Home Care Final Rule

Joint Employment in Consumer-Directed Programs

A Presentation for the National Resource Center for Participant-Directed Services

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Introduction:
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• Twin principles of WHD enforcement:
  – Expand fundamental wage rights to most of the home care workers currently exempt from FLSA protections.
  – Implement in a manner that ensures consumers and their families continue to have access to the critical community services on which they rely and that supports innovative models of care that help them live in the community.

• Interagency workgroup and collaboration with stakeholders
Introduction: Relevant FLSA Provisions

• Section 13(a)(15) of the FLSA creates both a minimum wage and overtime exemption for
  – “any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves
  – “(as such terms are defined and delimited by regulations of the Secretary).”

• Section 13(b)(21) creates an overtime (not minimum wage) exemption for
  – “any employee who is employed in domestic service in the household and who resides in such household.”
Introduction:
Major changes made by the Final Rule

- Updates the definition of companionship services and clarifies the duties test – consistent with Congressional intent – to extend FLSA protections to most home care workers.

- Limits the use of the companionship services exemption or the live-in domestic service employee overtime exemption to individuals or their representatives only. Third party employers may no longer claim these exemptions.
Introduction:
The Final Rule Retains Exemptions for Families

• Individuals and their families or household members may still claim the companionship services or live-in worker exemptions, provided the requirements of each exemption are met
Sub-Regulatory
Home Care Guidance

Since the Rule was issued, we’ve released two major pieces of sub-regulatory guidance.

• The application of the FLSA to shared living programs (Administrator’s Interpretation No. 2014-1, March 2014)
• Joint employment by public entities in consumer-directed programs (Administrator’s Interpretation No. 2014-2, June 2014)

These documents and other home care-related guidance are available at http://www.dol.gov/whd/homecare/.
Joint Employment in Consumer-Directed Programs

• The Final Rule did not change any of the longstanding law or the Department’s guidance about joint employment under the FLSA, it just made joint employment principles relevant in a new context.

• Specifically, because of the Final Rule, the FLSA will apply to many arrangements for home care services that were not structured with FLSA requirements in mind—including any with third party employers.
Joint Employment in Consumer-Directed Programs

- Each public or private agency that administers or participates in a consumer-directed, Medicaid-funded home care program will need to evaluate whether it is an employer under the FLSA.

- One of the most complex questions raised by the rule is how to apply and operationalize FLSA protections within consumer-directed, Medicaid-funded programs.
  
  - The Department’s outreach indicated that additional guidance about the application of the FLSA’s joint employment principles to consumer-directed, Medicaid-funded programs was necessary.
Joint Employment in Consumer-Directed Programs

• Our guidance:
  – Administrator’s Interpretation No. 2014-2 provides background on general joint employment principles and the FLSA’s economic realities test, and analyzes the most common questions arising from consumer-directed programs. It also provides seven detailed hypotheticals.
  – Fact Sheet 79E also addresses joint employment generally, and consumer-directed programs specifically.

These documents are available at http://www.dol.gov/whd/homecare/joint_employment.htm
Joint Employment in Consumer-Directed Programs

• We recognize and discuss in the AI that consumer-directed programs vary by state, and states often have several programs with differing models.
  – Therefore, each third party involved in each program must be individually evaluated for joint employer status.

• We also understand that these programs are highly regulated by the federal Medicaid program, and that all states are required to set rates for Medicaid-approved services, including home care services. But states have discretion to decide how to structure programs.
  – Our guidance looks at the many different ways states choose to structure their programs.
Our guidance explains that:

- Most, but not all, consumer-directed programs will have a third party joint employer.

- Thus, workers in these programs must be paid in compliance with the FLSA’s minimum wage and overtime requirements.
Implications of Joint Employment in Consumer-Directed Programs

• Providers will have to be paid overtime (i.e., time and one half their regular hourly rate) for all hours worked over 40 in a workweek.

• Entities that are joint employers will have to track overtime across multiple consumers.

• Entities that are joint employers will have to track travel time between consumers.
Implications of Joint Employment in Consumer-Directed Programs

- CMS has issued guidance regarding states’ options for Medicaid reimbursement for these overtime and travel time costs.

Joint Employment in Consumer-Directed Programs

• Various third parties may be involved in administering consumer-directed programs in addition to the state (or state agency). For example:
  – Counties, municipalities, or “public authorities”
  – Agencies with choice
  – Fiscal intermediaries
  – Managed care organizations

• Each third party must assess whether it is an employer under the FLSA.
Joint Employment in Consumer-Directed Programs

- We recognize in our guidance that a state administering any Medicaid-funded program must perform a range of functions as a condition for participation in the Medicaid program. These include:
  - Setting eligibility criteria for consumers and providers
  - Monitoring for fraud, abuse and quality control
  - Ensuring the fiscal accountability of the program
## Administrator’s Interpretation No. 2014-2: How the Guidance is Organized

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The scope of employment relationships under the FLSA is very broad.

An employee may have more than one employer.

Whether an entity is an employer under the FLSA is governed by **longstanding case law from the U.S. Supreme Court and other federal appellate courts** interpreting the language of the statute.
The “economic realities” test examines a number of factors to determine whether a worker is economically dependent on a purported employer, thus creating an employment relationship.

- The test is not formulaic nor is any single factor determinative.
- The ultimate question is economic dependence.
Economic Realities Test

Some factors to consider in doing an economic realities analysis:

- Ability to Hire and Fire
- Setting the Wage or Reimbursement Rate
- Control over Hours and Scheduling
- Who Supervises, Directs or Controls the Work
- Who Performs Payroll and Other Administrative Functions
Economic Realities Test

• The economic realities test should be applied to all situations to assess whether there is joint employment.
  – This is true regardless of the name used by the third party (e.g., fiscal/employer agent, Agency with Choice, fiscal intermediary, registry, or employer of record)
  – or the title of the worker (e.g., personal care attendant, registry worker, independent provider, or independent contractor).

• The same analysis will be used for
  – all consumer-directed programs and
  – all entities (including state entities, managed care organizations, fiscal intermediaries, agencies and non-profit organizations).
Strong, Moderate, and Weak Indicators

• Our guidance identifies common factors considered by courts in conducting an economic realities analysis and applies those factors to various aspects of consumer-directed programs.

• The AI analyzes whether each of these program variables is a “strong,” “moderate,” or “weak” indicator of an employment relationship.
Strong, Moderate, and Weak Indicators

For example, we looked at “Hiring Decisions” and explained that:

- If a public entity permits the consumer to recruit, interview, and hire any provider who meets basic qualifications that fact will not weigh in favor of employer status of the public entity.

- If a public entity runs a registry and permits a consumer to only hire from the closed registry, that fact will be a moderate-strength indicator of the entity’s employer status.

- If the public entity must co-interview or approve a provider based on criteria beyond the setting of basic qualifications, those facts should be considered strong indicators that the public entity is a joint employer.
We also examined “Setting Wages or Rates” and explained that:

- If a public entity administering a consumer-directed program sets the wage rate or reimbursement rate for home care workers, that is a **strong indicator** of employer status.

- In contrast, the setting of a true “cap” or wage range would be a **weak indicator** of employer status.
Strong, Moderate, and Weak Indicators

In the guidance, we also analyze factors such as:

• Ability to Fire
• Hours and Scheduling
• Supervises or Controls the Work
• Performs Payroll or other Administrative Functions
Hypotheticals

Consumer and Public Entity as Joint Employers
- One example of a program with a CBA
- One example of a state plan program in which the public entity exercises high control

Consumer as Sole Employer
- One example of a cash and counseling-type program
- One example of a waiver program with high flexibility and autonomy for consumer
Hypotheticals

**Consumer and Private Agency as Joint Employers**
- One example of an intermediary agency model

**Consumer and Managed Care Organizations**
- One example in which MCO is a joint employer
- One example in which MCO is NOT a joint employer
Hypothetical 1: Consumer and Public Entity as Joint Employers

- In this consumer-directed program, the public entity collectively bargains with a union representing home care providers.
- The public entity exercises control by providing extensive required training, offering paid time off, furnishing equipment, creating a procedure for redress of grievances, setting a wage rate, and offering a benefits package.
- The public entity also retains some control over hiring and firing by completing performance evaluations and reserving the right to terminate a worker for poor performance.
- A fiscal intermediary processes payroll and tax withholding.
Hypothetical 2: Consumer as Sole Employer

• In this cash and counseling program, consumers manage a flexible budget and decide what mix of Medicaid-allowable goods and services best meet their personal care needs. Participants may use their budgets to hire personal care workers, purchase other services, purchase items, or make home modifications that help them live independently.

• The consumer retains authority over hiring and firing, negotiates the wage rate paid to the employee within a cap, and sets the terms and conditions of employment.

(continued)
Hypothetical 2: Consumer as Sole Employer

(continued)

- The public entity sets minimal qualifications for providers (by requiring a criminal background check and CPR/First Aid certification), determines eligibility and assesses need under the program, and then performs only ministerial payroll and tax functions through a fiscal intermediary, similar to those that commercial payroll agents perform for businesses, such as maintaining records, issuing payments, and addressing tax withholdings.

- The public entity also sets a cap on wages for all workers participating in the program so that consumers will have enough resources in their budget for the entire month, and to help ensure fiscal accountability as well as guard against exploitation. The cap for home care workers is at the agency reimbursement rate of, for example, $26 per hour. Thus, the consumer may pay anywhere from minimum wage to $26 per hour, and if the consumer elects to pay less than the cap, the remaining funds remain in the consumer’s individual budget.
Hypothetical 3:
Consumer and Public Entity as Joint Employers

• The consumer posts a job announcement and selects applicants to interview.
• The consumer conducts interviews and chooses a provider, but the case manager must approve the hiring decision.
• The consumer provides all day-to-day supervision and controls the schedule as well as the manner in which work is performed.
• The consumer and public entity case manager conduct regular performance evaluations, and the case manager or consumer may decide to fire the provider for poor performance.
• The program also has required, ongoing, comprehensive, state-sponsored training requirements.
• The public entity sets a reimbursement rate for home care services, from which the consumer may not deviate.
• Payroll and withholdings are processed through a fiscal intermediary of the consumer’s choice.
Hypothetical 4:
Consumer and Private Agency as Joint Employers

• The public entity administers an intermediary agency model.
• The state sets reimbursement rates for all Medicaid services within the public entity, including home care services.
• The minimum qualifications for home care workers are set by state regulation. The public entity does not supervise the work, set schedules, or control conditions of employment.
• The public entity contracts with agencies to provide home care services, and provides a bundled reimbursement rate from which the agency is free to set a wage rate and retain a portion for administrative costs.
• The public entity reserves the right to conduct certain functions, including visiting the agency to assess performance, conduct fiscal and quality audits, and review personnel files on a random basis.

(continued)
Hypothetical 4: Consumer and Private Agency as Joint Employers

(continued)

• Consumers may recruit and select a provider, and the agencies participating in the program then screen and hire the worker (the agency may also recruit potential providers).

• Consumers provide daily supervision, set the worker’s schedule, and decide how and when certain tasks will be performed.

• Both consumers and agencies retain the right to fire the workers, and the agencies generally handle any disciplinary issues involving the workers.

• Agencies also conduct the administrative functions and supervision of workers required by regulation, train the workers, and evaluate job performance. The agencies maintain all employment records, although copies of such records are also sent to the public entity administering the program.
Hypothetical 5: Consumer and Private Agency as Joint Employers

- This public entity contracts with a managed care organization (MCO) to provide health care services, including home care services, to Medicaid recipients.

- The public entity pays the MCO a per consumer monthly rate, and from that total budget the MCO contracts with various providers in its network, including home care agencies. Within this network are several agencies participating in a consumer-directed intermediary agency program.

- The MCO pays the agencies a bundled rate from which the agency sets the wage rate; authorizes a certain number of hours based upon an assessment; pays health insurance, workers’ compensation, and unemployment insurance premiums; and also may choose to authorize overtime.

- The participating agencies permit consumers to hire and fire their own workers, and consumers set the provider’s schedule and provide all day-to-day supervision.
Hypothetical 6: Consumer, Agency, and MCO as Joint Employers

- This public entity contracts with a managed care organization (MCO) to provide health care services, including home care services, to Medicaid recipients.

- The public entity pays the MCO a per consumer monthly rate, and from that total budget the MCO contracts with various providers in its network, including home care agencies. Within this network are several agencies participating in a consumer-directed intermediary agency program.

- The MCO pays the agencies a bundled rate but requires the agencies to pay workers a particular hourly wage.

(continued)
Hypothetical 6: Consumer, Agency, and MCO as Joint Employers

(continued)

• The MCO also sets comprehensive provider qualifications and requires providers to attend training provided by the MCO on a regular basis.

• The agencies authorize a certain number of hours based upon an assessment; pay health insurance, workers’ compensation, and unemployment insurance premiums; assist the consumer if disciplinary matters regarding the provider arise; provide back-up workers when needed; and may choose to authorize overtime.

• The participating agencies permit consumers to hire and fire their own workers, consumers set the providers’ schedules, and consumers provide all day-to-day supervision.
Hypothetical 7: Consumer as Sole Employer

- The public entity sets forth basic hiring requirements (such as a criminal background check or CPR/First Aid certification) and retains the limited right to remove a provider from the program if it is determined, after an investigation, that there has been fraud or abuse.

- The public entity also sets a wage rate range for services that is approved by CMS. The wage rate range for home care workers is from $10 per hour to $24 per hour. The public entity does not provide any paid time off, equipment, mandatory training, or contributions to health insurance premiums.

- A consumer can hire anyone who meets minimal qualifications and the consumer retains the ability to fire for any reason.

- The consumer sets the worker’s schedule, determines the tasks to be performed, and supervises how the work is performed.

- The consumer reviews and approves the worker’s payroll, and the provider’s tax withholdings are deducted from the individual consumer’s budget (not any general state fund). The consumer has a choice between three fiscal intermediaries that perform payroll and other administrative functions.
Additional Information

Final Rule website: http://www.dol.gov/whd/homecare/


Send questions about the Rule or the application of the FLSA in the home care context to: homecare@dol.gov