



NATIONAL RESOURCE CENTER *for*  
PARTICIPANT-DIRECTED SERVICES

# Joint Employment under Department of Labor Rules

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# Purpose of Today's Listening Session

- ❑ Provide an overview of the DOL's latest guidance on Joint Employment
- ❑ Open the floor to hear your questions and concerns
- ❑ Use the questions and concerns from you to shape our work going forward on this topic
  - ❑ Going forward, we expect to provide:
    - Technical Assistance
    - Issue Briefs
    - “Models” for coming in to compliance & making decisions about your program and FMS design

# Overview

- ❑ DoL Administrator's Interpretation No. 2014-2 and associated Fact Sheet released June 19
- ❑ 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

# Implications of Joint Employment under DoL Rules

- ❑ Companionship and live-in worker exemptions not available to the third party employer
  - ❑ Minimum wage and overtime must be paid
- ❑ Joint employer is liable for FLSA violations such as unpaid minimum wage or overtime
- ❑ Hours worked for different consumers must be added up for overtime if the consumers are served by the same joint employer entity
- ❑ Worker travel time between consumers must be paid if there is a joint employer

# Overtime Scenario

- ❑ Ed Employee provides services to two consumers in the same program: to Carrie Consumer for 20 hours/week and to Carl Consumer for 30 hours/week
- ❑ The state is deemed a joint employer of care providers in this program.
- ❑ Carrie and Carl each have their own EIN and are considered employers by the IRS

State as Joint Employer



Carrie  
Consumer

20 hrs/  
week



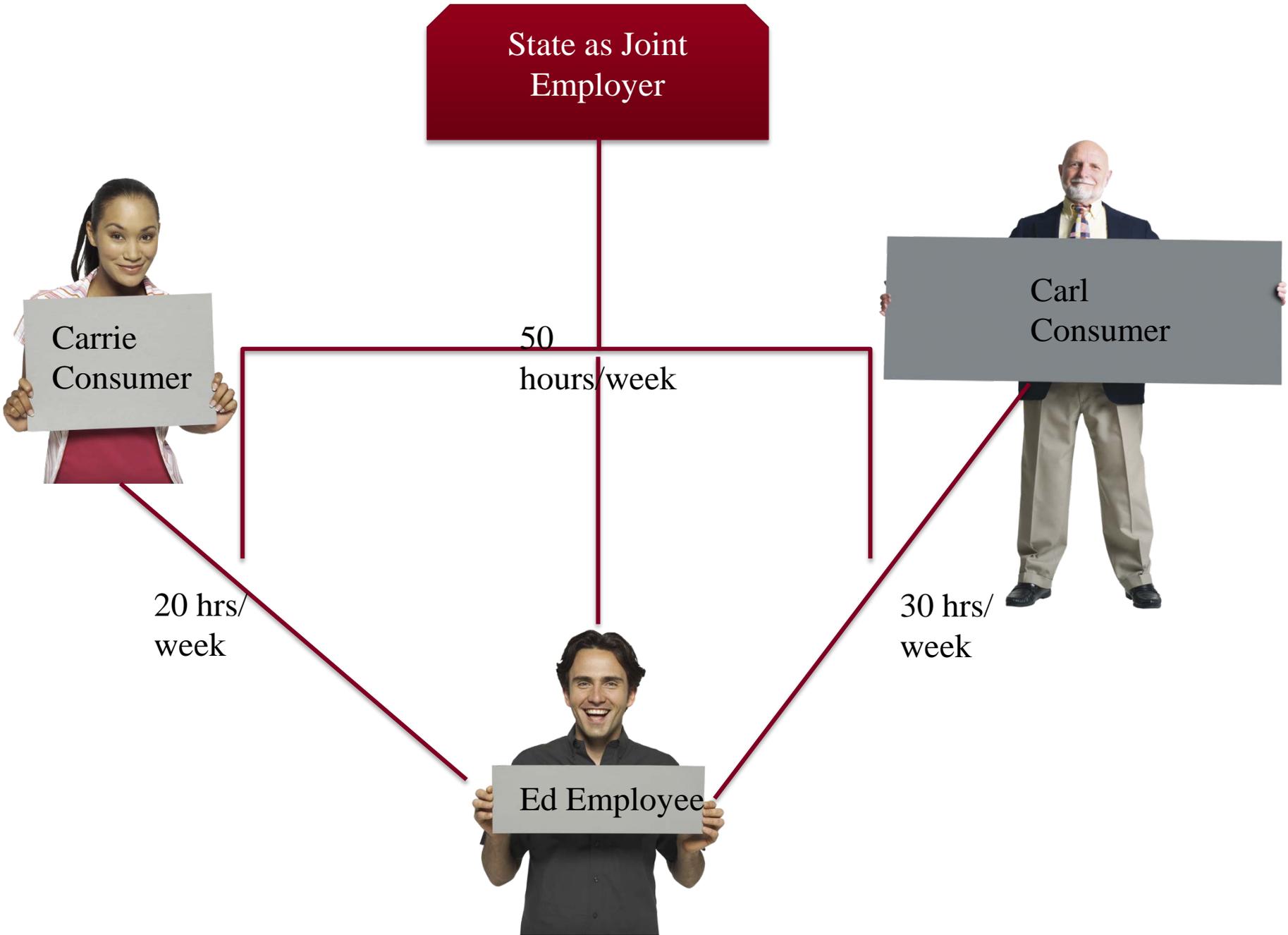
Carl  
Consumer

30 hrs/  
week

50  
hours/week



Ed Employee



Acme  
F/EA

State as Joint  
Employer

Better  
F/EA

50  
hours/week

Carrie  
Consumer

20 hrs/  
week

Carl  
Consumer

30 hrs/  
week

Ed  
Employee

# Travel Time

- ❑ Ed Employee provides services:
  - ❑ to Carrie Consumer from 8 am to 11 am, and
  - ❑ to Carl Consumer from 12:30 pm to 5 pm
- ❑ Ed drives from Carrie's home to Carl's home every day, and stops on the way at a pizza place for 30 minutes to get lunch for herself
- ❑ Driving straight from Carrie's home to Carl's home would take 1 hour without the stop for lunch
- ❑ The state is a joint employer of workers in the program Carl and Carrie are in
- ❑ Does Wendy have to be paid for travel time?

Ed's home



Carrie's home



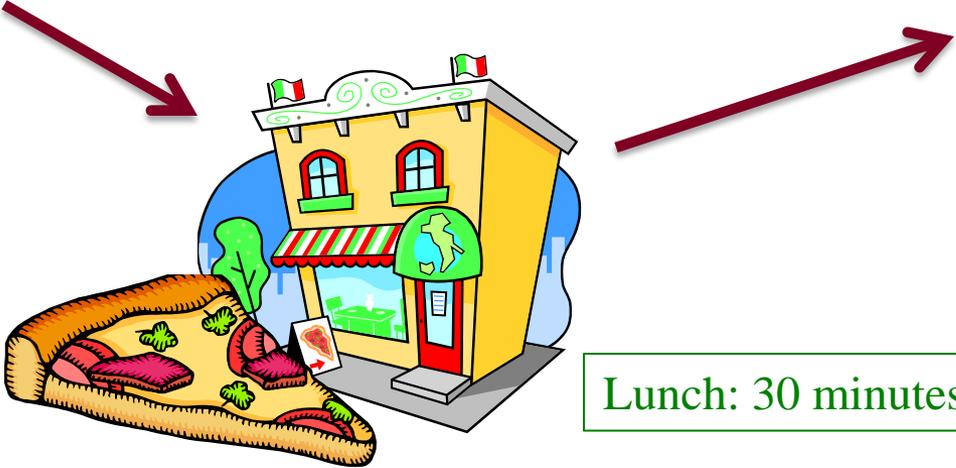
Carl's home



20 minutes  
*Commuter*

40 minutes  
*Commuter*

1 hour driving distance  
*Driving on the job for joint employer*



Lunch: 30 minutes

# What DoL Joint Employment Does NOT Mean

- ❑ DoL employer determination  $\neq$  IRS employer determination
- ❑ IRS does not recognize joint employment
- ❑ DoL guidance does not change IRS rules about joint employment
  - ❑ Economic realities test vs common law test
  - ❑ This guidance has no effect on tax filing requirements
- ❑ ACA employer mandate remains unchanged; uses common law test
  - ❑ If a consumer employer is the common law employer, ACA Health Insurance Mandate still doesn't apply to consumer

# Remember ADA/Olmstead

- ❑ States must continue to comply with their obligations under the Americans with Disabilities Act (ADA) and the Supreme Court's decision in *Olmstead*
- ❑ *Olmstead* rule: government programs must provide services and care in **the most integrated setting** appropriate to an individual
- ❑ “If a public entity as a joint employer of its home care workers puts in place new policies that have the impact of reducing or otherwise disrupting a consumer's services, the state must ensure that the policy **does not place the affected individuals at serious risk of institutionalization.**”
- ❑ More information from the Department of Justice:  
<http://www.ada.gov/olmstead>

# Economic Realities Factors in Consumer Direction

- ❑ DoL guidance lists the economic realities test factors that the DoL considers particularly important in consumer direction
- ❑ Not an exhaustive list
  - ❑ Courts may take all relevant circumstances into account when determining joint employment
- ❑ Each factor can be a “strong,” “moderate,” or “weak” indicator of joint employment

# Understanding the Factors

- ❑ The factors seek to provide an answer to the question of, on whom is the employee ultimately economically dependent in the course of this employment?
- ❑ The guidance states: “the ultimate question is one of economic dependence, the factors are not to be applied as a checklist, but rather the outcome must be determined by a qualitative rather than a quantitative analysis.”

# Wages

- ❑ Control over the wage or other benefits = an “essential” factor in the joint employment analysis
- ❑ Setting a wage = **very strong** indicator
  - ❑ “any entity that sets a wage rate will likely be considered an employer”
- ❑ Paying a bundled reimbursement rate to an FMS provider = **not an indicator** that the public entity is a joint employer
  - ❑ The rate must include costs other than wages (“administrative costs, overhead, worker benefits, profit for the agency, etc.”)
  - ❑ The FMS provider decides the wage rate

# Wages

- ❑ Paying a reimbursement rate that reflects only wages and taxes = **strong** indicator that the public entity is a joint employer
  - ❑ The wage rate is set directly based on the reimbursement rate
- ❑ Setting a wage cap or wage range = **weak** indicator
  - ❑ The range must meet 2 conditions:
    1. The range is large enough to give the consumer “meaningful discretion” in setting the wage (ex: \$10-\$24 per hour)
    2. The consumer is allowed to choose how to spend the money left over if paying a lower wage

# Power to Hire and Fire

- ❑ The ability to hire and fire is a **strong** indicator of employer status
- ❑ Setting basic qualifications to ensure consumer safety is a **weak** indicator of employer status
  - ❑ Ex: First Aid or CPR certification, criminal background check
- ❑ Requiring extensive qualifications such as comprehensive training is a **strong** indicator

# Power to Hire and Fire

## □ Hiring Decisions

- Consumer can hire any provider who meets basic qualifications = **not** an indicator of third party employer status
- Consumer can hire any provider from a closed registry = **moderate** indicator of employer status
- Third party must co-interview or approve the provider selected by the consumer = **strong** indicator of employer status

# Power to Hire and Fire

## □ Firing Decisions

- Third party can fire only in cases of fraud and abuse = **weak** indicator of employer status
- Third party can fire for poor performance, or reserves the right to fire for any reason = **strong** indicator of employer status
  - Even if the right to fire is only exercised very rarely, it is still a strong indicator of employer status if the third party reserves (but almost never uses) the right

# Hours and Scheduling

- ❑ Consumer retains complete control over scheduling = **weak** indicator of third party employer status
- ❑ Third party sets a fixed number of hours and consumer schedules the hours = **moderate** indicator of third party employer status
- ❑ Third party sets the schedule = **strong** indicator of third party employer status

# Supervision, Direction and Control

- ❑ **Weak** indicator of third party employer status:
  - ❑ Consumer decides what tasks are performed, and how and when they are performed
  - ❑ Third party monitors well-being of the consumer but does not supervise day-to-day work
- ❑ **Moderate** indicator of third party employer status:
  - ❑ Third party decides in the Plan of Care which tasks can be performed, and worker is limited to performing those tasks

# Supervision, Direction and Control

- ❑ **Strong** indicators of third party employer status:
  - ❑ Third party mandates lists of permissible tasks AND time allocated to each task
  - ❑ Provider required to inform both consumer AND program contact of absences
  - ❑ Program contact intervenes or mediates issues between the consumer and providers
  - ❑ Program provides for a grievance procedure for workers
  - ❑ Program conducts regular performance reviews
  - ❑ Program requires ongoing public-sponsored training
  - ❑ Provider must sign in and sign out directly with the public entity

# Payroll

- ❑ Functions similar to those performed by payroll agents are **weak** indicators of employer status:
  - ❑ maintaining records
  - ❑ issuing payments
  - ❑ addressing tax withholdings
  - ❑ ensuring that workers' compensation insurance is maintained for the worker on behalf of the consumer

# Other Factors

- ❑ Does a third party provide equipment for the provider to use?
- ❑ Does the third party provide mandatory training?
- ❑ Collective bargaining between a public entity and a union for training, benefits, wages, etc.
  - ❑ The public entity is probably always a joint employer if there is collective bargaining
- ❑ Courts can take all relevant factors into account when determining joint employment, not just the factors listed in the guidance

# CMS Releasing Guidance

- ❑ The DOL announced on June 19, just before this joint employer guidance was released that CMS, is developing guidance to assist states in understanding permissible reimbursement strategies for covering overtime and other costs related to the new companionship rules.

# Listening Session

- ❑ We want to hear your questions
  - ❑ We may not have the information today to answer them, but we want to hear them to shape our future assistance and work
- ❑ We want to hear your concerns
  - ❑ We may not have solutions today, but we want to hear them to shape our future assistance and work

