Fair Labor Standards Act Home Care Rule Tool Kit

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Guest speaker today presenting on, *Action Steps for Consumers and Advocates*, a publication from the Bazelon Center, NSCLC, NCIL, National Disability Rights Network, and AAPD
Resources

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Today

- Employer Tests
- Indicators of Joint Employer Status
  - Illustrates aspects of employment that DOL may use to assess whether a joint employer exists under FLSA
- Decision Trees
  - Tools to determine which FLSA exemptions may be applied in given employment contexts
- Consumer Direction Program Design Resource
  - Four consumer direction program models with factors and considerations
- Action Steps for Consumers and Advocates
  - Presented by Alison Barkoff, Bazelon Center for Mental Health Law
- Questions & Discussion
Both are tests of employment, but they are used for different purposes. Some factors are similar, but may be weighted differently for the tests. The result of one test should not influence the result of the other.
Employer Test Results

**Scenario A:**
Common Law Test Results

- Consumer
- Worker
- IRS & Many State Tax Agencies

**Scenario A:**
Economic Realities Test Employers

- Consumer
- Worker
- State
- FLSA
Indicators of Joint Employer Status

Remember, this is **not** a quantitative test!

This tool is **not intended** to definitively provide an answer regarding any entity’s joint employment status.
If you set it, forget it

- If an entity sets the rate of pay to an employee, the entity could potentially “forget” the other factors in the economic realities test: the entity has a very strong likelihood of being an employer.
FLSA Decision Trees

- Overview
- Companionship Exemption
- Travel Time
- Sleep Time
- Live-in Workers
- Shared Living
Hypothetical Consumer Direction Program

- We will use an example program with the following characteristics to illustrate use of the decision trees:
  - Medicaid-funded consumer direction program
  - Currently using one Vendor Fiscal/Employer Agent to provide Financial Management Services
  - The state is an FLSA third party employer, because the state sets the rate of pay for each employee (consumer is not permitted to choose a wage rate)
Travel Time - Scenario

- In the program described, Employee C works for Consumer A and Consumer B
- Consumer A and Consumer B are enrolled in the same program
- Employee C is traveling from the home of Consumer A, where Employee C has finished a shift, to Consumer B’s home to begin a new shift
Travel Time

Does the companionship exemption apply to the employer/employee relationship? (See Companionship Exemption Decision Tree.)

No

Is the travel "home to work" travel or "work to home" travel, and not travel between work shifts for two different consumers? (See DOL Fact Sheet #22.)

No

Is the travel "all in a day's work", i.e., meaning a work activity that the worker has to perform for the consumer, such as accompanying the consumer to a doctor's appointment, going to the store to buy groceries for the consumer, driving the consumer to a community event, etc.?

No

The state is a third party employer, thus companionship exemption cannot be taken

No, the travel is between a shift working for Consumer A & a shift working for Consumer B

No, the travel is between the home of Consumer A & the home of Consumer B
Is the worker traveling on a trip away from home, such as accompanying the consumer on vacation?

No, does not apply

Is the travel from Consumer A to Consumer B, for whom the employee also works?

Yes, Employee C is traveling between shifts for Consumer A & Consumer B
Bottom line: An employee’s travel time between work shifts for different consumers must be compensated when both consumers share a joint third party employer.
Purpose of Program Design Resource: 4 Models

- DOL Administrator’s Interpretation 2014-2 provided superb hypotheticals for joint employment factors.
- Economic realities test is key, but several key and competing rules, regulations and principles intersect in consumer direction.
Purpose of Program Design Resource: 4 Models

We propose 4 models that achieve different results for:

- Level of consumer control vs. third party control as an employer
- Affordable Care Act health insurance mandate requirements
- Use of companionship and live-in exemptions
- Requirements to pay overtime, minimum wage, travel time
- Possible program cost implications
- Who the common law employer is likely to be
- Who the economic realities test employer(s) is/are likely to be
- More
Factors change, Implications change

Factors of employment relationship

- Consumer control
- Third party control
- Overtime requirements
- Minimum wage requirements
- Travel time requirements
- ACA Employer Health Insurance Requirements
- Program costs
- Third party liability
- More
4 Models: Overview

- **Model 1:** *High Consumer Control*
  - Most Consumer-directed; may have lowest FMS costs
  - No FLSA joint employers
  - Consumer is sole employer under FLSA

- **Model 2:** *Hybrid Fiscal/Employer Agent*
  - Medium Consumer-directed; may have higher FMS costs than Model 1
  - F/EA is FLSA joint employer with consumer
  - Consumer is common law employer

- **Model 3:** *Fiscal/Employer Agent with State or Managed Care Entity as Third Party Employer*
  - Medium Consumer-directed; State is FLSA joint employer with consumer
  - Consumer is common law employer

- **Model 4:** *Agency with Choice*
  - Most third party control; may have highest FMS costs;
  - Agency is FLSA joint employer with consumer
  - Agency is common law employer
Features of Model 1: High Consumer Control

- Consumer is the common law employer
- Consumer is sole FLSA employer
- Consumer is employer for purposes of ACA
  - Thus, not required to provide health insurance to employees under ACA
- No joint third party employer exists
- At least minimum wage must be paid, unless the worker qualifies as a companion
- For employees who provide services to more than one consumer, no travel time must be paid when traveling between consumers
Considerations of Model 1: High Consumer Control

- FLSA companionship and live-in exemptions can be used if worker actually qualifies for them based on his/her job duties
- Likely could not be used with collective bargaining because the collective bargainer has control over compensation limits
- Could be used with collective bargaining if collective bargainer would not be deemed joint employer when applying the factors of the economic realities test
Features of Model 2: Hybrid Fiscal/Employer Agent

- Consumer is common law employer
- Consumer and F/EA are joint FLSA employers
- Consumer is employer for purposes of ACA
  - Not required to provide health insurance to employees under ACA
- Consumer and F/EA are joint employers under FLSA
- Overtime is required when a worker works over 40 hours per work week while jointly employed by the F/EA
- At least minimum wage must always be paid
- Compensation for travel time required when worker travels between shifts worked for different consumers while worker is jointly employed by F/EA
Considerations of Model 2: Hybrid Fiscal/Employer Agent

- Companionship and live-in exemptions to FLSA cannot be used by the third party joint employer (i.e., the F/EA)
- F/EA must track & pay travel time when a worker travels between shifts worked for different consumers while worker is jointly employed by F/EA
- F/EA must cover overtime costs when a worker works more than 40 hours in a work week while jointly employed by F/EA
- F/EA has more responsibility and duties in Model 2 than in Model 1; would likely require higher compensation for F/EA
Features of Model 3: F/EA with State or Managed Care Entity as Third Party Employer

- Consumer is common law employer
- Consumer and State or MCE are joint FLSA employers
- Consumer is employer for purposes of ACA
  - Not required to provide health insurance to employees under ACA
- Consumer a state or managed care entity are joint employers
- Overtime required when a worker works over 40 hours per work week while jointly employed by the state or managed care entity
- At least minimum wage must always be paid
- Compensation for travel time required when worker travels between shifts worked for different consumers while worker is jointly employed by state or managed care entity
Considerations of Model 3: F/EA with State or Managed Care Entity as Third Party Employer

- Cannot use companionship or live-in exemptions
- State or managed care entity must track and pay travel time when a worker is jointly employed by the state or managed care entity while the worker works for multiple consumers and travels between the consumers between shifts
Considerations of Model 3: F/EA with State or Managed Care Entity as Third Party Employer

- The state or managed care entity must cover overtime costs when a worker works more than 40 hours in a work week while jointly employed by the state or managed care entity.

- In Model 3, the state must independently track travel time between consumers for whom it shares a joint employment relationship and must track hours worked for employees and pay overtime for hours over 40 per week.

- Requires the payer to have more responsibility than in Model 1, 2 and 4.
Considerations of Model 3: F/EA with State or Managed Care Entity as Third Party Employer

- Complications arise if the payer uses multiple F/EAs to serve the program
  - If a worker works for consumers who use different F/EAs while the payer is a joint employer, the payer is still liable for overtime for all hours worked by a worker serving those consumers and for travel time between those consumers incurred by the worker
  - Complications exist because for each work week, the payer must know what hours and travel time workers had with each F/EA and then must coordinate appropriate payment to the workers
Features of Model 4: Agency with Choice

- Agency is common law employer
- Agency and consumer are FLSA joint employers
- Agency qualifies as large employer under ACA employer mandate if agency employs 50 or more full-time equivalent employees
  - Then full-time employees must be offered health insurance or agency must pay IRS penalties
- Consumer a agency are FLSA joint employers
- Overtime must be paid when a worker works 40 or more hours in a work week while jointly employed by the agency
- At least minimum wage must always be paid
- Compensation for travel time required when a worker travels between shifts worked for different consumers while the worker is jointly employed by the agency
Considerations of Model 4: Agency with Choice

- The companionship and live-in exemptions cannot be used because the agency is a third party employer.
- Agency must track & pay travel time when a worker is jointly employed by the agency while the worker works for multiple consumers & travels between the consumers between shifts.
- Agency must have plan to cover overtime costs when a worker works >40 hours in a work week while jointly employed by the agency.
- Requires agency to have more responsibility & duties than in Model 1.
- Model requires the agency to provide health insurance to qualifying employees and therefore could result in higher program costs than Models 1, 2, and 3.
A Note on the IRS Common Law Test

- NRCPDS has also been working with the IRS as we developed this tool kit.
- If common law employer is consumer and program is public, use Revenue Procedure 2013-39 for IRS filing and deposit procedures.
  - Economic realities test employer does NOT impact the Revenue Procedures to use.
- Common law test remains separate and distinct from economic realities test.
Considerations for Program Design

- Don’t forget your state’s labor rules
- Involve your counsel
- States, managed care entities, and FMS providers should ensure resources are in place to comply with the new rules in advance of January 1, 2015
- States considering program model changes are recommended to act now in order to be ready for 2016
What’s Next

- NRCPDS will provide assistance regarding operationalizing for FLSA compliance
- Please feel free to send your specific program questions our way
- We’d appreciate feedback on what future resources would be helpful
Questions
Action Steps for Consumers and Advocates Regarding the New Home Care Rule

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Consumers and advocates need to act now

• Consumers and advocates must take immediate action to make sure your state is ready to implement this rule in a way that helps and does not harm people with disabilities and seniors and their home care workers.

• Make sure your state is focusing on the new rule and its impact. Many states are not yet prepared for the January 1, 2015 effective date. This rule needs to be a priority in your state!
Push state officials to analyze the impact of the new rule on programs

- Your state must analyze each consumer-directed program to determine if there is any “third party employer.”
  - DOL has said most consumer-directed programs have a third party as a “joint employer” together with the consumer. DOL has offered technical assistance.

- Your state must analyze the fiscal impact in affected programs
  - Ask your state if they have completed, or at least began, an analysis of how many workers are working overtime (including across consumers) and how many workers travel between consumers.
  - Because states have not historically tracked the information, ask your state what data and methodology it will use to track or estimate these costs.
Advocate now for additional funding in impacted programs

• Without additional funding, states may take compliance actions that hurt consumers and workers.

• The rule’s effective date is in the middle of most states’ FY 2015 budgets. If your states’ FY ‘15 budget process is over, advocate for stop-gap measures to add money to these programs’ budgets.
  • Options might include state reserve funds, agency savings that could be re-allocated, or legislative action.

• Most state agencies are preparing to submit their FY ‘16 requests. Advocate now for additional funding in impacted programs.
Prevent your state from complying with the rule in ways that harm consumers and workers

• States could take actions that technically comply with the rule but undermine the goal of the rule and hurt consumers and workers.
  • Harmful actions could include prohibiting all overtime, restricting all or most travel, or abandoning consumer-directed models of care.

• These actions could lead to cuts in critical community services for consumers, shortages in this important workforce, loss of income by workers, and abandonment of models that allow people with disabilities and seniors to have more control over their lives.
Prevent your state from taking harmful compliance actions (cont’d)

• If your state is considering policies to set some limits on overtime or travel, work to ensure those policies are reasonable.
  • Your state should consider the cost of implementing restrictions (such as recruiting additional workers, setting up a backup worker system, or hiring staff to enforce the restrictions). Additional costs of restrictive policies may be more than funding more generous overtime and travel policies.

• Ensure your state creates a policy or process that allows consumers who would be harmed by new policies to be excepted or given alternative services.
  • The ADA and Olmstead require an exceptions process for people who would be placed at serious risk of institutionalization.
  • This includes people who may lose services because they cannot find additional workers (for example, they live in areas with worker shortages) or who might be harmed by having multiple workers due to their specialized needs.
Ensure your state uses Medicaid to help with additional costs but without impacting access to services

• The Centers for Medicaid & Medicare Services (CMS) has made clear that states can use federal matching Medicaid dollars to help pay for overtime and travel costs.
  • CMS has offered technical assistance to states.

• Make sure any Medicaid reimbursement for overtime and travel costs does not come out of budgets allocated to individual consumers for purchasing services.
  • If overtime and travel come out of individual consumer budgets, consumers will lose services they need and to which they are entitled.
Do not allow your state to abandon consumer-direction

• Some states may be unwilling to be joint employers in consumer-directed programs and may be considering abandoning consumer-directed programs.
  • This would reverse years of advocacy by people with disabilities and seniors to have more control over their own lives.

• If your state is seriously considering abandoning consumer-direction altogether, ensure they are aware of alternative models where the state is not a joint employer, including:
  • Agency with choice – an agency is the FLSA joint employer and common law employer
  • Hybrid Fiscal/Employer agent – an agency is the FLSA joint employer but consumer is common law employer
  • Individual Budget models (aka high consumer control or cash and counseling models) – consumer is FLSA and common law employer
Encourage your state to be engaged even in programs where there is no joint employer

- Even if your state determines there is no joint employer in its consumer-directed programs, individual consumers need to understand how to comply with the rule.

- Advocates should work with your state to develop education and assistance materials for consumers who are sole employers.
Additional Resources on the Home Care Rule


• Disability and Aging Advocacy Groups’ Action Steps for Consumers and Advocates Regarding the New Home Care Rule: http://www.bazelon.org/portals/0/Archives/HomeCareRule.pdf

• National Resource Center for Participant Directed Services’ FLSA Toolkit: http://www.bc.edu/content/bc/schools/gssw/nrcpds/tools/flsahomecaretoolkit.html