Judge David L.
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Action Steps for Consumers and Advocates Regarding the New Home Care Rules

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Push state officials to analyze the impact of the new rules on programs

- Potentially impacted programs include:
  - Consumer-directed home care programs – must be analyzed to determine if there is any "third-party employer" (DOL has said most have a third party "joint employer")
  - Agency home care programs – Medicaid rate structures need to take into account new FLSA obligations
  - Shared living programs – must be analyzed to determine if there is a third party employer or if workers are independent contractors
- Your state must analyze the fiscal impact in affected programs
  - Has your state determined how many workers are working overtime (including across consumers) and how many workers travel between consumers?
  - Because states have not historically tracked the information, ask your state what data and methodology it will use to track or estimate these costs.

Advocate now for additional funding in impacted programs

- Without additional funding, states may take compliance actions that hurt consumers and workers, like caps on hours, travel or working for multiple consumers.

- The FY ‘16 budget is finalized in almost all states. If your states’ FY ’16 budget does not address compliance, advocate for stop-gap measures to add money to these FY ‘16 programs’ budgets.
  - Options might include state reserve funds, agency savings that could be re-allocated, or legislative action.

- Most state agencies are now preparing their FY ‘17 budget requests. Advocate now for additional funding for FY ‘17 in impacted programs.

Prevent your state from complying with the rule in ways that harm consumers and workers

- States could take actions that technically comply with the rule but undermine the goal of the rule and hurt consumers and workers.
  - Harmful actions could include prohibiting all overtime, restricting all or most travel, or abandoning consumer-directed models of care.

- These actions could lead to cuts in critical community services for consumers, shortages in this important workforce, loss of income by workers, and abandonment of models that allow people with disabilities and seniors to have more control over their lives.

Prevent your state from taking harmful compliance actions (cont'd)

- Ensure your state creates a policy or process that allows consumers who would be harmed by new policies to be excepted or given alternative services.
  - December 15, 2014 "Dear Colleague Letter" from DOJ and HHS' Office of Civil Rights says the ADA and *Olmstead* generally prohibit across-the-board restrictions and caps on worker hours.
  - State must put in place an exceptions process for people who would be placed at serious risk of institutionalization.
    - Includes people who may lose services because they cannot find additional workers (eg, they live in areas with worker shortages) or who might be harmed by having multiple workers due to specialized needs.
  - States have *Olmstead* obligations both when they directly operate home care programs and when they operate them through private entities.

Prevent your state from taking harmful compliance actions (cont'd)

- March 20, 2015 letter from Secretary Perez to states' Governors emphasizing need for budget planning and for *Olmstead* compliance
- If your state (or a managed care entity with whom the state contracts) is considering policies to set some limits on overtime or travel, work to ensure those policies are reasonable.
  - Your state should consider the cost of implementing restrictions (such as recruiting additional workers, setting up a backup worker system, or hiring staff to enforce the restrictions).
  - Additional costs of restrictive policies may be more than funding more generous overtime and travel policies.

Ensure your state uses Medicaid to help with additional costs but without impacting access to services

- The Centers for Medicare & Medicaid Services (CMS) has made clear that states can use federal matching Medicaid dollars to help pay for overtime and travel costs.
  - CMS also included funding strategies for states that use managed care for LTSS.
  - CMS has offered technical assistance to states.

- Make sure any Medicaid reimbursement for overtime and travel costs does not come out of budgets allocated to individual consumers for purchasing services.
  - If overtime and travel come out of individual consumer budgets, consumers will lose services they need and to which they are entitled.

Do not allow your state to abandon consumer-direction

- Some states may be considering abandoning consumer-directed programs.
  - This would reverse years of advocacy by people with disabilities and seniors to have more control over their own lives.
- If your state is seriously considering abandoning consumer-direction altogether because they refuse to be a join employer, ensure they are aware of alternative models including:
  - Agency with choice – an agency is the FLSA joint employer and common law employer
  - Hybrid Fiscal/Employer agent – an agency is the FLSA joint employer but consumer is common law employer
  - Individual Budget models – consumer is FLSA and common law employer

Encourage your state to be engaged even in programs where there is no joint employer

- Even if your state determines there is no joint employer in its consumer-directed programs, individual consumers need to understand how to comply with the rule.

- Advocates should work with your state to develop education and assistance materials for consumers who are sole employers.

Additional Resources on the Home Care Rule

- **Department of Labor home care website:** http://www.dol.gov/whd/homecare/
- **Center for Medicare & Medicaid Services Guidance:**

http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf

- **Disability and Aging Advocacy Groups' *Action Steps for Consumers and Advocates Regarding the New Home Care Rule*:** http://www.bazelon.org/portals/0/Archives/HomeCareRule.pdf
- **National Resource Center for Participant Directed Services' FLSA Toolkit:** http://www.bc.edu/content/bc/schools/gssw/nrcpds/tools/flsahomecaretoolkit.html
- **Workgroup of Disability and Worker Advocates:** Led by Caitlin Connolly of National Employment Law Program (cconnolly@nelp.org)

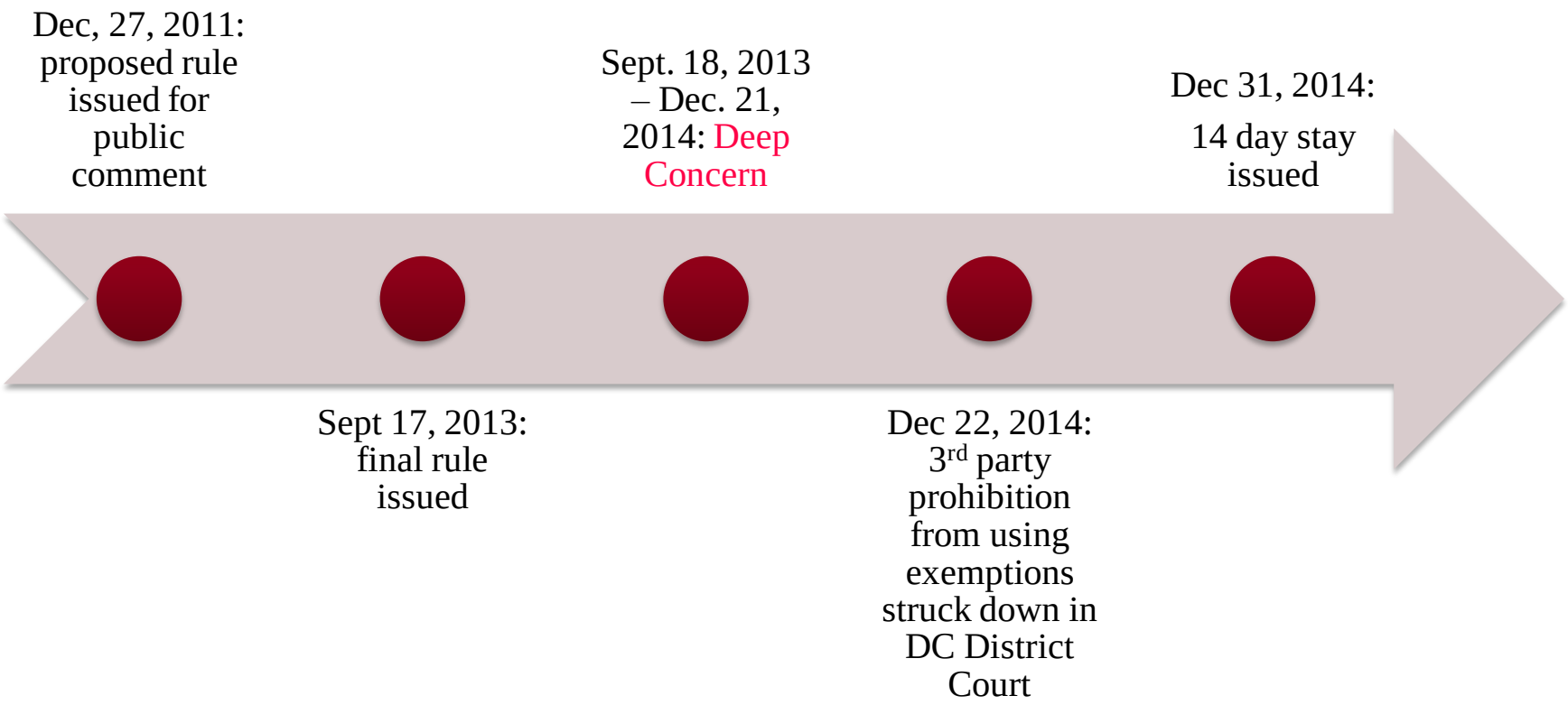
NATIONAL RESOURCE CENTER *for*
PARTICIPANT-DIRECTED SERVICES

Understanding The FLSA Home Care Rule and Litigation: Preparing Programs for Compliance Success

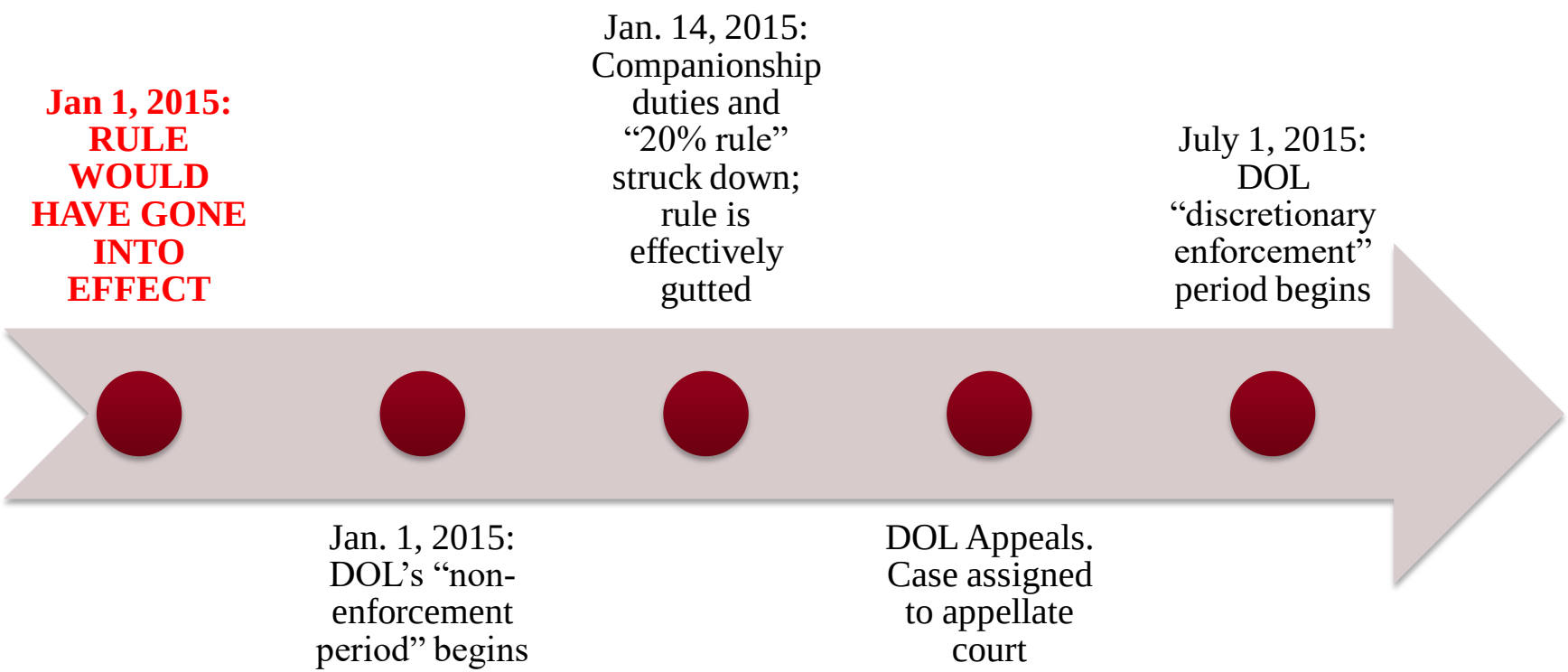
Mollie Murphy, FMS Lead
National Resource Center for
Participant-Directed Services (NRCPDS)

Alternative title for this session…

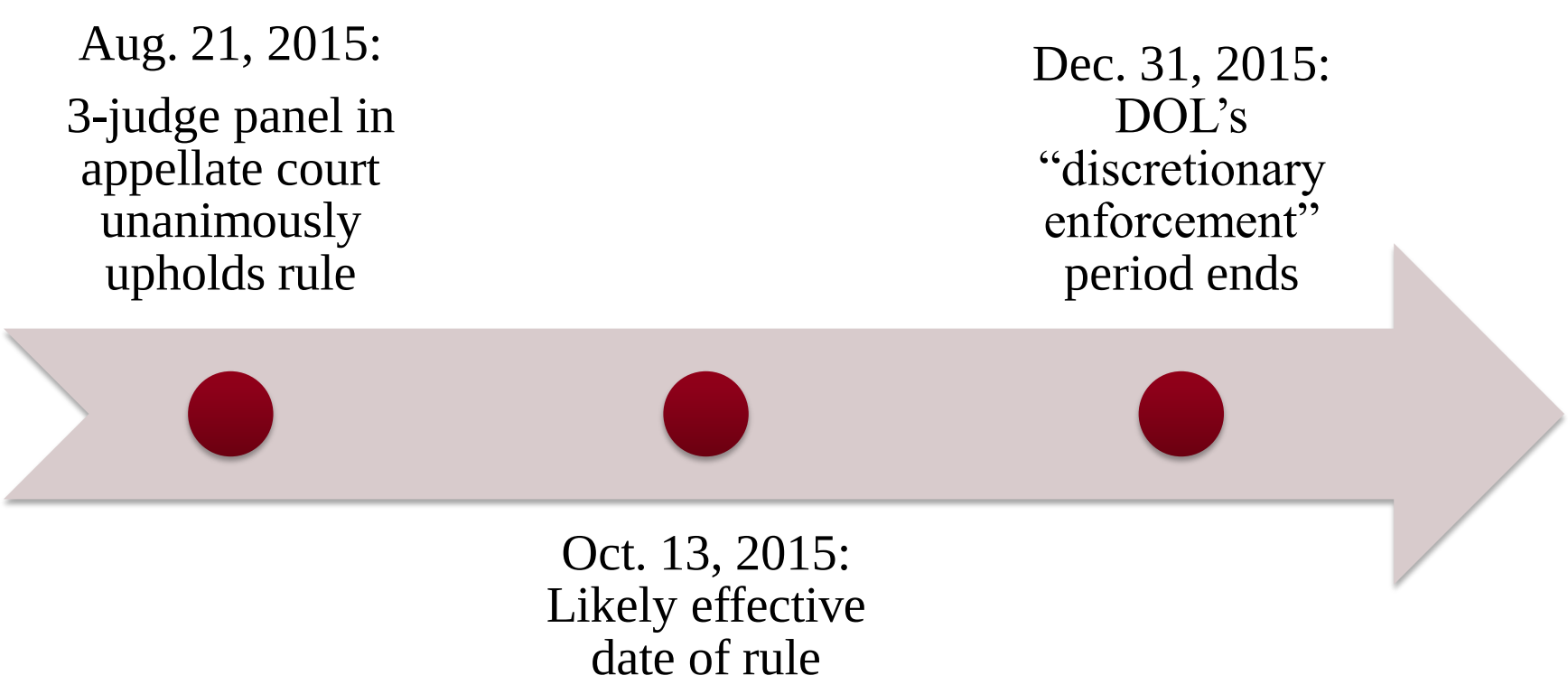
2011 – 2014 Timeline



2014 – July 2015 Timeline



August 2015 to Now Timeline



Legal Overview and What Might be Next

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DC Circuit Court of Appeals Decision

- On August 21st, a three judge panel of the DC Circuit Court of Appeals issued a unanimous decision upholding the home care rule in its entirety
- Court used the two step "Chevron" analysis for evaluating agency regulations: (1) does the statute address the specific topic? if yes, the statutory language and intent control; (2) if not, the agency can "fill in the gaps" as long as it is reasonable and not "arbitrary and capricious"

DC Circuit Court Decision (cont'd)

- The Court first analyzed the rules' prohibition on "third-party employers" (meaning anyone other than a consumer/household) using the companionship and live-in exemptions:
  - On Chevron step 1, Circuit Court disagreed with the district court that the statute directly addressed the issue of which employers could use these exemptions and relied heavily on the Supreme Court's decision in *Long Island Care at Home Ltd. v. Coke* to find that Congress had delegated this authority to DOL
  - On Chevron step 2 analysis, Court found that DOL's rationale for the rule, including the significant changes in the home care industry since the FLSA was passed, was reasonable and not arbitrary and capricious

DC Circuit Court Decision (cont'd)

- The Court then analyzed the narrowed definition of "companionship"
  - The district court had found that while DOL did have authority to define companionship (step 2 of Chevron), its definition was "arbitrary and capricious" because it was so narrow
  - The Circuit Court found that the plaintiffs, who are third-party employers, no longer had standing to challenge the narrowed companionship definition because they could not avail themselves of the exemption anyways. It did not address the merits.
- The Circuit Court reversed and remanded the case to the district court, ordering the judge to enter summary judgment in favor of DOL

Possible next steps and timing

- Plaintiffs may try to seek "en banc" review by the entire DC Court of Appeals or appeal to the Supreme Court.
  - But grant of review unlikely from a unanimous panel decision. And given the *Coke* decision, it is unlikely that the S. Ct. will grant certiori.
- The rules will go into effect as soon as the Court of Appeals' mandate issues and the district court enters judgment in favor of DOL (as early as October 13), unless the plaintiffs can convince the district court to "stay" the rules during an appeal or DOL seeks an expedited issuance of the mandate.
- DOL's previously announced "non-enforcement policy" ended June 30, 2015 and period of "prosecutorial discretion" ends Dec. 31, 2015
- Bottom line: States need to be getting prepared for compliance now!

The Companionship Exemption Rule

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What is the Companionship Exemption?

- Exemption from minimum wage and overtime
- Worker's primary duty must be providing **fellowship and protection** to an elderly person or person with an illness, injury or disability
  - Fellowship: social, physical and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events
  - Protection: accompanying the person to monitor their safety and well-being
- **Cannot be used by third party employers**

Care Services

- Care services are allowed under the companionship exemption, but are capped at 20% of the worker's hours per care recipient and per week
- "Care services" means:
  - Assistance with activities of daily living
    - "Dressing, grooming, feeding, bathing, toileting, and transferring"
  - Assistance with instrumental activities of daily living
    - "Meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care"

Duties Not Allowed Under the Companionship Exemption

- Work for other members of the household
  - Except for incidental benefits to other household members (e.g. dusting in a shared room, or household member eating leftovers)
- Medically related services
  - Services that typically require medical training and are typically performed by trained healthcare personnel such as nurses or nursing assistants
  - Examples: “Catheter care, turning and repositioning, ostomy care, tube feeding, treating bruises or bedsores, and physical therapy”
  - Does not include emergency first aid such as CPR, or minor health-related tasks such as applying an adhesive bandage
- Exemption cannot be claimed in a **workweek** when any such services are performed
- 20% allowance does not apply

Who Can Claim the Exemption?

- Exemption only available to the consumer, or to a member of the family or household employing the companion
  - Family and household defined broadly: authorized representatives, housemates, extended relatives qualify
- **Third-party employers cannot claim the exemption, even in joint-employment situations**
- See economic realities test factors in Administrator's Interpretation 2014-2 to determine if there is a joint employer

What Happens if the Companionship Exemption Doesn't Apply?

- If the companionship exemption cannot be claimed, then FLSA rules apply:
  - Minimum wage
  - Overtime
    - Unless the live-in exemption can be claimed
  - "Hours worked" are counted by FLSA rules:
    - "On duty" time
    - Travel time
    - Sleep time

The Live-in Worker Exemption Rule

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Live-in Workers

- Exempt from overtime
- Not exempt from minimum wage
- Applies to domestic service workers living in the household where they are employed, if they live there "permanently" or "on an extended basis"
  - At least 5 consecutive days and 4 nights per week, or vice versa, e.g. 9 a.m. Monday to 5 p.m. Friday
  - 24-hour shifts do not automatically turn the worker into a live-in worker
- Domestic service = providing "services of a household nature in or about a private home"
  - Includes housekeeping, cooking, cleaning, personal care, home health services, etc.

New Rules for Live-in Workers

- Third-party employers can't claim the live-in worker exemption
- New recordkeeping requirements
  - Must record the exact hours worked each day
  - Agreement regarding regular working hours also required by not sufficient
  - Worker must be paid for actual number of hours worked, even if different from the agreement

Joint Employment

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Joint Employment Administrator's Interpretation

- DoL Administrator's Interpretation No. 2014-2 and associated Fact Sheet released June 19, 2014
- Not new law, but an interpretation of existing law on joint employment
- Joint employment under DoL rules determined by the "economic realities" test
- Test comes from court cases and different courts may use somewhat different factors or descriptions of the test
- A court can always look at any relevant factors, even if not listed in the test

Common Law & Economic Realities Tests

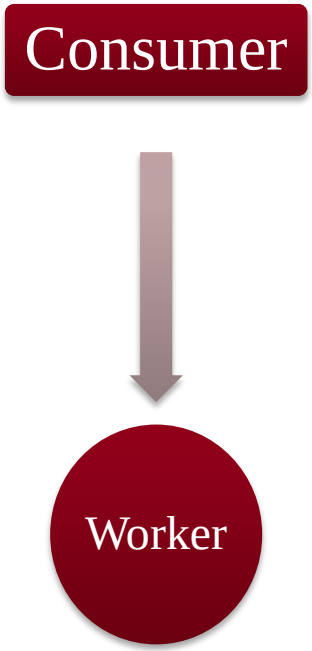
Both are tests of employment, but they are used for different purposes.
Some factors are similar, but may be weighted differently for the tests.
The result of one test should not influence the result of the other.

Understanding the Factors

- Each factor can be a "strong," "moderate," or "weak" indicator of joint employment
- Factors are a guide to answer the question:
  - On whom is the employee ultimately economically dependent in the course of this employment?
- "[B]ecause the ultimate question is one of **economic dependence**, the factors are not to be applied as a checklist, but rather the outcome must be determined by a qualitative rather than a quantitative analysis." – Administrator's Interpretation 2014-2

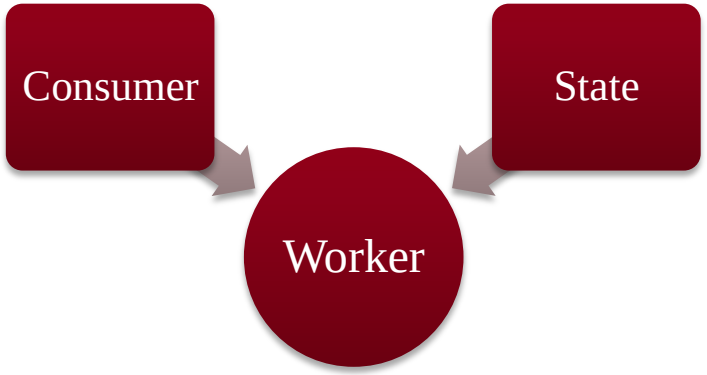
Employer Test Results

Scenario A:
Common Law Test Results



IRS & Many State Tax Agencies

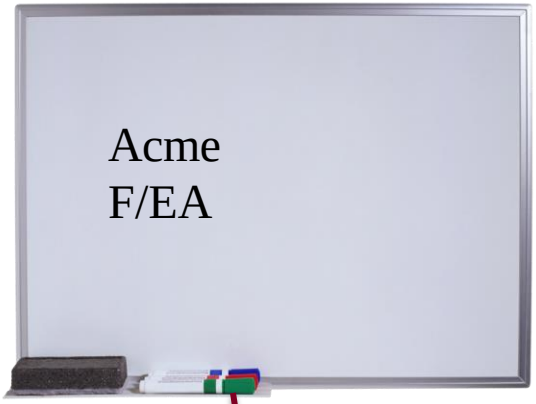
Scenario A:
Economic Realities Test Employers



FLSA

Overtime Scenario

- Ed Employee provides services to two consumers in the same program: to Carrie Consumer for 20 hours/week and to Carl Consumer for 30 hours/week
- The state is deemed a joint employer of care providers in this program.
- Carrie and Carl each have their own EIN and are considered employers by the IRS



State as Joint Employer

50 hours/week

20 hrs/ week

30 hrs/ week

Travel Time

- Does anyone here get paid for their time to drive from their home to work?
- What about if your boss asks you to drive to Staples to get some supplies and come back to the office – would that time count as your work day?

Travel Time

- Ed Employee provides services:
  - to Carrie Consumer from 8 am to 11 am, and
  - to Carl Consumer from 12:30 pm to 5 pm
- Ed drives from Carrie's home to Carl's home every day, and stops on the way at a pizza place for 30 minutes to get lunch for herself
- Driving straight from Carrie's home to Carl's home would take 1 hour without the stop for lunch
- The state is a joint employer of workers in the program Carl and Carrie are in
- Does Wendy have to be paid for travel time?

Ed's home

20 minutes

Commute

40 minutes

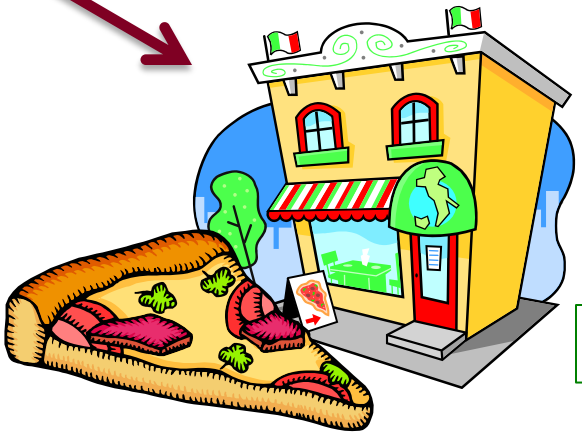
Commute

Carrie's home

Carl's home

1 hour driving distance

Driving on the job for joint employer



Lunch: 30 minutes

What DoL Joint Employment Does NOT Mean

- DoL employer determination ≠ IRS employer determination
- IRS does not recognize joint employment
- DoL guidance does not change IRS rules about joint employment
  - Economic realities test vs common law test
  - This guidance has no effect on tax filing requirements
- ACA employer mandate remains unchanged; uses common law test
  - If a consumer employer is the common law employer, ACA Health Insurance Mandate still doesn't apply to consumer

Summary

	Minimum Wage Exemption	Overtime Exemption	Duties Allowed	Worker's Residence	Can Third-Parties Claim?
Companions	Yes	Yes	Fellowship & Protection + 20% Care	Not Relevant	No
Live-in Workers	No	Yes	Domestic Service	Must Reside in the Household Where Employed	No

Deeper Dive:
Wednesday, 9/9
3PM Eastern
To register, email:
membership.nrcpds@gmail.com

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