

# U.S. DOL ISSUES GUIDANCE THAT WILL BE HELPFUL TO LHCSAS AND FISCAL INTERMEDIARIES

*Home Care Alert*  
July 27, 2018

On July 13, 2018, the United States Department of Labor Wage and Hour Division (WHD), issued guidance summarizing the standards by which the WHD will determine whether a home care, nurse, or caregiver registry is an employer of the caregivers on the registry for purposes of federal wage and hour laws. The guidance, although issued by the federal WHD could be helpful to New York home care agencies and fiscal intermediaries in structuring their wage and hour compliance and defending wage and hour claims.

The WHD guidance concludes that, generally, a registry serving purely as a matchmaker or a referral service for patients is likely not going to be considered an employer of the caregivers serving those patients. A registry, however, that goes beyond matching caregivers with patients and engages in hiring and firing caregivers and/or dealing with their compensation, duties, and schedules is likely to be found to be an employer of the caregivers. In all cases, the WHD will consider the “totality of the circumstances” in determining whether an employment relationship exists between a registry and the caregivers on that registry. According to the guidance, the following activities, if performed by the registry, will not be considered indicators of an employment relationship:

1. confirming caregiver credentials;
2. conducting background checks on caregivers;
3. contacting professional references;
4. determining what work caregivers are willing to perform, their target compensation, their availability, and other personal preferences;
5. interviewing the client to determine the needs of the client, the client’s budget, and the client’s personal preferences;
6. charging a fee for administrative services for the client, such as fees for recordkeeping, invoicing, collecting, and administering payroll;
7. posting available positions online for caregivers to screen and consider;
8. providing information to caregivers and clients regarding typical pay rates in the area;
9. acting as a liaison between the caregiver and the client in the process of the caregiver and the client negotiating compensation; and

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10. providing caregivers the opportunity to purchase necessary equipment from the registry or a third party.

Thus, to the extent a registry performs some or all of the activities above, the WHD is likely to determine that the registry is not an employer of the caregivers on the registry. If the registry engages in the below activities, however, the WHD is likely to find that the registry is an employer of the caregivers on the registry:

1. suggesting or determining the rate to be paid to the caregiver;
2. exercising control over the caregiver's schedule;
3. exercising any level of control over discipline;
4. interviewing candidates to evaluate subjective factors for the client;
5. exercising any control over hiring and firing decisions;
6. offering work assignments to select caregivers based on the registry's own criteria;
7. assigning specific caregivers to specific clients;
8. directing caregivers on how to provide services;
9. monitoring, supervising, or evaluating caregivers' performance;
10. charging fees for ongoing services to be provided by the caregiver; and
11. directing payment of its own funds to the caregiver, even if reimbursed by the client.

Although the guidance was issued by the U.S. Department of Labor, the guidance is consistent with New York's "economic realities" test for determining whether a business is an employer of a particular worker for purposes of New York Labor Laws. Thus, the guidance could be helpful to New York agencies that serve as registries (for nurses or aides) and fiscal intermediaries that are battling wage and hour claims from personal assistants when those entities are structuring their compensation and relationships with caregivers. Registries that do not wish to be liable to the caregivers for wage and hour violations (e.g., spread of hours pay, overtime) should carefully consider the WHD's guidance.

Please contact any one of the attorneys in our Home Care Group should you wish to discuss this new guidance and how it might affect your home care and fiscal intermediary operations and compliance.