APPLIED SELF-DIRECTION

Exploring the New Joint Employment Final Rule

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Agenda for Today

- Quick review of joint employment under the Fair Labor Standards Act (FLSA)
- Review new Department of Labor (DOL) Final Rule on joint employment
  - What has changed and what remains the same?
  - How does the new Rule affect past DOL guidance for self-direction?
- Explore potential impact on self-direction
  - Analyze FAQs on joint employment in self-direction
- Time for Q&A

Joint Employment: A Quick Review

Back to Basics

- DOL is responsible for enforcing the FLSA, which is the primary federal labor law governing wage and hour requirements for employees (including minimum wage, overtime, etc.)
  - DOL uses a *very* broad test of employment to determine who is an employer under the FLSA—a different test than that used by other government agencies
    - The Final Rule makes some changes to this test
  - The concept of joint employment were developed so that employers could not evade their FLSA responsibilities (e.g., by outsourcing hiring to a middleman)

Back to Basics

- Again, FLSA test of employment is different than those used by any other federal agency
  - Internal Revenue Service and most state agencies do not recognize joint employment
  - Some other agencies recognize joint employment for their purposes, but define "employment" differently than the FLSA
- Today, we will discuss joint employment under the FLSA specifically
- Applied Self-Direction staff are not attorneys, and today's webinar should not be construed as legal advice

Two Types of Joint Employment

"Vertical" joint employment

- The employee has an employer who suffers, permits, or otherwise employs the employee to work but another person simultaneously benefits from that work.
  - *Example*: A staffing agency provides temporary workers to a local business

"Horizontal" joint employment

- One employer employs a worker for one set of hours in a workweek and another employer employs the same worker for a separate set of hours in the same workweek.
  - *Example*: Two neighboring businesses agree to mutually hire a janitor

Joint Employment in Self-Direction

- When joint employment exists in self-direction, participants share some FLSA employer duties with another entity (e.g., Financial Management Services [FMS] entity, state)
  - When joint employment exists, a worker's hours must be aggregated across all participants served by the worker for overtime purposes
  - A worker's travel time traveling from one participant's house to another house in the same day must be compensated
    - Regular home-to-work commute travel need not be compensated
  - Live-in exemption and companionship exemption cannot be used when joint employer is a third party employer
    - Third party employer defined by DOL as any entity other than the individual and his or her household

Joint Employment in Self-Direction

- DOL Home Care Final Rule issued in 2013
  - Expanded federal minimum wage and overtime protections to millions of home care workers who were previously exempt from FLSA requirements
  - Prohibited third party employers from taking companionship exemption from minimum wage and overtime
  - Prohibited third party employers from taking live-in exemption from overtime
  - Defined "third party employer" as any employer who is not the individual receiving services and their household
  - Narrowed companionship exemption to apply only to workers who provided "fellowship and protection" and spent no more than 20% of workweek assisting with Activities of Daily Living and Instrumental Activities of Daily Living
- The Home Care Rule made joint employment a key compliance concern in self-direction

Operational Considerations with Joint Employment

- No way to know for sure whether joint employment existed unless a court officially ruled on it
  - While this is still the case, the Final Rule's new joint employment test is designed to help clarify the analysis
  - In litigation, circuit courts use many different joint employment analyses that are not the same as DOL's analysis to assess joint employment
    - Large multistate employers had instances in which FLSA joint employment was determined to exist in some states but not in others, despite their business models remaining the same in all states
- In self-direction, must have funding in place to pay overtime and travel time obligations and systems to track these obligations

Exploring the New Final Rule

Final Rule Basics

- DOL issued the Final Rule in an effort to "promote certainty among employers and employees, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy"
  - Final Rule becomes effective March 16, 2020
- The Final Rule abandons use of "economic dependence" and "economic realities test" to assess potential joint employment in favor of a new four-factor balancing test derived from longstanding case law
  - New test is based on *Bonnette v. California Health and Welfare Agency* (1983)

Final Rule: New Four-Factor Balancing Test

- To determine whether joint employment exists, DOL will now assess whether the potential joint employer:
  1. Hires or fires the employee;
  2. Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
  3. Determines the employee's rate and method of payment; and
  4. Maintains the employee's employment records.

- From the Rule: "No single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances."

Hold on! What are "employment records"?

- DOL defines "employment records" for purposes of the Final Rule as "only those records, such as payroll records, that reflect, relate to, or otherwise record information pertaining to the hiring or firing, supervision and control of the work schedules or conditions of employment, or determining the rate and method of payment of the employee." - DOL Joint Employment FAQ, #10

  (https://www.dol.gov/agencies/whd/flsa/2020-joint-employment/faq)

Does this mean every FMS entity is now a joint employer?

- No!
- "Whether a person is a joint employer will depend on all the facts in a particular case, and the appropriate weight to give each factor will vary depending on the circumstances. **However, the potential joint employer's maintenance of the employee's employment records alone will not lead to a finding of joint employer status**."

  - DOL Fact Sheet, *Final Rule on Joint Employer Status under the Fair Labor Standards Act*
- However, all four factors need not necessarily be met in order to be deemed a joint employer

Final Rule Details

- The new Rule allows for consideration of additional factors (beyond just the four factors) that indicate whether the potential joint employer has "significant control over the terms and conditions of the employee's work"
- DOL may include in its analysis a potential joint employer's ability, power, or reserved right to act in relation to the employee
  - But without some actual exercise of control, this ability, power, or right alone does not demonstrate joint employer status
  - This is a major change from previous DOL's position
- Standard contractual language reserving a right to act is alone insufficient for determining joint employer status
  - Must be some actual exercise of control

Final Rule Takeaways for Self-Direction

- Unlikely to lead to major swings in what entities are and are not currently considered joint employers in self-direction
- New four-factor balancing test may help simplify and clarify analysis to determine whether joint employment exists in a program
  - New test is significantly narrower than previous test used by DOL
- DOL is now much less focused on an entity's "reserved right of control" (i.e., theoretical ability to control employment relationship) and much more focused on actual control exerted by potential joint employers

FAQs on Joint Employment in Self-Direction

Q: We used Administrator's Interpretation No. 2014-2 to assess joint employment in our program. What do we do now?

U.S. Department of Labor
Wage and Hour Division
Washington, DC 20210

U.S. Wage and Hour Division

Administrator's Interpretation No. 2014-2

June 19, 2014

Issued by ADMINISTRATOR DAVID WEIL

SUBJECT: Joint employment of home care workers in consumer-directed, Medicaid-funded programs by public entities under the Fair Labor Standards Act.

In the Final Rule, Application of the Fair Labor Standards Act to Domestic Service, 78 FR 60454 (Oct. 1, 2013),[1] the Department modified the "third party employment" regulation, 29 CFR 552.109, to prohibit third party employers of domestic service employees—i.e., employers other than the individuals receiving services or their families or households—from claiming the companionship services exemption from minimum wage and overtime or the live-in domestic service employee exemption from overtime. 78 FR at 60480-85.

Q: We used Administrator's Interpretation No. 2014-2 to assess joint employment in our program. What do we do now?

- Administrator's Interpretation No. 2014-2 is Obama Administration-era guidance about FLSA joint employment in Medicaid-funded self-direction
  - Identifies strong, medium, and weak indicators of joint employer status in self-direction
    - Setting a worker's rate of pay is identified as a very strong indicator of joint employer status
    - Maintaining employment records identified as a weak indicator of joint employer status

Q: We used Administrator's Interpretation No. 2014-2 to assess joint employment in our program. What do we do now?

- This guidance was mentioned in the new Final Rule and is still in effect
  - The current DOL has declined to rescind this guidance
  - Specifically mentioned in Final Rule that AI No. 2014-2 is in accordance with the new four-factor balancing test
    - Both sets of guidance developed using the same *Bonnette* factors
- If you used this guidance in the past to assess potential joint employment in your program, the new Final Rule is unlikely to change your analysis

Q: Two family members who live together self-direct and use the same worker to provide services. Must the worker's hours be aggregated across both family members when calculating overtime?

- The new Final Rule does not make substantive changes to the analysis needed to answer the question
- In programs using Agency with Choice FMS, the answer is generally yes, because the FMS entity is generally considered a joint third party employer
- In programs using Fiscal/Employer Agent FMS, the analysis is less straightforward (see next slide and example scenarios)

A: It depends.

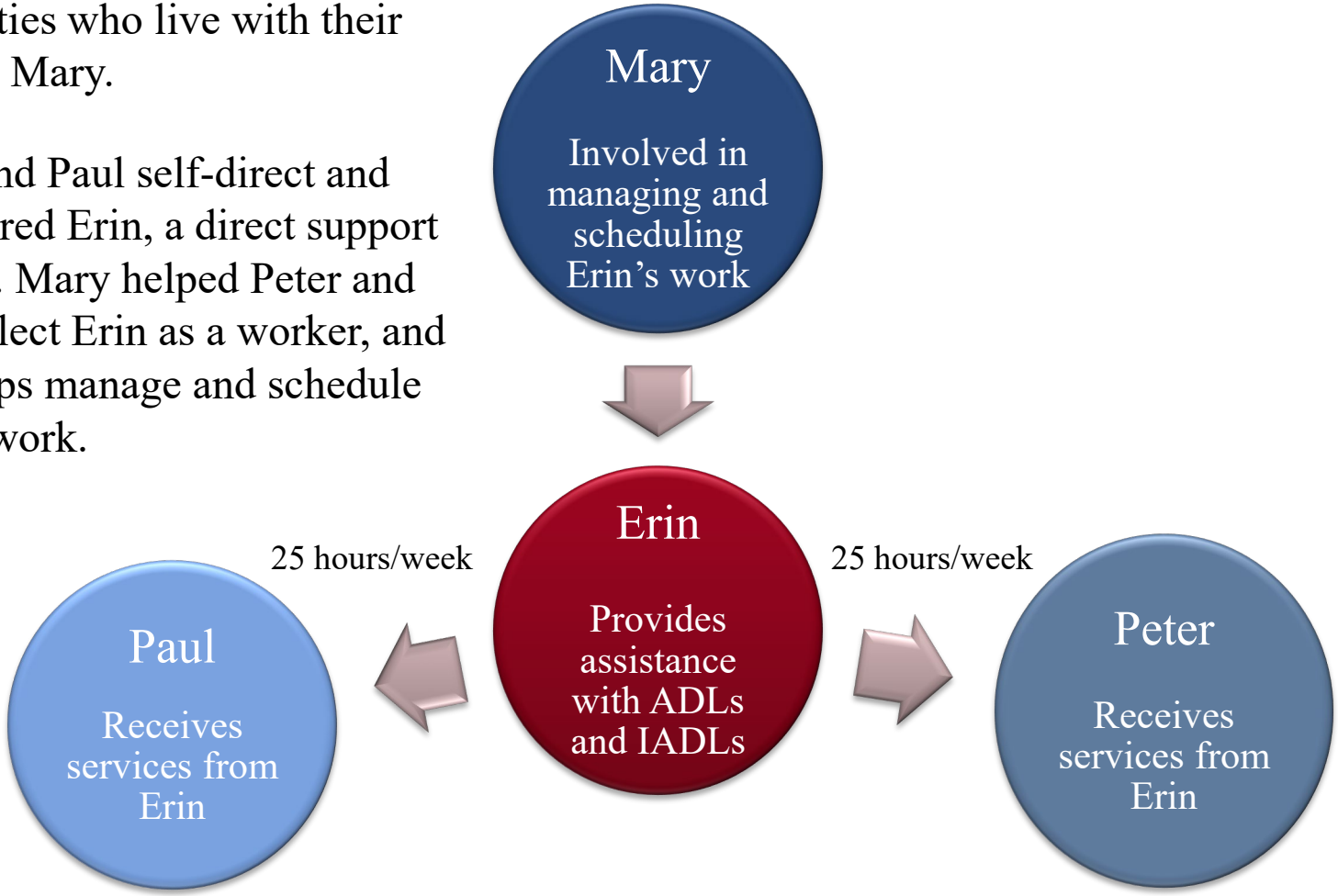
- "If the employers are acting independently of each other and are disassociated with respect to the employment of the employee, each employer may disregard all work performed by the employee for the other employer in determining its liability under the FLSA. However, if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining if they are in compliance. The employers will generally be sufficiently associated if there is an arrangement between them to share the employee's services, the employer is acting directly or indirectly in the interest of the other employer in relation to the employee, or they share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

  - DOL FAQ, #14 (https://www.dol.gov/agencies/whd/flsa/2020-joint-employment/faq)

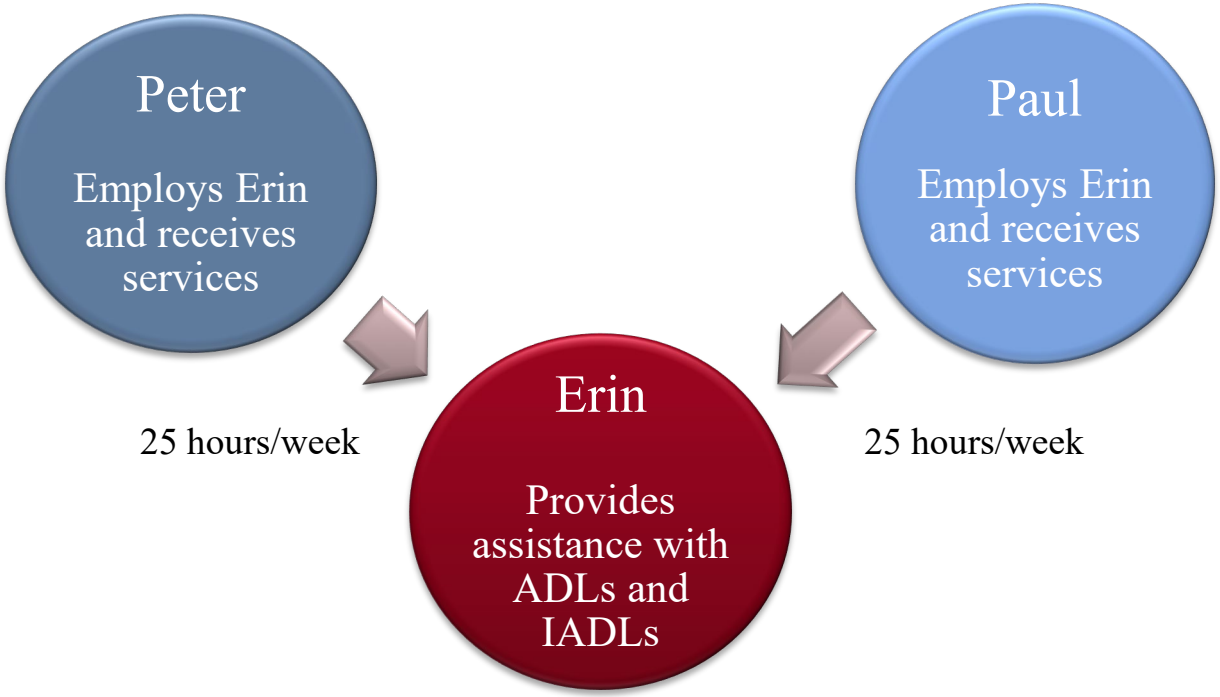
Example Overtime Scenario 1

Peter and Paul are brothers with disabilities who live with their mother, Mary.

Peter and Paul self-direct and have hired Erin, a direct support worker. Mary helped Peter and Paul select Erin as a worker, and she helps manage and schedule Erin's work.



Example Overtime Scenario 2



Questions to consider:

1. Is there a joint third party employer?
2. If not, does Erin qualify as a live-in worker?
3. To what extent do Peter and Paul coordinate Erin's services and schedule?
4. To what extent does Erin's work for Peter benefit Paul and vice versa?
5. If overtime is due, to what extent was each participant responsible for the overtime?

Compliance Considerations for Fiscal/Employer Agents

- Inform participants and representatives who share workers about FLSA rules on joint employment and associated compliance responsibilities and risks, plus any applicable program rules around overtime
  - Role of F/EA includes educating participants about compliance responsibilities
  - Avoid infringing on employers' responsibility to schedule their employees
- All employees have the right to file a lawsuit if they believe they were not paid in full

Reminders

- Who holds the EIN is not a substantive factor for FLSA joint employment analysis
  - DOL is not concerned with who holds the EIN when determining whether someone is an employer under the FLSA
  - DOL would instead analyze who is exerting control over hiring, firing, scheduling, managing, setting pay rate, etc.
- When joint employment exists, each employer is jointly and severally liable for ensuring the worker is paid in full
  - This means a worker can seek all damages from a single employer even if multiple employers were at fault for non-payment
- DOL is not concerned with which employer is paying the worker so long as the worker receives payment in full

Questions?

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