



NATIONAL RESOURCE CENTER *for*  
PARTICIPANT-DIRECTED SERVICES

# **TRICKY ISSUES**

## ***in Financial Management Services Operations***

By:

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# Today's Tricks

- ❑ Purchasing Supplies for Employee Work
- ❑ Counting Sleep Time
- ❑ Tax Filing & Deposit when Serving Private Pay
- ❑ Not Legal to Voluntarily Contribute to Social Security and Medicare

# **PURCHASING SUPPLIES FOR EMPLOYEE WORK**



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# Purchasing Supplies for Employee Work

In the participant-directed employer authority model, can you provide any information about how to handle providing gloves to the direct care worker?

Does the worker purchase and cover the cost?

Does the common law employer cover the cost?

Is the cost covered by the program?

# Supplies: OSHA Safety Standards

- ❑ Supplies Necessary for Safety
  - ❑ If the supplies are necessary for the safety or protection of the employee, it cannot be a requirement of the job that the employee cover the cost
  - ❑ The supplies must be provided, but not at the employee's cost
- ❑ How to pay for this?
  - ❑ As Durable Medical Equipment, through the waiver or through budget authority
  - ❑ Otherwise out of the budget
  - ❑ Other?

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# Supplies: As Condition of Employment

- ❑ If the supplies are NOT necessary for the safety or protection of the employee
  - ❑ the employer can require the employee to purchase the supplies as a condition of employment, provided:
    - cost does not reduce the employee's wages below what's required under minimum wage and overtime laws
    - the requirement that the employee purchase the supplies is incorporated into any employment offers and agreements
  - ❑ Some states don't allow the cost to be a paycheck deduction

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# Purchasing Supplies:

## Scenario 1

- ❑ The participant has a disease that is spread via blood or body fluids. The direct care worker must help apply a topical cream to the participant daily for bed sores. To prevent bodily fluid contact, the direct care worker must wear latex gloves.

# Purchasing Supplies:

## Scenario 2

- ❑ The direct care worker will prepare food for the participant. The participant has had some bad experiences in the past with workers' hair getting in the food. The participant wants the worker to wear a hair net whenever preparing food.
- ❑ The direct care worker was informed of the job requirement to purchase and wear a hair net as part of his application and job acceptance. The cost of the hair nets do NOT result in the worker's hourly wage being below minimum wage when the cost is deducted from the wage.

# COUNTING SLEEP TIME



# Counting Sleep Time

- ❑ If an employee is allowed to sleep while at work, does the sleep time have to be counted as hours worked, under federal labor law?
- ❑ The answer depends on whether the employee lives on the premises where the work is performed.



# Employee Does Not Live Where Working: 24 Hrs or Less

- ❑ If the employee is on duty less than 24 hours, all hours must be counted as hours worked
  - ❑ This applies even if the employee is permitted to sleep or engage in personal activities when not busy
  - ❑ This is true even if the employer provides sleeping facilities to the employee.
  - ❑ See: [29 CFR 785.21](#)

# Employee Does Not Live Where Working: 24 Hrs or More

- ❑ If the employee is on duty for 24 hours or more:
  - ❑ the employer and employee can agree to exclude up to 8 hours of sleep time from the hours worked
    - adequate sleeping facilities must be furnished and the employee must be able to usually get an uninterrupted night's sleep
- ❑ Interruptions in sleep time must be counted as time worked, and if the employee cannot get at least 5 hours of sleep because of interruptions then all hours must be counted as hours worked
- ❑ If there is no agreement about sleep time, then the sleep time cannot be excluded
  - ❑ See: [29 CFR 785.22.](#)

# Sleep Time: Employee Lives Where Working

- ❑ If the employee resides on the employer's premises on a permanent basis for an extended period of time, then not all the time spent on the premises has to be counted as hours worked. This applies even if the employee is permitted to sleep or engage in personal activities when not busy
  - ❑ The employer and employee can agree to exclude from hours worked the periods of “complete freedom from all duties” that the worker spends on personal pursuits, including sleep. See: [29 CFR 785.23, 29 CFR 552.102.](#)

# Sleep Time: Employee Lives Where Working, Excluding Time

- ❑ These periods of free time can be excluded from work only if they are “of sufficient duration to enable employee to make effective use of the time.”
- ❑ The sleep time can be excluded even if the employee is required to stay on the premises during sleep hours, so long as the employee is given other periods of freedom from duty when she is permitted to engage in personal pursuits and leave the premises
  - ❑ See: [Wage and Hour Division Opinion Letter FLSA2004-7](#).

# Sleep Time: Scenario 1

- ❑ A participant and caregiver share a home. The caregiver is required to be on the premises at night to attend to any occasional emergencies, however, the caregiver is permitted to leave the premises at all other times when not working.
- ❑ Can the sleep time be excluded from counting as hours worked?

# Sleep Time: Scenario 2

- ❑ A participant's family goes away for the weekend and the participant stays home. The participant asks her occasional direct care worker to stay with her for the weekend.
- ❑ During the day, the direct care worker is assisting the participant as he does when he's normally on duty.
- ❑ At night, the direct care worker sleeps uninterrupted in a guest room.
- ❑ Can the sleep time be excluded from counting as hours worked?

# Sleep Time: Scenario 3

- ❑ A participant lives alone, but prefers not to be alone at night in case of an emergency.
- ❑ She hires her niece to stay with her 3 nights a week.
- ❑ Her niece sleeps mostly uninterrupted, unless her Aunt needs her.
- ❑ Can the sleep time be excluded from counting as hours worked?

# Sleep Time Considerations

- ❑ Sleep time hours counted as hours worked factor into overtime calculations if the worker is NOT a companion.
- ❑ State laws and state labor departments may impose additional rules that are more restrictive than federal ones, so FMS providers should also check their particular state's rules before deciding how to count sleep hours.

# PRIVATE PAY TAX FILING



# Private Pay Tax Filing

- ❑ When serving public programs, Vendor and Government Fiscal/Employer Agents can utilize Revenue Procedures 70-6 & Notice REG-137036-08 (Vendor) and 80-4 with Notice 2003-70 (Government) to have authority to file and pay FICA, FIT and FUTA in the aggregate
- ❑ Key take-away: these procedures to allow aggregate filings and payment intended for representing employers in **public programs**, or HHCSRs

# Private Pay Tax Considerations

- ❑ Vendor F/EAs:
  - ❑ Can **always** file and pay FICA and FIT (941) in the aggregate for private pay or publicly funded employers (Rev. Proc. 70-6)
  - ❑ Can **only** file and pay FUTA in the aggregate if the employer was enrolled in a public program at some point during the calendar year (REG-137036-08)
  - ❑ If the employer was fully privately-funded for the entire calendar year, FUTA can only be filed and paid using the employer's individual EIN with individual deposits and individual Form 940

# Tax Filing and Payment if Participant 100% Privately-Funded

- ❑ Option 1
  - ❑ File and pay for 941 in the aggregate
  - ❑ File and pay for 940 for each individual employer
- ❑ Option 2
  - ❑ Do not execute a Form 2678, *Employer Appointment of Agent*, with the employer. Instead execute Form 8655, *Reporting Agent Authorization*
  - ❑ File and pay for both 941 and 940 for each individual employer
- ❑ Option 3
  - ❑ Provide Agency with Choice; Co-employ the worker with the participant

**NO VOLUNTARY  
CONTRIBUTION TO SOCIAL  
SECURITY & MEDICARE**

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# Not Legal to Choose to Contribute to Social Security & Medicare (FICA)

- ❑ Employees working for participants in F/EA model are household employees
- ❑ Household employees are normally subject to FICA if their wages in a year exceed a threshold amount (\$1,800 for 2013)
- ❑ Employees are exempt from FICA if employee is:
  - ❑ the employer's spouse
  - ❑ the employer's child under the age of 21
  - ❑ employer's parent (with the exception of some services provided by grandparents in certain circumstances)
  - ❑ a person under the age of 18 if being a household employee is not the person's principal occupation

# Opinion Letter Takes Away Any Mystery

- ❑ Regularly asked, “but what if we *want* to contribute to FICA?”
- ❑ Regulation is clear that contributions are not to be made
- ❑ Opinion letter from IRS dated 10/3/2011 makes clear, in no uncertain terms:

If FICA or SECA taxes do not apply, individuals cannot contribute to the social security system; nor can another entity, such as the state, contribute on their behalf.

- ❑ Link to letter: <http://www.irs.gov/pub/irs-wd/11-0100.pdf>



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# QUESTIONS?



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**-THANK YOU-**

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