NATIONAL RESOURCE CENTER *for*
PARTICIPANT-DIRECTED SERVICES

10 Year Financial Management Services Conference

November 9-10, 2015
Baltimore, MD

Supplemental Resources Booklet

10th Anniversary
Financial Management Services Conference
Supplemental Resources

Table of Contents

Questions and Answers on the Fair Labor Standard Act Home Care Rule

What is the Fair Labor Standards Act Home Care Rule?

- The "Home Care Rule" is a term used to collectively describe major regulations that modify the companionship and live-in worker exemptions of the Fair Labor Standards Act (FLSA). The new Rule prohibits third party employers from taking the companionship exemption from minimum wage and overtime as well as the live-in exemption from overtime. In addition, the Rule updates and narrows the definition of "companionship services" that can be exempt from minimum wage and overtime.

When does the Home Care Rule go into effect and when will it be enforced?

- After litigation, the Home Care Rule went into effect on October 13, 2015. DOL begins selective enforcement on November 12, 2015, and full enforcement will begin effective January 1, 2016. Workers are allowed to sue for back wages owed under the Home Care Rule effective October 13, 2015.

Who can claim the companionship and live-in worker exemptions under the Rule?

- Only the individual, family or household member employing the worker can claim the exemptions.
- Third party employers cannot claim the exemption even if they are joint employers with the individual or household member employing the worker.
    - Agencies operating under the Agency with Choice model will not be able to claim the companionship or live-in worker exemptions, because the agency is likely a third party employer.
    - Participants in some F/EA programs may continue to use the companionship and/or live-in exemptions if all other criteria are met. However, some F/EA programs operate with a third party employer (e.g., state, FMS provider, or managed care entity). Participants in these programs, who jointly employ workers alongside a third party, cannot use these exemptions. A participant's use of a Fiscal/Employer Agent does not preclude joint employment.

Who qualifies as a companion worker under the new rules?

- A companion worker provides **fellowship and protection** in a private home to an elderly person or a person with an illness, injury or disability.
    - Examples of fellowship and protection include: conversation; reading; games; crafts; and accompanying the person on walks, on errands, to appointments, or to social events.
- The companion may spend **up to 20%** of his or her total working hours during a workweek providing care services. Care services are defined as:
    - assistance with **activities of daily living** (such as dressing, grooming, feeding, bathing, toileting, and transferring) and
    - assistance with **instrumental activities of daily living** (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

What duties cannot be performed at all by a companion?

- A companion cannot perform any household work for other members of the household, or any medically related services.
- Medically related services, which are not allowed under the companionship exemption, are services typically performed by trained personnel such as registered nurses, licensed practical nurses, or certified nursing assistants. Some examples include: catheter care, turning and repositioning, ostomy care, tube feeding, treating bruising or bedsores, and physical therapy.
- The following tasks are <u>not</u> considered medically related services and are allowed under the companionship exemption:
    - Emergency care such as first aid or CPR performed in an unexpected, urgent situation.

- Minor health-related tasks such as assisting a consumer with the physical taking of medications, applying an adhesive bandage to a minor cut, helping a consumer put in eye drops, or calling a doctor's office to schedule an appointment.

What are the FLSA requirements for workers who do not qualify as companions?

- Workers who do not qualify as companions in a workweek are subject to all FLSA requirements during that workweek, including minimum wage, overtime and other FLSA regulations such as those regarding paying for travel time.
- Workers who qualify as companions are exempt from minimum wage and overtime under the FLSA, but they may still be subject to minimum wage and overtime under state law.

Who is a live-in worker?

- A live-in worker is a worker who provides domestic services in a private home and who **resides on the employer's premises** on a permanent basis or for an extended period of time.
- The worker must live in the employer's home permanently or for an extended period of time, such as 5 consecutive days per week, or 4 consecutive nights and 5 consecutive days or vice versa (for example, Monday morning to Friday afternoon).
- Short temporary assignments (such as having a worker live with the care recipient for 2 weeks) are not sufficient.
- A worker does not become a live-in worker merely by working extended shifts. For example, a worker who is on duty for 16 hours each day or night but then leaves the employer's premises to go home is not considered a live-in worker.
- Live-in worker services must be provided in a private home.
    - A private home can be either permanent or temporary (such as a hotel room in the case of a family traveling on vacation.)
    - An institution such as a nursing home, residential care home or other similar facility is not a private home.

What is the live-in worker exemption?

- Live-in domestic service workers are exempt from the **overtime** provisions of the FLSA, but not from minimum wage.
- Just like the companionship exemption, the live-in worker exemption can only be claimed by the individual and household employing the worker, not by a third party agency.

Do workers residing on the employer's premises have to be paid for all hours spent on the employer's premises?

- No, a worker who resides on the employer's premises does not have to be paid for periods of complete freedom from duty when the worker is free to either leave or stay on the premises as he or she chooses. This rule applies to all workers residing on the employer's premises, even if they are not domestic service live-in workers, and even if the employer is a third party agency.

What are the Home Care Rule's recordkeeping requirements for live-in workers?

- Live-in workers or their employers must keep records of the hours worked each day and must be paid according to the actual hours worked, instead of based on an agreement regarding regular working hours.

If a worker enrolls in a program that pays for providing care to a member of the worker's family, does the worker have to be paid for all hours spent assisting the worker's family member?

- No, enrollment in a program and the existence of an employment relationship does not turn all assistance provided by family members into employment.
- Only the hours contemplated in the plan of care are considered "hours worked" that must be compensated. The family or household member does not have to be paid for assistance provided outside of the hours in the plan of care.
- This rule only applies to family or household members who had a relationship with the care recipient that preceded the care giving. A worker who is a stranger before being hired does not

become a household member even if hired as a live-in worker, unless the worker enters into a new family relationship with the care recipient by marriage, legal adoption or a civil union.

- The "family members rule" only applies if programs treat family members and other workers equally when determining the number of hours of care. A program loses the benefit of the rule if the program pays for fewer hours of care when the hours are provided by a worker who is also a family member.
- The rule applies to both individuals and third party employers.

Questions and Answers on IRS Notice 2014-7 & Difficulty of Care Payments

Q: Does the Notice apply to non-waiver Medicaid HCBS programs?

A: The IRS has not yet given an official answer as of November 1, 2015. However, several states have requested a Private Letter Ruling on this issue. Therefore, we expect official guidance from the IRS to be forthcoming on this issue. However, NRCPDS believes it is likely that the IRS will officially extend the Notice's scope to all Medicaid-funded HCBS programs, regardless of whether the services are offered via a waiver or not.

Q: Can we include difficulty of care payments on Form W-2?

A: The IRS has been very clear that difficulty of care payments may not be included on Box 1 of Form W-2. However, the IRS is currently considering whether these payments may be included in Box 14, **Other**. As of November, 1 2015, a final decision has not yet been made.

Q: If an employee who receives difficulty of care payments is also FICA exempt due to a family relationship, should we issue Form W-2 with all zeros? How can the employee demonstrate that they made any money over the past year?

A: If an employee receives difficulty of care payments and is FICA exempt, then there is no need to issue Form W-2 to the employee per W-2 rules. From a practical perspective, however, this may be difficult to explain to the employee and could result in confusion. In that case, you could issue Form W-2 with all zeros. It may be helpful to include the employee's last pay stub for the year showing YTD earnings that the employee may use to demonstrate income. Box 15, for state earnings, may also help show that earnings were made over the year.

Q: How does the FLSA Home Care Rule affect Notice 2014-7 and vice versa?

A: The Home Care Rule and Notice 2014-7 are separate regulatory guidance from two different federal agencies, and they are not related. A live-in worker under FLSA does not necessarily receive difficulty of care payments. A worker receiving difficulty of care payments is not necessarily a live-in worker under FLSA.

Q: What proof does a worker need to give an FMS provider as proof that he/she qualifies for difficulty of care payments?

A: A worker must submit a signed statement made under penalties of perjury to their employer or FMS provider. The IRS has suggested the following language for use:

Under penalties of perjury, I declare that I am an individual care provider receiving payments under a state Medicaid Home and Community-Based Services waiver program for care I provide to _____ who lives in my home under the care recipient's plan of care.

Signed: *Date:*

Q: We are an Agency with Choice provider who is required to offer affordable health insurance to full-time employees per the Affordable Care Act. We have an employee who receives difficulty of care payments under IRS Notice 2014-7. Because the employee receives difficulty of care payments, which are excludable from federal income, the employee's gross federal income for the year is $0. How does

this affect the Affordable Care Act's requirement that the cost of each employee's contribution to their health coverage be 9.5% or less of their annual revenue?

A: In this case, the lowest risk approach is to use the federal poverty level safe harbor to confirm health coverage affordability. This safe harbor is met when the employee's required monthly contribution for lowest cost, self-only, minimum value coverage is no more than 9.5% of the federal poverty line for a single individual for the calendar year, divided by 12. In 2015, the federal poverty line is $11,700 for all US states other than Alaska and Hawaii (plus the District of Columbia.) Therefore, the employee's monthly contribution in these states could be up to $11,700 x 9.5% divided by 12, or **$92.62**.

Sample IRS Notice 2014-7 Letter for Workers

Dear *(Worker Name),*

The Internal Revenue Service has ruled that certain payments received for caring for a person with a disability may qualify as "difficulty of care payments" if the caregiver lives full-time with the person receiving care. Unlike regular wages, difficulty of care payments are excluded from federal income. Unlike wages, difficulty of care payments are not subject to Federal Income Tax.

To find out if you qualify for difficulty of care payments, review the statement below and mark whether it is **True** or **False** for you.

I live full-time with the person to whom I provide services through *(Name of Program)*. Our home is my only residence. I have no other part-time residence where I live without the person to whom I provide care.

_____True _____False

If you marked **True** and this statement accurately describes your living situation, then you qualify to receive difficulty of care payments. Difficulty of care payments are not subject to Federal Income Tax. When you file your annual tax return, the IRS may contact you asking you to provide proof of your address and the address of the person to whom you provide care. The best way to provide proof is to submit government ID, such as a driver's license, a utility bill, a medical bill, and/or a document from *(Name of FMS Provider).*

If you marked True and this statement accurately describes your living situation, please review and sign the following statement to have your pay classified as difficulty of care payments:

Under penalties of perjury, I declare that I am an individual care provider receiving payments under a state Medicaid Home and Community-Based Services waiver program for care I provide to _____ with whom I share a home.

Signed: *Date:*

If you marked **False** and this statement does not accurately describe your living situation, then the payments you receive for providing services are regular wages. Regular wages are subject to Federal Income Tax.

Suggested Steps to Refund Over-Collected FICA for Participant Employers Using a Fiscal/Employer Agent

The 2015 household employee FICA (Social Security and Medicare taxes) threshold is $1,900. Employees who earned less than $1,900 in gross wages in 2015 do not qualify to pay the employer or employee portions FICA. However, because it is unclear until year-end whether an employee will exceed $1,900 in gross wages, employees who are not otherwise exempt from FICA should have FICA taxes withheld from paychecks throughout the year. If the employee's total wages do not reach $1,900, FICA should be refunded at year-end.

The suggested steps for refunding over-collected FICA are listed below.

- Identify employees with less than $1,900 in gross wages for an employee/employer relationship for the calendar year
- Determine the employee portion of FICA withheld for each quarter in the year for each employee who earned less than $1,900 in their employee/employer relationship
- Determine the employer portion of FICA withheld for each quarter in the year for each employee who earned less than $1,900 in their employee/employer relationship
- Reverse the employer and employee FICA amounts for the employee and employer in your payroll system
- Cut a check to each qualifying employee for the amount of their over-collected employee FICA before issuing the employee's Form W-2
    - Do not withhold taxes, garnishments or make other deductions from the FICA refund payment to the employee
- Set aside or take note of the employer portion of FICA to return to the State or participant budget
- Issue Form W-2 to the employee
    - Social Security and Medicare wages and taxes (Boxes 3, 4, 5 & 6) should show $0 on Form W-2
    - Gross wages (Box 1) on Form W-2 will still be the gross wages the employee was paid
- Over-collected FICA will affect your fourth quarter Form 941. Before you file your fourth quarter Form 941, subtract the fourth quarter wages and FICA of each employee who is eligible for a FICA refund off the Form 941 before filing it with the IRS. Your liability for the fourth quarter is reduced by any other fourth quarter wages and corresponding FICA that was paid in the fourth quarter and is eligible for a refund. DO NOT SUBTRACT THE FICA REFUNDS FOR THE ENTIRE YEAR FROM THE FOURTH QUARTER 941.
    - Your liability for the 4th quarter is reduced by any 4th quarter wages and corresponding FICA that was paid in the 4th quarter and is eligible for a refund
    - If you have already deposited the FICA for the 4th quarter, determine if you want to credit a current or future return or get a refund (check from the Treasury)
    - On the Schedule R for Form 941, remember to include zero wages in Column D for the employer/employee relationship (this does not necessarily mean that that employer's Column D is $0, if the employer paid other employees who do not qualify for a FICA refund in Q4)
    - On the Schedule R for Form 941, remember to include zero wages in Column D for the employer/employee relationship. This does not necessarily mean that the employer's Column D is $0, if the employer paid other employees who do not qualify for a FICA refund in the fourth quarter.

- To refund over-collected FICA for the first, second, and third quarters of 2015, complete a Form 941-X for the aggregate amount of FICA refunded for that quarter. List "12/31/2015" on the 941-X as the date on which errors were discovered.
    - Check Box 1 on Part 1 to apply the over- deposit to a future return, or check Box 2 to get a check from the US treasury.
    - Note that if you select Box 2, you can only correct over-reported amounts on this 941-X, so you will need to complete a separate 941-X if you are also correcting under-reported amounts.
    - On Part 2, check Box 3 and 4a.
    - On page 2 of Form 941-X, Column 1 should be your originally filed Form 941 less amounts for employees impacted by FICA refunding. Column 2 should be the amount originally filed on Form 941 for the quarter.
    - Column 3 should be the difference between Columns 2 and 1. On Column 4, do the math, and use the right multiplier for the year you are correcting. Complete the lines on the page as required.
    - Line 20 on page 3 of the 941-X should be the amount of FICA refund you are requesting for the quarter. On Line 21, check the box if applicable. Do not check line 22 for FICA refunding (although, if you are also including over or under-reported amounts for changing the classification of a worker, then check this box). For Line 23, you can use the following explanation or create your own:

        The differences shown in column 3 of lines 8 and 10 were discovered on December 31, 2015 during our annual audit to identify over-collected FICA taxes. (Insert F/EA name here) (with EIN (insert EIN here)) serves as an Agent under Section 3504 of the Internal Revenue Code for Home Care Service Recipient HCSR) employers. These employers employ household employees. Per Publication 15, Circular E, employer and employee FICA is only due on wages paid to household employees if the workers earn more than the FICA wage threshold for the calendar year. In 2015, that FICA wage threshold was $1,900. As workers were paid throughout the year, (insert F/EA name here) withheld employee FICA and calculated employer FICA for these workers. We deposited and reported those FICA amounts using the 941 filing and depositing process. After the last paycheck of the year was issued for these employees, we identified any household employees who earned less than the FICA wage threshold. We have refunded this withheld FICA to the employees and we are filing this IRS Form 941-X to correct both the employer and employee FICA amounts with the IRS for the quarter listed on Page 1.
- Refund employer over-collected FICA to the state or participant budgets
- If a FICA refund check to worker is returned undeliverable, submit per State unclaimed property rules

About IRS Revenue Procedure 2013-39 and Its Impact on Fiscal/Employer Agent Services

Issued in December 2013, IRS Revenue Procedure 2013-39's primary purpose is to update and consolidate previously issued guidance and incorporate newer rules related to home care service recipients (HCSRs). In some cases, Rev. Proc. 2013-39 provides formal guidance around procedures that had previously been only implied in existing guidance from the IRS. Rev. Proc. 2013-39 supersedes Rev. Proc. 70-6.

Key Changes & Updates from Rev. Proc. 2013-39

- ***All HCSR employers, whether served by a government agent or not, must have an EIN.*** EINs must be obtained now for any employers who did not have them previously.

- ***A sub-agent must use its own name and EIN when representing an agent.*** The sub-agent files an aggregate return on the agent's behalf of using the sub-agent's own name, and deposits per the deposit schedule caused by aggregate liability.

- ***Use of a sub-agent is allowed for government and non-government agents***. However, HCSR employers only execute Form 2678 with the first agent, not also with the sub-agent. For example, if ABC Fiscal/Employer Agent has a contract with the state Medicaid agency to perform Fiscal/Employer Agent services for a self-direction program, and ABC Fiscal/Employer Agent hires XYZ Sub-Agent to function as a sub-agent for them per this Revenue Procedure, the HCSR employers would execute Form 2678 only with ABC Fiscal/Employer Agent. ABC Fiscal/Employer Agent and XYZ Sub-Agent would execute a single Form 2678 between themselves.

- ***The process to mark "some employees" on Form 2678 is formalized.*** If the employer plans to pay any wages, bonuses, other employee compensation to his HCSR employees, or if the employer plans to use this EIN for other wage-paying purposes, then:
    - The employer does not file a final return, but must continue filing a return if the employer with regard to the wages paid by the employer to his employees is separate from the agent.
    - This may work for Federal taxes, but consider state taxes.

- ***The IRS may independently revoke an agent authorization.*** This can happen if facts and circumstances indicate it is warranted. Revocation is made by notice to agent and employer.

- ***Notices of appointment of agent for HCSR employers are only sent to the agent, rather than to the agent and the employer.*** Rules to request an agent for an HCSR are the same, however.

Vendor Fiscal/Employer Agent Federal Forms

Commonly used Federal Vendor Fiscal/Employer Tax Forms with Instructions for Completion

Form	*Purpose*	*Completed When*	*Completed By*
IRS Form SS-4, *Application for Employer Identification Number*	Apply to IRS to obtain Employer Identification Number for a participant employer[1] or other individual serving as employer of participant's employees.	Before a participant hires employees.	Participant Employer
IRS Form 2678, *Employer Appointment of Agent*	Participant employer requests approval from IRS to have Fiscal/Employer Agent file returns and make deposits of employment and withholding taxes. This form is also used to revoke an existing appointment. Replacement versions of this form can be used in the Government Fiscal/Employer Agent model, but many programs choose to use this form anyway.	Before wages are paid to a participant's employees[2].	Participant Employer and Fiscal/Employer Agent
IRS Form 8821, *Tax Information Authorization*	Participant employer designates Fiscal/Employer Agent to inspect and receive participant employer confidential employment tax information. IRS Form 2678 has been updated to authorize Vendor Fiscal/Employer Agents to represent participants for purposes of FUTA, so this form is not required.	Optional. Not required. Can be useful at any point to make getting information from the IRS about the employer's taxes easier.	Participant Employer
IRS Form 941, *Employer's Quarterly Federal Tax Return*	Fiscal/Employer Agent files FICA (Medicare and social security taxes) and federal income tax withholding quarterly in the aggregate with its separate EIN for all participant employers the Fiscal/Employer Agent represents.	Quarterly for any quarter in which the Fiscal/Employer Agent paid wages for employees serving participants.	Fiscal/ Employer Agent
IRS Form Schedule R for Form 941, *Allocation Schedule for Aggregate Form 941 Filers*	Fiscal/Employer Agent files this schedule with the Form 941 to show the 941 detail data for each employer the agent represents. Each participant employer's EIN is required on this form. The only acceptable formats for a Schedule R are the form produced by the IRS or a replacement form that has been approved by the IRS. Do not submit spreadsheets to the IRS representing Schedule R data.	Whenever a Form 941 is filed. If a Form 941X is filed, a Schedule R is completed showing just those employers with corrected amounts. The Schedule R should reflect the new, correct amounts for those employers. This is especially relevant when Fiscal/Employer Agents request refunds of over-deposited FICA taxes.	Fiscal/ Employer Agent

[1] "Participant Employer" means the participant who is receiving services and serving as the common law employer OR an individual, such as a representative, who serves as the employer in place of the participant.

[2] Note that the Form 2678 is not effective until the IRS notifies the Fiscal/Employer Agent and employer. Programs may include statements in their contracts with a Fiscal/Employer Agent that the Agent must withhold, file and pay applicable taxes even before 2678 approval is granted.

Form	Purpose	Completed When	Completed By
IRS Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*	Fiscal/Employer Agent files FUTA annually in the aggregate using the Fiscal/Employer Agent's separate EIN for all individuals the Fiscal/Employer Agent represents.	Annually for any year in which the Fiscal/Employer Agent paid wages for employees serving participants.	Fiscal/Employer Agent
Schedule R for Form 940, *Allocation Schedule for Aggregate Form 940 Filers*	Fiscal/Employer Agent files this schedule with the Form 940 to show the 940 detail data for each employer the agent represents. Each participant employer's EIN is required on this form. The only acceptable formats for a Schedule R are the form produced by the IRS or a replacement form that has been approved by the IRS. Do not submit spreadsheets to the IRS representing Schedule R data.	Whenever a Form 940 is filed.	Fiscal/Employer Agent
Form W-2, *Wage and Tax Statement*	Report annual wage and tax information for each employee who serves a participant employer. If Fiscal/Employer Agent files 250 or more IRS Forms W-2, Fiscal/Employer Agent must file electronically using the Social Security Administration's Business Services Online.	Annually for each tax year. Must be issued to employees by January 31 of the year after the tax year for which the statement is filed. Must be submitted to IRS/SSA by February 28 if filing on paper. Must be submitted to IRS/SSA by March 31 if filing electronically. State tax agencies may require Forms W-2 by a State imposed deadline.	Fiscal/Employer Agent

***Please Note*: Example Forms are located in the "Example Forms" folder on your thumb drive. Thank you for helping to reduce the Center's carbon footprint.**

A resource developed by:

info@participantdirection.org
www.participantdirection.org