

The USDOL Home Care Rules: What does good implementation look like?

In 2015, the U.S. Department of Labor's final home care rules went into effect, extending the federal minimum wage and overtime protections of the Fair Labor Standards Act (FLSA) to two-million-plus home care workers in the United States. These new rules end the racist and sexist exclusion of home care workers from these basic federal protections and provide most of them with a floor of basic labor protections that will improve their working conditions.

As the demand for home care continues to surge, ensuring good jobs is critical to promoting quality of care and to sustaining local and state economies. States and other employers must now abide by state and federal laws and do right by both workers and consumers.

Checklist: What does good implementation look like?

1. States and other employers are implementing the USDOL home care rules and their state laws by:
 - Paying at least the state or federal minimum wage, whichever is higher, for all hours worked.
 - Paying overtime rates for hours worked over 40 in a week (or otherwise specified by state law).
 - Paying for travel time between consumers.
 - Paying for all hours worked and properly applying the sleep-time rules.
 - Maintaining accurate records of workers' hours and pay.
 - Treating workers as W-2 employees rather than independent contractors, where workers meet the broad definition of "employee."
 - Taking advantage of USDOL's extensive resources and technical assistance.

2. States are taking the steps necessary for good implementation by:
 - Budgeting the necessary Medicaid dollars to pay for any increased costs associated with complying with the new federal rules.
 - Collecting data on the Medicaid-funded (and when applicable, the entire) home care workforce, hours worked, compensation, and other information.
 - Creating a taskforce, commission, or other entity to involve all relevant state agencies and affected stakeholders in promoting good implementation.
 - Making home care jobs quality jobs by providing family-sustaining wages, benefits, consistent scheduling, and opportunities for advancement.

3. States and employers are finding solutions that do not violate the rights of consumers by:
- Not imposing unreasonable worker hours caps.
 - Ensuring there is a robust exceptions process to any caps on worker hours.¹
 - Not cutting services to consumers or changing eligibility requirements.
 - Ensuring that wages and workplace policies allow employers and consumers to recruit and retain qualified workers.
 - Not eliminating consumer-directed programs and ensuring consumers have the option to self-direct their own care.
4. Advocates are pushing for all of the above by:
- Creating coalitions with unions and other worker groups, disability rights organizations, consumer groups, and others to push for funding for implementation and enforcement of the rules.
 - Making sure home care workers know their rights and have full access to records of their hours and pay.
 - Providing consumers with information about the rules and any state implementation measures that may affect their current home care arrangements.
 - Making sure consumers know their rights under the Americans with Disabilities Act.
 - Encouraging good state, federal, and private compliance assistance and enforcement.
 - Organizing workers and consumers to voice their collective concerns and suggestions for improvements to the home care industry and programs.

What are states doing right?²

California: The state's estimated 376,000 workers in its In-Home Supportive Services (IHSS) program are now paid for weekly overtime and travel time. The governor budgeted \$450 million for fiscal year 2016-2017 to cover overtime costs. Because of the federal match, at least double that amount will go to workers and into local economies.³ The state recognized its role as an employer in some programs and created policies: a worker hours cap of 66 to 70 hours per week, based on consumer needs and a budget analysis; pay for up to seven hours of travel time per week; and an exceptions process.⁴

Florida: The state budget included \$37 million - \$23 million of it from Medicaid - to fund minimum wage, overtime, and travel time costs, beginning July 1, 2016. To be in compliance sooner, the Legislature approved \$9.5 million to cover costs starting April 1, 2016. The state committed additional funding aimed at providing services to 1,300 people currently on the waiting list.⁵

Kansas: The state increased its sleep cycle support per diem rate from \$30.60 to \$78.30 per day.⁶

Massachusetts: The state began paying the 35,000 personal care attendants (PCAs) in its MassHealth Medicaid-funded home care program for travel time and any overtime, beginning January 1, 2016.⁷ To facilitate the transition, MassHealth's contracted fiscal intermediaries now track PCAs' cumulative weekly work hours across all consumers, and automatically record, calculate, and pay for any workday travel time.⁸ In September,

the state implemented a 40-hour worker cap per week, with an exceptions policy that permitted live-in attendants to work up to 60 hours per week and allows for emergency overtime. The policy grants consumers exemptions while they search for an attendant. Additionally, all MassHealth PCAs were granted earned sick leave, effective July 1, 2015, and will see an increase in pay to \$15 per hour by 2018. The Personal Care Attendant Workforce Council, whose mission is to ensure the quality of long-term, in-home, personal care by recruiting, training and stabilizing the work force of PCAs, bargains with 1199SEIU, the union representing the workers.

Minnesota: The governor's FY2016-2017 supplemental budget recommends including \$18.2 million to fund overtime and travel time. This was calculated through a 2.72 percent rate increase for the Personal Care Assistance, Consumer Support Grants and Consumer Directed Community Support Programs.⁹ While the legislature's final budget did not include this funding, the governor's estimate and call for funding was an important step. The collective bargaining agreement between SEIU Healthcare Minnesota and the state creates an \$11 wage floor and paid leave for the state's home care workers.

Nebraska: The state's Division of Medicaid and Long-Term Care began paying for overtime and travel time in October 2015. The state sent a letter to home care workers and issued a memo outlining the processes for payment.¹⁰

New York: The state is surveying Medicaid-reimbursed home care agencies to determine how much their labor costs have increased as a result of paying workers in accordance with federal minimum wage and overtime rules, and whether the state should increase its reimbursement rates to agencies to cover these additional costs.¹¹ In the meantime, retroactive to October 13, 2015, the NY Department of Health has increased its reimbursement rate by \$0.34 per hour to pay for travel time and for increased payment for "live-in" cases and created a mechanism for managed long term care plans to disburse funds to providers.¹² New York worked in collaboration with SEIU 1199 United Health Care Workers East, worker advocacy organizations, and disability rights organizations to calculate the adjustment. As is available to all states, New York requested increased funding from the federal Center for Medicare and Medicaid Services (CMS), as provided for in Title XIX of the Social Security Act, and as is noted in the memo listed under the "Resources" section.¹³ Additionally, New York State created the *Task Force to Combat Worker Exploitation and Abuse*. New York City recently created the Office of Labor Standards, and within it, the City Council created the Division of Paid Care, charged with researching and creating resources on caregiver workforce issues.

Ohio: Since January 1, 2016, the Ohio Department of Medicaid has made overtime payment to eligible independent providers who bill for more than 40 hours in a work week.¹⁴

Oregon: The Oregon Home Care Commission, the state agency that provides caregivers to 24,000 Medicaid beneficiaries, is expected to receive \$14 million in the state's FY2017 budget to account for implementation of the home care rules. The state has created a worker hours cap of 50 per week, per consumer, with an exceptions process and policy.¹⁵ Additionally, a contract between the state and SEIU Local 503 outlines a pathway of up to \$15 an hour by 2017. Home care workers currently have a base wage of \$13.75 an hour in Oregon.¹⁶

Pennsylvania: In January 2016, the Department of Human Services established overtime rates, separate from the regular rates, to enable consumer-employers to pay home care workers overtime. The state estimated the fiscal impact to the state for the FY 2016 budget would be \$3.1 million; including federal matching funds, the total cost is estimated at \$6.2 million.¹⁷

Vermont: The state created an exceptions form for consumer-directed participants to request that a home care worker be paid overtime to avoid placing the participant at risk of harm or at serious risk of institutionalization.¹⁸

Virginia: The governor included funding for overtime and proposed a worker hours cap of 56 hours per week. The legislature did not include this budget item and struck down his proposed amendment but the governor's estimate and call for funding was an important step.¹⁹

Washington: The state has budgeted \$29 million for compliance with rule's overtime and travel time requirements, with funding available in April 2016.²⁰ The state has created a worker hours cap of 65 hours per week, depending on the independent providers previous schedule, and enacted when the state does an annual review of a consumer's plan of care. In July of 2017, the cap will switch to 60 hours per week, with an exceptions policy and process.²¹

Working together for good implementation

Workers, consumers, employers, and advocates are coming together to advance home care worker rights by ensuring that workers in programs throughout the state are paid in accordance with federal and state minimum wage and overtime laws while ensuring that consumers do not lose service or otherwise experience harms, including unnecessary institutionalization. In noncompliant states, grassroots actions, constituent calls, meetings with state leaders, media coverage, and letters are all being utilized to pressure employers, governors, state agencies, and legislators to implement the rules well.

By ensuring compliance with new federal and state wage and hour rules, states and employers will take a crucial step forward towards improving workers' rights while also ensuring its home care system can continue to deliver the critical high-quality services that so many individuals with disabilities, seniors, and their families rely on and many more will require in the coming years.

Contact

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U.S. Department of Labor Home Care Rules: Key Considerations for Developing an Exceptions Process for Overtime Caps

This brief is designed to provide workers, consumers, employers, and states with a description the key elements of an exceptions policy to any worker-hours caps. Any exceptions policy should ensure that individuals are not placed at serious risk of institutionalization as a result of the caps. States should plan an implementation budget that ensures stable worker hours, with no unreasonable reductions that can further destabilize the workforce, reducing the potential for sustaining a long-term, professional workforce.

Department of Labor Home Care Rules

The US Department of Justice and HHS' Office of Civil Rights have urged states implementing caps on home care worker hours to develop an exceptions policy for individuals who might be placed at serious risk of institutionalization as a result of the caps.¹ Their letter reminds states that under the Americans with Disabilities Act (ADA), as interpreted by the Supreme Court's *Olmstead v. L.C.* decision, public entities must ensure that all individuals with disabilities can receive services in the most integrated setting appropriate to their needs. Under federal law, a state will violate the ADA and *Olmstead* if its overtime caps lead to cuts in services that force individuals with disabilities into institutions or cause a decline in their health and safety that places them at serious risk of institutionalization. Furthermore, unreasonable cuts to worker hours can destabilize the workforce, reducing the potential for sustaining a long-term, professional workforce to meet current and future home care demands.

An exceptions process should contain allowances for **short-term exceptions** for emergencies (e.g., a provider unexpectedly quits or is unable to arrive at his/her shift) as well as for **long-term exceptions** for individuals with complex care needs or other reasons. For example, individuals living in rural areas may be unable to hire additional workers.

Exceptions processes that fail to include both short-term and long-term exceptions will not adequately protect states from risk of *Olmstead* violations.

¹ See Dear Colleague letter: http://www.ada.gov/olmstead/documents/doj_hhs_letter.pdf

Criteria for Authorizing Exceptions

The State of Oregon's Office of Developmental Disabilities Services has developed an exceptions process to its 50 hour cap on worker hours. Oregon's policy is a good example of a robust policy that allows for exceptions in a range of circumstances where the cap could lead to a loss in services or negatively impact the individual's health and safety. Specifically, Oregon's policy authorizes exceptions for individuals who meet one or more of the following criteria:

- ***Provider Capacity Exception:*** No qualified In Home provider agency or [Personal Support Worker] ... within 45 minutes of the individual's service location is able to provide needed services.
- ***Provider Unable to Work:*** A provider quits, is terminated, no longer meets qualifications, or credentials have expired.
- ***Out-of-Town Situations:*** An individual requires care to ensure their health and safety, and it is not feasible to bring additional providers.
- ***Relief or Substitute Care:*** When another provider or caregiver who has been scheduled to provide services becomes unavailable to provide services critical to the health and safety of the individual.
- ***Emergent Need:*** An urgent need for care arises and exceeding the limit is unavoidable without risking the health and safety of the individual.
- ***Unique/Complex Needs:*** The individual's health and safety would be compromised by adding additional providers to the service plan.

(Quoted from Oregon Office of Developmental Disabilities Services, Developmental Disabilities Worker's Guide: Exceptions to Individual Support Plan Hourly Cap for Personal Support Workers, published July 20, 2015.²)

These reasons encompass a broad variety of circumstances why an individual may require an exception to state-imposed caps. Furthermore, they cover both **short-term** and **long-term** reasons why an exception request may be necessary to ensure an individual's health and safety, while also ensuring the individual can remain in his or her own home and community in accordance with *Olmstead*.

Oregon's **Unique/Complex Needs** component is of particular importance because it recognizes that in some instances, a particular worker may be required for certain tasks in order to ensure an individual's health and safety. For example, individuals with compromised immune systems may be put at risk by having multiple workers. As the DOJ/HHS letter noted, some individuals "with extraordinary medical or behavioral needs may not be able to tolerate multiple workers in their home."

² Full text available at:

<https://www.dhs.state.or.us/spd/tools/dd/cm/PSW%20Hours%20Limits%20Exceptions%20Worker%20Guide.pdf>

Process for Requesting, Responding To, and Appealing Exceptions Requests

States should ensure that individuals are notified about the exception criteria and the process for requesting an exception. Both individuals themselves and case managers, who should proactively identify circumstances where overtime may be needed, should be able to make a request for an exception.³ States also should ensure that there is a timely response to requests, preferably within a specific timeframe. For example, the state of California responds to exceptions requests in its In-Home Supportive Services (IHSS) program within ten calendar days, although a response may be made immediately if the request is made via telephone:

An IHSS recipient seeking an exception may contact the county to make the request via telephone or written correspondence. If the request is made via telephone, the county IHSS staff may approve or deny the exception request immediately while speaking with the recipient.⁴

As noted above, California also permits written requests to be submitted. It is recommended that all states allow written exceptions requests in addition to telephone requests in order to accommodate individuals who may prefer or require a particular method. Finally, states should ensure that there is a process for individuals to seek review of a denial of an exceptions request, such as through a state's Medicaid appeals system.⁵

Assistance with Addressing Unauthorized Overtime

States should work with consumers and case managers to find solutions to address any unauthorized overtime. The state should provide assistance, additional supports and outreach to individuals whose requests for overtime are denied or who are repeatedly using unauthorized overtime. The state should make clear to consumers and workers that workers must be paid for any work performed and all hours worked, regardless of the policy and even if it is considered "unauthorized" and assist the consumer with finding alternatives to meeting their service needs.

³ Letter from DOJ AAG Perez and HHS OCR Director Rodriguez to Governor Gregoire, October 22, 2012, http://www.ada.gov/olmstead/documents/ltr_gov_gregoire.docx, p.2.

⁴ Quoted from <http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acj/2016/16-01.pdf>, p. 11.

⁵ Letter from DOJ AAG Perez and HHS OCR Director Rodriguez to Governor Gregoire, October 22, 2012, http://www.ada.gov/olmstead/documents/ltr_gov_gregoire.docx, p.2.

Contacts & Resources

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- PHI, Robert Espinoza (respinoza@phinational.org), (718) 928-2085, www.phinational.org/fairpay
- Department of Labor, www.dol.gov/whd/homecare, 1-866-487-9243
- A list of State Labor Offices can be found on the US DOL Wage and Hour website: www.dol.gov/whd/contacts/state_of.htm

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Independent contractor classification in home care

Correct classification of workers as employees is key to securing their legal protections and ensuring fair competition by law-abiding businesses. Rarely are home care workers really running an independent business, despite many job structures that purport them to be.

Home care workers are vulnerable to independent contractor misclassification

Personal care and home care services are seldom performed by individual independent businesses, but home care agencies frequently mislabel their employees “independent contractors” and deny them basic workplace protections and benefits. Home care workers perform work that is an integral part of a home care agency’s business, do not invest capital in a business, and generally have little, if any, ability to set their duties, hours and wages. Agencies and other entities maintain the ability to intervene if the level of services provided does not meet expectations, and they typically interact with the consumers to recover payments and set up the care or services needed.

Also called “payroll fraud,” independent contractor misclassification is more common in lower-wage jobs like construction and janitorial, and is on the rise in home care, where some employers require their workers to sign “independent contractor” agreements as a condition of getting a job. Numerous courts have found home care companies’ classification of their workers as “independent contractors” to be improper (see page 2) because few home care workers are really running their own business. Yet some consultants and law firms continue to advise home care employers on how to set up an independent contractor model for their workforce. Contractor Management Services (CMS) notes on its website that “driven by the attractive financial returns and the need to match service capacity with patient needs, many home healthcare agencies are increasing their reliance on independent contractors for delivery.”¹ CMS has presented multiple webinars through the American Network of Community Options and Resources (ANCOR), an association that includes some home care providers, offering techniques to convert home care worker employees to independent contractors.²

Some home care companies have recently announced they will switch their workers from independent contractor to employee status, perhaps in response to increased scrutiny of the 1099 business model. On-line home care providers HomeHero and Honor both launched using an independent contractor model, but company leaders have recently said publicly that they will convert to an employee model.³ HomeHero co-founder and CEO Kyle Hill told the L.A. Business Journal that he hopes to have the company’s 1,200 caregivers switched over by

summer 2016,⁴ and Honor CEO Seth Sternberg announced his company will make a similar transition.⁵

Home care workers should very seldom, if ever, be classified as independent contractors. A recent US Department of Labor (US DOL) Administrator's Interpretation (AI) describing the breadth of coverage of the Fair Labor Standards Act (FLSA) to employees is an important reminder that most workers are covered by the FLSA, despite what their employers may label them.⁶

Implications and consequences of 1099 status

Being classified as an independent contractor, also known as having 1099 status, has many consequences. If a home care agency treats a home care worker as an independent contractor, that person is considered to be running his or her own business and this means that the individual is responsible for:

- Paying upfront the employer- and employee-side of Social Security and Unemployment (FICA and FUTA) taxes, currently 15.3% of pay, along with income taxes. W2 employees, in contrast, pay only half of that rate and the other half is paid by their employer.
- Additional state and local tax and reporting burdens placed on any worker running her own business, including requirements to pay for workers' compensation and other state licensing and insurance requirements for businesses.
- Calculating and remitting quarterly estimated self-employment taxes in addition to filing an annual return, as well as any individualized business tax deductions and credits.

A 1099 form is the form that the IRS requires businesses to use to report payment for services of non-employees.

To all other workers who are regular employees, businesses must issue a W-2 form and make proper payroll withholdings for each tax year.

Most significantly, being an independent business means that a worker is not entitled to the protections of minimum wage or overtime pay, compensation for on-the-job illnesses or injuries, unemployment insurance if separated from work involuntarily, employment-based benefits like health insurance and retirement contributions, or protection against discrimination.

The home care agency's classification is not the final word

Only workers who run a separate business should be classified as independent contractors. Workers who are paid an hourly wage to provide services through an entity, such as a home care agency whose business is to arrange and oversee the services delivered by the worker, should generally be classified as employees. Courts in Maryland, North Carolina, Pennsylvania, and elsewhere have found that agencies that treated their home care workers as independent contractors violated the law.⁷ If an agency misclassifies a home care worker as an independent contractor, she can challenge her status and try to enforce her rights as an employee.

Sample reported cases of home care worker misclassification

- In a case against franchisor Griswold International, California franchisees asserted that Griswold fraudulently promised them a system under which workers could be classified as independent contractors so that neither clients nor franchisees were responsible for taxes or compliance with wage and hour or other labor or employment laws.⁸

- In a 2010 case against Lee’s Industries, Inc. and Lee’s Home Health Services, Inc. a home care agency required home care workers previously treated as employees to sign an agreement calling themselves independent contractors in order to keep their jobs, despite the fact that there were no changes to the job or to the worker’s business status. The NLRB found that this constituted an improper labor practice.⁹
- In a similar case, *Cooney v. O’Connor*, a Maryland home care agency had its employees sign an “Independent Contractor agreement” as a condition of getting a job and unsuccessfully attempted to prevent former employees from collecting unemployment insurance benefits.¹⁰ The 2001 decision from Maryland Court of Special Appeals concluded that the care providers were employees.¹¹
- Caring First, Inc, a home health care agency in Florida, is being sued by the Department of Labor for misclassifying certain employees as independent contractors and paying them a flat hourly rate, regardless of the number of hours worked.¹²

Conclusion and recommendations

Independent contractor abuses are increasingly common in the home care industry, but there is potential to reverse this damaging trend. Home care workers, now covered by the Fair Labor Standards Act (FLSA), benefit from the recent US DOL Administrator’s Interpretation (AI) on independent contractors. As the AI urges, “correct classification of workers as employees or independent contractors has critical implications for the legal protections that workers receive, particularly when misclassification occurs in industries employing low wage workers.” Home care workers, particularly vulnerable to labor violations, and law-abiding businesses that treat their home care workers as employees will benefit greatly from increased scrutiny of independent contractor misclassification.

Resources

- Contact the National Employment Law Project at 202-640-6516 or visit www.nelp.org.
 - *Independent Contractor vs. Employee: Why misclassification matters and what we can do to stop it* (NELP, May 2016), <http://www.nelp.org/content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>.
 - *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, (NELP, July 2015), <http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf>.
 - *Upholding Labor Standards in Home Care: How to Build Employer Accountability into America’s Fastest-Growing Jobs* (NELP, Dec. 2015), <http://www.nelp.org/content/uploads/Report-Upholding-Labor-Standards-Home-Care-Employer-Accountability.pdf>.
 - U.S. Department of Labor’s Wage and Hour Division *Administrator’s Interpretation*, (USDOL, July 2015), https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf.
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Endnotes

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- ⁶ Weil, David. U.S. Department of Labor, Wage and Hour Division. Administrator's Interpretation No. 2015-1, July 15, 2015. http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf
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- ⁸ Justia Dockets and Filings, Andersen et al v. Griswold International, LLC et al, retrieved July 16, 2015. <https://dockets.justia.com/docket/california/candce/4:2014cv02560/277971>
- ⁹ Lee's Industries, Inc. and Lee's Home Health Services, Inc. and Bernice Brown, Case No. 4-CA-36904 (Decision by National Labor Relations Board Division of Judges), 2/25/10; Ruckelshaus, Catherine K on behalf of National Employment Law Project Testimony before the United States Congress Senate Committee on Health, Education, Labor and Pensions. June 17, 2010. <http://www.nelp.org/content/uploads/2015/03/MisclassTestimonyJune2010.pdf>
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