

To: Families Using Family-Managed Respite, and Participants, their Families and Households Using Developmental Disabilities Services and TBI Funding for Independent Direct Support Providers

From: Clare McFadden, Interim Director, Developmental Disabilities Services Division, Department of Disabilities, Aging and Independent Living (DAIL) *SS for*

Re: IMPORTANT MEMO: Paying Workers/Providers Overtime due to Department of Labor (DOL) "Home Care" Rule; Family-Managed Respite, Developmental Disabilities Services and TBI

Date: October 9, 2015

- I. This memo is important. It tells you about a new rule you must follow.
Effective the workweek of October 11, 2015, many direct care workers, including those who provide services to participants under the Developmental Disabilities Services program (e.g., community supports, in-home supports and respite), will be entitled to be paid an overtime rate if they work more than 40 hours in a workweek. This is because of a new rule by the U.S. Department of Labor (DOL). Information on the Rule can be found at <http://www.dol.gov/whd/homecare>. You are getting this memo because you use the services of direct care workers and may be subject to this new Rule.
- II. When the Law Requires An Overtime Rate
An overtime rate means that an employee/provider gets paid time-and-a-half for any time he or she works over 40 hours in one workweek. Not all employees/providers are entitled to an overtime rate when they work more than 40 hours in a workweek.
- If your worker provides *only* what are called "companionship services" (see below), you will not have to pay an overtime rate if he or she works more than 40 hours in a workweek.
 - If your provider is a "live-in domestic service employee" (see below), you will not have to pay an overtime rate if he or she works more than 40 hours in a workweek.
 - If you are using the services of someone who is providing respite for a foster child in DCF custody (or a child receiving therapeutic foster care), you will not have to pay an overtime rate if the provider provides care for more than 40 hours in a workweek.

Companionship Services

Your employee/provider is providing “companionship services” if he or she is keeping the participant company or is keeping the participant safe. Examples of “companionship services” include spending time with the participant and talking, reading, playing games, and running errands.

If, in addition to keeping the participant company or keeping the participant safe, your employee/provider spends less than 20% of his or her workweek providing “care” for the participant, the “companionship services” exemption still applies and you will not be required to pay the employee/provider an overtime rate if he or she works more than 40 hours during the workweek. “Care” means assistance with “activities of daily living” (ADLs) or Instrumental Activities of Daily Living (IADLs). Examples of “care” include dressing, feeding, bathing, toileting, transferring, meal preparation, light housework, and physical assistance with taking medications.

If, on the other hand, your employee/provider spends more than 20% of his or her workweek providing “care” for the participant, **or** provides medically-related services for the participant (such as those that typically require training by medical personnel (e.g., RN, LPN, CNA)) **or** services that are not entirely for the participant, these are NOT “companionship services,” and the law will require that the employee/provider be paid time-and-a half for all hours worked over 40 in the workweek (unless your employee/provider is a “live-in domestic service employee”).

Live-in Domestic Service Employees

Your employee/provider is a “live-in domestic service employee” if he or she has no home other than the home in which he or she works for the participant, **or** if the employee/provider works and sleeps on the premises where he or she works for 5 days per week (120 hours or more per week).

III. Instructions you must follow

- Beginning the workweek of October 11, 2015, unless your worker/provider is providing “companionship services,” is a “live-in domestic service employee” or is providing respite for a foster child in DCF custody (or therapeutic foster care), the worker will be paid an overtime rate (i.e., time-and-a half) for any time he or she works over 40 hours in a workweek.
- A workweek is defined as Sunday to Saturday.
- You must determine if the hours worked by your employee/provider are “companionship services” or if your employee/provider is a “live-in domestic service employee.”
- You must keep a record of whether the hours worked by your employee/provider are “companionship services,” and you must keep records of the actual hours worked by any “live-in domestic service employee.”
- If you submit a timesheet to ARIS Solutions with more than 40 hours worked in a given workweek, it is your responsibility to notify ARIS Solutions, in writing, if hours are exempt from the overtime rate requirement. Hours are exempt if the employee/provider provides “companionship services,” if the employee/provider is a “live-in domestic service employee” or if the employee/provider is providing respite for a foster child in DCF custody (or in therapeutic foster care).

- If the hours worked are exempt from the overtime rate requirement, and you submit paper timesheets, write "EXEMPT" on the top of the timesheet. If you submit timesheets electronically, check the box marked "EXEMPT." By doing so, you will have provided written notice to ARIS Solutions. ARIS Solutions will then process all of the hours worked as regular time.
- If you submit a timesheet with more than 40 hours worked in a workweek and do not mark the hours as "EXEMPT," ARIS Solutions will pay the overtime rate for all hours worked over 40 in the workweek.
- You must keep track of your budget because you will be responsible to pay your employee/provider any wages and employee taxes in excess of the budget.
- **You must manage within the approved budget.**

IV. Variations

- If you believe that additional funding is needed to avoid placing the participant at risk of harm or at serious risk of institutionalization, you may apply for a variance.
- You must document the need for a variance. You must provide the documentation when you request a variance.
- Variance requests must be submitted in writing, and must include the following information:
 - a. A description of the participant's specific unmet need(s);
 - b. An explanation of why a specific employee/provider must work more than 40 hours, which include services other than "companionship services," in one workweek to meet the participant's needs; and
 - c. A description of the actual and immediate risk of harm or serious risk of institutionalization if additional funding is not approved.
- Variance requests for the Developmental Disabilities Services program must be sent to the provider agency or, if self/family managing, to Transition II.
- Variance requests for the TBI program must be sent to:
 - Department of Disabilities, Aging and Independent Living
 - Developmental Disabilities Services Division
 - Weeks Building, 103 South Main Street
 - Waterbury VT 05671-1601
- When considering the variance request, the agency/DAIL may require additional information and/or documentation to be submitted in support of the request.
- The agency/DAIL will send a written decision regarding the variance request to the participant, his or her legal representative, and to you.
- The agency/DAIL will send a written decision, with appeal rights, if applicable, within 30 days of receiving the request for a variance.

V. Questions

For more information about payroll services you may contact ARIS Solutions. For information about program rules, please contact your service coordinator.