# We Count on **Home Care**

## Home Care Final Rule & Shared Living Guidance

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

1-866-4US-WAGE
WWW.DOL.GOV/WHD

# Introduction

- The Fair Labor Standards Act (FLSA) is the federal law that requires employers to pay employees minimum wage and overtime.
- It already applies to some home care services, and as of January 1, 2015 (the effective date of the October 1, 2013 Final rule), it will apply to a broader range of such services.

# Introduction

Today, we are going to provide a summary of:

1. The home care Final Rule
2. DOL guidance regarding shared living arrangements

# Topic 1

# Home Care Final Rule

# Final Rule

- There are two exemptions from the FLSA relevant to home care work:
  - The FLSA's minimum wage and overtime requirements do not apply to **domestic service employees who provide "companionship services."**
  - The FLSA's overtime requirement does not apply to employees who are **"live-in" domestic service employees**.
- The Final Rule updated these exemptions.

"Domestic service employment" means work in the private home of the person receiving services.

# Final Rule

## Who may claim the exemptions

- Under the Final Rule, third party employers of home care providers MAY NOT claim the companionship services or live-in domestic service employee exemptions.
  - A third party employer is any employer other than the consumer or the consumer's family or household.
  - A third party employer could be, for example, a private home care agency or a public agency that administers a consumer-directed program.
- In other words, the exemptions are only available to the consumer or the consumer's family or household.

# Final Rule

## Revised definition of “companionship services”

- Under the Final Rule, “companionship services” means the provision of **fellowship** and **protection**.
- It includes the provision of **care** if the care is provided along with fellowship and protection and does not exceed 20% of total hours worked per consumer per workweek.
- It does not include domestic services provided primarily for benefit of other members of the household.
- It does not include **medically related services**.

# Final Rule

**Revised definition of "companionship services"**

- **Fellowship** means engaging the person in 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** means being present with the person in his or her home, or to accompany the person when outside of the home, to monitor the person's safety and well-being.

# Final Rule

## Revised definition of "companionship services"

- **Care** means assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs).
- **Medically related services** means services that typically require and are performed by trained personnel, such as RNs, LPNs, or CNAs.
  - Medically related services may be invasive, sterile, or otherwise require the exercise of medical judgment.
  - Whether services are medically related is based on the nature of the task, NOT the training or occupational title of the worker.

# Final Rule

## Live-in domestic service employee

- A live-in domestic service employee is a worker who resides in the private home where she works on a "permanent basis" or for "extended periods of time."
  - **Permanent basis** means works and sleeps on the employer's premises seven days per week and therefore has no home of his or her own other than the one provided by the employer.
  - **Extended periods of time** means works and sleeps on the employer's premises for five days a week (120 hours or more) OR works and sleeps on the employer's premises for five consecutive days or nights.

*Note*: Direct care workers who work 24-hour shifts are not necessarily live-in domestic service employees.

# Final Rule

## Live-in domestic service employee

- Under the FLSA, an employer and a live-in domestic service employee may enter an agreement regarding the employee's meal, sleep, and other break time (*i.e.*, time for which the employee, if completely free from duty, need not be paid).
  - The rules regarding this reasonable agreement apply to all employers of live-in employees, including third party employers who may not claim the live-in domestic service employee exemption.

# Final Rule

## Live-in domestic service employee

- The FLSA requires that the employer keep a copy of this agreement.
- Under the Final Rule, the employer must also keep accurate records of hours actually worked by the live-in domestic service employee.
  - The employer may assign the employee the task of creating and submitting those records to the employer, but the employer is ultimately responsible for having them.

# Topic 2

# Shared Living

# Shared Living

- The Department received many questions about the Rule's effect on shared living and adult foster care programs.
- In response, in March 2014, the Department released guidance regarding the application of the FLSA to shared living arrangements, including adult foster care and paid roommate situations.
  - Administrator's Interpretation No. 2014-1
  - Fact Sheet #79G

The guidance is available on our home care website, at:
http://www.dol.gov/whd/homecare/shared_living.htm

# Shared Living

- By “shared living,” the Department means arrangements in which the consumer and provider live together.
- This term includes programs often called adult foster care, host home, paid roommate, supported living, life sharing, etc.
  - It does not refer to roommates or family who have no expectation of payment, i.e., provide exclusively natural supports.
  - It does not refer to programs in which services are provided in group homes or via shift work, regardless of whether the programs are called by these names.
  - It does not necessarily mean “live-in” under the FLSA as discussed earlier.

# Shared Living

- For each shared living arrangement, the relevant questions are:
  1. Does the FLSA apply?
  2. If so, how do employers comply with the FLSA?
- The guidance groups shared living arrangements into two major categories:
  - those that occur in the provider's home (adult foster care/host home) and
  - those that occur in the consumer's home (paid roommate scenarios).

# Shared Living

**In a provider's home**

- The FLSA applies to employees, not independent contractors.
  - A home care provider could be an employee of a consumer and/or of a third party. Only if neither is her employer is she an independent contractor.
- In most shared living arrangements that occur in the provider's home, the provider will be an independent contractor.

# Shared Living

**In a provider's home**

- Why is the provider usually an independent contractor?
  - The provider will not be an employee of the consumer because when shared living arrangements occur in the provider's home, the provider controls and has invested in the residence.
  - The provider will not be an employee of a third party if the third party oversees the program but is not involved in the work (for example, the third party does not manage the residence or direct the provider regarding how to care for the consumer).

# Shared Living

**In a provider's home**

- When is a provider instead an employee?
  - If the third party is more involved in the provider's relationship with the consumer. For example:
    - If a case manager instructs the provider on how to perform tasks.
    - If the third party finds and rents the residence in which the shared living arrangement occurs.
    - If the third party negotiates the terms of the provider's employment, such as wages and benefits.

# Shared Living

**In a provider's home: Family care providers**

- Some state programs allow a family member of the consumer to be an adult foster care provider.
- The provider's status as a family member (as opposed to being unrelated to the consumer) and the fact that the consumer may have already lived with the family member before he or she became a provider is not determinative of whether the family member is an employee or independent contractor.
- The same economic realities analysis applies to each provider whether he or she is a family member of the consumer or not.

# Shared Living

## In a provider's home: Respite workers

- A separate analysis must be conducted to determine whether any other worker in the home (usually called a respite or relief worker) is an employee for purposes of the FLSA.
  - Whether any particular worker is an employee or independent contractor for purposes of the FLSA depends on the economic realities test, which considers whether the worker is economically dependent on the potential employer or is instead in business for herself.
  - The economic realities test, which has been developed by courts, is described in the Administrator's Interpretation regarding shared living.

# Shared Living

## In a provider's home: Respite workers

- Depending on the particular circumstances, a respite worker could be an employee either of an adult foster care provider or of a public or private agency that arranges the respite care.
  - In most cases, a provider or agency will control the worker's services (such as by setting the worker's schedule and directing the worker as to the tasks to be performed), the worker will have no opportunity for profit or loss but will instead receive wages, the worker will not have invested in the relationship, and the worker will provide services that are integral to the business of the potential employer.
  - Based on those facts, the economic realities test will most often lead to the conclusion that respite workers are employees who are likely entitled to FLSA minimum wage and overtime protections.

# Shared Living

**In a consumer's home**

- In most shared living arrangements that occur in the consumer's home, the provider will be an employee of the consumer.
  - The consumer controls the residence, sets the schedule, etc.
- Therefore, the FLSA applies if:
  1) there is coverage and
  2) no exemption applies.

# Shared Living

**In a consumer's home**

- Coverage
  - Because these arrangements occur in the private home of the consumer, the provider's work constitutes "domestic service employment."
  - That means the work will almost always be covered for FLSA purposes.

# Shared Living

**In a consumer's home**

- Exemptions
  - Again, an arrangement that occurs in the private home of the consumer will involve "domestic service employment."
  - That means the **consumer** might be able to claim either or both of the FLSA exemptions updated by the Final Rule.
    - Companionship services exemption from minimum wage and overtime requirements (consider duties)
    - Live-in domestic service employee exemption from overtime requirements (consider whether provider lives in the home permanently or for extended periods of time)

# Shared Living

**In a consumer's home**

- The provider might also be an employee of a third party.
  - Use the economic realities test to determine whether a joint employment relationship exists. A major factor to consider is the third party's control over the provider's work.
    - For example, if a provider must ask the third party's permission to be away from the residence or to make a change to the consumer's daily schedule, those facts weigh in favor of a finding that the provider is an employee.
    - On the other hand, if a provider must notify a third party that she will be away from the residence overnight but the third party cannot refuse to grant her request or sanction her for taking the evening off, those facts would not weigh in favor of employee status.

# Shared Living

**In a consumer's home**

- Coverage
  - Again, these arrangements involve domestic service employment, so there will almost always be coverage if a third party employs a shared living provider whose services occur in the consumer's home.
- Exemptions
  - Under the Final Rule, a third party employer **may not** claim the companionship services or live-in domestic service employee exemption, so no exemptions apply.

# Shared Living

**What if the home is new to both the provider and the consumer?**

- Consider the facts and circumstances to determine whether the provider or the consumer has primary control over the residence and relationship.
- Relevant facts include:
  - Who found the residence
  - Who arranged to buy or lease it
  - Who furnished common areas
  - Who maintains the residence (such as by cleaning it and making repairs to it)
  - Who pays the mortgage or rent

# Shared Living

## If the FLSA applies

- The FLSA requires that an employer:
  - Pay **minimum wage** for all **hours worked**,
  - Pay **overtime compensation** for all **hours worked** over 40 in a workweek, and
  - Keep employment **records**.
- The shared living guidance addresses how to
  (1) determine an employee's hours worked and
  (2) calculate whether the FLSA's minimum wage and overtime requirements are satisfied.

# Shared Living

## If the FLSA applies: Hours Worked

- Under the FLSA, “hours worked” includes all time spent performing tasks for the employer or waiting to perform such tasks.
  - Examples: dressing a consumer, waiting at a doctor’s office to drive a consumer home from an appointment.
  - Hours worked includes time spent working outside of scheduled/assigned hours if the employer knows or has reason to know that the work was occurring.

# Shared Living

## If the FLSA applies: Hours Worked

- Because it can be difficult to distinguish between a live-in employee's on-duty and off-duty time, there are special rules for applying hours worked principles to live-in workers.
- Specifically, an employer and live-in employee may enter a **reasonable agreement** that describes the work the employee is to perform and the time designated as excluded from hours worked.
  - Particularly in the shared living context, a clear and specific reasonable agreement will benefit all parties.

# Shared Living

## If the FLSA applies: Hours Worked

- Some tasks are easy to classify as work or off-duty activities.
  - For example, time spent helping a consumer bathe is hours worked; time spent attending a college course while completely relieved from duty is not.
- Other activities may occur during either on-duty or off-duty time, depending on the context.
  - For example, going to a community event together at a time when the provider could choose to be apart from the consumer could be unpaid if a reasonable agreement only requires the provider to assist the consumer at certain times of day.
  - But going to the event together could be hours worked if the reasonable agreement states that the provider's duties include engaging the consumer in community activities.

The actual time spent performing work must be compensated, even if it is greater than anticipated in the reasonable agreement.

# Shared Living

## If the FLSA applies: Hours Worked

- It may be permissible for the reasonable agreement between the employer and live-in employee to exclude from hours worked up to eight hours per night of the provider's **sleep time**.
  - The sleep time must be during normal sleeping hours, i.e., overnight.
  - The provider must typically be paid for some hours during non-sleep time. The agreement must be reasonable.

# Shared Living

## If the FLSA applies: Hours Worked

- Sleep time examples:
  - If a provider is paid for services performed between 8pm and 10pm each evening and 6am and 8am each morning, the eight hours of sleep time in between may be excluded.
  - If a provider is required to sleep at the residence five nights a week, and four hours per day on two weekdays and each weekend day are paid, up to eight hours of sleep time per night may be excluded.

# Shared Living

## If the FLSA applies: Hours Worked

- Sleep time examples:
  - If a provider's sole responsibility is to be at the residence five nights a week from 10:00pm to 8:00am, it will likely be reasonable to agree to treat two of those ten hours as hours worked and exclude the remaining eight hours as sleep time.
  - But if a provider's sole responsibility is to be at the residence overnight five nights a week, excluding all of that time or considering just one hour per night to be hours worked would not be reasonable.

# Shared Living

## If the FLSA applies: Compliance

- *Minimum wage.* The federal minimum wage is currently $7.25 per hour. An employee must receive at least that rate.
- *Overtime.* The FLSA requires that an employee receive one and a half times her hourly rate for each hour worked over 40 in a workweek.
- *Recordkeeping.* The FLSA requires that employers keep records regarding their employees and hours worked. The Final Rule mandates that employers of live-in employees comply with the recordkeeping obligations.

# Shared Living

## If the FLSA applies: Compliance

- Under certain circumstances, an employer may credit toward minimum wage the fair value of rent, utilities, and/or board (this is called the **section 3(m) credit**).
  - A separate guidance document that explains in detail when an employer may take the section 3(m) credit is forthcoming.

# Shared Living

## If the FLSA applies: Compliance

- To calculate an hourly rate including the section 3(m) credit, the value of the room and board is added to cash wages and divided by the hours worked in a given week.
  - Assume a provider receives $6 per hour and lodging the fair value of which is $100 per week. If the provider works 30 hours in a workweek, add $180 ($6 x 30) to $100 and divide by 30 hours, for an hourly rate of $9.33 ($280 / 30). This rate complies with the federal minimum wage requirement.
- The credit goes toward minimum wage, not overtime.
  - Assume the next week the provider works 50 hours. Add $300 ($6 x 50) to $100 and divide by 50 hours, for an hourly rate of $8 ($400 / 50). The provider is owed $40 ($8 x .5 x 10 hours over 40) in overtime compensation.

# Additional Information

- Information about the Final Rule, including our shared living guidance and fact sheets about a variety of other topics, is available at our Home Care website, http://www.dol.gov/whd/homecare/.
- Email questions about home care or shared living to homecare@dol.gov.
- Call the Wage and Hour Division helpline, 1-866-4US-WAGE (1-866-487-9243), or contact a local Wage and Hour Division Office, with general FLSA questions.