



NATIONAL RESOURCE CENTER *for*  
PARTICIPANT-DIRECTED SERVICES

# The Companionship and Live-in Worker Exemptions: Scenarios in Participant Direction

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# The New Companionship and Live-in Worker Exemption Rules

- ❑ Will go into effect on January 1, 2015
- ❑ Narrowed exemptions from the FLSA for companions and live-in workers
- ❑ Exemptions no longer available to third-party employers
  - ❑ F/EA: exemptions most likely can be claimed if other conditions are met
  - ❑ Agency with Choice: exemptions cannot be claimed

# Companionship Definition

- ❑ Providing fellowship and protection to an elderly person or person with an illness, injury or disability
  - ❑ Fellowship: “social, physical and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events”
  - ❑ Protection: accompanying the person to monitor their safety and well-being
- ❑ Care Services are allowed under the companionship exemption, but are capped at 20% of the worker’s hours per care recipient and per week
  - ❑ Assistance with activities of daily living
    - “Dressing, grooming, feeding, bathing, toileting, and transferring”
  - ❑ Assistance with instrumental activities of daily living
    - “Meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care”

# Duties Not Allowed Under the Companionship Exemption

- ❑ Work for other members of the household
  - ❑ Except for incidental benefits to other household members (e.g. dusting in a shared room, or household member eating leftovers)
- ❑ Medically related services
  - ❑ Services that typically require medical training and are typically performed by trained healthcare personnel such as nurses or nursing assistants
  - ❑ Examples: “Catheter care, turning and repositioning, ostomy care, tube feeding, treating bruises or bedsores, and physical therapy”
  - ❑ Does not include emergency first aid such as CPR, or minor health-related tasks such as applying an adhesive bandage
- ❑ Exemption cannot be claimed in a **workweek** when any such services are performed
- ❑ 20% allowance does not apply

# Workweek Definition

- ❑ An employer can choose that the workweek start at whatever time and on whatever day the employer wants
  - ❑ It does not have to coincide with the time when the employee starts work for the day
  - ❑ Ex: Workweek can start Sundays at 11:59 pm for someone working 9-5 weekdays
- ❑ The workweek doesn't have to be the same for all employees
  - ❑ Each employee's records must note the time and day when the employee's workweek starts
- ❑ Not related to pay periods or pay days
- ❑ Once a workweek period is chosen, it should stay the same for all future workweeks



# Workweek Scenario 1

- ❑ Wendy provides services to Pat
- ❑ For 35 hours each week, Wendy provides personal care services that do not qualify as exempt companion services
- ❑ For 10 hours each week, Wendy provides pure companionship services, a separate service in Pat's plan of care
- ❑ Wendy tracks her hours providing companionship as separate from the hours providing personal care and denotes each of the hours as for the service performed on the timesheet
- ❑ Can the companionship exemption be claimed for the 10 hours of companionship services?

# Workweek Scenario 2

- ❑ Wendy provides companionship services to Pat on most weeks of the year
- ❑ On Thanksgiving, Pat hosts a dinner for her extended family at her home
- ❑ During Thanksgiving week only, Wendy spends Wednesday and Thursday cooking food for Pat's entire family
- ❑ Wendy's workweek starts on Mondays at 1 am
- ❑ Can Pat and Wendy claim the companionship exemption for any days during Thanksgiving week?
- ❑ Is the exemption lost for other weeks in that year?

# What happens if the exemptions don't apply?

- ❑ If the companionship exemption cannot be claimed, then FLSA rules apply:
  - ❑ Minimum wage
  - ❑ Overtime
    - Unless the live-in exemption can be claimed
  - ❑ “Hours worked” are counted by FLSA rules:
    - “On duty” time
    - Work done by paid family member caregivers
    - Travel time
    - Sleep time

# Minimum Wage

- ❑ For employees not subject to the companionship exemption, all hours worked must be paid at least minimum wage
  - ❑ Federal minimum wage: \$7.25 per hour
  - ❑ State minimum wage applies if higher
- ❑ Paying a daily or weekly rate is allowed, but the rate per hour must be at least equal to the minimum wage
  - ❑ Scenario: Wendy Worker is paid \$300 per week and works no more than 30 hours per week. The federal minimum wage is \$7.25 per hour and no state minimum wage applies. Wendy is paid at least \$10 per hour, so Wendy's employer is in compliance with the FLSA
- ❑ Paying per visit (or other unit of work) is also allowed, but the rate per hour at the end of the week must be at least minimum wage
  - ❑ Scenario: A worker employed by an agency provides emergency backup care and is paid \$50 per visit. At the end of a week, the worker made 2 visits which took 10 hours total. The worker was effectively paid \$10 per hour that week so the minimum wage obligation was met

# Business Expenses

- ❑ Minimum wage must be paid “free and clear”
  - ❑ The employee can’t incur business expenses that put their wages under minimum wage
- ❑ Scenario:
  - ❑ Wendy Worker drives a consumer to the doctor in Wendy’s car, and is not reimbursed for mileage
  - ❑ Wendy is paid \$7.25 per hour
  - ❑ Are the federal minimum wage obligations met?
    - Must subtract Wendy’s “reasonably estimated” expenses from her wages
    - The IRS **business** mileage rate (56 cents per mile in 2014) may be used

# Room and Board

- ❑ The value of employer-provided lodging can be counted as wages to meet minimum wage obligations, but only if all the following apply:
  - ❑ The employee **voluntarily** accepts the lodging
  - ❑ The lodging is furnished in compliance with any applicable federal, state and local laws
  - ❑ The lodging is **primarily for the benefit of the employee**
  - ❑ The employer maintains accurate records of costs incurred in furnishing the lodging, and
  - ❑ The credit claimed does not exceed the reasonable cost or fair value of the lodging furnished

# Room and Board Scenario 1

- ❑ Wendy Worker provides care services to Catherine Consumer
- ❑ Wendy chooses to move into a spare bedroom in Catherine's house to avoid having to commute to work
- ❑ Catherine provides the lodging free of rent to Wendy
- ❑ The lodging complies with all applicable laws regarding rentals
- ❑ Catherine does not require Wendy's assistance at night and almost never interrupts Wendy during sleep
- ❑ The fair market value of the room rental is \$100 per week
- ❑ **Can the fair market value of the room be counted as compensation?**

# Room and Board Scenario 2

- ❑ Will Worker provides services to Chris Consumer
- ❑ Chris sometimes requires assistance at night and wants Will to be available to help, so he tells Will to move into a spare room in Chris' house
- ❑ Will pays no rent and the room complies with all rental laws
- ❑ The fair market value of the room rental is \$100 per week
- ❑ **Can the fair market value of the room be counted as compensation?**

# Overtime

- ❑ Overtime (federal law)
  - ❑ Applies if the worker is not subject to the companionship or live-in worker exemptions
  - ❑ A worker who works more than 40 hours in a workweek must be paid at one and a half times their regular rate for hours worked over 40
- ❑ A workweek is seven consecutive 24-hour periods
- ❑ Hours cannot be averaged between workweeks
  - ❑ An employee who works 20 hours in a week and 50 hours in the next week must be paid 10 hours of overtime
- ❑ States may have different overtime requirements

# Regular rate of pay

- ❑ Overtime is based on the worker's regular rate of pay, not on the minimum wage
  - ❑ A worker with a regular rate of \$20 per hour must be paid 1.5 times \$20 = \$30 per hour overtime
- ❑ How do we calculate the regular hourly rate of pay when the worker is paid on a daily or weekly basis?
  - ❑ The answer depends on the employment agreement

# Overtime Scenario 1

- ❑ If there is no agreement regarding the number of hours on which the pay is based, the regular rate is the amount earned in a workweek divided by the number of hours worked in that workweek
  - ❑ Wendy Worker works between 30 and 50 hours per week
  - ❑ Wendy's employment agreement says only that Wendy's weekly rate is \$500
  - ❑ If Wendy works 50 hours in a week, her regular rate of pay is \$500 divided by 50, or \$10
  - ❑ Wendy must be paid the extra "half," or \$5 per hour, for hours worked over 40
  - ❑ Wendy's total pay for the week will be the \$500 weekly rate plus an extra \$50 for the 10 hours of overtime

# Overtime Scenario 2

- ❑ If the agreement states the number of hours on which the rate is based, then the regular rate is the amount earned in a workweek divided by the hours specified in the agreement
  - ❑ Wendy Worker is paid \$500 a week
  - ❑ Wendy's agreement states that the \$500 weekly pay is based on 40 hours of work
  - ❑ Wendy's regular rate of pay is \$500 divided by 40 regardless of how many hours Wendy works in a week
  - ❑ If Wendy works 50 hours in a week, her regular rate of pay is \$500 divided by 40 or \$12.5 per hour
  - ❑ Wendy must be paid  $\$6.25 \times 10 = \$62.50$  in extra overtime for the week

# Counting Hours Worked

- ❑ If the companionship exemption doesn't apply, the hours worked must be counted according to Department of Labor Rules
- ❑ The Department of Labor has special rules for counting:
  - ❑ Which hours are on duty and off duty
  - ❑ Hours worked by family or household member caregivers
  - ❑ Travel time
  - ❑ Sleep time

# When is a worker off duty?

- ❑ A worker is off duty (i.e., on break) and does not have to be paid if:
  - ❑ A break is substantial in length
    - Generally, **at least 30 minutes**
  - ❑ The worker is **completely relieved from duty** and able to effectively use the time for her own purposes
    - Break time must be paid if:
      - The worker is interrupted during break, or
      - The worker performs any work during break.
        - For example: A worker is interrupted during a 30 minute lunch break and asked to assist the service recipient for 5 minutes. The entire 30 minutes must be paid.
- ❑ The worker **should know the length of the break ahead of time**
  - A worker required to remain on the employer's premises and be available whenever needed is “engaged to wait” and must be paid for time spent waiting

# Break Time Scenario 1

- ❑ Wendy provides services to Pat
- ❑ Pat takes a nap between 2 and 3 p.m. and usually does not need Wendy during this time, but asks Wendy to remain on the premises and be available to provide services if Pat wakes up early
- ❑ Wendy watches TV between 2 and 3 p.m. and is usually not interrupted
  - ❑ Does Wendy have to be paid for the hour between 2 and 3 p.m., on days when Pat doesn't need her help at all during that hour?

# Break Time Scenario 2

- ❑ Wendy provides services to Pat
- ❑ Pat tells Wendy that she will not need her between 2 and 3 p.m.
- ❑ Wendy can choose to stay in Pat's house for that time or leave the premises
- ❑ Wendy uses the 1 hour to go shopping at a nearby mall
  - ❑ Does the hour between 2 and 3 p.m. have to be paid?

# Break Time Scenario 3

- ❑ Same as Scenario 2, but Wendy does not have a car and Pat's home is not in walking distance of any shopping areas or near public transportation, so Wendy can't go shopping even though she wants to
- ❑ Wendy spends the hour watching TV in Pat's home
  - ❑ Does the hour have to be paid?

# Special Rule for Employees Who Are Family or Household Members

- ❑ Applies only to family members offering home care services in Medicaid and other publicly funded programs
- ❑ Only the hours listed in the Plan of Care are considered “hours worked”
- ❑ Unpaid additional hours of care arise out of the familial relationship, not the employment relationship
- ❑ Who is a family or household member?
  - ❑ The family member must have a close, pre-existing relationship with the family or the consumer
  - ❑ Rule cannot be used to reduce the hours or pay of caregivers who are family members
  - ❑ If the employee is not a family member, all hours worked must be paid

# Family or Household Members

- ❑ Patty Participant needs 50 hours of personal care per week
  - ✗ “Hire your family member. They will work the 50 hours, but we’ll pay them for 40”
    - Not allowed
  - ✔ “Hire your family member for 40 hours and a new worker for 10 hours”
    - Allowed
  - ✔ “Hire your family member (or anyone else) for 50 and we’ll pay 40 of straight time and 10 of time and a half”
    - Allowed

# Natural Supports

- ❑ May a care recipient’s “natural supports” (unpaid care provided by family members) be taken into account when deciding how many hours of paid care the plan of care should provide?
  - ❑ Yes, so long as they are taken into account in the same way whether or not the chosen caregiver is a family member.
- ❑ Scenario: Patty Participant receives care from her family in the evenings and needs a caregiver during daytime
  - ✅ Plan of Care 1: pays for daytime care, and Patty can hire a family member or an outside worker to provide it - allowed
  - ❌ Plan of Care 2: pays only for daytime care if Patty hires a family member, and for both daytime and evening care if Patty hires an outside worker - not allowed

# Travel Time

- ❑ Commute between worker's home and worksite does not have to be paid
- ❑ Travel time between worksites must be paid if the employer is the same between worksites
  - ❑ Agency with Choice: travel (excluding commute) must be paid
- ❑ If an employee has a break between two shifts that is longer than the travel time, the extra time does not have to be paid
  - ❑ Example: Wendy Worker provides care for Abe until 12:30 p.m. and for Bob starting at 2 p.m. Abe's home is 30 minutes away from Bob's home. Wendy spends 30 minutes traveling, and stops at a mall on the way to have lunch and shop for 1 hour. The 30 minutes travel time is "hours worked" but the 1 hour break is not
- ❑ Time for driving the consumer during the workday (on errands etc.) must be paid

# Travel Away From Home

- ❑ Travel during regular working hours must be paid even on the weekends
  - ❑ Example: A worker's regular hours are 9 a.m. to 5 p.m. on weekdays. The worker travels as part of his job from 8 a.m. to 6 p.m. on a Saturday. The hours between 9 a.m. and 5 p.m. must be paid
- ❑ Travel outside of regular working hours must be paid if the worker is required to provide assistance during travel
  - ❑ Example: A worker accompanies a consumer on a 4-hour flight and assists the consumer as needed. The full 4 hours must be paid

# Sleep Time

- ❑ For workers who do not live on the employer's premises
  - ❑ For a shift of less than 24 hours, the employee must be paid for sleep time
  - ❑ For a shift of 24 hours or more, the employer and employee can agree to exclude from hours worked up to 8 hours of sleep if
    - The employer furnishes sleeping facilities
    - The employee can usually sleep uninterrupted
  - ❑ Interruptions in sleep time must be counted as time worked, and if the employee cannot get at least 5 hours of sleep because of interruptions then all hours must be counted as hours worked
  - ❑ If there is no agreement about sleep time, then the sleep time cannot be excluded
- ❑ For workers who live on the employer's premises
  - ❑ The employer and employee may agree to exclude sleep time (and other time spent off-duty)
  - ❑ Interruptions must be paid

# Sleep Time Scenario 1

- ❑ A participant and caregiver share a home
- ❑ The caregiver is required to be on the premises at night to attend to any occasional emergencies
- ❑ However, the caregiver is permitted to leave the premises at all other times when not working
- ❑ Can the sleep time be excluded from counting as hours worked?

# Sleep Time Scenario 2

- ❑ A participant's family goes away for the weekend and the participant stays home. The participant asks her occasional direct care worker to stay with her from Saturday evening to Sunday morning
- ❑ During the evening and morning hours, the direct care worker is assisting the participant as he does when he's normally on duty
- ❑ At night, the direct care worker sleeps uninterrupted in a guest room
- ❑ Can the sleep time be excluded from counting as hours worked?

# Live-in Workers

- ❑ Applies to domestic service workers living in the employer's home “permanently” or “on an extended basis”
  - ❑ At least 5 consecutive days or nights per week, 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
- ❑ Exempt from overtime
- ❑ Not exempt from minimum wage
- ❑ New recordkeeping requirements
  - ❑ Must record exact hours worked each day
- ❑ Exemption not available to third-party employers

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# Questions?