

Home Care Final Rule

Presentation for the

Wage & Hour Division, U.S. Department of Labor

This presentation is for general information and is not to be considered in the same light as official statements of position contained in the Department's regulations.

Introduction

Topics:

I. Home Care Final Rule

Changes to the domestic service employment regulations under the FLSA

II. Joint Employment

Brief overview of joint employment as it pertains to home care workers

III. Shared Living

How the FLSA applies to shared living arrangements

IV. FLSA Compliance and “Hours Worked” Principles

The minimum wage, overtime, and recordkeeping requirements and to what time they apply

Introduction

- Background:
 - The Fair Labor Standards Act (FLSA) is the federal law that requires employers to pay their employees minimum wage and overtime compensation.
 - The minimum wage and overtime requirements apply to “domestic service” employees, *i.e.*, workers providing services of a household nature in or about private homes.
 - For example, nannies, housekeepers, and home health aides are domestic service employees.

Introduction

- Background Continued
 - 29 U.S.C. 202(a)
“That Congress further finds that the employment of persons in **domestic service** in households affects commerce.”
 - 29 C.F.R. 552.3
“[T]he term **domestic service employment** refers to services of a household nature performed by an employee in or about a **private home** (permanent or temporary).”

Introduction

Background Continued

- 29 U.S.C. 206(f)
The FLSA's **minimum wage** protections apply to a domestic service employee if:
 - The employee performs domestic service for **more than 8 hours** in the workweek (the work can occur in one or more households)or
 - The employee earns a certain amount per calendar year:

2016	\$2,000	2014	\$1,900
2015	\$1,900	2013	\$1,800
- 29 U.S.C. 207(l)
The FLSA's **overtime** protections apply to a domestic service employee who works more than 40 hours in a workweek unless otherwise exempt.

Introduction

- Background Continued:
 - Certain exemptions exist within the FLSA's general, broad coverage of domestic service employees.
 - Two of these exemptions were updated in the Home Care Final Rule:
 - **Companionship Services Exemption:** The FLSA's minimum wage *and* overtime requirements do not apply to domestic service employees who provide "companionship services." 29 U.S.C. 213(a)(15)
 - **Live-In Domestic Service Employee Exemption:** The FLSA's overtime requirement does not apply to employees who are "live-in" domestic service employees. 29 U.S.C. 213(b)(21)

Introduction

Twin Principles

The “Twin Principles” in Implementing the Rule

- 1) Extend to home care workers the basic wage protections that most American employees enjoy.
- 2) Ensure that recipients of assistance and their families continue to have access to the critical community services on which they rely and that support innovative models of care that help them live in the community.

Part I - Home Care Final Rule

What are the rules?

The new regulations:

1. Change who may claim the exemptions
 - Third party employers may not claim either the companionship services or live-in domestic service employee exemptions
 - Individuals, families or households may still claim the companionship services and live-in domestic service employee exemptions
2. Update the definition of “companionship services”
3. Change recordkeeping requirements for live-in domestic service employees

Home Care Final Rule

Companionship Services

Who may claim the companionship services exemption?

29 C.F.R. 552.109(a)

- Under the new rules, third party employers of home care workers **MAY NOT** claim the companionship services exemption regardless of the employee's duties.
 - Third party employers may include private home care agencies or public agencies that administer a consumer-directed or other type of home care program.
- **The companionship services exemption is only available to the consumer or the consumer's family or household.**

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Companionship Services

29 C.F.R. 552.6

Definition of “companionship services” -

- Means the provision of **fellowship** and **protection**.
- Includes the provision of **care** if the care is provided along with fellowship and protection and does not exceed 20% of total hours worked per person per workweek.
- Does not include domestic services provided primarily for benefit of other members of the household.
- Does not include **medically related services**.

Home Care Final Rule

Live-in Domestic Service Employees

Who may claim the live-in domestic service employee exemption?

- Under the new rules, third party employers **MAY NOT** claim the live-in domestic service employee exemption from overtime pay.
 - Third party employers may include private home care agencies or public agencies that administer a consumer-directed or other type of home care program.
- The live-in domestic service employee exemption from overtime is only available to the consumer or the consumer's family or household.

Live-in Domestic Service Employees

Who is a live-in domestic service employee?

- Under the FLSA, a live-in domestic service employee is a worker who resides in the private home where he/she works on a “**permanent basis**” or for “**extended periods of time**.” The Final Rule did not change the meaning of this term. 29 C.F. R. 552.102; 29 C.F. R. 785.23
 - **Permanent basis** = works and sleeps on the employer’s premises seven days per week and therefore has no home of his/her own other than the one provided by the employer.
 - **Extended periods of time** = works and sleeps on the employer’s premises for five days a week (for a total of 120 hours or more) OR works and sleeps on the employer’s premises for five consecutive days or nights.

Note: Home care workers who work 24-hour shifts are not necessarily live-in domestic service employees.

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Live-in Domestic Service Employees

What are the recordkeeping requirements for live-in domestic service employees? 29 C.F.R. 552.110

- An employer and a live-in domestic service employee may enter into an agreement regarding the employee's meal, sleep, and other breaks (*i.e.*, time for which the employee, if completely free from work, need not be paid). The employer must keep a copy of this agreement.
- Under the new rules, the employer must also keep accurate records of hours actually worked by the live-in domestic service employee.
 - The employer may assign the employee the task of creating and submitting those records to the employer, but the employer is ultimately responsible for having them.

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Live-in Domestic Service Employees

Additional resources for maintaining time records may be found using the following links:

- **Work hours calendar**
<http://www.dol.gov/whd/FLSA/EmployeeCard/calendarR5Web.pdf>
- **Timesheet app**
<https://itunes.apple.com/us/app/dol-timesheet/id433638193?mt=8>

DAY	DATE	IN	OUT	TOTAL HOURS
Sunday	6/3/07	—	—	—
Monday	6/4/07	8:00pm	12:02pm	8
Tuesday	6/5/07	1:00pm	5:03pm	8
Wednesday	6/6/07	7:57am 1:00pm	11:58am 5:00pm	8
Thursday	6/7/07	8:02am	12:10pm	8
Friday	6/8/07	1:06pm	5:05pm	8
Saturday	6/9/07	—	—	—
Total Workweek Hours:				24

Private Home

- The companionship services and live-in domestic service employee exemptions apply in the context of “domestic service employment,” the category of work that includes home care.
- “Domestic service employment” means services of a household nature performed by an employee in or about a **private home**. 29 C.F.R. 552.3
- There are existing rules regarding how to know whether a residence is a private home for purposes of the FLSA.

Private Home

- A **private home** may be permanent or temporary, but the fact that a place is an individual's sole residence is not enough to make it a private home under the FLSA.
 - For example, a nursing home is not a private home.
- The determination of whether a particular residence is a private home is fact-specific and may require consideration of several factors.

Private Home

- Some factors that can help assess whether a residence is a private home include, Fact Sheet #79:
 - Whether the consumer lived in the living unit before he or she received any services;
 - Whether the consumer would be allowed to live in the unit if the consumer were not receiving services from the service provider;
 - Who owns the living unit;
 - Who manages and maintains the residence, *i.e.*, who provides the essentials that the consumer needs to live there, such as paying the mortgage or rent, utilities, food, and housewares.

Part II - Joint Employment

- As previously explained, **third party employers of home care workers MAY NOT claim the companionship services or live-in domestic service employee exemptions.**
- A home care worker may be employed both by the consumer, family, or household and a third party. This is **joint employment.**
 - For example, a family and a private home care agency could both employ a personal care assistant.
 - In a consumer-directed program, a consumer and a state agency administering the program could both employ a home health aide.

Joint Employment

- In June 2014, the Department released guidance regarding **joint employment** of home care workers in consumer-directed, Medicaid-funded programs by public entities under the FLSA.
 - Administrator's Interpretation No. 2014-2
 - Fact Sheet #79E

The guidance is available on our home care website, at:
https://www.dol.gov/whd/homecare/joint_employment.htm

Joint Employment

- We recognize in our guidance that a state administering any Medicaid-funded program must perform a range of functions as a condition for participation in the Medicaid program. *These include:*
 - Setting eligibility criteria for consumers and providers
 - Monitoring for fraud, abuse and quality control
 - Ensuring the fiscal accountability of the program

Joint Employment

- Our guidance identifies common factors considered by courts in conducting an economic realities analysis and applies those factors to various aspects of consumer-directed programs.
- The AI analyzes whether each of these program variables is a “strong,” “moderate,” or “weak” indicator of an employment relationship.

Joint Employment

Some factors to consider in doing an economic realities analysis:

Ability to Hire
and Fire

Setting the Wage
or Reimbursement
Rate

Control over Hours
and Scheduling

Who Supervises,
Directs or Controls
the Work

Who Performs
Payroll and Other
Administrative
Functions

Joint Employment

- Power to hire and fire
 - Weak: Setting basic qualifications in order to assure consumer safety, such as requiring a criminal background check and First Aid or CPR certification
 - Strong: more extensive provider qualifications, such as fulfilling comprehensive, state-administered training requirements (beyond training required for relevant licenses)

Joint Employment

- Hiring decisions
 - Weak: a public entity permits the consumer to recruit, interview, and hire any provider who meets basic qualifications (or maintains an open registry to which the consumer can refer his or her preferred provider for inclusion)
 - Moderate: a public entity runs a registry and permits a consumer to only hire from the closed registry
 - Strong: a public entity must co-interview or approve a provider based on criteria beyond the setting of basic qualifications

Joint Employment

- Firing Decisions
 - Weak: a public entity may exclude providers from working within the Medicaid program only in situations dictated in federal Medicaid requirements—i.e., if the worker is determined to have committed fraud or is found after an investigation to have abused a consumer
 - Strong: a public entity reserves the right to remove a worker at any time from the household, or can fire a worker for poor performance,

Joint Employment

- Setting a wage/reimbursement rate
 - Weak:
 - The third party ultimately controls the hourly wage paid to workers (because the reimbursement rate includes so much beyond wages)
 - There is a true cap or range, meaning the rate (1) provides a consumer with meaningful discretion to determine how much to pay home care workers within his or her individual budget; and (2) allows a consumer choice in how to spend unused funds
 - Strong:
 - A public entity administering a consumer-directed program sets the wage rate for home care workers
 - Because the reimbursement rate effectively controls the wage rate, the consumer and any private third party do not have any discretion in adjusting the wage earned by the home care worker

Joint Employment

- Hours and scheduling
 - Weak: the consumer is able to freely decide when, how often, and for how long the provider will work
 - Moderate: the public entity sets an explicit number of hours for which the consumer may receive home care services from which the consumer may not deviate, and the consumer controls the scheduling within that timeframe
 - Strong: the public entity specifies certain hours or specific weekly schedules to be worked

Joint Employment

- Supervises, directs, or controls the work
 - Weak: the consumer has sole control over the worker, the tasks that are performed
 - Moderate: the public entity more explicitly identifies (perhaps in a plan of care) the specific permissible tasks and limits the worker to performing those exact tasks, and the public entity engages in quality management activities that are more similar to daily supervision
 - Strong: the public entity mandates the list of specific permissible tasks and the time allocated for performance of each task, if the provider is required to inform the program contact of absences, if the program contact mediates issues between the consumer and providers, if the program provides for a grievance procedure, if the program conducts regular performance reviews, if the program requires ongoing public-sponsored training, or if the provider must sign in and sign out\with the public entity

Joint Employment

- Performs payrolls and other administrative functions
 - Weak: functions that are similar to the tasks performed by commercial payroll agents for businesses, such as maintaining records, issuing payments, addressing tax withholdings, and ensuring that workers' compensation insurance is maintained for the worker on behalf of the consumer

Joint Employment

- How does Medicaid factor in?
 - Public entity (or delegated) actions that are typically not strong indicators of joint employment:
 - Set general eligibility criteria for consumers
 - Determine whether individuals meet these criteria
 - Conduct an assessment of each consumer's needs
 - Develop individualized plans of care together with the consumer
 - Implement measures designed to prevent fraud and abuse (e.g., setting basic qualifications for providers to participate in the Medicaid program such as requiring providers to pass a criminal background check, conducting on-site visits, and developing a process for reporting and investigating abuse, neglect, and/or exploitation of consumers)

Part III - Shared Living

- In March 2014, the Department released guidance regarding the application of the FLSA to **shared living arrangements**, including adult foster care and paid roommate situations.
 - Administrator's Interpretation No. 2014-1
 - Fact Sheet #79G

The guidance is available on our home care website, at:
http://www.dol.gov/whd/homecare/shared_living.htm

Shared Living

- By “shared living,” the Department means arrangements in which the consumer and provider live together.
- This term includes programs often called adult foster care, host home, paid roommate, supported living, life sharing, etc.
 - It does not refer to roommates or family who have no expectation of payment, *i.e.*, provide exclusively natural supports.
 - It does not refer to programs in which services are provided in group homes or via shift work, regardless of whether the programs are called by these names.
 - It does not necessarily mean “live-in” under the FLSA.

Shared Living

- The guidance groups shared living arrangements into two major categories:
 - Those that occur in the provider's home (adult foster care/host home) and
 - Those that occur in the consumer's home (paid roommate scenarios).

Shared Living

In a provider's home

- The FLSA applies to employees, not independent contractors.
 - A home care provider could be an employee of a consumer and/or of a third party. Only if neither is her employer is she an independent contractor.
- In most shared living arrangements that occur in the provider's home, the provider will be an independent contractor.

Shared Living

In a provider's home

- Why is the provider usually an independent contractor?
 - The provider will not be an employee of the consumer because when shared living arrangements occur in the provider's home, the provider controls and has invested in the residence.
 - The provider will not be an employee of a third party if the third party oversees the program but is not involved in the work (for example, the third party does not manage the residence or direct the provider regarding how to care for the consumer).

Shared Living

In a provider's home

- When is a provider instead an employee?
 - If the third party is more involved in the provider's relationship with the consumer. For example:
 - If a case manager instructs the provider on how to perform tasks.
 - If the third party finds and rents the residence in which the shared living arrangement occurs.
 - If the third party negotiates the terms of the provider's employment, such as wages and benefits.

Shared Living

In a provider's home: Respite workers

- Depending on the particular circumstances, a respite worker could be an employee either of an adult foster care provider or of a public or private agency that arranges the respite care.
 - In most cases, a provider or agency will control the worker's services (such as by setting the worker's schedule and directing the worker as to the tasks to be performed), the worker will have no opportunity for profit or loss but will instead receive wages, the worker will not have invested in the relationship, and the worker will provide services that are integral to the business of the potential employer.
 - Based on those facts, the economic realities test will most often lead to the conclusion that respite workers are employees who are likely entitled to FLSA minimum wage and overtime protections.

Shared Living

In a consumer's home

- In most shared living arrangements that occur in the consumer's home, the provider will be an employee of the consumer.
 - The consumer controls the residence, sets the schedule, etc.
- The **consumer** might be able to claim either or both of the FLSA exemptions updated by the Final Rule.
 - Companionship services exemption from minimum wage and overtime requirements (consider duties)
 - Live-in domestic service employee exemption from overtime requirements (consider whether provider lives in the home permanently or for extended periods of time)

Shared Living

In a consumer's home

- The provider might also be an employee of a third party.
 - Use the FLSA “economic realities” test to determine whether a joint employment relationship exists. A major factor to consider is the third party’s control over the provider’s work.
 - For example, if a provider must ask the third party’s permission to be away from the residence or to make a change to the consumer’s daily schedule, those facts weigh in favor of a finding that the provider is an employee.
 - On the other hand, if a provider must notify a third party that she will be away from the residence overnight but the third party cannot refuse to grant her request or sanction her for taking the evening off, those facts would not weigh in favor of employee status.
- A third party employer MAY NOT claim either exemption.

Shared Living

What if the home is new to both the provider and the consumer?

- Consider the facts and circumstances to determine whether the provider or the consumer has primary control over the residence and relationship.
- Relevant facts include:
 - Who found the residence
 - Who arranged to buy or lease it
 - Who furnished common areas
 - Who maintains the residence (such as by cleaning it and making repairs to it)
 - Who pays the mortgage or rent

Part IV - FLSA Compliance and Hours Worked

- If it applies, the FLSA requires that an employer:
 - Pay **minimum wage** for all **hours worked**,
 - Pay **overtime compensation** for all **hours worked** over 40 in a workweek, and
 - Keep employment **records**.

FLSA Compliance

- **Minimum wage:** The federal minimum wage is currently \$7.25 per hour. If a State or local minimum wage is higher, that rate applies. 29 U.S.C. 206
- **Overtime:** The FLSA requires that an employee receive one and a half times her regular rate for each hour worked over 40 in a workweek. 29 U.S.C. 207
- **Recordkeeping:** The FLSA requires that employers keep records regarding their employees and hours worked. 29 U.S.C. 211(c)

FLSA Compliance

Minimum Wage

- Payment of a daily, weekly, or monthly rate is permissible if the total compensation for each week divided by the hours worked that week is equal to at least the minimum wage.
 - For example, if a worker is paid a daily rate of \$50 and works for 5 hours each work day of a given workweek, she has received \$10 per hour that week and the obligation to pay minimum wage has been met.
 - If a worker receives a monthly payment, her weekly rate is the monthly payment times 12, divided by 52, and her hourly rate is calculated by dividing that weekly rate by the hours worked. 29 C.F.R. 778.113

FLSA Compliance

Minimum Wage

- Payment of different wage rates at different times, for different tasks, or to different employees is permissible as long as at the end of the workweek, the employee has been paid at or above the minimum wage.
 - For example, an agency may pay employees one rate for care services and another for travel time or one rate for waking time and another for sleep time. 29 C.F.R. 778.115

FLSA Compliance

Overtime: One and a Half Times the Regular Rate

- Overtime compensation due is calculated based on the employee's "regular rate" of pay per hour.
 - The regular rate must be at least minimum wage, and it may be higher.
- The regular rate is the amount earned in a workweek divided by the number of hours worked in that workweek.
 - If a worker is paid \$400 a week and works 30 hours in week 1 and 50 hours in week 2, her regular rate is \$13.33 in week 1 and \$8 in week 2. In week 2, she is owed \$40 (one-half of \$8 x 10 hours over 40) in overtime compensation.
 - If a worker is paid \$400 a week based on an agreement that the weekly salary is for 40 hours of work, her regular rate is \$10 regardless of how many hours she actually worked that workweek. 29 C.F.R. 778.114

FLSA Compliance

- Under certain circumstances, an employer may credit toward its minimum wage obligation the value of housing (or food or other facilities) provided to an employee.
- This is the **Section 3(m) Credit**. 29 C.F.R. 531.29
- *Field Assistance Bulletin No. 2015-1: Credit for lodging, issued December 2015*
 - Detailed guidance about the section 3(m) credit, including information about how to determine the proper amount of the credit, is available at http://www.dol.gov/whd/homecare/credit_wages.htm.

Section 3(m)

- Requirements for claiming the credit, 29 C.F.R. 531.30 – 531.31:
 - The lodging is regularly provided by the employer or similar employers;
 - The employee voluntarily accepts the lodging;
 - The lodging is furnished in compliance with applicable federal, state, or local law;
 - The lodging is provided primarily for the benefit of the employee rather than the employer; and
 - The employer maintains accurate records of the costs incurred in furnishing the lodging. 29 C.F.R. 516.27
 - *Exception specific to domestic service: ER can claim 7.5 x MW without records. 29 C.F.R. 552.100(d).*

Section 3(m)

- Primarily for the benefit of the employee
 - An employer may not claim the section 3(m) credit if the employer requires the employee to leave an existing home and live on the employer's premises to be 'on call' to meet the needs of the employer.
 - The employer's demands on an employee's time is relevant to a determination of who primarily benefits from the employee's living at the residence.
 - Whether the employer has provided an employee with adequate lodging is another factor that may help determine who primarily benefits from the living arrangement and the lodging provided.

Section 3(m)

- Primarily for the benefit of the employee
 - A college student moves into the extra bedroom in a home owned by an 80-year-old man to provide him assistance with bathing and dressing for two hours in the mornings and preparing for sleep for one hour each night, but the student is otherwise free to spend her time as she pleases.
 - A home health aide who serves an individual with a health condition that requires her to have constant assistance, including overnight.
 - An employee is only provided a cot or couch to sleep on in a living space shared with the employer.

Section 3(m)

- Amount of the credit, 29 C.F.R. 531.2 - 531.3:
 - “Reasonable cost” or “fair value,” whichever is less.
 - Reasonable cost = the actual cost to the employer
 - For example, a portion of the monthly mortgage or rental payment as well as utility payments
 - Can’t include any profit
 - The source of the funds, other than that they are from an employer, is not relevant
 - Consider what portion of the residence the employee uses to determine what portion of the cost should be considered
 - Fair value = what the actual cost should be, if lower
 - Use the fair value if the actual amount the ER pays is not reasonable (i.e., if the fair value is lower)
 - Can consider average rental amounts

Section 3(m)

- Meal credit
 - “Voluntarily accepts” does not apply to meals.
 - FOH § 30c09(b): “Therefore, where an employee is required to accept a meal provided by the employer as a condition of employment, [the WHD] will take no enforcement action, provided that the employer takes credit for no more than the actual cost incurred.”
 - Special recordkeeping exception for meals provided to domestic service employees. 29 C.F.R. 552.100(c).
 - Employers can take credit of up to 37.5% of MW for a breakfast (if furnished), up to 50% of MW for a lunch (if furnished), and up to 62.5% of MW for a dinner (if furnished), which meal credits when combined do not in total exceed 150% of MW for any day. No records required.
 - Employers can credit themselves with the actual cost or fair value of furnishing meals, whichever is less, but then they have to keep records.

Section 3(m)

- Wage calculations, 29 C.F.R. 531.36 - 531.37; 29 C.F.R. 778.116
 - Determine a weekly amount of the credit
 - Only counts toward minimum wage obligation
 - A live-in domestic service employee receives \$6 per hour as well as room and board, for which the reasonable cost is \$100 per week.
 - If the employee works 30 hours in a workweek, the \$180 ($\6×30) cash wages is added to the \$100 in section 3(m) credit for a total of \$280 received in the week,
 - Regular rate = $\$9.33$ ($\$280 / 30$).
 - If the same live-in domestic service employee works for 50 hours, she would receive \$300 ($\6×50) in cash wages plus \$100 in section 3(m) credit for a total of \$400,.
 - Regular rate = $\$8$ ($\$400 / 50$).
 - Her third party employer would then owe her an additional \$40 ($\$8 \times .5 \times 10$) in overtime compensation.

Hours Worked

- The FLSA requires payment for all **hours worked**.
- Hours when the employee is “on duty” is hours worked. 29 C.F.R. 785.15
 - This includes time spent working, and time spent being “engaged to wait.”
 - For example, if an employee is in a home while a consumer is napping and must be available whenever the consumer wakes up, even if the employee spends the time watching TV or reading a book for pleasure, those are hours worked.
- Time when the employee is completely relieved from duty long enough to use the time for his/her own purposes is NOT hours worked. 29 C.F.R. 785.16
 - For example, if the employee leaves the home for three hours to see a friend and run errands for herself.

Hours Worked

Meal Breaks

- Meal periods, usually of 30 minutes or more, are NOT hours worked. 29 C.F.R. 785.19
 - But if the employee works during his/her meal, for example, by helping a consumer eat, he/she must be paid for the time.
- A 5- to 20-minute rest period is not a meal break; it is hours worked that must be paid. 29 C.F.R. 785.18

Hours Worked

Travel Time

- Travel from home to work or from work to home (*i.e.*, commuting time at the beginning and end of a work day) is NOT hours worked. 29 C.F.R. 785.35
- Time spent traveling between different sites of work for the same employer is hours worked. 29 C.F.R. 785.38
 - For example, driving for 30 minutes between the private homes of two consumers where a home care agency is the employee's joint employer.
- Travel between jobs for different employers is NOT hours worked.
 - For example, driving for 30 minutes between the home of a consumer who receives services through a state program and another who hired and pays the worker privately.

Hours Worked

Travel Time

42- Q. How is the travel time counted if an employee does not travel directly between the homes of two individuals receiving services?

- Workers who travel to more than one worksite for an employer during the workday must be paid for travel time between each worksite; if the travel is not direct because the employee is relieved from duty long enough to engage in purely personal pursuits, only the time necessary to make the trip must be paid.
- For example, Tiffany is a direct care worker who is employed by Handy Home Care Agency. She provides services to two of the agency's clients, Mr. Jackson, from 9:00am to **11:30am**, and Mr. Smith, from **2:00pm** to 6:00pm. Tiffany drives to the two different worksites which are **30 minutes apart**. She leaves Mr. Jackson's home at 11:30am and goes to a restaurant for lunch, shops for herself, and then arrives at Mr. Smith's home at 2:00pm.
- Because Tiffany is completely relieved from duty long enough to use the time effectively for her own purposes (i.e., lunch and shopping) not all of the time is hours worked. The 30 minutes required to travel between the two homes is hours worked and, as of January 1, 2015, must be paid by the Handy Home Care Agency even though Tiffany did not travel directly between consumers.

Hours Worked

Sleep Time

- Under what circumstances an employer may exclude sleep time from an employee's hours worked under the FLSA
- *Field Assistance Bulletin No. 2016-1: Exclusion of Sleep Time, issued April 2016*
 - Detailed guidance about the exclusion of sleep time from hours worked is available at https://www.dol.gov/whd/homecare/sleep_time.htm

Hours Worked

Sleep Time

FAB 2016-1	Live-in employee		Shifts of 24 hours or more	Shifts of fewer than 24 hours
	Extended periods of time	Permanent		
Requirements for excluding an employee's sleep time from hours worked	<ul style="list-style-type: none"> Reasonable agreement to exclude sleep time Employer must provide private quarters in a homelike environment 		<ul style="list-style-type: none"> Employer provides adequate sleeping facilities Employee can usually enjoy an uninterrupted night's sleep (5 consecutive hours) Express or implied agreement to exclude sleep time 	Sleep time may not be excluded
Maximum number of hours that can be excluded	Up to 8 hours per night as long as the employee is paid for at least 8 hours during the 24-hour period	Up to 8 hours per night as long as the employee is paid for some other hours during the workweek	Up to 8 hours, in a fixed period, in each 24-hour shift	Sleep time may not be excluded
Limitations on exclusion on a particular night	<ul style="list-style-type: none"> Any interruption to sleep time must be paid If during any night the employee does not get reasonable periods of uninterrupted sleep totaling at least 5 hours, the employer may not exclude any sleep time 			

Hours Worked Sleep Time

- Shifts of less than 24 hours, 29 C.F.R. 785.21
 - If an employee is on duty for a shift that is less than 24 hours, the employee must be paid even for time he/she is sleeping.

Hours Worked

Sleep Time

- Shifts of 24 Hours or More, 29 C.F.R. 785.22
 - If an employee is on duty for 24 hours or more, the employer and employee can exclude from hours worked up to 8 hours spent sleeping if:
 1. The employer furnishes **adequate sleeping facilities**,
 2. The employee can **usually enjoy 5 consecutive hours of uninterrupted sleep**, and
 3. The employer and employee have an **express or implied agreement** to exclude sleep time.

Hours Worked

Sleep Time

- **Adequate sleeping facilities** depend on the particular circumstances, but generally require access to basic sleeping amenities, reasonable standards of comfort, and basic bathroom and kitchen facilities.
 - Unlike for live-in employees, the sleeping area need not be private.

Hours Worked

Sleep Time

- An employee can **usually enjoy 5 consecutive hours of uninterrupted sleep** if interruptions occur less than half the time.
 - Note the 5 hours must be all at once.
 - “Usually” means half or more than half of the time.
- Can this employee usually enjoy an uninterrupted night’s sleep?
 - A personal care attendant provides home care services to a consumer on weekends. The employee is not paid for the hours between 11:00pm and 6:00am, which are considered sleep time.
 - If during the six months the employee has worked for the consumer each weekend, the consumer has woken the employee up each night for assistance going to the bathroom, usually once around 1:00am and again around 3:00am.
 - If over the six months of employment, the consumer has woken the provider up for assistance going to the bathroom every other night around midnight, which usually takes about 15 minutes.

Hours Worked

Live-In Domestic Service Employees

- There are special rules for applying hours worked principles to live-in workers. 29 C.F.R. 785.23
- Specifically, an employer and live-in employee may enter into a **reasonable agreement** that describes the work the employee is to perform and the time designated as excluded from hours worked.
 - Particularly in the shared living context, a clear and specific reasonable agreement will benefit all parties.
 - The agreement should normally be in writing.

Hours Worked

Live-In Domestic Service Employees

- For a live-in domestic service employee, the employee and the employer may make an agreement excluding from hours worked: 29 C.F.R. 552.102; 29 C.F.R. 785.23
 - sleep time,
 - meal time,
 - other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits.
- The live-in domestic service employee still must be paid for all hours worked. In other words, the actual time spent performing work must be compensated, even if it is greater than anticipated in the reasonable agreement.

Hours Worked

Live-In Domestic Service Employees

- Some tasks are easy to classify as work or off-duty activities.
 - For example, time spent helping a consumer bathe is hours worked; time spent attending a college course while completely relieved from duty is not.
- Other activities may occur during either on-duty or off-duty time, depending on the context.
 - For example, going to a community event together at a time when the provider could choose to be apart from the consumer could be unpaid if a reasonable agreement only requires the provider to assist the consumer at certain times of day.
 - But going to the event together could be hours worked if the reasonable agreement states that the provider's duties include engaging the consumer in community activities.

Hours Worked

Live-In Domestic Service Employees

Sleep time may be excluded from live-in employees' hours worked if:

1. The employer and employee have a reasonable agreement to exclude sleep time, and
 2. The employer provides the employee with **private quarters** in a **homelike environment**.
- **Private quarters** are a living and sleeping space that is separate from the person receiving services.
 - Generally, private quarters means a separate bedroom.
 - However, the particular circumstances of the case may warrant a different arrangement (such as if the paid care provider is the consumer's spouse).
 - A **homelike environment** is a space that includes facilities for cooking and eating, a bathroom, and a space for recreation.
 - These facilities may be shared with the consumer and/or other household members.

Hours Worked

Live-In Domestic Service Employees

- How much sleep time can be excluded from a live-in employee's hours worked?
 - Extended periods of time (*i.e.*, does not live there exclusively but meets the residency requirements previously described): Up to eight hours of sleep time may be excluded as long as the worker is paid for at least eight hours of work time in the same 24-hour period.
 - Permanently (*i.e.*, has no other home): The provider must typically be paid for some hours during non-sleep time in order to exclude up to 8 hours of sleep time. The agreement must be reasonable.

Hours Worked

Sleep Time

- Even if an employee's sleep time is usually excluded from hours worked, 29 C.F.R. 785.22(b):
 - Any interruptions to sleep time must be paid.
 - If during any night the employee does not get reasonable periods of uninterrupted sleep totaling at least 5 hours, the employer may not exclude any sleep time for that particular night.

Hours Worked

Training Time

29 C.F.R. 785.27

- Time employees spend in meetings, lectures, or training is usually hours worked.
- Training time is not hours worked if:
 - Attendance is outside regular working hours,
 - Attendance is voluntary,
 - The course, lecture, or meeting is not job-related, and
 - The employee does not perform any productive work during attendance.

Additional Information

- Visit our Home Care website at www.dol.gov/homecare for:
 - Information about the Home Care Final Rule
 - Joint employment and shared living guidance
 - Fact sheets and FAQs about a variety of other topics related to home care, in the context of the FLSA
 - Email updates (go to “Subscribe to Home Care News”)
- Contact a local Wage and Hour Division Office <http://www.dol.gov/whd/america2.htm>