

REVISED JOINT GUIDANCE ISSUED BY DSS AND CTDOL
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 for compliance assistance. **However, Connecticut’s minimum wage of \$9.60 per hour effective 1/1/16, and \$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: USDOL guidance confirms that it is permissible for employers to credit the actual amounts of the cost of housing and food provided to the PCA by the client toward a live-in’s wages. Please note that the employer must keep track of the actual costs of housing and food as noted below. Housing and food costs may, however, only be credited toward straight time wages rather than as part of any additional overtime compensation owed, as reflected in the examples below. In addition to payment for the straight time, the live-in is entitled to time and a half for all hours worked after 40.

The first permissible credit is the housing credit. We strongly recommend that all Agency employers providing live-in services review Field Assistance Bulletin No. 2015-1 (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;
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.

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. 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).

DSS has provided the Access Agencies with a worksheet for the purpose of keeping accurate records of the (actual) costs the client incurs in furnishing lodging to an employee. The involved Access Agency Care Manager will use the worksheet to calculate the credit for housing costs and will provide this information to the involved agency. The agency may then apply this amount to the live-in's minimum wage for his or her regular time. ***Sample calculation for purposes of illustration only:*** If the PCA's share of the client's housing costs is \$100 per week, that amount will be divided by all straight-time hours, e.g., 40, resulting in an amount of \$2.50 per hour that may be applied toward the minimum wage for the straight time.

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 \$9.60 (hourly wage).

Sample calculation for purposes of illustration only: If the PCA's share of food is \$75 per week, that amount would be divided by all straight time hours resulting in an amount of \$1.75 per hour that may be applied toward the minimum wage for straight time.

The ***sample calculation*** would be as follows: \$9.60(minimum wage) - \$2.50 (lodging credit) – \$1.75 (food credit) = \$5.35. So, the payment for 40 hours of straight time would be \$214.

All agencies are reminded that the credit for lodging and food may only be taken for the **actual cost of lodging and food**. With respect to *live-in domestic service employees only*, an employer that does not provide such records may claim a certain amount—up to seven and one-half times the federal statutory minimum hourly wage for each week lodging is furnished, currently \$54.38 (7.5 x \$7.25)—toward wages rather than the reasonable cost or fair value of the housing provided.

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, 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 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.

Sample calculation for purposes of illustration only: Again, continuing on the examples above, if we assume the PCA is a seven day per week live-in, if only the sleep time is deducted, the live-in is also entitled to 72 hours of overtime (16 hours/day x 7 days – 40 hours of straight time). The overtime in this example is paid at the rate of \$14.40 (\$9.60 hourly wage x 1.5) per hour.

The amount of overtime due in this example is calculated as follows: $\$14.40 \times 72 = \$1,036.80$.

Therefore, the total pay due to the live-in caregiver in this continuing example is the straight time less the housing and food credits + overtime.

If we continue with the **sample calculation** from the previous page: We would add \$214 (wages for first 40 hours) + \$1,036.80= \$1,250.80. Again, this is a **sample calculation for illustrative purposes only**. Agencies are reminded to use the *actual costs of lodging and food* when determining the amount of wages owed for straight time.

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.

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