




OFFICE OF LONG-TERM LIVING BULLETIN

ISSUE DATE January 11, 2016	EFFECTIVE DATE January 1, 2016	NUMBER 54-16-01, 59-16-01
SUBJECT: Overtime and Minimum Wage Requirements in Participant-Directed Models of Service	 Jennifer Burnett Deputy Secretary, Office of Long-Term Living	

PURPOSE:

The purpose of this bulletin is to communicate new overtime and minimum wage policy guidance to Office of Long-Term Living (OLTL) Service Coordination Entities (SCEs) and vendor fiscal/employer agents (VF/EAs) to ensure compliance with changes to the U.S. Department of Labor Fair Labor Standards Act regulations at 29 CFR Part 552.

SCOPE:

This bulletin applies to SCEs and VF/EAs serving individuals in the following OLTL Home and Community-Based Services (HCBS) Programs: Aging, Attendant Care, COMMCARE, Independence, and OBRA waivers and the Act 150 Program. For the purposes of this bulletin, participant-employed direct care workers (DCWs) are defined as individuals employed by the participant as the common-law employer (CLE) or by a representative the participant has appointed to serve as the CLE.

BACKGROUND:

Amendments to the U.S. Department of Labor's Fair Labor Standards Act change how participant-employed DCWs can be classified in terms of wage and overtime requirements. These changes will now require CLEs in OLTL's participant-directed programs to begin paying at least minimum wage for all hours worked and overtime for hours worked over 40 hours per week.

The Fair Labor Standards Act also contains an exemption to the overtime rules for domestic service employees who live in the same residence as the individual who they are serving. In light of this provision, OLTL is implementing a policy requiring CLE's to claim the exemption when their DCW qualifies under the exemption. This essentially means when a DCW lives in the same residence as the OLTL participant he or she serves, the DCW will not be paid overtime for hours worked over 40 in a week (explained further below).

In addition, under the Fair Labor Standards Act, principles relating to the compensability of travel time become applicable. Thus, a DCW working for multiple consumers of a single

employer must be compensated for time spent traveling between consumers under certain circumstances. Consequently, OLTL is implementing a policy prohibiting one individual from serving as the appointed CLE for multiple participants.

PROCEDURE:

The following requirements and procedures apply to the participant-directed service model for hours worked on or after January 1, 2016:

Minimum Wage

CLEs must pay DCWs at least minimum wage for all hours worked. OLTL's VF/EA will work with CLEs to ensure this requirement is met. SCEs must also communicate this information to CLE's during discussions about DCW wages.

Overtime

CLE's must pay overtime at a rate of 1.5 times the hourly wage to DCWs who work more than 40 hours per week for one CLE. A week is defined as Sunday 12:01 a.m. through Saturday 11:59 p.m. A DCW who works for multiple CLEs and in the aggregate works for more than 40 hours per week must be paid at the regular hourly rate provided he or she does not exceed 40 hours pay per week with each CLE.

OLTL has added new overtime modifiers for Personal Assistance Services (PAS) and Respite in PROMISE™, SAMS, and HCSIS. The new procedure code/modifier combinations are W1792 TU for PAS (Consumer) overtime and S5150 TU for Respite (Consumer) overtime.

To ensure quality in service provision and compliance with regulations, SCEs must take the following steps:

1. Add overtime units to service plans based on available VF/EA Reports, your professional judgment based on case history, and discussions with the participant about projected use of overtime. Utilize the new procedure code/modifier combinations of W1792 TU for PAS overtime or S5150 TU for Respite overtime.
2. Decrease the units of W1792 and S5150 by an amount equal to the number of overtime units added to the plan. The addition of overtime units to the plan must not change the total number of units available on the service plan.
3. Follow up with CLEs whose DCW timesheets are pending when there are no overtime units remaining on the service plan. Determine the number of overtime units to be added to the service plan.
4. Utilize reports provided by the VF/EA to monitor CLE adherence to the service plan.
5. The addition of overtime units to a service plan does not change participant/CLE responsibilities pertaining to requesting additional hours on the service plan. The CLE/participant is required to notify the SC when requesting additional hours over and above the regular schedule due to a change in circumstances. This includes the addition of overtime hours to the service plan.

Services My Way

CLE's in the Services My Way model must also pay at least minimum wage for all hours worked and overtime at a rate of 1.5 times the hourly wage to DCWs who work more than 40 hours per week for one CLE. To ensure quality in service provision and compliance with

regulations, SCEs must work with each CLE in the Services My Way model to ensure budget calculations include minimum wage and overtime pay, if applicable. When adjusting budget calculations for overtime pay, the number of assessed units will continue to be multiplied by the average regional agency personal assistance rate (currently Procedure Code W1793 = \$4.68).

Utilize VF/EA Reports, your professional judgment based on case history, and discussions with the participant to determine the number and cost of overtime units to include in the budget calculations.

Live-In Domestic Service Employees Exemption

DCWs who qualify as live-in domestic service employees are exempt from the overtime requirements of the Fair Labor Standards Act. In order to be a live-in domestic service employee, a worker must reside on the employer's premises either "permanently" or for "extended periods of time." A worker resides on the employer's premises permanently when he or she lives, works, and sleeps on the employer's premises 7 days per week and therefore has no home of his or her own other than the one provided by the employer under the employment agreement.

A worker resides on the employer's premises for an extended period of time when he or she lives, works and sleeps on the employer's premises for 5 days a week (120 hours or more). If a domestic worker spends less than 120 hours per week working and sleeping on the employer's premises, but spends 5 consecutive days or nights residing on the premises, this also constitutes an extended period of time.

The VF/EA must identify DCWs who qualify for this exemption and provide a Live-In Employee Exemption form to these individuals. CLEs and DCWs who qualify for the exemption are required to sign the form and return it to the VF/EA, documenting the live-in arrangement. SCEs are required to communicate the requirement to participants and CLEs who are in a live-in situation with the DCW and to inform them that overtime will not be paid in these situations due to the exemption.

CLE for Multiple Participants

Some individuals in OLTL programs serve as the appointed CLE for multiple participants. OLTL is implementing a policy that prohibits one individual from serving as the appointed CLE for multiple participants. The VF/EA has identified individuals who currently serve as the appointed CLE for multiple participants. The VF/EA will provide a report to each SCE to notify them of the participants who will be impacted. SCEs must work with participants impacted by this change to assist them in establishing a one-to-one relationship with an appropriate CLE and assist newly selected CLEs in enrolling with the VF/EA.

COMMENTS AND QUESTIONS REGARDING THIS BULLETIN SHOULD BE DIRECTED TO:

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