



## COLORADO DEPARTMENT OF HEALTH CARE POLICY & FINANCING

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John W. Hickenlooper, Governor • Susan E. Birch MBA, BSN, RN, Executive Director

TO: All Stakeholders

FROM: Lori Thompson, Assistant Director-Program Services

DATE: October 29, 2014

SUBJECT: Communication Brief – Home Care Final Rule and Shared Living Guidance

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### **Purpose:**

To provide non-binding policy analysis of the status of Host Home Providers as Independent Contractors.

### **Background:**

The U.S. Department of Labor issued a final rule, “Application of the Fair Labor Standards Act to Domestic Service” on October 1, 2013, effective January 1, 2015. Recognizing that this rule change may have implications for provision of services through the Home and Community Based Services for Persons with Developmental Disabilities (HCBS-DD) waiver, the Department contracted with Hendrickson Development to provide an analysis on the rule change. The following is a summary of that analysis.

### **Information:**

Courts and federal agencies have spent considerable time sorting out the distinction between employees and Independent Contractors. At least three tests exist to make this determination. On the federal level, the Internal Revenue Service provides guidance with respect to tax matters in its Employer’s Supplemental Tax Guide. The U.S. Department of Labor explains the “Economic Realities” test used in matters related to the Fair Labor Standards Act in its Fact Sheet #3. Colorado has its own test as described below.

Colorado law presumes that workers are employees unless the relationship between a worker and an employer meets a two part test: the worker is free from control and direction in the performance of the service and the worker is customarily engaged in an independent trade, occupation or business related to the service (work) performed.

The factors considered in each test are similar, but not identical. Thus, the outcome will depend upon which entity is doing the determination, and which laws apply to a given situation. Furthermore, while these sources give guidance and list factors to be considered, each employment or contractual relationship is unique and determinations are made on a case-by-case basis.

Employers must pay careful attention to the relationships they have with Independent Contractors and follow state and federal laws with respect to their classification. Penalties for misclassifying workers as Independent Contractors can be substantial and can include back taxes or premiums, civil fines, interest and other retroactive damages.

This policy analysis is not intended to provide legal or tax advice. Persons needing such advice for particular situations should consult the appropriate professional. The Division for Intellectual and Developmental Disabilities does not oversee nor regulate employment or tax laws.

**Attachments: (links)**

<http://www.dol.gov/whd/flsa/>.

<http://www.dol.gov/whd/fact-sheets-index.htm>

<http://www.dol.gov/WHD/opinion/adminIntrprtnFLSA.htm>

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