

# Home Care Final Rule

**Webinar for State Entities**  
*September 18, 2015*

***U.S. Department of Labor***



U. S. DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION

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# Introduction

## Twin Principles

### The “Twin Principles” in Implementing the Rule

- 1) Extend to home care workers the basic wage protections that most American employees enjoy.
- 2) Ensure that recipients of assistance and their families continue to have access to the critical community services on which they rely and that support innovative models of care that help them live in the community.

# Introduction

## Original Implementation Timeline

### Timeline

- Publication Date: October 1, 2013
- Effective Date: January 1, 2015
- Non-enforcement policy: **July 1, 2015 – December 31, 2015**
  - During this second phase of the non-enforcement policy, DOL will use its prosecutorial discretion, making determinations on case-by-case basis as to whether to bring enforcement actions against any employer, with strong consideration of an employer's efforts to make any adjustments necessary to implement the Final Rule, and in particular a State's efforts to bring its publicly funded home care programs into FLSA compliance.

# Home Care Lawsuit

**On August 21, 2015, The D.C. Circuit Court of Appeals unanimously affirmed the validity of the Home Care Final Rule. The court's decision, however, does not take effect immediately.**

- Several associations representing private home care agencies asked a Federal District Court in Washington, D.C. to stop the rule from going into effect.
- The district court issued two orders in the case, vacating the major provisions of the Rule.
- The Department appealed, and on August 21, 2015, the D.C. Circuit Court of Appeals issued a unanimous opinion affirming the validity of the Final Rule and reversing the district court's orders.
- The Department will not begin enforcement of the Rule until 30 days after the appellate court's decision takes effect.
- For the most current information, visit our litigation webpage: <http://www.dol.gov/whd/homecare/litigation.htm>

# Introduction

## Topics for today:

- I. **Home Care Final Rule:** Changes to the domestic service employment regulations under the FLSA
- II. **Joint Employment:** Brief overview of joint employment as it pertains to home care workers
- III. **Shared Living:** How to apply the FLSA to shared living arrangements
- IV. **Hours Worked:** Brief Overview
- V. **Next Steps for States:** Preparation for implementation
- VI. **Assistance for States:** Ongoing technical assistance from DOL and other resources available

# Part I:

## New Home Care Final Rule

- The **Fair Labor Standards Act (FLSA)** is the federal law that requires employers to pay employees, including domestic service employees, minimum wage and overtime.
- “Domestic service employment” means services of a household nature performed by an employee in or about a private home.
- A **private home** may be permanent or temporary, but the fact that a place is an individual’s sole residence is not enough to make it a private home under the FLSA.
  - For example, a nursing home is not a private home.

# New Rules

- The Home Care Final Rule updated two exemptions that can apply in the domestic service context:
  - **Companionship Services Exemption:**  
The FLSA's minimum wage *and* overtime requirements do not apply to domestic service employees who provide “companionship services.”
  - **Live-In Domestic Service Employee Exemption:**  
The FLSA's overtime requirement does not apply to employees who are “live-in” domestic service employees.

# New Rules

## Third party regulation

The new regulations change who may claim the exemptions:

- Under the new rules, third party employers **MAY NOT** claim the companionship services exemption regardless of the employee's duties.
- Under the new rules, third party employers **MAY NOT** claim the live-in domestic service employee exemption from overtime pay.
- These exemptions are still available to the consumer or the consumer's family or household.



# New Rules

## Companionship services regulation

- The new regulations also update the definition of “companionship services” for families or households that may be claiming the exemption for their employees, to focus on the provision of fellowship and protection.
- But remember, under the new rule, third party employers of home care workers must pay those workers in compliance with the FLSA’s minimum wage and overtime requirements, **regardless of duties performed.**

# Part II

## Joint Employment

- How to determine whether an employee is in an employment relationship with more than one party for purposes of the FLSA

# Joint Employment

In June 2014, the Department released guidance on the topic of joint employment, in particular with regard to consumer-directed programs, which is 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
- **Fact Sheet #79E:** Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA)

# Joint Employment

- Although the Final Rule did not change any of the longstanding case law or the Department's guidance about joint employment, the regulatory changes will require each public or private agency that administers or participates in a consumer-directed, Medicaid-funded home care program to ***conduct its own analysis, in consultation with its attorneys, in evaluating whether it is an employer under the FLSA.***
- DOL's joint employment guidance is designed to aid states, state agencies, private agencies, non-profit agencies, and fiscal intermediaries in making their own assessments.

# Joint Employment

- As previously explained, **third party employers of home care workers MAY NOT claim the companionship services or live-in domestic service employee exemptions.**
- A home care worker may be employed both by the consumer, family, or household and a third party. This is **joint employment.**
  - For example, a family and a private home care agency could both employ a personal care assistant.
  - In a consumer-directed program, a consumer and a state agency administering the program could both employ a home health aide.

# Joint Employment

## Implications of Joint Employment

- Joint employers must account for the following:
  - Home care workers will have to be paid overtime (*i.e.*, time and one half their regular hourly rate) for all hours worked over 40 in a workweek.
  - Entities that are joint employers will have to pay overtime generated by work for multiple consumers.
  - Entities that are joint employers will have to pay for travel time between consumers' homes.

# Joint Employment

- Under the FLSA, we use the “**economic realities**” test to determine whether a worker is in an employment relationship with a third party. This test calls for looking at a range of factors to assess the situation.
- No one factor controls the outcome of the test; the point is to use the factors to evaluate whether overall, the entity or person is an employer of the worker.

**Note:** The outcome of the “economic realities” test only determines whether employment relationship exists for FLSA purposes. It does not determine whether an employment relationship exists for purposes of tax, state, or other laws.

# Joint Employment

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



# Part III

## Shared Living

- How the FLSA applies in the context of shared living arrangements, including adult foster care and paid roommate situations

# Shared Living

- In March 2014, the Department released guidance regarding the application of the FLSA to shared living arrangements, including adult foster care and paid roommate situations.
  - Administrator’s Interpretation No. 2014-1
  - Fact Sheet #79G

The guidance is available on our home care website at:  
[http://www.dol.gov/whd/homecare/shared\\_living.htm](http://www.dol.gov/whd/homecare/shared_living.htm)

# 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.

# Shared Living

- 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).

# 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.

# Shared Living

## In a provider's home

- When is a provider instead an employee?
  - If the third party is more involved in the provider's relationship with the consumer. For example:
    - If a case manager instructs the provider on how to perform tasks.
    - If the third party finds and rents the residence in which the shared living arrangement occurs.
    - If the third party negotiates the terms of the provider's employment, such as wages and benefits.

# 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 **consumer** might be able to claim either or both of the FLSA exemptions updated by the Final Rule.
  - Companionship services exemption from minimum wage and overtime requirements (consider duties)
  - Live-in domestic service employee exemption from overtime requirements (consider whether provider meets the FLSA definition of live-in)

# Shared Living

## In a consumer's home

- The provider might also be an employee of a third party.
  - Use the FLSA “economic realities” test to determine whether a joint employment relationship exists. 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.
- A third party employer MAY NOT claim either exemption.



# Part IV: Hours Worked

- There are also longstanding FLSA principles concerning how to determine for what time a worker must be paid – we refer to these as “hours worked” rules
- These principles were not changed by the Final Rule, but are now relevant in a the home care context
- “Hours worked” issues include how to properly pay for **travel time** and **sleep time**, and how to determine hours worked for **live-in** domestic service employees
- WHD is available to provide detailed technical assistance on any of these issues

# Part V: Next Steps for States

## What we've heard from States

- What States might need to change includes:
  - Pay rate methodology (*e.g.*, daily to hourly rates)
  - Funding for overtime work
  - Increase size of workforce
  - Ability to track overtime and/or travel time
  - Managing workers' overtime hours, including developing an exceptions policy that considers ADA requirements under *Olmstead*

# Next Steps for States

## What we've heard from States

- How States might need to make these changes includes:
  - Budget allocations
  - Waiver amendments
  - Statutory amendments
  - Formalizing new programmatic policies
  - IT upgrades

# Part VI: Assistance and Resources

## **DOL's State Engagement**

- Regular communication with state associations
- Webinars on the Final Rule, shared living, and joint employment
- Individual, State-specific conference calls with all 50 States to provide technical assistance
  - So far, 100+ conference calls/meetings with individual states to provide technical assistance
- Presentations at ILSA conferences, HCBS conferences, etc.

# Assistance and Resources

## DOL's Subregulatory Guidance

- Two Administrator's Interpretations (Shared Living and Joint Employment)
  - Written in response to questions from the regulated community
  - In developing the guidance, we worked closely with stakeholders, including NASUAD, NASDDDS, and NAMD
- Nine fact sheets
- Dozens of FAQs
  - Updated based on questions from States and other stakeholders

# Assistance and Resources

## HHS Guidance

- CMS Informational Bulletin regarding billing for travel time and overtime generated by multiple consumers
  - <http://www.dol.gov/whd/homecare/hhs-doj.htm>

## HHS/DOJ Guidance

- “Dear Colleague” letter from DOJ Civil Rights Division and HHS Office for Civil Rights regarding State’s obligations under the ADA and *Olmstead*
  - <http://www.dol.gov/whd/homecare/hhs-doj.htm>

# Assistance and Resources

- We continue to stand ready to provide individualized technical assistance
- How to maximize your time on calls with DOL:
  - Review materials available on the home care website (<http://www.dol.gov/whd/homecare/>) in advance
  - Talk to your attorneys about your questions—they may have answers or be in the best position to answer your questions
  - Consider sending DOL questions or discussion topics in advance
  - Include representatives from all relevant agencies (Medicaid, health, social services, aging, etc.) and/or waivers/programs, your attorneys, state department of labor, and/or budget officers, as appropriate
  - Have one central point of contact within your state to communicate with DOL

# Additional Information

- Visit our Home Care website at [www.dol.gov/homecare](http://www.dol.gov/homecare) for:
  - Information about the Home Care Final Rule
  - Joint employment and shared living guidance
  - Fact sheets and FAQs about a variety of other topics related to home care, in the context of the FLSA
  - Email updates (go to “Subscribe to Home Care News”)
- Point of contact for states: [tatum.laura@dol.gov](mailto:tatum.laura@dol.gov)
- Call the Home Care Information Line at (202) 343-5940.