



pennsylvania
DEPARTMENT OF HUMAN SERVICES
BUREAU OF FINANCIAL OPERATIONS

May 4, 2015

Ms. Canice Barr, Administrator
One Care, Inc.
8400 Bustelton Avenue
Philadelphia, Pennsylvania, 19152

Dear Ms. Barr:

I am enclosing for your review the final audit report of One Care, Inc. as prepared by the Division of Audit and Review (DAR). Your response has been incorporated into the final report and labeled as an Appendix. The report covers the period from January 1, 2013 to November 30, 2014.

I would like to express my appreciation for all of the courtesy extended to my staff during the course of the fieldwork. I understand that your staff was especially helpful to Barbara Miller in completing the audit process.

The final report will be forwarded to the Department's Office of Long Term Living (OLTL) to begin the Department's resolution process concerning the report's contents. The staff from OLTL will be in contact with you to follow-up on the actions taken to comply with the report's recommendations.

If you have any questions concerning this matter, please contact David Bryan, Audit Resolution Section at [REDACTED].

Sincerely,

A handwritten signature in black ink that reads "Tina L. Long".

Tina L. Long, CPA
Director

Enclosure

c: Mr. Jay Bausch
Ms. Kimberly Nagel
Mr. Michael Luckovich
Ms. Jennifer Whalen
Ms. Angela Episale
Mr. Grant Witmer

bc: Mr. Alexander Matolyak
Mr. Daniel Higgins
Mr. David Bryan
Mr. Grayling Williams
Ms. Shelley Lawrence
SEFO Audit File (S1404)

Some information has been redacted from this audit report. The redaction is indicated by magic marker highlight. If you want to request an unredacted copy of this audit report, you should submit a written Right to Know Law (RTKL) request to DHS's RTKL Office. The request should identify the audit report and ask for an unredacted copy. The RTKL Office will consider your request and respond in accordance with the RTKL (65P.S. §§ 67.101 et seq.) The DHS RTKL Office can be contacted by email at: rapwrtkl@pa.gov.

May 4, 2015

Mr. Brendan Harris, Executive Deputy Secretary
Department of Human Services
Health & Welfare Building, Room 334
Harrisburg, Pennsylvania 17120

Dear Deputy Secretary Harris:

In response to a request from the Office of Long Term Living (OLTL), the Bureau of Financial Operations (BFO) initiated an audit of One Care, Inc. (One Care). The audit was designed to investigate, analyze and make recommendations regarding the reimbursements from the Provider Reimbursement and Operations Management Information System (PROMISe) for client care. Our audit covered the period from January 1, 2013 to November 30, 2014 (Audit Period).

This report is currently in final form and therefore contains One Care's views on the reported findings, conclusions and recommendations.

Executive Summary

One Care provides Personal Assistance Services through the Attendant Care, Attendant Care 60+, Independence and the Pennsylvania Department of Aging (PDA) waiver programs which are funded through OLTL. Total questioned costs are \$32,440.

The report findings and recommendations for corrective action are summarized below:

FINDINGS	SUMMARY
<p>Finding No. 1 – Claims Reimbursed Through PROMISe were not Adequately Documented.</p>	<p>A statistically valid random sample (SVRS) of PROMISe paid claims was tested for adequacy of supporting documentation. The discrepancies identified relate to missing time sheets and/or daily activity notes. The total questioned costs related to these errors are \$32,440.</p>
HIGHLIGHTS OF RECOMMENDATIONS	
<p>OLTL should:</p> <ul style="list-style-type: none"> Recover \$32,440 related to Personal Assistance Services claims which were inadequately documented. <p>One Care should:</p> <ul style="list-style-type: none"> Only bill for claims which are adequately supported by the required documentation and accurately reflect the number of units that were provided. 	

One Care, Inc.
January 1, 2013 Through November 30, 2014

FINDINGS	SUMMARY
Finding No. 2 – One Care did not Deliver Services in Accordance with the Authorized Schedule.	Certain claims were billed according to the PDA authorized schedule and did not reflect the actual times when services were delivered as documented by the care-givers' time sheets.
HIGHLIGHTS OF RECOMMENDATIONS	
One Care should: <ul style="list-style-type: none"> • Only submit claims for reimbursement that are in agreement with the actual service times and related units. • Deliver services to consumers in accordance with the PDA authorized schedule. 	

FINDINGS	SUMMARY
Finding No.3 – One Care did not Pay Its Care-givers Overtime	One Care did not pay its care-givers overtime when time worked exceeded 40 hours per week; as such, they are not in compliance with the Federal Fair Labor Standards Act (FLSA).
HIGHLIGHTS OF RECOMMENDATIONS	
One Care should: <ul style="list-style-type: none"> • Immediately begin paying care-givers overtime whenever the time worked exceeds 40 hours in a one week period. • Review previous pay periods and compensate those employees whose time exceeded 40 hours in a one week period to comply with the FLSA. 	

FINDINGS	SUMMARY
Finding No. 4 – Internal Control Deficiencies	Internal control deficiencies were identified regarding insufficient review of daily activity notes and inadequate monitoring of service delivery to ensure that services provided conform to the authorized service delivery schedule.
HIGHLIGHTS OF RECOMMENDATIONS	
One Care should: <ul style="list-style-type: none"> • Develop and implement procedures to ensure that the daily activity notes are complete prior to billing. • Ensure services are provided according to the Individual Support Plan (ISP) service delivery schedule. 	

See Appendix A for the Background, Objective, Scope and Methodology and Conclusion on the Objective.

One Care, Inc.
January 1, 2013 Through November 30, 2014

Results of Fieldwork

Finding No. 1 – Claims Reimbursed Through PROMISe were not Adequately Documented.

A SVRS of claims were selected from the claims reimbursed through PROMISe during the Audit Period. The SVRS consisted of Personal Assistance Services claims. The underlying documentation was analyzed to determine the validity of each sampled claim. In order for a claim to be considered valid, a time sheet and daily activity note must be maintained¹ to support the services that were billed. Errors included missing time sheets, missing daily activity notes and units of service that were incorrectly compiled. The net of over- and under-billed claims resulted in questioned costs of \$32,440.

Recommendations

The BFO recommends OLTL recover \$32,440 related to PROMISe claims which were inadequately documented.

The BFO also recommends that One Care only bill for claims which are adequately supported by the required documentation and accurately reflect the number of units that were provided.

Finding No. 2 – One Care did not Deliver Services in Accordance with the Authorized Schedule.

Claims related to four PDA consumers were identified where One Care billed PROMISe based on the approved schedule instead of billing the actual time that was documented on the care-givers' time sheets. The PDA waiver authorizes a specific number of units to be delivered on a particular day. In these instances, the total number of units provided did agree with the weekly authorized amount. However, the service was not provided on the specific days as presented in the plan of care. For example, there were instances where more units were delivered on fewer days. Units billed must be in agreement with the time sheets and daily activity notes, and the services must follow the authorized schedule of service delivery.

Recommendations

The BFO recommends that One Care only submit claims for reimbursement that are in agreement with the actual service times and related units.

The BFO also recommends that One Care deliver services to consumers in accordance with the PDA authorized schedules.

¹ 55 Pa Code, Chapter 52 Sections §52.14 Ongoing Responsibilities of Providers, and §52.15 Provider Records. Also, 55 Pa. Code Chapter 1101 Sections §1101.11 General Provisions and Sections §1101.51 Ongoing Responsibilities of Providers

One Care, Inc.
January 1, 2013 Through November 30, 2014

Finding No. 3 – One Care did not Pay Its Care-givers Overtime.

An analysis of payroll records and time sheets indicated that care-givers who worked more than 40 hours in a given week did not receive overtime pay. Management stated that they were not required to pay overtime. One Care believed that they could claim the “Companionship Exclusion” under the FLSA; however, a third party service provider is not entitled to claim this exclusion².

The FLSA requires overtime to be paid for time worked in excess of 40 hours in a work week. It also requires time in excess of 40 hours in a week period to be paid at a rate of not less than time and one-half the regular rate of pay. As such, One Care is in violation of the Federal FLSA.

Recommendations

The BFO recommends that One Care immediately begin paying care-givers overtime whenever the time worked exceeds 40 hours in a one week period.

The BFO also recommends that One Care review previous pay periods and compensate those employees whose time exceeded 40 hours in a one week period to comply with FLSA.

Finding No. 4 – Internal Control Deficiencies

The BFO’s analysis of One Care’s documentation and billing procedures identified the following internal control deficiencies:

Daily activity notes are not sufficiently reviewed. Claims were identified which did not have a corresponding daily activity note. Procedures were not adequate to ensure all standards of care and documentation were met prior to a claim being submitted for reimbursement.

Services were not monitored to ensure they conform to the authorized schedule. Some claims were identified where the care-giver did not follow the authorized service delivery schedule. Any deviations from the authorized schedule must be fully documented, and if the consumer’s service delivery schedule needs to be changed, it must be authorized by the supports coordinator.

Recommendations

The BFO recommends that One Care develop and implement procedures to ensure that the daily activity notes are complete prior to billing.

The BFO also recommends that One Care ensure services are provided according to the ISP service delivery schedule.

² United States Department of Labor, Wage and Hour Division Fact Sheet #79A; PA Minimum Wage Act

One Care, Inc.
January 1, 2013 Through November 30, 2014

Exit Conference/Auditor's Commentary

An Exit Conference was held on April 23, 2015 at the request of One Care. The draft report and One Care's response was discussed. As a result, minor changes were made to Finding No. 1. Furthermore, One Care management expressed concerns related to their responsibility to pay care-givers overtime. The overtime requirement is an on-going issue and as of the issuance of this report, the FLSA has not published the final rule on overtime requirements.

In accordance with our established procedures, an audit response matrix will be provided to OLTL. Once received, OLTL should complete the matrix within 60 days and email the Excel file to the DHS Audit Resolution Section at:



The response to each recommendation should indicate the OLTL's concurrence or non-concurrence, the corrective action to be taken, the staff responsible for the corrective action, the expected date that the corrective action will be completed and any related comments.

Sincerely,

A handwritten signature in black ink that reads "Tina L. Long".

Tina L. Long, CPA
Director

- c: Mr. Jay Bausch
- Ms. Kimberly Nagel
- Mr. Michael Luckovich
- Ms. Jennifer Whalen
- Ms. Angela Episale
- Mr. Grant Witmer

bc: Mr. Alexander Matolyak
Mr. Daniel Higgins
Mr. David Bryan
Mr. Grayling Williams
Ms. Shelley Lawrence
SEFO Audit File (S1404)

ONE CARE INC.

APPENDIX A

APPENDIX A

Background

One Care Inc. is a private, for-profit, licensed home health agency located in Philadelphia providing homecare service to consumers located in Montgomery, Delaware, Chester, and Philadelphia counties.

Objective/Scope/Methodology

The audit objective, developed in concurrence with OLTL was:

- To determine if One Care has adequate documentation to substantiate its paid claims through PROMISe for services reimbursed.

The criteria used to ascertain the adequacy of supporting documentation was 55 Pa. Code Chapter 52, 55 Pa. Code Chapter 1101 and pertinent Federal Waiver requirements.

We conducted this performance audit in accordance with generally accepted government auditing standards (GAGAS). Those standards require that we plan and perform the audit to obtain sufficient evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

Government auditing standards require that we obtain an understanding of management controls that are relevant to the audit objective described above. The applicable controls were examined to the extent necessary to provide reasonable assurance of the effectiveness of those controls. Based on our understanding of the controls, material deficiencies related to daily activity notes, PROMISe billings, and overtime were identified. Areas where we noted an opportunity for improvement in management controls are addressed in the findings of this report.

The BFO's fieldwork was conducted from January 15, 2015 to January 21, 2015 and was performed in accordance with GAGAS. This report is available for public inspection.

Conclusion on the Objective

In conclusion, One Care did not meet the documentation requirements for reimbursement of PROMISe claims. Supporting documentation such as time sheets and daily activity notes contained errors resulting in claims being overbilled. As a result, total questioned costs are \$32,440.

ONE CARE INC.
RESPONSE TO THE DRAFT REPORT
APPENDIX B

March 30, 2015

Mr. Daniel Higgins, Audit Manager
Division of Audit and Review
Bureau of Financial Operations
Department of Human Services
[REDACTED]

Dear Mr. Higgins:

One Care, Inc. received the draft of the performance audit report prepared by the PA Department of Human Services, Division of Audit and Review (DAR) for January 1, 2013 through November 30, 2014. With One Care, Inc being a fairly new agency with only 2 years of operating, we welcomed this audit assuming it would be a learning experience that would help us with future improvements. However, after the audit and while reading our "draft" performance audit report we became more confused on the overall configurations of discrepancies and the questioned cost related to the errors.

Findings #1: Claims reimbursed through PROMISe were not adequately documented.

One Care, Inc. is disputing the total questioned cost and possible repayment of \$33,714.00. During our closing conference, it was reported by DAR that our errors totaled \$1,050.00 as the result of the over or under billed claims assessed during the audit. In addition to this; three errors were identified that were outside of the SVRS. These errors related to claims which did not show certain task completed for each day on the daily activity notes but did have signatures from the client and the caregiver indicating that services were provided. The total questioned cost for these errors was \$1,274. We understand the possibility of repayment for unintentional human errors made such as over- and- under billing with no adjustments made resulting in either under or over payment. However, we don't understand the questioned cost calculated by the 3 additional errors that were found outside of the SVRS and the claims under billed. These claims were never identified to us during or after the audit. After the audit we received an email from [REDACTED] on January 22, 2015 in regards to questionable claim errors. We responded to [REDACTED] email on January 23, 2015 with appropriate requested documentation and made required corrections to support the questionable claim errors. WE are still unsure about the finding of a questioned cost of \$1,274 if these were identified outside of the SVRS. We would like to review the 3 additional errors identified outside of the SVRS and be allowed to dispute if needed. If however the 3 additional errors are valid, wouldn't they be included in the overall total questioned cost. It would be more understanding if an additional \$31,390.00 were actually found by reviewing our records and not based off the assumption that an additional \$31,390.00 worth of errors would be accounted for after auditing all the claims during this audit period. Please find the supported emails attached with this response.

As a company committed to providing quality service to our clients we appreciate the business from OLTL in allowing us to do so. We as a company have seen steady growth in our agency and we are looking forward to future acceleration. However, at this time a repayment of this magnitude would cause a tremendous financial hardship for our company. It would jeopardize the overall operation of the company and also affect our ability to fund and support our current and possible future cases. We understand and can make necessary funding arrangements to repay \$1,050.00 for over and under billed claims, but to be charged a \$31,390.00 fine for it does not seem at all reasonable or constitutional. It

would also help us and possibly many other agencies if in the event claims are over billed, the billing system would notify the processor of this error.

As a result of this finding we have implemented a new process to help avoid processing inadequate claims.

- Only bill for claims which adequately support the required documentation and accurately reflect the number of units that were provided.
- We have assigned 2 internal staff members to both review billed and pay against the authorized hours with additional attention to the task completion area of the daily activity note.

Findings #2: One Care did not deliver service in accordance with the authorized schedule.

Upon our conversations and review of certain claims, we did find that some services were provided outside of PDA authorized time schedule. However, some of our caregivers were abiding by the clients request to have them come in at times that best suited the clients' lifestyle. Often clients express to their caregiver the need to change times or days for their care to be provided for various reasons such as an appointment that needs the caregiver to accompany, shopping on specific days or other personal reasons. For example a client is allowed 28hours a week, broken down into 7 days from 9am to 1pm but had a doctor's appointment at 1pm and the client needed the patient caregiver to go with them to the doctor they would request the aide to come in at 12pm to help get dressed, accompany to the appointment and back home. Many of our clients are set in their ways and want to keep a regular schedule that has been routine to them for many years. Unfortunately, most times internal staff are not made aware of the changes made among the client and the caregiver until after the schedule has been altered. We feel it is our responsibility to make each client feel respected and comfortable while caring for them in their homes and want to honor their request. In trying to honor their request for schedule changes we contact the Care Manager and ask for the appropriate adjustments to be made to the service order to meet the clients' needs. Often times the care manager will say that it will be updated and sometimes the service order will reflect the change but occasionally we have difficulty billing, usually it is due to the units not being updated or corrected in HICSIS. It is unfortunate that we don't find this out until we bill, causing conflicts between billing, timesheet and service order.

Moving forward One Care, Inc. will practice the following:

- Deliver services to consumers in accordance with the PDA authorized schedule
- only submit for reimbursement that are in agreement with the actual service times and related units.
- If service orders are updated but not updated in HICSIS no units will be processed for that particular day until all is in accordance to the authorized schedule.

Finding #3: One Care did not pay its caregiver overtime.

During our audit closing we provided [REDACTED] and [REDACTED] with information that we received when we contacted [REDACTED] from the Department of Labor (DOL) [REDACTED]. We consulted with [REDACTED] when the Home Care Final Rule went into effect January 1, 2015. After an in depth conversation about our company and the services that we provide, One Care was informed by [REDACTED] from DOL, that there was a pending law suit against DOL by association of home care companies and that DOL had appealed it, and it was set to go to trial in early May. She also explained that since it was part of a pending law suit the Final Rule was not being enforced as of yet. Prior to the Final Rule, One Care, Inc met compliance by FLSA "Companionship Exemption" and Joint Employment in Domestic Service Employment. The payroll audit conducted by DAR was from January 1, 2013- November 30, 2014, which is a period prior to the Final Rule effective date of January 1, 2015. Once the rule went into effect home care agencies were allowed 60 days to enforce the new changes. During this closing we were given information from [REDACTED] about the new overtime law that was revised September 2013, but it even stated it would not take effect until January 2015. This also confirms that One Care was still in compliance under FLSA. We in return provided [REDACTED] and [REDACTED] with information during our closing conference, from United States Department of Labor Wage and Hour Division Fact Sheet #25, Fact Sheet # 79E which was revised in June of 2014, and 2 different pages from DOL's website with updates referring to the Final rule. The information provided to [REDACTED] and [REDACTED] was the most current information to that date. A copy of all documentation that we provided directly to [REDACTED] and [REDACTED] are attached.

Since our closing conference we have implemented the Home Care Final Rule, by paying all care-givers overtime whenever the time worked exceeds 40 hours in one week period. We continue to make a practice of checking the DOL website for updates.

Finding #4 Internal Control Deficiencies (regarding insufficient review of daily activity notes)

Since the audit One Care, Inc has reviewed and changed our protocol on how daily activity notes are completed and monitored prior to billing. One Care, Inc has made some internal staffing changes to insure that daily activity notes are completed and services are being provided according to the clients ISP service delivery schedule. Unfortunately, in human error there were no marks on 4 daily activity notes in which 2 notes were the same client that supports finding #4. However, on the same 4 daily activity notes both the care-giver and the client's signature, along with the time-in and time-out was provided indicating that service was provided. It is One Care, Inc's policy to conduct supervisory visits every 60 days, make courtesy calls to the clients at least twice monthly, and mail out survey forms to the clients and fortunately, there had been no reports to One Care, Inc. regarding the dates reviewed during the audit about services not being provided or not being provided to standard. One Care, Inc. takes pride in the services we provide to our clients at all times. By ODP standards we have 90 days to correct timesheets and daily activity notes. In which we asked [REDACTED] if we could have the care-givers do so, since all 4 daily activity notes were under the 90 day mark. We were told we could not make any corrections by [REDACTED].

Moving forward we will insure all daily activity notes are reviewed for accuracy and completion prior to billing. We will also ensure services are provided according to the Individual Support Plan service delivery schedule.

March 30, 2015

As a new agency we appreciate your recommendations and will use this audit as a learning experience. We would like to recommend that OLTL help out many home care agencies by updating the billing portal with and system that will notify providers of billing errors such as over billed and under billed claims. This will allow early detection of honest human mistakes, corrections to be made immediately and decrease the risk of such high penalties.

We do agree with some of the findings in this audit. However we do not agree with the overtime finding and recommendations of the penalty/questioned cost. We respectfully request that the questioned cost of \$33,714.00 be reconsidered or removed given that our audit revealed errors totaling only \$1050.00, minus the questioned cost of \$1,274.00 found on errors outside of the SVRS.

We would like to request an exit conference if the DAR thinks it would be beneficial. We thank you for your time and giving us the opportunity to give a final response. We respectfully request your consideration in the penalty being removed.

Regards,



Canice Barr, RN
Administrator
One Care, Inc

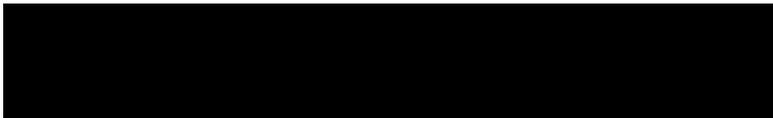


Attached is a list of the claims where we identified an overbill. Many of them did not have daily activity notes but a couple may be missing a time sheet. Please review and let me know if you have any additional documentation to support any of the errors. If you have any question you can contact me at the number below.

Thanks,



Department of Human Services | Bureau of Financial Operations



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Sample #	Name	Dates of Service	Units Over Billed
5	[REDACTED]	9/28/2014 - 9/30/2014	4
11	[REDACTED]	10/13/2014 - 10/17/2014	12
23	[REDACTED]	11/1/2014 - 11/1/2014	44 No daily activity note for [REDACTED]
46	[REDACTED]	11/1/2014 - 11/1/2014	16 No daily activity note
61	[REDACTED]	10/1/2014 - 10/4/2014	64 No daily activity note
64	[REDACTED]	9/15/2013 - 9/21/2013	8
89	[REDACTED]	4/28/2013 - 4/30/2013	44 No daily activity notes
92	[REDACTED]	10/12/2014 - 10/18/2014	96 No daily activity notes 10/13 - 10/18
96	[REDACTED]	11/7/2014 - 11/7/2014	20 No daily activity notes
99	[REDACTED]	7/17/2014 - 7/18/2014	8

Subject: Re: Exception List



As per our conversation earlier today, below are the items discussed and addressed:

- [redacted] – additional timesheet is attached
- [redacted] – will be removed from the overbilled status to the billed correctly status by you
- [redacted] – overbilled at 4 units – adjustment has been made within the system to correct
- [redacted] – overbilled at 8 units – adjustment has been made within the system to correct
- Direct care workers that missed checking services provided during shifts that were covered and signed off by both the direct care worker and the client:

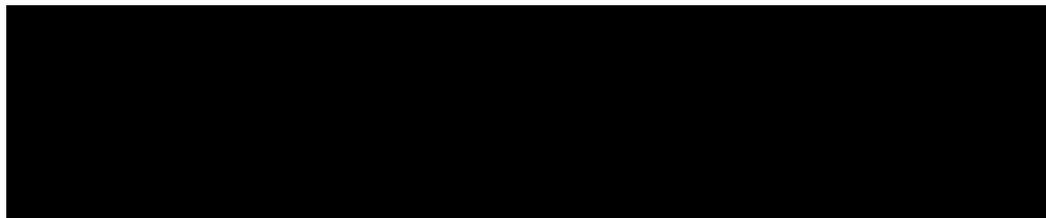
- [redacted] (2 timesheets)
- [redacted] (2 timesheets)
- [redacted]

I am not sure what to do about these, however the direct care worker and the client signed the appropriate dates and times unfortunately in human error they did not check off the tasks that were performed that day. I wanted to know since we have 90 days to actually submit billing, do we have 90 days to have them correct the time sheets?

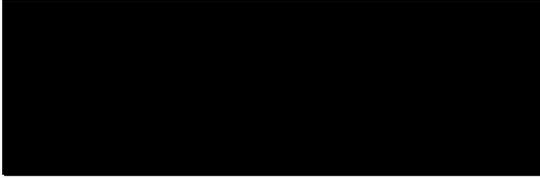
Thank you,

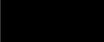
Bobbie Green, RN

Director of Nursing



Subject: Phone Call

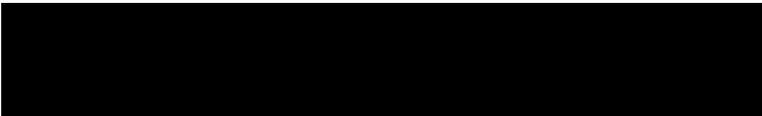


Good Morning 

I tried calling you back but the phone has been busy. I wanted to get back to you right away. We cannot accept documentation that is “re-created” for lack of a better word. With the notes, if they are not there then we really can’t accept it. We also cannot accept verification from the consumer or their representative. Unfortunately, there is not much you can do with those other than moving forward ensure that time sheets are not accepted unless the note is completed. Feel free to call again with any other questions?



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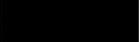
Subject: RE: Question



Yes, we have #52 but have additional questions related to it. If you could send us the time sheets for the dates below, it would help us understand what was billed for the entire week and tie that into what was authorized for the week. As is appears now more service was provided than billed and we are trying to determine if this is actually an underbilling.



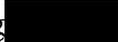
Subject: Re: Question

Good Morning 

I'm sorry, we are unsure as to what you are requesting. We looked on our list of errors and #52 is not one of them. We didn't send you sample #52. I do know February 28th is the end of the month and would have been billed separately from the week. Please email me with more direction as to what the error is and what you are requesting to fix or prove it.

Thank you



Good Morning 

I have one question regarding sample #52. The sample claim period is 2/27/2013 – 2/28/2013 for 48 units. We did receive the time sheet which indicted 74 units delivered on these dates. Could you provide the time sheets for the periods 2/24/2013 – 2/26/2013 and 3/1/2013 – 3/4/2013. These time sheets cover the entire week and will allow us to verify the total number of units provided for the week as compared to the total number of units authorized for the week. Could you scan these two time sheets to me this morning?





Fact Sheet #25: Home Health Care and the Companionship Services Exemption Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the application of the FLSA companionship services exemption in the home health care industry. The following information applies to the home health care industry until January 1, 2015. As of that date, revised regulations regarding the companionship services become effective. For information on the new regulations see Fact Sheet: Application of the Fair Labor Standards Act to Domestic Service; Final Rule. The following information applies to the home health care industry until the new regulations are in effect.

Characteristics

Employers who provide home health care services for individuals who (because of age or infirmity) are unable to care for themselves may or may not be required to pay minimum wage and/or overtime premium pay depending upon the type of services provided and the nature of the working relationship. Employees providing "companionship services" as defined by the FLSA need not be paid the minimum wage or overtime. Trained personnel such as nurses, whether registered or practical, are not exempt from minimum wage or overtime under the exemption for companions, but registered nurses may be exempt as professionals. Certified nurse aides and home health care aides may be considered exempt from the FLSA's wage requirements depending upon the nature of their work. Please see Fact Sheet #17N for additional information on nursing exemptions.

Requirements

Persons employed in domestic service in households are covered by the FLSA. Nurses, certified nurse aides, home health care aides, and other individuals providing home health care services fall within the term "domestic service employment."

An employee who performs companionship services in or about the private home of the person by whom he/she is employed is exempt from the FLSA's minimum wage and overtime requirements if all criteria of the exemption are met. "Companionship services" means services for the care, fellowship, and protection of persons who because of advanced age or physical or mental infirmity cannot care for themselves. Such services include household work for aged or infirm persons including meal preparation, bed making, clothes washing and other similar personal services. General household work is also included, as long as it does not exceed 20 percent of the total weekly hours worked by the companion. Where this 20 percent limitation is exceeded, the employee must be paid for all hours in compliance with the minimum wage and overtime requirements of the FLSA.

The term "companionship services" does not include services performed by trained personnel such as registered or practical nurses. Registered nurses are exempt from the FLSA's wage requirements where their time is spent in the performance of the duties of a nurse and are paid on a salary or a "fee basis" as defined by Regulations, 29 CFR Part 541.

Individuals other than trained personnel (such as nurses) who attend to invalid infants and young children are considered companions, rather than babysitters, and their status may thus be within the companion exemption.

FS 25

Covered domestic service employees who reside in the household where they are employed are entitled to the minimum wage but may be exempt from the Act's overtime requirements.

Typical Problems

An employee hired as a companion to an aged individual with a physical infirmity spends more than 20 percent of his/her time doing general household work. That person must be paid at least the minimum wage and one and one-half the regular rate of pay for hours in excess of forty in a workweek.

An employee who provides care and protection for minor children, where the children are not physically or mentally infirm, must be paid the minimum wage and proper overtime compensation. This activity would not constitute exempt companionship services.

Where to Obtain Additional Information

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).

This publication 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.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
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United States Department of Labor

Wage and Hour Division

What are the minimum wage, overtime pay, and recordkeeping requirements?

If you are a home care agency or other third party employer, **effective January 1, 2015**, you are required to pay at least the federal minimum wage and overtime pay to any direct care worker you jointly or solely employ, regardless of the worker's duties. Direct care workers are workers who provide home care services, such as certified nursing assistants, home health aides, personal care aides, caregivers, and companions.

Also **effective January 1, 2015**, agencies and other third party employers may no longer claim the overtime pay exemption for live-in domestic service workers.

Minimum wage

The federal minimum wage is currently \$7.25 an hour, though many states have their own minimum wage laws. When a worker is protected by both state and federal minimum wage laws, the worker is entitled to the higher minimum wage. (Check your state minimum wage [here](#).) [More >>](#)

Overtime

Workers who are covered under federal overtime pay protections must be paid at a rate not less than one and one-half times their regular rate of pay after 40 hours of work in a workweek. [More >>](#)

[See an example](#)

Recordkeeping

You are also required to keep basic employee time and pay records for any nonexempt direct care worker you employ, including the hours they work. [More >>](#)

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

Introduction

Domestic service employment means services of a household nature performed by a worker in or about a private home (permanent or temporary). The term includes services performed by workers such as babysitters, cooks, waiters, maids, housekeepers, nannies, janitors, caretakers, handymen, gardeners, and family chauffeurs, as well as those services provided by home care workers. Home care workers may include companions, personal care aides, home health aides, nurses, and other workers who provide assistance to individuals in their homes. These examples are illustrative and not exhaustive.

Domestic service employees are generally covered under the Fair Labor Standards Act ("FLSA") and therefore must be paid at least the federal minimum wage for all hours worked, and overtime pay at not less than one and one-half times the regular rate of pay for all hours worked over 40 in a workweek. Section 13(a)(15) of the FLSA provides a narrow exemption from the minimum wage and overtime pay requirements for domestic service employees who are casual babysitters and domestic service workers employed to perform companionship services for people with disabilities and older adults ("companionship services exemption"). Section 13(b)(21) of the FLSA provides an exemption from the overtime pay requirement, but not the minimum wage requirement, for those employees who reside in the private home where they work ("live-in domestic service employee exemption").

In the Final Rule, Application of the Fair Labor Standards Act to Domestic Service, 78 FR 60454 (Oct. 1, 2013),¹ the Department modified the "third party employment" regulation, 29 C.F.R. 552.109, to prohibit third party employers of domestic service employees—i.e., employers other than the individuals receiving services or their families or households—from claiming the companionship services exemption from minimum wage and overtime or the live-in domestic service employee exemption from overtime. 78 FR 60480-85.

Private agencies, non-profit organizations, or public entities may be third party joint employers of domestic service employees, and in particular home care workers, under the FLSA. Although the Final Rule did not change any of the Department's guidance about joint employment, the regulatory changes prohibiting third party employers from claiming the companionship services and live-in domestic service employee exemptions will require every potential employer to evaluate whether it may be a joint employer under the FLSA.

This fact sheet summarizes general longstanding joint employment principles established by case law, discusses how joint employment may arise in the home care context, and provides nine hypotheticals analyzing how these existing principles would apply in common home care scenarios, including both private-pay examples as well as Medicaid-funded consumer-directed programs.

¹ The effective date for the Final Rule is January 1, 2015.

Joint Employment – General Principles

A single individual may be simultaneously considered an employee of more than one employer under the FLSA. In such cases, the employee's work for the joint employers is considered as one employment for purposes of the Act, and the joint employers are individually and jointly responsible for FLSA compliance, including paying not less than the minimum wage for all hours worked during the workweek and, if applicable, overtime compensation for all hours worked over 40 in the workweek. 29 C.F.R. 791.2(a). A determination of whether joint employment exists must be based upon all the facts of the particular case. For instance, two employers may both supervise the same employee or one may hire and set the pay rates while another has authority to supervise or fire the worker; both scenarios may represent a joint employment relationship.

As a general example, workers sent by a cleaning company to a client-hotel to clean hotel rooms may be jointly employed by both the cleaning company and the hotel. Similarly, a private agency, non-profit organization, or public entity that hires a home care worker to provide services in an individual's home may be a joint employer with the individual (or family or household member of the individual).

Determining Joint Employment

Joint employment is determined by applying the "economic realities" test, which examines a number of factors to determine whether a worker is economically dependent on a purported employer, thus creating an employment relationship. Factors to consider may include whether a possible employer has the power to direct, control, or supervise the worker(s) or the work performed; whether a possible employer has the power to hire or fire, modify the employment conditions or determine the pay rates or the methods of wage payment for the worker(s); the degree of permanency and duration of the relationship; where the work is performed and whether the tasks performed require special skills; whether the work performed is an integral part of the overall business operation; whether a possible employer undertakes responsibilities in relation to the worker(s) which are commonly performed by employers; whose equipment is used; and who performs payroll and similar functions. Other factors also may be considered and no one factor is controlling. The ultimate question is one of economic dependence.

Joint Employment and Home Care Workers

In the home care context, there are a variety of employment situations in which joint employment may exist. Many home care providers are jointly employed by two or more entities; these entities may include a consumer,² a private home care agency, a non-profit organization, or a public entity (which include instrumentalities of state, county, or municipal governments or special-purpose entities created by a state, county, or municipal government). For example, a private home care agency and consumer may jointly employ a provider.

In other situations, a public entity and a consumer may jointly employ a provider through a Medicaid-funded consumer-directed program. In these programs, consumers (or their representatives, if applicable) have decision-making authority over some services and take direct responsibility for managing their services, assisted by a system of available supports. Other third parties may also be joint employers in consumer-directed programs. For example, a public entity, non-profit home care

² Throughout this document, the Department uses the term "consumer" to refer to an individual receiving home care services and "provider" to refer to a home care worker providing services.

agency, and consumer could all potentially jointly employ a provider through a consumer-directed program.

The Department has published Administrator's Interpretation No. 2014-2 (AI) to help determine when public entities are employers of home care workers who provide services through consumer-directed programs. The AI describes in detail many common aspects of consumer-directed programs, such as which entity retains the right to hire and fire, which entity controls the wage, schedule and other conditions of employment, and which entity performs payroll and other administrative functions. The AI provides guidance as to whether these various aspects are "strong," "moderate," or "weak" indicators of employer status.

In any potential joint employment situation, the same economic realities analysis applies. All of the facts and circumstances relevant to whether a worker is economically dependent on a possible employer must be assessed in order to make a determination about employment status.

Obligations of Joint Employers Under the FLSA

Generally, where a joint employment relationship exists, each employer is responsible for complying with the FLSA (including payment of at least the federal minimum wage for all hours worked and overtime pay at not less than one and one-half times the regular rate of pay for hours worked over 40 in a workweek).

Under the Final Rule, in joint employment situations, the individual, family, or household employing the worker will be able to claim the companionship services or live-in domestic service employee exemption if the prerequisites for claiming those exemptions are met. (For information about the companionship services exemption, see Fact Sheet # 79A: Companionship Services Under the Fair Labor Standards Act (FLSA). For information about the live-in domestic service employee exemption, see Fact Sheet #79B: Live-In Domestic Service Workers Under the Fair Labor Standards Act (FLSA).) This means that an individual consumer, family, or household who may properly claim the companionship services or live-in domestic service employee exemptions will not be liable for minimum wage or overtime pay obligations related to those exemptions.

Under the Final Rule, third party employers of home care workers (that is, any employer who is not the consumer or a member of the consumer's family or household, such as a private or non-profit home care agency or a public entity administering home care programs) are not permitted to claim either the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim these exemptions even when they jointly employ a worker with an individual, family, or household who may claim either exemption. Thus, any third party employer of a domestic service worker is obligated to pay not less than the minimum wage for all hours worked and overtime compensation for all hours worked over 40 in a workweek, and any third party employer of a live-in domestic service worker is required to pay overtime pay for all hours worked over 40 in the workweek.

In addition, all third party employers of domestic service workers will be required to pay for time spent traveling between consumers, as well as overtime generated by working for multiple consumers. An employee's normal commute between home and the worksite is not considered "hours worked" and therefore does not have to be paid. However, the time an employee spends traveling from job site to job site during the workday for an employer (when, for instance, a home care worker assists multiple clients) must be counted and paid as hours worked. Additionally, an employee who works for multiple consumers of a single joint employer (typically, a public entity or a

private home care agency) must be paid at the overtime rate for any hours worked over 40 in a single workweek, aggregating the time worked across consumers for a joint employer. For example, if a worker spends 30 hours per week providing home care services to one consumer and 20 hours per week providing home care services to a second consumer, then any joint employer – whether a private agency, a public entity, or both – is responsible for ensuring that the worker receives overtime pay for the 10 hours over 40 worked each week.

Joint Employment Examples in the Home Care Context

Below are several examples of common home care models and how joint employment principles would apply to each. Although this guidance focuses on the most common factors that may create an employment relationship in the home care context, all of the relevant facts and circumstances must be considered to make a determination about employment status, and courts may consider other factors when evaluating the economic dependence of a worker on a possible employer.

In these examples, the term “consumer” may also include an individual’s family member, household member, or representative.

Example One – Private-Pay Registry with Consumer as Sole Employer

A private home care agency advertises as a “registry” that provides potential home care workers. The registry conducts a background screening and verifies credentials of potential workers, and assists consumers by locating home care workers who may be able to meet a client’s needs. The registry informs a home care worker of the opportunity to work for a potential client. If interested in the opportunity, the worker is responsible for contacting the client for more information. The worker is not obligated to pursue this or any other opportunity presented and is not prohibited from registering with other referral services or from working directly with clients independent of this private registry. The registry does not provide its workers any equipment, does not supervise or monitor any work they perform, and has no power to terminate a worker’s employment with a client. The registry processes the worker’s payroll checks according to information provided by clients, but does not set the pay rate.

In this scenario, the home care worker is likely not an employee of the registry, and the consumer is the sole employer. There is no permanency in the relationship between the registry and provider. The registry does not provide any equipment or facilities, exercises no control over daily activities, and has no power to hire or fire. The worker is able to accept as many or as few clients as he or she wishes. The client sets the rate of pay and negotiates directly with the worker about which services will be provided. This conclusion, however, does not mean that every “registry” will not be an employer; any change in the specific facts may change the outcome. For example, a home care registry that maintains a log of assignments showing the shifts worked, establishes the rate which will be charged, and exercises control over the home care workers’ duties and the work schedules would be an employer.

Example Two – Private Agency and Consumer as Joint Employers

A private home care agency offers a variety of services to older adults who require assistance in order to live at home. The agency recruits and hires providers, and ensures they are properly trained to assist with activities of daily living or instrumental activities of daily living, or to provide companionship services such as watching over a consumer while he or she sleeps. Consumers contract with the agency to receive services and are billed at a set hourly rate. The agency

determines each worker's rate of pay based on factors such as the services performed and the worker's qualifications and tenure at the agency. The agency performs typical payroll functions and provides the workers with some other job-related benefits.

The consumer decides what services he or she requires, how the worker will perform the services, the number of work hours he or she requires, and the schedule for the workers. Together, the agency and consumer agree on how many workers will be assigned to provide assistance. Although the agency retains the ultimate decision of whether to terminate the worker's employment with the agency, a consumer who is not satisfied with the performance of a particular worker may request a different worker at any time.

In this scenario, the agency and the consumer are joint employers. The agency, among other factors, sets the rate of pay, hires and trains the worker, and has the ability to terminate employment, while the consumer sets the schedule and solely controls and supervises the actual work performed.

Example Three – Consumer-Directed Program with Public Entity and Consumer as Joint Employers

In this consumer-directed program, the public entity collectively bargains with a union representing home care providers. The public entity exercises control by providing required training, offering paid time off, furnishing equipment, creating a procedure for redress of grievances, setting a wage rate, and offering a benefits package. The public entity also retains some control over hiring and firing by completing performance evaluations and reserving the right to terminate a worker for poor performance. A fiscal intermediary processes payroll and tax withholding.

The Department believes that in such programs, the public entity administering the program is a joint employer of the provider along with the consumer. The fiscal intermediary, performing purely ministerial functions, would not be an employer.

Other public programs in which the home care providers are not parties to a collective bargaining agreement but in which the public entity nonetheless demonstrates similar levels of control over the providers' working conditions will also be considered joint employers. For example, some programs are structured such that a case manager is involved in determining the worker's schedule or directing the method of work, or the public entity sets a wage rate for providers. In programs such as these, with similar levels of control as described above, the public entity will be considered a joint employer with the consumer.

Example Four – Consumer-Directed Program, with Consumer as Sole Employer

In this consumer-directed program, the public entity sets forth basic hiring requirements (such as a criminal background check or CPR/First Aid certification) and retains the limited right to remove a provider from the program if it is determined, after an investigation, that there has been fraud or abuse. The public entity also sets a wage rate range for services that is approved by the Centers for Medicare and Medicaid Services. The wage rate range for home care workers is from \$10 per hour to \$24 per hour. A consumer can hire anyone who meets minimal qualifications and the consumer retains the ability to fire for any reason. A budget is developed annually by the consumer with the help of a case manager. It is the responsibility of the consumer to keep up with financial statements to determine whether monthly spending should be adjusted. The consumer sets the worker's schedule, determines the tasks to be performed, and supervises how the work is performed. The consumer reviews and approves the worker's payroll, and the provider's tax withholdings are deducted from the individual consumer's budget (not any general state fund). The consumer has a

choice between three fiscal intermediaries that perform payroll and other administrative functions. The public entity does not provide any paid time off, equipment, mandatory training, or contributions to health insurance premiums.

In this scenario, the consumer is likely the sole employer of the worker. Any slight change in the specific facts of this example may change the analysis.

Example Five – Consumer-Directed Program, with Consumer and Public Entity as Joint Employers

In this consumer-directed program, the consumer posts the job announcement and selects applicants to interview. The consumer conducts interviews and chooses a provider, but the case manager must approve the hiring decision. The consumer provides all day-to-day supervision and controls the schedule as well as the manner in which work is performed. The consumer and public entity case manager conduct regular performance evaluations, and the case manager or consumer may decide to fire the provider for poor performance. The program also has required, ongoing, comprehensive, state-sponsored training requirements. The public entity sets a reimbursement rate for home care services, from which the consumer may not deviate. Payroll and withholdings are processed through a fiscal intermediary of the consumer's choice.

In this scenario, the public entity and the consumer are likely joint employers of the provider. The fiscal intermediary is not an employer.

Example Six – Intermediary Agency Consumer-Directed Model, with Consumer and Agency as Joint Employers

In this consumer-directed program, the public entity administers an intermediary agency model. The state sets reimbursement rates for all Medicaid services within the public entity, including home care services. The minimum qualifications for home care workers are set by state regulation. The public entity does not supervise the work, set schedules, or control conditions of employment. The public entity contracts with agencies to provide home care services, and provides a bundled reimbursement rate from which the agency is free to set a wage rate and retain a portion for administrative costs. The public entity reserves the right to conduct certain functions, including visiting the agency to assess performance, conduct fiscal and quality audits, and review personnel files on a random basis.

Consumers may recruit and select a provider, and the agencies participating in the program then screen and hire the worker (the agency may also recruit potential providers). Both consumers and agencies retain the right to fire the workers, and the agencies generally handle any disciplinary issues involving the workers. Agencies also conduct the administrative functions and supervision of workers required by regulation, train the workers, and evaluate job performance. The agencies maintain all employment records, although copies of such records are also sent to the public entity administering the program. Consumers provide daily supervision, set the worker's schedule, and decide how and when certain tasks will be performed.

In this scenario, the agencies and consumers are employers, and it is likely that the public entity is not an employer. The public entity performs minimal functions required by regulation, while the agencies set the wage rate, hire and train workers, and supervise much of the work.

Example Seven – Cash and Counseling Consumer-Directed Program with a Wage Cap, with Consumer as Sole Employer

In this cash and counseling consumer-directed program, consumers are given the option to manage a flexible budget and decide what mix of Medicaid-allowable goods and services best meet their personal care needs. Consumers may use their budgets to hire personal care workers, purchase

other services, purchase items, or make home modifications that help them live independently. The consumer retains authority over hiring and firing, negotiates the wage rate paid to the employee within a cap, and sets the terms and conditions of employment.

The public entity sets minimal qualifications for providers (by requiring a criminal background check and CPR/First Aid certification), determines eligibility and assesses need under the program, and then performs only ministerial payroll and tax functions through a fiscal intermediary, similar to those that commercial payroll agents perform for businesses, such as maintaining records, issuing payments, and addressing tax withholdings. The public entity also sets a cap on wages for all workers participating in the program so that consumers will have enough resources in their budget for the entire month, and to help ensure fiscal accountability as well as guard against exploitation. The cap for home care workers is at the agency reimbursement rate of, for example, \$26 per hour. Thus, the consumer may pay anywhere from minimum wage to \$26 per hour, and if the consumer elects to pay less than the cap, the remaining funds remain in the consumer's individual budget.

In this scenario, the consumer is likely the sole employer of workers hired through such a program.

Example Eight – Public Entity, Managed Care Organization, and Intermediary Agency Consumer-Directed Program, with Consumer and Agency as Joint Employers

This public entity contracts with a managed care organization (MCO) to provide health care services, including home care services, to Medicaid recipients. The public entity pays the MCO a per consumer monthly rate, and from that total budget the MCO contracts with various providers in its network, including home care agencies. Within this network are several agencies participating in a consumer-directed intermediary agency program. The MCO pays the agencies a bundled rate. The agency then sets the wage rate; authorizes a certain number of hours based upon an assessment; pays health insurance, workers' compensation, and unemployment insurance premiums; and also may choose to authorize overtime. The participating agencies permit consumers to hire and fire their own workers, and consumers set the provider's schedule and provide all day-to-day supervision.

In this scenario, on these specific facts, it is likely that the agencies and the consumers are joint employers, and that the MCO and public entity are likely not joint employers. The MCO merely pays the bundled rate to the agencies, and the agencies perform all other indicia of employment. However, any slight change in the particular facts could change the analysis.

Example Nine – Public Entity, Managed Care Organization, and Intermediary Agency Program, with Consumer, Managed Care Organization, and Agency as Joint Employers

This public entity contracts with a managed care organization (MCO) to provide health care services, including home care services, to Medicaid recipients. The public entity pays the MCO a per consumer monthly rate, and from that total budget the MCO contracts with various providers in its network, including home care agencies. Within this network are several agencies participating in a consumer-directed intermediary agency program. The MCO pays the agencies a bundled rate but requires the agencies to pay workers a particular hourly wage. The MCO also sets comprehensive provider qualifications and requires providers to attend training provided by the MCO on a regular basis. The agencies authorize a certain number of hours based upon an assessment; pay health insurance, workers' compensation, and unemployment insurance premiums; assist the consumer if disciplinary matters regarding the provider arise; provide back-up workers when needed; and may choose to authorize overtime. The participating agencies permit consumers to hire and fire their own workers, consumers set the providers' schedules, and consumers provide all day-to-day supervision.

In this scenario, based on these specific facts, it is likely that the MCO, the agencies and the consumers are joint employers and that the public entity is likely not a joint employer. The MCO does far more than simply pay the bundled rate (as the MCO did in Example Eight) in this example, and indicia of employment is spread among the MCO, agencies, and consumers. However, any slight change in the particular facts could change the analysis.

Where to Obtain Additional Information

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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