



COMMISSIONER
Jon Weizenbaum

September 21, 2015

To: Financial Management Services Agencies
Consumer Directed Services Option Employers

Subject: Information Letter 14-66
Impact of Department of Labor Companionship Exemption on Financial Management Services Agencies and Consumer Directed Services Employers

This information letter, originally issued on October 17, 2014, is being reissued in response to the August 21, 2015 U.S. Court of Appeals for the District of Columbia ruling to uphold the U.S. Department of Labor (DOL) Home Care Final Rule. The Home Care Rule was slated to be effective January 1, 2015. Due to federal litigation, the DOL has not begun enforcement. On September 9, 2015, the DOL announced it would not begin enforcement of the Final Rule until 30 days after the Court of Appeals opinion becomes effective. The letter also updates the minimum attendant compensation rate to at least \$8.00 per hour, effective September 1, 2015.

The purpose of this letter is to inform Financial Management Services Agencies (FMSA) and Consumer Directed Services (CDS) option employers of the change in exemptions related to the wage and hour requirements of the Fair Labor Standards Act (FLSA) released by the U.S. Department of Labor (DOL). FMSAs are required to share this information with CDS employers immediately. CDS employers should begin to assess the effect of this change, if any, on the budget and, if necessary, make plans to alter the budgets or hire additional staff.

Currently, CDS employers who have authorization for over 40 hours a week of services and hire only one employee to provide those services, such as habilitation and respite, can use the companionship exemption. Using the companionship exemption keeps employers from paying overtime costs, as long as the work performed by the employee meets the criteria to claim the exemption.

The Home Care Final Rule changes the exemption criteria and most CDS employers will no longer be able to claim the companionship exemption. FMSAs must work with CDS employers to determine whether they can continue to claim the companionship exemption. The FMSAs and CDS employers need to use the tool DOL developed, which can be accessed at DOL Wage and Hour Division website <http://www.dol.gov/whd/homecare/individuals.htm>.

The new definition of companionship services is limited; therefore, few CDS employers will continue to qualify for the companionship exemption. Any employee who meets the criteria below must be paid overtime at a rate of time and one half for all hours over 40 worked during the workweek:

1. The employee spends more than 20 percent of his or her work week assisting with activities of daily living (ADLs), such as assistance with eating, bathing or dressing or instrumental activities of daily living (IADLs), which help the individual become more independent, such as participation in age-appropriate activities, meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications or arranging for medical care; or
2. The employee performs medically related tasks such as routine skin care, medication administration, and transferring or bowel programs.

Currently, CDS employers are required to pay at least minimum wage or the attendant compensation wage minimum as described in 40, Texas Administrative Code, Chapter 41, Section 41.505, relating to Payroll Budgeting. With the change in the DOL rule, CDS employers will now need to address the possibility of overtime payment required by the FLSA. Overtime payment will apply to all hours over 40 worked during the workweek.

If the CDS employer must pay overtime, there are two options:

- reduce the per hour rate paid to the employee to accommodate the overtime payment and still stay within budget (per hour rate must be at least \$8.00 per hour); or
- hire additional employees to reduce or limit overtime resulting in minimal, if any, impact on the budget.

The CDS rules do not allow a CDS employer to reduce the number of hours authorized for services in order to pay overtime. To learn more about the upcoming FLSA rule changes, please visit <http://www.dol.gov/whd/regs/compliance/whdfs79e.pdf>.

For questions regarding the content of this letter, contact DADS at: CDS@dads.state.tx.us

Sincerely,

[signature on file]

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Interim Director
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[signature on file]

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