U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division

(updated June 2014)

Fact Sheet #79F: Paid Family or Household Members in Certain Medicaid-Funded and Certain Other Publicly Funded Programs Offering Home Care Services Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information regarding how the FLSA's requirements apply to the employment of a family or household member paid through certain Medicaid-funded and certain other publicly funded programs offering home care services.

Who are paid family or household care providers?

Certain Medicaid-funded and certain other publicly funded programs allow a recipient of home care services (or that person's representative) to select and supervise the care provider and further allow the selection of a family or household member of that person as a paid care provider.

Under these programs, the particular services to be provided and the number of hours of paid services are described in a written agreement, usually called a "plan of care," developed with the individual and approved by the program after an assessment of the services the recipient of care requires and that person's existing circumstances, such as unpaid assistance provided by family or household members (often called "natural supports").

What is the significance of an FLSA employment relationship?

The FLSA requires, among other things, the payment of at least the minimum wage as well as overtime compensation to all workers who are employees, i.e., who are in an employment relationship with an employer (and the FLSA applies because in addition, the employer is covered by the FLSA and the employee is not exempt from the Act). See Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act. Under the FLSA, family or household members can be hired as employees of other family or household members to provide home care services, creating an employment relationship. If such an employment relationship is created (and neither the companionship services nor the live-in domestic service employee exemptions apply, see Fact Sheet # 79A: Companionship Services Under the Fair Labor Standards Act and Fact Sheet #79B: Live-in Domestic Service Workers Under the Fair Labor Standards Act), it is subject to the requirements of the FLSA.

Ordinarily, under the FLSA, including in the context of domestic service work such as home care, if an employment relationship exists, all hours worked by an employee for an employer must be paid. See Fact Sheet #79D: Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act. For example, if an 80-year-old woman hires a certified nursing assistant (CNA) to provide medical care in her home and the woman and CNA agree that the CNA will work and be paid for 30 hours per week, if the CNA actually works for 35 hours in a given week, she must be paid for all 35 hours.

What is the scope of a paid family or household care provider's FLSA employment relationship?

When a paid care provider is a family or household member of the person receiving home care services, the decision to hire the family or household member does not turn all care provided into employment. There is both

a familial or household relationship and an employment relationship, and only hours worked within the scope of the employment relationship are covered by the FLSA. In these circumstances, the employment relationship is usually limited by a "plan of care" or other written agreement developed with the involvement of the individual and approval of the Medicaid-funded or other program.

For example, a familial relationship, but not an employment relationship, exists where a father assists his adult son with a physical disability with eating dinner and bathing in the evenings. If the son enrolled in a Medicaid-funded program and the father became his son's paid care provider under a program-approved plan of care that funded eight hours per day of services, the father would then also be in an employment relationship with his son for purposes of the FLSA. If the requirements described below are met, the father's employment relationship with his son extends only to the eight hours per day of paid work contemplated in the plan of care. The assistance he provides at other times stems from his familial relationship and is not part of that employment relationship and therefore need not be paid. If, based on the structure of the program, a state or other agency was also an employer of the father, see Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA), this interpretation would also apply to the employment relationship between the father and that agency.

What are the requirements for the application of this special interpretation limiting the scope of the employment relationship of paid family and household care providers?

(1) Home Care In or About a Private Home

This unique interpretation only applies in the home care services context. Under the FLSA, home care is domestic service employment because workers are providing services of a household nature in or about a private home. See Fact Sheet #79 Private Homes and Domestic Service Employment Under the Fair Labor Standards Act. Work done by family or household members in other contexts, such as for a family business, is subject to the typical FLSA law and regulations regarding the employment relationship and hours worked.

(2) Family or Household Relationship

This unique interpretation also does not generally apply to relationships that do not involve preexisting family ties or a preexisting shared household. Therefore, except as noted below, it would not apply to a direct care worker who did not have a family or a household relationship with the individual in need of services prior to the individual's need arising or the creation of the plan of care. In other words, all services provided by a direct care worker who becomes so close to the consumer as to be "like family," or a direct care worker who becomes part of the consumer's household when hired to be a live-in employee, must be paid pursuant to typical FLSA law and regulations. If the consumer and caregiver enter into a new family relationship during the course of an employment relationship (for example, through marriage or civil union), however, then the FLSA employment relationship would be limited even though the family relationship did not predate the employment relationship.

(3) Reasonableness of the Plan of Care

An employment relationship is limited to the paid hours contemplated in the plan of care or other written agreement developed with the individual and approved by certain Medicaid-funded or certain other publicly funded home care programs only if that agreement is "reasonable." For purposes of an FLSA analysis, "reasonable" does not mean whether the amount or type of services or paid hours to be provided are appropriate for the consumer. Instead, in this context, a determination of reasonableness will take into account whether the plan of care would have included the same number of paid hours if the care provider had not been a family or household member of the consumer. In other words, a plan of care that reflects unequal treatment of a care provider because of his or her familial or household relationship with the consumer is not reasonable. For instance, the program may not reduce the number of paid hours in a plan of care because the selected care provider is a family or household member. In addition, a program may not require an increase in the hours of

unpaid services performed by the family or household care provider in order to reduce the number of hours of paid services.

Examples:

- A 23-year-old man with developmental disabilities is enrolled in a Medicaid-funded program that pays for home care services for him. When he meets with his planning team for an annual reevaluation of his plan of care, he explains that he is considering moving out of his parents' home and into his own apartment. The team determines that if he remains in his parents' home, he will need 40 hours of paid services each week in addition to the natural supports he receives from his parents. If he moves into a nearby apartment, his parents will still provide some natural supports, but he will need 55 hours of paid services. The consumer decides that he would like to live on his own, so the plan of care provides for 55 hours of paid services. As long as the 55-hour allotment remains in place regardless of whether the paid care provider is a family member (such as either or both of his parents) or any other individual (such as a friend or professional identified through a registry), the plan of care is "reasonable" for FLSA purposes. The analysis of reasonableness for FLSA purposes does not depend on the residential setting or the level of natural supports, but instead on treating family members who become paid providers in the same manner as any other provider. In other words, if a program offers fewer hours of services to an individual because he or she selects a family member as a paid provider, the family member's employment relationship will not be limited to the paid hours. In this example, if the man's mother becomes his paid care provider for 40 hours per week and a neighbor is the care provider for the other 15 hours per week, the mother's employment relationship is limited to those 40 hours. Therefore, if she provides additional care to her son, such as by cleaning his apartment or helping him prepare for bed, during time outside of the 40 paid hours, those activities are part of the familial relationship and the time need not be paid.

- A 90-year-old woman who can no longer care for herself enrolls in a Medicaid-funded program administered by the county in which she lives. She is assessed to need paid services for 30 hours per week beyond the existing unpaid assistance she receives from her daughter and other relatives. Had the consumer chosen a neighbor to become her paid care provider, her plan of care would have included those 30 paid hours each week. But because the woman instead chose her daughter to become her paid provider, the county reduced the paid hours in the plan of care to 15 hours per week. In this example, the plan of care is not reasonable for FLSA purposes because it treats the family care provider unequally, and the paid hours in the plan of care will not determine the scope of the FLSA employment relationship.

- A veteran with physical disabilities receives home care services through a publicly funded program. His plan of care provides for 30 hours per week of paid services. Twenty-five of those hours are provided by a care provider the veteran did not previously know and five of the hours are provided by his aunt. The number of paid hours of services the veteran receives was not affected by the aunt's status as his family member. The plan of care also contemplates that he will receive natural supports on evenings and weekends from his father, with whom he lives. One weekend, the veteran's father needs to travel out of town, and the father asks the aunt to stay at the father and veteran's home and assist the veteran while the father is away. The aunt does so, and is not paid. Because the aunt has both an employment relationship and a familial relationship with the veteran and her paid hours of care are delineated in a reasonable plan of care, the additional weekend supports she provides in place of the veteran's father are within the familial relationship, and it does not violate the FLSA to not pay the aunt for that time.

Additional Resources and Relevant Information

For more information about the Fair Labor Standards Act, and in particular, how it applies in the context of home care and other domestic services provided in or about a private home, please see the following resources:

Fact Sheet: Final Rule Concerning Domestic Service Workers Under the Fair Labor Standards Act (FLSA)

Fact Sheet #79: Private Homes and Domestic Service Under the Fair Labor Standards Act (FLSA)

Fact Sheet # 79A: Companionship Services Under the Fair Labor Standards Act (FLSA)

Fact Sheet #79B: Live-In Domestic Service Workers Under the Fair Labor Standards Act (FLSA)

Fact Sheet #79C: Recordkeeping Requirements for Individuals, Families, or Households who Employ Domestic Service Workers Under the Fair Labor Standards Act (FLSA)

Fact Sheet #79D: Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act (FLSA)

Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act Service Workers Under the Fair Labor Standards Act (FLSA)

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

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