



U.S. Department of Justice
Civil Rights Division

**Department of Health and
Human Services**
Office for Civil Rights



December 15, 2014

Dear Colleague:

On October 1, 2013, the Department of Labor promulgated a rule extending the minimum wage and overtime protections of the Fair Labor Standards Act (FLSA) to most home care workers (“Home Care Rule”). Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (Oct. 1, 2013). The Home Care Rule becomes effective on January 1, 2015.¹

The Civil Rights Division and the Department of Health and Human Services’ Office for Civil Rights (OCR) recognize the importance of ensuring adequate workplace protections for home care workers, who provide critical services to millions of Americans. At the same time, it is important that states implement the Department of Labor’s rule in ways that also comply with their obligations under Title II of the Americans with Disabilities Act (ADA). In particular, because home care workers, such as personal care assistants and home health aides, often provide essential services that enable people with disabilities to live in their own homes and communities instead of in institutions, states should consider whether reasonable modifications are necessary to avoid placing individuals who receive home care services at serious risk of institutionalization or segregation.

The Department of Justice and OCR enforce the rights of people with disabilities to live integrated lives free from unnecessary segregation in institutions. Specifically, Title II of the ADA requires that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”² As directed by Congress, the Attorney General issued regulations implementing Title II, which are based on regulations issued under section 504 of the Rehabilitation Act.³ The Title II regulations require public entities to “administer services, programs, and activities in the most integrated setting

¹ The Department of Labor announced that it will not bring an enforcement action against any employer related to FLSA obligations under the new Home Care Rule before June 30, 2015. It will then use prosecutorial discretion until December 31, 2015 to determine whether to bring enforcement actions, taking into account the good faith efforts of states and other entities to bring their home care programs into compliance with the Home Care Rule. Application of the Fair Labor Standards Act to Domestic Service; Announcement of Time-Limited Non-Enforcement Policy, 79 Fed. Reg. 60,974 (Oct. 9, 2014).

² 42 U.S.C. § 12132 (1990).

³ See *id.* § 12134(a); 28 C.F.R. § 35.190(a) (1991); Exec. Order No. 12,250 (1980), 45 Fed. Reg. 72,995 (1980), reprinted in 42 U.S.C. § 2000d-1. Section 504 of the Rehabilitation Act of 1973 similarly prohibits disability-based discrimination. 29 U.S.C. § 794(a) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”).

appropriate to the needs of qualified individuals with disabilities.”⁴ The preamble discussion of the “integration regulation” explains that “the most integrated setting” is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible”⁵

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court held that Title II’s integration mandate prohibits the unjustified segregation of individuals with disabilities. Furthermore, compliance with Title II’s integration mandate requires that public entities reasonably modify their policies, procedures, or practices when necessary to avoid discrimination.⁶ The obligation to make reasonable modifications may be excused only where the public entity demonstrates that the requested modifications would “fundamentally alter” its service system.⁷

Moreover, the ADA and the *Olmstead* decision are not limited to individuals currently in institutional or other segregated settings. They also apply to persons at serious risk of institutionalization or segregation. For example, a public entity could violate *Olmstead* if it fails to provide community services, or reduces those services, in a way likely to cause a decline in health, safety, or welfare leading to an individual’s eventual placement in an institution.

The Department of Labor’s Home Care Rule narrows the circumstances in which the companionship services and live-in domestic service employee exemptions from FLSA protections apply, both by updating the definition of “companionship services” and by prohibiting third party employers from claiming either exemption. Because of these changes, most home care workers, including those providing services through publicly funded programs, will be entitled to receive at least the Federal minimum wage for all hours worked and overtime compensation—one and a half times the worker’s regular hourly rate of pay—for all hours worked over 40 in a workweek.

Implementation of the Home Care Rule will require each public or private agency that administers or participates in a consumer-directed home care program, including those funded by Medicaid, to evaluate whether it is a joint employer under the FLSA. If it is a joint employer, the entity will then be responsible for compliance with the requirements of the FLSA. The Act’s minimum wage requirement applies to any time spent traveling between worksites—in the home care context, the consumer’s home—when employed by the same sole or joint employer at each worksite. The FLSA’s overtime compensation requirement includes, in the home care context, combined hours spent working for more than one consumer as part of the joint employment by the third party entity. More information and guidance regarding the Home Care Rule can be found at: U.S. Dept. of Labor, Wage and Hour Div., *We Count on Home Care*, available at: <http://www.dol.gov/whd/homecare/> (last visited December 5, 2014).

The Civil Rights Division and OCR encourage states to conduct a thorough analysis of all their home care programs to determine whether any changes must be made to comply with the FLSA once the Home Care Rule becomes effective. In planning implementation steps, states must

⁴ 28 C.F.R. § 35.130(d) (1991).

⁵ 28 C.F.R. Pt. 35, App. B at 673 (2011).

⁶ 28 C.F.R. § 35.130(b)(7) (1991).

⁷ *Id.*; see also *Olmstead*, 527 U.S. at 604-07.

consider whether reasonable modifications are necessary to avoid placing individuals who receive home care services at serious risk of institutionalization or segregation.⁸ A state's obligation to make reasonable modifications to its policies, procedures, and practices applies even when a home care program is delivered through non-public entities.

Many states are already taking concrete steps to implement the Home Care Rule. Some states are developing budget proposals to pay overtime and travel time for home care workers who work over 40 hours in a week. The Centers for Medicare and Medicaid Services (CMS) has published guidance to assist states in understanding Medicaid reimbursement options that will enable them to account for the cost of overtime and travel time that may be compensable as a result of the Home Care Rule. See Cindy Mann, *CMCS Informational Bulletin: Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes* (July 3, 2014), <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf>.

Other states are planning to comply with the new rule by setting limits or capping direct care workers' hours or travel time. We are sensitive to states' budgetary constraints. However, implementation of across-the-board caps risks violating the ADA if the caps do not account for the needs of individuals with disabilities and consequently places them at serious risk of institutionalization or segregation. For example, if a state prohibits home care workers from exceeding 40 hours a week of work, individuals who need more than 40 hours a week of care may not receive their full hours where home care workers are scarce. And even where home care workers are available, consumers with extraordinary medical or behavioral needs may not be able to tolerate multiple workers in their home. Emergency situations may also arise where a scheduled second worker is not available and the individual's home care support needs would not be met without immediate authorization of overtime hours and pay.

Therefore, states need to consider reasonable modifications to policies capping overtime and travel time for home care workers, including exceptions to these caps when individuals with disabilities otherwise would be placed at serious risk of institutionalization.⁹ Whether a reasonable modification is needed and what the modification should be depends on the specific factual circumstances. States should also consider implementing processes that reliably and expeditiously enable individuals with disabilities to obtain cap exceptions when they are warranted. Finally, where implementation of the Home Care Rule disrupts services, states should collect and monitor data to ensure that the service disruption does not place individuals with disabilities at serious risk of institutionalization.

⁸ In the final Home Care Rule regulations, the Department of Labor recognized states' obligations to comply with the requirements of the Americans with Disabilities Act when considering changes to implement the Home Care Rule. 78 Fed. Reg. 60,454, 60,485-87.

⁹ CMS has similarly encouraged states to consider exceptions to limitations on overtime and travel time when necessary to avoid placing an individual at risk of harm. See Cindy Mann, *CMCS Informational Bulletin: Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes* (July 3, 2014), <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf>; see also CMS, *Application for a § 1915(c) Home and Community-Based Waiver, Instructions, Technical Guide and Review Criteria* at 141 (January 2008), <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/Technical-Guidance.pdf>.

For more information regarding states' obligations under *Olmstead* and the Americans with Disabilities Act's integration mandate, visit *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, available at: http://www.ada.gov/olmstead/q&a_olmstead.htm (last visited December 5, 2014).

The Civil Rights Division and OCR recognize and appreciate the work that states do in supporting individuals with disabilities to live integrated lives in their communities.

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