

The USDOL Home Care Rules: What does good implementation look like?

In 2015, the U.S. Department of Labor's final home care rules went into effect, extending the federal minimum wage and overtime protections of the Fair Labor Standards Act (FLSA) to two-million-plus home care workers in the United States. These new rules end the racist and sexist exclusion of home care workers from these basic federal protections and provide most of them with a floor of basic labor protections that will improve their working conditions.

As the demand for home care continues to surge, ensuring good jobs is critical to promoting quality of care and to sustaining local and state economies. States and other employers must now abide by state and federal laws and do right by both workers and consumers.

Checklist: What does good implementation look like?

1. States and other employers are implementing the USDOL home care rules and their state laws by:
 - Paying at least the state or federal minimum wage, whichever is higher, for all hours worked.
 - Paying overtime rates for hours worked over 40 in a week (or otherwise specified by state law).
 - Paying for travel time between consumers.
 - Paying for all hours worked and properly applying the sleep-time rules.
 - Maintaining accurate records of workers' hours and pay.
 - Treating workers as W-2 employees rather than independent contractors, where workers meet the broad definition of "employee."
 - Taking advantage of USDOL's extensive resources and technical assistance.
2. States are taking the steps necessary for good implementation by:
 - Budgeting the necessary Medicaid dollars to pay for any increased costs associated with complying with the new federal rules.
 - Collecting data on the Medicaid-funded (and when applicable, the entire) home care workforce, hours worked, compensation, and other information.
 - Creating a taskforce, commission, or other entity to involve all relevant state agencies and affected stakeholders in promoting good implementation.
 - Making home care jobs quality jobs by providing family-sustaining wages, benefits, consistent scheduling, and opportunities for advancement.

3. States and employers are finding solutions that do not violate the rights of consumers by:
 - Not imposing unreasonable worker hours caps.
 - Ensuring there is a robust [exceptions process](#) to any caps on worker hours.¹
 - Not cutting services to consumers or changing eligibility requirements.
 - Ensuring that wages and workplace policies allow employers and consumers to recruit and retain qualified workers.
 - Not eliminating consumer-directed programs and ensuring consumers have the option to self-direct their own care.

4. Advocates are pushing for all of the above by:
 - Creating coalitions with unions and other worker groups, disability rights organizations, consumer groups, and others to push for funding for implementation and enforcement of the rules.
 - Making sure home care workers know their rights and have full access to records of their hours and pay.
 - Providing consumers with information about the rules and any state implementation measures that may affect their current home care arrangements.
 - Making sure consumers know their rights under the Americans with Disabilities Act.
 - Encouraging good state, federal, and private compliance assistance and enforcement.
 - Organizing workers and consumers to voice their collective concerns and suggestions for improvements to the home care industry and programs.

What are states doing right?²

California: The state's estimated 376,000 workers in its In-Home Supportive Services (IHSS) program are now paid for weekly overtime and travel time. The governor budgeted \$450 million for fiscal year 2016-2017 to cover overtime costs. Because of the federal match, at least double that amount will go to workers and into local economies.³ The state recognized its role as an employer in some programs and created [policies](#): a worker hours cap of 66 to 70 hours per week, based on consumer needs and a budget analysis; pay for up to seven hours of travel time per week; and an [exceptions process](#).⁴

Florida: The state budget included \$37 million - \$23 million of it from Medicaid - to fund minimum wage, overtime, and travel time costs, beginning July 1, 2016. To be in compliance sooner, the Legislature approved \$9.5 million to cover costs starting April 1, 2016. The state committed additional funding aimed at providing services to 1,300 people currently on the waiting list.⁵

Kansas: The state increased its sleep cycle support per diem rate from \$30.60 to \$78.30 per day.⁶

Massachusetts: The state began paying the 35,000 personal care attendants (PCAs) in its MassHealth Medicaid-funded home care program for travel time and any overtime, beginning January 1, 2016.⁷ To facilitate the transition, MassHealth's contracted fiscal intermediaries now track PCAs' cumulative weekly work hours across all consumers, and automatically record, calculate, and pay for any workday [travel time](#).⁸ In 2017, the

state implemented a 50-hour worker cap per week, with an exceptions policy that permits approved attendants to work up to 66 hours per week and allows for emergency overtime. Overtime requests will be decided and shared with consumers within four business days.⁹ Additionally, all MassHealth PCAs were granted [earned sick leave](#), effective July 1, 2015, and will see an increase in pay to \$15 per hour by 2018. The Personal Care Attendant Workforce Council, whose mission is to ensure the quality of long-term, in-home, personal care by recruiting, training and stabilizing the work force of PCAs, bargains with 1199SEIU, the union representing the workers.

Minnesota: The governor's FY2016-2017 supplemental budget recommends including \$18.2 million to fund overtime and travel time. This was calculated through a 2.72 percent rate increase for the Personal Care Assistance, Consumer Support Grants and Consumer Directed Community Support Programs.¹⁰ While the legislature's final budget did not include this funding, the governor's estimate and call for funding was an important step. The collective bargaining agreement between SEIU Healthcare Minnesota and the state creates an \$11 wage floor and paid leave for the state's home care workers.

Nebraska: The state's Division of Medicaid and Long-Term Care began paying for overtime and travel time in October 2015. The state sent a [letter](#) to home care workers and issued a [memo](#) outlining the processes for payment.¹¹

New York: The state is [surveying](#) Medicaid-reimbursed home care agencies to determine how much their labor costs have increased as a result of paying workers in accordance with federal minimum wage and overtime rules, and whether the state should increase its reimbursement rates to agencies to cover these additional costs.¹² In the meantime, retroactive to October 13, 2015, the [NY Department of Health](#) has increased its reimbursement rate by \$0.34 per hour to pay for travel time and for increased payment for "live-in" cases and created a mechanism for managed long term care plans to disburse funds to providers.¹³ New York worked in collaboration with SEIU 1199 United Health Care Workers East, worker advocacy organizations, and disability rights organizations to calculate the adjustment. As is available to all states, New York requested increased funding from the federal Center for Medicare and Medicaid Services (CMS), as provided for in Title XIX of the Social Security Act, and as is noted in the memo listed under the "Resources" section.¹⁴ Additionally, New York State created the [Task Force to Combat Worker Exploitation and Abuse](#). New York City recently created the [Office of Labor Standards](#), and within it, the City Council created the Division of Paid Care, charged with researching and creating resources on caregiver workforce issues.

Ohio: Since January 1, 2016, the Ohio Department of Medicaid has made overtime payment to eligible independent providers who bill for more than 40 hours in a work week.¹⁵ The state is now looking to propose a 40-hour cap but has drafted an exceptions policy.¹⁶

Oregon: The Oregon Home Care Commission, the state agency that provides caregivers to 24,000 Medicaid beneficiaries, is expected to receive \$14 million in the state's FY2017 budget to account for implementation of the home care rules. The state has created a worker hours cap of 50 per week, per consumer, with an exceptions process and policy.¹⁷ Additionally, a contract between the state and SEIU Local 503 outlines a pathway of up to \$15 an hour by 2017. Home care workers currently have a base wage of \$13.75 an hour in Oregon.¹⁸

Pennsylvania: In January 2016, the Department of Human Services established [overtime rates](#), separate from the regular rates, to enable consumer-employers to pay home care workers overtime. The state estimated the fiscal impact to the state for the FY 2016 budget would be \$3.1 million; including federal matching funds, the total cost is estimated at \$6.2 million.¹⁹

Vermont: The state created an [exceptions form](#) for consumer-directed participants to request that a home care worker be paid overtime to avoid placing the participant at risk of harm or at serious risk of institutionalization.²⁰

Virginia: The governor included funding for overtime and proposed a worker hours cap of 56 hours per week. The legislature did not include this budget item and struck down his proposed amendment but the governor's estimate and call for funding was an important step.²¹

Washington: The state has budgeted \$29 million for compliance with rule's overtime and travel time requirements, with funding available in April 2016.²² The state has created a worker hours cap of 65 hours per week, depending on the independent providers previous schedule, and enacted when the state does an annual review of a consumer's plan of care. In July of 2017, the cap will switch to 60 hours per week, with an exceptions policy and process.²³

Working together for good implementation

Workers, consumers, employers, and advocates are coming together to advance home care worker rights by ensuring that workers in programs throughout the state are paid in accordance with federal and state minimum wage and overtime laws while ensuring that consumers do not lose service or otherwise experience harms, including unnecessary institutionalization. In noncompliant states, grassroots actions, constituent calls, meetings with state leaders, media coverage, and letters are all being utilized to pressure employers, governors, state agencies, and legislators to implement the rules well.

By ensuring compliance with new federal and state wage and hour rules, states and employers will take a crucial step forward towards improving workers' rights while also ensuring its home care system can continue to deliver the critical high-quality services that so many individuals with disabilities, seniors, and their families rely on and many more will require in the coming years.

Contact

Reach out to National Employment Law Project (NELP)'s Caitlin Connolly (cconnolly@nelp.org), call 202-640-6516, or visit www.nelp.org/campaign/implementing-home-care-reforms.

Frequently asked questions, resources, and materials

Online Materials and Resources

- [Advancing Home Care Worker Rights](#) – National Employment Law Project resources
- [Homecare Workers: Know Your Rights](#) – National Domestic Workers Alliance resources
- [Action Steps for Consumers and Advocates](#) – Bazelon Center & other disability rights organizations created this advocacy guide.
- [Department of Labor Information on the Final Rule](#): Information includes press releases, Frequently Asked Questions, and fact sheets on the home care rule.
- [Department of Labor Letter to Governors](#): In this March 20, 2015 letter to governors, U.S. Labor Secretary Perez calls for states to be ready to implement the rule in a way that both protects the rights of workers and supports the individuals who rely on home care services.
- [Dear Colleague Letter](#): In this December 15, 2014 letter, the Civil Rights Division of the U.S. Department of Justice and the Office for Civil Rights of the Department of Health and Human Services provide guidance to states.
- [CMS CMCS Informational Bulletin \(January 8, 2016\)](#): Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes & [CMS CMCS Informational Bulletin \(July 3, 2014\)](#): Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes

Key Questions and Resources

A compilation of questions and resources for implementing the U.S. DOL home care rule in your state.

Questions	Resources
<ul style="list-style-type: none"> ▪ Which home care workers are now covered by federal minimum wage and overtime rules? ▪ What are the federal rules for compensation for overtime hours, travel time between consumers, and overnight hours? 	<ul style="list-style-type: none"> ▪ Implementation Resource Website – USDOL ▪ Federal Minimum Wage and Overtime Protections for Home Care Workers Fact Sheet and Resource Website - National Employment Law Project (NELP) ▪ Final Rule: Application of the Fair Labor Standards Act to Domestic Service
<ul style="list-style-type: none"> ▪ What Medicaid programs provide home and community based services in the state? ▪ How do the state’s Medicaid HCBS programs operate with regard to: determining service hours; managing service delivery; and setting worker wages? 	<ul style="list-style-type: none"> ▪ 1915(c), 1915(i), 1915(j), and 1915(k) waiver authorities
<ul style="list-style-type: none"> ▪ What are the characteristics of the state’s current HCBS service delivery system? ▪ How many home care workers provide services? How many of them are working part-time? ▪ How often do they work over 40 hours a week? ▪ What data is there, if any, on the number of workers who serve multiple consumers and the travel time 	<ul style="list-style-type: none"> ▪ National Direct Service Workforce Resource Center (NDSWRC) Website – Centers for Medicare and Medicaid Services (CMS) ▪ The Need for Monitoring the Long-Term Care Direct Service Workforce and Recommendations for Data Collection – NDSWRC ▪ Michigan Office of Services to the Aging Surveys

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<p>between those consumers?</p> <ul style="list-style-type: none"> ▪ How does the state’s workforce capacity compare with the demand for HCBS? ▪ What data are needed (e.g. agency/employer landscape, turnover, vacancies, waiting lists)? ▪ What are key data sources? 	<p>of provider organizations and workers providing services in consumer-directed Medicaid HCBS programs</p>
<ul style="list-style-type: none"> ▪ What state wage laws apply to home care workers and what do they require? 	<ul style="list-style-type: none"> ▪ Analysis of State Wage Law Coverage – NELP ▪ NELP attorneys are available to assist with further evaluation of whether a specific state’s wage laws cover all or some home care workers; whether state coverage is currently in effect or will become effective concurrent with the federal rules change; the extent of state overtime coverage; other state rules on payment for sleep time, waiting time, travel time, wage payment and notice and record-keeping; and review of relevant local living wage laws.
<ul style="list-style-type: none"> ▪ What are the potential impacts of the new rules on the state Medicaid budget based on HCBS program design overall, and in Medicaid consumer-directed programs, specifically? ▪ How is the state collecting information and informing stakeholders of rights and responsibilities, throughout all home care services and systems in the state? ▪ Is the state (or county or public program) a joint employer? ▪ How many consumers receive services in excess of 40 hours per week? ▪ How many workers provide services in excess of 40 hours per week? ▪ Does the state currently pay workers overtime compensation for hours in excess of 40 per week? If not, if the state maintains workers’ current overtime hours and pays workers 1.5 times their regular wage rate for all hours over 40 per week, how much would that cost annually? ▪ How many workers provide services to more than one consumer? ▪ How much time do workers spend travelling between consumers? ▪ Does the state currently pay workers for travel time? If not, how much would it cost to pay workers for time spent travelling between consumers? ▪ Do family members of consumers provide paid services? If so, how many hours of service? ▪ How does the cost of high-hour cases compare to the 	<ul style="list-style-type: none"> ▪ Guidance on Joint Employment - USDOL ▪ Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes (July 3, 2014) – Center for Medicaid & CHIP Services at CMS ▪ Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes (January 8, 2016) - Center for Medicaid & CHIP Services at CMS

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cost of institutional care?	
<ul style="list-style-type: none"> What steps are necessary to foster interagency collaboration and stakeholder engagement in successful implementation? What guidance should be developed and distributed to providers? What adjustments might be necessary to Medicaid reimbursement policies? What record-keeping reforms are necessary? 	<ul style="list-style-type: none"> Can Home Care Companies Manage Overtime Hours? Three Successful Models - PHI Private Homes and Domestic Service Employment Under the FLSA - USDOL
<ul style="list-style-type: none"> How can states build support for any additional funding needed to implement the new rules while ensuring consumers receive the appropriate number of hours of service they require? 	<ul style="list-style-type: none"> Giving Caregivers a Raise: The Impact of a \$15 Wage Floor in the Home Care Industry - NELP Ten Dollars or Thirteen Dollars? Comparing the Effects of state Minimum Wage Increases in California – Institute for Research on Labor and Employment, University of California, Berkeley
<ul style="list-style-type: none"> How can states ensure they are abiding by the Americans with Disabilities Act and Supreme Court <i>Olmstead</i> decision? 	<ul style="list-style-type: none"> Department of Labor Letter to Governors Dear Colleague Letter from HHS Office of Civil Rights and DOJ Civil Rights Division Disability Rights Organization Advocacy Guide
<ul style="list-style-type: none"> How can states help consumers in consumer-directed programs identify additional caregivers? 	<ul style="list-style-type: none"> Resources on Matching Services Registries – PHI Oregon Matching Services Registry and Referral System – Oregon Home Care Commission

Endnotes

¹ See the co-authored fact sheet, *U.S. Department of Labor Home Care Rules: Key Considerations for Developing an Exceptions Process for Overtime Caps*, April 2016.

<http://nelp.org/content/uploads/USDOL-Home-Care-Rules-Considerations-for-Developing-Exceptions-Process-Overtime-Caps.pdf>

² For current status of states, please contact Caitlin Connolly at cconnolly@nelp.org. The information in this document is to the best of our knowledge.

³ Medicaid.gov, *Financing & Reimbursement* page; retrieved on March 9, 2016.

<https://www.medicaid.gov/medicaid-chip-program-information/by-topics/financing-and-reimbursement/financing-and-reimbursement.html>

⁴ California DSS *Letter to all county IHSS program managers*, January 7, 2016.

<http://www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2016/16-01.pdf> *Disability*; and Disability Rights California posting of the *IHSS: Overtime & Related Changes*, January 25, 2016.

<http://www.disabilityrightscalifornia.org/Events/20150IHSSOvertimeInformation.htm>

⁵ Schweers, Jeff, *Advocates for disabled appreciate funding boost but worry it falls short*. Tampa Tribune, March 28, 2016. <http://www.tbo.com/news/politics/advocates-for-disabled-appreciate-funding-boost-but-worry-it-falls-short-20160328/>

⁶ Kansas Dept for Aging and Disability Services memo, October 30, 2015,

<http://www.kdads.ks.gov/docs/default-source/CSP/HCBS/DOL/dol---consumer-information-10-30-15-finalc3a85ba0172e66d690a7ff00009edf98.pdf?sfvrsn=0>

and UnitedHealthcare Memo, effective January 1, 2016.

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- https://www.uhccommunityplan.com/content/dam/communityplan/healthcareprofessionals/Bulletins/KS-Bulletins/KS_Sleep_Cycle_Support.pdf
- ⁷ MassHealth Public Stakeholder Listening Sessions memo, <http://bit.ly/1UT0ftS>
- ⁸ PCA Overtime and Intra-Day Travel Time Pay, December 28, 2015 memo. <http://www.masshealthmtf.org/news/personal-care-attendant-pca-overtime-and-intra-day-travel-time-pay>
- ⁹ Massachusetts Health and Human Services February 2017 Update, retrieved March 2, 2017. <http://www.mass.gov/eohhs/consumer/insurance/masshealth-member-info/pca/pca-overtime-faqs.html#>
- ¹⁰ Governor's FY16-17 Supplemental Budget Recs, p26 <http://mn.gov/mmb/images/16-17-supplemental-agency-item.pdf>
- ¹¹ Nebraska Division of Medicaid and Long-Term Care memo re: Overtime and Travel Time, December, 29, 2015. <http://dhhs.ne.gov/Documents/Memo-to-Providers-12-29-15.pdf>
- ¹² A November "Dear Colleague" letter outlined some of the state's approaches to implementation, including a survey of home care agencies to better assess an appropriate reimbursement rate. <http://phinational.org/sites/phinational.org/files/flsa-colleaguemessage-11915.pdf>
- ¹³ New York State Department of Health, Fair Labor Standards Act Payments page, retrieved March 9, 2016. http://www.health.ny.gov/health_care/medicaid/redesign/flsa_payments_faqs.htm
- ¹⁴ Social Security Administration, Medicaid policy page, retrieved March 9, 2016. <https://www.ssa.gov/policy/docs/progdsc/sspus/medicaid.pdf>
- ¹⁵ Ohio Department of Medicaid memo, *Independent Provider Overtime Rates Effective January 1, 2016*, issued December 10, 2015 and revised on April 1, 2016. <http://medicaid.ohio.gov/Portals/0/Providers/ODM-IP-Update.pdf>
- ¹⁶ Draft rule, retrieved March 2, 2017. <http://dodd.ohio.gov/RulesLaws/Documents/5123-2-9-03%20New%202017-01-05.pdf>
- ¹⁷ Oregon memo, *Exceptions to Individual Support Plan Hourly Cap for PSWs*, July 20, 2015. <https://www.dhs.state.or.us/spd/tools/dd/cm/PSW%20Hours%20Limits%20Exceptions%20Worker%20Guide.pdf>
- ¹⁸ SEIU Local 503 Homecare page, retrieved June 2016. <http://www.seiu503.org/category/worksites/care-providers/homecare/>
- ¹⁹ Pennsylvania Department of Human Services, *Notice 46 Pa.B.106*, January 2, 2016. <http://www.pabulletin.com/secure/data/vol46/46-1/23.html>
- ²⁰ Vermont Division of Disability and Aging Services, *Variance Request Form*, May, 2016. <http://www.ddas.vermont.gov/ddas-programs/programs-cfc/variance-request-813c>
- ²¹ Virginia Dept. of Medical Assistance Services, *Overview of the Governor's Introduced Budget*, January 19, 2016. http://hac.virginia.gov/subcommittee/health_human_resources/files/01-19-16/Cindi%20Jones%20-%20DMAS%20Presentation%201-19%2016.pdf
- ²² Washington 2015-2017 Omnibus Operating Budget – 2016 Supplemental, page 119, March 28, 2016. http://leap.leg.wa.gov/leap/Budget/Detail/2016/SOAgencyDetail_0329.pdf
- ²³ State of Washington, *Engrossed Second Substitute House Bill 1725*, Passed by the House and Senate on March 29, 2016. <http://lawfilesextra.leg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Passed%20Legislature/1725-S2.PL.pdf>