

Paying Minimum Wage and Overtime to Home Care Workers

A Guide for Consumers and their Families
to the Fair Labor Standards Act



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

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This guide is meant to help individuals, families, and households that use home care services determine their responsibilities under the **Fair Labor Standards Act (FLSA)**, the federal minimum wage and overtime law that applies to most home care workers.

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Introduction



Who needs this guide?

HOME CARE WORKERS

When this guide refers to “home care workers,” we mean workers who provide certain types of services in private homes.

Home care services are fellowship and protection, personal care, and/or health-related services, such as assisting a consumer with:

Fellowship & protection



Hobbies



Games



Keeping company

Personal care



Dressing



Grooming



Bathing



Cooking



Cleaning



Other daily activities

Health-related services



Tube feeding



Injections



Other medically related activities

Home care services are provided in **a consumer’s own home**. Personal care and/or health-related services that are provided in a group home, nursing home, residential care facility, or hospital are NOT home care services.

Home care workers are called by **a number of different job titles**, such as home health aide, personal care attendant, certified nursing assistant (CNA), provider, or caregiver.

Home care workers may live in or live outside your home; they may be family members, friends, or people you didn’t know before they began providing services; they may be paid with private funds, Medicaid funds, or some other combination.

Overview

This guide is about your responsibilities under the **Fair Labor Standards Act (FLSA)**. The FLSA is the federal law that gives most workers in the United States minimum wage and overtime pay protections. We at the U.S. Department of Labor enforce the FLSA, and we recently updated the FLSA rules about home care workers. Under the new rules, most home care workers must now be paid at least the federal minimum wage, and overtime pay. We call this change the “Home Care Final Rule.”

If you use or help manage the services of a home care worker, you may be responsible for paying minimum wage and overtime, and for keeping certain records regarding your home care worker(s). This guide will help you understand if you have those responsibilities and, if you do, how to make sure you pay your home care worker properly under the FLSA.

If you employ a home care worker, you may also have other responsibilities under other laws – such as IRS requirements, Medicaid regulations, or state employment laws – but this guide is NOT about those laws. This guide is only about the federal minimum wage and overtime law.



Why did the Department of Labor publish the Home Care Final Rule?

The Home Care Final Rule makes sure that home care workers have the same basic wage protections as most U.S. workers, including those who perform the same jobs in nursing homes and group homes. Better wages for home care workers will also help to ensure that consumers have access to high-quality care in their homes from a stable workforce.

Who needs to follow the FLSA rules





Live-in home care workers


See **minimum wage and overtime:** page 30

A special FLSA rule applies to home care workers who live in the same home as the consumers they work for (called “**live-in**” **home care workers**). They are entitled to receive at least the federal minimum wage for all their hours worked, but are not required to receive overtime pay. This is called the “**live-in domestic service employee exemption.**”

Only consumers and their families and households may claim the live-in domestic service employee exemption. Agencies or other outside employers of live-in workers must always pay overtime, even though you are not required to.

In determining the number of hours for which a live-in home care worker must be paid, you and your employee can create an agreement regarding the worker’s schedule. It can exclude from work time:




Sleep time,



Meal breaks, and



Other periods of off-duty time when the worker may either leave or stay at the home for purely personal pursuits (provided such a personal break is long enough for the worker to make effective use of the time).


See **hours worked:** page 35



What is a “live-in” home care worker?

To be a “live-in” home care worker, the employee must either live at the consumer’s home full-time (that is, have no other home of their own), or spend at least 120 hours or five consecutive days or nights in the consumer’s home per week.

A live-in home care worker could be a family member of the consumer or a provider who moved into a consumer’s home as part of a shared living arrangement.

Workers who come to a consumer’s home for 24-hour shifts but are not present for at least 120 hours each week or for five consecutive days or nights are not live-in workers.

You and your live-in home care worker can reach any agreement regarding paid time that is reasonable given the facts of your situation. However, if any part of the time that is supposed to be for sleeping, meal breaks, or other periods of free time is interrupted by work, the worker must be paid for the time spent working. You and your live-in home care worker should update the agreement whenever there are significant differences between the unpaid times in the agreement and the worker’s actual schedule.



See Wage and Hour Division Fact Sheet 79B, Live-in Domestic Service Workers Under the FLSA, for more information about live-in home care workers and how they must be paid.
www.dol.gov/whd/homecare/factsheets.htm



Live-in home care workers



See Live-in Direct Hire & Agency checklists:
pages 42-43

Example: Live-in hired through agency

Stanley needs home care services, so he calls Local Home Care Agency (Local), which sends Mary to work for him. Mary moves out of her apartment and into Stanley's home, and she provides daily personal care services to Stanley. Stanley and Mary agree on her work schedule, and Stanley tells Mary what tasks he would like her to perform. Local sets Mary's pay rate at \$10 per hour.

In this situation, Local is Mary's employer under the FLSA and Stanley is Mary's employer under the FLSA. Both Local and Stanley are responsible for making sure Mary receives at least the federal minimum wage. Only Local is responsible for making sure that Mary receives overtime pay, because Stanley, and only Stanley, can use the live-in domestic service employee exemption.

Because Mary is a live-in worker, it might be that Stanley and Local can count the value of the housing she receives toward the wages he is required to pay.

Example: Live-in hired directly

Stanley needs home care services, so he calls a registry, which gives him a few names of potential workers to interview. Stanley meets Mary and hires her. They agree that Mary will move out of her apartment and into Stanley's home, and she will provide daily personal care services to Stanley there. Stanley and Mary create a written work schedule for Mary and agree that Mary's pay rate will be \$10 per hour.

In this example, because Mary is a live-in home care worker whose only employer is Stanley, she must receive at least the minimum wage, but the FLSA does not require that she receive overtime pay.

Because Mary is a live-in worker, it might be that Stanley can count the value of the housing she receives toward the wages he is required to pay.



See Live-in Direct Hire checklist:
page 42



See section 3(m) credit:
page 30

How to follow the FLSA rules





Minimum wage



See
hours
worked:
page 35

As of early 2016, the **federal minimum wage** is \$7.25 per hour. That means any worker who is covered by the FLSA minimum wage protections must be paid at least \$7.25 an hour for all hours worked.

Example: Hourly rate

Your home care worker comes to your home 5 days each workweek for 5 hours each day, for a total of 25 hours each week. (A workweek is any set seven-day period. For example, your workweek could be Monday to Sunday.) You pay your home care worker \$10 per hour, for a total of \$250 each week. You have complied with the FLSA's minimum wage requirement.



Credit toward wages for housing and meals provided to employees

Under certain circumstances, the FLSA allows you to count the cost of housing and food you provide to your home care worker toward the worker's minimum wage payment. For more information, visit the Department's Home Care Website and click on "Credit toward Wages under Section 3(m) of the FLSA for Lodging Provided to Employees."

www.dol.gov/whd/homecare/credit_wages.htm

Example: Daily rate

You pay your home care worker \$50 each day she comes to your house to provide services. One workweek, she comes 5 days and works a total of 25 hours. In that week, the worker would have received \$250 (\$50 per day x 5 days). That means her hourly rate of pay would be \$10 (\$250 total pay for the workweek / 25 hours). Because \$10 is more than \$7.25, you would have complied with the FLSA's minimum wage requirement.

The next workweek, the home care worker comes to your house on 5 days, but she stays later on a few of those days and works a total of 40 hours. In that week, the worker would have received \$250 (\$50 per day x 5 days). That means she would have received only \$6.25 per hour (\$250 total pay for the workweek / 40 hours). You would owe her an additional \$1 per hour to reach the federal minimum wage of \$7.25, or \$40 (\$1 per hour x 40 hours).

Week 1

$$\frac{\$250}{25 \text{ hours}} = \$10.00 \text{ per hour}$$

Meets federal
minimum wage
requirement

Week 2

$$\frac{\$250}{40 \text{ hours}} = \$6.25 \text{ per hour}$$

\$1.00 for each hour
worked to reach
federal minimum wage



Overtime pay



See hours worked: page 35

Overtime pay means one and a half times a worker’s regular rate of pay. If overtime pay is due, the worker must receive it for every hour worked over 40 hours in a workweek.

Reminder: A workweek is any set seven-day period (for example, Monday to Sunday).

Example: Overtime calculations

Ellen is a certified nursing assistant employed by a home care agency and consumers who need assistance with medically related tasks. Her pay rate is \$10 per hour. The agency must follow the FLSA rules, including paying her overtime, because agencies cannot claim the companionship services exemption. The consumers who are her employers must follow the FLSA rules, including paying her overtime, because she performs medically related tasks for them and does not live in their homes.

If this is Ellen’s schedule in a certain workweek:

| Day of Week | Time In | Time Out | Time In | Time Out | Hours Worked |
|--------------|---------|----------|---------|----------|--------------|
| Monday | 6:00am | 11:00am | 2:00pm | 7:00pm | 10 |
| Tuesday | 6:30am | 4:30pm | | | 10 |
| Wednesday | 6:00am | 11:00am | 3:30pm | 7:00pm | 8.5 |
| Thursday | 6:00am | 11:00am | 3:00pm | 10:30pm | 12.5 |
| Friday | 6:30am | 3:30pm | | | 9 |
| Total | | | | | 50 |

Ellen is paid as follows:

Ellen must receive at least the federal minimum wage for all 50 hours worked in the workweek and overtime pay for the 10 hours over 40 in the workweek.

She receives \$10 per hour for each of the first 40 hours in the workweek, which is \$400. She receives \$15 per hour for each of the 10 hours over 40 in the workweek, because one and a half times \$10 is \$15. That equals another \$150. So if Ellen receives \$550 total, she has been paid according to the FLSA overtime pay requirement.

Workweek

$$\text{\$10} \times 40 \text{ regular hours} = \text{\$400}$$

$$\text{\$15} \times 10 \text{ overtime hours} = \text{\$150}$$

$$\text{\$400} + \text{\$150} = \text{\$550 in this workweek}$$

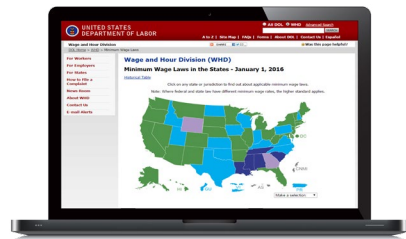
Reminder: The worker only needs to be paid once. So if an agency or fiscal intermediary writes checks to your home care worker that include all of the wages owed, you don’t have to pay any additional wages to the employee.



Hours worked



Other minimum wage and overtime laws might apply



Some states have established minimum wage and overtime requirements that require higher payments to home care workers than these federal standards.

Where both laws apply, you must

follow the law that provides the higher wage to the employee. Check your state laws to learn more. You can find your state law at: www.dol.gov/whd/minwage/america.htm

Hours worked means time that an employee works for which an employer must pay.

The FLSA requires payment for all time when the worker is providing services or is required to be available to provide services. For example, if your home care worker is cooking for you or helping you get dressed, that time must be paid for, and is considered “hours worked.” Or if you are napping and the worker must be available whenever you wake up, the worker’s time is hours worked, even if she spends the time watching TV.

Time does not count as hours worked if an employee has a break long enough to use the time for his or her own purposes. For example, if your home care worker is free to go to a movie, run a personal errand, or attend an event at her child’s school, the worker does not have to be paid for this time.



What if I use an agency?

When selecting an agency to find a home care worker, consider asking that agency if they’re aware of and follow all federal labor laws, and pay their workers at least the federal minimum wage and overtime.



For more information on how to determine what time is “hours worked” that must be paid under the FLSA, see Wage and Hour Division’s Fact Sheet #79D, Hours Worked Applicable to Domestic Service Employment Under the FLSA.

www.dol.gov/whd/homecare/factsheets.htm



Recordkeeping



See
hours
worked:
page 35

If your home care worker must be paid minimum wage and/or overtime, then someone must keep basic employment records. If you have hired a home care worker directly, you must keep the records. If you use an agency or fiscal intermediary, they may keep the records, as long as you can access the records if you need to.

Basic records employers must keep for each employee include:

1. Full name;
2. Social security number;
3. Home address;
4. Hours worked each day and total hours worked each workweek;
5. Total cash wages paid each week to the employee by employer, including any overtime pay; and
6. Any weekly amounts claimed by the employer as part of wages for housing or food provided to the employee.

NOTE: Records of wages paid (payroll records) must be kept by an employer for at least three years. Records used to calculate how much pay is owed (time cards, work and time schedules, and records of additions to or deductions from wages) should be kept for at least two years.

Additional recordkeeping requirements for live-in home care workers

An employer and a live-in domestic service employee may enter into an agreement regarding the employee's meal, sleep, and other off-duty time. If you and your home care worker have one of these agreements, you must keep a copy of it.

An employer must also keep accurate records of time actually worked by the live-in home care worker, to confirm that it matches the agreement or show how it was different from the agreement. As with other records, a home care agency or other employer of your worker can create and keep these records, as long as you can access them. If you are keeping the records yourself, you may assign the employee the task of creating those records and submitting them to you, but you are responsible for having them.



A tip for capturing work times

You can use any timekeeping method that works for you and that accurately tracks your home care worker's work time each day. Many individuals and families who employ home care workers find that it works well to keep a calendar to record start, stop, and meal times each day. You may also use a timesheet like the sample pictured, or any other method, as long as it is accurate.

Consequences of not complying with the FLSA

Weekly Time Sheet Sample

Employee Information

Full Name:

Social Security Number:

Home Address:

| Day of Week | Date | Time In | Time Out | Hours Worked |
|--------------------|------|---------|----------|--------------|
| Monday | | | | |
| Tuesday | | | | |
| Wednesday | | | | |
| Thursday | | | | |
| Friday | | | | |
| Saturday | | | | |
| Sunday | | | | |
| Total Hours | | | | |

If you are responsible for paying a home care worker at least the federal minimum wage and overtime and that worker does not receive all wages due, you are violating federal law. Your worker can sue you or file a complaint with the Department of Labor asking the Department to investigate. If it is found that you haven't paid the full amount of wages owed under the FLSA, you will have to pay the missing amount—and possibly even double that amount—to your worker.

Other resources





Checklists for paying home care workers properly

Direct Hire

If **YOU** hired a home care worker directly, and that worker does not live with you, make sure **YOU**:

- Pay the worker the federal minimum wage for all hours worked up to 40 in a week.
- Pay overtime pay (one and a half times the employee's regular hourly rate) for any hours over 40 in a week.
- Keep basic employment records.
- Count all hours worked.

*In certain cases, you may be able to use the companionship services exemption, meaning you do not have to pay minimum wage and overtime. Go to page 19 to learn if your worker qualifies.

Live-In Direct Hire

If **YOU** hired a home care worker directly and that worker lives with you, make sure **YOU**:

- Pay the worker the federal minimum wage for all hours worked.
- Keep basic employment records.
- Count all hours worked.
- Strongly consider having a written agreement about schedules, breaks, sleep time, etc.

*For an explanation of which home care workers are "live-in" employees, go to page 24.

Agency

If **YOU** hired a home care worker through an agency or non-profit organization:

- You are probably legally responsible for making sure the worker receives at least the federal minimum wage and, if the worker does not live with you, overtime pay, although the agency or non-profit organization can take care of that obligation for you.
- Make sure the agency you are using is paying the worker properly and recording all hours worked.
- Make sure the agency is keeping basic employment records, and that you can access them if you need to.

Self-Directed

If **YOU** hired a home care worker through a Medicaid-funded, self-directed program:

- You are legally responsible for making sure the worker receives at least the federal minimum wage and, if the worker does not live with you, overtime pay.
- If you use a fiscal intermediary, make sure the fiscal intermediary pays the worker properly and records all hours actually worked.
- Make sure the fiscal intermediary, state agency, or regional center keeps basic employment records, and that you can access them if you need to.

Additional Information

Please visit our website at www.dol.gov/homecare for more information about how the FLSA applies to home care, including:

- fact sheets,
- frequently asked questions,
- webinars,
- and shared living guidance.

Or you can call **1-866-487-9243** to ask questions about the FLSA.

The U.S. Department of Labor provides this information as a public service, to help individuals comply with the Fair Labor Standards Act and Department of Labor regulations. Parties remain independently responsible for determining whether the wages they pay comply with federal law. Therefore, we make no express or implied guarantees. The Federal Register and the Code of Federal Regulations remain the official sources for regulatory information published by the Department of Labor.

www.dol.gov/homecare

1-866-487-9243



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