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Upcoming Department of Labor Changes Affecting Personal Care Services: What CILs Need to Know

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The New Department of Labor Home Care Rule

- Final rule promulgated by the U.S. Department of Labor on September 17, 2013
- Will go into effect on January 1, 2015
- Narrowed exemptions for companions and live-in workers under the FLSA
  - Third-party employers no longer eligible for these exemptions
- DoL also released:
  - Administrator’s Interpretation No. 2014-1 (on shared living programs)
  - Administrator’s Interpretation No. 2014-2 (on joint employment of domestic service workers)
  - Announcement of Time-Limited Non-Enforcement Policy
Agenda

• What is the companionship exemption?
  - What kind of work qualifies for the exemption?

• What is the live-in worker exemption?
  - New recordkeeping requirements

• Shared living guidance
  - When can a shared living provider be an independent contractor?

• New joint employment rules and implications
  - Factors that determine joint employment
  - Companionship and live-in worker exemptions not available to third-party employers
  - Overtime
  - Travel time

• Time-limited non-enforcement policy
  - What are the risks of delaying compliance?
The New Companionship Exemption Rule

For more information, please reference the Companionship Exemption Decision Tree from NRCPDS’ FLSA Home Care Rule Tool Kit (http://www.bc.edu/schools/gssw/nrcpds/tools/flsahomecaretoolkit.html) p. 9.
What is the Companionship Exemption?

- Exemption from minimum wage and overtime
- Worker’s primary duty must be providing **fellowship and protection** to an elderly person or person with an illness, injury or disability
  - Fellowship: social, physical and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events
  - Protection: accompanying the person to monitor their safety and well-being
- **Cannot be used by third party employers**
Care Services

• Care services are allowed under the companionship exemption, but are capped at 20% of the worker’s hours per care recipient and per week
• “Care services” means:
  – Assistance with activities of daily living
    • “Dressing, grooming, feeding, bathing, toileting, and transferring”
  – Assistance with instrumental activities of daily living
    • “Meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care”
Duties Not Allowed Under the Companionship Exemption

• Work for other members of the household
  – Except for incidental benefits to other household members (e.g. dusting in a shared room, or household member eating leftovers)

• Medically related services
  – Services that typically require medical training and are typically performed by trained healthcare personnel such as nurses or nursing assistants
  – Examples: “Catheter care, turning and repositioning, ostomy care, tube feeding, treating bruises or bedsores, and physical therapy”
  – Does not include emergency first aid such as CPR, or minor health-related tasks such as applying an adhesive bandage

• Exemption cannot be claimed in a **workweek** when any such services are performed

• 20% allowance does not apply
Who Can Claim the Exemption?

• Exemption only available to the consumer, or to a member of the family or household employing the companion
  - Family and household defined broadly: authorized representatives, housemates, extended relatives qualify
• Third-party employers cannot claim the exemption, even in joint-employment situations
• See economic realities test factors in Administrator’s Interpretation 2014-2 to determine if there is a joint employer
What Happens if the Companionship Exemption Doesn’t Apply?

• If the companionship exemption cannot be claimed, then FLSA rules apply:
  - Minimum wage
  - Overtime
    • Unless the live-in exemption can be claimed
  - “Hours worked” are counted by FLSA rules:
    • “On duty” time
    • Travel time
    • Sleep time
Questions?
The New Live-in Worker Exemption Rule

For more information, please reference the Live-in Worker Decision Tree from NRCPDS’ FLSA Home Care Rule Tool Kit http://www.bc.edu/schools/gssw/nrcpds/tools/flsahomecaretoolkit.html p. 12.
Live-in Workers

- Exempt from overtime
- Not exempt from minimum wage
- Applies to domestic service workers living in the household where they are employed, if they live there “permanently” or “on an extended basis”
  - At least 5 consecutive days and 4 nights per week, or vice versa, e.g. 9 a.m. Monday to 5 p.m. Friday
  - 24-hour shifts do not automatically turn the worker into a live-in worker
- Domestic service = providing “services of a household nature in or about a private home”
  - Includes housekeeping, cooking, cleaning, personal care, home health services, etc.
New Rules for Live-in Workers

• **Third-party employers can’t claim the live-in worker exemption**

• New recordkeeping requirements
  - Must record the exact hours worked each day
  - Agreement regarding regular working hours also required but not sufficient
  - Worker must be paid for actual number of hours worked, even if different from the agreement
Sleep Time

- When the consumer and provider live together, up to 8 hours of sleep time per night can be unpaid if:
  - The sleep period is at night
  - Interruptions are paid
  - The worker is paid a reasonable number of hours of work other than sleep time during the week

- Examples:
  - Not allowed: a provider’s only responsibility is to spend the night with the consumer, and the provider is paid for 1 hour of work in the morning
  - Allowed: 8 hours of sleep time excluded if the provider is paid for 2 hours of work in the morning or evening
  - Allowed: sleep time excluded on weeknights, and provider is paid for 4 hours per day on 2 weekdays and 2 weekend days
Distinguishing On-Duty from Off-Duty Activities

• Some activities are always work
  – Example: provider helping the consumer bathe
• But some activities could be either work or leisure
  – Example: provider and consumer attend a community event together in the evening
  – Could be either leisure, or work if the provider’s responsibility is to help the consumer attend community events
• Consumer and provider should enter into a “reasonable agreement”
  – Agreement specifies which tasks the provider is required to perform
Shared Living

For more information, please reference the Shared Living Decision Tree from NRCPDS’ FLSA Home Care Rule Tool Kit
New Shared Living Guidance

• New guidance for shared living arrangements
• Issued by the Department of Labor in March 2014
• Can a provider be an FLSA independent contractor?
  - *If there is a third-party employer, then the provider will not be an independent contractor*
• See the *Shared Living Decision Tree* from NRCPDS’ FLSA Home Care Rule Tool Kit
  
  [http://www.bc.edu/schools/gssw/nrcpds/tools/flsahomecaretoolkit.html](http://www.bc.edu/schools/gssw/nrcpds/tools/flsahomecaretoolkit.html), p. 13
Shared Living Situations

- Consumer moves into the provider’s home (or the consumer and provider were already sharing a home)
- Provider moves into the consumer’s home
- Provider and consumer move into a new home together
Consumer Moves into Provider’s Home

• Provider will often be an FLSA independent contractor if:
  – The provider usually decides the schedule and daily activities (even if taking into account the consumer’s preferences)
  – The provider undertakes the main investment in maintaining the residence

• Exception:
  – The provider is not an FLSA independent contractor if the provider is the employee of a third party

• Economic realities test must be applied
• Same analysis applies even if consumer and provider were already living together
Provider Moves into Consumer’s Home

• Provider will usually be an employee of the consumer, because:
  – Consumer usually decides the schedule and daily activities and instructs the provider what tasks to perform
  – Consumer undertakes the main investment in acquiring and maintaining the home
• Economic realities test must be applied
Consumer and Provider Move into New Home

• If the provider has primary control of the residence and the relationship, then provider is an FLSA independent contractor (unless there is a third-party employer)

• If consumer has primary control, or the provider and consumer share control, then provider is an employee of the consumer

• Factors:
  - Who identified the residence and arranged to buy or lease it
  - Who pays the mortgage or rent
  - Who furnished the common areas of the residence
  - Who cleans and maintains the residence
Questions?
Joint Employment

For more information, please reference the Indicators of Joint Employment Status from NRCPDS’ FLSA Home Care Rule Tool Kit
http://www.bc.edu/schools/gssw/nrcpds/tools/flsahomecaretoolkit.html p. 5.
Economic Realities Test Joint Employment Factors

- Power to hire and fire
  - Provider qualifications
  - Hiring decisions
  - Firing decisions
- Control over the wage and other employment benefits
  - Setting a wage rate
  - Reimbursement rates
  - Setting a cap or wage range
- Hours and scheduling
- Supervises, directs, or controls the work
- Performs payroll and other administrative functions
- Other factors
Understanding the Factors

• Each factor can be a “strong,” “moderate,” or “weak” indicator of joint employment

• Factors are a guide to answer the question:
  – On whom is the employee ultimately economically dependent in the course of this employment?

• “[B]ecause the ultimate question is one of economic dependence, the factors are not to be applied as a checklist, but rather the outcome must be determined by a qualitative rather than a quantitative analysis.” – Administrator’s Interpretation 2014-2
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.
Common Law & Economic Realities Tests

- 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

CIL

FLSA
What DoL Joint Employment Does NOT Mean

- DoL employer determination ≠ IRS employer determination
- IRS does not recognize joint employment
- DoL guidance does not change IRS rules about joint employment
  - Economic realities test vs common law test
  - This guidance has no effect on tax filing requirements
- ACA employer mandate remains unchanged; uses common law test
  - If a consumer employer is the common law employer, ACA Health Insurance Mandate still doesn’t apply to consumer
Implications of Joint Employment under DoL Rules

• Companionship and live-in worker exemptions not available to the third-party employer
  – Minimum wage and overtime must be paid
• Joint employer is liable for FLSA violations such as unpaid minimum wage or overtime
• Hours worked for different consumers must be added up for overtime if the consumers are served by the same joint employer entity
• Worker travel time between consumers must be paid if there is a joint employer
**Overtime Scenario**

- Ed Employee provides services to two consumers served by the same CIL: to Carrie Consumer for 20 hours/week and to Carl Consumer for 30 hours/week
- The CIL is deemed a joint employer of care providers in this program
- Carrie and Carl each have their own EIN and are considered employers by the IRS
- Does the CIL have to pay overtime to Ed Employee?
CIL as Joint Employer

Carrie Consumer
- 20 hrs/week

Ed Employee
- 50 hours/week

Carl Consumer
- 30 hrs/ week

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Travel Time

• Ed Employee provides services:
  – to Carrie Consumer from 8 am to 11 am, and
  – to Carl Consumer from 12:30 pm to 5 pm
• Ed drives from Carrie’s home to Carl’s home every day, and stops on the way at a pizza place for 30 minutes to get lunch for himself
• Driving straight from Carrie’s home to Carl’s home would take 1 hour without the stop for lunch
• Carl and Carrie receive services through the same CIL, which is deemed is a joint employer of workers by DoL rules
• Does Ed have to be paid for travel time?
What gets Paid?

Carrie’s home

Ed’s home

20 minutes Commute

40 minutes Commute

1 hour driving distance

Driving on the job for joint employer

Carl’s home

Lunch: 30 minutes
Questions?
Time-Limited Non-Enforcement Policy
What is Non-Enforcement?

- DoL announced a “Time-Limited Non-Enforcement Policy” affecting the Homecare Rule
- Effective date of the Rule remains January 1, 2015
- DoL will not bring enforcement actions against employers violating the Rule for the first 6 months (until June 30, 2015)
- DoL will exercise discretion in deciding whether to bring enforcement actions against an employer for the subsequent 6 months (July 1, 2015 to December 31, 2015)
  - DoL will take into account the employer’s efforts to bring itself into compliance
Risks in Delaying Compliance

• DoL non-enforcement does not preclude private lawsuits for violations of the FLSA (including Home Care Rule)
  - Back wage liability starts accruing on January 1, 2015
  - Likelihood of private action unclear
    • Back wage damages are small, but
    • Successful FLSA litigants can recover legal fees and double damages
    • Class action lawsuits are possible
• Safest practice is to comply with the Home Care Rule as of its effective date of January 1, 2015
Questions?
Wrap Up, Evaluation, and Contact Information

Please *click the link below* to complete your evaluation of this program:

https://vovici.com/wsb.dll/s/12291g574e7

Contact:

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