



# Oregon

Governor Kate Brown

Department of Human Services

*Office of the Director*

500 Summer St. NE, E-62

Salem, OR 97301

Voice: 503-945-5600

Fax: 503-581-6198

February 18, 2015



The Honorable Alan Bates, Co-Chair  
The Honorable Nancy Nathanson, Co-Chair  
Ways and Means Subcommittee on Human Services  
900 Court Street NE  
Salem, OR 97301

Dear Co-Chairs:

Please accept this letter as response to the Committee's questions raised during the presentation on Home and Community Based Services and Department of Labor regulation changes on February 16, 2015.

**Question:** What happens if one of the requirements of the new Home and Community Based Services regulations jeopardize the safety of one of the residents? Are there going to be any exceptions to these regulations?

**Answer:** In the regulations, the Center for Medicare and Medicaid Services (CMS) acknowledges that some individuals will require modifications to the requirements in the regulations in order to live safely in their homes and communities. Through a person-centered planning process, case managers will be able to identify concerns and strategies to address those concerns. These strategies may include implementing restrictions not otherwise allowed in the regulations.

As an example, an individual with advanced dementia may not be able to have locks on their bedroom door and may not be able to leave the building at will. However, an individual with an intellectual disability may need to have someone to support them in the community, but can have have a lock on their bedroom door. The limits must be the least restrictive necessary to meet the identified concern and be specific to the individual.

As another example, if a person living in a group home has issues controlling when and how much they eat, that individual may have restrictions in their support plan on when and how they can access food. Other individuals in the same home,

*"Assisting People to Become Independent, Healthy and Safe"*

without those specific issues, should still have access to food at any time. Again, the limits must meet an identified concern and be specific to the individual.

**Question:** Please provide more information on the Live-in program administered by Aging and People with Disabilities. Please include information on eligibility and compensation levels.

**Answer:** Individuals qualify for live-in services when:

- (A) The individual requires assistance with ADL or IADL tasks at unpredictable times throughout most 24-hour periods; and
- (B) The individual requires minimal, substantial, or full assistance with ambulation and requires assistance with transfer (as defined in OAR 411-015-0006); or
- (C) The individual requires full assistance in transfer or elimination (as defined in OAR 411-015-0006); or
- (D) The individual requires full assist in at least three of the eight components of cognition/behavior (as defined in OAR 411-015-0006).

In the month of December, 2014:

- 550,301 total hours were billed. Of that number,
  - 179,640 were paid at the rate of \$13 per hour.
  - 368,986 were paid at a lower rate, most often \$6.50 per hour.
  - 1,675 hours were paid at a rate higher than \$13 per hour.
  - *Effective, 1/1/15, the rates above increased to \$13.75/\$6.88*
- 1,958 unique consumers utilized live-in Home Care Workers.
- The average In-Home Consumer utilized 287 hours
- 2,268 unique Home Care Workers served in-home consumers. (*The number is higher than the number of consumers due to respite providers.*)
- The average Home Care Worker serving live-in consumers worked 243 hours with an average compensation amount of \$2,102.
- This equates to an average hourly wage of \$8.65.

**Question:** How many states collectively bargain with their in-home workforce?

**Answer:** In addition to Oregon, we are aware of collective bargaining for Home Care Workers in California, Connecticut, Illinois, Maryland, Massachusetts,

Michigan, Minnesota, Missouri, New York, Vermont and Washington. There may be others that we are unaware of.

**Question:** For the fiscal impact identified, please separate out the costs of each component of the regulation.

**Answer:** The biennial fiscal impact is estimated at:

Overtime on hourly plans:	\$12.1M Total Funds
Paying all hours at min wage:	\$15.8M Total Funds
Additional hours for live-in:	\$103.1M Total Funds
Overtime for live-in:	\$71.3M Total Funds
Spousal pay costs:	\$25.6M Total Funds
Travel	\$14.6M Total Funds
Total Estimated Cost:	\$242.5M Total Funds

As a reminder, these fiscal impacts were calculated using current program policies. The Department looks forward to working with members of the Committee on contingency planning for the potential impacts of these regulations.

**Question:** Please provide a listing of the individuals that have participated in the Department of Labor Stakeholder process.

**Answer:** In addition to DHS staff support, the stakeholder group includes:

- Brooke Emery, Lane Council of Governments
- George Green, Northwest Senior and Disability Services
- Jennifer Bickett, Community Pathways
- Devin Overall, Catholic Community Services
- Josh Avarette, Catholic Community Services
- Sue Gordon, Community Living Case Management
- Toni Smith, Partnerships in Community Living
- Jill Sorenson, Independent Services Network
- Sarah Noack, United Cerebral Palsy
- Dawn Alisa Sadler, Marion County Developmental Disability Services
- Jamie Daignault, Oregon Council on Developmental Disabilities
- Leslie Sutton, Oregon Council on Developmental Disabilities
- Julia Greenfield, Disability Rights Oregon
- Ross Ryan, consumer advocate

- Katie Coombes, Service Employees International Union
- Jereme Grzybowski, Service Employees International Union
- Rebecca Sandoval, Home Care Worker
- Jon Bartholomew, AARP Oregon
- Karen Berkowitz, Oregon Law Center
- Larisa Kofman, Oregon Alzheimer's Association
- Joseph Lowe, Oregon Home Care Commission
- Mark King, Oregon Home Care Commission
- Mike Volpe, Oregon Disabilities Commission
- Pam Ruona, Oregon Health Care Association
- Sarah Gelser, State Senator
- Nancy Nathanson, State Representative
- Charles Richards, Governor's Commission on Senior Services
- Sherry Stock, Brain Injury Association of Oregon
- Tina Treasure, Independent Living Council

In addition to this group, we engaged the Governor's Commission on Senior Services in November for the purposes of obtaining an advisory opinion on how to address this issue. We have included their recommendation as an attachment to this letter.

We hope this letter addressed the identified questions adequately. If you have additional questions, don't hesitate to contact Mike McCormick at 503-945-6229 or email at [mike.r.mccormick@dhsosha.state.or.us](mailto:mike.r.mccormick@dhsosha.state.or.us) or Lilia Teninty at 503-945-6918 or email at [lilia.teninty@dhsosha.state.or.us](mailto:lilia.teninty@dhsosha.state.or.us)

Sincerely,



Eric Luther Moore  
DHS Chief Financial Officer

cc: Laurie Byerly

**Enclosure**



November 7, 2014

Governor Kitzhaber,

I am writing on behalf of the Governor's Commission on Senior Services (GCSS) . We appreciate your request for our recommendations about how to responsibly address Oregon's compliance with the US Department of Labor's (DoL) amended administrative rule for companionship exemptions under the Fair Labor Standards Act (FLSA).

The Commission has seriously considered your request to examine ways of minimizing the impact of these changes on consumers and members of the direct care workforce who serve them, while concurrently minimizing the fiscal impact, which is currently estimated at \$240 million for the 2015-2017 biennium.

To develop these recommendations, the Commission included FLSA changes as an agenda item at its regularly scheduled October meeting and convened a special meeting to review this issue. At these meetings, Aging and People with Disabilities (APD) staff briefed us extensively on the impact of the changes, as well as a full spectrum of potential policy and program changes that could mitigate the impacts.

Throughout our multiple discussions, several overarching themes emerged:

1. **Preservation of Oregon's unique system of long-term services and supports based on the values of dignity, choice, and independence.** Due to the high costs associated with compliance with the new DoL interpretation, we are concerned that consumer choice for in-home care could be diminished. Changing FLSA rules should not cause more consumers to be involuntarily institutionalized because receiving the care they need at home or in a community-based setting becomes cost-prohibitive.
2. **Support for fair wage standards and worker protections for direct-care workers who serve older and disabled Oregonians.** We understand that the intent of the new interpretation is to adequately compensate those providing in-home care and services. As advocates of quality care for older adults, the Commission fully supports fair compensation for those who provide care for older adults and adults with disabilities.
3. **Improve the quality of care that older adults and people with disabilities in Oregon receive.** The shift in interpretation of the FLSA places the State in the position of

“joint employer” with the consumer employer and as such, the State has an opportunity to strengthen the quality of services delivered to Oregonians. The Commission strongly believes that care provided to Oregonians must be:

- *Consistent.* Direct-care workers throughout the state, from both the Home Care Registry and those who are relative care providers, should provide reliable and dependable care to Oregon’s older and disabled citizens.
- *Proficient.* A variety of quality ongoing training options should be required for direct-care workers to prepare them to provide person-centered care to people with diverse needs and conditions in every region of the State. We must continue to work toward higher standards for training and educating direct-care workers - including relative care workers - to protect consumers’ health, safety and well-being, and the cost of paying these workers a fair wage should not impede such efforts.
- *Sufficient.* The State must embark on a comprehensive effort to recruit and train a high quality workforce to meet the expanding need for direct-care workers throughout the State.

Specifically, Commissioners recommend a list of policy changes suggested by APD staff, which would cut the fiscal impact of the FLSA changes in half, from an estimated \$240 million to approximately \$120 million for the 2015-2017 biennium. The Commission believes that these changes will save money by tightening up the current long term services and supports system without significantly impacting the services most consumers receive. These changes include:

1. Limiting the number of hours that hourly direct-care workers can work to 50-55 hours per week with limited exceptions.
2. Limit travel time to no more than ten percent of a worker’s paid time. (For example, a worker claiming 35 hours of time in a week may claim no more than 3.5 hours as travel time.)
3. Amend eligibility definition to limit the number of future consumers who qualify for the live-in program, but preserve or current relationships for those already enrolled in the program.
4. Create “on-call” services for consumers with intermittent needs.
5. Limit live-in workers to no more than five days per week.
6. Utilize robust options counseling through the Aging and Disability Resources Connection (ADRC) for in-home recipients and create methods to evaluate the impact of options counseling throughout Oregon.
7. Embark on intense and targeted work force recruitment and training for workers, as well as adding training requirements for relative caregivers.

In addition to the above policy changes, the Commission recommends the following:

- **State government should take full advantage of enforcement guidance provided by the DoL.** By making good faith efforts to comply with new regulations, states may be able to earn an additional six months to bring systems into compliance. The additional six months (beyond the June 30, 2015 extended deadline) can provide additional cost savings for the 2015-2017 biennium, but in order to receive this additional grace period, Oregon must illustrate to DoL that there is a viable plan for compliance that can be fully implemented by January 1, 2016. We believe this goal can be accomplished and that the executive branch should take significant efforts to that end.
- **Savings from reforms to the Senior Medical Deduction should be used to protect, preserve, and strengthen programs for older adults and people with disabilities.** Savings from the Senior Medical Deduction are estimated at \$117 million for the 2015-2017 biennium (report #4-13, November 2013). These savings should be reinvested in programs to serve the older adult and disabled population. Under no circumstance should APD programs, such as those supporting long term services and supports or those expanding Oregon Project Independence (OPI) to persons with disabilities, bear the fiscal burden of FLSA changes.
- **Between \$30 million and \$40 million from the General Fund should be used to help offset costs brought about by FLSA changes.** Although these changes impact the APD budget significantly, these costs should not be borne completely by APD, and they should not impact the budget for programs and services offered to APD consumers. Fair treatment and compensation for direct-care workers is a statewide issue and should be shared broadly within the statewide budget.

We hope that our recommendations are helpful as you create your budget for the coming biennium, and we welcome any questions or further opportunities to assist you with this matter.

Sincerely,



Judy Strand  
Chair, Governor's Commission on Senior Services