



NATIONAL RESOURCE CENTER *for*
PARTICIPANT-DIRECTED SERVICES

September 2014

FLSA Home Care Rule Toolkit

*Impact Assessment & Implementation Resources for
Stakeholders*

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The National Resource Center for Participant-Directed Services (NRCPDS)

At the National Resource Center for Participant-Directed Services (NRCPDS), housed at Boston College, our mission is to infuse participant-directed options in all home and community-based services. We have more than two decades of experience making participant direction a reality, and we provide national leadership, technical assistance, training, education, and research that improves the lives of people of all ages with disabilities.

Boston College
Haley House
314 Hammond Street
Chestnut Hill, MA 02467
phone: 617-552-6582 fax: 617-552-1975
e-mail: info@participantdirection.org
www.participantdirection.org

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1. Introduction to the Toolkit

On January 1, 2015, a new Department of Labor (DOL) rule will go into effect that will change the rules surrounding the companionship and live-in worker exemptions for domestic service workers. This rule change and subsequent guidance from the DOL have been called the “DOL Home Care Rules.”

Previously, the companionship and live-in worker rules exempted some domestic service workers from certain requirements of the Fair Labor Standards Act (FLSA). Under the companionship exemption, workers who provided companionship services were exempt from the minimum wage and overtime requirements of the FLSA. Under the live-in worker exemption, domestic service workers who lived in the household of the care recipient (also referred to as the consumer¹) were exempt from overtime, but not from minimum wage.

The new rule preserves the exemptions, but narrows them in two major ways. First, the definition of companionship work is narrowed, which means fewer workers will be classified as companions and eligible for the companionship exemption. Second, if the worker is solely employed or jointly employed by a third party employer,² the third party employer is prohibited from claiming either the companionship or the live-in worker exemption. This means that the exemptions are effectively lost if a third party joint employer is present. This part of the new rule has brought focus on determining when a third party joint employer exists in consumer direction.

The DOL also issued a new Administrator’s Interpretation that clarifies the circumstances in which a third party is a joint employer. The DOL believes that under this new guidance, a third party employer is present in most consumer direction home care programs. For those programs in which a third party joint employer exists, the companionship and live-in worker exemptions will not be available for use.

The existence of a joint third party employer in a program will also affect how FLSA rules regarding travel time and overtime apply in these programs. Joint employers must pay for travel time if a worker travels between multiple consumers in a workday, and they must aggregate a worker’s hours across consumers when calculating overtime due.

¹ The Department of Labor’s Administrator’s Interpretation 2014-2 uses the term “consumer” to refer to the individual who is directing his or her own services and uses the term “consumer-directed” and “consumer direction” to refer to the concept of individuals managing their publicly-funded long-term care services and supports. For consistency, this document uses the same terms, however, other terms are regularly used. “Participant” or “individual,” in place of “consumer,” are terms commonly used to refer to the person in the program directing his or her own services. “Participant direction” and “self direction” are terms commonly used in place of “consumer direction.”

² A third party employer in a consumer direction or home care context is an employer who is not the consumer, the consumer’s representative or in the consumer’s household. A third party employer can either be a sole employer or could share employer status with other parties, including the consumer. When the third party employer shares employer status, we call the third party a joint employer.

This FLSA Home Care Rule Tool Kit exists to help states, consumer direction programs, Financial Management Services (FMS) providers, and other stakeholders understand how these new rules may impact their programs and to recognize options available to maintain their consumer direction programs while also maintaining compliance with the new rules.

NRCPDS will add to this tool kit as we create additional resources to aid stakeholders.

2. Joint Employment Indicators in Consumer Direction

Based on *Department of Labor Administrator's Interpretation No. 2014-2*.

For more information, see: <http://www.dol.gov/whd/homecare/>

The Department of Labor released *Administrator's Interpretation No. 2014-2* in order to help potential joint employers determine their employer status. This determination is particularly important in light of the revised Companionship and Live-in Worker Exemption Rules, which do not allow third party employers to claim these exemptions.

The determination of joint employment is based on all factors and circumstances that could be relevant to the issue of economic dependence. This list includes the most common factors that play a role in consumer direction programs, but other factors may also be considered. There is no formula to determine joint employment. Not all factors have the same weight and the number of factors in each category does not directly determine whether an employment relationship exists.

Joint Employment Factor	Impact on Employer Status	Description of Joint Employment Factor
1. Power to Hire and Fire		
Setting Provider Qualifications	<input type="checkbox"/> Weak	Setting of very basic qualifications in order to assure consumer safety, such as requiring a criminal background check and First Aid or CPR certification.
	<input type="checkbox"/> Strong	More extensive provider qualifications, such as fulfilling comprehensive, state-administered training requirements (beyond training required for relevant licenses).
Hiring Decisions	<input type="checkbox"/> Not an indicator of joint employment	The program permits the consumer to recruit, interview, and hire any provider who meets basic qualifications (or maintains an open registry to which the consumer can refer his or her preferred provider for inclusion).
	<input type="checkbox"/> Moderate	The potential joint employer runs a registry and permits a consumer to only hire from the closed registry.
	<input type="checkbox"/> Strong	The potential joint employer must co-interview or approve a provider based on criteria beyond the previously discussed setting of basic qualifications.
Firing Decisions	<input type="checkbox"/> Weak	The potential joint employer may exclude providers from working within the Medicaid program only in situations dictated in Medicaid requirements—i.e., if the worker is determined to have committed fraud or is found after an investigation to have abused a consumer.

Joint Employment Factor	Impact on Employer Status	Description of Joint Employment Factor
	<input type="checkbox"/> Strong	<p>The potential joint employer reserves the right to remove a worker at any time from the household, or can fire a worker for poor performance, even if the right is rarely exercised.</p>
2. Control over the Wage or Other Employment Benefits		
Setting a Wage Rate	<input type="checkbox"/> Very strong	<p>The Department believes that setting a wage rate is so fundamental to the ultimate question of economic dependence that any entity that sets a wage rate will likely be considered an employer.</p>
Setting Reimbursement Rates	<input type="checkbox"/> Weak indicator that the entity setting the reimbursement rate is an employer	<p>If the rate includes costs other than wages (such as administrative costs, overhead, worker benefits, profit for the agency, etc.), and a third party ultimately controls the hourly wage paid to workers, such reimbursement rates do not, by themselves, convert a public entity (or other entity setting the reimbursement rates) to a joint employer.</p>
	<input type="checkbox"/> Strong indicator that the entity setting the reimbursement rate is an employer	<p>The reimbursement rate only differs from the hourly wage in that it might include the employer's social security or unemployment tax contribution that will later be deducted from the wage. The consumer and any private third party do not have any discretion in adjusting the wage earned by the home care worker.</p>
Setting a Cap or Wage Range	<input type="checkbox"/> Weak	<p>Setting a wage cap or range is a weak indicator of employer status if the cap or range (1) provides a consumer with meaningful discretion to determine how much to pay home care workers within his or her individual budget; and (2) allows a consumer choice in how to spend unused funds that are available as a result of using a lower wage rate on other authorized Medicaid expenditures.</p>
	<input type="checkbox"/> Strong	<p>The cap/range is so limiting that it essentially functions as a wage rate, and the consumer has little discretion to actually set a wage.</p>
3. Hours and Scheduling		
Control Over Hours and Scheduling	<input type="checkbox"/> Weak	<p>The consumer retains complete control (within his or her individual budget) over scheduling, including the number of work hours, for home care workers. The consumer is able to freely decide when, how often, and for how long the provider will work.</p>
	<input type="checkbox"/> Moderate	<p>The potential joint employer sets an explicit number of hours for which the consumer may receive home care services from which the consumer may not deviate, and the consumer controls the scheduling within that timeframe.</p>

Joint Employment Factor	Impact on Employer Status	Description of Joint Employment Factor
	<input type="checkbox"/> Strong	<p>The potential joint employer specifies certain hours or specific weekly schedules to be worked.</p>
4. Supervises, Directs, or Controls the Work		
Supervision, Direction and Control	<input type="checkbox"/> Weak	<p>The consumer has sole control over the worker, the tasks that are performed (within the limits of Medicaid-authorized services), how the tasks are performed, and when the tasks are performed, and the potential joint employer does not supervise or direct the day-to-day work in any manner, but rather only performs minimal functions focused on the well-being of the consumer (rather than any assessment or management of the provider).</p>
	<input type="checkbox"/> Moderate	<p>The potential joint employer more explicitly identifies (perhaps in a plan of care) the specific permissible tasks and limits the worker to performing those exact tasks, and the potential joint employer engages in quality management activities that are more similar to daily supervision (for example, a case manager/service coordinator makes regular, on-site visits and assesses the provider's performance beyond ensuring the safety of the consumer).</p>
	<input type="checkbox"/> Strong	<p>Any of the following by themselves are a strong indicator of employer status: if the potential joint employer mandates the list of specific permissible tasks and the time allocated for performance of each task, if the provider is required to inform both the consumer and the program contact of tardiness or absences, if the program contact intervenes or mediates issues between the consumer and providers, if the program provides for a grievance procedure for workers, if the program conducts regular performance reviews, if the program requires ongoing public-sponsored training, if the provider must sign in and sign out directly with the potential joint employer, or if the provider is required to provide sign in and sign out times directly to a representative of the potential joint employer (such as a case manager).</p>
Electronic Verification Systems	<input type="checkbox"/> Moderate	<p>The provider is required to utilize an electronic verification system (for purposes of auditing or to generate payroll), but the consumer still retains the ultimate responsibility for verifying or approving provider timesheets.</p>

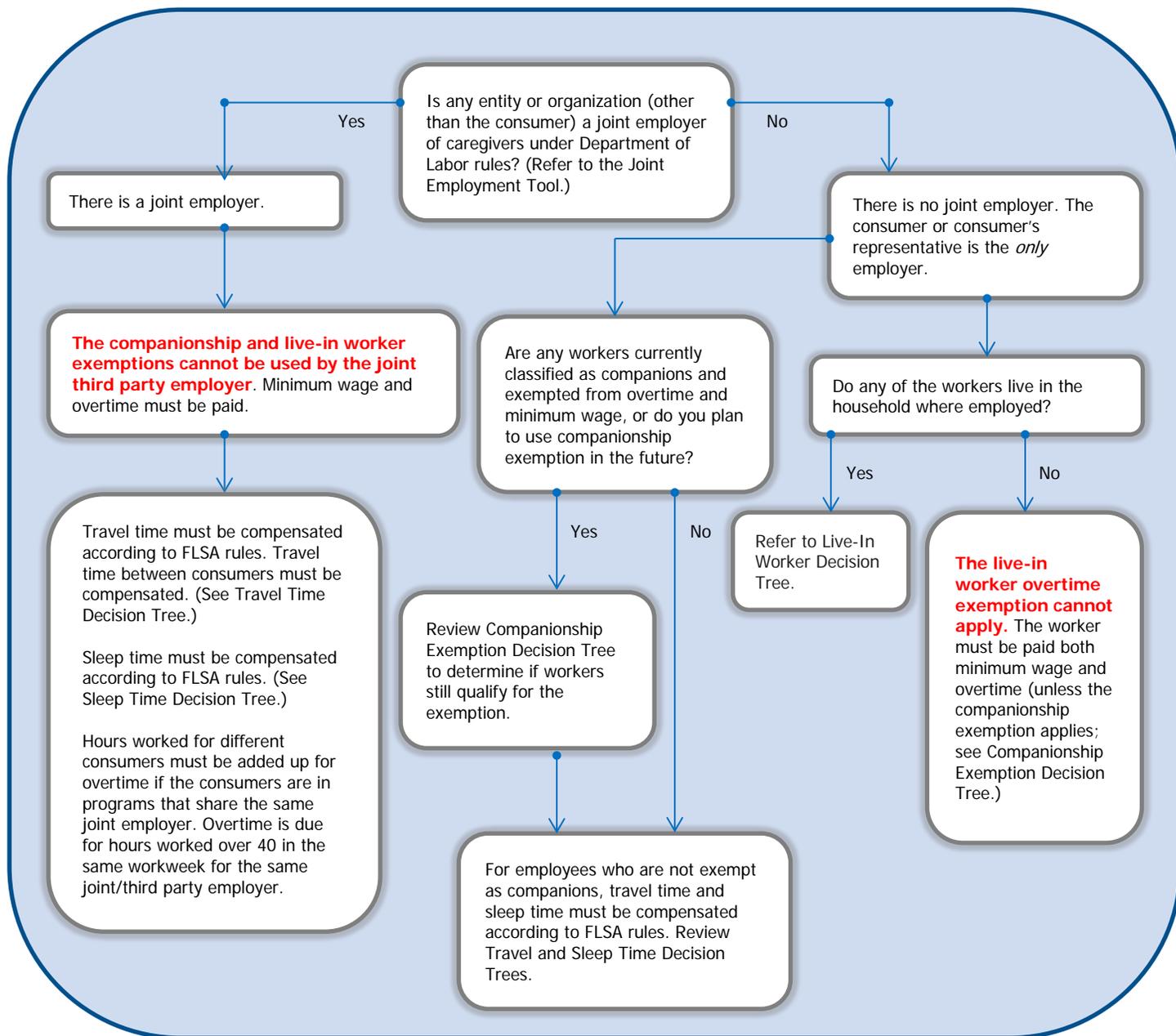
Joint Employment Factor	Impact on Employer Status	Description of Joint Employment Factor
	<input type="checkbox"/> Strong	<p>The provider is required to utilize an electronic verification system and the consumer does not verify or approve provider timesheets.</p>
5. Performs Payroll and Other Administrative Functions		
	<input type="checkbox"/> Weak	<p>The public entity or a fiscal management agent performs payroll or other administrative functions on behalf of the consumer, meaning functions that are similar to the tasks performed by commercial payroll agents for businesses, such as maintaining records, issuing payments, addressing tax withholdings, and ensuring that workers' compensation insurance is maintained for the worker on behalf of the consumer.</p>
6. Other Factors		
<p>“This list is meant to be illustrative. There are multiple other factors a court may consider to be relevant in evaluating whether an employment relationship exists. These factors may include, for example, whether the purported employer provides equipment for the worker to use or whether the purported employer provides mandatory training. All of the facts relevant to whether a worker is economically dependent upon a purported employer should be assessed.” - <i>Administrator’s Interpretation 2014-2</i></p>		

3. FLSA Decision Trees

The following decision trees are designed to help stakeholders navigate the new FLSA home care rules and maintain compliance with these rules. Readers are encouraged to utilize these trees to determine which FLSA exemptions, if any, can be applied to employment scenarios that exist in their program(s).

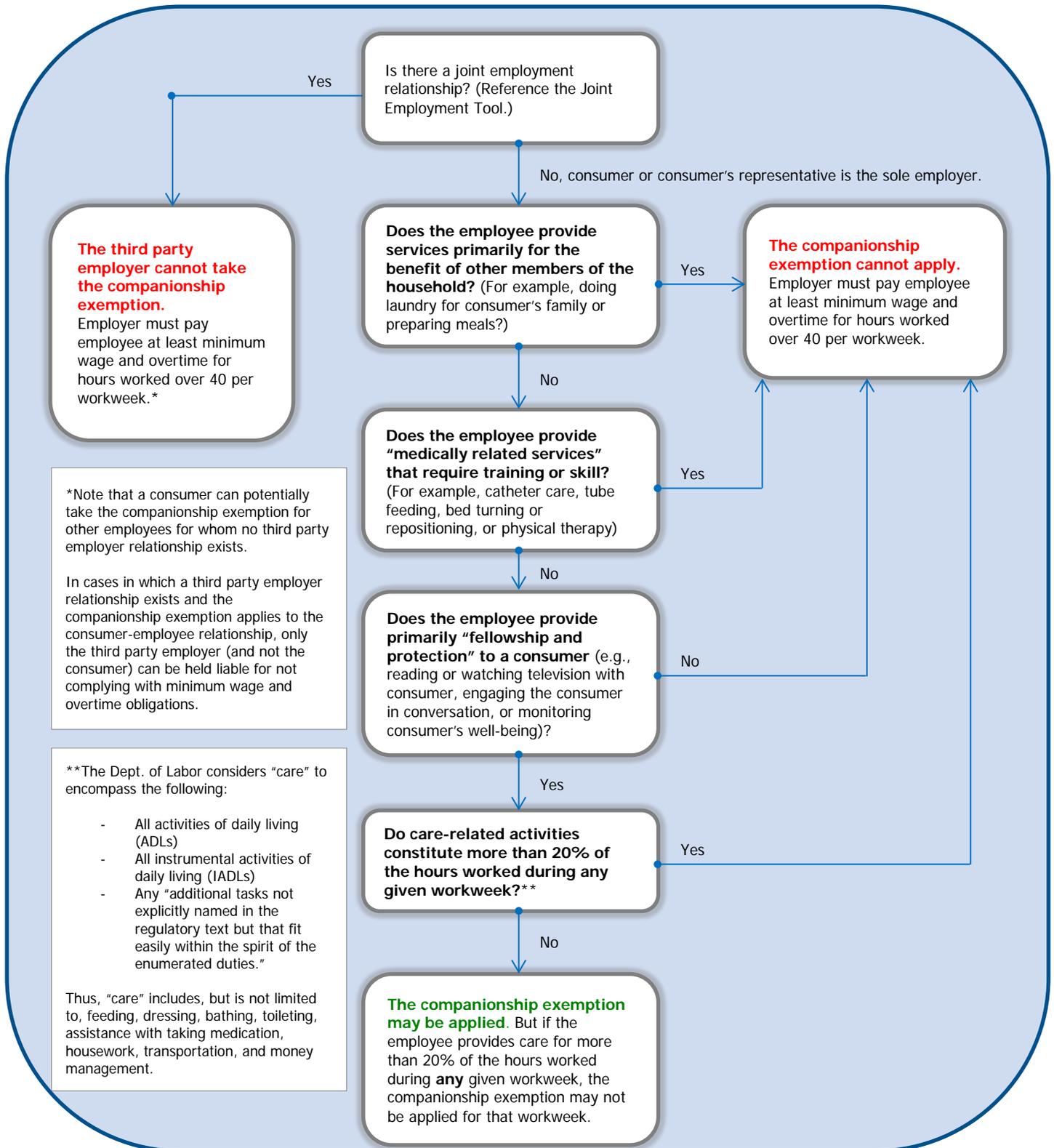
- ❖ The **Overview** decision tree will help stakeholders determine how the rules may or may not apply to them or their programs.
- ❖ The **Companionship Exemption** decision tree will help stakeholders determine whether the companionship exemption can be legally applied in a given employment context.
- ❖ The **Travel Time** decision tree will help stakeholders determine whether or not an employee's travel time must be compensated as hours worked under the FLSA.
- ❖ The **Sleep Time** decision tree will help stakeholders determine whether hours an employee spends sleeping must be compensated under the FLSA.
- ❖ The **Live-in Exemption** decision tree will help stakeholders determine whether or not the live-in worker exemption can be legally applied to a given employment context.
- ❖ The **Shared Living** decision tree will help stakeholders determine whether a worker who resides in the same household as a consumer is or is not an employee, thus rendering the worker either non-exempt or potentially exempt from FLSA protections.

What is the impact of the Department of Labor's new Home Care Rule on your program or organization?



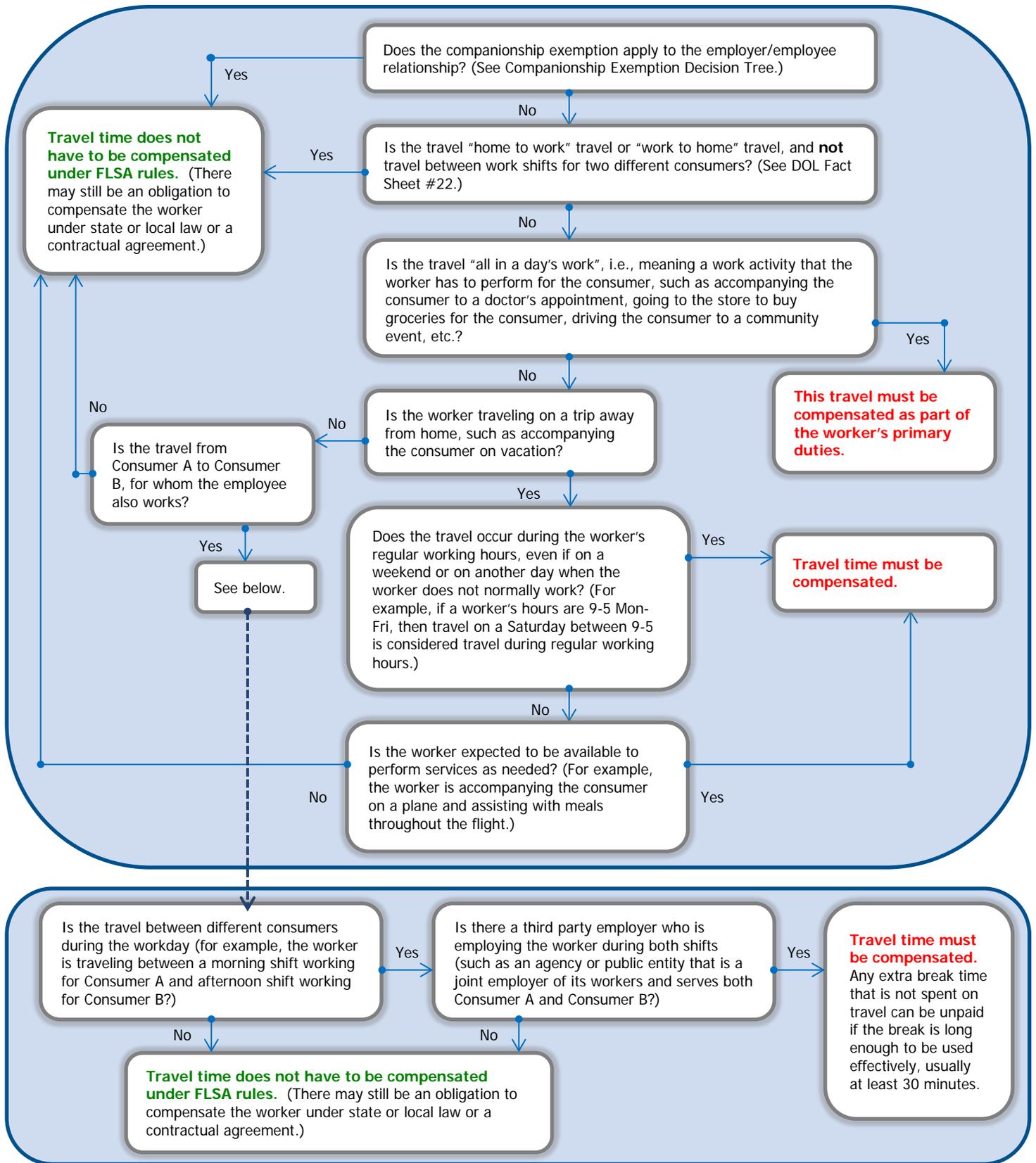
Overview Decision Tree

Can the companionship exemption apply to an employee?



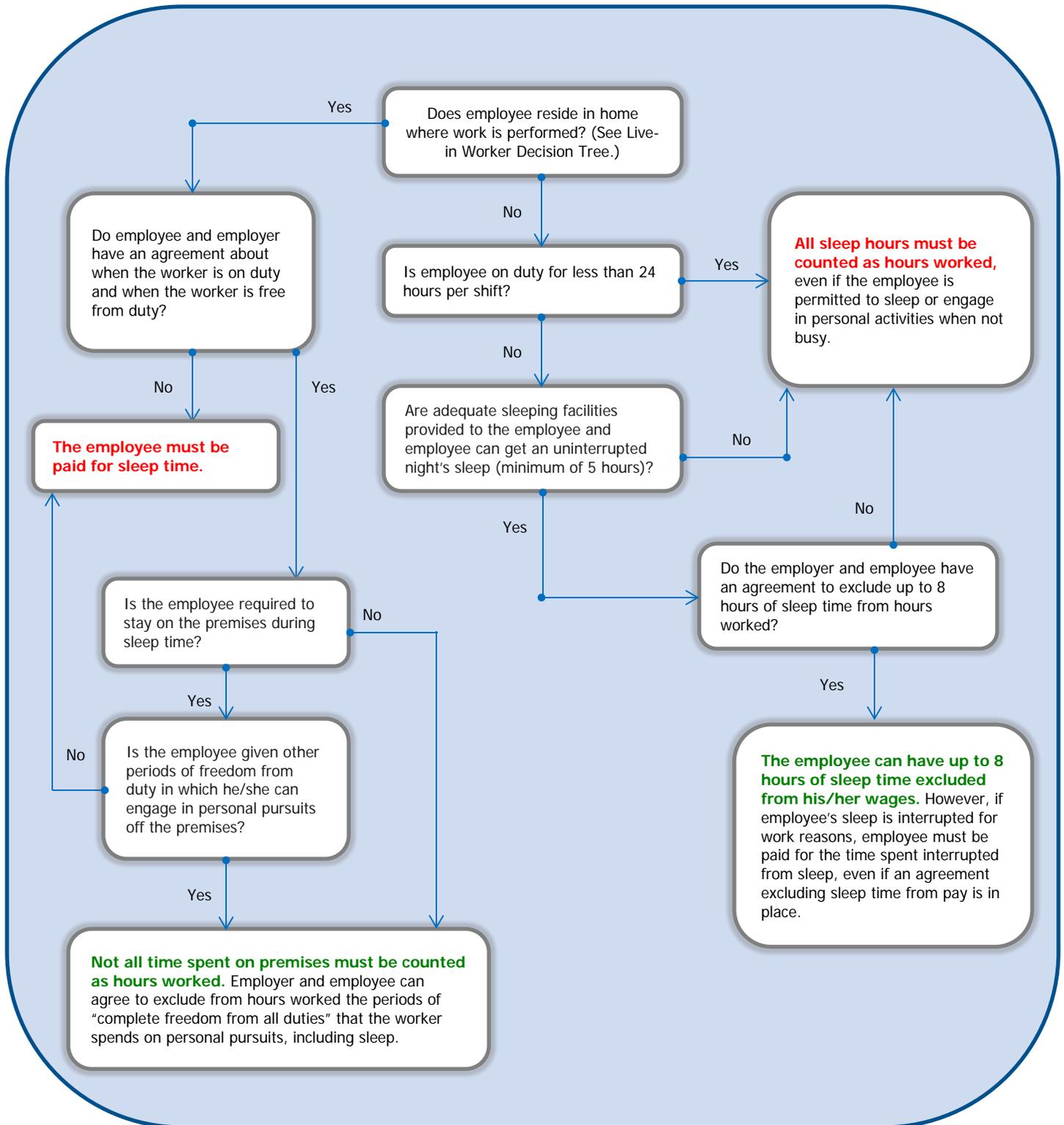
Companionship Exemption Decision Tree

Must travel time be compensated?



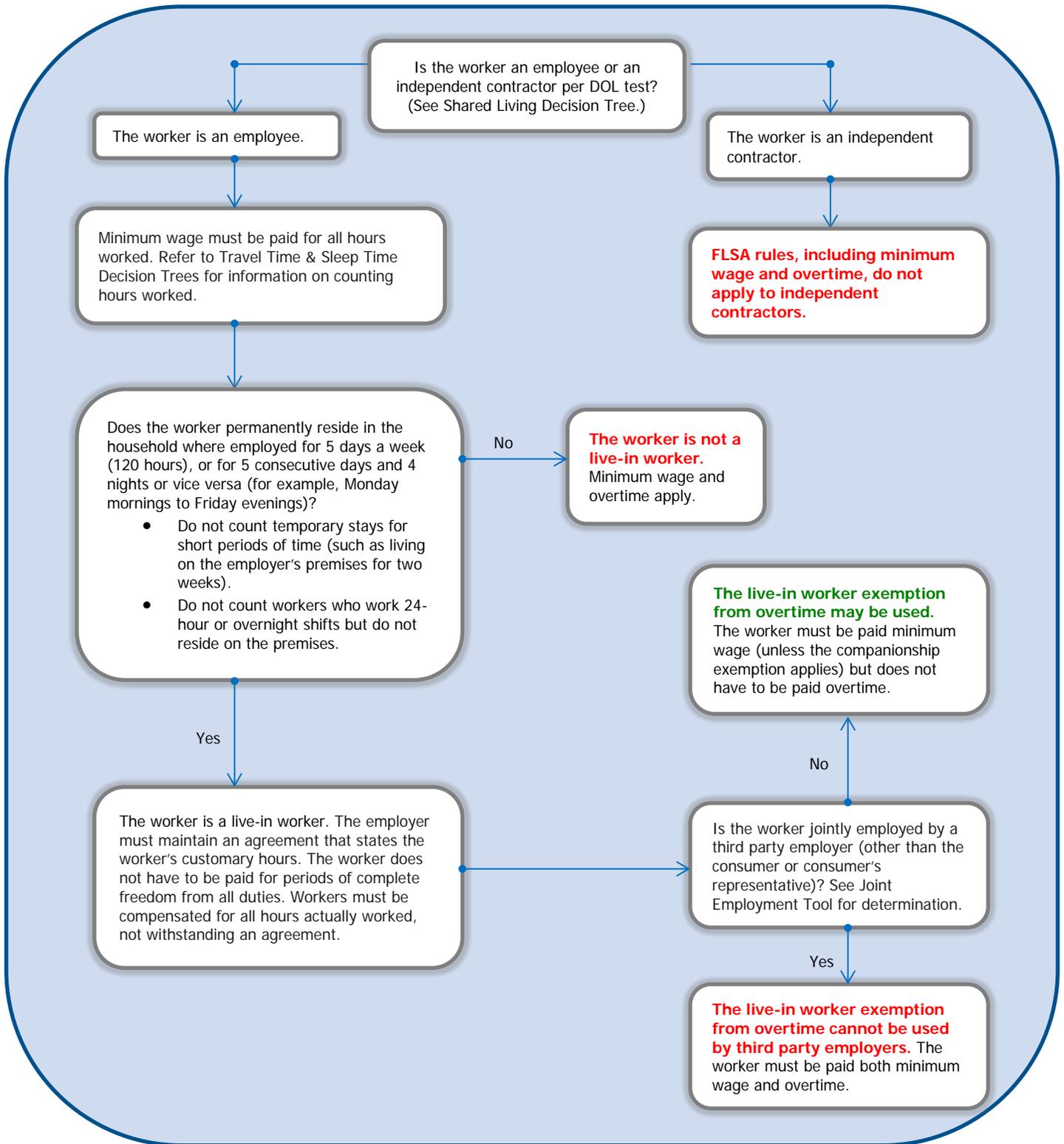
Travel Time Decision Tree

Must the employee be paid for sleep time?



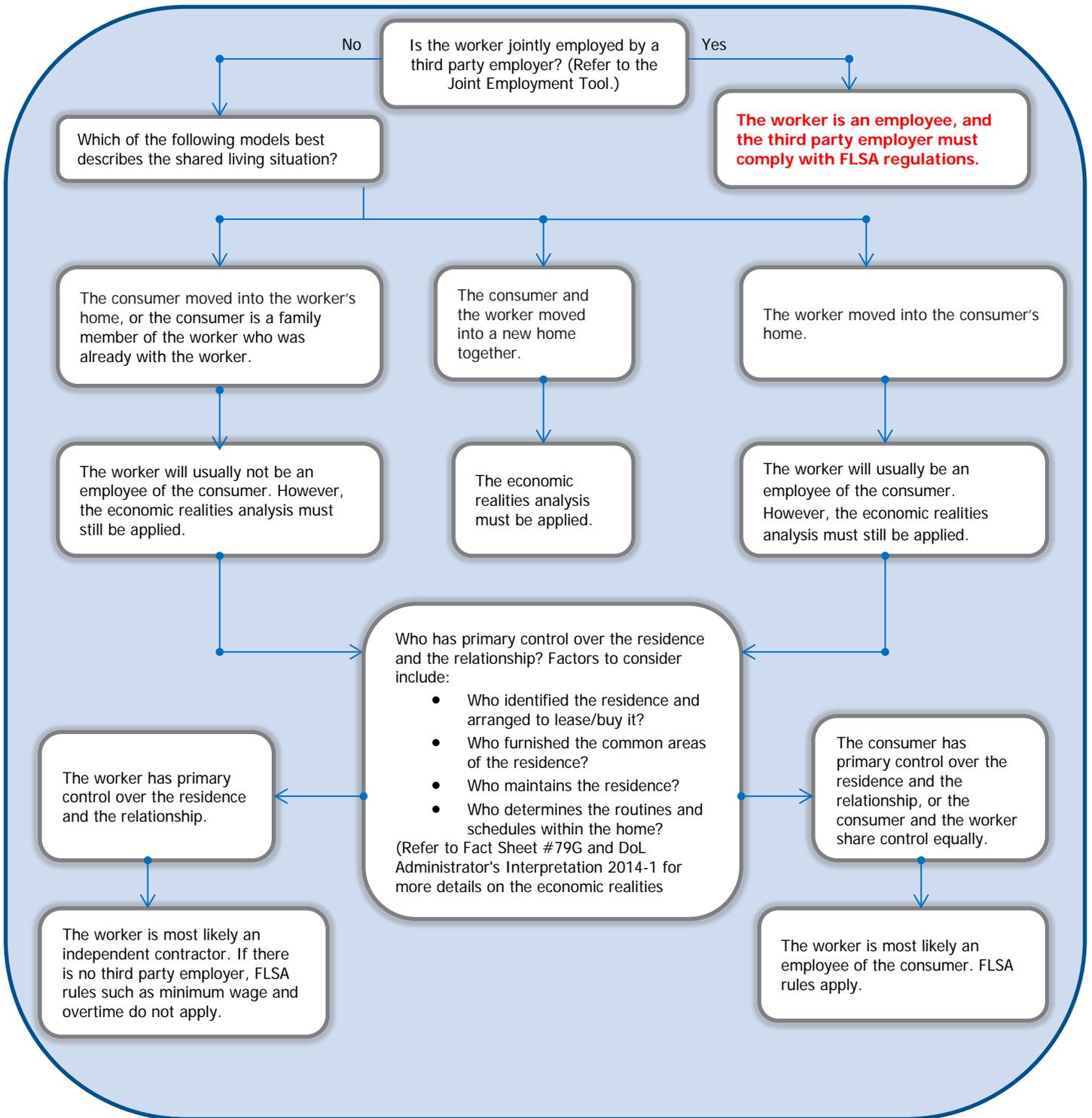
Sleep Time Decision Tree

Can the live-in worker exemption be applied?



Live-In Worker Decision Tree

Is a worker in a shared living arrangement an employee under the FLSA or an independent contractor?



Shared Living Decision Tree

4. Consumer Direction Program Design Resource

Third Party Joint Employment in Four Consumer Direction Models

States and managed care entities operate consumer direction programs, most of which are uniquely designed. The factors in the economic realities test may be implemented quite differently from program to program. The Department of Labor's (DOL's) Administrator's Interpretation 2014-2 guidance published on June 19, 2014³ presented several hypotheticals from consumer direction programs, highlighting the variance that exists across programs.

This resource outlines frameworks for four proposed models that can be used in consumer direction programs. The resource seeks to explain each model at a high level, outline who the expected employer(s) is/are under each of the common law and economic realities tests, present how the program might structure each of the key employer test factors and, finally, present some features of and considerations for the model. Some of these models may not currently exist in programs precisely as described here. Certainly variance on these models or other models altogether can occur in consumer direction, but when they do, the features and considerations presented for these four models may not apply. For example, these models outline those in which only a single entity is a third party joint employer with the consumer (if a joint employer exists in the model). If factors in the model were different, it would be possible to have multiple joint employers with a consumer (such as a state or managed care entity AND an F/EA). The factors and considerations of such a model would be different than those presented in the models here.

In a later addition to the Tool Kit, NRCPS will provide guidance on how these models may be implemented and operationalized.

About Employer Tests

Depending on the law or regulation that is being applied, different tests are used to determine if an employer/employee relationship exists between a given entity and worker. The Department of Labor uses a test known as the economic realities test for determining employer status. The economic realities test is the relevant employer test for the new Department of Labor home care rules, the FLSA companionship exemption, and live-in worker rules. To determine if a joint employer exists for FLSA purposes, as is important in maintaining compliance with the DOL home care rules, the economic realities test is utilized.

The Internal Revenue Service uses a different test—the common law test—for determining employer status when applying federal tax laws and regulations. In addition to being used for federal tax laws and regulations, the common law test determines who is an employee for

³ http://www.dol.gov/whd/homecare/joint_employment.html

purposes of the employer health insurance mandate of the Affordable Care Act and associated tax penalties, because the IRS was given authority to enact most of the mandate's regulations. State tax or labor rules could use either test or a different approach, but many state rules use the common law employer test.

Both the economic realities test and the common law test are established by court cases and involve several factors that must be considered when determining employer status. The factors can have different weights based on the circumstances. There is no mathematical formula to determine the outcome and no fixed number of factors that can establish whether an employer/employee relationship exists or does not between an entity and a worker. Under both tests the entire relationship must be examined; the factors are only used as a guide to evaluate the overall situation.

The economic realities test and the common law test can sometimes lead to different outcomes. It is therefore possible for an entity/worker relationship to be classified differently under different tests. For example, in certain circumstances an entity may be considered an employer or joint employer of a worker under the economic realities test, but not considered an employer of the same worker under the common law test. Similarly, a worker may be considered an independent contractor under the FLSA when applying the economic realities test, but could be considered an employee for IRS rules when applying the common law test.

Importantly, the common law test generally results in only a single entity being deemed a common law employer. The economic realities test, however, honors that more than one entity can simultaneously and jointly employ an employee. In other words, under the economic realities test, the test used in the application of the FLSA, multiple entities can be joint employers and jointly employ a single worker. There can very rarely, and essentially never in consumer direction, be multiple simultaneous common law employers of a worker.

That the economic realities test allows for joint employment is critical for the new home care rules. The new home care rules make clear that neither the companionship exemption nor live-in worker exemptions can be used if a third party employer is present in the employ of a home care worker. This means that if a worker provides service to a consumer, depending on the factors of the employment relationship, both the consumer and another third party, could jointly employ the employee. In such a scenario, a third party joint employer would exist and the third party employer could not utilize the companionship and live-in worker exemptions from the FLSA.

Model 1: High Consumer Control

In this model, maximum consumer choice and control is preserved with the consumer⁴ being the sole common law employer and the sole employer under the economic realities test. If the worker does not qualify for the companionship exemption per the narrowed rules effective January 1, 2015, minimum wage must be paid for all hours worked and overtime must be paid if a worker works more than 40 hours in a work week for a given consumer employer. This model does not allow the state, managed care entity or Fiscal/Employer Agent (F/EA⁵) to control the employee's work process and the state, managed care entity or F/EA's role in determining individual employee compensation is limited, despite the state or managed care entity being able to control the consumer's authorization or budget amount.

Employers in Model 1

Common law employer: Consumer (or person assigned by the consumer like a representative, family member, parent, spouse, child, friend, guardian)

FLSA Employer(s): Consumer (or person assigned by the consumer like a representative, family member, parent, spouse, child, friend, guardian)

Employer Test Factors in Model 1

Development of Consumer's Plan of Care or Assessment: Any entity, including a state or managed care entity or an entity acting as a provider or a contractor, can perform an assessment on the consumer or develop the consumer's plan of care. In this model, the plan of care should meet the requirements of the federal program under which it operates and should focus on the needs of and outcomes for the consumer and the resources available to meet those needs. The plan of care should not include the worker's weekly or daily schedule or rate of pay. It should not outline particular amounts of time for a task to take. The plan of care should not dictate a process the worker will use to deliver the services.

Worker qualifications: The state, managed care entity and F/EA have minimum qualifications for the worker. Any basic qualifications the state, managed care entity or F/EA have are solely to protect the consumer's safety, health and welfare, such as requiring a criminal background check

⁴ When referring to a consumer as an employer, in many consumer direction programs indeed the care recipient or consumer is the same individual carrying out the employer duties. However, in some cases, a person assigned by the consumer such as the consumer's representative, household member, family member or close friend actually performs the employer duties and is named on tax and other paperwork as the employer. For purposes of simplification, in this resource when referring to a consumer as employer, the term "consumer" also includes when the consumer's representative, household member, family member or close friend etc. actually performs the employer duties.

⁵ "Fiscal/Employer Agent", abbreviated "F/EA", is a term widely used in consumer direction to refer to an IRS employer agent under Internal Revenue Code §3504 and in accordance with IRS Revenue Procedure 2013-39 that also manages some fiscal aspects of the self direction program, such as adjudicating service delivery to a consumer service authorization, spending plan or budget. While most F/EAs are non-government entities or "Vendor F/EAs", "F/EA" in this document can also refer to a government entity performing the services. A government entity merely performing the employer agent payment, tax filing and tax depositing services is not likely to make the government entity a joint employer.

or First Aid or CPR certification. The consumer can individually set his/her own qualifications for the worker.

Hiring decisions: The consumer decides whom to hire.

Firing decisions: The consumer decides when and if a worker must be fired. The state or managed care entity may exclude the worker from the program in cases where the worker is determined to have committed fraud or who is found after an investigation to have abused a consumer.

Setting a wage rate: The consumer decides a worker's wage rate within his/her budget or decides within a large wage range (e.g. from minimum wage up to a service reimbursement rate less employer taxes). Any third party, including a state, managed care entity or F/EA, could establish the wage range.

Setting a cap or wage rate: Any third party, including a state, managed care entity or F/EA could establish the wage range or wage cap, while the consumer would decide the worker's wage rate within that range. The wage range must be large enough for the consumer to have meaningful control over the worker's pay rate.

Hours and scheduling: A dollar amount is provided to the consumer for his/her entire budget, or a dollar amount is provided for each service authorized for the consumer. The consumer must stay within his/her budgeted or authorized dollar amount. The consumer does all scheduling in collaboration with his/her workers.

Supervises, directs or controls the work: The consumer supervises, directs and controls the work performed by the worker. The state, managed care entity or other entity (e.g. a case manager) performs minimal functions focused on the well-being of the consumer (rather than any assessment or management of the worker).

Performs payroll or other administrative functions: F/EA

Model 1 Features

- **ACA Health Insurance Mandate:** The Affordable Care Act (ACA)'s employer mandate to provide health insurance to full-time employees does not apply, because the consumer is the common law employer and will not qualify as a large employer under the ACA.
- **Third Party Joint Employment:** A third party joint employer under the FLSA does not exist in this model.
- **Overtime:** For overtime pay to be due, the worker must:
 - Not qualify as a companion based on the duties the worker is performing (See *Companionship Exemption Decision Tree*); and
 - Work more than 40 hours in a work week for a single consumer employer
- **Minimum Wage:** At least minimum wage pay is required unless the worker qualifies as a companion based on the duties the worker is performing. (See *Companionship Exemption Decision Tree*).

- **Travel Time:** For any employee who provides services to more than one consumer in a program, no travel time payment must be made when an employee travels between consumers.⁶

Model 1 Considerations

- The FLSA companionship and live-in exemptions can be used if the worker actually qualifies for them based on his/her job duties or live-in status, per the narrowed requirements effective January 1, 2015. (See *Companionship Exemption Decision Tree* and *Live-In Worker Decision Tree*).
- Model 1 likely could not be used with collective bargaining because the collective bargainer would have control over compensation limits, which the Department of Labor considers to be a potentially strong indicator of employer status. However, this model could be used with collective bargaining in situations where the collective bargainer would not be deemed the joint employer when applying the factors in the economic realities test. An example of when collective bargaining and this model *may* co-exist is when the collective bargainer sets only the wage floor and the consumer maintains meaningful control of the worker's wage rate.
- Model 1 may be the model with the lowest administrative cost to the program.

Model 2: Hybrid Fiscal/Employer Agent

In this model, consumer choice and control is preserved with the consumer being the sole common law employer, but because the F/EA has some control over employee compensation, the consumer and F/EA are joint employers under the FLSA's economic realities test. Because the F/EA is a joint employer in this model, overtime must be paid when one worker works more than 40 hours in a work week while jointly employed by the F/EA. This model allows only the F/EA and consumer to control the employee's work process and the state and managed care entity's role in determining individual employee compensation is limited, despite the state or managed care entity being able to control the consumer's authorization or budget amount.

Employers in Model 2

Common law employer: Consumer (or person assigned by the consumer, such as a representative, family member, parent, spouse, child, friend, guardian)

FLSA Employer(s): Consumer (or person assigned by the consumer like a representative, family member, parent, spouse, child, friend, guardian) *and* Fiscal/Employer Agent

Employer Test Factors in Model 2

Development of Consumer's Plan of Care or Assessment: Any entity, including a state or managed care entity or an entity acting as a provider or a contractor, can perform an assessment on the consumer or develop the consumer's plan of care. In this model, the plan of care should

⁶ This is true unless the consumers share an employer (like a parent or family member) and the consumers live in different locations, but the employer is the common law and sole FLSA employer directing their work and he or she directs the worker to travel between the consumers or otherwise travel while on the job.

meet the requirements of the federal program under which it operates and should focus on the needs of and outcomes for the consumer and the resources available to meet those needs. The plan of care should not include the worker's weekly or daily schedule or rate of pay. It should not outline particular amounts of time for a task to take. The plan of care should not dictate a process the worker will use to deliver the services.

Worker qualifications: The state, managed care entity and F/EA have minimum qualifications for the worker. Any basic qualifications the state, managed care entity or F/EA have are solely to protect the consumer's safety, health and welfare, such as requiring a criminal background check or First Aid or CPR certification. The consumer can individually set his/her own qualifications for the worker. The F/EA may have additional qualifications, provided the qualifications do not overly restrict the consumer's choice of worker and the qualifications are required by program rules. The consumer can individually set his/her own qualifications for the worker.

Hiring decisions: The consumer decides whom to hire.

Firing decisions: The consumer decides when and if a worker must be fired. The state or managed care entity may exclude the worker from the program in cases where the worker is determined to have committed fraud or who is found after an investigation to have abused a consumer.

Setting a wage rate: The consumer or the F/EA decides a worker's wage rate within the consumer's budget or within a large wage range (e.g. from minimum wage up to the service reimbursement rate less employer taxes).

Setting a cap or wage rate: Any third party, including a state, managed care entity or F/EA could establish the wage range, while the F/EA would decide the worker's wage rate within that range. The wage range must be large enough for the F/EA to have meaningful control over the worker's pay rate.

Hours and scheduling: The consumer manages all scheduling within his/her authorized dollars or hours.

Supervises, directs or controls the work: The consumer supervises, directs and controls the work performed by the worker. The state, managed care entity or other entity (e.g. a case manager) performs minimal functions focused on the well-being of the consumer (rather than any assessment or management of the worker).

Performs payroll or other administrative functions: F/EA

Model 2 Features

- **ACA Health Insurance Mandate:** The ACA employer mandate to provide health insurance to full-time employees does not apply, because the consumer is the common law employer and will not qualify as a large employer.
- **Third Party Joint Employment:** The consumer and F/EA are FLSA joint employers.

- **Overtime:** Overtime pay is required when a worker works over 40 hours in a work week while jointly employed by the F/EA. This means that when a worker works more than 40 hours for one consumer or across multiple consumers in a work week when jointly employed by the F/EA, overtime pay is due for all hours worked over 40.
- **Minimum Wage:** At least minimum wage pay is always required.
- **Travel Time:** Compensation for travel time is required when a worker travels between shifts worked for different consumers while the worker is jointly employed by the F/EA (see *Travel Time Decision Tree*).

Model 2 Considerations

- The companionship and live-in exemptions to the FLSA cannot be used by the third party joint employer (i.e., the F/EA).
- The F/EA must track and pay travel time when a worker travels between shifts worked for different consumers while the worker is jointly employed by the F/EA.
- The F/EA, state or managed care entity must have plan to cover overtime costs when a worker works more than 40 hours in a work week while jointly employed by the F/EA⁷.
- This model requires the F/EA to have more liability and duties than in Model 1, which may be reflected in higher costs to the program.
- Depending on state law, the F/EA may have more Workers' Compensation liability in Model 2 than in Model 1 and therefore Workers' Compensation policies for each consumer or policies to otherwise cover workers in the consumers' homes may be required or desired. This can impact overall program cost.

Model 3: Fiscal/Employer Agent with State as Third Party Employer⁸

In this model, much consumer choice and control is preserved. While the consumer remains the common law employer, the consumer and the state will share a joint employment relationship for purposes of FLSA. Because the state has some control over employee compensation, the consumer and state are joint employers under the FLSA's economic realities test. The state is a joint employer in this model, so overtime must be paid when one worker works more than 40 hours in a work week while jointly employed by the state. If an employee works a total of over 40 hours per week while working part-time for two consumers respectively (e.g., employee works 20 hours per week for Consumer A and 25 hours per week for Consumer B), the employee must be paid overtime for hours worked over 40 in a work week. However, the overtime must be paid by the state rather than the consumer(s) in this scenario and may not be drawn from the consumers' budgets or authorizations.

⁷ The Centers for Medicare and Medicaid Services released a bulletin on options for Medicaid payments in the implementation of the Fair Labor Standards Act. See: Mann, Cindy, (2014). Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes. Washington, DC: Centers for Medicare and Medicaid Services, Center for Medicaid and CHIP Services.

⁸ Note this model could potentially apply to payers other than states. For example, a consumer and a managed care entity could share a joint employment relationship.

This model allows only the state and consumer to control the employee's work process, and the state is able to control the consumer's authorization or budget amount in addition to having control of employee compensation, such as setting the pay rate.

Employers in Model 3

Common law employer: Consumer (or person assigned by the consumer, such as a representative, family member, parent, spouse, child, friend, guardian)

FLSA Employer(s): Consumer (or person assigned by the consumer, such as a representative, family member, parent, spouse, child, friend, guardian) *and* state or managed care entity

Employer Test Factors in Model 3

Development of Consumer's Plan of Care or Assessment: Any entity, including a state or managed care entity or an entity acting as a provider or a contractor, can perform an assessment on the consumer or develop the consumer's plan of care. In this model if the state or managed care entity creates the plan of care, the plan of care can dictate the employee's daily or weekly schedule, the process by which the employee will deliver services, and the employee's rate.

Worker qualifications: The state or managed care entity may have qualifications to protect the consumer's safety, health and welfare or qualifications required by program rules. Any qualifications set by the state or managed care entity should not overly restrict the consumer's choice of worker. The consumer can individually set his/her own qualifications for the worker. The program may require ongoing public-sponsored training for workers.

Hiring decisions: The consumer decides whom to hire.

Firing decisions: The consumer decides when and if a worker must be fired. The state or managed care entity may exclude the worker from the program in cases where the worker is determined to have committed fraud or who is found after an investigation to have abused a consumer.

Setting a wage rate: The state or managed care entity decides the wage rate. The consumer has little if any control over the wage rate.

Setting a cap or wage rate: The state or managed care entity sets the wage cap or wage rate.

Hours and scheduling: The consumer schedules the worker most of the time. The state or managed care entity sets the number of hours/units or amount of money available to the consumer based on a budget or assessment and can have some control over the worker's daily or weekly schedule as established in the plan of care.

Supervises, directs or controls the work: The consumer manages the on-the-job work, but the state or managed care entity may engage in quality management activities more similar to daily supervision, such as making regular onsite visits to assess the provider's performance beyond ensuring the safety of the consumer.

Performs payroll or other administrative functions: F/EA

Model 3 Features

- **ACA Health Insurance Mandate:** The ACA employer mandate to provide health insurance to full-time employees does not apply, because the consumer is the common law employer and will not qualify as a large employer.
- **Third Party Joint Employment:** The consumer and state or managed care entity are FLSA joint employers.
- **Overtime:** Overtime pay is required when a worker works over 40 hours in a work week while jointly employed by the state. This means that when a worker works more than 40 hours for one consumer or multiple consumers in a work week when jointly employed by the state or managed care entity, the state or managed care entity must pay overtime for all hours worked over 40.
- **Minimum Wage:** At least minimum wage pay is always required.
- **Travel Time:** Compensation for travel time is required when a worker travels between shifts worked for different consumers while the worker is jointly employed by the state or managed care entity (see *Travel Time Decision Tree*).

Model 3 Considerations

- The companionship and live-in exemptions cannot be used. There is a third party employer, the state or managed care entity.
- The 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.
- The state or managed care entity must have plan to 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.
- The state or managed care entity 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.
- Complications arise if the state or managed care entity uses multiple F/EAs to serve the program. If a worker works for consumers who use different F/EAs while the state or managed care entity is a joint employer, the state or managed care entity 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 state or managed care entity must know what hours and travel time workers had with each F/EA and then must coordinate appropriate payment to the workers.
- This model requires the state or managed care entity to have more liability and responsibilities than in Model 1, Model 2 and Model 4.

Model 4: Agency with Choice⁹

In this model, some important consumer choice and control is preserved. However, because in the Agency with Choice model the agency is both the common law employer and a joint employer with the consumer under the FLSA's economic realities test, the agency has significant opportunity for control. This model works well for programs that encourage consumer choice and control and want a third party to have a role in overseeing the worker and setting worker rate of pay. In this model, the agency is a joint employer and overtime must be paid when one worker works more than 40 hours in a work week while jointly employed by the agency. This model allows only the agency and consumer to control the employee's work process and the state and managed care entity's role in determining individual employee compensation is limited—despite the state, managed care entity, or agency being able to control the consumer's authorization or budget amount. The agency can have a role in interviewing workers, terminating workers, selecting workers, recruiting workers, training workers and setting the workers' pay rates while the consumer should maintain a lead role in selecting his/her workers, interviewing workers, discharging workers from serving the consumer, scheduling workers, and managing the workers' on-the-job duties.

Employers in Model 4

Common law employer: Agency

FLSA Employer(s): Agency and consumer (or person assigned by the consumer like a representative, family member, parent, spouse, child, friend, guardian)

Employer Test Factors in Model 4

Development of Consumer's Plan of Care or Assessment: Any entity, including a state or managed care entity or an entity acting as a provider or a contractor, can perform an assessment on the consumer or develop the consumer's plan of care. In this model, the plan of care should meet the requirements of the federal program under which it operates and should focus on the needs of and outcomes for the consumer and the resources available to meet those needs. The plan of care should not include the worker's weekly or daily schedule or rate of pay. It should not outline particular amounts of time for a task to take. The plan of care should not dictate a process the worker will use to deliver the services.

Worker qualifications: Any qualifications set by the state or managed care entity are solely to protect the consumer's safety, health and welfare. The agency may have additional qualifications, provided the qualifications do not overly restrict the consumer's choice of worker. The consumer can individually set his/her own qualifications for the worker.

Hiring decisions: The consumer decides whom to hire.

⁹ For more on Agency with Choice see, *Agency with Choice: Key Components for Practical Implementation while Maintaining Participant Choice and Control*. National Resource Center for Participant-Directed Services, Boston College, 2012.

Firing decisions: The consumer decides when and if a worker must be fired. The state or managed care entity may require termination from the program in cases where the consumer's safety, health or welfare is at risk or fraud has occurred.

Hiring decisions: The consumer refers selected workers to the agency for hire. The agency, at a minimum, interviews the worker and reviews USCIS Form I-9 documents. In general, the agency hires whom the consumer refers. In some infrequent circumstances, the agency denies hiring the worker referred by the consumer. The agency can also suggest workers to the consumer, but to preserve consumer direction, this should be uncommon.

Firing decisions: The consumer can discharge the worker from his/her home, but the agency actually fires the worker if the agency does not have other duties for the worker to perform under the agency's employ. In cases wherein the consumer is discharging the worker for an illegal reason, the agency must continue to employ the worker or prohibit the consumer from discharging the worker in order to protect the agency.

Setting a wage rate: The agency decides the wage rate or decides within a large wage range (e.g. from minimum wage up to a service reimbursement rate less employer taxes). Any third party, including a state or managed care entity could establish the wage range.

Setting a cap or wage rate: Any third party, including a state, managed care entity or agency could establish the wage range, while the agency would decide the worker's wage rate within that range.

Hours and scheduling: The consumer or agency schedule the worker. The agency sets the number of hours/units or amount of money available to the consumer based on a budget or assessment provided by the state or managed care entity.

Supervises, directs or controls the work: Consumer manages much of the on-the-job work, but the agency can provide direction and may discipline the worker or provide feedback to the worker.

Performs payroll or other administrative functions: Agency

Model 4 Features

- **ACA Health Insurance Mandate:** Agency could qualify as a large employer under the ACA employer mandate if agency employs 50 or more full-time employees, including those providing services to consumers.¹⁰ In this case, those full-time employees must be provided ACA compliant health insurance or the agency must pay the penalties.
- **Third Party Joint Employment:** The consumer and agency are FLSA joint employers.

¹⁰ For the purposes of the Affordable Care Act, a full-time employee is defined as any employee who works at least 30 hours per week. Employees who work varied hours, e.g. 15 hours one week and 40 hours the next, are deemed "variable hour employees" and special tests apply to determine whether the employee should be considered full-time or part-time.

- **Overtime:** Overtime calculations are required when a worker works 40 or more hours in a work week while jointly employed by the agency. This means that when a worker works 40 or more hours for one consumer or multiple consumers who use the same agency in a work week, overtime pay is due for hours over 40.
- **Minimum Wage:** At least minimum wage pay is always required.
- **Travel Time:** Compensation for travel time is required when a worker travels between shifts worked for different consumers while the worker is jointly employed by the agency (see *Travel Time Decision Tree*).

Model 4 Considerations

- The companionship and live-in exemptions cannot be used. There is a third party employer, the agency.
- The agency must track and pay travel time when a worker is jointly employed by the agency while the worker works for multiple consumers and travels between the consumers between shifts.
- The agency must have plan to cover overtime costs when a worker works more than 40 hours in a work week while jointly employed by the agency.¹¹
- This model requires the agency to have more liability and duties than in Model 1 and therefore likely requires higher compensation for the agency than in Model 1.
- This model requires the agency to provide health insurance or pay penalties to qualifying employees (assuming the agency has enough full-time employees to qualify under the ACA as a large employer) and therefore could result in higher program costs than in Models 1, 2, and 3.

¹¹ The Centers for Medicare and Medicaid Services released a bulletin on options for Medicaid payments in the implementation of the Fair Labor Standards Act. See: Mann, Cindy, (2014). Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes. Washington, DC: Centers for Medicare and Medicaid Services, Center for Medicaid and CHIP Services.

The Models At-a-Glance

This chart shows some of the key factors and considerations reviewed in this document. A “✓” in the model’s column indicates that the factor or consideration exists for the model.

Factors and Considerations	Model 1	Model 2	Model 3	Model 4
Consumer ¹² is Common Law Employer	✓	✓	✓	
Consumer is sole FLSA Employer	✓			
F/EA or agency is joint third party FLSA Employer with consumer		✓		✓
State or managed care entity is joint third party FLSA Employer with consumer			✓	
Plan of Care developed by entity of program’s choice	✓	✓	✓	✓
Plan of Care does not specify worker schedule, rate, or process of delivering service	✓	✓		✓
Plan of Care can (but doesn’t have to) specify worker schedule, rate, or process of delivering service			✓	
State or managed care entity can have minimum qualifications for worker. Qualifications limited to those for consumer health and safety or to prevent program fraud	✓	✓		✓
F/EA or agency has additional qualifications for the worker as required by program rules		✓		✓
State or managed care entity has additional qualifications for the worker as required by program rules			✓	
Consumer establishes worker qualifications of his/her choice	✓	✓	✓	✓
Consumer decides whom to hire	✓	✓	✓	
Consumer refers selected worker to the agency for hire; agency rarely denies hiring worker				✓
Consumer makes firing decisions	✓	✓	✓	
Consumer determines when he/she no longer wants service of worker; agency either re-assigns worker or fires worker				✓
State or managed care entity requires termination from the program in cases where the consumer’s safety, health or welfare is at risk or fraud has occurred	✓	✓	✓	✓

¹² When referring to a consumer as an employer, in many consumer direction programs indeed the care recipient or consumer is the same individual carrying out the employer duties. However, in some cases, the consumer’s representative, household member, family member or close friend actually performs the employer duties and is named on tax and other paperwork as the employer. For purposes of simplification, in this resource when referring to a consumer as employer, the term “consumer” also includes when the consumer’s representative, household member, family member or close friend etc. who actually performs the employer duties.

Factors and Considerations	Model 1	Model 2	Model 3	Model 4
Consumer can set the worker wage rate within his/her budget or within a range that allows the consumer meaningful control	✓			
The F/EA decides the wage rate, or decides within a meaningful wage range established by a third party, such as a state or managed care entity		✓		
The state or managed care entity decides the wage rate, or decides within a meaningful wage range established by a third party			✓	
The agency decides the wage rate, or decides within a meaningful wage range established by a third party, such as a state or managed care entity				✓
Consumer schedules the worker	✓	✓		
Consumer schedules the worker most of the time but the state or managed care entity may have some control over the worker's daily or weekly schedule as established in the plan of care			✓	
Agency or consumer schedules the worker				✓
Consumer supervises, directs, and controls the worker's on-the-job work	✓	✓	✓	
Consumer manages much of the on-the-job work, but the agency can provide direction and may discipline the worker or provide feedback to the worker				✓
F/EA or agency performs payroll and administrative functions	✓	✓	✓	✓
Model is not likely subject to ACA employer health insurance mandate requirements	✓	✓	✓	
Model is likely subject to ACA employer health insurance mandate requirements				✓
Third party joint FLSA Employer does not exist	✓			
Third party joint FLSA Employer is F/EA		✓		
Third party joint FLSA Employer is state or managed care entity			✓	
Third party joint FLSA Employer is agency				✓
Overtime is due when worker does not qualify for companionship or live-in worker exemptions and works more than 40 hours in work week for a single consumer	✓	✓	✓	✓
Overtime is due when worker works more than 40 hours in work week while jointly employed by the F/EA ¹³		✓		
Overtime is due when worker works more than 40 hours in work week while jointly employed by the state or managed care entity ¹⁴			✓	
Overtime is due when worker works more than 40 hours in work week while jointly employed by the agency ¹⁵				✓
At least minimum wage pay is required unless the worker qualifies as a companion or live-in worker based on the duties the worker is performing	✓			

¹³ That is, when working for multiple consumers who use the same F/EA.

¹⁴ That is, when working for multiple consumers who share a joint employment relationship with the state or managed care entity.

¹⁵ That is, when working for multiple consumers who use the same agency.

Factors and Considerations	Model 1	Model 2	Model 3	Model 4
At least minimum wage pay is always required		✓	✓	✓
Travel time between work shifts for different consumers is not compensated as work time	✓			
Travel time between work shifts for different consumers is compensated as work time when both consumers use the same F/EA		✓		
Travel time between work shifts for different consumers is compensated as work time when both consumers have a joint employment relationship with the state or managed care entity			✓	
Travel time between work shifts for different consumers is compensated as work time when both consumers use the same agency				✓
Complications arise if the state or managed care entity uses multiple F/EAs to serve the program			✓	
May be higher cost for F/EA, agency, state or managed care entity than Model 1 as F/EA, agency, state or managed care entity has more liability and risk than in Model 1 and with a third party joint employer there is greater opportunity for overtime pay		✓	✓	✓
May be higher cost than Models 1 or 2 as health insurance likely must be provided to qualifying workers and with a third party joint employer there is greater opportunity for overtime pay than in Model 1				✓