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**HIGHLIGHTS OF THE FAIR LABOR STANDARDS ACT PROVISIONS THAT APPLY TO CAREGIVERS WORKING IN THE HOME OF AN INDIVIDUAL WITH A DISABILITY**

**General FLSA Requirements for Domestic Service Workers**

* Home health aides, certified nursing assistants, personal care attendants and other caregivers who are employed by a person with disabilities to provide him/her care and support and work in the person’s home are considered domestic service workers
* If the domestic service worker provides care and support to a person with disabilities in person’s home but does not live in there AND
  + is employed by the disabled person, their family or household, or a third party, then employer must pay minimum wage and overtime
  + is independently contracted, then independent contractor is exempt from paying minimum wage and overtime
* Is it an Employment or Independent Contractor relationship? Perform “economic realities” test below

**Economic Realities Test**

* Test distinguishes an independent contractor engaged in a business of his or her own from a worker who, as a matter of economic reality, follows the usual path of an employee and is dependent on the employer he or she serves.
* See DoL Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA) <http://www.dol.gov/whd/regs/compliance/whdfs13.htm>
* Typically, if caregiver lives with an individual, it is employment relationship (e.g., the individual or family hires, trains, supervises, decides schedule, provides facilities/supplies, determines how work should be performed, manages budget, sets rules about outside employment, etc.)
* Typically, if individual lives with caregiver, it is independent contractor relationship (e.g., the caregiver provides facilities/supplies, sets schedule, decides how to perform work, manages budget, takes profit/loss risk, decides how long to work with individual and whether to work with other clients)
* BEWARE of **third party employers**:
  + A third party (such as the state, a shared living agency, or another third party acting on the state’s behalf) could be a joint employer of a live-in caregiver along with a person with a disability or family.
  + A third party employer of a live-in caregiver is required to pay its providers ***at least the federal minimum wage and overtime pay*** if it is an FLSA-covered employer.
  + The more a third party is involved in directing the caregiver’s work, the more likely the third party is an employer and subject to FLSA requirements

**FLSA Exemptions**

* If the caregiver provides care and support AND lives in the employer’s home (as his/her permanent residence), it is generally an employment relationship, and the employer is exempt from overtime compensation requirement
* If the caregiver lives in employer’s home AND provides only companionship services, it is generally an employment relationship, and the employer is exempt from overtime and minimum wage requirements
  + Companionship services are defined as “fellowship” and “protection”
  + If the caregiver performs medically related tasks or spends over 20% of work time providing “care” (assisting with activities of daily living [“ADLs”] and instrumental activities of daily living [“IADLs”]), there is no companionship services exemption

For More Information:

* DOL Fact Sheet #79A: Companionship Services under the Fair Labor Standards Act <http://www.dol.gov/whd/regs/compliance/whdfs79a.htm>
* DOL Fact Sheet #79B: Live-in Domestic Service Workers under the Fair Labor Standards Act <http://www.dol.gov/whd/regs/compliance/whdfs79b.htm>
* DOL Fact Sheet #79G: Application of the Fair Labor Standards Act to Shared Living Programs, including Adult Foster Care and Paid Roommate Situations: <http://www.dol.gov/whd/regs/compliance/whdfs79g.htm>
* DOL Administrator's Interpretation No. 2014-1: <http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_1.htm>

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**FEDERAL AND STATE TAXES THAT APPLY TO EMPLOYERS WHO HIRE CAREGIVERS TO WORK IN THE HOME OF A PERSON WITH A DISABILITY**

FEDERAL TAXES

* Employer (e.g., the disabled person, their family or household, or a third party) must pay:
  + Social Security and Medicare
    - Must withhold taxes from paycheck if caregiver is paid $2000 or more in cash wages (not including rent, utilities, food, internet, cable, etc.)
    - Taxes are 15.3% of cash wages (Employer share is 7.65% and employee share is 7.65%)
    - See <https://www.irs.gov/publications/p926/ar02.html>
  + Federal Unemployment Taxes
    - Due annually on domestic service
    - FUTA tax is 6.0% of employee's FUTA wages. However, you may be able to take a credit of up to 5.4% against the FUTA tax, resulting in a net tax rate of 0.6%. The credit for 2016 is limited unless you pay all the required contributions for 2016 to your state unemployment fund by April 18, 2017.
    - If you pay cash wages to all of your household employees totaling $1,000 or more in any calendar quarter of 2015 or 2016, the first $7,000 of cash wages you pay to each household employee in 2016 is FUTA wages. (A calendar quarter is January through March, April through June, July through September, or October through December.) If your employee's cash wages reach $7,000 during the year, don't figure the FUTA tax on any wages you pay that employee during the rest of the year.
    - Filed with employer’s 1040 return on Schedule H by April deadline of each year
* Employers must report wages and file federal tax returns
  + Register for an Employer ID Number with the IRS prior to hiring caregiver. The [Online EIN Application](http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Apply-for-an-Employer-Identification-Number-(EIN)-Online) helps you get an employer identification number.
  + Complete Form W-2 and give Copies B, C, and 2 to your employee by January 31. Send Copy A of Form W-2 with Form W-3, Transmittal of Wage and Tax Statements, to the SSA by January 31. Electronic filing is available to all employers and is free, fast, secure, and offers a later filing deadline. Visit the SSA's Employer W-2 Filing Instructions & Information website at [www.socialsecurity.gov/employer](https://apps.irs.gov/app/scripts/exit.jsp?dest=http://www.socialsecurity.gov/employer) for guidelines on filing electronically.
  + Attach employer’s Schedule H (Form 1040) to Form 1040, 1040NR, 1040-SS, or 1041. Use Schedule H to figure total household employment taxes (social security, Medicare, and FUTA taxes). Add these household employment taxes to your income tax. Pay the amount due by the April deadline.

STATE TAXES

* Employer (e.g., the disabled person, their family or household, or a third party) must pay State Unemployment Taxes
  + Liable if total amount of wages paid for domestic services in a calendar quarter equals or exceeds $1,000. (While the Virginia Employment Commission defines wages to include the cash value of all other forms of remuneration, such as board and lodging, ***the value of meals and lodging furnished should not be included as wages if furnished at the employer’s premises for the convenience of the employer***.) §60.2-229, Regulation 16 VAC 5-10-10
  + register with VEC and get a VEC Account Number at [iReg](http://www.vec.virginia.gov/employers/tax-registration-massclaims)
  + Report and tax are due on a quarterly basis
  + If history of quarterly payrolls < $5,000, may get option to file VEC reports on an annual basis if approved in advance and employer agrees to file reports using [IFile](http://www.vec.virginia.gov/employers/tax-registration-massclaims)
  + For more information, see:
    - <http://www.vec.virginia.gov/employers/faqs/Employer-UI-Tax-Questions>
    - <http://www.vec.virginia.gov/sites/default/files/documents/employerhandbook20150210.pdf>
    - <http://www.vec.virginia.gov/forms-publications>