AN OVERVIEW OF THE DEPARTMENT OF LABOR HOME CARE RULE FOR VETERAN DIRECTED-HOME COMMUNITY-BASED SERVICES

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Introduction

The Department of Labor Homecare Final Rule will go into effect on January 1, 2015. The Rule is an interpretation of certain provisions of the Fair Labor Standards Act that relate to homecare workers.

Exemption from Overtime Requirements Narrowed

The Rule’s main effect in the Veteran-Directed Home and Community-Based Services (VD-HCBS) program is to narrow the circumstances under which a worker is exempt from overtime requirements; per the companionship exemption to the Fair Labor Standards Act (FLSA). A worker is exempt from overtime only if either the companionship exemption or the live-in worker exemption applies. If the companionship or live-in exemptions apply, then a worker could be paid straight time (as opposed to overtime) for all hours worked. In most cases in the VD-HCBS program (and if any of the following conditions are not met) a worker must be paid at least time and a half of the regular pay rate for hours worked over 40 in a work week.

The companionship exemption will only be available if all of the following conditions are met for a worker:

- The worker’s primary duty is providing fellowship and protection to the Veteran. Examples of fellowship and protection activities include: watching television, playing cards, engaging the Veteran in conversation, monitoring the Veteran’s well-being.
- Care-related activities such as assistance with Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs) take up no more than 20% of the worker’s time in the workweek for which the companionship exemption is claimed.
- The worker does not provide any medically related services, or any services for the benefit of other members of the household.
- The worker cannot be employed or jointly employed by a third party employer.

The live-in worker exemption will only be available if all of the following conditions are met for a worker:

- The worker lives in the Veteran’s household either permanently or for an extended period of time (at least five days a week, or five consecutive days and four nights per week or vice versa). Temporary stays for short periods of time do not count (such as a worker staying with the Veteran’s for only two weeks while the Veteran’s family is on vacation).
• The worker and the Veteran must maintain both an agreement showing the worker’s usual work hours, and a record of the actual number of hours worked each day by the worker. The worker must be paid for the actual number of hours worked even if it differs from the hours listed in the agreement.
• The worker cannot be employed or jointly employed by a third party employer.

Maintaining VD-HCBS Intended Program Design Components

The VD-HCBS program is designed to operate with the Veteran\(^1\) as the sole employer, because the Veteran has a high degree of control over the employment relationship with that Veteran’s workers. However, if a VD-HCBS program is not operated as intended, then there is a risk that an entity other than the Veteran could be a third party joint employer of the workers, which has important implications outlined in the final section of this document.

In order to uphold the Veteran as the sole employer of his/her workers and operate the VD-HCBS program as intended, the following practices should be observed:

• The Veteran’s plan of care should not include the worker’s weekly or daily schedule or the worker’s rate of pay, and should not dictate a process that the worker will use to deliver the services.
• The Veteran must have the ability to set a wage rate within a meaningful wage range. Program policy allows the Veteran to set the wage rate between minimum wage and $20 per hour. This range is considered a meaningful wage range and should not be narrowed.
• The Veteran should decide whom to hire and, if necessary, fire.
  o Third parties may require termination from the program in cases where the Veteran’s safety, health or welfare is at risk or fraud has occurred.
  o The Veteran should be able to individually set his or her own qualifications for the worker. The program may have minimum qualifications for the worker, meaning qualifications that are strictly necessary to protect the Veteran’s safety, health and welfare.
• The Veteran should do all scheduling of the workers in collaboration with his or her workers. No parties other than the Veteran (or Veteran’s representative) should be scheduling the workers.
  o The worker should be required to report absences and schedule changes only to the Veteran or his/her representative, not to a third party.
• The Veteran should be the one supervising, directing and controlling the work performed by the worker.

\(^{1}\) In the VD-HCBS program, it is acceptable for a Veteran to appoint a representative who may be the employer of the Veteran’s worker(s). In this document, where referring to the Veteran in an employer capacity, that could also be the Veteran’s representative.
The program should not require reporting to a third party of every task that is performed or the time it took to perform it.

- Any issues with a worker should be managed by the Veteran. The Veteran may get coaching, support and help managing the worker, but a third party should not itself manage a worker.
- The Veteran should make his or her own choice on whether to use a worker who is not a companion or live-in worker for more than 40 hours per week and thereby incur overtime. If overtime is incurred, it must be paid from the Veteran’s budget, which could impact budget fund availability for services.
  - It is reasonable and suggested for Options Counselors to ensure a Veteran understands the impact on his/her budget of directing a worker to work more than 40 hours in a week and thereby incurring overtime. Options Counselors can help a Veteran think through how to use his/her budget, even in regard to overtime use, but no third party should tell a Veteran whether or not to use a single worker for more than 40 hours in a week.
- The program should focus on the Veteran’s wellbeing, coaching a Veteran, and helping the Veteran manage his/her program. The program should not be focused on monitoring the worker’s performance. Managing worker performance is the Veteran’s role.

A Veteran may choose to delegate any of the Veteran’s responsibilities to a representative such as a friend or family member. A Veteran’s representative is not considered a joint third party employer under the Homecare rule.

**Implications if the Program is Not Operated as Designed**

If the program is not operated with full Veteran employer control as intended, a third party joint employer may exist. The existence of a third party joint employer in a program would have several important consequences, such as:

- Workers employed by the same joint employer and who work for more than one Veteran would have to be compensated for time spent traveling between Veterans’ homes.
- The joint employer would have to add up the hours worked by a worker for all Veterans and calculate and pay overtime on hours worked across Veterans.
- The companionship and live-in worker exemptions from overtime are not available if there is a joint employer.