



August 15, 2016

**Attention Personal Care Attendant Employers:**

The Alaska Department of Labor and Workforce Development, Wage and Hour Administration, is currently responding to an increase in complaints concerning personal care attendants (PCAs) hired by agency based and consumer directed personal care attendant agencies. This letter is being sent as an industry-wide notice to address multiple issues that appear to be subject to widespread misunderstanding throughout the industry. Among the issues that have been the focus of the complaints and subsequent enforcement activities are:

- The absence of written hiring agreements between the PCA agency and the PCA; changes to the rate of pay without the required written notice;
- Nonpayment of wages and overtime consistent with the *Alaska Wage and Hour Act*;
- Nonpayment of wages for all hours worked;
- Insufficient or nonexistent records of all daily and weekly hours worked by every employee;
- Nonpayment or insufficient payment for time spent in travel;
- PCAs being misclassified as independent contractors;
- PCAs not being paid for overtime when their employers enter into a joint-employer relationship;
- PCAs subjected to unlawful deductions from wages, the withholding of paychecks, or who are being compelled to reimburse employers for hours the employee was directed to work but which were later denied by Medicaid.

We will address each of these issues in this letter, and we are always available to discuss any follow-up questions you may have.

### Written Hiring Agreements and Changes in the Rate of Pay

Under Alaska law, “an employer shall notify an employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the payday before the time of change.”<sup>1</sup> It is important to include an established rate of pay even if some rates are derived from Medicaid, because “an employee's regular rate is the basis for computing overtime.”<sup>2</sup> Many agreements in the industry may derive the rate of pay from established rates required by Medicaid; however, when work is performed by a PCA that is outside of those hours specifically approved by Medicaid, and no clearly written agreement establishing an alternative rate of pay exists, then the rate of pay will be based on the same reimbursement amount as hours worked under the care plan. If multiple rates of pay have been established, a weighted average must be used to determine the proper overtime rate. Additionally, an agency cannot change an employee’s wage to match the Medicaid reimbursement amount without the required notification. Any change with respect to the rate of pay must be provided to the employer in writing the payday before the time of change. The change cannot be made in the middle of a pay period and it cannot be retroactive.

### Minimum Wage and Overtime

Outside of any specific Medicaid requirements concerning minimum payments for services, the minimum wage requirement in Alaska is \$9.75 per hour.<sup>3</sup> Barring any allowable exemptions, an employee who works over 8 hours in a day and/or more than 40 straight-time hours in a week is entitled to 1.5 times their regular rate of pay (this requirement of the law is referred to as “overtime”).<sup>4</sup> An employee must be paid timely and correctly and at least the State minimum wage for all hours worked in a pay period. If the employee performs work for the benefit of employer, the time spent working is compensable time, even if an employee’s CPR license or other certifications have lapsed. If work is directed by *or allowed by* the agency, the time spent working is compensable.<sup>5</sup> These hours spent working must be recorded; an accurate record of all daily and weekly hours worked must be kept, and most importantly, the employee must be paid.

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<sup>1</sup> AS 23.05.160

<sup>2</sup> 8 AAC 15.100

<sup>3</sup> AS 23.10.065

<sup>4</sup> AS 23.10.060

<sup>5</sup> 29 C.F.R. § 785.11 (2013)

### Accurate Record of Hours Worked

An employer shall keep an accurate record of the daily and weekly hours worked by each person.<sup>6</sup> PCAs are required to “maintain a contemporaneous record for Medical Assistance billing for each recipient for who [sic] that assistant provides personal care services.”<sup>7</sup> These records contain an account of time spent in providing services to the recipient of said services. Be advised, these records may not be sufficient to meet the requirements of wage and hour laws in the state of Alaska. The records kept by the employer must include all daily and weekly hours worked by each employee. The hours spent only in providing care to the recipient of services may not be sufficient to account for all the hours actually worked by the employee. The time worked may also include time spent in preparing to deliver services to the recipient, time spent on post-provision duties, time spent preparing records, and travel time between homes.

### Travel Time

The PCA agency must determine whether time spent in travel is working time. If time spent in travel is part of the principal activity of the employee’s work day, such as taking a client to a doctor’s appointment, the time is considered work and must be paid.<sup>8</sup> When an employee has been directed to provide services to one consumer and is then assigned to provide services to a second consumer at another site, the time spent in travel between the two sites is compensable time. Put simply, travel from job site to job site during the workday must be counted as hours worked.

### Independent Contractor or Employee?

Frequent calls to the Wage and Hour office have also raised the issue of the PCA’s being an independent contractor rather than an employee. When determining whether or not the relationship between the business and the alleged employee is subject to the *Alaska Wage and Hour Act* and the federal *Fair Labor Standards Act (FLSA)*, it must be determined “whether the worker is dependent upon finding employment in the business of others. If the facts show such a dependency, the worker is an employee.”<sup>9</sup> The Alaska Medical Assistance Program states: “[e]nrolled providers are

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<sup>6</sup> AS 23.05.080

<sup>7</sup> Responsibilities of a Consumer Directed Personal Care Assistant (PCA); *Consumer Directed Personal Care Agency Services: Provider Billing Manual*; April 2003; p. I-6; Retrieved April 29, 2013, from <http://www.medicaidalaska.com/providers/Billing1.shtml>.

<sup>8</sup> 29 C.F.R. § 785.38 (2013)

<sup>9</sup> *Jeffcoat v. State, Dept. of Labor*, Sup. Ct. Op. No. 3162 (File No. S-1444), 732 P.2d 1073 (1987).

subject to the limits of Alaska state policy and must provide services within the guidelines and restrictions of the medical assistance program,” and further, “[t]he consumer directed personal care agency shall act as the “employer of record” for PCAs who perform the personal care tasks prescribed for a recipient in the recipient’s individualized service plan. The recipient will act as the “employer in fact.”<sup>10</sup> Therefore, the PCA is an employee, employed by both the recipient and the agency (thereby creating a joint-employer relationship).

### **Joint-Employer Relationship**

A joint-employer relationship results when two or more employers work together in sharing the services of a single employee. There may be a perfectly legitimate reason for two employers to devise such a working arrangement, but whatever the reason, both joint-employers share the overtime liability when the employee works over eight hours in a single day, and over 40 straight-time hours in a single week.

The issue has also been raised as to whether or not a PCA agency can lawfully direct an employee to work up to 8 hours in a day and/or 40 hours in a week which have been approved in a service plan that allots time in excess of 8 hours per day and/or 40 hours in a week, then have any residual hours that extend beyond the 8 daily hours and/or 40 weekly hours transferred to the control of a second agency for provision of the remaining hours of service. The motivation behind this arrangement is seemingly to avoid the overtime liability. However, this type of arrangement would result in the establishment of a joint-employer relationship and therefore would not remove the requirement that the employer pay the overtime penalty.

### **Work Directed by the Employer**

In some cases, consumer directed agencies have directed PCAs to provide care to a recipient prior to the approval of a service plan. Even though a joint-employer relationship exists between the recipient and the agency, if the agency indicates to the employee (or directs the recipient to indicate to the employee) that hours are to be

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<sup>10</sup> Responsibilities of a Consumer Directed Personal Care Assistant (PCA); *Consumer Directed Personal Care Agency Services: Provider Billing Manual*; April 2003; p.I-9; I-6; Retrieved April 29, 2013, from <http://www.medicaidalaska.com/providers/Billing1.shtml>.

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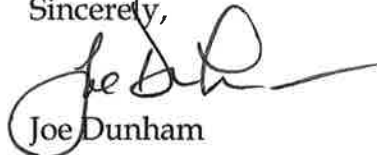
worked and then the hours are worked, those hours worked must be paid.<sup>11</sup> It may be the case that billed hours are later denied, or a reimbursement for services billed in error is required by Medicaid for hours that have already been worked. The employer's responsibility to compensate for hours worked by the employee remains the same. In this instance, deductions made from an employee's check, the withholding of paychecks, or the requirement that employees reimburse the employer for such hours out of the employee's wages already received or anticipated to be received are strictly prohibited.<sup>12</sup>

### Resources

In conclusion, an agency that is involved in any practice that is not consistent with Alaska wage and hour laws must correct the discrepancy at once. We have noted the applicable statutes and regulations for your review, and they are available on our website at this link: <http://labor.alaska.gov/lss/forms/pam100.pdf>.

The Wage and Hour Administration provides a cost-free counseling service to Alaska employers, and we invite you to take advantage of this service. A monthly seminar is offered to the employers and employees concerning wage and hours laws. This seminar is offered at each of our four locations in Anchorage, Wasilla, Fairbanks, and Juneau. Check our website for the time and location of each seminar, or contact our office at (907) 269-4909. An investigator is on duty each business day from 8:00 a.m. to 5:00 p.m. to answer any questions you may have.

Sincerely,



Joe Dunham  
Statewide Supervising Investigator  
Wage and Hour Administration  
Anchorage Regional Office

JD:jr  
PCA letter

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<sup>11</sup> 29 C.F.R. § 785.11 (2013)

<sup>12</sup> 8 AAC 15.160