



December 13, 2022

Amy DeBisschop, Director  
Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Ave. NW  
Washington, DC 20210

RE: Employee or Independent Contractor Classification Under the Fair Labor Standards Act  
RIN 1235-AA43, ANCOR Written Comments

Dear Director DeBisschop:

On behalf of the American Network of Community Options and Resources (ANCOR), thank you for the opportunity to provide feedback to the U.S. Department of Labor (Department) on the proposed rule impacting Employee or Independent Contractor Classification under the Fair Labor Standards Act (FLSA). We appreciate the Department's intent to clarify the existing rule by returning to a totality-of-the-circumstances analysis and create regulation more consistent with the Department's longstanding guidance prior to the publishing of the January 2021 rule titled "Independent Contractor Status Under the Fair Labor Standards Act" (2021 IC Rule). Our comments are limited to requesting confirmation that the Department's current guidance on shared living arrangements will remain in effect with the promulgation of the proposed rule.

Founded more than 50 years ago, ANCOR is a national, nonprofit association representing 2,000 private community providers of long-term supports and services to people with intellectual and developmental disabilities (I/DD), as well as 56 state provider associations. Combined, our members support more than one million individuals with I/DD across their lifespan and are funded almost exclusively by Medicaid. Our mission is to advance the ability of our members to support people with I/DD to fully participate in their communities.

ANCOR offers the following comment and context in response to the proposed rule. Our comments are focused on ensuring consistency with the Department's longstanding guidance with specific attention to shared living arrangements. We have organized our feedback by section below, touching upon broad themes and recommendations that arose within those topics.

### Shared Living

Shared living, also often referred to as "Adult Foster Care," is an established Medicaid-funded service delivery model for adults with I/DD in which a person receiving services and the person offering those services (i.e. Shared Living Provider) live together in a private home.<sup>1</sup> The Shared

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<sup>1</sup> Dep't of Labor, Medicaid Shared Living Programs, <https://www.dol.gov/agencies/whd/direct-care/shared-living> (last visited Dec. 13, 2022).

Living Provider provides the person receiving services with the individualized supports the person may need to perform activities of daily living, promote independence and community inclusion, and avoid unnecessary and costly institutionalization. Shared living arrangements may include a Shared Living Provider moving into the preexisting residence of the person receiving services, both the Shared Living Provider and person receiving services moving into a new residence, and/or the establishment of a shared living arrangement in the family home of the person receiving services with a family member serving as the Shared Living Provider.

This model of care is subject to stringent federal and state statutory and regulatory oversight intended to administer quality standards and protect the person receiving services. As such, shared living arrangements often include a third-party private entity that facilitates the matching of the person receiving services to a Shared Living Provider and oversees the arrangement to monitor quality of the services and compliance with licensing and program requirements established by state regulation. Though the regulations may vary across programs and states, for the purposes of our comments the crucial analysis is the implications of the FLSA on the relationships between the person receiving services, Shared Living Provider, and potential third-party private entity.

Given the benefits of this service delivery model to people with disabilities, it is critical to avoid confusion or create new barriers to its implementation. Introducing ambiguity into the Department's current interpretation of a Shared Living Provider's status under the FLSA, may have the unintended impact of discouraging people with disabilities and third-party private entities from engaging with this model of care. With the direct support workforce crisis<sup>2</sup> currently threatening access to community-based services, any negative impact to other community-based service models carries the risk of increasing unnecessary institutionalization for people with disabilities.

### Longstanding Shared Living Guidance

In 2014, the Department analyzed the application of the FLSA to Medicaid shared living programs with Fact Sheet # 79G: Application of the Fair Labor Standards Act to Shared Living Programs, including Adult Foster Care and Paid Roommate Situations<sup>3</sup> and Administrator's Interpretation No: 2014-1(Shared Living Guidance).<sup>4</sup> The Department's Shared Living Guidance analyzes three separate types of shared living arrangements: (1) those in which the person receiving services lives in the Shared Living Provider's home; (2) those in which the provider lives in the Shared Living Provider's home; and (3) those in which the Shared Living Provider and the person receiving services move into a new home together. While the guidance is not offered as a substitution for a fact-specific analysis, it has served a critical role in guiding and supporting people with disabilities, Shared Living Providers, and third-party entities to understand their responsibilities to each other under the FLSA.

The Shared Living Guidance is consistent with the proposed rule and should remain the interpretation of the Department with respect to application of FLSA to shared living

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<sup>2</sup> ANCOR, The State of America's Direct Support Workforce Crisis 2022, [The-State-of-Americas-Direct-Support-Workforce-Crisis-2022.pdf](https://www.ancor.org/wp-content/uploads/2022/03/The-State-of-Americas-Direct-Support-Workforce-Crisis-2022.pdf).

<sup>3</sup> Dep't of Labor, Fact Sheet #79G: Application of the Fair Labor Standards Act to Shared Living Programs, Including Adult Foster Care and Paid Roommate Situations (Mar. 2014), available at <https://www.dol.gov/agencies/whd/fact-sheets/79g-flsa-shared-living>.

<sup>4</sup> Dep't of Labor, Administrator's Interpretation No. 2014-1 (Mar. 2014), available at [https://www.dol.gov/sites/dolgov/files/WHDLegacy/files/FLSAAI2014\\_1.pdf](https://www.dol.gov/sites/dolgov/files/WHDLegacy/files/FLSAAI2014_1.pdf).

arrangements. Established prior to the 2021 IC Rule, the Shared Living Guidance is analyzed using a totality-of-the-circumstances analysis in which the economic reality factors were not assigned a predetermined weight. The employment relationships were articulated with specific citation to established case law including *Scantland v. Jeffry Knight* in which “[n]o single factor is determinative; rather, each is meant to aid in an overall assessment of whether the worker is economically dependent on the potential employer.”<sup>5</sup> The applied analysis is consistent with the proposed rule and the Department’s intent to return to longstanding FLSA guidance and caselaw.

Request for Clarification

**ANCOR requests the Department make clear in promulgation of the final rule that Fact Sheet # 79G: Application of the Fair Labor Standards Act to Shared Living Programs, including Adult Foster Care and Paid Roommate Situations and Administrator’s Interpretation No: 2014-1 are not in conflict with the proposed rule and remain the interpretation of the Department with respect to application of FLSA to shared living arrangements.**

Thank you for this opportunity to provide comment. Please reach out to me at [ldawson@ancor.org](mailto:ldawson@ancor.org) if we can provide further clarification or information regarding the above.

Sincerely,



Lydia Dawson, J.D.  
Director of Policy, Regulatory, and Legal Analysis

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<sup>5</sup>*Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311-12 (11th Cir. 2013) (citing *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311-12 (5th Cir. 1976)).