Home Care Final Rule

FMS Conference Presentation

November 9, 2015

U.S. Department of Labor

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
- Litigation Delay of DOL Enforcement: January 1, 2015 – October 13, 2015 (date of mandate issuance)
- Non-enforcement: October 13, 2015 – November 11, 2015
- Prosecutorial Discretion: Nov. 12, 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.

Introduction

Topics for today:

I. **Home Care Final Rule:** Changes to the domestic service employment regulations under the FLSA

II. **Joint Employment:** Overview of joint employment as it pertains to home care workers

III. **Shared Living:** Brief introduction to guidance on applying the FLSA to shared living arrangements

IV. **Hours Worked:** FAQs

V. **Resources:** An overview of our website

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. Since 1974, most domestic service employees have been entitled to minimum wage and overtime protections.
- "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.

Home Care Final Rule

- 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.

Home Care Final Rule

Third party regulation

The updated regulations change who may claim the exemptions:

- Under the Final Rule, third party employers **MAY NOT** claim the companionship services exemption regardless of the employee's duties.
- Under the Final Rule, 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.

Home Care Final Rule

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 Final 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.**

Home Care Final Rule

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*

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.

- **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

- CMS has issued guidance regarding states' options for Medicaid reimbursement for these overtime and travel time costs.
- This guidance is available at http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf.

How the Guidance is Organized

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

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.

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

Economic Realities Test

- The economic realities test should be applied to all situations to assess whether there is joint employment.
  - This is true regardless of the name used by the third party (*e.g.*, fiscal/employer agent, Agency with Choice, fiscal intermediary, registry, or employer of record)
  - or the title of the worker (*e.g.*, personal care attendant, registry worker, independent provider, or independent contractor).
- The same analysis will be used for
  - all consumer-directed programs and
  - all entities (including state entities, managed care organizations, fiscal intermediaries, agencies and non-profit organizations).

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.

Strong, Moderate, and Weak Indicators

We also examined “Setting Wages or Rates” and explained that:

- If a public entity administering a consumer-directed program sets the wage rate or reimbursement rate for home care workers, that is a **strong indicator** of employer status.
- In contrast, the setting of a true “cap” or wage range would be a **weak indicator** of employer status.

Strong, Moderate, and Weak Indicators

In the guidance, we also analyze factors such as:

- Ability to Fire
- Hours and Scheduling
- Supervises or Controls the Work
- Performs Payroll or other Administrative Functions

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

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. The guidance is available on our home care website at: http://www.dol.gov/whd/homecare/shared_living.htm

- **Administrator's Interpretation No. 2014-1**
- **Fact Sheet #79G**

Part IV: Hours Worked

- There are longstanding FLSA principles concerning how to determine for what time an employee 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.
- FAQs on our website address many questions about “hours worked” issues.

Hours Worked

- Under the FLSA, an employee must be paid for all "hours worked."
- "Hours worked" includes all time spent performing tasks for the employer or waiting to perform such tasks.
  - Examples: dressing a consumer, waiting at a doctor's office to drive a consumer home from an appointment.
  - Hours worked includes time spent working outside of scheduled/assigned hours if the employer knows or has reason to know that the work was occurring.

Hours Worked

Travel Time

- Travel from home to work or from work to home (*i.e.*, commuting time at the beginning and end of a work day) is NOT hours worked.
- Time spent traveling between different sites of work for the same employer is hours worked.
  - For example, driving for 30 minutes between the private homes of two consumers where a county or other public entity is the employee's joint employer.
- Travel between jobs for different employers is NOT hours worked.

Hours Worked

Sleep Time

- If an employee is on duty for a shift that is less than 24 hours, the employee must be paid even for time she is sleeping.
- If an employee is on duty for 24 hours or more, the employer and employee can exclude from hours worked up to 8 hours spent sleeping if:
  - The employer furnishes adequate sleeping facilities, and
  - The employee can usually enjoy uninterrupted sleep.

Hours Worked

FAQ #39: Under my state law, all sleep time during which a home care worker is required to be in the home must be paid at the state minimum wage or higher. In other words, under state law, all sleeping hours must be included as worked, paid time. But under the federal FLSA, this sleep time can under many circumstances be excluded from hours worked. Must those hours, because they are paid pursuant to state law, be included in a calculation of overtime due pursuant to the FLSA?

- A. No. Payment for time not otherwise required to be compensated under the FLSA does not necessarily convert that time into FLSA hours worked—i.e., time that must be paid according to FLSA requirements. The Department's regulations provide that whether the time that is not required to be compensated becomes hours worked depends on the intent of the parties. If the employer and employee have an agreement to exclude sleep time from FLSA hours worked, even if the time is paid under state law, that agreement, if reasonable, controls.
- This FAQ and others are available on our home care website at: http://www.dol.gov/whd/homecare/faq.htm

Common Questions about Overtime Calculation

FAQ #48: How is overtime calculated when a home care provider is paid different hourly rates for different types of work?

- A. Under the FLSA, an employer may pay the same employee different rates for different types of work as long as the employee's regular rate of pay is at least the minimum wage. As in all circumstances, an employer may not manipulate rates or payment methods for the purpose of avoiding its obligation to pay overtime compensation.
- If an employee receives different rates of pay for work in a single workweek, the employee's "regular rate" for that week is the weighted average of such rates (or "blended rate"). That is, each workweek, the earnings from all hourly rates are added together and the sum is then divided by the total number of hours worked at all jobs for the same employer, and the overtime pay due is one-half of that result times the number of hours worked over 40.

Common Questions about Overtime Calculation

<u>FAQ #48 (continued)</u>: How is overtime calculated when a home care provider is paid different hourly rates for different types of work?

For example, assume an employee of a home care agency is paid $10.00 per hour for time spent providing care and $8.00 per hour for travel time. In a particular workweek, the employee worked 45 hours providing care and 5 hours traveling. The calculations for computing the overtime compensation due in this workweek are as follows:

($10.00 × 45 hours) + ($8.00 × 5 hours) = $490.00 of straight time pay

$490.00 ÷ 50 total hours = $9.80 is the weighted average (regular rate)

50 total hours – 40 hours = 10 overtime hours worked

$9.80 × .5 × 10 overtime hours = $49.00 in overtime compensation

$490.00 + $49.00 = $539.00 is the total amount due

Common Questions about Overtime Calculation

<u>FAQ #48 (continued)</u>: How is overtime calculated when a home care provider is paid different hourly rates for different types of work?

Alternatively, an employer may calculate the overtime obligation based on the rate for the particular task(s) performed during the hours over 40 in the workweek (i.e., the "rate in effect" or "applicable rate"), but only if there is an agreement or understanding with the employee (made in advance), the hourly rate(s) upon which the overtime is computed are at least the Federal minimum wage, and the hourly rate(s) are actually paid for such work when performed during non-overtime hours.

Common Questions about Overtime Calculation

<u>FAQ #48 (continued)</u>: How is overtime calculated when a home care provider is paid different hourly rates for different types of work?

Using the previous scenario, assume the employee's 10 hours of overtime consisted of 7 hours of providing care and 3 hours of travel.

The calculations for paying overtime based on the "rate in effect" are as follows:

($10.00 × 45 hours) + ($8.00 × 5 hours) = $490.00 of straight time pay

$10.00 × .5 × 7 hours = $35.00 in overtime compensation for hours of care services over 40 total hours in the workweek

$8.00 × .5 × 3 hours = $12.00 in overtime compensation for hours of travel time over 40 total hours in the workweek

$35.00 + $12.00 = $47.00 total overtime compensation due

$490.00 + $47.00 = $537.00 is the total amount due

Part V: Resources

Visit our website at www.dol.gov/homecare for:

- Information about the Home Care Final Rule
- Administrator's Interpretations on joint employment and shared living
- Fact sheets and FAQs
- Relevant guidance from HHS and DOJ
- Litigation updates
- Recordings of informational public webinars
- Email updates (go to "Subscribe to Home Care News")