



## DoL Guidance: Joint Employment

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*June 20, 2014*

FMS Membership

The Department of Labor (DoL) has just released Administrator's Interpretation Administrator's No. 2014-2, Joint employment of home care workers in consumer-directed, Medicaid-funded programs by public entities under the Fair Labor Standards Act, and the associated Fact Sheet #79E, Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA). Both documents are available at: [http://www.dol.gov/whd/homecare/joint\\_employment.htm](http://www.dol.gov/whd/homecare/joint_employment.htm) shortly

### Economic Realities Test

The economic realities test is used by the Department of Labor to determine joint employment for the purpose of applying the Fair Labor Standards Act (FLSA) and Department of Labor Rules and Regulations. The new guidance explains how the economic realities test should be applied to consumer-directed programs to determine which entities other than the consumer may be joint employers of a direct care worker.

The factors of the economic realities test come from court cases and differ somewhat from case to case. Also, courts can consider factors other than those listed in the test. The factors are not applied like a checklist and there is no mathematical formula to determine the outcome. Instead, "the outcome must be determined by a qualitative rather than a quantitative analysis." The ultimate question is "whether the worker is economically dependent on a purported employer."

### Which Third Parties May Be Employers

Depending on the structure of a program, potential employers can include various public entities such as "the state itself, a statewide agency that oversees Medicaid programs or a county department of aging" and private entities such as a Fiscal/Employer Agent, Agency with Choice provider, fiscal intermediary, worker registry, managed care organization, or other entities. The name used by the third party does not determine the outcome of the analysis.

The Administrator's Interpretation released by the DoL focuses on addressing whether a public entity may be a joint employer, but states that a similar analysis can be used for "the entire range of consumer-directed programs" including private entities. The accompanying Fact Sheet provides examples relevant to both public and private entities that may be joint employers.

## Federal Regulation of Medicaid Programs

The guidance recognizes that states administering any Medicaid-funded program have certain obligations under federal Medicaid law such as: setting general eligibility criteria for consumers, determining whether individuals meet these criteria, conducting an assessment of each consumer's needs, developing individualized plans of care together with the consumer, and implementing measures designed to prevent fraud and abuse such as setting basic qualifications for providers, conducting on-site visits, and developing a process for reporting and investigating abuse, neglect and/or exploitation of the consumer. In addition, Medicaid requires states to set rates for services and CMS must approve the rate setting methodology, and under some waivers the state must prove to CMS that the cost of the program does not exceed the cost of serving consumers in institutions.

The DoL believes that states have considerable discretion in deciding how to comply with federal requirements, and the method by which the state chooses to comply with the requirements will affect whether the state or another public entity is deemed a joint employer or not. If the state chooses to comply with the federal regulations by "implementing low-control functions and processes, and permitting the consumer considerable discretion to perform nearly all employer functions," then the state is not likely to be deemed a joint employer just for exercising its required functions. However, if the state "chooses to comply with Medicaid's legal requirements by exercising a high degree of control over the terms and conditions of a provider's employment," then the state (or entity acting on behalf of the state) is likely to be a joint employer.

## Implications of Joint Employment

If a third party entity is deemed a joint employer according to the Department of Labor, then that entity is responsible for complying with Fair Labor Standards Act obligations such as paying workers minimum wage and overtime.

### ***Companionship and Live-in Worker Exemptions***

Third party employers cannot claim the companionship and live-in worker exemptions. The guidance reiterates that the exemptions are still available to the consumer or household employing the worker, which means that the consumer or household will not be responsible for paying the workers minimum wage and overtime if they can claim the exemption, but the third party employer will still be responsible for those costs.

### ***Travel Time***

A worker who travels between two consumers during the workday must be paid for the travel time if the consumers are served by the same entity (such as an agency or state that is deemed an employer of the worker). Therefore, joint

employers will have to budget for the cost of paying for travel time between consumers.

### ***Aggregating Overtime***

A worker who works over 40 hours in a week must be paid overtime, including in cases when the work is performed for different consumers but the worker is employed by a single joint employer. For example, if a worker is jointly employed by an agency or state and works 20 hours per week providing services for Amy and 30 hours per week providing services for Bob, then the worker must be paid 10 hours of overtime that week.

### ***No Effect on Tax Filing or the ACA Employer Mandate***

It should be noted that the IRS does not use the economic realities test and does not follow Department of Labor rules to determine the identity of the employer. Thus, this new guidance does not affect any IRS rules such as tax filings, or the employer mandate under the Affordable Care Act which is administered by the IRS.

## **Most Common Factors Relevant for Determining Joint Employment in Consumer-Directed Programs**

The guidance lists several factors that are likely to be the most relevant in a consumer-directed program when determining whether a public entity is a third party employer. The DoL provides examples of specific practices and whether they would be a “weak” “moderate” or “strong” indicator that the third party entity is an employer. (Although the Administrative Interpretation talks specifically about factors relevant to public entities, these factors can also apply if a private entity such as an agency is a potential joint employer in a consumer-directed program).

### **1. Power to Hire and Fire**

The ability to hire and fire workers is considered “a strong indicator of employer status” by the DoL.

#### ***Provider Qualifications and Training***

Setting very basic qualifications for providers “in order to assure consumer safety, such as requiring a criminal background check and First Aid or CPR” would be considered only a **weak** indicator of employer status.

However, requiring more extensive provider qualifications such as comprehensive training would be a **strong** indicator of employer status.

#### ***Hiring Decisions***

A **weak** indicator of third party employer status would be if a consumer is allowed to hire any provider who meets basic qualifications.

A **moderate** indicator of employer status would be if the public entity runs a registry and permits the consumer to hire only workers who are listed in the registry.

A **strong** indicator of third party employment would be if the public entity co-interviews or must approve the provider selected by the consumer.

### ***Firing Decisions***

If a public entity may fire providers only in situations dictated in federal Medicaid requirements (i.e. in cases of fraud and abuse), that fact would be a **weak** indicator of employer status.

However, if a public entity reserves the right to fire worker for any reason, then that fact would be a **strong** indicator of employer status. It makes no difference that the public entity might not actually fire workers very often. The mere fact that the entity retains that right is an indicator of employer status.

## **2. Control over the Wage or Other Employment Benefits**

The DoL believes that “the ability to determine the method and rate of payment is an essential factor in the joint employment analysis.”

### ***Setting a Wage Rate***

Setting a fixed wage rate is a very **strong** indicator of employer status because it is “fundamental to the ultimate question of economic dependence.” The guidance states that “any entity that sets a wage rate will likely be considered an employer.”

### ***Reimbursement Rates***

If a reimbursement rate paid to an intermediary (such as a private agency) is a bundled rate that includes costs other than wages and does not directly correlate with worker wages, then the existence of a reimbursement rate by itself does not lead to a determination that the public entity is a joint employer.

However, if the reimbursement rate only includes the wage rate and possibly the tax contribution associated with that wage, so that the consumer or intermediary do not have any discretion to adjust the wage earned by the worker, then the reimbursement rate will be a **strong** indicator that the public entity is an employer.

### ***Setting a Cap or Wage Range***

A cap or wage range is a **weak** indicator of employment status so long as it (1) provides a consumer with meaningful discretion to determine the wage rate and (2) allows the consumer choice in how to spend the unused funds that are

available as a result of lowering the wage rate. An example provided in the Fact Sheet of such a wage range would be \$10-\$24 per hour.

### 3. Hours and Scheduling

If the consumer retains complete control (within a budget) over scheduling and setting the number of work hours, that fact would be a **weak** indicator of employer status of the public entity.

If the public entity sets the number of hours for which the consumer may receive services, and the consumer controls the scheduling, that fact would be a **moderate** indicator of employer status of the public entity.

If the public entity sets the worker's schedule, that would be a **strong** indicator that the public entity is an employer.

### 4. Supervises, Directs or Controls the Work

If the public entity only performs minimal supervision functions that are focused on the well-being of the consumer and not on the performance of the provider, and the consumer controls the tasks performed by the worker and the time and manner of performing these tasks, then these facts would be **weak** indicators that the public entity is an employer.

If the public entity identifies in a plan of care the specific tasks that the worker is allowed to perform, and engages in quality management activities such as performing on-site visits to evaluate the provider's performance beyond ensuring the safety of the consumer, then those facts would be **moderate** indicators that the public entity is an employer.

If the public entity identifies both the allowed tasks and the time allocated for those tasks, if the provider is required to inform not just the consumer but also the program contact when being late or absent, if the program contact intervenes in issues between the consumer and providers, if the program provides for a grievance procedure for workers, if the program conducts regular performance reviews, if the program requires ongoing public-sponsored training, or if the provider must sign in and out directly with the public entity, then those factors would each be **strong** indicators that the public entity is an employer.

If the provider is required to use an electronic verification system and the consumer does not approve time sheets, then this would be seen as a **strong** indicator that the public entity is an employer. However, if the provider is required to use an electronic verification system only for purposes of auditing and payroll, and the consumer is responsible for approving time sheets, then this fact will be seen as a **moderate** indicator that the public entity is an employer.

## 5. Performs Payroll and Other Administrative Functions

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, are **weak** indicators that an entity is an employer.

## 6. Other Factors

Other factors that can affect the determination of joint employment include whether the third party provides equipment for the worker to use or provides mandatory training.

All factors relevant to the situation can be taken into account by a court when determining joint employment, even if those factors are not listed in the DoL guidance or the economic realities test.