



A Summary of Recent Guidance on Shared Living from the Department of Labor

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On March 27, 2014, the Department of Labor issued *Administrator's Interpretation No. 2014-1*, and *Fact Sheet #79G: Application of the Fair Labor Standards Act (FLSA) to Shared Living Programs, including Adult Foster Care and Paid Roommate Situations*, available at http://www.dol.gov/whd/homecare/shared_living.htm. The new guidance explains how the economic realities test is applied to shared living programs, and also provides new information regarding certain issues related to shared living such as unpaid sleep time, distinguishing between leisure and work time, and counting free rent and utilities as compensation. The Interpretation also reiterates an employer's obligations for complying with minimum wage, overtime and recordkeeping requirements in cases where the FLSA applies.

Applying the Economic Realities Test to Shared Living Programs

The economic realities test determines whether a care provider is an employee of the consumer, or an independent contractor. The Interpretation and the Fact Sheet provide examples of how the test is applied in three common shared living situations: when the consumer moves into the care provider's home, when the provider moves into the consumer's home, and when both the consumer and the provider move into a new home together.

Consumer Moving into the Provider's Home

If the consumer moves into the provider's home, the provider will often be an independent contractor and not an employee of the consumer. The economic realities test must be applied to the relationship, and the most relevant factors will be "the degree of control the potential employer exercises over the worker and the extent of the relative investments of the worker and potential employee." In cases where the provider usually decides the schedule and the daily activities (even while taking into account the consumer's preferences), and the provider invests into the maintenance and furnishing of the residence more than the consumer, the economic realities test factors listed above point towards the provider being an independent contractor.

However, there can also be cases when the consumer is an employer of the provider even if the consumer moves into the provider's home or the program is called an adult foster care program. That is because the economic realities test is fact specific and therefore the outcome will depend on all the facts of the situation, not just on whether the consumer moves into the provider's home or the other way around.

There could also be cases where the provider is the employee of a third party, even if the provider is not the employee of the consumer. According to Section 1(b) of the Fact Sheet: "For example, the provider will likely be an employee of a third party that finds and rents a residence in which the arrangement can occur, or whose case manager makes frequent visits or phone calls to the home specifically to instruct the provider about particular tasks to perform or ways to fulfill or not fulfill duties. Additionally, if adult foster care providers are part of a collective bargaining agreement with a third party, such as a state, that entity may be a third party employer if the terms of the agreement reflect sufficient involvement by the third party with the providers' conditions of employment, such as wages and benefits." In such cases the provider might not be considered a domestic service worker and thus is not automatically covered by the FLSA as a domestic service worker. Therefore, a more detailed analysis must be undertaken to decide if the FLSA applies. In general, the FLSA applies to all state or state agency third party employers, all private agencies with an annual gross volume of business of at least \$500,000, or to employees who regularly travel between states in the course of business.

If a family member of the consumer becomes a foster care provider, the fact that the consumer already lived with the provider before the foster care relationship began does not determine whether the provider is an independent contractor or not. Instead, the economic realities test is applied, just like in cases where the consumer moved into the provider's home only once the paid care relationship began.

Provider Moving into the Consumer's Home

If the provider moves into the consumer's home, the consumer will usually be an employer of the provider. The consumer usually controls the provider's schedule and dictates how tasks should be performed, and also undertakes the main investment in acquiring and maintaining the home, which means that under the economic realities test the consumer will usually be an employer of the provider.

The provider is considered a domestic service employee in such a case, so the FLSA will apply. The companionship and live-in worker exemptions from certain FLSA provisions may apply in certain cases, unless the provider is jointly employed by a third party employer.

Provider and Consumer Move into a New Home

If the provider and the consumer move into a new residence together, the outcome will depend on who controls the residence and the relationship. In cases where the provider has primary control over the residence and the relationship, the provider will be an independent contractor. In cases where the consumer has primary control, or the control is shared between the consumer and the provider, the provider is an employee of the consumer.

The following factors are relevant to determine who has control over the residence and the relationship: who identified the residence and arranged to buy or lease it, who furnished the common areas of the residence, who maintains the residence by cleaning it or making

repairs, and who pays the mortgage or rent. Ownership of the residence - or the names listed on the lease in case of a rented residence - are other factors to be taken into account, but are not determinative by themselves. All circumstances must be taken into account as a whole.

Other Guidance for Shared Living Programs

Sleep Time

The Interpretation clarifies the conditions for excluding sleep time for employees who live with the consumer. If the worker lives with the consumer permanently, then sleep time can be unpaid even if the worker is required to spend the night on the premises, but only if the following conditions are met: no more than 8 hours of sleep can be excluded, the sleep period has to be at night, interruptions must be paid, and the worker must be paid for a reasonable number of hours of work other than the sleep time. For example, if a worker's only responsibility is to spend the night on the premises and the worker is not paid for any hours worked or is paid for only one hour per day, such an arrangement would not be considered reasonable.

Distinguishing Hours Worked from Leisure Time

In shared living arrangements, it can be difficult to distinguish leisure time activities from work. The Interpretation recommends creating a "reasonable agreement" that lists the activities the provider is expected to perform. Some activities could be either work or leisure activities based on the agreement. For example, if the provider and consumer go to a community event together, such an activity can be an unpaid activity if it is not part of the provider's responsibilities, but it can also be considered work that must be paid if one of the provider's responsibilities is to help the consumer stay integrated in the community.

Rent and Utilities

Rent and utilities provided for free can be considered wages if certain conditions are met (most importantly, the worker must voluntarily accept them and they must be primarily for the benefit of the worker and not the employer). The Interpretation clarifies that in some situations, free rent and utilities could be the only payment that a worker receives.