



October 26, 2020

Division of Regulations, Legislation, and Interpretation,  
Wage and Hour Division,  
U.S. Department of Labor

Submitted electronically via [www.regulations.gov](http://www.regulations.gov)

**RE: ANCOR Comments on DOL Independent Contractor Proposed Guidance**

The American Network of Community Options and Resources (ANCOR) is a national, nonprofit trade association representing more than 1,600 private community providers of services to people with disabilities. Combined, we support over one million people with disabilities, and work to shape policy, share solutions and strengthen the community. On behalf of our members, we thank you for this opportunity to provide comments on the US Department of Labor (DOL) regarding its interpretation of independent contractor status under the Fair Labor Standards Act (FLSA or Act).

We request additional clarification specifically around Shared Living. This is a unique service delivery model that involves [relationship between] a provider, a person with a disability and the independent contractor that he/she lives with and who is directly responsible for assuring the daily delivery of essential care and support services. This model of care is subject to stringent federal and state government regulatory oversight and is a highly rated program throughout the country. It is critical to avoid the imposition of impediments, directly or inadvertently, to the continuation of this successful service delivery model that so effectively promotes the independence of persons with a disability and facilitates their access to and inclusion in everyday experiences in their communities. It also has been a model that can alleviate the number of full-time employees required in traditional residential waiver models during dire staffing shortages, exacerbated by the pandemic.

ANCOR fully agrees with the Department's statement in the proposed rule that "stakeholders would benefit from clarification" regarding the standard for evaluating whether an individual is an employee or independent contractor under the FLSA.

ANCOR requests additional clarification around the application of the proposed rule to shared living. Shared living, also referred to as adult foster care, is an established service delivery model for disabled adults which many states have adopted and which is designed to promote the independence of consumers and facilitate their access to and inclusion in every day experiences in their communities. The Department previously analyzed the application of the FLSA to shared living in Fact Sheet # 79G: Application of the Fair Labor Standards Act to Shared Living Programs, including Adult Foster Care and Paid Roommate Situations (March 2014) and Administrator's Interpretation No: 2014-1 (March 27, 2014).

Shared living programs are often administered by a third party non-public/private agency. Such non-public/private agencies are subject to extensive federal and state regulatory requirements which are intended to protect the adult with a disability (who is often referred to as a "consumer"). Shared living arrangements often involve a consumer living with an adult (who is often referred to as a "provider") in the provider's own home, where a third-party agency facilitates the matching of the consumer with the provider and oversees the arrangement to monitor quality of the services to the consumer and compliance with licensing and program requirements established by state regulations. In the Department's previous guidance referenced above, the Department articulated additional factors specific to the context of shared living to be considered in analyzing the status of a provider vis a vis an agency.

Given the benefits of this service delivery model to consumers across the country and the fiscal implications associated with how states and agencies implement shared living, it is critical to avoid impediments to the continuation of this model, which include ambiguities in a provider's status under the FLSA and the risk to a third party private agency that a provider, who is classified as an independent contractor under the shared living service delivery model, will subsequently be deemed an employee. Consistent with the Department's goal to "promulgate a clearer and more consistent standard," ANCOR requests that the final rule make clear that an agency's relationship with a provider who hosts a consumer in the provider's own home is presumptively an independent contractor arrangement when, consistent with the Department's analysis in Fact Sheet # 79G, the agency's involvement "is to recruit providers into the program, facilitate matching of consumers and providers, oversee quality management and monitoring compliance with licensing and other program requirements once the arrangement is established, and set the amount the adult foster care provider will be paid."

ANCOR also requests the Department to make clear in the final rule that, in the context of shared living, an agency's requirement that a provider comply with applicable legal requirements, such as state regulations that govern the agency or the provider which are designed to protect the consumer, does not constitute "control" that makes the provider more or less likely to be an employee under the FLSA. This statement would be consistent with the Department's proposed clarification in § 795.105(d)(1)(i) that requiring an individual to "comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards" does not constitute such control.

Finally, ANCOR is concerned about the Department's statement in the proposed rule that, if finalized, the proposed rule "would contain the Department's sole and authoritative interpretation of independent contractor status under the FLSA." This statement could be interpreted to mean that the proposed rule, if finalized, would render obsolete the Department's specific guidance on the application of the FLSA to shared living in Fact Sheet # 79G and Administrator's Interpretation No. 2014-1. ANCOR requests that the Department make clear that such guidance, as clarified per the above comments, would continue to be the view of the Department with respect to shared living.

Thank you in advance for your consideration of our submitted comments.

Sincerely,

A handwritten signature in cursive script that reads "Shannon McCracken".

Shannon McCracken  
Vice-President of Government Relations