



## **Fair Labor Standards Act Provider Webinar July 28, 2015** **Questions and Answers**

*Note: Unanswered questions or questions requiring additional research will be updated once research is complete.*

### **Q1: Does other third party mean 1099 employees?**

A1: In the federal regulations a third party is any entity that is not really the individual, the member of the family or in the household retaining the services, so it is basically someone, or it is an entity outside of the household. We have to examine to see if a 1099 worker would be considered an entity in the definition of the US Department of Labor, we have to think about that to see how to answer the question specifically. *(Les Hendrickson)*

### **Q2: If we have to pay overtime, do we get overtime pay from Medicaid?**

A2: Medicaid pays for a rate for services, those rates are determined by the General Assembly and subject to approval by the Centers for Medicare and Medicaid Services. They are not structured to pay you and you do not bill based upon the costs that you incur. If you incur overtime costs, no, Medicaid will not pay you overtime. Having said that, the data collection in the survey is an attempt to measure the public policy impacts and the fiscal impacts of these regulations on your businesses.

There are federal regulations that ensure that our rates have to be adequate to ensure service provision and if we determine that there is a problem we will have an obligation to look at that. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

### **Q3: What Department is in place for reporting agencies using independent employees in the state of Colorado?**

A3: I am not sure that any of the Departments have regulations that require the reporting of independent employees besides the regular employment rules and payroll practices and those activities but in a policy matter I don't think it is required of licensure to the best of my knowledge but I believe the Department representatives can provide a better response. *(Les Hendrickson)*

I would be happy to give you some perspective from the State Department of Labor and Employment. You all don't report those classifications of 1099 vs. W2 employees to us. What we do however, is we do those random and targeted audits in partnership with the US Department of Labor. We do random audits simply to ensure compliance with the classification rules.

First of all, the giant caveat here is the implementation of this rule is currently on hold because it is pending litigation and has been suspended until then. If this rule does go into effect and the new classification guidelines between requiring W2 employee status for individuals who may otherwise previously have been independent contractors would go into effect then it would fall to us if we were auditing an individual contractor, we would not go out and audit specifically to determine compliance with this new rule. If a company happened under a random or other audit, to fall under this new rule we would likely identify those classification changes as necessary be made prospectively going forward.

I don't know if that is helpful or not, I am trying to make sense of the question. *(Pat Teegarden, Department of Labor and Employment)*

**Additional information about the question: When it is discovered that agencies are using independent contractors instead of employees is there someone that would want that information so that they can research further to confirm if appropriate?**

This is Randy with the Department of Public Health, I am still a little confused as to the question. From a survey stand point I don't think we would looking at those personnel independent contractor relationships unless of course it became germane to some part of the system piece that we tend to look at and then what we do with personnel issues like that, if we see something that needs to be looked at further we would refer it to the appropriate agency. I don't know that CDPHE would be looking into those specifically. *(Randy Kuykendall, Department of Public Health and Environment)*

Those of you who are out there who have been using independent contractors and may have a question about whether you can still use independent contractors, if you want to contact me and get some sense of it without actually reporting to talk it through I would be willing to have this conversation in the future. The problem is that we can't provide you with legal advice and it may be better for you to seek your own legal guidance from your own attorney if you are going to make a decision about whether somebody is a W2 employee or an independent contractor and when you make that decision. Then it is possible that the US Department of Labor and Employment could disagree with you if you choose the independent contractor route and then you could potentially have some exposure on that. We will do our best from the state agency perspective to help you walk through the various checklists of things to determine that if the rule does ultimately go into effect after the litigation is completed but it is probably more viable to seek your own council. *(Pat Teegarden, Department of Labor and Employment)*

**Q4: Does unskilled relative care count as companionship?**

A4: From a Medicaid perspective, Medicaid services or client's eligibility for unskilled relative care comes from an assessment of need for Activities of Daily Living (ADL) support we call the ULTC 100.2. A care plan is developed based upon the ADL needs that are identified in that assessment. That means that unskilled care of any kind, whether it is relative care or not, is primarily for ADL support and therefore would not count as companionship and would not be subject to the exemption. Meaning that overtime would be required to be paid. However, it is important to note that there are payers other than Medicaid who may pay for services in a different way who may pay for care that is definable as companionship. In that case an unskilled relative care worker could potentially continue to fall within the exemption. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

**Q5: Would an In-Home Support Services (IHSS) employee also be required to receive overtime compensation?**

A5: I don't think the final rule makes the distinction between an IHSS employee and any other employee, the same rules apply to both. Where it is an IHSS employee or non-IHSS employee working for a third party they would be entitled to receive overtime compensation. *(Les Hendrickson)*

**Q6: For home health office employees, can we comp time that is worked in excess of 40 hours a week, or is it a final rule that we must pay overtime and cannot comp the time? These are salaried employees with expectation to work 40 hours a week.**

A6: This one is for me and it is a question that I will need to get an answer to. *(Pat Teegarden, Department of Labor and Employment)*

I think generally speaking the rule pertains to individuals involved in the provision of direct care service and there are some facts and circumstance that determines whether those direct care employees are subject to overtime. I don't believe there is anything in the pending rule that would impact office employees that don't provide direct care. Having said that I think the determination about overtime for salaried office employees is something that I cannot speak to, it just appears to not be a subject of the final rule. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

Separate and apart from what we are discussing in this proposed rule, a change in the salary level at which employees are eligible for overtime. My understanding is that it went from somewhere in the low 20s with a proposed rule that is pending and is working its way forward now to somewhere in the low 50s per year range. We are still waiting for more detail on that and it is still making its way through the rule making process. I will get back with more information on that because that applies to office employees generally. *(Pat Teegarden, Department of Labor and Employment)*

**Q7: If you have a 1099 Medical Director for Hospice, is that person considered an employee or an independent contractor?**

A7: You can't answer that question with a simple yes or no. The federal agencies have various lists or factors that you consider so what you do is you work through the lists. For example: We still left the independent contractor test screen mentioned by USDOL on the screen. You could ask about that 1099 Medical Director, you can ask these various questions about totality of circumstances that you use. *(Les Hendrickson)*

**Q8: How do we determine when an employee reaches overtime and how long will it be before the State of Colorado decides it will reimburse the agency for the increased cost?**

A8: After 40 hours it is probably going to be considered overtime. I should defer the second part of the question to someone else. *(Les Hendrickson)*

I will answer the second part of that question. It depends on what we find in the survey and it depends upon a safe budget process, let me explain both of those in brief.

First, we are interested in measuring the magnitude of this fiscal impact upon home care agencies. Typically there are cost factors that impact your business, unless they are large that does not necessary drive an appropriation. Gas prices went up to \$4 a gallon, that did not tie directly to an increase to home care agencies. Gas prices went down, that did not lead to a measured cut. If the data shows that the impact is large and widespread then it may be necessary to recommend policy action. This department and all executive branches do not have the ability to spend money unilaterally. The executive branch proposed a budget to the General Assembly which debates and votes on it. The governor then has the ability to sign it or not and also has line item veto authority. So that process can take a

while. The next time the General Assembly meets to consider a budget will be in the spring of 2016. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

**Q9: If an administrative employee who works in the office on salary works more than 40 hours, is it required to pay them over-time including the owner and Administrator?**

A9: I think off the top of my head, that I need to get more information on a recent proposal that came out of the White House and is being proposed through the Department of Labor. It depends on what administrative means. I think the driving factor, if I understand it correctly, is going to be salary level, and that salary level goes in to the low \$50K per year range but I am not positive on that. Let me get a lot more information on another rule being proposed that is in the process of implementation and I believe it is out for comment now. *(Pat Teegarden, Department of Labor and Employment)*

**Q10: Did I hear that right, salaried employees cannot provide care?**

A10: The short answer is no, you did not hear that right. Others may want to chime in. What is true is that salaried office workers that do not provide direct care are not subject to the facts and circumstances test of the exemption, which is for direct care staff not office staff. Also, to Pat's point, employees that are salaried may or may not be able to maintain that status under the proposed but not finalized change at the federal Department of Labor that changes the standard of who can be paid salary without overtime compensation and who must be paid overtime. And Pat has promised to follow up with more information on that. Pat is there anything you would add to that? *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

That's exactly right, Jed. And I'm going to have a lot of work to do to get up to speed on that and on the new changes that have been proposed. It's basically a new cut off threshold between exempt and non-exempt employees. *(Pat Teegarden, Department of Labor and Employment)*

**Q11: There are organizations that represent themselves as providing home care services, but only provide a broker service that puts patients together with caregivers. These caregivers are independent contractors. Will there be any impacts to these "Caregiver Broker Agencies" and will there be any disclosure requirements to the patient to understand their risks in hiring this type of caregiving situation?**

A11: We are into an area here which spills over throughout Colorado's economy and we have a lot of discussion with regard to independent contractor analysis. I want to go back to something that Les said and I can't emphasize it enough because it is the decided law from the Supreme Court of the State of Colorado. That is that we apply the totality of the circumstances test under Colorado law to whether or not someone is an independent contractor or should rather be classified as a W2 employee and we have got a lot of material on our unemployment insurance decision website within Colorado Department of Labor and Employment and I would be happy to help people look through that if you are trying to determine that. I will emphasize that simply stating the factors list and required in regulations does not necessarily make it so, that you are classified as an independent contractor. There has to be an in fact application of that which shows that individual is working for the company in a fashion which truly reflects the intent of those factors. I don't think we need to be so vague about it but we have had a lot of experience with this outside

of the health care home care industry and I want to be very careful in terms of that. *(Pat Teegarden, Department of Labor and Employment)*

Taking what Pat said, that there may be a determination that these direct care staff are not employees of the broker agency is something that bears looking at. However, it is worth noting that if that determination is made, that if those employees are not direct staff of the broker agency, it may well be that under the law depending on the circumstances and the amount of control of the client receiving services who is making payment that the law could potentially classify that direct care worker as an employee of the patient. It is important to note that in that case, that is where the third party exemption comes in and the rules are different. That is a complicated example and a good example to flush out more in the written response. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

Randy, can you address whether there will be any disclosure requirements to the patient to understand their risks in hiring this type of caregiving situation? *(Les Hendrickson)*

Absolutely. I think the disclosure conversation, particularly around placement agencies, the Department of Public Health and Environment is presently in the process of working with the community to develop some forms around this along with the consideration of some other rules that are out there that are being debated. At this point in time and I guess the best answer I can give right now is it's under debate. Yes, ultimately we will need to come to a consensus and a place where the forms address what the appropriate disclosure is going to be because of course the folks receiving services have a right to be protected in terms of understanding what their responsibilities will or won't be. So we are in that process with the stakeholder group right now and I can't give you an affirmative answer at the moment but there will be a resolution in the not too distant future. *(Randy Kuykendall, Department of Public Health and Environment)*

**Q12: Is the 12-hour rule not in place for over-time? After 12 hours is it considered overtime?**

A12: I don't think so, whatever has been the law so far on that, remains the law on overtime. Nothing's changing with regard to applicability on how you calculate overtime. I don't remember those numbers off the top of my head, in terms of within a 7-day work period, how that all breaks out. But someone else may know the answer. *(Pat Teegarden, Department of Labor and Employment)*

Well as far as I know, that's right Pat. I think we can commit together as State agencies to research that and see if we can get a definitive answer and a written response that we'll post on the internet. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

Absolutely we can. I apologize, I am not the agency expert on application of overtime law but I will make sure that we have included in our written response. *(Pat Teegarden, Department of Labor and Employment)*

**Q13: Is there an effective date of when agencies (Class B, non-medical Home Care Agency HCA) officially have to start paying overtime to their direct care workers, personal care providers, and homemakers?**

A13: That's actually a complicated question. Les, I don't know to what degree it's worth talking about the Department of Labor conversation about the applicability of the stay, being

legally, technically speaking Department of Labor made the point that only the litigants in the lawsuit were subject to the stay, and those that weren't party to the lawsuit may not be subject to the stay and may be subject to action, retroactive to January 1<sup>st</sup> of this year. Is it also worth talking about the discretionary enforcement provisions that the Department of Labor has talked about? Or maybe that is too complicated and that requires written response? What do you think Les? *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

This is definitely a matter we should take away and reflect on. Because the status of any one individual home care agency could differ, we can't really provide any advice to a single agency that says if you're subject to the new law or not. It does sort of depend on whether you're involved in the litigation or if you are represented in the litigation. That is a good question but we need to take it back and think about it. *(Les Hendrickson)*

I think it's worth adding that there is a discretionary enforcement period at the Department of Labor. Now many overtime actions are private right to action brought by employees who desire overtime, but to the extent that the federal Department of Labor is enforcing its rule, it gave itself discretion for a year in applying the new rule. We understand in these conversations with you and collecting this information, that we are considered to be a proactive state. We are hoping that means the federal Department of Labor will look favorably upon Colorado's efforts to come into compliance, and will exercise its discretion in Colorado. Meaning that, the hope is, that Colorado has adequate time to adjust. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

**Q14: In reference to overtime vs. comp time for office employees - I would like clarification of the Wage Order 31.**

A14: I will make a note of Wage Order 31 and we will get a broader discussion of all of that into the written response. I'm sorry that I didn't think to have somebody to specifically answer questions without the nuisance details of when overtime applies, and when comp time versus overtime is acceptable. I know that it has to do with specific periods of time within the work week, but I will make sure we include that in our written responses. *(Pat Teegarden, Department of Labor and Employment)*

**Q15: The IRS came out with a new ruling exempting family live-in caregivers in 2014. Would this prevent agencies from paying over-time?**

A15: The IRS ruling exempting family live-in-caregivers from paying income tax on their earnings seems to imply from an IRS perspective that those family live-in-caregivers are not employees from at least an IRS perspective. Do we know Les if those family live-in-caregivers would be considered employees from the Department of Labor that has a different standard from the IRS? *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

No, I'm not sure about that. Clearly, the IRS ruling is very beneficial to persons who are taking care of people in their homes, fixed home providers, or foster home providers. But how that interacts with allowing agencies to not pay overtime, I'm not sure they do. I guess the IRS ruling came out in March or April of 2014, but it was well before the new DOL rules or well before the discussion of the new DOL rules. I don't think they're really related to each other. I don't think the IRS ruling is that related to the Fair Labor Standards Act. *(Les Hendrickson)*

**Q16: Will all of the information be given to the public at large? Will they be told that if they hire home care workers privately, they would become employers with liability and costs to those employees?**

A16: I don't know that it applies necessarily to the public understanding that our rules and regulations apply to the licensed or certified facilities and what they're required to share in terms of information with clients for our rules and regulations. Although as the Department we are certainly always available to provide information to anybody that asks, we would do everything we could to do that. But, it probably wouldn't necessarily be a commitment beyond ensuring that the facilities and the operators are providing all the appropriate information to potential clients as they are conducting business. *(Randy Kuykendall, Department of Public Health and Environment)*

Randy, is it fair to say, it is worth noting as State agencies, we have specific authority granted to us from the law, and that we don't have authority where the law doesn't clearly grant it to us. However, wouldn't you say, and I would include Pat on this too, if we perceive a gap in public policy, then we are all jointly obliged to think about and discuss this with our stakeholders and work with them to come up with solutions that may or may not require statutory change? *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

Absolutely true. I think we do that on an ongoing basis, where we may find those gaps, sometimes gaps that certainly weren't intended, but need to be dealt with. We would always try to continue to work to address those in the best way we can. Again, and Jed you're right, within the authority we do have, as well as certainly our obligation to keep the public at large informed. *(Pat Teegarden, Department of Labor and Employment)*

**Q17: How will these rules affect companies like [www.care.com](http://www.care.com) in the State?**

A17: I'm not familiar with care.com. Randy or Pat are you? *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

I'm not familiar with it. But I am reviewing the online Terms of Use right now for Care.com. The company states it does not employ any care providers and provides a web based means of care providers and care seekers to post and meet. There are additional tools available online to assist with decision making and narrowing selection regarding the hiring of a care provider. The care seeker becomes the direct employer of the care provider, or uses their back-up service, which is an agency referred by Care.com. *(Randy Kuykendall, Department of Public Health and Environment)*

I'm not familiar with care.com. *(Pat Teegarden, Department of Labor and Employment)*

So this may be something we need to research and provide written response to. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

**Q18: If a Class A agency has all W-2 employees, is there an issue other than paying over-time for more than 40 hours in the field and does this include mileage costs as well?**

A18: Les what do you think about travel time here? 40 hours in the field, I wonder if we maybe need to define that before we answer the question. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

I wonder to what extent reimbursement of mileage is a company benefit policy. I think we have to do a little bit more research here to understand the question better I think. I'm not sure what other issues, or what Martin had in mind when he referred to is there an issue, other than paying OT, etc. Martin if you are still on, could you amplify your question a little bit for us so we could work on it? *(Les Hendrickson)*

**Q19: Does travel time count towards all hours accumulated and once travel time causes the care provider to go over 40 hours do we need to pay over-time? Or will travel time be separate?**

A19: To the best of my knowledge, you have to distinguish, we are talking about travel time between clients, we are not talking about travel time from the caregiver's home to the first client. If the person is working with more than one individual in a day, the only travel time we are talking about is between clients, and that does count, yes. *(Les Hendrickson)*

**Q20: I didn't think comp time really existed?**

A20: Pat, I know that, as State employees, that the law that we are subject to is a little bit different, that comp time is something the State could use, but for private employers in terms of overtime and the use of comp time to offset the need to pay time and half, is that a question we need to research and get back to? *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

Yes. *(Pat Teegarden, Department of Labor and Employment)*

Okay. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

**Q21: Is it true that current Colorado law follows the Companionship Exemption which allows 3rd party employers to avoid paying over-time except in two situations, 1. if care is provided in a non-private home (e.g., Assisted Living) or 2. if the direct care worker spends more than 20% of their time providing general household work? What if direct care worker works more than 40 hours in a work week in a non-private home or does general household work (more than 20% of their hours)?**

A21: I would recommend that we take that question back and look at it. I think it's complicated enough. It is asking if a certain situation exists - two situations exist. So I think we would want to think about the general situation plus the two situations. *(Pat Teegarden, Department of Labor and Employment)*

**Q22: So those of us who follow the rules, get a license and pay a ton for it, get hit, but those who are independent and the public will not. The public deserves to know the ramifications of hiring an independent contractor.**

A22: I'm not hearing a question, but maybe Randy you can talk about the risk that an individual or corporation incurs by providing home care without a license in Colorado. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

Absolutely, Colorado law does require any agency that is providing home care, as is defined in the statute and by regulations, to be licensed by Colorado Department of Public Health. We do work to enforce those regulations wherever those are applicable. We are certainly willing to work with any agency to ensure that they are able to meet the standards of the law. Again as I said earlier, the Department of Public Health and Environment feels very

strongly that it is in our charge and it is our responsibility to do what's appropriate to ensure that both agencies, as well as consumers, are appropriately informed with regard to the responsibilities both of the agencies and then as we are talking about home care providers, whatever those relationships those might be. We understand the importance of consumer protection and ensuring that those safe guards are always in place and we will continue to work to see that those things happen. *(Randy Kuykendall, Department of Public Health and Environment)*

**Q23: Has the rule changed that comp time only applies to public sector employers and private employers must pay over-time (comp time would not apply)?**

A23: There is some difference between comp time for public and private employers. I know that there are certain salaried employers who generally have discretion in how they determine the hours in terms of employment for salaried employees. The State of Colorado has particular rules there. I should not have spoken in general about employment policies. Let's answer this one in writing. Let's go to the experts at CDLE. As employee of the Medicaid agency, I probably should not have answered that earlier, Bill, and so you should not infer anything from my response. CDLE is the appropriate agency to answer this and we will get something in writing here. Is that fair Pat? I'm walking back what I said before because I'm not sure it's accurate. *(Jed Ziegenhagen, Department of Health Care Policy & Financing)*

This is great Jed. Thank you. It's very appreciated. I'm going to need to pull together a couple of experts to take a look very specifically at existing over time policy and how it applies. And then we can give that as a blanket primer to everybody in addition to the specific questions about the rule and the impact it would have with status of the industry. Our overtime laws and rules are what they are and I will get that pulled together and included in our written responses. *(Pat Teegarden, Department of Labor and Employment)*

**Q24: Do we have to pay and include driving time in daily/weekly totals and including overtime?**

A24: Driving time between clients is work time, so yes you would include this in your totals. Driving time from your home to a client or from a client to your home is a commuting cost and it is not includable. *(Les Hendrickson)*

**Q25: Sure, the issue of an all-inclusive pay for an employee has an effect with regards to overtime pay. Because I think for employees who may fall into an overtime situation will ask if they are going to be additionally compensated.**

A25: I think once again, we seem to be going a little bit over the same material in a few different ways. I'm going to look into the newly proposed threshold as to exempt and nonexempt employees and we will include that in the response. Whether or not someone when hired as an employee is eligible for overtime pay or not that is something the employer and employee should determine on the front end of the employment agreement and move forward accordingly regarding the industry in which you are working. *(Pat Teegarden, Department of Labor and Employment)*

**Q26: If the law changes the salary base to \$50K+, what is the advantage to employers of keeping salary workers salaried versus changing them to hourly?**

A26: We are working on a response.

**Q27: How do you handle travel time if you have an “at home office”? And then you have a client meeting at the client’s house?**

A27: We are working on a response.

**Q28: What happens when the time in between shifts/clients is 3 hours long - do you still pay for travel time? (Regular time it takes from one client to the next)**

A29: We are working on a response.

**Q30: What happens with extended time in between shifts, say 3 hours, and there is no time to go home?**

A30: We are working on a response.

**Q31: As an industry, some Class B agencies in Colorado are providing services and paying caregivers as independent contractors and by definition it is not acceptable for them to be classified as independent employees. Given this is happening is there a department in Colorado who would want to know of such agencies?**

A31: We are working on a response.

**Q32: Can we get a copy of the PowerPoint/recording of the presentation sent out at the end of the presentation?**

A32: Yes, we will send it to everyone and the PowerPoint presentation and webinar recording is be posted on the HCPF website here – [www.colorado.gov/hcpf/long-term-services-and-supports-training](http://www.colorado.gov/hcpf/long-term-services-and-supports-training).

**Q33: What is the survey link?**

A33: [www.surveymonkey.com/r/FLSAWebinar](http://www.surveymonkey.com/r/FLSAWebinar)

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