

DEPARTMENT OF DISABILITIES, AGING AND INDEPENDENT LIVING

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To: Developmental Services Directors, Designated Agency Executive Directors, Vermont Council of Developmental and Mental Health Services, Developmental Disabilities Services Division

From: Stuart Schurr, Deputy Commissioner, Department of Disabilities, Aging and Independent Living 

Re: DOL "Home Care" Rule: The Application of the Fair Labor Standards Act to Domestic Service

Date: December 18, 2014

On January 1, 2015, a new U.S. Department of Labor (DOL) Rule will go into effect, extending the Fair Labor Standards Act's (FLSA) minimum wage and overtime protections to direct care workers who provide home care assistance. The FLSA is a federal law that requires employers to pay employees minimum wage and overtime, with limited exemptions for "companionship services" or live-in domestic service workers. To determine if an entity is an "employer" the DOL applies the "economic realities" test. Examples of employers may include, but are not limited to, the following: the participant, his or her family members, and shared living providers.

The new DOL Rule also limits which employers may potentially claim the "companionship services" or live-in domestic service worker exemptions to the following: the participant, the participant's family member, or the participant's household. Third party employers of direct care workers may not claim these exemptions. The DOL defines a "third party" as "any entity that is not the individual, member of the family, or household retaining the services." Third party employers may include private agencies or government entities that administer a consumer-directed or other type of home care program. Each agency should review the DOL Rule, and consult with its legal counsel, to determine whether it is subject to the requirements of the FLSA as a third party employer. Information on the Rule can be found at <http://www.dol.gov/whd/homecare>

A participant, participant's family member, or participant's household (including a shared living provider) may avoid having to pay overtime if the direct care worker is only providing "companionship services," as now more narrowly defined by the new DOL Rule. "Companionship services" is defined by the new DOL Rule as the provision of "fellowship" and "protection," as well as the provision of "care" as set forth below. "Fellowship" means engaging the person in social, physical and mental activities; "protection" means being present with the person to monitor his or her safety and well-being; "care" means assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs) when the care is attendant to the provision of "fellowship" and "protection" and does not exceed 20% of the total hours worked per person per workweek. "Companionship services" does not include

domestic services provided for the benefit of other members of the participant's household or medically-related services (i.e., those that typically require, and are performed by, trained personnel, such as RNs, LPNs, or CNAs). It is the responsibility of employers to determine whether the companionship exemption applies. A copy of the memo being sent to employers is attached. Included are some additional details regarding the definition of "companionship services."

Having reviewed the new DOL Rule and considered DOL's guidance and interpretations, DAIL has begun to make changes to some of its programs, many of which will not be implemented by January 1, 2015. For programs in which participants' budgets are already based on a flexible wage model, such as Developmental Disabilities Services, however, employers are expected to comply with the FLSA's minimum wage and overtime requirements, in accordance with the new DOL Rule, beginning January 1, 2015.

1. Beginning January 1, 2015, employers of workers who provide care (e.g., community supports, in-home supports and respite) will continue to have flexibility as to how much those employees are paid, provided the employee is paid at least \$10.80 per hour or \$150.00/day.
2. Beginning January 1, 2015, unless there is an applicable FLSA exemption (e.g., "companionship services"), if an employee works more than 40 hours in a workweek for an employer, that employer must pay the employee time-and-a-half for all hours worked over 40 hours in that workweek. A workweek is defined as Sunday to Saturday, consistent with the ARIS timesheets.
3. The determination as to whether a service or a combination of services is exempt from overtime pay requirements shall be made by, and is the sole responsibility of, the employer.
4. If an employer submits a timesheet to ARIS, which reflects more than 40 hours worked by an employee in a given workweek, it is the sole responsibility of the employer to notify ARIS, in writing, if hours are exempt from overtime pay requirements. If submitting paper timesheets, the employer would write "EXEMPT" on the top of the timesheet. If submitting timesheets electronically, the employer would check the box marked "EXEMPT." Upon receipt of that notification from an employer, ARIS has been instructed to process pay for these hours over 40 hours in the workweek as "straight time" (i.e., not at time-and-a-half).
5. If an employer fails to notify ARIS when submitting the timesheet that hours worked over 40 in a workweek are deemed by the employer to be exempt from the overtime pay requirements, ARIS has been instructed to assume those hours are NOT exempt and will pay overtime, at one-and-a-half times the hourly rate.
6. In determining the hours worked in a workweek, when paying a daily rate, a day is based upon 16 hours. So, for example, if one employee is providing three or more days of daily respite in a single workweek, by the third day the employee will be exceeding 40 hours for the workweek and, unless a "companionship services" exemption applies, must be paid overtime for all hours worked over 40.

7. If an employee is working for the same employer and is providing support to more than one participant during the same hours, the employer must submit those timesheets at the same time to ensure that the hours are counted correctly for the purposes of overtime. If an employee working for the same employer with more than one participant exceeds 40 hours in a workweek and is entitled to overtime, the employer must inform ARIS from which participant's budget the overtime should be paid.

8. Subject to the availability of funds in an individual's budget, ARIS will process timesheets in accordance with this instruction. **The employer will be responsible for payment of any wages and employer taxes in excess of the budget.**

9. Employers must manage within approved budgets.

For more information or questions

For more information regarding the "Home Care" Rule, you may contact Jennifer Perkins at 786-5081. Please note, however, that she cannot provide a legal interpretation of the application of the Rule to specific employment situations.

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To: Employers Using Developmental Disabilities Services Funding to Hire
Independent Direct Care Workers

From: Stuart Schurr, Deputy Commissioner, Department of Disabilities, Aging and Independent Living 

Re: **IMPORTANT UPDATE:** DOL "Home Care" Rule: The Application of the Fair Labor Standards
Act to Domestic Service Requirements for Employers to Pay Overtime

Date: December 18, 2014

On January 1, 2015, a new U.S. Department of Labor (DOL) rule will go into effect, extending the Fair Labor Standards Act's (FLSA) minimum wage and overtime protections to direct care workers who provide home care assistance. The FLSA is a federal law that requires employers to pay employees minimum wage and overtime, with limited exemptions for "companionship services" or live-in domestic service workers. A description of "companionship services" is at the end of this memo. To determine if an entity is an "employer" the DOL applies the "economic realities" test. Examples of employers may include, but are not limited to, the following: the participant/consumer, his or her family members, and shared living providers. You are receiving this memo because you have been an employer hiring direct care workers. Employers using Developmental Disabilities Services funding to hire direct care workers are required to comply with the FLSA's minimum wage and overtime requirements, in accordance with the new DOL Rule, **beginning January 1, 2015**. Below is information to assist you in complying with the new Rule:

1. Beginning January 1, 2015, employers of workers who provide care (e.g., community supports, in-home supports and respite) will continue to have flexibility as to how much those employees are paid, provided the employee is paid at least \$10.80 per hour or \$150.00/day.
2. Beginning January 1, 2015, unless there is an applicable FLSA exemption (e.g., "companionship services"), if an employee works more than 40 hours in a workweek for an employer, that employer must pay the employee time-and-a-half for all hours worked over 40 hours in that workweek. A workweek is defined as Sunday to Saturday, consistent with the ARIS Solutions timesheets.
3. The determination as to whether a service or a combination of services is exempt from overtime pay requirements shall be made by, and is the sole responsibility of, the employer.

4. If an employer submits a timesheet to ARIS, which reflects more than 40 hours worked by an employee in a given workweek, it is the sole responsibility of the employer to notify ARIS, in writing, if hours are exempt from overtime pay requirements. If submitting paper timesheets, write "EXEMPT" on the top of the timesheet. If submitting timesheets electronically, check the box marked "EXEMPT". Upon receipt of that notification from an employer, ARIS has been instructed to process pay for these hours over 40 hours in the workweek as "straight time" (i.e., not at time-and-a-half).
5. If an employer fails to notify ARIS when submitting the timesheet that hours worked over 40 in a workweek are deemed by the employer to be exempt from the overtime pay requirements, ARIS has been instructed to assume those hours are NOT exempt and will pay overtime, at one-and-a-half times the hourly rate.
6. In determining the hours worked in a workweek, when paying a daily rate, a day is based upon 16 hours. So, for example, if one employee is providing three or more days of daily respite in a single workweek, by the third day the employee will be exceeding 40 hours for the workweek and, unless a "companionship services" exemption applies, must be paid overtime for all hours worked over 40.
7. If an employee is working for the same employer and is providing support to more than one participant during the same hours, the employer must submit those timesheets at the same time to ensure that the hours are counted correctly for the purposes of overtime. If an employee working for the same employer with more than one participant exceeds 40 hours in a workweek and is entitled to overtime, the employer must inform ARIS from which participant's budget the overtime should be paid.
8. Subject to the availability of funds in an individual's budget, ARIS will process timesheets in accordance with this instruction. **The employer will be responsible for payment of any wages and employer taxes in excess of the budget.**
9. Employers must manage within approved budgets.

DETERMINING WHEN YOUR EMPLOYEES MUST BE PAID FOR OVERTIME WORKED

The new federal Department of Labor (DOL) Rule, which alters the Fair Labor Standards Act (FLSA), does not require overtime to be paid for "Companionship Services." In Developmental Services, several different supports (for example; respite, community supports and home supports) may be considered "companionship services" if they are consistent with the description below. If the work the employee provides is considered "companionship services," the employee does not need to be paid overtime when he or she provides more than 40 hours of support within a workweek.

It is the employer's responsibility—not the DA's or ARIS's,—to determine if an employee is providing "companionship services" and is not required to be paid for overtime hours. In the event of a Department of Labor review of employee pay, the employer must be able to demonstrate that "companionship services" were provided.

Department of Labor defines **Companionship** as:

- **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; and
- **Protection:** i.e., accompanying the person to monitor their safety and well-being.

Provision of Care- If your employee spends less than 20% of his or her workweek in the "Provision of Care," the "companionship services" exemption may still apply; however, if your employee spends 20% or more of his or her time during the workweek performing tasks considered to be "Provision of Care," the employee must be paid overtime (time-and-a-half) for each hour worked over 40 hours.

DOL defines Provision of Care as:

- Dressing
- Grooming
- Feeding
- Bathing
- Assisting with toilet needs
- Physical transferring
- Meal Preparation
- Driving
- Light Housework
- Assisting with Financing
- Arranging medical care
- Physical assistance with taking medications

Tasks that are not companionship services:

An employee must be paid overtime for hours worked over 40 hours in a workweek if the employee provides any household work or medically-related services during the workweek.

DOL defines household work as work performed for the benefit of other members of the household (e.g., doing laundry for other household members, cooking for the whole family).

DOL defines Medically-Related Services as those that typically require training by medical personnel (RN, LPN, CNA) and include invasive or sterile procedures or procedures that otherwise require the exercise of medical judgment. Examples include, but are not limited to:

- Turning and repositioning
- Ostomy care
- Catheter care
- Tube feeding
- Treating bedsores
- Physical therapy

For more information or questions

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