Update on the Fair Labor Standards Act And Its Impact On Shared Living

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Issues We Will Tackle Today…

- General requirements of the Fair Labor Standards Act ("FLSA").
- How the FLSA pertains to shared living arrangements.
- Staying in compliance with the FLSA.

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FLSA Basics

- The Fair Labor Standards Act ("FLSA") is administered by the Wage and Hour Division ("WHD") - Enacted in 1938.
- The Act establishes standards for minimum wages, overtime pay, recordkeeping, and child labor.
- Specifically:
  - sets statutory minimum wage;
  - requires 1½ times regular rate of pay for all hours worked over 40 in a workweek; and
  - requires employer to keep track of hours worked.

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FLSA Basics

- The Act requires employers of covered employees, who are not otherwise exempt, to pay employees a minimum wage of not less than $7.25/hour, effective July 24, 2009.
- Under 20 years of age may be paid a minimum wage of not less than $4.25/hour, during the first 90 consecutive calendar days of employment with an employer.
- Employers may not displace any employee to hire someone at the youth minimum wage.

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FLSA Basics

- The Act does not limit the number of hours in a day or number of days in a week that an employer may require an employee to work, as long as the employee is at least 16 years old.
- The Act does not limit the number of hours of overtime that may be scheduled.
- Yet, unless the employee falls within one of the numerous exemptions, overtime must be paid for work over 40 hours in a workweek.

FLSA Basics: Record-Keeping

- General requirements for non-exempt employees
  - Name
  - Home Address
  - Date of Birth, if under 19
  - Sex and Occupation
  - Time/Day of beginning of workweek
  - Regular rate
  - Hours worked each workday/workweek
  - Earnings – straight-time and overtime
  - Total wages and any deductions
  - Date of payment and period covered

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FLSA Overtime Exemptions

- What are the standard exemptions?
  - Administrative
  - Professional (Learned/Creative)
  - Executive
  - Computer Professional
  - Outside Sales
  - Highly Compensated Employees
- Actual job duties matter more than job descriptions.
- Minimum salary – $455 per week.

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Why Proper Classification Matters

- Damages
  - Two years
  - Extended to 3 years if reckless disregard
  - Liquidated damages
    - Must be assessed unless defendant can show it acted in good faith and with reasonable grounds.
  - Attorneys' fees
  - No guarantee it's over

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Why Proper Classification Matters

- Personal Liability
  - "Any person acting directly or indirectly in the interest of an employer in relation to the employee."
  - An owner, officer, director, participating shareholder, manager, or supervisor may be subject to liability where he or she was responsible in whole or in part for the alleged violation.
  - Potential criminal liability for willful violations.

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Why Proper Classification Matters

- Presumption
  - Employer bears the burden of establishing the applicability of exemptions.
- No insurance
  - Generally, EPLI coverage does not apply to FLSA claims.

FLSA Minimum Standards

- FLSA requirements are minimum standards.
  - Cannot reduce.
  - Cannot be waived.
- State/local law may exceed (must check applicable laws)…if so, the employer must follow the stricter state law.
- Collective bargaining agreements and other contracts may exceed.

FLSA Minimum Standards

- Beyond the exemptions and the federal minimum wage, numerous "living wage" requirements have emerged.
  - February 12, 2014: Executive Order requiring federal contractors to pay employees $10.10/hour minimum.
  - March 13, 2014: President proposed revisions to "modernize and streamline existing overtime regulations…."

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Employers & Employees Subject to the FLSA

- Who does the FLSA impact?
  - All of you. (Even supervisors!)
- How does the FLSA impact?
  - Violations carry a hefty civil penalty (back pay wages, liquidated damages, attorneys fees, interest).
  - DOL may assess civil penalties *per employee* for each repeated or willful violation.
  - DOL may pursue criminal penalties for willful violations ($10k and jail).

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Employers & Employees Subject to the FLSA

- Covered Employers – any person acting directly or indirectly in the interest of an employer in relation to an employee.
  - Two can be joint employers. Look out!
  - Individuals can be considered an "employer."
- Covered Employees – any person employed by an employer.
  - Suffer or permitted to work.
  - Excludes *bona fide* independent contractors
    - Apply the economic realities test (20 factors).

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Employers & Employees Subject to the FLSA

- Covered Employees – cont'd.
  - Excludes trainees and volunteers.
    - Trainees – who are they?
      - training similar to vocational-technical schools,
      - do not displace regular workers,
      - training is for trainee's primary benefit,
      - employer receives no immediate benefit,
      - trainees not entitled to job at the end, and
      - no wages paid.

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Fair Labor Standards Act (FLSA)

- 1938
- Regulations tailored for Pre-WWII problems.
- Technology and new service-specific professions have added challenges for employers.
- Brighter lines – exempt v. non-exempt
- And…pressure to limit exemptions even further!

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1938 Workplace

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Workplace Today

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Litigation

- In the ten years from 2001 to 2011, the number of FLSA collective actions filed in federal court increased by nearly 500%.
- In 2012, FLSA collective action filings in federal court increased 16%.
- In 2012, 90% of all federal and state court employment law class actions filed in the U.S. were wage and hour class or collective actions.

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Application of FLSA to Shared Living Arrangements

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Shared Living Arrangements

- How they are defined by federal law:
  - Programs that provide supports and services allowing people with disabilities and older adults to live in their own homes or in family homes, as opposed to group homes or institutions, and where the individual receiving assistance and the worker providing it share a life together.
  - These programs are referred to by various titles, such as “adult foster care,” “host home,” “paid roommate,” “supported living,” or “life sharing.”

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New DOL Rule – Effective 1/1/15

- The Department of Labor ("DOL") published a Final Rule on October 1, 2013 extending minimum wage and overtime pay protections under the FLSA to many direct care workers who provide essential home care assistance to people with disabilities and older adults.
  - Includes: home health aides, personal care assistants, and workers in similar occupations.
- The Rule takes effect on January 1, 2015.

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New DOL Rule – Effective 1/1/15

- The DOL has recently announced:
  - For six months, from January 1, 2015 to June 30, 2015, it will not bring enforcement actions against any employer who fails to comply with the FLSA obligation newly imposed by the rule.
  - During the subsequent six months, from July 1, 2015 to December 31, 2015, the DOL will exercise its discretion in determining whether to bring enforcement actions, "giving strong consideration to the extent to which states and other entities have made good faith efforts to bring their home care programs into FLSA compliance."

New DOL Rule – Effective 1/1/15

- DOL Issued Fact Sheet #79G
  - Outlines the application of the FLSA to Shared Living programs, including adult foster care and paid roommate situations.
  - Fact Sheet can be found at:

http://www.dol.gov/whd/regs/compliance/whdfs79g.htm

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New DOL Rule – Effective 1/1/15

- Along with the Fact Sheet, DOL published Administrator's Interpretation ("AI") 2014-1
  - It discusses how longstanding FLSA principles apply to shared living programs.
  - It provides guidance on how the FLSA's requirements may apply to home care work that occurs in shared living arrangements.
    - Be careful! You must still do a fact-specific analysis of the particular shared living program.

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Shared Living Arrangements

- The DOL groups “shared living” arrangements into three categories:
  - Consumer lives in a provider’s home;
  - Provider lives in the consumer’s home; and,
  - Provider and consumer live in a new home.
- The common characteristic of shared living is that a consumer and a person providing paid services are living and sharing a life together in a private home.

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Shared Living Arrangements

- We will discuss the application of FLSA principles to each shared living arrangement.
- It is the particular facts of the arrangement between a provider, consumer, and – if relevant – third party that determine whether and how the FLSA applies.
- It is not the name or characterization of the program that determines whether and how the FLSA applies.

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What is Not Shared Living

- The DOL has concluded that the following is NOT shared living:
  - Group homes
  - Arrangements involving workers coming into a home for shifts to provide care.
  - Personal arrangements where an employment relationship clearly does not exist. For example:
    - one who provides care for a spouse or child with a disability without the expectation of compensation;
    - one who shares an apartment with an individual with disabilities based on friendship or mutual convenience without providing any formal services to the individual and without any expectation of compensation; or,
    - substitute/respite workers, hired to provide assistance when the provider is unavailable or otherwise needs relief from his or her responsibilities.

When does the FLSA apply?

- A provider is entitled to receive at least the federal minimum wage and overtime pay in any workweek in which the FLSA applies.
- The FLSA applies if three factors are present:
  - there is an *employment relationship* (*i.e.*, employee and not an independent contractor);
  - the employer is a *covered employer* (the employer is of the type or size which is covered by the FLSA definitions); and
  - the employee is *not exempt* (an employer may not claim any exemptions from the Act's requirements for that employee).
- If all three factors are present, the employee must be paid for all "hours worked."

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Shared Living Arrangements - Pay

- In shared living arrangements, a provider may receive compensation in the form of hourly wages, a daily or monthly stipend, a weekly or monthly salary, or some combination of these payments…. provided that, when converted to an hourly rate each workweek, it satisfies minimum wage and overtime pay requirements.

Shared Living Arrangements - Pay

- Under the FLSA, there are special rules for determining hours worked for live-in employees (including most shared living providers).
- If certain conditions are met, the fair value of board, lodging, and other facilities counts towards the minimum wage requirement.

Types of Shared Living Arrangements

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In the Provider's Home

- Provider allows a consumer to move into his/her existing home in order to integrate the individual into the shared experiences of a home and family.
  - Common in many state Medicaid systems.
  - Also referred to as "adult foster care" or "host home."
- Key question: Is the provider an employee of the consumer and/or a third party who finances the cost of providing care to the consumer or an independent contractor?

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In the Provider's Home: Independent Contractor?

- Employee versus independent contractor requires application of the "economic realities" test – *i.e.*, factors relevant to whether a provider is economically dependent on the consumer or the third party.
- An independent contractor is engaged in a business of his/her own.
- A worker who, as a matter of economic reality, follows the usual path of an employee and is dependent on the employer is not an independent contractor.
- Factors commonly considered can be found in DOL Fact Sheet 13: Employment Relationship Under the FLSA and in DOL Fact Sheet 79E: Joint Employment in Domestic Service Employment Under the FLSA.
- The FLSA does not require payment of minimum wage and overtime compensation to providers who are properly categorized as independent contractors.

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In the Provider's Home: Independent Contractor?

- Multi-factor test
- Third Circuit - Economic Realities test:
  - Degree of control
  - Opportunity for profit or loss
  - Investment in equipment and employment of workers
  - Special skill
  - Permanence of working relationship
  - Integral economic relationship
- Contractor agreement important, but not dispositive
- Benefits
- 1099 v. W-2
- If it looks like a duck, it probably is.

In the Provider's Home: The Case for Independent Contractor

- Many shared living arrangements in a provider's home involve independent contractors.
- Two key factors to show IC arrangement:
  - degree of control the potential employer exercises over the worker (*e.g.*, provider will typically determine much of the way daily life proceeds within the home; integration into provider's schedule).
  - extent of the investments of the worker and potential employer (*e.g.*, provider has obtained and maintains the home in which the services are provided and may have made modifications to the home to become the consumer's provider; consumer has not made any such investment).

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In the Provider's Home: The Case for Independent Contractor

- A third party will likely not be an employer of the provider if the third party's involvement is limited to:
  - recruiting providers into the program,
  - facilitating the match of consumers and providers,
  - overseeing quality management and compliance with licensing and other program requirements once the arrangement is established, and
  - setting the amount the adult foster care provider will be paid.

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In the Provider's Home: The Case for Independent Contractor

- Third party will lose an argument that a provider is an independent contractor if the third party controls:
  - whether a provider will choose to participate in the program,
  - whether a provider will bring a particular consumer into his or her home, and/or, most importantly,
  - how the day-to-day activities of the home and provision of services to the consumer will occur.
- When the third party has more involvement in the workplace, there will often be an employment relationship between the third party and the provider.

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In the Provider's Home: An Employment Relationship

- This analysis is fact specific.
- Be careful – DOL can still find that a provider is an employee, even if the consumer lives in the provider's home or the program is called adult foster care.
- Such finding of employment could occur when a third party (perhaps through a case manager) is so involved in the provider's relationship with the consumer that the third party's role becomes one of direction and management of the workplace.
- In this case, the provider will be an employee of that third party rather than an independent contractor.

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In the Provider's Home: An Employment Relationship

- Examples provided by DOL for finding an employment relationship:
  - "[T]he provider will likely be an employee of a third party that finds and rents a residence in which the arrangement can occur, or whose case manager makes frequent visits or phone calls to the home specifically to instruct the provider about particular tasks to perform or ways to fulfill or not fulfill duties."
  - "[I]f adult foster care providers are part of a collective bargaining agreement with a third party, such as a state, that entity may be a third party employer if the terms of the agreement reflect sufficient involvement by the third party with the providers' conditions of employment, such as wages and benefits."

(*See* Fact Sheet #79G)

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In the Provider's Home: An Employment Relationship

- Once an employment relationship is found to exist between provider and third party – for services in a provider's home – the third party employer must still analyze two things: FLSA exemptions and FLSA coverage.
- As for exemptions: Third party employers may no longer claim the companionship services exemption from minimum wage and overtime or the live-in domestic service employee exemption from overtime pay. (*See* DOL October 2013 Final Rule.)

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In the Provider's Home: An Employment Relationship

- As for coverage:
  - State or state agencies that employ a home care provider are, by definition, covered by the FLSA.
  - Private agencies *may be* covered if its annual gross volume of business is at least $500,000.
  - An individual provider employed by a private agency that fails to meet the $500,000 threshold would still be individually covered if he/she regularly travels between states during the course of the job.
- Under any of these conditions in which coverage is met, the provider is entitled to receive at least the federal minimum wage and overtime pay from the third party.

(*See* DOL Administrator's Interpretation 2014-1 for further details.)

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In the Consumer's Home

- Provider moves into a consumer's home to perform services such as providing fellowship and protection, helping integrate the consumer into the community, or merely being present during nights in case of an emergency.
- Provider often lives rent-free in the consumer's home and might or might not receive additional payment.
- Sometimes called "roommate arrangements."
- Often funded by Medicaid but may also be funded by another public program or privately.

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In the Consumer's Home: An Employment Relationship

- Threshold issue: Whether the consumer is the sole employer (and if so, whether an exemption applies) or whether there also is a third party that is a joint employer.
- Determining whether or not an employment relationship exists requires assessing the economic realities of the relationships between the provider and the consumer as well as the provider and any third party.

In the Consumer's Home: An Employment Relationship

- Provider will typically be the employee of the consumer when he/she moves into a consumer's home to provide services.
- Why provider is likely not an independent contractor:
  - The consumer is likely to set the provider's schedule.
  - The consumer is likely to direct the provider how and when to perform certain tasks.
  - The consumer is likely to otherwise control the provider's work.
  - The provider is unlikely to have invested in the arrangement (*e.g.*, the home) and, thus, the consumer has overall control of the premises where the work is being performed.

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In the Consumer's Home: An Employment Relationship

- Once an employment relationship is found to exist – for services in a consumer's home – the consumer must still analyze two things: FLSA exemptions and FLSA coverage.
- As for coverage: Shared living arrangements in which the provider moves into the consumer's home almost certainly involve "domestic service employment," a category of employment that is broadly covered under the Act.
  - Therefore, the consumer will essentially always be a covered employer.

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In the Consumer's Home: An Employment Relationship

- As for exemptions: Depending on the arrangement, to avoid paying minimum wage and/or overtime, a consumer employing a provider may be able to apply the…
  - Companionship Services Exemption, or
  - Live-In Domestic Services Exemption.

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In the Consumer's Home: An Employment Relationship

- **Companionship Services Exemption** (*See* Fact Sheet #79A):
  - Consumer is exempted from paying minimum wage and overtime pay to direct care workers who provide "fellowship" and "protection" to consumers.
  - If the provider performs medically related tasks or spends more than 20 percent of work time providing "care" (defined as assisting with activities of daily living ("ADLs") and instrumental activities of daily living ("IADLs")), the consumer may not claim the companionship services exemption.
  - While you must still analyze this exemption on the facts of each specific arrangement, it is likely that a consumer will be able to apply the companionship exemption when the provider's only responsibility is to spend nights at the consumer's residence in case of an emergency.

In the Consumer's Home: An Employment Relationship

- **Live-in Domestic Service Overtime Exemption**:
  - Consumer may claim the live-in domestic service exemption from overtime – even if the companionship services exemption may not be claimed – as long as the provider lives in the consumer's residence permanently or for extended periods of time (as opposed to, for instance, working an overnight shift)
  - For details on what constitutes a "live-in" domestic service worker and other conditions of the exemption, *see* Fact Sheet #79B: Live-In Domestic Service Workers Under the FLSA.
  - In these circumstances, the consumer is exempt only from paying the FLSA overtime premium and must still pay at least the federal minimum wage for all hours worked (unless the companionship services exemption described in the previous paragraph applies).

In the Consumer's Home: An Employment Relationship

- When it is determined that the consumer employs the provider, the consumer is a covered employer – and no FLSA exemptions can be claimed – the consumer must follow the requirements of the FLSA, including using the value of rent or board to offset wage obligations and creating agreements with providers to exclude certain sleep time and other personal breaks from hours worked.

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In the Consumer's Home: A Joint Employment Relationship

- A third party (such as the state, a shared living agency, or another third party acting on the state's behalf) could be a joint employer along with a consumer in shared living arrangements in a consumer's home.
- Determining whether a third party is an employer under these programs requires consideration of the economic realities test.

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In the Consumer's Home: A Joint Employment Relationship

- When is a third party considered the employer?
  - You must first determine the extent of the control the third party exercises in the arrangement.
  - The more involved a third party becomes in directing the manner in which the provider performs the work (such as determining the tasks the provider performs or the manner in which he or she performs them), the more likely it is that the third party is an employer and therefore subject to the FLSA.
  - Example of control: 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.
  - Example that does NOT show control: Provider whose responsibility as a roommate is to sleep at the home must notify a third party that she will need to be away from the residence overnight but the third party cannot refuse to grant her request or sanction her for taking the evening off.

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In the Consumer's Home: A Joint Employment Relationship

- If a third party collectively bargains with providers or is otherwise involved in determining providers' conditions of employment—such as, but not limited to, wage rates, vacation or sick time, health insurance, or other benefits—the third party will likely be a joint employer of the provider.

In the Consumer's Home: A Joint Employment Relationship

- A third party employer in this type of shared living arrangement is required to pay its providers at least the federal minimum wage and overtime pay if it is an FLSA-covered employer.
  - A third party will almost always be an FLSA-covered employer.
  - A third party may not claim any FLSA exemption in these circumstances because the companionship services and live-in domestic service exemption are only available to consumers or their families or households.

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Shared Living in a New Home

- A wide range of shared living arrangements exist when dealing with a new home created by consumer and provider.
- This is the most confusing of analyses when trying to determine IC relationship or employment.
- The DOL requires an analysis to determine whether the final arrangement is more similar to shared living in a provider's home or shared living in a consumer's home.
  - This determination depends on all of the circumstances that go into who controls the residence and relationship.
  - For example: who identified the residence, arranged to buy or lease it, furnished common areas, maintain it by cleaning and making repairs, and pays the mortgage or rent.
  - No single fact alone is controlling.

Shared Living in a New Home

- The DOL has advised that, if the provider has primary control over the residence and relationship, the consumer likely does not employ the provider; then, you must analyze whether a third party is an employer of the provider.
- The example provided by the DOL:
  - "If, in order to become an adult foster care provider, an individual moves from a one-bedroom to a two-bedroom apartment, furnishing the apartment except for the second bedroom and arranging for certain upgrades so that it meets program requirements, and then a consumer moves in and his name is added to the lease, the provider is likely not an employee of the consumer." (*See* Fact Sheet #79G)

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Shared Living in a New Home

- The DOL, however, has also cautioned that where the consumer controls a newly established home or where control over the home is shared, it is likely that the consumer employs the provider.
- Moreover, you should determine whether any third party could also be seen as an employer.
- The example provided by the DOL:
  - "if a provider and consumer are matched as roommates through a Medicaid-funded program and then jointly identify and rent an apartment they like, furnish the apartment, and take on responsibility for keeping the apartment clean and purchasing food, assuming the consumer exercises control over the residence, the provider is likely employed by the consumer."

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Applying FLSA to Determine Hour Worked and Compensation

- Once it is determined that the FLSA applies to the shared living arrangement, certain FLSA principles may be relevant. These include:
  - Reasonable agreements.
  - Sleep Time.
  - Rent and Utilities.

Applying FLSA to Determine Hour Worked and Compensation

- Reasonable Agreements:
  - The employer and provider may come to a “reasonable agreement” to exclude from paid hours worked the amount of time the provider spends engaging in typical private pursuits, such as eating, sleeping, entertaining, and other periods of complete freedom from all duties.
    - Any calls to duty during these otherwise unpaid periods must be paid.
    - Sleep time of no more than eight hours may be excluded if the provider can generally enjoy uninterrupted sleep.
    - To exclude off-duty breaks (other than meal and sleep time) they must be long enough to enable the provider to make effective use of his/her own time.

Applying FLSA to Determine Hour Worked and Compensation

- Reasonable Agreements:
  - Clearly and specifically identify the tasks the provider is required to perform.
  - Agreements should accurately reflect the work that is required to be performed and cannot be used to improperly limit the number of hours that are paid.
  - The actual amount of time a provider spends performing work tasks must be compensated (despite what the agreement anticipates).
  - Some unpaid services, often called “natural supports” in the context of Medicaid programs, may be outside the scope of the reasonable agreement.
  - If the reasonable agreement does not treat the provider unequally because he/she is a family or household member, such differentiation between the employment relationship and familial relationship is permitted.

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Applying FLSA to Determine Hour Worked and Compensation

- Sleep time.
  - If the provider lives on the consumer's premises permanently, under certain circumstances, sleep time may be excluded from payment (even when provider is required to remain on the premises overnight).
  - This exclusion is only permissible when the time is during normal sleeping hours – *i.e.*, overnight and not the daytime.
  - No more than eight hours per night of sleep time may be excluded.
  - Interruption to sleep time by a call to duty must be paid regardless of an agreement to exclude the time.
  - In order to deduct sleep time, the provider must typically be paid for some hours during non-sleep time (early morning, late evening).

Applying FLSA to Determine Hour Worked and Compensation

- Sleep time.
  - There is no set or specific number of hours that must be compensated in order to permit the exclusion of sleep time in arrangements where the provider is required to spend overnight hours on the premises.
  - However, the circumstances must be such that the agreement regarding work and non-work time is reasonable.
  - DOL example: “If a provider and her employer agree to exclude eight hours of sleep time per night and the provider is paid an hourly rate for services she performs between the hours of 8:00pm and 10:00pm each evening and 6:00am and 8:00am each morning, that agreement would typically be reasonable.”
  - DOL example: “If a provider’s sole responsibility is to be at the residence for eight hours each night, an agreement to exclude all time the provider is required to be on the premises will not be reasonable….”

Applying FLSA to Determine Hour Worked and Compensation

- Rent and utilities.
  - Some arrangements pay the provider partially or fully by being able to live rent-free in the consumer's home.
  - Section 3(m) of the FLSA allows an employer to credit the fair value of the board, lodging, and other facilities towards the minimum wage requirement provided certain conditions are met.
  - *See* DOL Administrator's Interpretation 2014-1 for a complete list of requirements for claiming this credit.
  - The employer must still meet its wage obligation.
    - DOL example: Provider receives cash wages of $180 in a workweek for 30 hours of work, plus free rent and utilities valued at $100 per week. $280 full compensation divided by 30 hours = $9.33 per hour and is compliant with the federal minimum wage requirement.

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Tips For Avoiding Wage & Hour Litigation

- Understand federal and state wage and hour law.
- Know if there is a “living wage” requirement.
- Audit classifications regularly.
- Audit payroll practices regularly.
- Audit recordkeeping practices regularly.
- Train supervisors on these issues.

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Final Questions?

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