

# interChange Provider Important Message

**Attention: CHC Agency Based Providers of Live-In Personal Care Assistance Services, Access Agencies, Fiscal Intermediary**

## **REVISED JOINT GUIDANCE ISSUED March 20, 2017 BY DSS AND CT DOL REGARDING USDOL'S HOME CARE FINAL RULE**

The United States Labor Department ("USDOL") announced a final rule (78 FR 60454, 10/1/13), which was originally effective January 1, 2015, and was stayed pending the outcome of a lawsuit filed by the Home Care Association of America in federal court. The US Court of Appeals for the D.C. Circuit ultimately upheld the rule and it became effective on October 13, 2015. USDOL began enforcement on November 12, 2015. The rule amends regulations regarding domestic service employment. The purpose and effect of the amendments are to extend Fair Labor Standards Act ("FLSA") protections (specifically, minimum wage and overtime) to most home care workers. It is important to note that the Connecticut Minimum Wage law applies to individuals in domestic service employment as defined in the regulations of the Federal Fair Labor Standards Act. For this reason, it is necessary to be familiar with the federal regulations and to refer to [www.dol.gov/whd/homecare](http://www.dol.gov/whd/homecare) for compliance assistance. However, Connecticut's minimum wage of \$10.10 per hour effective 1/1/17, would apply.

This bulletin provides guidance regarding the impact of the federal FLSA on the provision of agency-based live-in services to recipients of Connecticut Medicaid Home and Community-Based waivers. This guidance applies exclusively to third-party agency employers providing live-in services and not to consumer/family employers who directly hire such employees without assistance from a third-party agency employer.

**Credit for Housing and Food Costs:** The US DOL recently advised the Department of Social Services (DSS) and the Connecticut Department of Labor (CT DOL) that the housing credit will rarely be allowed. The US DOL relies on the requirement that the lodging must primarily benefit the employee, rather than the employer, as outlined in Field Assistance Bulletin No. 2015-1 (FAB No. 2015-1). We strongly recommend that all Agency employers providing live-in services review FAB No. 2015-1 on the US DOL website. The FAB 2015-1 provides detailed guidance on when the credit may be taken for lodging provided to employees.

An employer who wishes to claim the section 3(m) credit for lodging must ensure that the following five requirements are met:

1. Lodging must be regularly provided by the employer or similar employers;
2. The employee must voluntarily accept the lodging;

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3. The lodging must be furnished in compliance with applicable federal, state, or local laws;
4. The lodging must primarily benefit the employee, rather than the employer; and
5. The employer must maintain accurate records of the (actual) costs incurred in the furnishing of the lodging.
6. (Emphasis added.) See FAB 2015-1.

USDOL has indicated that housing costs must be calculated on an individual basis, and are dependent on actual housing-related expenditures. Additionally, as noted above, if the lodging is primarily for the benefit of the employer rather than the employee, the housing credit will not be allowed. Each agency should evaluate each situation on a case by case basis to determine whether it would be allowed. Pursuant to the FLSA recordkeeping regulations, in order to take a wage credit under section 3(m), an employer must maintain accurate records of the (actual) costs incurred in furnishing lodging to the employee. See 29 C.F.R. § 516.27(a); see also 29 C.F.R. § 552.100(d).

The second permissible credit is the food credit. The USDOL has indicated that credits for food must also be calculated on an individual basis. If the client provides food for the caregiver, a credit may be taken for the actual cost of providing food. The agency may calculate the hourly wage payment by subtracting the actual costs of housing and actual cost of providing food from the minimum wage of \$10.10 (hourly wage).

**Credits for Hours Not Worked:** Agencies have posed questions regarding the permissibility of deducting time not worked by a live-in from that individual's compensable time. Pursuant to 29 CFR 552.102, "the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and 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." Nevertheless, all hours actually worked must be compensated, such as where the normal sleeping period or normal meal period is interrupted by a call to duty. Although the parties may have an agreement that sets forth the parties' expectations regarding the normal schedule of work time, and the parties may agree to exclude sleep, meal and other relief periods from hours worked, that agreement does not control the compensation due each week. The hours worked must be compensated.

Information available on the USDOL website, [www.dol.gov/whd/homecare](http://www.dol.gov/whd/homecare), indicates that the employer and employee can agree to allow the employee to have up to 8 hours of sleep time, in which case the sleep time can be excluded from hours worked. See 29 C.F.R. § 785.22. Uninterrupted sleep time may be deducted from the live-in's time on site in a client's home, initially resulting in

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a 16-hour work day. Any interruptions to sleep by a call to duty, however, must be paid, and if the employee does not sleep for at least 5 hours during a given night, no sleep time may be deducted.

If additional time for meal periods and other duty free periods are excluded by agreement between the employee and employer and the employee is actually able to use the anticipated meal and free time for the employee's own purposes, such additional periods would be deducted from all hours worked including the straight time and overtime in excess of the regular 40 hours.

The DSS has reviewed its recently published rate for the live-in service, procedure code 1023Z. Effective 1/1/16 the Department will reimburse live-in service at a daily rate of \$236.47. There will not be any increase to the rate.

Please contact Kathy Bruni, DSS Alternate Care Program Manager, with any questions or concerns at [Kathy.a.bruni@ct.gov](mailto:Kathy.a.bruni@ct.gov) or (860) 424-5177 or the CT DOL Wage and Workplace Standards Division at (860) 263-6790.