a base rate based on factors such as regional worker availability or travel distance to home.
- May implement this as modifiers to procedure codes
- States may already have similar systems in place for shift differentials, etc.
- May be administratively complex to monitor modifiers and control costs. Calls for documentation standards to account for additional payments

# Payment When the Individual is Sole Employer

- A beneficiary may have obligations to pay minimum wage and/or overtime compensation if the services do not meet the companionship definition or the worker is not a live-in employee
- Cost considerations for overtime must meet state program rules and should be factored into the **individual's self**-directed budget when individually controlled



# Payment When the Individual is Sole Employer

- States currently have different overtime policies
- If a worker earns overtime working for just one person, that cost can be allocated to that person and be considered part of the consumer-directed budget.
- Commuting time (travel time from home to work site and back) is never required to be paid

# Questions?

- CMS is offering technical assistance to states to in regard to FLSA issues
- **Consult DOL's guidance and seek legal counsel in determining the effects of FLSA on direct care programs at the state level under Medicaid**

Contact: Dianne Kayala, [dianne.kayala@cms.hhs.gov](mailto:dianne.kayala@cms.hhs.gov) if you have questions

## ***Department of Labor (DOL) Fair Labor Standards Rule The State Response***

**2014 HCBS Conference  
*September 15, 2014***

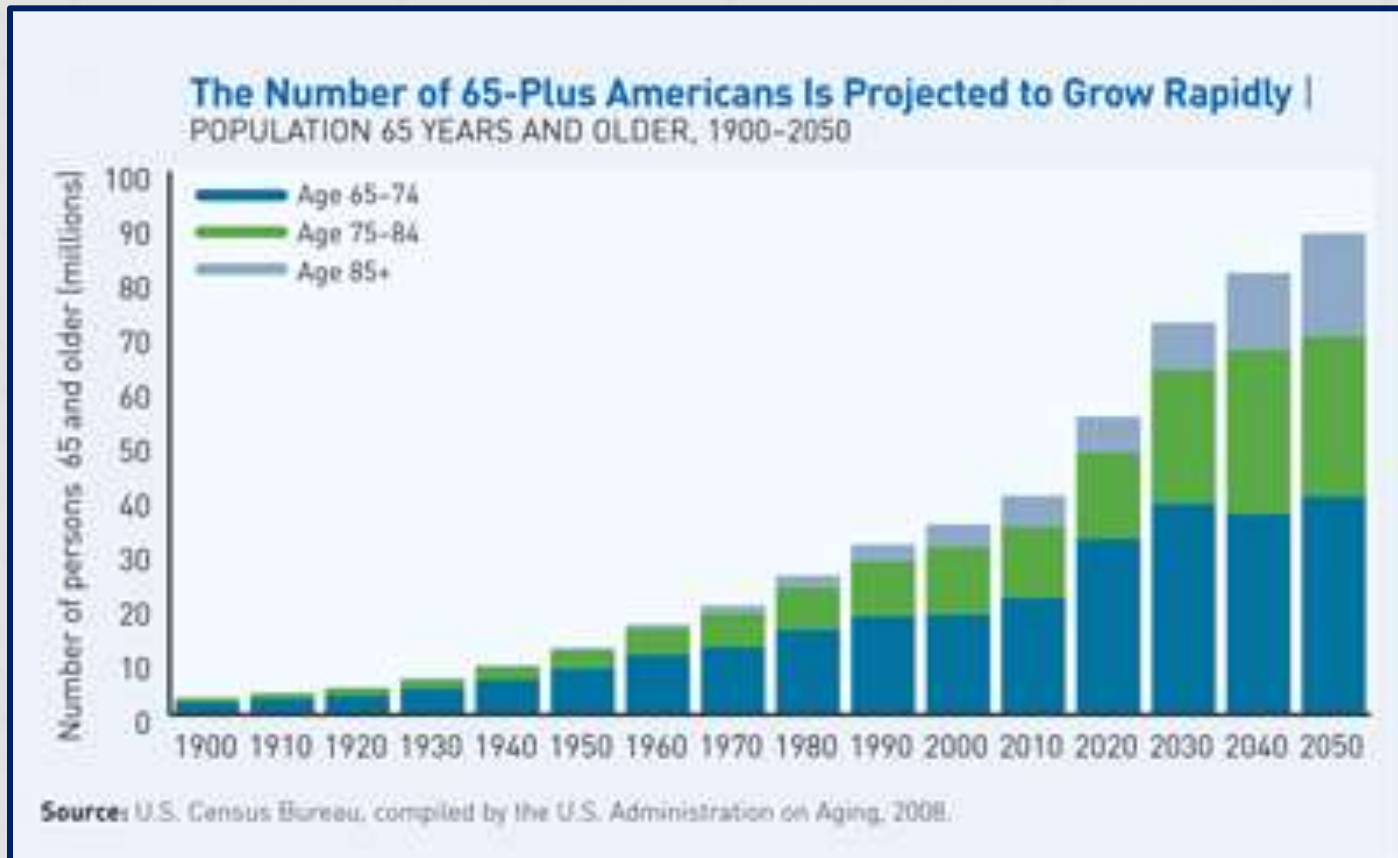
**Dan Berland**

National Association of State Directors of Developmental Disabilities Services

# THE CONTEXT FOR THE STATE RESPONSE

- Demographic and Budget Pressures
- Bandwidth Issues

# THE AGING OF AMERICA

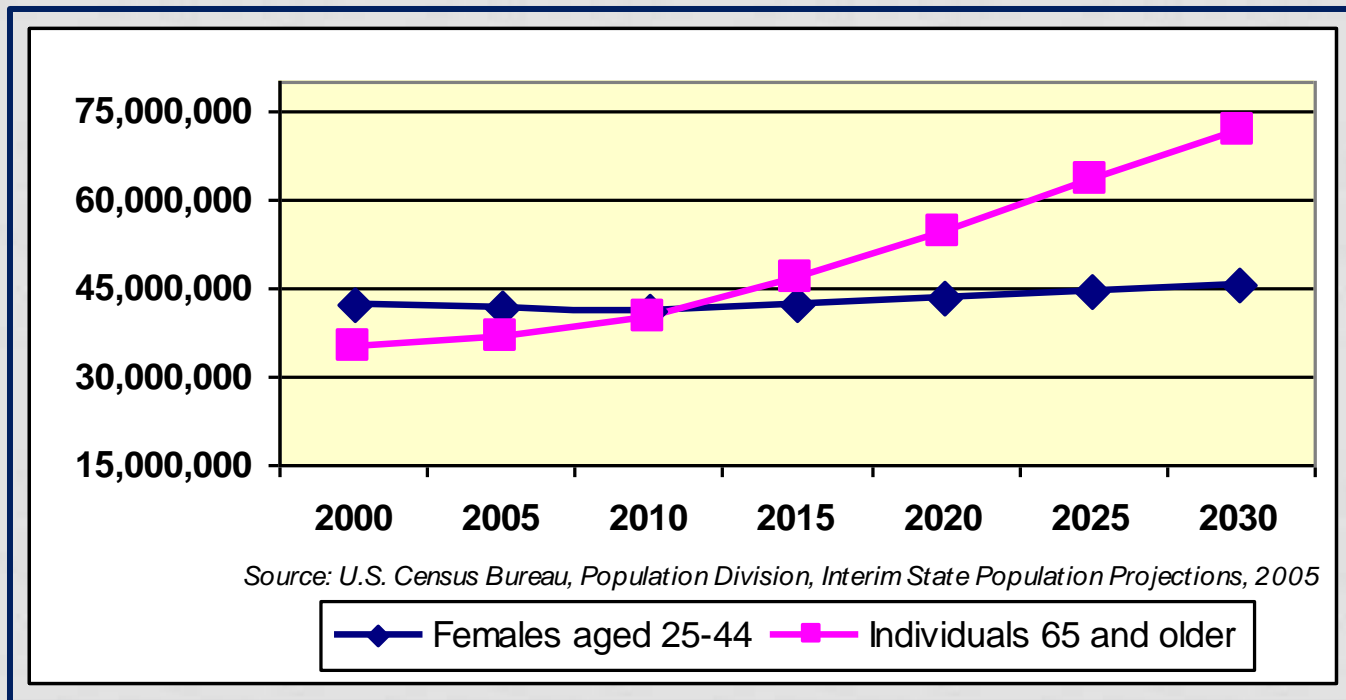


# IMPACT OF THE BABY BOOM GENERATION

70% of Americans who reach age 65 will need some form of long-term care for an average of three years.



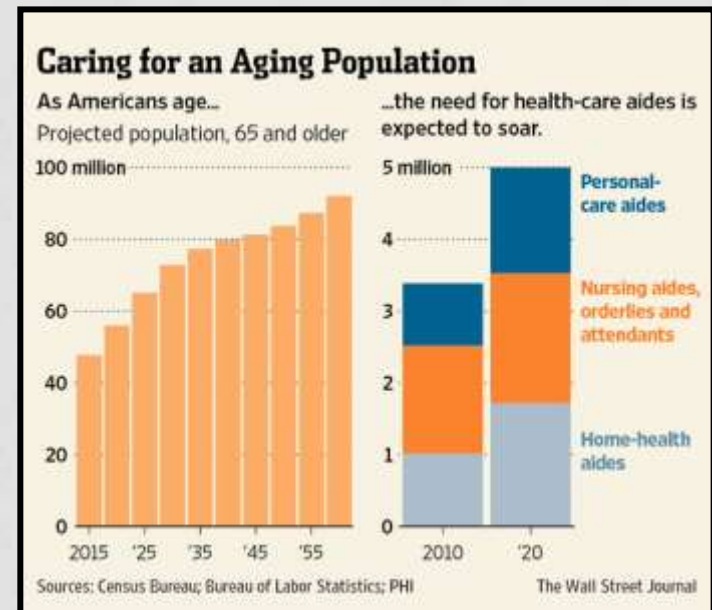
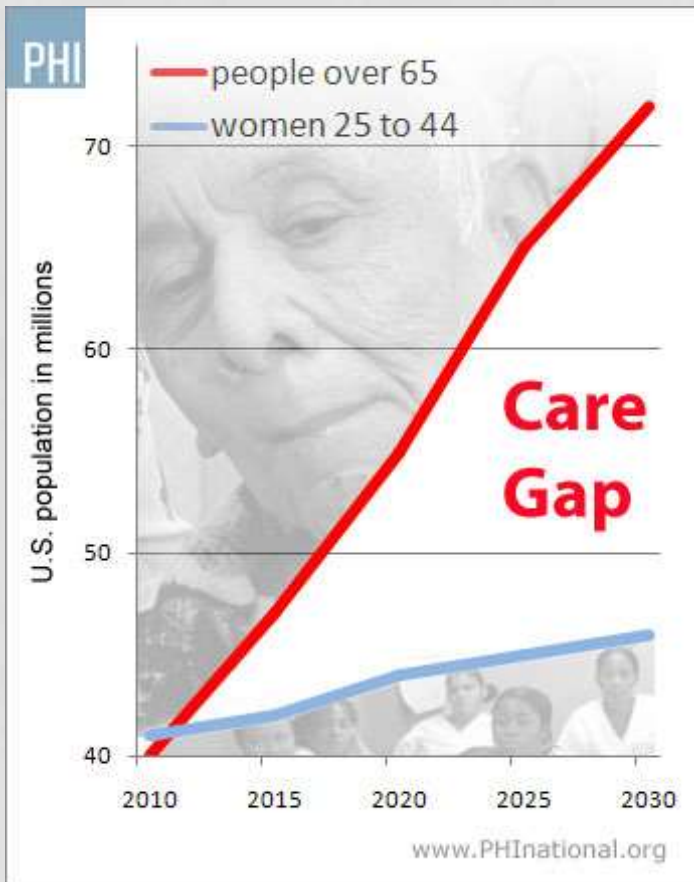
# SHORTAGE OF CARE GIVERS



# SHORTAGE OF CARE GIVERS

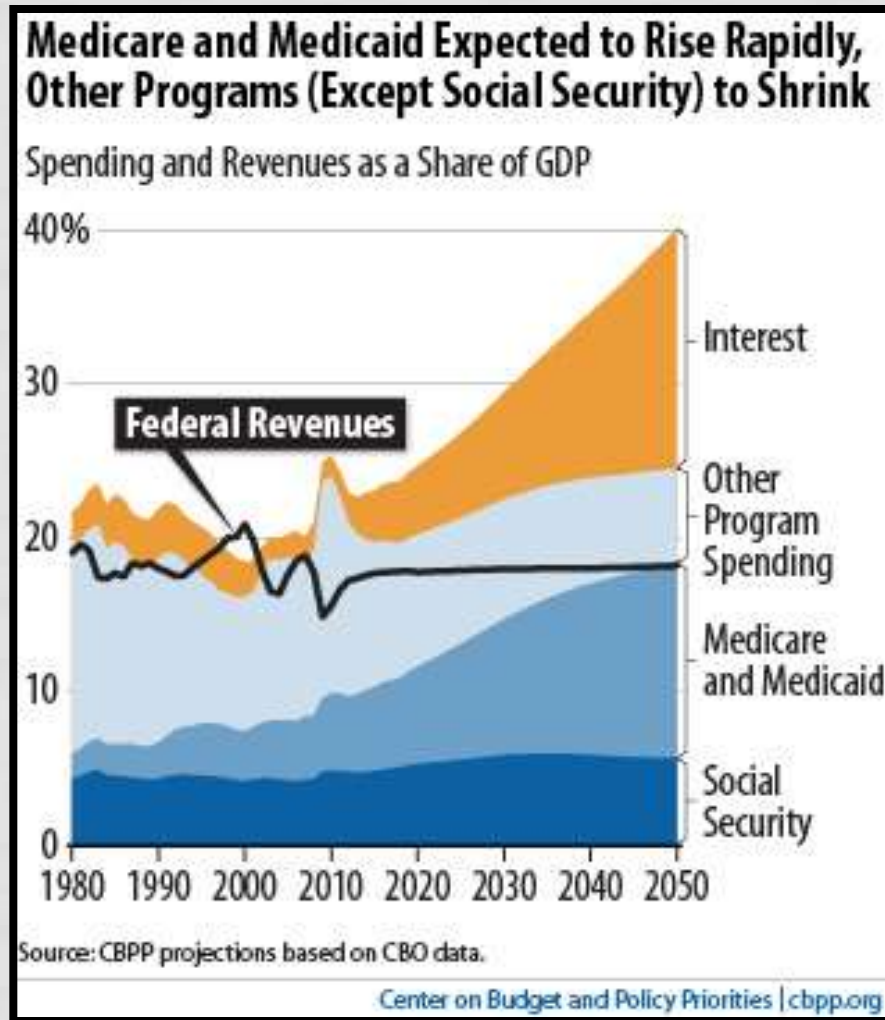
*A labor shortage is worsening in one of the nation's fastest-growing occupations—taking care of the elderly and disabled—just as baby boomers head into old age.*

Wall Street Journal  
April 15, 2013

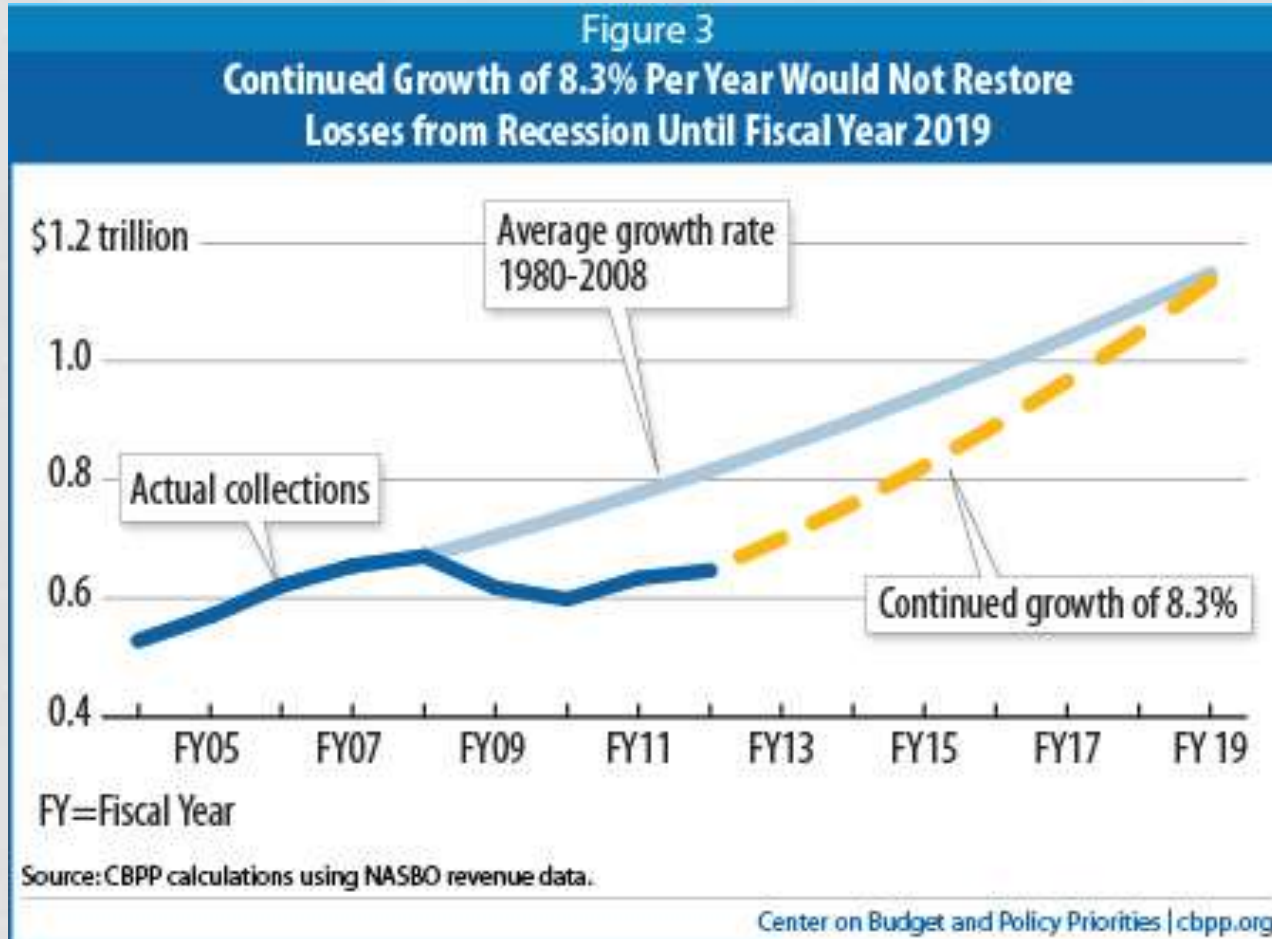




# PRESSURES ON MEDICARE AND MEDICAID



# STATES CAN'T MAKE UP THE DIFFERENCE







# Thinking for the Long Term About Cost

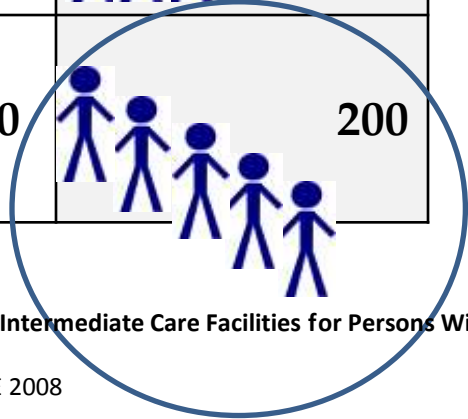
Type of Service	Cost per Person	20 yrs. Cost	30 yrs. Cost
ICF/MR Institution	\$238,500	\$4,770,000	\$7,155,000
HCBS 24 hr. staffed Residential	\$150,000	\$3,000,000	\$4,500,000
Shared Living	\$50,000	\$1,000,000	\$1,500,000
Support in Own or Family Home	\$25,000	\$500,000	\$750,000



Data Source: Lakin, K.C. MSIS and NCI data from 4 states (1,240 Individuals)

# Re-evaluating current services – How many can we serve?

Type of Service	Cost per Person	Cost to Serve the Waiting List 122,870	People Served with \$5 M
ICF/MR	\$128,275	\$15,761,114,925	 39
Non-family HCBS	\$70,133	\$8,617,241,710	 71
Host Family	\$44,122	\$5,421,270,140	 113
Own Family	\$25,072	\$3,080,596,640	 200



# MAJOR FEDERAL CHANGES

- HCBS Rule
  - Assessment
  - Transition Plan
  - Five Year Process
- Medicaid Expansion
- States lost staff during the recession

# STATES ARE STILL FIGURING OUT THE IMPACT ON THEIR SYSTEMS

- Kansas has estimated that the rule change will affect approximately 41 percent of the state's Medicaid participants that receive personal care services.
- Oregon has estimated that the rule will impact total Medicaid costs by \$60 million in the current fiscal year and \$242 million over the next two years. Governor Kitzhaber states that the rule carries significant policy implications and all of the necessary changes cannot be made and implemented prior to January 1, 2015.

# OREGON

Oregon's letter to DOL lays out the tasks ahead of them:

- Collective bargaining over the impacts of policy changes
- Modification to Medicaid State Plan and waivers
- Modification to existing legacy I.T. systems
- Procurement of new I.T. systems to manage time keeping.
- Modification of administrative rules
- Training of thousands of staff, providers, and consumers

# IMPLEMENTATION CHALLENGES

- Most impacted parts of the program:
  - Self-directed services
  - Paid family caregivers
  - Shared living in the home of an individual with a disability

However....

New costs will now be incurred whenever an individual provider works for multiple agencies where a joint employment relationship exists with the state, or works for the state and for a provider where a joint employment relationship exists



# IMPLEMENTATION CHALLENGES

- Assessing Employer Status
  - State as joint employer
  - Provider agency as joint employer
- Calculating Overtime
  - Changes to rules, rates, and budgets
  - Who incurs the expense?
- Travel Time
  - Tracking travel time
  - Who incurs the expense?
- Budget issues
  - Forecasting
  - Legislative approval
- Timing
  - Getting waiver approvals at the same time as developing transition plans
  - CMS approval of administrative changes
  - State legislature approval

# IMPLEMENTATION CHALLENGES

## RATES

- Rates must accommodate minimum wage, overtime and travel time
- May need to convert from daily to hourly rates (i.e., respite and time waiting)
- Can't reduce services

# IMPLEMENTATION CHALLENGES I.T.

- Tracking employees who work for multiple individuals or agencies
- Tracking travel time
- Implementing the CMS guidance on claiming FFP for overtime and travel time will require new I.T. functionality

# IMPLEMENTATION CHALLENGES

## MODEL DESIGN

- States must adapt their systems to fit the CMS guidance
- States may change rules to avoid overtime
- States may move to Agency-With-Choice
- States may shift some models of support to other models

# CALIFORNIA

- Brown administration predicted \$600 million increase in costs by June 2016.
- Budget plan capped number of hours for in-home workers;
  - No overtime, no exceptions
  - Created pool of backup providers who would be available on short notice
- Budget included exceptions and \$66 million funding for overtime

# PRESERVING WHAT WORKS

- Relationship-Based Service Arrangements (Shared Living)
  - DOL guidance suggests a path to preserving these arrangements
  - Changes will still be necessary
- Paid Family Caregivers
  - Rule recognizes dual nature of employee and family relationship
  - States may wish to convert high hour family caregiver relationships to shared living

# A Community for Everyone



# Arlene

**25<sup>th</sup> Year Providing Supports**





# Colleen

## 36 Different Roommates



# Richard



# Building with Intent



*For a seed to achieve its greatest expression, it must come completely undone . The shell cracks, its insides come out and everything changes. To someone who doesn't understand growth, it would look like complete destruction.*

*Cynthia Ocle*

# The Big Challenge

- What's the difference between a roommate and a live-In caregiver ?

# The Big Challenge

- Support companions working over 40 hours per week will not be exempted from overtime

# Other Third Party Considerations

- Exempted hours for sleep time
- Tighter record keeping requirements
- No casual arrangements
- No stipends for roommates

joe@cvision.org

Community Vision, Inc.







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*Shaping policy, sharing solutions, strengthening communities*



# The New FLSA Rule: How Providers Will Respond

Katherine Berland

Director of Government Relations, ANCOR

National Association of States United for Aging and Disabilities

*National Home & Community Based Services Conference*

September 15, 2014

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SHAPING POLICY, SHARING SOLUTIONS, STRENGTHENING COMMUNITY

p: 703.535.7850 · [ancor@ancor.org](mailto:ancor@ancor.org) · [www.ancor.org](http://www.ancor.org)



ANCOR is...

A national nonprofit trade association  
advocating and supporting

- Over 800 private providers of services and supports to
- Over 500,000 people with disabilities and their families
- And employing a workforce of over 400,000 direct support professionals (DSPs) and other staff

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SHAPING POLICY, SHARING SOLUTIONS, STRENGTHENING COMMUNITY

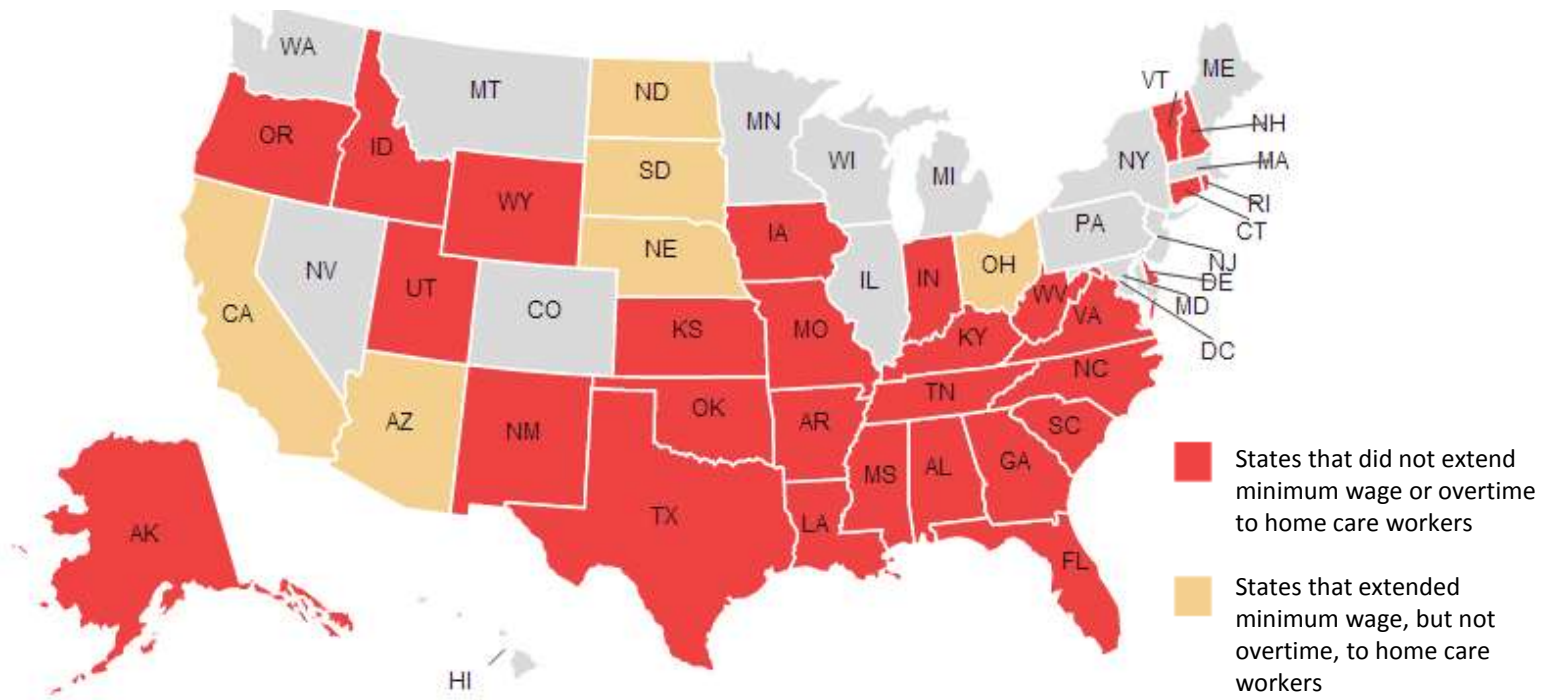
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# The Provider Perspective

## Challenges

- Quality Service Delivery
- Workforce Sustainability
- Regulatory and Statutory Compliance
- Third-party/joint employment of DSPs
- Effective date of rule

## Use of Companionship Exemption Prior to Rule



Source: [National Employment Law Project](#)

SHAPING POLICY, SHARING SOLUTIONS, STRENGTHENING COMMUNITY

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# Supported Living/Shared Living

	Supported Living	Shared Living
Benefits	<ul style="list-style-type: none"> <li>• Facilitates an individual living in the community</li> <li>• Encourages independence and autonomy</li> <li>• Encourages stability and permanence in housing</li> <li>• Functionally separates housing from other services</li> </ul>	<ul style="list-style-type: none"> <li>• Facilitates an individual living in the community in a family or roommate setting</li> <li>• Relationships formed are personal, unique, and often highly satisfying for all involved</li> </ul>
Challenges	<ul style="list-style-type: none"> <li>• Add'l reporting &amp; regulatory requirements</li> <li>• Increased costs to individuals and providers</li> <li>• More workers needed to cover shifts</li> <li>• Employer/employee relationship rather than familial or friendship</li> </ul>	<ul style="list-style-type: none"> <li>• Discourages individual ownership of property and autonomy</li> <li>• Correctly matching individual to host family or roommate</li> </ul>

# IRS Foster Care Payment Guidance

## Difficulty of Care Payments

- §131 of the Internal Revenue Code excludes qualified foster care payments from income
- [IRS Notice 2014-7](#) permits qualified Medicaid waiver payments as “difficulty of care” payments, excludable from income, *regardless of whether the care provider is related or unrelated* to the individual

# The Independent Contractor Model

## Independent Contractors vs. Employees

- The FLSA applies when an employment relationship exists. Independent contractors are outside of the FLSA.
- The new rule does not change established law for determining whether an employment relationship exists; the “economic realities” standard is used to determine worker status.



# Independent Contractor Model

Benefits	<ul style="list-style-type: none"><li>• Direct Support Professionals can negotiate their own hours, rates, and benefits</li><li>• Provider incurs lower overhead and administrative costs</li><li>• More flexibility in around hours and rates</li></ul>
Challenges	<ul style="list-style-type: none"><li>• The model must be implemented correctly to ensure that it is in full compliance with the law</li><li>• Medicaid rates influence amount of flexibility possible in negotiations</li><li>• Provider cedes control over training and daily oversight</li></ul>

# Overtime

## Prohibiting or Limiting Overtime

- Providers already struggle with attracting and retaining quality DSPs, and paying them adequately.
- Prohibitions against overtime lead to service hours cut, number of workers increased, or both.
- Many programs and individuals cannot afford the additional cost of bringing in additional workers, assuming they can be found.

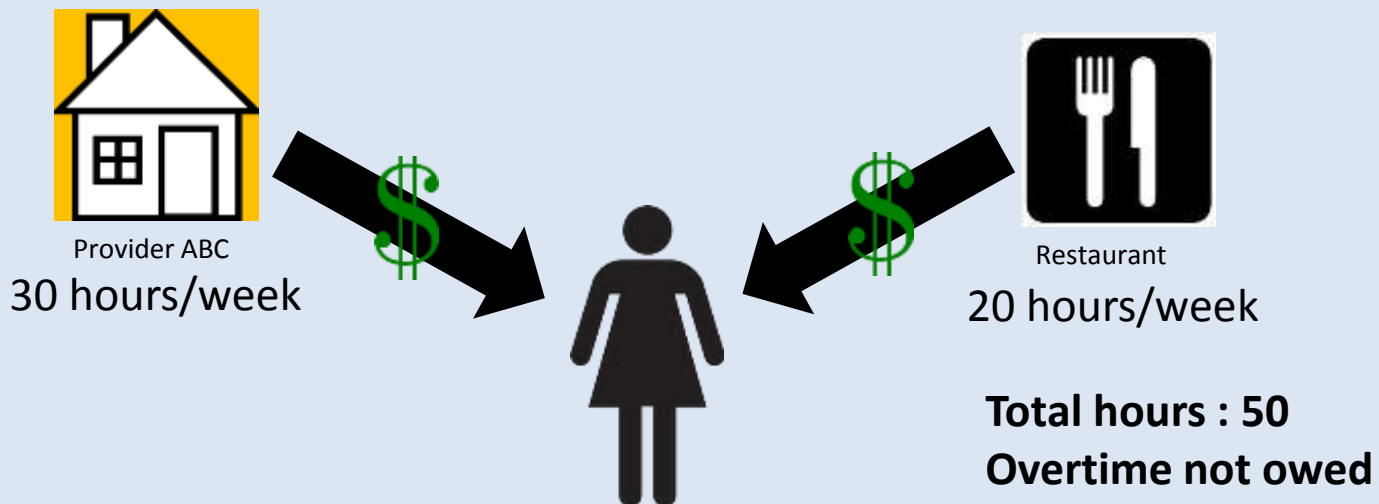
# Third-Party Employment

## Changes for Third-Party Employers

- Third-party employers are not entitled to companionship or live-in domestic service worker exemptions.
- Employment relationship determined by the subjective “economic realities” test.
- No one factor controls, must look at totality of relationship to determine whether employment relationship exists.

# Joint Employment

## *Scenario #1: No Joint Employment Relationship*



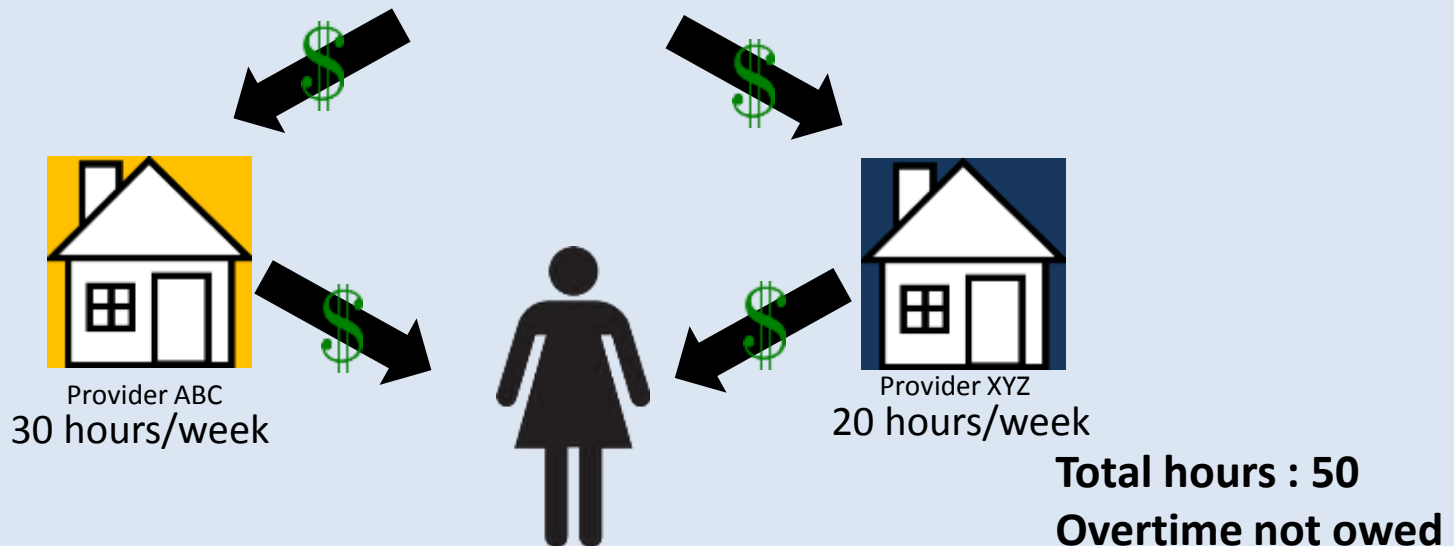
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# Third-Party/Joint Employment

## Scenario #2: No Joint Employment Relationship

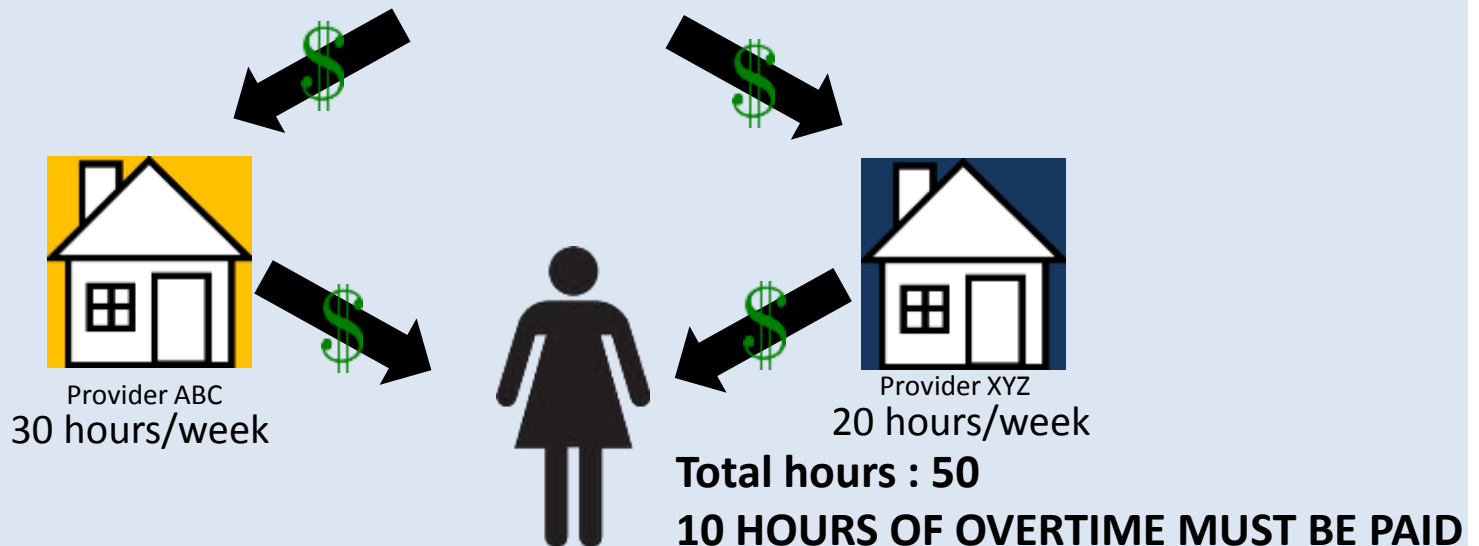
**State Medicaid Program (or other public entity)**  
*Pays for services, but does not exercise control over worker*



# Third-Party/Joint Employment

## Scenario #3: Joint Employment Relationship

**State Medicaid Program (or other public entity)**  
*Pays for services, AND exercises control over worker*



# Travel Time

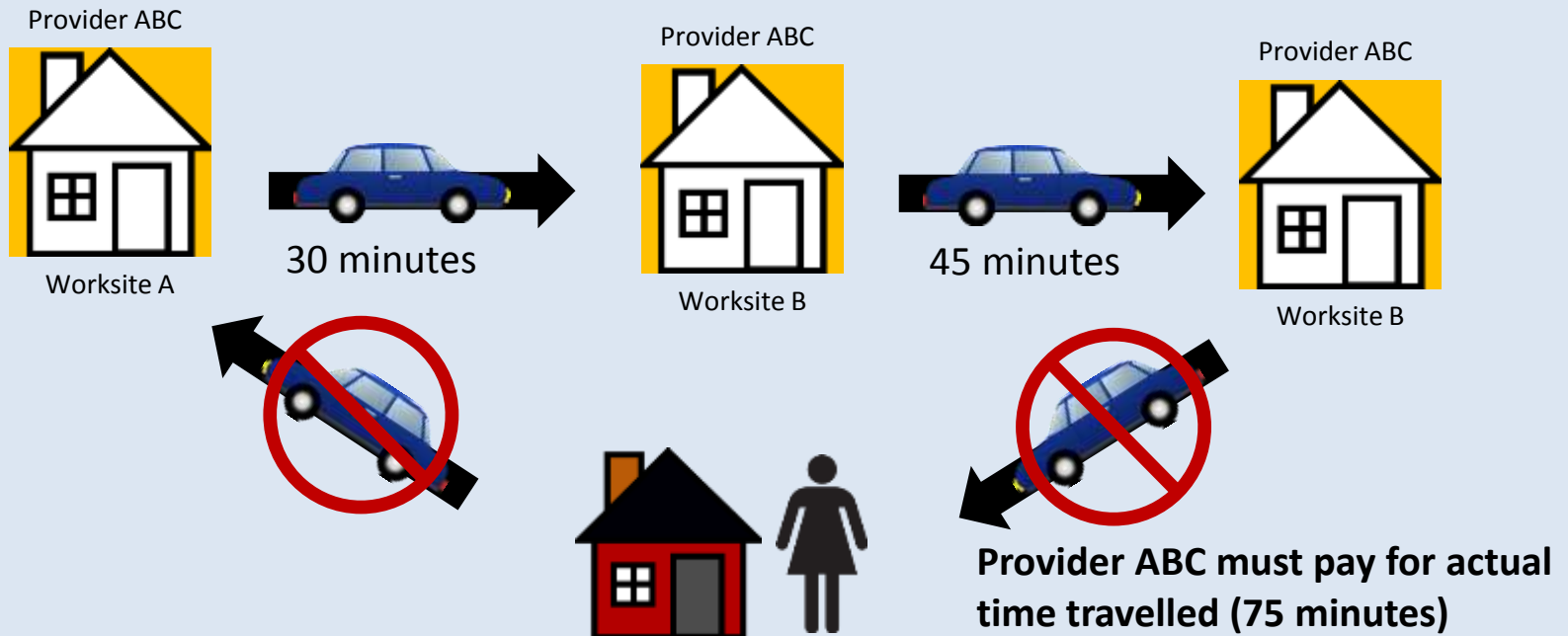
## Managing Travel Time

Providers are developing strategies to manage travel expenses.

- The challenge is amplified in rural areas where drive distance is greater.
- Many DSPs support more than one individual, complicating who will be responsible for compensating travel between worksites.

## Travel Time

*Scenario #1: Providers NOT in Joint Employment Relationship with Public Entity*



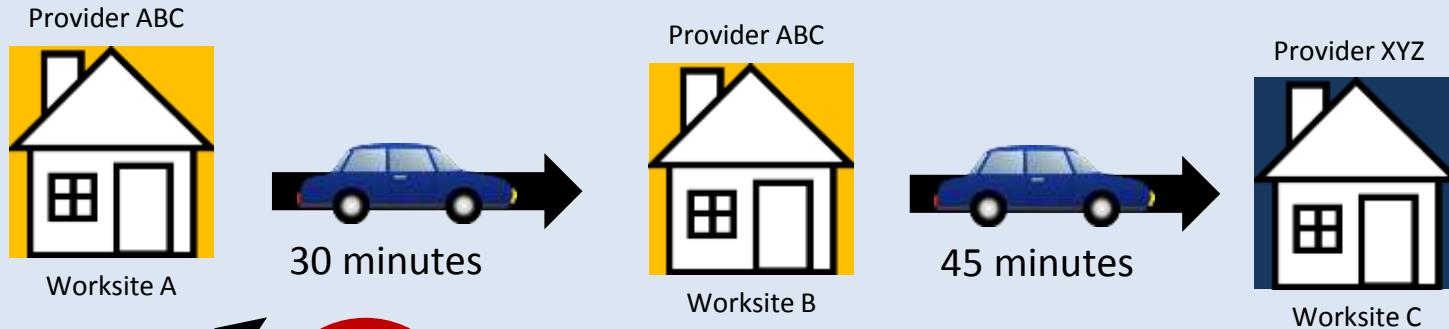
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## Travel Time

*Scenario #2: Providers in Joint Employment Relationship with Public Entity*



**DSP must be compensated for travel time of 75 minutes**

# Questions?

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# Contact Information/Follow Up

[ANCOR Leadership Summit: \*Shaping Policy\*](#)

November 11 - 12, 2014

The Liaison Capitol Hill Hotel, Washington DC

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NATIONAL RESOURCE CENTER *for*  
PARTICIPANT-DIRECTED SERVICES

# Fair Labor Standards Act Home Care Rule Tool Kit

September 8, 2014

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# Today

- ❑ Employer Tests
- ❑ Consumer Direction Program Design Resource
  - ❑ Four consumer direction program models with factors and considerations

# Common Law & Economic Realities Tests



Both are tests of employment, but they are used for different purposes. Some factors are similar, but may be weighted differently for the tests. The result of one test should not influence the result of the other.

# Employer Test Results

## Scenario A: Common Law Test Results

Consumer



IRS & Many  
State Tax  
Agencies

## Scenario A: Economic Realities Test Employers



FLSA

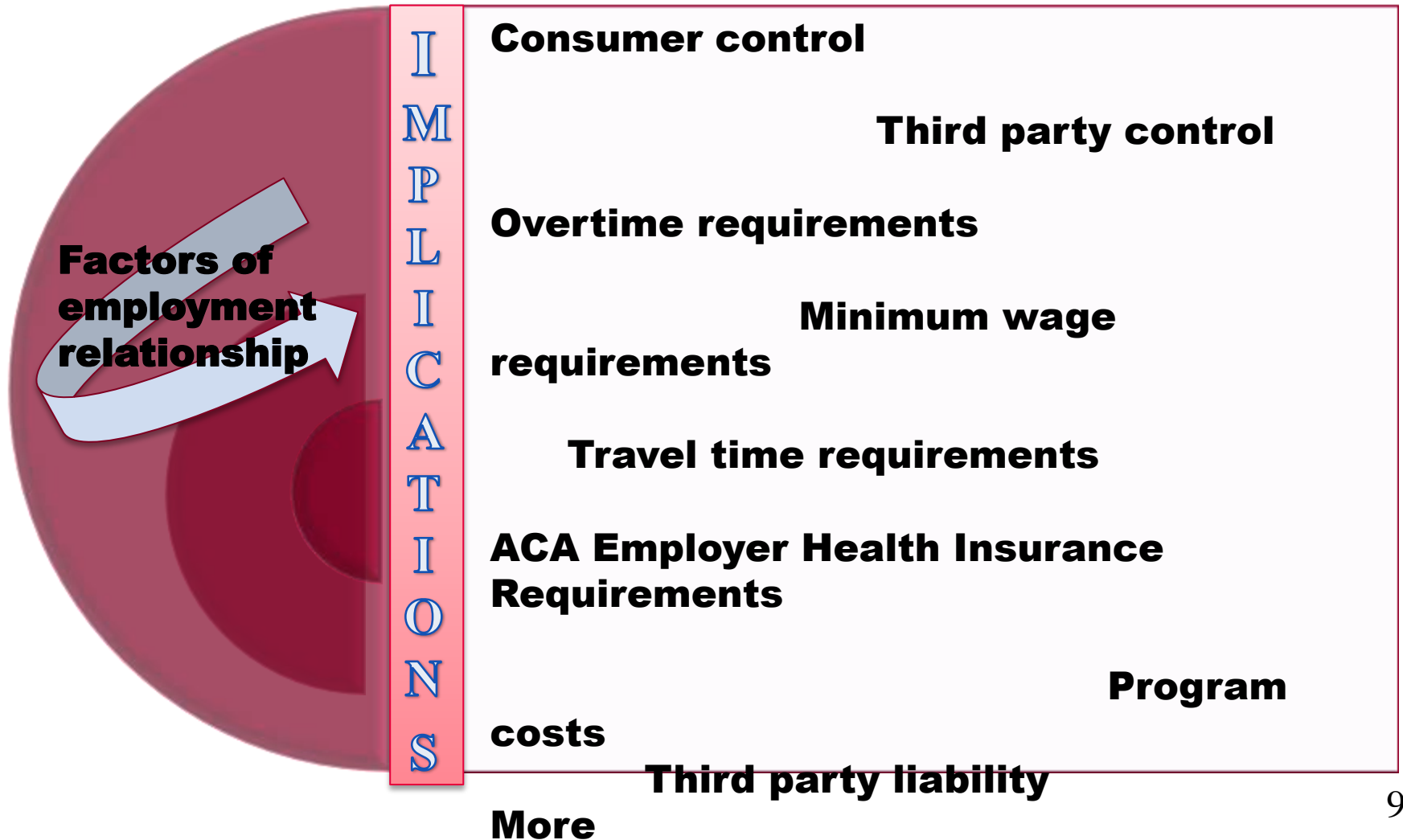
# Purpose of Program Design

## Resource: 4 Models

- ❑ We propose 4 models that achieve different results for:
  - ❑ Level of consumer control vs. third party control as an employer
  - ❑ Affordable Care Act health insurance mandate requirements
  - ❑ Use of companionship and live-in exemptions
  - ❑ Requirements to pay overtime, minimum wage, travel time
  - ❑ Possible program cost implications
  - ❑ Who the common law employer is likely to be
  - ❑ Who the economic realities test employer(s) is/are likely to be
  - ❑ More



# Factors change, Implications change



# 4 Models: Overview

- ❑ **Model 1: *High Consumer Control***
  - ❑ Most Consumer-directed; may have lowest FMS costs
  - ❑ No FLSA joint employers
  - ❑ Consumer is sole employer under FLSA
- ❑ **Model 2: *Hybrid Fiscal/Employer Agent***
  - ❑ Medium Consumer-directed; may have higher FMS costs than Model 1
  - ❑ F/EA is FLSA joint employer with consumer
  - ❑ Consumer is common law employer
- ❑ **Model 3: *Fiscal/Employer Agent with State or Managed Care Entity as Third Party Employer***
  - ❑ Medium Consumer-directed; State is FLSA joint employer with consumer
  - ❑ Consumer is common law employer
- ❑ **Model 4: *Agency with Choice***
  - ❑ Most third party control; may have highest FMS costs;
  - ❑ Agency is FLSA joint employer with consumer
  - ❑ Agency is common law employer

# Features of Model 1: High Consumer Control

- ❑ Consumer is the common law employer
- ❑ Consumer is sole FLSA employer
- ❑ Consumer is employer for purposes of ACA
  - ❑ Thus, not required to provide health insurance to employees under ACA
- ❑ No joint third party employer exists
- ❑ At least minimum wage must be paid, unless the worker qualifies as a companion
- ❑ For employees who provide services to more than one consumer, no travel time must be paid when traveling between consumers

# Considerations of Model 1: High Consumer Control

- ❑ FLSA companionship and live-in exemptions can be used if worker actually qualifies for them based on his/her job duties
- ❑ Likely could not be used with collective bargaining because the collective bargainer has control over compensation limits
- ❑ Could be used with collective bargaining if collective bargainer would not be deemed joint employer when applying the factors of the economic realities test

# Features of Model 2: Hybrid Fiscal/Employer Agent

- ❑ Consumer is common law employer
- ❑ Consumer and F/EA are joint FLSA employers
- ❑ Consumer is employer for purposes of ACA
  - ❑ Not required to provide health insurance to employees under ACA
- ❑ Consumer and F/EA are joint employers under FLSA
- ❑ Overtime is required when a worker works over 40 hours per work week while jointly employed by the F/EA
- ❑ At least minimum wage must always be paid
- ❑ Compensation for travel time required when worker travels between shifts worked for different consumers while worker is jointly employed by F/EA

# Considerations of Model 2: Hybrid Fiscal/Employer Agent

- ❑ Companionship and live-in exemptions to FLSA cannot be used by the third party joint employer (i.e., the F/EA)
- ❑ F/EA must track & pay travel time when a worker travels between shifts worked for different consumers while worker is jointly employed by F/EA
- ❑ F/EA must cover overtime costs when a worker works more than 40 hours in a work week while jointly employed by F/EA
- ❑ F/EA has more responsibility and duties in Model 2 than in Model 1; would likely require higher compensation for F/EA

# Features of Model 3: F/EA with State or Managed Care Entity as Third Party Employer

- ❑ Consumer is common law employer
- ❑ Consumer and State or MCE are joint FLSA employers
- ❑ Consumer is employer for purposes of ACA
  - ❑ Not required to provide health insurance to employees under ACA
- ❑ Consumer a state or managed care entity are joint employers
- ❑ Overtime required when a worker works over 40 hours per work week while jointly employed by the state or managed care entity
- ❑ At least minimum wage must always be paid
- ❑ Compensation for travel time required when worker travels between shifts worked for different consumers while worker is jointly employed by state or managed care entity

# Considerations of Model 3: F/EA with State or Managed Care Entity as Third Party Employer

- ❑ Cannot use companionship or live-in exemptions
- ❑ State or managed care entity must track and pay travel time when a worker is jointly employed by the state or managed care entity while the worker works for multiple consumers and travels between the consumers between shifts



# Considerations of Model 3: F/EA with State or Managed Care Entity as Third Party Employer

- ❑ The state or managed care entity must cover overtime costs when a worker works more than 40 hours in a work week while jointly employed by the state or managed care entity
- ❑ In Model 3, the state must independently track travel time between consumers for whom it shares a joint employment relationship and must track hours worked for employees and pay overtime for hours over 40 per week
- ❑ Requires the payer to have more responsibility than in Model 1, 2 and 4

# Considerations of Model 3: F/EA with State or Managed Care Entity as Third Party Employer

- ❑ Complications arise if the payer uses multiple F/EAs to serve the program
  - ❑ If a worker works for consumers who use different F/EAs while the payer is a joint employer, the payer is still liable for overtime for all hours worked by a worker serving those consumers and for travel time between those consumers incurred by the worker
  - ❑ Complications exist because for each work week, the payer must know what hours and travel time workers had with each F/EA and then must coordinate appropriate payment to the workers

# Features of Model 4: Agency with Choice

- ❑ Agency is common law employer
- ❑ Agency and consumer are FLSA joint employers
- ❑ Agency qualifies as large employer under ACA employer mandate if agency employs 50 or more full-time equivalent employees
  - ❑ Then full-time employees must be offered health insurance or agency must pay IRS penalties
- ❑ Consumer and agency are FLSA joint employers
- ❑ Overtime must be paid when a worker works 40 or more hours in a work week while jointly employed by the agency
- ❑ At least minimum wage must always be paid
- ❑ Compensation for travel time required when a worker travels between shifts worked for different consumers while the worker is jointly employed by the agency

# Considerations of Model 4: Agency with Choice

- ❑ The companionship and live-in exemptions cannot be used because the agency is a third party employer
- ❑ Agency must track & pay travel time when a worker is jointly employed by the agency while the worker works for multiple consumers & travels between the consumers between shifts
- ❑ Agency must have plan to cover overtime costs when a worker works >40 hours in a work week while jointly employed by the agency
- ❑ Requires agency to have more responsibility & duties than in Model 1
- ❑ Model requires the agency to provide health insurance to qualifying employees and therefore could result in higher program costs than Models 1, 2, and 3

# A Note on the IRS Common Law Test

- ❑ NRCPPDS has also been working with the IRS as we developed this tool kit
- ❑ If common law employer is consumer and program is public, use Revenue Procedure 2013-39 for IRS filing and deposit procedures
  - ❑ Economic realities test employer does NOT impact the Revenue Procedures to use
- ❑ Common law test remains separate and distinct from economic realities test

# Considerations for Program Design

- ❑ Don't forget your state's labor rules
- ❑ Involve your counsel
- ❑ States, managed care entities, and FMS providers should ensure resources are in place to comply with the new rules in advance of January 1, 2015
- ❑ States considering program model changes are recommended to act now in order to be ready for 2016

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# What's Next

- ❑ NRCPPDS will provide assistance regarding operationalizing for FLSA compliance
- ❑ Please feel free to send your specific program questions our way
- ❑ We'd appreciate feedback on what future resources would be helpful

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# Questions