



NATIONAL RESOURCE CENTER *for*
PARTICIPANT-DIRECTED SERVICES

Fair Labor Standards Act Home Care Rule Q&A

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Ask Us Anything!

- ❑ We'll do our best to answer!
- ❑ Share your concerns.

Joint Employment

- ❑ Not new law, but an interpretation of existing law on joint employment
- ❑ Joint employment under DoL rules determined by the “economic realities” test
- ❑ Test comes from court cases and different courts may use somewhat different factors or descriptions of the test
- ❑ A court can always look at any relevant factors, even if not listed in the test



Workers eligible to receive difficulty of care payments under IRS Notice 2014-7 are not necessarily exempt from overtime under the live-in exemption.

- Could be a joint third party employer

Workers exempt from overtime under the live-in exemption are not necessarily eligible to receive difficulty of care payments under IRS Notice 2014-7.

- Worker could have another home where they live part-time

Questions & Concerns?



Joint Employment Continued

- ❑ Under the Economic Realities Test, an entity is likely to be a joint employer if the entity has control over the worker's "economic reality"
 - ❑ That is, does the entity affect the earnings of the worker or the ability for the worker to get hired or stay working?
- ❑ A joint employer who is not the participant or representative is likely to be a third party employer.
- ❑ Hours worked by a single worker for a third party employer (even across participants) must be aggregated and counted toward OT
- ❑ Travel time between participants must be paid by a third party employer

Indicators of Joint Employer Status

- ❑ Not to be used like a quiz or checklist
 - ❑ No formula to determine joint employment
 - ❑ Result not based on which category the majority of factors fall into
- ❑ The ultimate question is economic dependence
 - ❑ Is the worker economically dependent on a supposed employer?
- ❑ Factors to be used as a list of things to think about while trying to answer the ultimate question of economic dependence
- ❑ The name used by the third party **does not determine** the outcome of the analysis

Indicators of Joint Employer Status

- ❑ Joint employer status not directly based on the number of factors in each category
 - ❑ Can a single “strong” factor make an entity into a joint employer?
 - “Setting a wage rate is so fundamental to the ultimate question of economic dependence that any entity that sets a wage rate will likely be considered an employer”
- ❑ Other factors that are not listed may nevertheless be relevant to determine economic dependence

Factor 1: Power to Hire and Fire

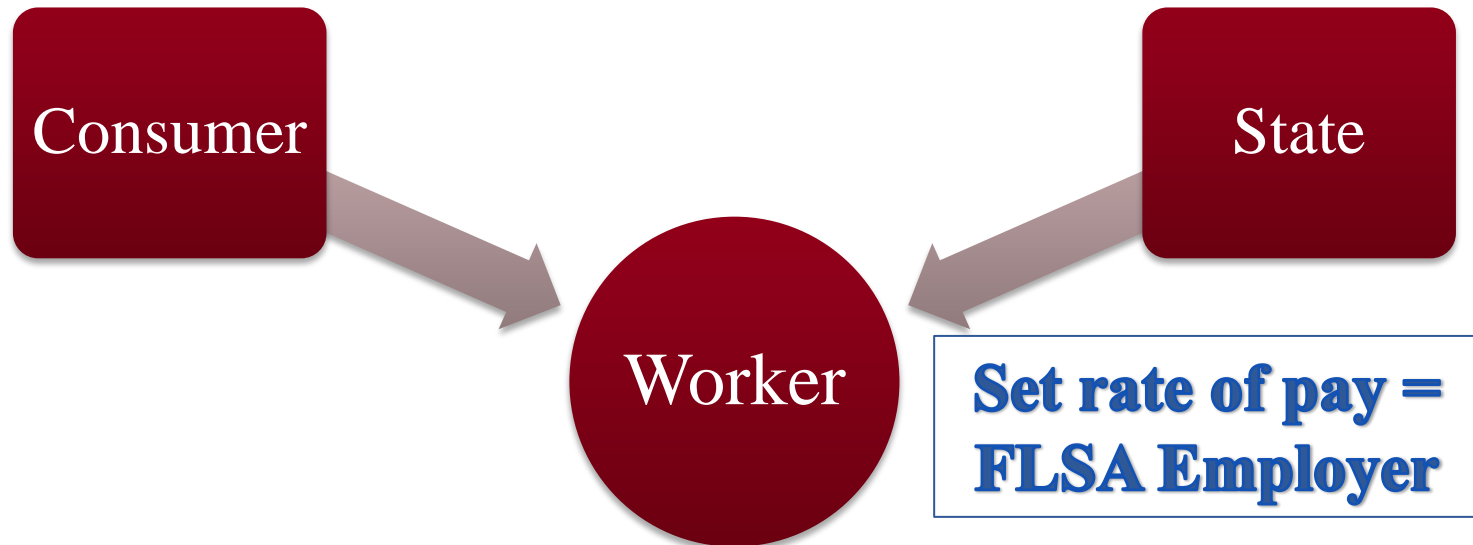
Strong Indicator	Moderate Indicator	Weak Indicator
Requiring extensive provider qualifications, such as comprehensive training		Setting basic qualifications for workers to ensure consumer safety
Entity co-interviews worker or must approve the consumer's selection of worker	Entity runs a registry; consumers must only hire workers listed on the registry	A consumer may hire any worker who meets basic qualifications
Entity can fire worker for any reason		Entity may fire workers only as required by federal Medicaid requirements (e.g., fraud/abuse)

Factor 2: Control over Wage or Benefits

Strong Indicator	Weak Indicator
Entity sets the rate of pay, or sets reimbursement rate that prevents consumer from adjusting worker's rate of pay	Entity sets reimbursement rate that includes costs other than wages and does not directly correlate with worker wages
Entity sets a narrow wage range that does not provide consumer with meaningful discretion	Entity sets a wage cap, wage floor, or wage range that provides consumer with: <ul style="list-style-type: none">• Meaningful discretion to determine the wage rate• Choice in how to spend the unused funds that are available as a result of lowering the wage rate

If you set it, forget it

- ❑ If an entity sets the rate of pay to an employee, the entity could potentially “forget” the other factors in the economic realities test: the entity has a very strong likelihood of being an employer



Factor 3: Control over Hours and Scheduling

Strong Indicator	Moderate Indicator	Weak Indicator
Entity sets the worker's schedule	Entity sets number of hours for which consumer may receive services, but consumer controls scheduling	Consumer retains complete control (within budget) over scheduling and setting the number of work hours

Factor 4: Supervises, Directs, or Controls the Work

Strong Indicator	Moderate Indicator	Weak Indicator
<p>Entity identifies both allowed tasks and the time allocated for the tasks</p> <p>Worker must inform consumer AND entity when late or absent</p> <p>Entity intervenes in issues between consumers and workers</p> <p>Entity provides grievance procedure for workers</p> <p>Entity requires ongoing public-sponsored training</p>	<p>Entity identifies in plan of care the specific tasks that worker can perform, and engages in quality management activities to evaluate worker performance</p>	<p>Entity only performs minimal supervision, focusing on the wellbeing of the consumer and not on worker performance</p> <p>Consumer controls the tasks performed by the worker, plus their timing and the way they are done</p>

Factor 5: Performs Payroll or Administrative Functions

Weak Indicator

Functions that are normally performed by payroll entities, such as maintaining records, issuing payments, processing tax withholdings, and ensuring that workers' compensation insurance is maintained

Factor 6: Other Factors

- ❑ Other factors that could affect the determination of joint employment include whether the third party provides equipment for the worker to use or provides mandatory training
- ❑ Courts can take other factors into account when determining joint employment, even if those factors are not listed in DOL guidance or the economic realities test
- ❑ This is a **qualitative** assessment
 - ❑ Determinations are handled on a case-by-case basis

Joint Employment in Existing Program Models

- ❑ **Cash and Counseling/individual budget authority programs**
 - ❑ Consumer is only employer under FLSA
 - ❑ No joint employment
- ❑ **Programs in which state sets the rate of pay**
 - ❑ State jointly employs workers with consumers
- ❑ **Agency With Choice programs**
 - ❑ Agency likely jointly employs workers with consumers
 - ❑ Possibly other FLSA employers depending on factors

Types of Payments

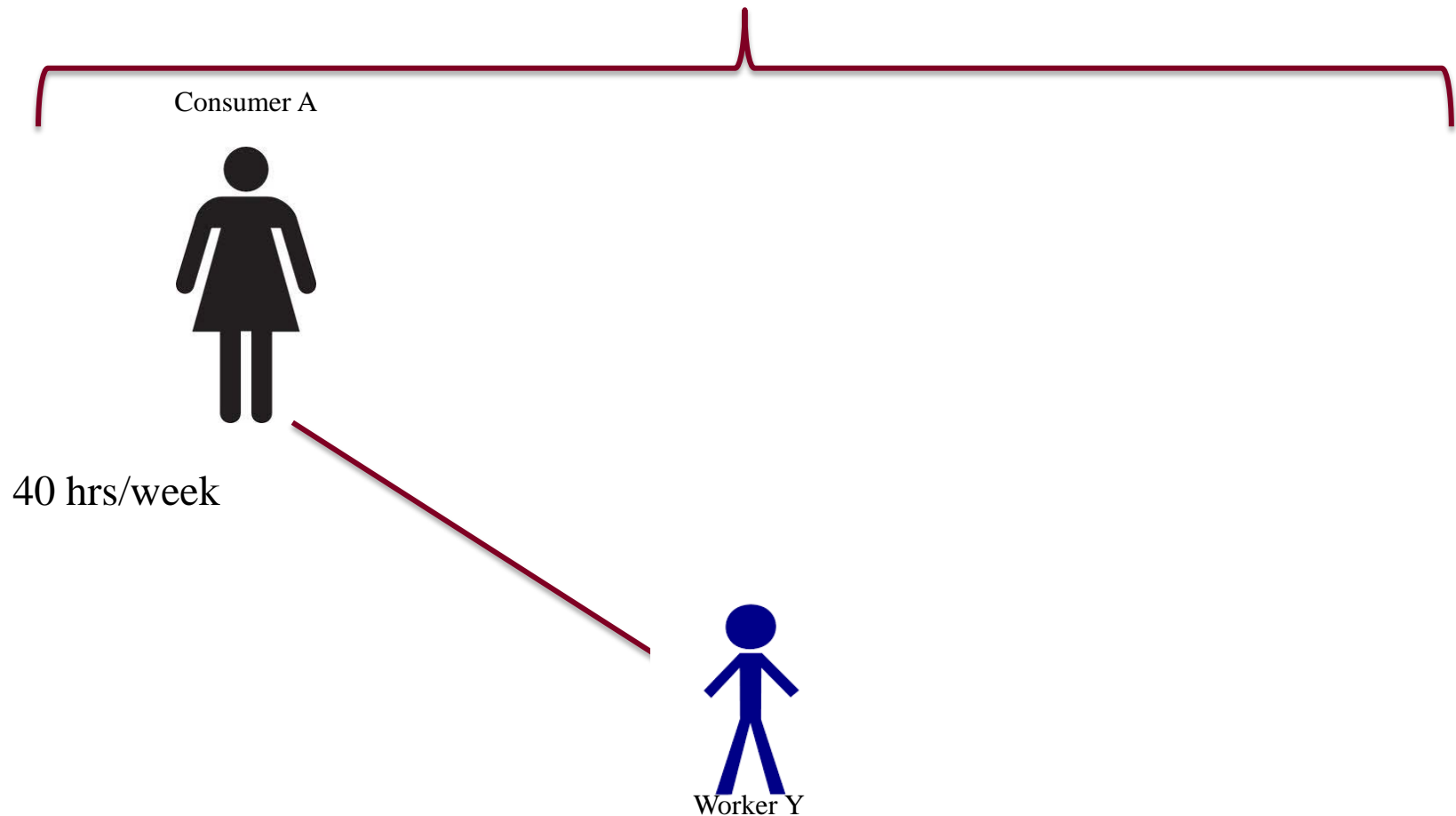
- ❑ **Consumer-attributable straight time:** Any hours worked by a worker for a consumer are paid at at least straight time that is attributable to a consumer.
- ❑ **Consumer-attributable overtime:** The overtime premium (half rate of the effective base rate) when a worker works for *a single consumer-employer* more than 40 hours in a work week.
- ❑ **Third party attributable overtime:** The overtime premium (half rate of the effective base rate) when a worker works for more than 40 hours in a work week while jointly employed and the hours over 40 are not a result of working more than 40 hours for a single consumer.

Types of Payments *cont.*

- ❑ **Travel Time:** Time that must be compensated when a worker is third party jointly employed and works at multiple work sites (e.g. consumer homes) in a single work day.

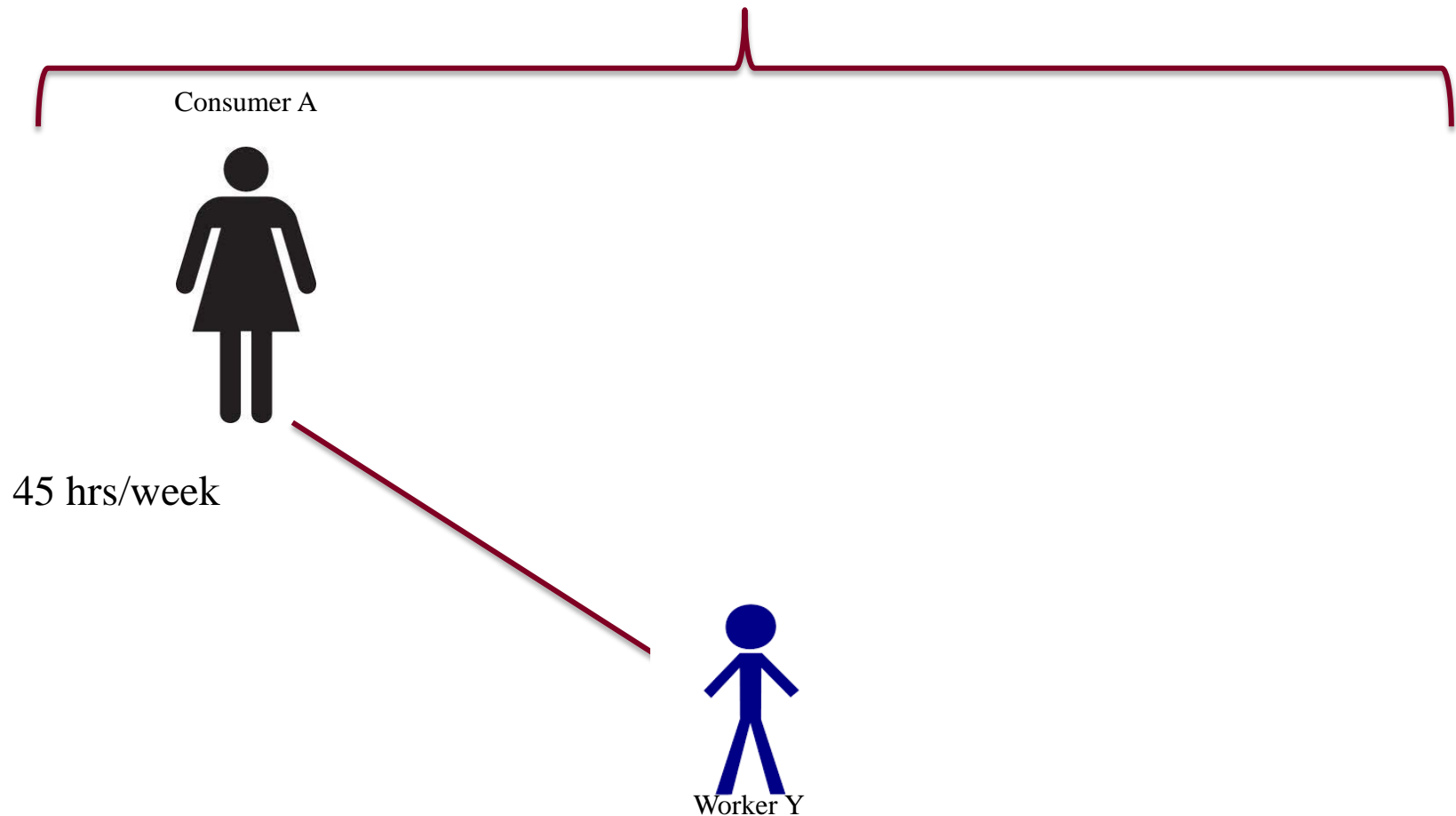
Consumer-Attributable Straight Time

Third Party Joint Employer (e.g. a state)



Consumer-Attributable Overtime

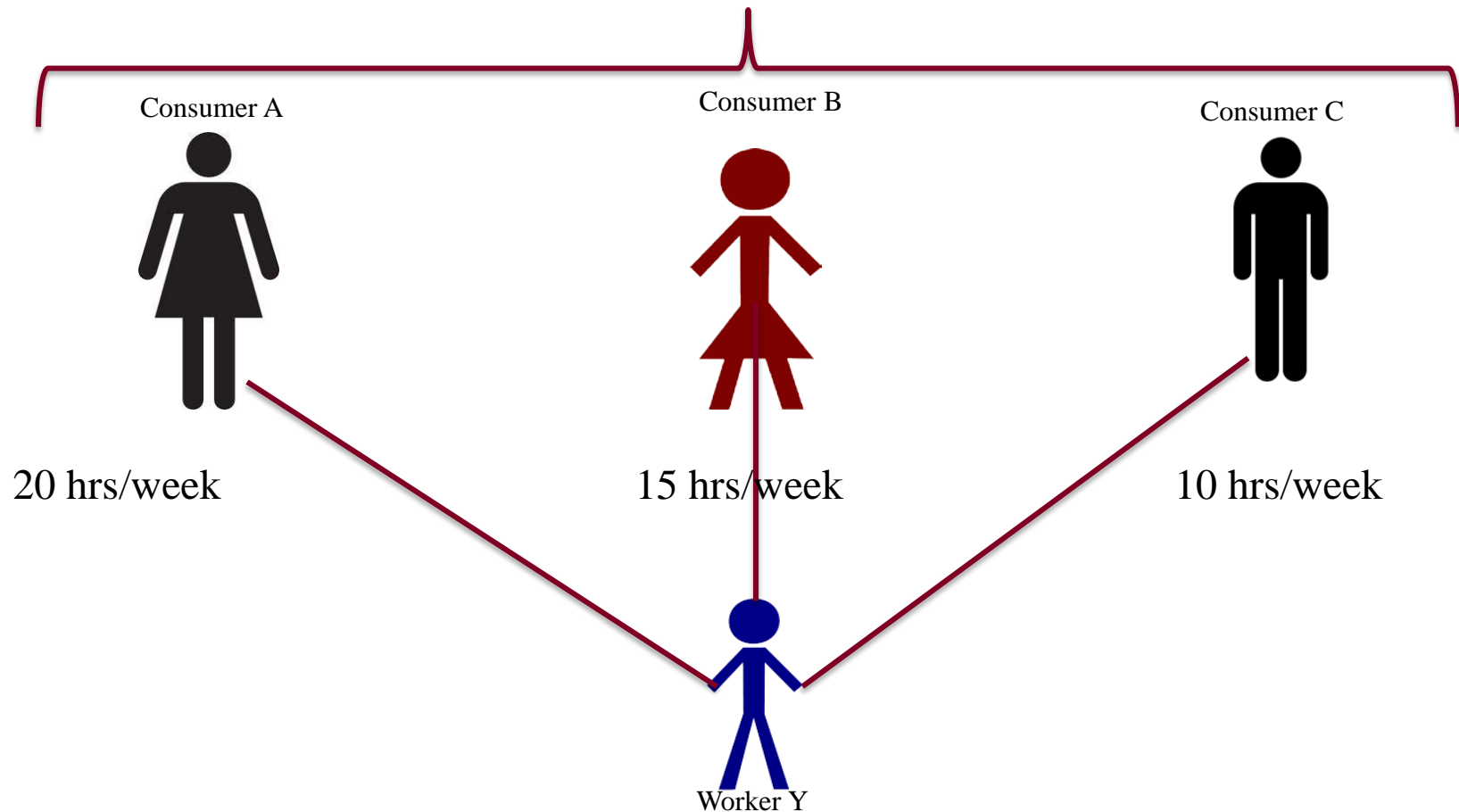
Third Party Joint Employer (e.g. a state)



Third Party Attributable Overtime

Third Party Joint Employer (e.g. a state)

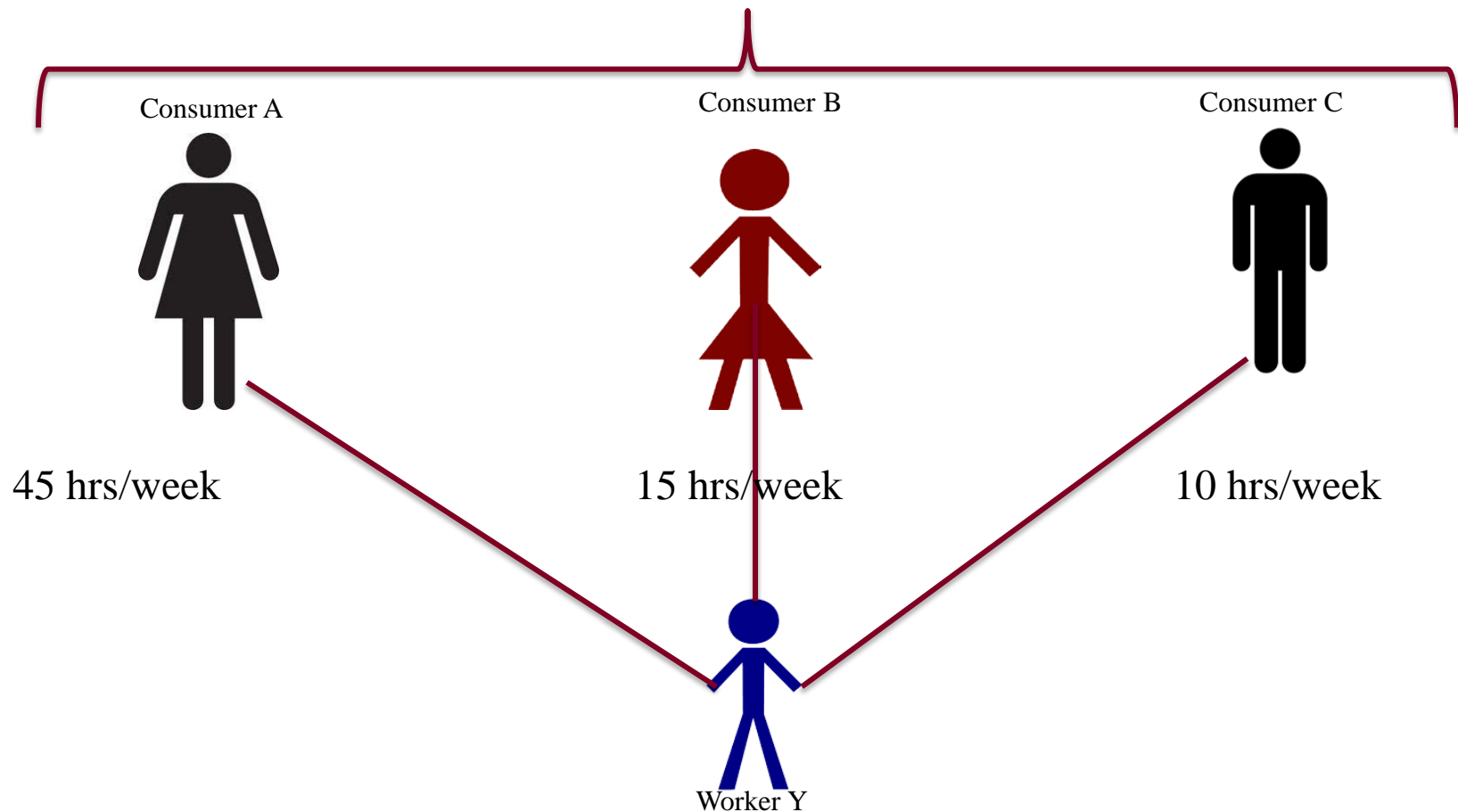
Owes 5 hours of non-consumer-specific overtime premium



Third Party Attributable Overtime

Third Party Joint Employer (e.g. a state)

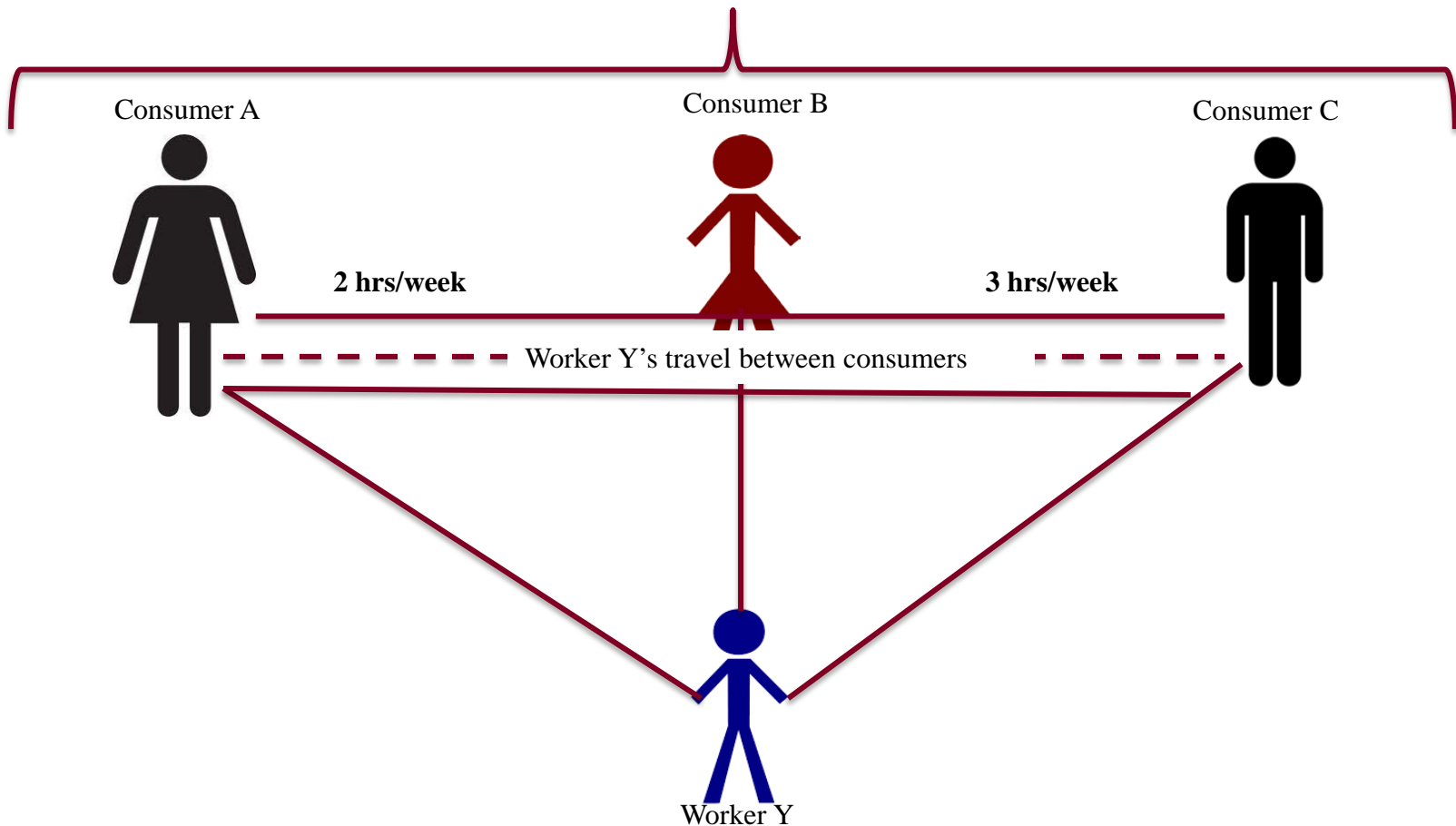
Owes 25 hours of non-consumer-specific overtime premium



Travel Time (straight time)

Third Party Joint Employer (e.g. a state)

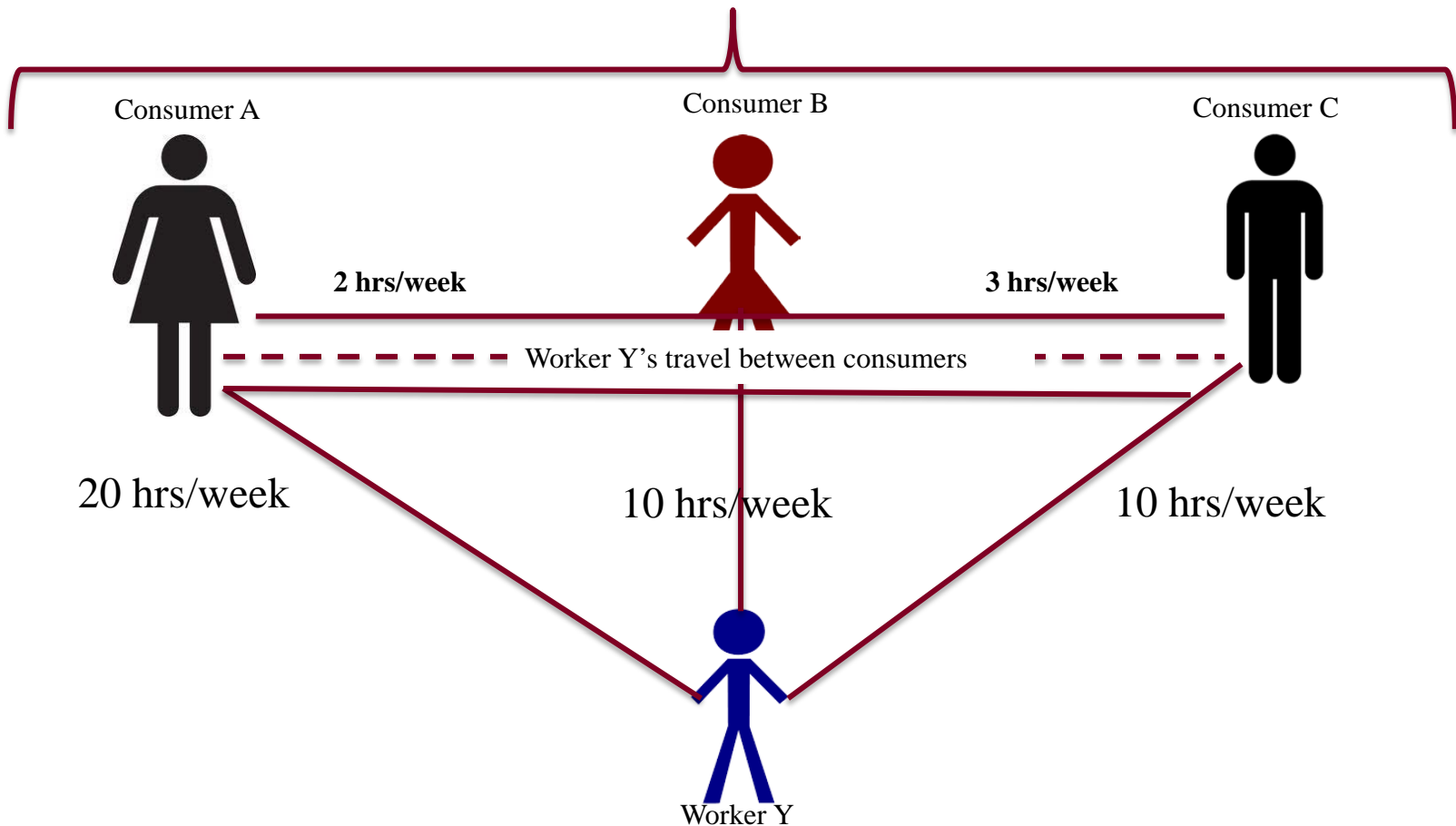
Owes 5 hours of travel time



Travel Time (straight + OT premium)

Third Party Joint Employer (e.g. a state)

Owes 5 hours of straight travel time and 5 hours of OT premium



Here's what we know

- ❑ We are in talks with IRS to finalize guidance on tax reporting
 - ❑ Still some unanswered questions
- ❑ Third party joint employer does **not** need to collect its own W-4 information from the worker
 - ❑ Per IRS, can use W-4 information collected by common law employer
- ❑ Third party payments can never qualify as “difficulty of care” payments under IRS Notice 2014-7

Third Party Attributable Wages

- ❑ Third party attributable wages (overtime premium not attributable to a consumer and travel time) are the legal payment obligation of the third party
- ❑ These wages must be paid, reported, and taxes paid on these wages under the third party EIN, *not the consumer employer's*
- ❑ These payments are wages because they arise from a consumer-worker common law employment relationship
- ❑ Third party is legally obligated to pay them, making third party a statutory employer

Third Party Joint Employer EIN

- ❑ We are working with the IRS now for third parties to be able to get separate EINs to pay these third party wages
 - ❑ We expect to have more information on this within the next few weeks

Third Party Joint Employer & Agent

- ❑ A third party could appoint another entity to pay its wages, deposit associated taxes and file related returns
- ❑ Could appoint a Rev. Proc. 70-6 agent, but major drawbacks:
 - ❑ If appoint a 70-6 agent, 941 and W-2 would be filed under the agent's EIN (with a Schedule R with the third party's EIN), but 940 would have to be filed under the third party's EIN
 - ❑ SUTA & SIT would be filed under third party's own EIN
 - ❑ Result = FICA, FUTA, SUTA mismatch

Third Party Joint Employer & Agent *for third party wages only*

- ❑ Probably better for the Third Party Joint Employer to appoint a reporting agent, rather than a 3504 agent
- ❑ Would execute an IRS Form 8655 with the reporting agent *for third party wages only*
- ❑ Reporting agent would file and pay 941, 940, SIT, SUTA and file W-2s all using the Third Party's EIN
 - ❑ No risk of mismatch
 - ❑ Administratively simpler

State Taxes for Third Party Joint Employers

- ❑ Third party joint employer will need to have a state tax ID number for purposes of filing and paying SIT
- ❑ Will also need state unemployment tax ID number for filing and paying SUTA
- ❑ Do not use consumer-employer accounts to report third party wages and taxes to the state

FICA Refunding

- ❑ The third party joint employer is *not* a household employer
- ❑ Do not refund FICA for workers who earn less than the FICA threshold (\$1900 in 2015) from the third party employer
- ❑ Still refund FICA as you normally would for workers who earn less than the FICA threshold for wages paid by a consumer employer

Family Exemptions

- ❑ The third party joint employer is *not* a household employer
- ❑ Do not apply family employee exemptions (exemptions from FICA, FUTA, SUTA for spouse, child, parent of employer) for wages paid by the third party joint employer
- ❑ Apply family exemptions as you normally would for wages paid by consumer employers

Other Options for W-2, 941 etc?

- ❑ Could we *please* report what the third party is responsible for under a consumer employer's EIN, W-2 etc?
 - ❑ For example, could we split the overtime costs across consumers for tax reporting purposes only?
- ❑ Per IRS to us, no. “The legal obligation for payment is with the third party, so any OT or travel not attributable to an HCSR must be reported under the third party's EIN.”
- ❑ This is not yet in writing from the IRS.

Third Party as Common Law Employer?

- ❑ From the IRS, most likely not.
- ❑ Third party is not likely common law employer (based on the cases the IRS has seen and heard of so far), but because the compensation is associated with a common law employment relationship (that between consumer and worker) makes the payments wages. These are wages the third party is legally obligated to pay.

The Live-in Exemption Today



*For more information, please reference the **Live-in Worker Decision Tree** from NRCPPDS' [FLSA Home Care Rule Tool Kit](#), p. 12.*

Live-in Workers

- ❑ Exempt from overtime if there is no third party employer
- ❑ Not exempt from minimum wage
 - ❑ Live-in workers can only be exempt from minimum wage if they also qualify as companions
- ❑ Applies to domestic service workers living in the household where they are employed, if they live there “permanently” or “on an extended basis”
 - ❑ At least 5 consecutive days and 4 nights per week, or vice versa, e.g. 9 a.m. Monday to 5 p.m. Friday
 - ❑ 24-hour shifts do not automatically turn the worker into a live-in worker

New Rules for Live-in Workers

- ❑ **Third-party employers can't claim the live-in worker exemption**
- ❑ New recordkeeping requirements
 - ❑ Must record the exact hours worked each day
 - ❑ Agreement regarding regular working hours also required by not sufficient
 - ❑ Worker must be paid for actual number of hours worked, even if different from the agreement

Key Definitions

- ❑ Domestic service = providing “services of a household nature in or about a private home”
 - ❑ Includes housekeeping, cooking, cleaning, personal care, home health, etc.
 - ❑ Services that are not performed in or about a private home are not considered domestic service employment
 - Live-in exemption can only be taken for domestic service performed in or about private home
 - If work is **not** performed in private home, workers are **not exempt** from FLSA overtime requirements

What is a “private home”?

- ❑ May be a “fixed place of abode” or a “temporary dwelling”
- ❑ A home owned and occupied by a family is generally a private home
- ❑ A nursing home, residential treatment facility, residential care home or facility, or other similar residence would NOT be considered a private home
 - ❑ **Cannot take live-in exemption in these facilities**

Indicators of Private Home Status

Likely a Private Home	Not Likely a Private Home
Client lived in living unit before receiving any services.	Client did not live in living unit before becoming a client, and client would not live in the living unit if he or she were not receiving services.
Living unit is owned or leased by client or client's family.	Living unit is owned or leased by service provider.
Many essentials of daily living are provided by the client or client's family.	Service provider provides essentials of daily living.
Client would be allowed to live in the unit without contracting for services.	Client would not be allowed to live in the unit without contracting for services.
Cost/value of services is incidental to other living expenses.	Cost/value of services is a substantial portion of the total cost of maintaining the living unit.
Service provider does not use any part of the business residence for its own business purpose.	Service provider uses any part of the residence for its own business purpose, for example using part of the residence as a business office.

About the Private Home Analysis

- ❑ No single factor is determinative
 - ❑ This is a qualitative analysis and must be made on case-by-case basis
- ❑ Other factors involved:
 - ❑ Whether significant public funding is involved
 - ❑ Who determines who lives together in the home
 - ❑ Whether residents live together for treatment purposes as part of an overall care program
 - ❑ The number of residents
 - ❑ Whether the clients can come and go freely
 - ❑ Whether the employer or client acquires the furniture
 - ❑ Who controls access to the living unit
 - ❑ Whether the provider is a for-profit or not-for-profit entity

Shared Living



*For more information, please reference the **Shared Living Decision Tree** from NRCPPDS' [FLSA Home Care Rule Tool Kit](#), p. 13.*

DOL's Shared Living Guidance

- ❑ Administrator's Interpretation 2014-1 issued by the Department of Labor in March 2014
- ❑ Can a provider be an FLSA independent contractor?
 - ❑ **If there is a third-party employer, then the provider will not be an independent contractor**
- ❑ See the *Shared Living Decision Tree* from NRCPPDS' FLSA Home Care Rule Tool Kit, p. 13

Shared Living Situations

- ❑ Consumer moves into the provider's home (or the consumer and provider were already sharing a home)
- ❑ Provider moves into the consumer's home
- ❑ Provider and consumer move into a new home together

Consumer Moves into Provider's Home

- ❑ Provider will often be an FLSA independent contractor if:
 - ❑ The provider usually decides the schedule and daily activities (even if taking into account the consumer's preferences)
 - ❑ The provider undertakes the main investment in maintaining the residence
- ❑ Exception:
 - ❑ The provider is not an FLSA independent contractor if the provider is the employee of a third party
- ❑ Economic realities test must be applied
- ❑ Same analysis applies even if consumer and provider were already living together

Common Example of an FLSA Independent Contractor

- ❑ A parent providing services to a young child with an intellectual or developmental disability
 - ❑ The parent decides the child's schedule and daily activities
 - ❑ The parent undertakes the main investment in maintaining the residence
 - ❑ There is no FLSA third party employer (the parent does not work through a home health agency or other third party)

Quick Note

- ❑ Remember, DOL analyzes employment relationships differently than the IRS does
 - ❑ DOL's view of "employment" is generally broader than IRS's view
- ❑ Even if a worker is properly classified as an independent contractor under IRS rules, they may nevertheless be an employee under DOL rules
 - ❑ **Just because a worker receives an IRS Form 1099 does not necessarily mean they will be an independent contractor for FLSA purposes**
 - ❑ For more information, see DOL Administrator's Interpretation 2015-1

Provider Moves into Consumer's Home

- ❑ Provider will usually be an employee of the consumer, because:
 - ❑ Consumer usually decides the schedule and daily activities and instructs the provider what tasks to perform
 - ❑ Consumer undertakes the main investment in acquiring and maintaining the home
- ❑ Economic realities test must be applied

Consumer and Provider Move into New Home

- ❑ If the provider has primary control of the residence and the relationship, then provider is an FLSA independent contractor (unless there is a third-party employer)
- ❑ If consumer has primary control, or the provider and consumer share control, then provider is an employee of the consumer
- ❑ Factors:
 - ❑ Who identified the residence and arranged to buy or lease it
 - ❑ Who pays the mortgage or rent
 - ❑ Who furnished the common areas of the residence
 - ❑ Who cleans and maintains the residence

Can Room and Board Count as Wages?

- ❑ If an employee is allowed to live in a home rent-free, does this count towards meeting minimum wage obligations? Yes, but only if:
 1. the employee has voluntarily accepted the lodging;
 2. the lodging is furnished in compliance with applicable federal, state, or local law;
 3. the lodging is provided primarily for the benefit of the employee and not the employer;
 4. the employer maintains accurate records of the costs incurred in furnishing the lodging; and
 5. the cost claimed does not exceed the reasonable cost or fair value of the lodging furnished.

Sleep Time

- ❑ When the consumer and provider live together, up to 8 hours of sleep time per night can be unpaid if:
 - ❑ The sleep period is at night
 - ❑ Interruptions are paid
 - ❑ The worker is completely free to leave the premises for her own purposes and engage in normal private pursuits during all non-duty time other than the sleep time (footnote 23, AI 2014-1)
 - ❑ The worker is paid for all the sleep time if such time is interrupted for duty calls to the extent that the worker cannot get at least 5 hours of sleep during the period (footnote 23, AI 2014-1)
 - ❑ The worker is paid a reasonable number of hours of work other than sleep time during the week

Sleep Time Examples

□ Examples:

- **Not allowed:** a provider's only responsibility is to spend the night with the consumer, and the provider is paid for 1 hour of work in the morning
- **Allowed:** 8 hours of sleep time excluded if the provider is paid for 2 hours of work in the morning or evening
- **Allowed:** sleep time excluded on weeknights, and provider is paid for 4 hours per day on 2 weekdays and 2 weekend days