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**Report of the Working Group to Clarify the Working
Status of Respite Care and Shared Living Residential
Service Providers for Individuals with Developmental
Disabilities**

Transmitted to:

Joint Standing Committee on Labor

By:

Laura A. Fortman, Commissioner
Maine Department of Labor

February, 2010

As Required by Resolve Chapter 96

“Resolve, Directing the Department of Labor and the Department of Health and Human Services to Establish a Work Group to Clarify the Working Status of Respite Care and Shared Living Residential Service Providers for Individuals with Developmental Disabilities“

Stakeholder members and attendance at meetings:

Steve Minkowsky	Maine Workers' Compensation Board	v	v	v
Jane Gallivan	Dept. of Health and Human Services	v	v	
May Lou Dyer	Maine Association for Community Service Providers	v	v	v
Charlene Kinnelly	Maine Association for Community Service Providers	v	v	v
Laura Boyett	Dept of Labor, Bureau of Unemployment Compensation	v	v	v
Neal Ouellett	Living Innovation Support Services	v	v	v
Patrick Ende	Office of the Governor	v	v	v
Lauralee Raymond	Dept. Of Labor Legislative Liaison	v	v	v
William Peabody	Dept. Of Labor Bureau of Labor Standards	v		
Charlie Dingman	Preti-Flaherty for Living Innovations	v	v	v
Deborah Friedman	Office of the Governor	v	v	
Mike Sylvester	Maine State Employees' Association-Service Employees International Union	v		
Terry Hathaway	MDOL Staff	v	v	v
John Rioux	MDOL Staff	v	v	v
Lloyd Black	Dept of Labor, Bureau of Unemployment Compensation		v	v
Joan Smyrsky	Dept of Health and Human Services, Children's Behavioral Health (Added 9/29/2009)		v	v
Carl L Pufahl	Living Innovation Support Services		v	v

Executive Summary

At the conclusion of the first session of the 124th Legislature, L.D. 1361 Resolve, Directing the Department of Labor and the Department of Health and Human Services to Establish a Work Group to Clarify the Working Status of Respite Care and Shared Living Residential Service Provides for Individuals with Developmental Disabilities was passed and signed by the Governor on June 8, 2010. (See Appendix A for the full text of the resolve). The resolve chartered a work group comprised of members from various pieces of the system that provides respite care and shared residential services. The Commissioner established the required working group and allocated staff resources to convene, facilitate and participate in its deliberations.

The work Group on LD1361 met September 28, October 26, and November 16, 2009. During these meetings we discussed the services and tasks of the providers, the working status of individuals providing the services and possible solutions to clarifying the employment status for these occupations. We were not able to arrive at a blanket employment exemption or across the board employment coverage determination for unemployment insurance coverage without running into conflict with federal unemployment laws.

The Maine Department of Labor stated from the beginning that Unemployment Insurance is a federal program and involves both state and federal law, definitions, and

standards. If the state does not comply with federal laws, definitions, and standards, then the State stands to lose federal unemployment tax credits which would result in significantly increased federal unemployment taxes for all Maine employers. As the Department mentioned in the hearings on this bill which later turned into this Resolve, we did not see a way around Maine and Federal statutes for an exemption. US DOL provided an informal ruling to the Department earlier that these positions were not exempt from the definition of employment under the Federal Unemployment Tax Act and therefore, could not be exempted under state unemployment insurance employment coverage without creating a federal statutory conformity issue. Conformity issues would result in the loss of state FUTA credits. Stakeholders in the working group, (Living Innovations and their attorney Charlie Dingman of Preti Flaherty) drafted a question for the US DOL for an official response. We received the language for this question on December 10, 2010 and on January 19, 2010 we received an official response from the US DOL (See email in Appendix B). US DOL continues to state these positions are not exempt from the definition of employment under the Federal Unemployment Tax Act and therefore, can not be exempted under state unemployment insurance employment coverage without creating a federal statutory conformity issue resulting in the loss of state FUTA credits. We do not recommend any further action based on this response.

Discussion

The working group discussed the working status of individuals in Maine. There are three systems in Maine: Bureau of Unemployment Compensation, Bureau of Labor Standards (Wage and Hour) and the Worker's Compensation Board.

Bureau Unemployment Compensation (Maine Department of Labor)

- Unemployment Insurance is a federal/state partnership program and involves both state and federal law, definitions, and standards.
- If the state does not comply with federal laws, definitions, and standards, then the state can lose critical FUTA (Federal Unemployment Tax Act) tax credits which results in increased employer-paid federal unemployment taxes. Additionally, the administrative funding for the Unemployment Insurance Program is jeopardized.
- The ABC employer-employee test is a state standard and subject to state control.
- The ABC test presumes that the employer-employee relationship exists and the presumed employer must prove otherwise.
- The ABC test is conjunctive—all three criteria must be negative for the entire test to result in a negative finding.
- It's possible that a worker may be an employer for unemployment insurance program protection and an independent contractor under another program as there are different employment standards for different taxing and insurance protection programs.
- The laws recognize casual labor—that is one-time labor needs or a small amount of labor as opposed to an ongoing, lengthy work relationship. In UI this is seen as a threshold for the amount of wages, \$1500 per quarter.
- UI often finds misclassification through blocked claims (when an individual applies for UI benefits, and no wages have been reported for the individual, then UI

must investigate to determine if the individual was a covered employee under the ABC test to determine potential benefit eligibility.)

- “Employee” is not defined in UI law. The determining factor is the work, the nature of the business relationship between an individual and a contracting business, and the application of the ABC test.
- Some states that have taken legislative action to exempt adult foster care provider occupations are being questioned about a potential federal conformity issue as there is no FUTA exemption for this occupation.
- There is federal FUTA (Federal Unemployment Tax Act) statute that governs what work is covered by UI.
- There cannot be a blanket exemption for a specific occupation for UI coverage unless the occupation is also exempted under FUTA
- Paying out more than \$1,000 a quarter may make an agency/family an employer under the UI employment standard.
- If a provider has multiple employers then it is more likely that he or she can be classified as an independent contractor but there are other factors that must be taken into consideration.
- A majority of the agencies are non-profit employers and many have elected to pay UI taxes.
- The amount of wages is only one component in determining employer status

Respite Work

- Respite care is generally found to be employment for UI purposes and is on a case-by-case basis. A bigger question is who is the employer? It depends and could be the family, the agency, or DHHS, depending on the situation.
- Case decisions have varied in identifying the employer.

Shared Living

- By state DHHS regulation there cannot be more than two clients per provider. Mostly there is only one.
- One agency reported that they had 1 Unemployment Insurance claim in 11 years.
- Income from this is not covered as wages for federal income tax purposes if the provider cares for 4 or fewer clients—it is seen as a difficulty-of-care reimbursement
- The fact that it is not seen as wages for federal income tax purposes does not mean that the work and providers are not considered to be employment for UI coverage protection.
- There was a recent case determined to be an Independent Contractor by the Unemployment Insurance Commission. The finding was not the result of a consensus of the Commission so it is too early to tell if this result can be considered guidance to the agency on these situations.

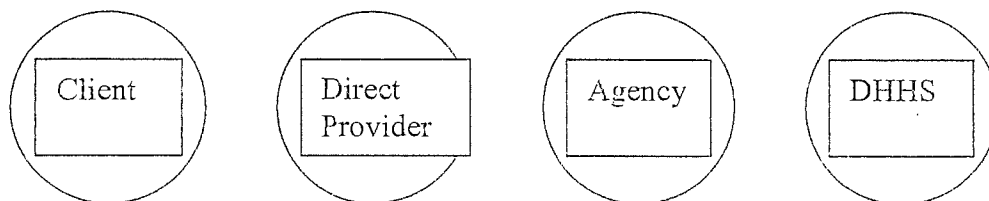
Worker's Compensation (Worker's Compensation Board)

- Any cases would be brought about by a claim resulting from an injury or illness
- The larger question may be if an injury is determined to be work-related, who is the employer? (i.e. who's liable for the medical and benefit costs?)
- There are no federal laws or guidelines on WC.
- Definitions generally linked and tied to MeDOL/UI
- The Timberlake case outlines criteria A-H but it is not conjunctive. The WC Board is heading in that direction however.
- They are not aware of cases and the data system is not capable of identifying this type of case.

Bureau of Labor Standards (Wage & Hour) (Maine Department of Labor)

- Has no definition of employee
- As with UI, there is a presumption of employment and debatable cases are turned over to UI for determination. BLS goes with that determination.
- There was a blanket exemption for "domestic" workers at one time.
- There are exemptions in federal law but the same exemptions do not exist in state law.
- Exemptions to these laws would exempt from overtime and what is counted as wages—not from UI and WC.

The working group did have many conversations during these meetings specifically on services and tasks of providers. The below graph was provided to distinguish the roles in this process. In some cases the roles follow the full line below between client → direct provider → agency → DHHS and in others the agency role is bypassed. In all cases there is a client, the person in need of support; the direct provider; the person providing that support; and DHHS, the state entity overseeing the services.



The follow points were made by the service provider community:

- These arrangements are new support models and as such, labor law does not address the situations. There is recognition of adoption as non-work and health care as work

but this is in between those two and not really either. There is familial responsibility but not persistent adoptive responsibility.

- In all cases there are qualifications and standards that have to be met by the respite and shared living care provider and by those who recruit the providers.
- An overarching goal of these services is to provide community-based care and services. These types of care are alternatives to institutionalization.
- Anything that increases the costs, risks that services are cut in some way.
- Respite care and shared living are components of a more comprehensive living plan for the clients.
- The existence of and specifications in a contract can influence the determination of the relationship but are not the sole criteria even if the relationship is specified
- In its contracts with the agencies, DHHS specifically makes the agencies responsible for sub-agreements with others.
- It costs the state programs around \$60,000 a year per person for community based services versus around \$100,000 a year for institutionalized services.
- The programs enable the individuals to maintain a home environment despite difficult support needs. These programs avoid institutionalization and the change that would be involved for these individuals.
- The services that the agencies provide are somewhat similar to those of a temporary help agency in that there is recruitment, screening, and matching. It is dissimilar in that there is a determination of fit and requirement of suitability mandated by a third party—DHHS.
- The Long Island Care At Home, LTD., Et. Al. vs Coke allows that the payer may not be the employer in allowing for an exemption under FSLA.
- If there is no treatment plan and the work amounts to babysitting, then there is recognition that if the amount is less than \$1,000 per quarter, then it is “casual labor”. This should be the case since the hours are restricted to under 192 per year.
- DOL recognizes MaineCare providers as independent contractors even when they are individuals.
- There may still be a question to ask federal DOL that allows that the payments for these services may be outside the system and definition of wages. (Action Item) See Appendix B for the response.

- It would be best to have a single solution to the two service models but two solutions may be necessary.
- Above and beyond the wages, the other requirements of employment may become issues such as providing “light duty” for Workers’ Compensation.
- Insuring through UI would cost about \$93.60 to \$370.00 maximum per year per \$12,000.00 of taxable wages per employee. This is using the rates in effect for 2010. This is only if employers are contributory and most nonprofits are not.
- Insuring for Workers’ Compensation would be from \$2.86 to \$6.08 per \$100 of gross salary.
- In some state systems, there is joint liability and proportional liability among employers where the role is shared.
- Respite Care (Respite care services are to provide regular caregivers with breaks and clients with uninterrupted services. The durations are limited and the respite caregivers are not the primary caregivers)
 - Adult Respite Care
 - Agency Contracts (A profit or non-profit contracts with a care provider or family members select someone or do the respite care and are reimbursed.
 - Fixed Beds (client is “placed” in a home that provides the services and can do so for a number of clients)
 - Home respite (caregiver goes to the client home)
 - Agency recruits and screens providers
 - Agency verifies that work was done to justify charges
 - The use of agencies is to expedite payments (To avoid a cumbersome state reimbursement process)
 - Children’s Respite Care (Parents or guardians seeking a break from child care or foster care.)
 - There are 3 coordinating agencies under contract in three parts of the state.
 - There are about 2,200 children in this program in a year
 - The children have cognitive disorders, multiple needs and physical health needs
 - The cost is \$7-11 an hour and is considered cost-effective versus alternatives
 - The alternative is crisis services or institutionalization
 - On-line training
 - Recruitment/screening
 - Families contracting with families and relatives
 - Children with medical and/or behavioral needs
 - Parents select from a list of providers
 - Parents request payments from DHHS
 - There are no fixed-bed facilities for this.

- There is a contract between DHHS and the three agencies for an allotment of money for the program
- Elder Respite Care is not one of these but is likely to be influenced by any changes made to these since it is similar.
- Shared Living (Adults with developmental disabilities are placed with families or others for day-to-day living support.)
 - There are 400-500 of these arrangements in Maine
 - An individual or family agrees to provide support for an adult
 - The support giver and client mutually agree to arrangement
 - The client may live in provider's home (not considered employees)
 - The provider may live in the client's home (considered employees)
 - The client and provider may lease another location (??employees)
 - The homes are not licensed
 - The agency recruits, verifies qualifications, coordinates, pays
 - Support involves day-to-day and a 24/7 commitment
 - There is a formal, personal plan of living support
- Agencies require documentation of support given and/or monitors

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Resolve, Directing the Department of Labor and the Department of Health and Human Services To Establish a Work Group To Clarify the Working Status of Respite Care and Shared Living Residential Service Providers for Individuals with Developmental Disabilities

Sec. 1 Work group established. Resolved: That the Commissioner of Labor and the Commissioner of Health and Human Services, within existing resources, shall establish a work group, referred to in this resolve as "the work group," to review the status of certain direct support providers with respect to certain laws, such as those governing unemployment compensation, workers' compensation and minimum wage. The commissioners shall invite the participation of representatives from each department and representatives from affected organizations including the Workers' Compensation Board, the Maine State Employees Association and the Maine Association of Community Service Providers and its members; and be it further

Sec. 2 Examine working status of providers. Resolved: That the work group shall examine the services and tasks performed by respite care and shared living residential service providers for adults and children with developmental disabilities to determine if there are ways to clearly identify the working status of those providers. The work group shall also examine whether statutory or regulatory actions are needed to provide clarification of the providers' status; and be it further

Sec. 3 Reporting date established. Resolved: That the Commissioner of Labor and the Commissioner of Health and Human Services shall report the work group's findings and any recommendations to the Joint Standing Committee on Labor by December 15, 2009, along with any statutory changes required to clarify the status of respite care and shared living residential service providers; and be it further

Sec. 4 Authority to introduce legislation. Resolved: That the Joint Standing Committee on Labor may submit legislation to the Second Regular Session of the 124th Legislature to implement the recommendations of the work group.

“We have reviewed the memorandum dated December 6, 2009 from Leonard M. Cole containing suggested text for a letter from you to the U.S. Department of Labor on the issue of exempting from FUTA coverage certain payments received by foster care providers. The general premise is that, because such payments to foster care providers are excluded from the definition of “income” under § 131 of the IRC, such payments are not “wages” under FUTA. We addressed this issue in an email to you dated October 1, 2009; our position on this issue has not changed.

If ME were to amend its law to define foster care individuals as independent contractors solely in terms of §131, IRC, we would find that a conformity issue exists under the required coverage provisions of FUTA with respect to services provided for governmental entities, Indian tribes, and 501(c)(3) non-profits. In addition, for those caregivers who provide services to and are paid by for-profit entities, the for-profit entities would be responsible for 100% of the FUTA tax, as such caregivers are not excluded from coverage under Federal law.

“Wages” is defined in §3306(b), FUTA. That definition provides that “the term ‘wages’ means all remuneration [up to the first \$7,000 paid to each employee in each calendar year] *for employment.*” (Emphasis added.) Thus, if services are not specifically excluded from the definition of “employment,” the remuneration is “wages,” and is subject to UC contributions. Section 3306(a), FUTA, defines “employer;” §3306(b), as noted above, defines “wages;” and §3306(c) defines what is and is not “employment.” Nowhere in these statutory provisions has Congress excluded from coverage services referred to in §131, IRC.

The December 6 memorandum provides a footnote to the effect that FUTA “does not require . . . that employers be charged state unemployment taxes with respect to specified services, but that unemployment compensation be available to individuals who provided such services.” The problem with this argument is that, if specific services are not deemed to be covered employment, the persons providing those services may not be paid unemployment compensation on the basis of those wages. That is, the wages paid for providing foster care services will not be used to determine monetary eligibility, resulting in a finding of no entitlement, or a lower entitlement, to benefits.

While it is true that states may choose not to charge employers for benefits under certain circumstances, we have long advised states that the decision not to charge employers must be based on some reasonable criteria. For example, if an individual is denied benefits based on the reason for separation from employment with employer “A”, but later purges that disqualification by working for employer “B” and is subsequently laid off and qualified for bene-

fits, the state may choose not to charge employer "A" for any benefits the claimant receives. Or if a claimant quits for health reasons not attributable to the employer, and is qualified for benefits, the state may choose not to charge that employer for benefits paid to the claimant. (See UCPL 78, attached.) However, these are case-by-case determinations; nothing in Federal law permits a state to noncharge benefits paid to an entire segment of the workforce.

The December 6 memorandum further notes that the IRS considers certain foster care payment recipients to be independent contractors. However, the IRS 20-factor test does not govern what constitutes "employment" and "wages" under state law. In fact, many states have tests for determining independent contractor status that are more restrictive than the 20-factor test used by the IRS. Thus, the mere fact that the IRS considers such persons to be independent contractors does not require a finding that the services provided are not "employment" under state law.

Neither §131, IRC nor §3306(b), FUTA, refers to the other statute. In light of the rule of statutory construction that a legislative body is presumed to know the effect of new or amended legislation on existing law, one would have to conclude that Congress did not intend to exclude from FUTA coverage those foster care caregivers with 4 or fewer individuals in their care, or who receive difficulty-of-care payments.

I hope that this addresses the concerns raised by Mr. Cole in his memorandum. Please let me know if we may be of further help to you on this issue.

Pam

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Any advice provided in this e-mail represents an informal, staff-level opinion. If you would like a formal opinion, please write Gay Gilbert, Administrator, Office of Unemployment Insurance, 200 Constitution Ave. NW, Room S-4231, Washington, DC 20210."