

DOH Policy Questions and Answers on Joint Employer Status

<p>1</p>	<p>Can an FI, without any possible means of control, be held liable for hours worked beyond a consumer's authorized hours, such as "informal support" hours, "on call" and "engaged to wait" hours, "shopping" hours before or after work, job-related training hours, and hours driving a consumer to a specific destination, which may not even be recorded, but can be claimed by a PA, subjecting the FI to the payment of unauthorized hours worked, an additional 100% of that amount as liquidated damages under New York Labor Law, interest and other penalties? (Note: An FI does not receive the consumer's plan of care and is not privy to the home health services the consumer needs, requests or are provided at their direction – only the consumer knows.)</p>	<p>The Lead FI and the consumers are joint employers.</p> <p><i>The concept of joint employment is that the Lead FI and the consumer will each have certain employment related responsibilities to the personal assistant. (emphasis added)</i></p> <p>Consistent with the CDPAP Medicaid Program, the consumer is responsible for managing their own plan of care, which reflects the authorized hours determined by the LDSS or MCO and for scheduling and supervising PA's hours and approving their timesheets. Only the hours that are authorized by the LDSS or MCO are billable and payable under the CDPAP Medicaid program. <i>The consumer is responsible for payment of any hours the consumer directs or permits the PA to work that are in addition to or beyond the hours or services authorized by the LDSS or MCO. (emphasis added)</i></p> <p><i>(T)he responsibilities an FI has as an employer under state law do not extend where the FI is unable to control the employment relationship, such as recruiting, hiring, scheduling, training or terminating PAs, which are the consumer's responsibilities pursuant to SSL §366-f (4-a)(a)(ii) (emphasis added)</i></p> <p><i>(T)o achieve a consistent statewide standard, the joint employment attestation requires the FIs to acknowledge that their relationship to PAs is an employer-employee relationship as determined by and to the extent that FIs are responsible for employment related practices in statute and regulation. (emphasis added)</i></p>
<p>2</p>	<p>Can an FI be allowed to control a consumer's scheduling of its personal assistants' hours, where such scheduling requires the personal assistant to work significant overtime or "spread" or "split" shifts, which can substantially add to the cost of payrolling a PA? (Note: If a per person/per month reimbursement scheme is eventually imposed, it becomes even more critical for an FI to understand whether it can cost-effectively service a consumer who schedules its PAs for significant overtime or "spread" or "split" shifts.)</p>	<p>SSL Section 355-f prohibits Fiscal Intermediaries from recruiting, hiring, scheduling, training, supervising or terminating PAs or managing the Consumer's authorized plan of care. <i>Dictating the number of hours a Personal Assistant can work and refusing lawful overtime pay can infringe on the Consumer's ability to schedule the Personal Assistant of their choice. (emphasis added)</i></p>

3	<p>Can an FI be held liable and subject to penalty under federal and NYS laws that apply to employers with a certain minimum number of employees, such as the Affordable Care Act's penalties for not providing workers with acceptable health insurance under that Act? (Note: Under ERISA, PAs can be considered eligible participants in any self-funded health care plan and in any retirement or 401(k) plan of the FI that covers its management or staff employees, and may also be considered members of a “controlled group” for retirement plan purposes with a company related to the FI.)</p>	<p><i>Any compliance obligations under federal law that may arise out of the joint employer attestation should be evaluated by an offeror with its labor and employment counsel. (emphasis added)</i></p> <p>The Lead FI is responsible for listing themselves as the employer on all applicable forms.</p>
4	<p>Can an FI be held liable when a consumer's PA injures, intentionally or otherwise, the consumer or a member of the consumer's family, guests, or even bystanders at whatever location the PA is performing services for the consumer? Or when the PA is harassed by anyone based on the protected classes covered by anti-discrimination laws?? (Note: The FI does not know whether the PA’s workplace, i.e., the consumer's home, the consumer's or worker's car, or elsewhere, is safe or secure for the consumer or the worker – only the consumer knows. Nor can the FI take meaningful steps to ensure such safe and secure conditions. What is more, workplace harassment, discrimination and retaliation law was changed in 2019 to make it far easier for any worker to make out and file a claim.)</p>	<p>The FI should track all complaints related to the provision of CDPAP services, even if the disposition of such complaint is to assist the consumer or PA in referring the complaint to the MCO or LDSS complaint process.</p> <p>RFO Section 4.2(d) encourages, as a best practice, FI’s providing training for consumers to assist them in their role as an employer.</p> <p>Direct communications between subcontractors and plans are not precluded by RFO but the permissibility of such communications will be governed by the role of the subcontractor and the terms of the agreement between the parties.</p>
5	<p>Can an FI, at other than at prohibitive cost, obtain comprehensive property and casualty and other business insurances to cover the risks of injury to consumers and others present in whatever locations the PA is providing services to the consumer or will an insurer deny coverage of a claim once it determines that the FI was barred from direction and control over the PA or the hiring or firing of the PA, the location at which services were provided, or any way of protecting against the risks to the consumer, a member of the consumer’s family, guests or bystanders? (Note: Unlike a Professional Employer Organization (“PEO”), a FI has no ability to transfer these risks to the primary employer, in this case, the consumer.)</p>	<p>FIs are required to obtain their own liability insurance.</p>

6	<p>Can an FI be subject to a union's claim at the National Labor Relations Board that the PAs should be added to an existing bargaining unit of home care employees, or a union's request that a "neutrality agreement" be signed allowing the union to organize the PAs without opposition, or an organizing drive by any union that may seek to become the exclusive bargaining representative of the PAs? (Note: A union collective bargaining agreement may require the FI to adhere to set wage rates and benefits for PAs, with no flexibility, and commit to fixed contribution rates to the union's labor-management trust funds.)</p>	<p><i>Any compliance obligations under federal law that may arise out of the joint employer attestation should be evaluated by an offeror with its labor and employment counsel. (emphasis added)</i></p>
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