# RESPITE CARE IN COLORADO:

# OVERCOMING THE FEAR OF LIABILITY

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This publication was prepared by the American Bar Association under a contract from the Colorado Department of Human Services, Division of Child Care and Developmental Disabilities Services, and funded by the US Department of Health and Human Services, Administration for Children and Families, Grant No. 90CN-0132. Points of view stated in this document are those of the authors and do not necessarily represent the official position or policies of the State of Colorado or the federal government.

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**Acknowledgments**

The authors would like to thank the Colorado Respite Grant Steering Committee and Project Director for their assistance with the legal and liability issues survey and the Division of Child Care, Colorado Department of Human Services for their guidance in the development of this report.

Special thanks are also due Julie Kohler, an intern at the Center on Children and the Law, who helped turn a dry legal document into a user friendly publication. Finally, Katherine Vargo, a risk management consultant from Louisville, Kentucky, provided guidance and advice on insurance issues and wrote some to the information found on pages 28-30 of this report.

## Introduction

This report is part of a project designed to promote community connections and family-directed respite options for families of children with developmental disabilities in Colorado. A possible barrier to respite care is the fear of liability that agencies or individuals will be sued for things that go wrong while respite care is being provided. This study addresses this fear. It will start the process of identifying, understanding and addressing liability for the purpose of overcoming potential barriers to respite provision. To be of practical help, the study presents liability in the context of risk management. It strives to help readers understand liability and to begin to take steps to reduce the risk of loss associated with it.

Thinking about and attempting to reduce losses associated with liability does not reflect "greedy" or "self-centered" thinking on the part of an organization or respite care provider. Nor does it mean that the service provider or organization has :lost touch: with what is really important in respite care—quality service for children with developmental disabilities and their families. Actually, the risk management process is a useful tool in promoting a higher quality of care: taking steps to reduce the risk of loss associated with liability means taking steps to reduce injury or harm to all involved in respite provision—children, families, providers and the organization itself. It can assist in increasing the availability of care, since it can reduce fear which is a barrier to respite provision.

Although this study contains background information on liability issues, it is not a substitute for the specific advice of an attorney licensed to practice law in Colorado. Nor is it a substitute for consultation with insurance providers about the specific provisions of an insurance policy. It will serve, however, to help readers generate a list of questions for both and to provide readers with a general awareness of some of the Colorado laws from which they may frame those questions.

**WHAT IS RISK MANAGEMENT?**

**AN OVERVIEW TO THE RISK MANAGEMENT PROCESS…**

RISK MANAGEMENT IS A
**PROACTIVE**
METHOD OF REDUCING
AND MINIMIZING
BOTH THE FEAR OF LOSS
AND THE LOSS ITSELF

Barriers to respite care can exist because there is a known risk. But frequently we create the barriers from a general fear of unknown risks. A goal of the risk management process is to allow an organization or individual to function and grow without fear of undertaking activities ("risks") that are necessary to that growth. Specifically, risk management is a planned process for reducing an organization's or individual's potential liability and loss of assets. Risk management is a multi-step process in which risks peculiar to your business are identified and evaluated, and techniques to cope with the risk analyzed, selected, and implemented.

**Risk** is an activity or situation that may lead to any consequence unintended by and actually or potentially harmful to the agency or individual.

Risk management need not be a frightening, confusing or overwhelming process. It is a simple process, based on common sense, that we routinely apply to everyday life. Examples include:

| Activity/situation | Unintended Consequence | Risk Reduction |
|---|---|---|
| Driving | Accidents/Injuries | Seat Belts |
| Cooking | Fire | Smoke Detectors |
| Steep Stairs | Fall | Handrail, yellow illuminating strip |

Organizations have used risk management techniques –both in their daily operations and their policies and procedures—for quite some time. Once the purpose of and process involved

with risk management are better understood, it becomes easier to apply them to respite care provision.

| HOW DO MANY AGENCIES ALREADY USE RISK MANAGMET? | STEPS IN THE RISK MANAMEMENT PROCESS: |
|---|---|
| Here are a few examples:<br>1) Children are provided with age appropriate toys;<br>2) Cleaning supplies and other dangerous chemicals are kept locked away;<br>3) Agency staff carry first aid supplies with them when accompanying children on field trips;<br>4) Agency staff bring cellular phones with them when they go into dangerous neighborhoods;<br>5) Agency staff use universal health care precautions to avoid spread of infectious diseases. | Step I: Identify the Risks<br><br>Step II: Evaluate the Risks<br><br>Step III: Prepare a Risk Reduction Plan<br><br>Step IV: Protect Agency or Individual Assets/Finance the Risk |

**STEP I: IDENTIFY THE RISKS:**

The first step in the risk management process is to identify risks that the respite provider, respite care agency, or the family encounter in entering into a respite arrangement.

**Respite Care Agency**

As used in this study, respite care agency can be an agency that directly provides respite care or is an intermediary agency (i.e., facilitates parent selection or retention of respite providers through referral lists, vouchers, or other means).

**Respite Care Provider**

As used in this study, respite care provider refers to the individual who actually performs the respite care services.

Risks, in the context of liability, are activities or situations which might cause unintended injury to a person or property and lead to a lawsuit.

**WHAT ARE THE RISKS?**

Some examples of risks associated with respite care include:

- Transporting persons receiving respite
- Medication persons receiving respite
- Taking care of children with behavioral challenges
- Feeding infants and toddlers
- Leaving children with providers unknown to the agency or selected by the parents
- Presence of other children in the household

These situations or activities (identified by Colorado respite providers/agencies at a series of trainings in 1994-95) may result in unintended harm to the respite provider, child or family member. For each of the above identified risks, what are the *foreseeable* unintended consequences?

The challenge to a respite care agency is to identify all activities or situations that may cause harm.

## HOW SHOULD ORGANIZATIONS IDENTIFY RISKS?...GATHER INFORMATION!!

There are many ways for organizations and individuals to identify risks. Generally, the process involves gathering information from both inside and outside sources. Consulting involves looking carefully at the organization's own specific circumstances. Inside sources might include agency employees and board members, respite providers, and families receiving services. Consulting outside sources helps an organization gain a broader and more accurate perspective.

| INSIDE SOURCES: | OUTSIDE SOURCES: |
|---|---|
| • Interviews with staff, volunteers, supervisors, board members<br>• Checklists and Questionnaires (e.g., inventory of property, list of staff qualifications)<br>• Documents<br>-insurance records<br>-workers' compensation data<br>-Agency files<br>-Insurance provisions (coverage, limitations and exclusions)<br>-Permits which specify allowed activities and use of premises, vehicles | • Consultation<br>- similar organizations<br>- expert advice<br>- legal counsel<br>- insurance providers<br>- professional risk managers<br>• Future Trends (changes in law, characteristics of families)<br>• Personal Experience<br>-training sessions<br>-pretraining surveys |

As a part of this study, and a first step in identifying risk to Colorado respite care agencies and providers, a small telephone survey of parents, respite care agencies, and respite care providers was conducted in 1994. At the time of the survey, **no person could identify any cases where a respite care provider or agency had been sued** in the course of providing respite care services. However, there were some interesting answers that may affect future liability. These include:

- Most parents were unaware of the qualifications of respite providers and had never conducted criminal background checks. Some respite care organizations also do not conduct these background checks.

- Respite care providers are paid in different ways: by parents using their own funds, by parents using funds provided by the agency, and by the agency directly (at least one agency required parents to sign time sheets and declare that they are the employer, but the agency paid the providers). Some parents use volunteer providers.

- Parents were generally unaware of insurance protection, such as whether their homeowner's insurance policy or the provider's automobile insurance policy applied to injuries arising during the course of providing respite care. Many agencies, in turn,, knew little about insurance coverage and left it to the families and respite providers to work out.

## STEP II: EVALUATING LIABILITY RISKS…not all risks are equal

### Civil Liability 101

To apply risk management, it helps to have a preliminary understanding of legal grounds for holding an individual or entity accountable in a court of law. Through this understanding, you can begin to separate risks that have a legal consequence, from those that don't.

There are many types of liability a respite care agency and provider may face:

**Criminal Liability –** involves violation of criminal law. In the area of respite care, the most likely criminal violations are for assaultive behavior, including physical and sexual abuse. Criminal lawsuits are initiated by local prosecutors, on behalf of the state. The penalty may be a fine, term of imprisonment, or probation. As a general rule, a respite care agency will not be criminally prosecuted for the crimes committed by an individual. As will be discussed below, however, the agency may be held civilly liable for such actions.

**Civil liability –** covers any wrong, injury or damage, for which the person committing or allowing the injury to occur may be held responsible. Actions for monetary judgments are brought by the injured party.

**Employment Law and Benefits –** may cover a range of issues affecting employer-employee relationships, for example withholding of income taxes, payment of federal and state unemployment taxes, coverage of worker's compensation, and application of disability law. See in Appendices "Employer Liability Under Federal Tax and Benefit Laws."

For the purpose of this study, the focus is on civil liability.

**LIABILITY RISK (Civil)**

Exposure to risk of loss or damage due to *negligent or intentional* act of an individual.

In the area of civil liability, negligent and intentional acts are called torts. Intentional acts include such things as trespass, false imprisonment, slander and assault. Negligence is the most common form of civil liability likely to affect respite care agencies.

Negligence consists of four parts:

1) A **duty** which requires persons to conform to certain **standards of conduct** in relationship to third parties. As a practical matter, respite care providers owe a duty to families and children they serve. Duties may be defined in law, agency policies and procedures, training, and commonly accepted practices in the community. IN most negligence cases, an individual owes a duty to act in the same way a "reasonably prudent" person would have acted in a similar circumstance (often called reasonable care). Negligence can result from an individual's action as well as inaction: "the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances."1
2) A **breach** of duty or failure to conform to a duty recognized by law, i.e., does not exercise reasonable care.
3) The third party is injured as a result of the failure of an individual/organization to conform to the duty, i.e., causation between the breach of duty and the injury, commonly referred to as a **proximate cause.**
4) Some actual **damages** or loss suffered by the third party (in playground basketball terms: "no harm, no foul.)

**POSSIBLE EXAMPLES OF NEGLIGENCE:**

A worker builds a wheel chair ramp which later fails to support the weight of the chair and the person in the chair falls and is injured.

A parent has a rickety stairs in her house, and someone falls down.

A respite provider, instructed to give a child medicine, forgets to do so and the child has convulsions.

A respite care provider leaves hot coffee within arms length of the child, who knocks it over and burns herself.

In each of these examples, the worker, parent, or the respite providers might be held liable, depending on the facts of each case. Liability is fact driven' change one fact and the outcome may change too. Consider, for example, the spilled coffee incident. Might your view of liability differ if the child was one year old, or eleven? If yes, what changed? The duty? The breach? The causation? The injury? The answer – the duty and standard of conduct. A reasonable person might put coffee within arm's length of

an older child, but not close to an infant. While both may be labeled "accidents," only the case involving the one year old might be considered negligence.

**A few facts about Negligence in Colorado**

- **There must be a Duty of Care.** In most respite arrangements, a court would likely find that a direct care provider has a duty to protect the child form foreseeable injury occurring in the course of the care. While we did not find any Colorado court cases involving respite care services, other types of child care services have been litigated. For example, in one case involving head injuries to a 25-month-old child left in a bowling alley nursery, the court recognized that the organization "assumed the responsibility of caring for the child, and…had a duty of reasonable care while dealing with children upon the prmises."2
- **Children often need more care:** "the degree of care required of a child is measured by childhood, and…one who deals with children is bound to exercise greater caution that dealing with an adult."3 Though this comes naturally to many, it is important to understand that the court may consider this is making a negligence determination. Thus, a court may expect a provider to hold a child's hand when they are crossing a street, to supervise play near a swimming pool, or not leave a cup of hot coffee within the reach of a toddler.
- **More skilled respite may be required to provide a higher level of care.** "For those practicing a profession involving specialized knowledge or skill, reasonable care requires the actor to possess 'a standard minimum of special knowledge and ability' (citations omitted), and to exercise reasonable care in a manner consistent with the knowledge and ability possessed by members of the profession in good standing."4 In legal parlance, this is termed malpractice.
- **Liability may sometimes extend to the entire disability of an injured child.** If a child with a developmental disability is injured as a result of the negligence of a respite provider, one of the challenges will be determining how to apportion the Colorado courts have instructed fact finders that "(w)here a pre-existing condition exists which has been aggravated by the accident it is your duty, if possible, to apportion the amount the disability and pain between that caused by the pre-existing condition and that caused by the accident. But if you find that the evidence does not permit such an apportionment, then the defendant is liable of the entire disability."5
- **Negligence may be connected to the violation of a statute (negligence per se).** Negligence may result from the violation of a statute or ordinance. For example, most states preclude non-health care professionals from administering medication,

yet many lay respite providers are asked to perform this service. The Colorado Nurse Practice Act limits this practice. 6 Colorado, like many states, has exceptions to this prohibition, some of which may apply to respite care providers. For example, the Act exempts:

> care of the sick by domestic servants, housekeepers, companions or household aides of any type whether employed regularly or because of an emergency of illness, but who shall not assume in any way to practice professional nursing.

This principle may also apply to respite providers and agencies covered by licensing requirements and other governmental standards. Whether a violation of these or other statutes is in fact grounds for civil liability (many of these statutes carry separate criminal penalties for violations) depends on the act often requires a court to determine what the legislature intended.

Liability based upon legislative violations is, of course, subject to statutory changes, and therefore requires close monitoring.

- **If a child dies as a result of the negligence, those responsible may still be held liable and be required to pay damages.** Colorado, like many other states, has a Wrongful Death Statute which allows family members of the deceased to be compensated for their loss.8
- **Children generally have a longer period of time than adults to file lawsuits.** By statute, potential plaintiffs are usually given one to three years to file a lawsuit after the alleged negligent or intentional conduct took place. This is referred to as the statute of limitations. The running of this time period may be "tolled" – suspended or delayed—under certain circumstances. One such circumstance is the minority status of the potential plaintiff. In Colorado, the statute of limitations does not begin until a child turns 18, or a legal representative is appointed (parents are not presumed to be this representative, but also must be appointed). In a civil action based on sex offense against a child, an action may commence within six years of majority, but this does not apply to vicarious liability (see below.)9
- **Negligence principles apply to incidents occurring in automobiles.** From a liability perspective, few activities are riskier than transporting others. Automobile accidents are a common occurrence, and serious bodily injury, even death, can result. There is a great deal of law relating to automobiles, 10 and if use of an automobile is to be part of the respite provider's duties, those involved

should consult their insurance providers and attorneys for advice. Reference may also be made to "Responses to insurance questions" in the Appendix for one expert's perspective on how insurance providers nationwide generally treat these issues.

- **Organizations can be held accountable for the negligence of their "servants."**

| **WHO IS LIABLE?** |
| --- |
| Providers<br>Agencies |

It stands to reason that an individual can be held accountable for their own conduct which results in harm to another. Thus, respite care providers may be sued for their own negligence or intentional torts. But what about the respite care agency? In many situations, the provider does not have the resources and insurance to pay a judgment. Can the injured party also sue the agency? The answer is, maybe, depending on the relationship between the agency and provider, or whether the agency itself contributed to the harm.

## VICARIOUS LIABILITY

At its most basic level, employers are responsible for the negligence of their employees. Known as vicarious liability or *respondent superior* ("look to the man higher up"), this is a cost of doing business. The injured customer or client can seek relief against the business, no matter how innocent the employer may be.

The application of vicarious liability to respite care, more than any other issue, was the focus of questioning in the series of Colorado trainings given to respite care providers and entities in 1994-95. This is hardly surprising in light of the rich and varied way parents receive respite services. Let's look at a few different respite care arrangements:

- Parent selects and pays respite care provider from a list maintained by a referral agency
- Parent selects a respite care provider and uses a voucher from the agency to pay for the service
- Provider is a paid employee of the agency
- Provider is a volunteer of the agency

- Provider is a private entity under contract to the agency to provide respite care services.

In the third example, vicarious liability principles would clearly apply. But what about the others? In Colorado, as in most states, vicarious liability has been extended by case law beyond the straightforward employer-employee relationship.

Perhaps a better way to view this relationship is in terms used at common law: master-servant (of which employer-employee is included). At common law, a master is liable for the resulting harm of a servant. A servant is defined as:

> One who works physically for another, subject to the control of that other, who is called the master. The statement that the servant is subject to the control of the master does not mean that the master must stand by constantly and observe and supervise the work; it means merely that the relation presupposes a right on the part of the master to have work performed in such manner as he directs and a correlative duty on the part of the servant to perform in the manner directed, expressly or by implication, by the master. 11

What relationships fall under vicarious liability are driven by the facts of each case. Colorado courts have provided some guidance.

- **Employer/employee?** A federal district court in Colorado has listed the factors to determine whether a employer/employee relationship exists as follows:
    1) the selection and engagement of the servant
    2) the payment of wages
    3) the power of dismissal
    4) the power of control of the servant's actions"12
- **It's all about control.** The same court noted that "(i)f there is a conclusive test to determine whether the relation of master/servant or employer/employee exists, that test turns on a determination of the right of control.

Let's look at two examples:

Many recipients of services from Colorado Child and Family Services use the agency's respite services. Colorado Child and Family Services has contracted with a number of individual respite care providers in the community; it interviews potential respite care providers and pays respite providers a set fee for their services.

Colorado Family Care works differently. It neither selects or pays respite care providers. Rather, Colorado Family Care actively seeks information about independent respite providers in the community and provides any interested consumers with a list of providers. The consumers then contact the respite providers themselves and personally make all arrangements, including payment. For respite care services, Colorado Family Care acts like a referral agency.

How would these relationships between the respite care agency and direct provider be described, for vicarious liability purposes?

| IN OTHER WORDS… | WHO'S AN EMPLOYER? |
|---|---|
| The factors earlier identified by the federal court can be easily turned into questions an organization can ask itself to determine if it has an employer/employee relationship with respite providers:<br>1) Do we select and engage respite providers to provide in-home respite care?<br>2) Is the respite provider paid wages and what is our involvement in that process?<br>3) If there is a problem in the respite arrangement, can we fire the respite provider?<br>4) In looking at our overall involvement in these respite arrangements, what actions might be considered exercising control over the respite provider? | Let's apply the court's criteria for determining whether and employer/employee relationship exists between organizations and respite providers to the two fictitious organizations in the previous example:<br>Since Colorado Child and Family Agencies…<br>1) is involved in the selection of the respite provider;<br>2) pays the provider a fee;<br>3) can dismiss a respite provider; and<br>4) appears as though it would have some degree of control over the provider…<br>…it may be an employer for purposes of vicarious liability. Colorado Family Care, which does not perform these duties, might not be characterized as such. |

Would you answer change if Colorado Family Care also gave vouchers to the parents to pay for respite services? If Colorado Family Care trained the providers? If Colorado Family Care conducted extensive background checks of providers? If Colorado Family Care did all of these things?

There is no simple answer to these questions, although logic suggests the more actively CFC is tied back to the providers, the more likely it will be considered an employer for vicarious liability purposes.

- **What about volunteers?** Volunteers may be liable as well for their conduct, although limited immunity (to be discussed in a later section) may extend to certain acts and omissions which result in injury. And although volunteers do not fit all of the factors which define an employer/employee relationship, (e.g.

they are not paid for their work), organizations may still be held vicariously liable for tortuous conduct of volunteers (0or deemed negligent in their selection or supervision of volunteers, to be discussed further in a forthcoming section). For this reason screening, training and supervising volunteers is critical.

- **What about independent contractors?** An **independent contractor** is not an employee for purposes of vicarious liability. Thus, "as a general rule, a person hiring an independent contractor to perform work is not liable for the negligence of the independent contractor."13

"An independent contractor is…one who contracts with another to accomplish a result using his or her own rather than the other's methods with respect to the conduct involved and the performance of the work. Other than the result of the work, an independent contractor is not subject to control of the person engaged." 14

- **If I'm an employer—what conduct would I be liable for?** To determine what respite provider conduct a respite agency would be liable for, it is necessary to further examine a second criteria of vicarious liability. In addition to being in an employment relationship, the provider's conduct must be considered to be within the **course and scope of employment** with the organization.15 As defined by Colorado courts, "an employee is acting within the scope of his employment if he is engaged in the work which has been assigned to him by his employer or he is doing what is necessarily incidental to the work which has been assigned to him or which is customary within the business in which the employee is engaged." 16

Colorado courts have been hesitant to recognize intentional torts as being within the scope of employment; 17 negligent conduct may fall within the scope of the employment relationship.

**WHAT DO RESPITE PROVIDERS DO?**

To understand what is typically within the scope of a respite provider's employment, think about what respite providers often do…

Feeding meals
Giving medications
Transporting a child
Taking a child for a walk

…may all fall under the scope of employment, whether they are performed properly or negligently, while…

Sexual abuse
Physical abuse

…are less likely to be within the scope of employment.

**BUT WAIT!! THERE'S MORE…Negligent Hiring and Supervision**

So if the respite care provider sexually assaults the child, is the respite care agency off the hook? Not necessarily. In addition to vicarious liability, an organization can be liable for its own mistakes. Specifically, liability can result from the agency's negligent hiring or supervision of respite workers.

- **What is negligent hiring?** This action focuses on the hiring decisions and practices of an agency. The Colorado Supreme Court describes this action as follows: "(a)n employer may be liable for harm to others for negligent employing an improper person for a task which may involve a risk to others. (footnote omitted) The employer may be liable for the employee's activities outside of the scope of his or her employment (e.g., some intentional acts of misconduct).18 In most cases, negligent hiring involves employees with a history of violent or antisocial behavior. Thus, for example, in a child abuse case the agency may have breached its *duty* when it hires someone with a known propensity to assault children or fails to conduct an adequate background check which would have revealed this propensity. What's more, the Colorado Supreme Court has recognized the degree to which a background check must be conducted is directly related to the extent of contact an employee has with the public.19 When the job requires frequent contact with the public, the Court stated:

> the employer's duty of reasonable care is not satisfied by a mere review of personal data disclosed by the applicant on a job application form or during a personal interview.

Thus, given a respite care provider's direct contact with a vulnerable population –

children—some meaningful background check would be expected.

While there have been no reported cases of negligent hiring in the respite care arena, a number of recent cases have held or affirmed the liability of a church or religious entity for the assaultive behavior of a clergyman against a member of his congregation.20

- **How do courts establish that an organization was negligent in its hiring?** As with vicarious liability, to find negligent hiring an employment or agency relationship must first be established. The criteria used to establish an employment relationship for negligent hiring are similar to those for vicarious liability previously discussed. According to the Colorado Supreme Court, the criteria are as follows:

  1) "An 'agent' is generally one who acts for, or in place of, another, or is entrusted with the business of another.

  2) The control a principle exercises over the manner of work performed by an agent is evidence that an agency relation exists. (citation omitted)

  3) No one factor including control is determinative.

  4) The most important factor in determining whether a person is an agent is the right to control' not the facto of control." 21

Let's look at another example:

Colorado Kiddies Services is another agency people look to for use respite care services. Kiddies Services provides those interested with a list of respite care providers. However, in order for respite care providers to appear on Kiddies Services' provider list, potential providers must complete a training program conducted by a Kiddies Services staff member. In addition, Kiddies Services conducts a background check on all respite providers and issues guidelines and policies that provider's must heed in order to be included on the agency's respite care provider list. Kiddies Services does not pay respite care providers (parents pay providers directly).

If a Colorado Kiddies Services respite provider assaults a child, may Kiddies Services be liable for negligent hiring and supervision?

- Yes, if it knew or should have known of the provider's propensity to assault children, and
- If the provider is an agent of Kiddies Services.

**WHO IS AN AGENT?**

Let's apply to Colorado Kiddies Services the court's criteria for determining whether an agency relationship exists. This may be more difficult to definitively discern since the criteria are not as clear as those for establishing an employment relationship. However, from the information given it appears that…

1) respite providers are entrusted with the business of Colorado Kiddies Services; and
2) Kiddies Services exercises some control through its guidelines and policies that providers must adhere to.

…as a result, Colorado Kiddies Services may be characterized as having an agency relationship with respite care providers for purposes of negligent hiring and supervision.

- **What is meant by Negligent Supervision?** Negligent supervision focuses on the adequacy of supervision an agency provides over its employees (and volunteers). All agencies have a *duty* to supervise staff with reasonable care. The duty is breached when the agency knew or should have known that an employee is engaging in improper conduct and failed to take sufficient steps to stop it. As defined by the Colorado courts, an employer may be subject to liability for negligent supervision (and retention) if he knows, or should have known an employee's conduct would subject third parties to an unreasonable risk of harm.22

**THE REALITY…**
**BACKGROUND CHECKS**

Negligent hiring and supervision liability translates into real issues for many agencies that provide respite services. It is for these reasons that provider screening becomes an important liability issue.

**WHAT'S THIS ABOUT IMMUNITIES?**

For reasons of public policy, different laws may protect certain individuals or entities from liability. These immunity laws are created both by the courts and the legislature. They may be absolute (i.e., provide complete protection) or limited (i.e., provide protection in only limited circumstances).

| TYPES OF IMMUNITIES: | EXAMPLES OF IMMUNITIES: | WHO MAY BE AFFECTED |
|---|---|---|
| • Absolute<br>• Limited | • Sovereign<br>• Parental<br>• Statutorily Granted | • Public entities<br>• Public employees<br>• Parents<br>• Mental health care providers<br>• Developmental disability services providers<br>• Volunteers |

**When may immunity law apply to liability in respite care situations?**

Depending on the circumstances involved, different immunity laws may apply. Their applicability, however, varies and an attorney should be sought to answer any specific questions that may arise.

- **Sovereign immunity:** Historically, "sovereign immunity" shielded governments and their subdivisions from liability. Colorado, by statute, has extended this immunity to Colorado public entities and employees. 23 The law creates immunity from tort liability against governmental entities and public employees for injuries caused by their actions or inactions within the scope of employment, unless their conduct was willful and wonton. In addition, six exceptions to immunity are specified, most notably the immunity waiver for injuries resulting fro the operation of a motor vehicle. This has clear applications to respite arrangements and demonstrates the limited nature of sovereign immunity.

- **Parental Immunity:** For family harmony and financial security, most states have extended immunity to parent of their negligent conduct which results in injury to their children. Colorado courts have adopted a rule of limited parental immunity (immunity may apply in some cases and not in others). Unless a court construes that a parent's hiring of a respite provider was in furtherance of his or her business, the parent will be immune from their own negligence in the hiring or supervising of a respite provider. In other words, while there may be a lawsuit against the provider, there can be no suit against the parent under vicarious liability or parental negligence theories.

- **Other Statutorily Granted Immunity:** Limited immunity has also been statutorily granted to designated mental health care providers, 24 developmental disability service providers, 25 members of the board of directors of nonprofit corporations or nonprofit organizations, 26 certain uncompensated directors,

officers, or trustees or nonprofit organizations, 27 and individuals providing good faith emergency assistance (good Samaritan). 28

In recent years, the Colorado legislature has acknowledged the important role volunteers play in their community, and the possible deterrent effect of liability on their service. Accordingly, in the 1992 Volunteer Service Act, the legislature has sought to

> "strike a balance between the right of a person to seek redress for injury (tort) and the right of an individual to freely give time and energy without compensation as a volunteer in service to the community without fear of personal liability for acts undertaken in good faith absent willful and wonton conduct on the part of the volunteer…29

The balance struck: **volunteers for nonprofit entities, acting in good faith and without willful or wanton conduct, are immune from civil liability for their actions or inactions that cause harm.** The act permits suits arising out of the operation of a motor vehicle by a volunteer, but limits any awards to the amount of insurance coverage maintained by or on behalf of the volunteer.

Under a separate and earlier Act, the legislature earmarked volunteers *and nonprofit corporations* that provide services for young persons for limited, good faith immunity. 30 Unlike the Volunteer Service Act, this provision protects nonprofit corporations, but does not apply to claims by third parties.

| **THE VOLUNTEER QUESTION…** | **WHAT DOES THIS MEAN FOR RISK MANAGEMENT?** |
|---|---|
| Limited immunity has been broadly granted to volunteers under the Volunteer Service Act. In addition, other acts provide for limited immunity to nonprofit organizations and corporations and their directors and officers. Since the immunity is limited, however, lawsuits may be filed and the court will determine whether the immunity applies under the facts of the case. | While immunities may protect a "wrongdoer" from suffering the legal consequences, they do not protect the injured party. Risk management seeks to preserve an entity's assets and prevent harm. Thus in fashioning a risk management program, all significant risky activities should be addressed, regardless of whether the entity is shielded by immunity. |

**Another form of immunity – WORKERS' COMPENSATION**

- **Immunity of employers for harms to employees**

So far, the discussion of liability has focused on injuries to recipients of respite care. However, respite care agencies are potentially responsible for injury or loss suffered by the provider while performing respite care services. This potential liability falls under the Colorado Workers' Compensation Act. 31 The primary purpose of workers' compensation is to provide a remedy for job-related injuries without regard to fault. Under the statute, an injured employee is compensated from the employer and the employer is guaranteed that they will be immune from a separate tort action. As with vicarious liability, the key factor in determining whether a respite care agency is responsible for an injury to a provider under worker's compensation is the nature of the relationship between the two. Once again, it is necessary to discern if the agency and provider have an employer/employee relationship; different (but similar) criteria, however, are used for this determination than were used in vicarious liability cases.

- **So who is an employee??** Under the Colorado Workers' Compensation Act, the criterion for determining if an individual is an employee is much less complicated; an employee is defined under the Act as follows:

  " any individual who performs services for pay for another shall be deemed to be an employee, irrespective of whether the common-law relationship of master and servant exists," with an exception.32

- **The exception...Independence.** Even if an individual meets the criterion for being an employee, the individual will not be considered an employee if both of the following criteria apply:

1) The individual is "free from control and direction in the performance of the service and in fact"; and
2) The individual "is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."33

- **It's all about control…again!!** Once again, proving that the provider is independent requires the agency to examine the degree of control between itself and the individual and prove that it does not have control over the individual. The Act is particular in how this independence must be proven. A contract entered into between parties is not enough to prove that there is freedom from control; rather, the actual facts of the relationship between the organization and providers must support this claim.

- **A parent hires her own respite care provider – do they have to obtain workers' compensation insurance?** The Workers' Compensation Act exempts certain employment situations form its provisions. Included is the **Domestic Work Exemption**. 34 This exemption may apply to situations where a respite provider works in the parent's home, the parent has no other employees subject to workers; compensation, and the respite care provision is not within the course of the trade, business or profession of the parent. In addition, the exemption will only apply if the provider is not regularly employed, on a full time basis (40 hours a week or more or on five days or more a week) 35, by the parent. While the parent may not be obligated to purchase workers' compensation insurance, the provider could still sue the parent for civil liability if the provider is injured or harmed. In such cases, the parent's homeowners insurance may (but nay not, depending on the coverage) provide some protection.

- **Getting down to the specifics…**It is possible to prove independence through a written contract, but the statue sets forth specific requirements that must be present in order to do so. The document must be signed by both parties (provider and organization) and demonstrate that the organization:
    - Does not have a requirement of exclusive services with the provider
    - Does not maintain a quality standard
    - Does not pay the provider a salary or hourly rate instead of a fixed or contract rate
    - Has only a limited right to terminate the provider
    - Provides no more than minimal training
    - Does not provide tools or benefits to the providers

Let's look at a couple of actual Colorado cases which, while not involving respite care, may shed light on some respite care arrangements.

| **Example** |
| --- |
| The obligation of an "employer" to pay unemployment insurance taxes is another situation which hinges upon the definition of who is an employee. In Colorado, the workers' compensation and state unemployment insurance definition of employment are similar. Under Colorado law, services performed by an individual for another are covered unless the putative employer shows that the individual is free from control and direction in the performance of the services, and is customarily engaged in an independent trade, occupation, profession or business related to the services. In a recent case, an agent who booked musicians was found to be an employer under the unemployment compensation act. The key facts: the musicians, while free to play for others, received 95-99% of their income as musicians from work booked by the agent; the musicians, while working out of their home, did not have business addresses or phone numbers (evidence not customarily engaged in independent trade or business). 37 |

| **Example 2** |
| --- |
| **The facts**<br><br>The claimant (injured party) is a full time federal employee who works part time as a high school athletic referee. A Colorado High School Activities Association (CHSAA) identifies certified umpires and sends the names to various school districts. The districts, in turn, select their umpires and send them contracts drafted by CHSSAA, for individual games. If the umpire wishes to work a particular game, they execute and return the contract. While CHSAA sets the rate of pay (through negotiations with an umpires association) and drafts the contracts, the individual schools pay the fees. The contract explicitly states that the individual is an independent contractor and not an employee. In officiating a high school game, a claimant breaks his leg. |
| **The question**<br>Under this scenario, for workers' compensation purposes, who is the employer, the CHSAA, the school district, the individual school, or is the referee an independent contractor? |

**The answer**

According to Colorado Appellate Court, the claimant was an independent contractor, relying on the two prong test of control and relative nature of the work. The court found the claimant was free from control and direction, and was customarily engaged in an independent trade or profession. Specifically, the claimant refereed up to 40 games a year for a number of schools, was called upon to exercise independent judgment, retained sole discretion and control over the performance of his duties, and could not be fired by a school official in the course of a game. 38

Based on these case examples,, look at the different kinds of respite care arrangements and thing how the issue of workers' compensation or unemployment compensation might be resolved?

| **IN OTHER WORDS…** | **WHO'S INDEPENDENT?** |
|---|---|
| An organization may want to ask itself two questions when attempting to determine if a respite provider would beet the criteria for independence from an employer/employee relationship under the Colorado Workers' Compensation Act:<br>1) Is the provider really free from control and direction of the family or organization arranging respite in the performance of the service?<br>2) Is respite provision the respite provider's customary occupation? | Let's take another look at the fictitious organizations used in previous examples to apply the court's criteria of independence from the employer/employee relationship under the Colorado Workers' Compensation Act:<br>Although Colorado Kiddies Care does not pay respite providers, it is engaged in a number of activities which demonstrate its control (trainings, background checks, etc.)<br>Providers that appear on the referral list for Colorado Family Care are not subject to the same degree of organizational control, and therefore, may qualify as independent contractors. |

- **Let's clarify…what about volunteers now?** Herein lies a possible distinction between the organizational liability discussed earlier and liability covered under the Colorado Workers' Compensation Act: since volunteers are not paid (and

therefore, may not fit the criterion for an employee under the Act) organizations may not be responsible for work related injuries of volunteers under workers' compensation. However, the courts have construed wages liberally for workers' compensation purposes. Thus, the inquiry may turn to what non-monetary rewards did a volunteer receive that may qualify as wages, e.g., training, college credits. 39

- **The next step…** Just as there were two steps in the process of determining organizational vicarious liability, there are other conditions that must exist in order for a provider to be compensated by an agency for an injury or loss experienced while performing respite care responsibilities. If a provider has been deemed an employee of the organization according to the Colorado Workers' Compensation Act then it must be determined that :

    - At the time of the injury, the provider was performing an activity which fell within the course of employment; and
    - The injury was not self-inflicted.

It may be difficult to predict whether a provider's injury due to the child's intentional acts will be covered under the Act. Workers' Compensation normally covers injuries resulting from work-related accidents; accidents, as defined by the Act, do not include events caused but the "will or design" of the person causing it to occur. 40 In this event, the injured provider could still bring a law suit against the child's parents (even if workers' compensation applies, the worker can bring a separate action against the parents, as workers' compensation only bars suits against employers and co-employees).

If the parents are sued, civil liability is likely to be decided using the same principles of negligence and intentional tort mentioned earlier.

**LIABILITY…TO SUM IT ALLUP**

The following chart lists some of the different types of liability discussed in this study, who is seeking compensation from whom and details a possible instance when this liability may arise.

| Who is Liable | Type of Liability | Injured Party | Necessary Criteria | Possible Example |
|---|---|---|---|---|
| Provider | Criminal | Child in respite care | Dependent on situation | A child in respite care is physically abused by the respite provider |
| Provider | Civil | Child in respite care | Dependent on situation | A provider is negligent in performing respite duties |
| Organization | Vicarious Liability | Child in respite care | 1) Employer/employee relationship exists<br>2) Intentional tort was committed within scope of employment | A provider physically abuses a child; parents seek compensation from the organization for the child's injury (courts have rarely found this behavior to be within the scope of employment). |
| Organization | Vicarious Liability | Child in respite care | 1) Employer/employee relationship exists<br>2) Negligent conduct was committed within the scope of employment | A provider is negligent with a child in their care; parents seek compensation from the organization fro the child's injury. |
| Organization | | Child in respite care | 1) Agency relationship exists<br>2) The organization has the "right to control" | An organization hires an unqualified provider and the child is harmed in the provider's care (as a result of intentional tort or negligent conduct). |

| | | | | |
|---|---|---|---|---|
| Organization | Negligent Supervision | Child in respite care | The employer had antecedent reason to believe that an undue risk of harm would exist because of the employment. | An organization knows that a certain provider may be likely to harm a child in his care, but does not take steps to prevent harm from occurring; a child in the provider's care is subsequently harmed. |
| Organization | Workers' Compensation Act | Provider | 1) Employer/employee relationship exists (based on Act criteria)<br>2) The injury arose out of and in the course of the employee's employment<br>3) The injury was not self-inflicted | A provider, employed by an organization, was harmed while providing respite care; the provider seeks compensation from the organization. |
| Organization | Civil | Provider | Same as organizational liability | A provider, employed by either an organization or parents was harmed while performing respite care responsibilities; the provider seeks compensation from the non-employer (either the organization or parents) |

**Evaluating the liability risks continues…**

Not all risks are equal from a liability perspective. As a practical matter, an agency should prioritize its list of risks generated in step one by answering two questions.

- How **frequently** does the risk occur?
- If the unintended consequence (damages) associated with the risk occurs, how **severe** is the injury or loss?

Activities which occur frequently and may have significant unintended consequences

(e.g., seriously bodily injury or death) are your main concerns. After that, activities which occur frequently but have more modest consequences, or which occur infrequently but even one instance can lead to serious injury or harm, demand your attention. Those activities which seldom occur and have little minimal harm associated with them can be addressed last.

Once an organization has evaluated its liability risks, it should progress to the next step in the risk management process.

**STEP III: PREPARE A RISK REDUCTION PLAN**

The next step in the risk management process is to prepare risk reduction plans. These plans may take one of four approaches or any combination thereof:

- **Avoid Risk.** This entails ceasing to undertake the risky activity. Before doing so, the agency should answer this question: should the activity be a part of our services, or is it too hazardous? For example, should the agency continue to have its providers medicate children, or are the possible harms too great?

- **Modify Risk.** This entails changes in the activity to make it safer. These changes often are instituted through changes in the magic "Ps": policy, practice, procedures, premises, and people.

  - By changes in the people, we include how people are hired and supervised, how jobs are described, and how individuals are trained. Training is an important part of risk management, and should include both a competency and safety component. For example, if respite providers will be administering medicine, the need training on when and how to administer (competency), as well as training in CPR (safety); if providers are to bathe infants and change diapers, they may need competency training on how to do these tasks, and safety training on how to avoid contracting possible infectious diseases.

- **Transfer Risk.** This entails transferring the financial loss to others, such as through insurance or contracting services out to an independent contractor.
- **Retain Risk.** This entails accepting the risk and preparing for the financial consequences. This may be suitable where the risk is both infrequent and not severs. A deductible on your insurance is a form of risk retention.

For each risk identified and evaluated by the respite care agency, a risk reduction strategy must be prepared, and steps to carry it out carefully mapped, executed and monitored.

## STEP IV: PROGECT ORAGANIZATION OR INDIVIDUAL ASSETS/FINANCE THE RISK:

A key component of risk management is to protect and preserve an agency's assets. This is done by reducing the level of risk and by shifting the financial loss to others.

### Insurance

The most common means of financing a risk is by purchasing insurance (liability, automobile, homeowners, medical, etc.). Reliance on insurance should only be as an underlying source of security and not as an alternative to other risk management methods. An insurance agent or consultant or experienced risk manager needs to assist the agency and provider in purchasing insurance. This person can piece together policies to provide comprehensive but not excessive coverage.

It is critical that everyone have a minimal understanding of the language of the insurance contract. A few things to remember.

**Who is insured?** Each insurance policy identifies who is insured, i.e., who will be protected if sued for a covered (see below) activity. Ina typical general commercial liability policy this covers the organization and its employees. While most general liability policies protect an entity for injuries caused by its volunteers, they do not generally afford protection to the volunteer himself, unless specifically added (for a cost) to the policy, i.e., additional insured.

**What is covered?** All insurance policies identify what activities or "occurrences" (risks) are covered. For example, general liability policies cover most bodily injury and property damage claims, unless they are *excluded*. The list of exclusions tend to be long (for according to courts, if something is not specifically excluded, it is covered by the policy). For example, general liability insurance policies often exclude:

Use of vehicles
Professional malpractice
Workers' compensation
Intentional actions
Employment related lawsuits (e.g., wrongful termination)

### A word about personal insurance

Many individuals who provide respite care to it on a part time or volunteer basis. Not being in the full time business of providing this service, they rely upon their personal homeowners or automobile insurance for coverage. This may not be wise. As a first step,

these individuals should contact their agent or broker to ascertain whether these policies cover losses arising from respite care services.

*Homeowners Insurance*

All homeowner's policies exclude coverage for child care services. Most policies also exclude coverage related to a business. Thus respite care services will not be covered unless your insurance carrier views it as an "incidental business."

In order for the standard homeowner's policy to provide coverage for "incidental business," the policy may limit the amount of money the caregiver can earn during a calendar year. The dollar amount is usually low, such as $2500. Many other insurance companies word the policy to exclude coverage for "business pursuits" which would allow the insurance company to deny any and all claims arising out of respite care service.

To obtain coverage for services earning more than the "incidental" cap or on policies that exclude all business pursuits, and endorsement can be added to the policy that will broaden coverage to include respite care services. This endorsement is often called a "home Services Endorsement." Most provide in-home care services. The caregiver should make it clear to the agent the type of services being offered, the level of care required, the special needs of the child, and where the care is provided.

Another important consideration is whether the child will be considered an "insured" in the caregiver's policy. Many policies include a person under the age 21 living in the household and who is in the care of the policy holder (caregiver). This fact will make a significant difference in how a claim is handled by the insurance carrier.

For example, if the child is injured when the caregiver moves him, and the child is in the caregiver's home, the question arises who will pay the medical bills. If the child I considered an "insured" in the caregiver's homeowners policy there would be no medical coverage for the child. Medical payments, Coverage M, will pay for injuries to guests of the caregiver but not for someone who is in the care, custody and control of the caregiver. The child's family health insurance would be called upon to pay the medical bills. Any agreements between the family and the caregiver should have a clear understanding of who pays for medical expenses in order to avoid confusing at a later date.

Homeowner's insurance medical payments, Coverage M, provides a limited amount of insurance for guests who may be injured while on the homeowner's property. Many homeowners carry this coverage because it is a courtesy to be able to pay for injuries occurring on their property, and helps reduce future lawsuits by quickly paying the injured medical bills.

*Automobile Insurance*

The standard automobile insurance policy will exclude coverage for losses arising out of a business pursuit. Endorsements should be added to cover respite care services as a business pursuit.

Auto Insurance Payments, Coverage C, provides a limited amount of insurance for any passenger (including the driver) who may be injured while occupying a vehicle owned by the caregiver, the family, or agency. Many people do not carry this coverage because they have health insurance that will pay for injuries or coverage may be available if another driver is at fault. Coverage C must be specifically added to the policy.

**What if I'm not an insured, or risks I am concerned about aren't covered?** In this case you have several options. If you can afford it, you can try to get a rider to your liability policy to cover the activity/individual, or you can purchase other types of insurance that may apply. For example, directors and officers of organizations may be covered by D&O insurance policies, which, among other things, would protect them from employment related lawsuits. Or, as stated above, you could cover your volunteers through a rider to your general liability policy, or seek a separate policy designed for volunteers.

**Waivers, Releases, and Hold Harmless**

Another common form of financing a risk is shifting financial accountability by third party contract. These might include waivers (or releases) and hold harmless (indemnification) agreements.

Anyone attempting to shift responsibility should consult with an attorney to determine how to draft such an agreement and whether courts will honor them.

Waivers are essentially promises that you won't be sued. It is a contract by which one party absolves another of any financial liability in the event something goes wrong. Thus, for example, a respite care agency may obtain a release from liability, signed by a parent, for injuries that may occur in the course of administering medication to a child, going on a field trip, emergency medical care, or for any possible negligence.

While it is sound practice to obtain these waivers, they are not always upheld by courts, and thus pose some degree of uncertainty. Courts are reluctant to uphold waivers

between parties of unequal bargaining power, or waivers that are too broad or ambiguous. One Colorado court has provided factors for courts to consider in determining the validity of a waiver:

1) the service provider's duty to the public
2) the nature of the service provided
3) whether the contract was fairly entered into by the plaintiff, and
4) whether the intention of the parties was clearly and unambiguously expressed. 41

Even if ultimately unenforceable, waivers serve important functions. They can act as a deterrent to a lawsuit, and they encourage parties to be aware of the risks, and take precautionary measures.

**Hold harmless** agreements, unlike waivers, are not assurances that you won't be sued. Rather, they are agreements that, in the event of a lawsuit, one organization (indemnitor) will cover the losses of another (indemnitee). Typically, loses include legal fees, court costs, and damages as a result of the negligent acts of, depending on the type of agreement, the 1) the indemnitor, 2) the indemnitee, or 3) either. Since the indemnitee can still be sued, the financial solvency or evidence of insurance (certificate of insurance) of the indemnitor is very important.

Due to the Colorado constitutional prohibition against a government entity becoming responsible for the liability of another, 42 the enforceability of an indemnity agreement against a public agency is questionable.

**METHODS OF RISK FINANCING:**

Liability Insurance
Shifting Financial Accountability by Contract
Waiver
Hold Harmless

## PUTTING IT ALL TOGETHER

The following examples trace the risk management process in some areas common to respite care.

| **Risk: Administration of Medicine to Child** |
|---|

| **Evaluation of Risk:** | **Possible ways to reduce risk:** |
|---|---|
| *Frequency:* How may children you serve require medication?<br><br>*Severity*: If mistake, possible serious bodily injury or even death.<br><br>Thus risk is potentially frequent and even isolated instances can be severe- implement risk reduction plan quickly.<br><br>*Legal liability:* possible negligence if wrong dosage, wrong medication, wrong method, failure to give, or violation of Nurse Practice Act (criminal misdemeanor) | *Avoid:* Do not have any respite provider medicate child.<br><br>*Modify:*<br><br>1) have doctors prepare a form letter that is sent out to all respite providers regarding the administration of medication.<br>2) Develop policy so that all medication that respite providers will have to administer is labeled and packaged in single dosages, with instructions form doctor or pharmacist.<br>3) Require providers to maintain a medication log<br>4) Require providers to receive CPR training<br>5) Require parents to demonstrate medication procedure<br>6) Require training of provider by professional nurse.<br><br>*Transfer:* Have parents sign a release (waiver) from liability. |

| Risk: Driving Child | |
|---|---|
| **Evaluation of Risk** | **Possible ways to reduce risk** |
| *Frequency:* How frequently are children driven?<br><br>*Severity:* If even one accident may be death and/or serious bodily injury.<br><br>Thus risk is severe and possibly frequent – implement risk reduction plan quickly.<br><br>*Liability:* Negligence or possibly intentional tort or crime (e.g., driving under the influence) | *Avoid*: Do not transport children.<br><br>*Modify:*<br>1) Screen providers for safe driving record;<br>2) Train providers on safe and emergency driving techniques;<br>3) Ensure vehicles regularly inspected and well maintained.<br><br>*Transfer:*<br>1) Hire bus or cab company to drive children (independent contractor), or<br>2) Make sure drivers covered by comprehensive automobile insurance (may require changes to you agencies policy or individual's automobile insurance policy, to cover work related accidents). |

| Risk: High turnover of providers, care given in private homes, lack of information on individual providers | |
|---|---|
| **Evaluation of Risk** | **Risk reduction** |
| *Frequency*: rate of staff turnover?<br><br>*Severity*: unknown persons working alone in a private home away from direct supervision – all kinds of bad things can happen, including sexual abuse of child.<br><br>Implement risk reduction plan quickly.<br><br>*Liability*: negligence (incl. negligent hiring and supervision), intentional tort, criminal act. | *Avoid*: May be unavoidable unless elect to provide all respite at center (or increase pay to providers to discourage turnover).<br><br>*Modify:*<br>1) Change in hiring procedure: criminal background checks, multiple interviews, pre-service training requirements, reference checks, psychological evaluations, written bios, special screening tests. 43<br>2) Change in supervision; close monitoring by parents and agency staff through frequent and unannounced inspections, start new providers at a center based facility.<br><br>*Transfer*:<br>1) Consider Independent contractor options.<br>2) Obtain rider to general commercial liability that would cover sexual abuse by provider. |

**Your own exercise…**

The best way to get started on risk management is to sit down with you colleagues and identify your won risks and complete the following chart. (If you are stumped, try one of these: 1) Your agency provides respite care services that entail feeding infants and toddlers, or 2) your agency provides respite car services to families with children with : behavioral challenges."

| **Risk:** | |
|---|---|
| **Evaluation of Risk** | **Risk Reduction** |
| *Frequency:* | *Avoid:* |
| *Severity:* | *Modify:* |
| *Liability:* | *Transfer:* |

1. Black's Law Dictionary, 930-31 (5th ed. 1979).

2. Zimmer v. Celebrities, Inc., 615 P.2d 76 (Colo. App. 1980)

3. Zimmer v. Celebrities, Inc., 615 P. 2d 76, 80 (Colo. App. 1980)

4. United Blood Services v. Quintana, 827 P. 2d 509, 519 (Colo. 1992)

5. Stephens v. Koch, 192 Colo. 531, 561 P. 2d 509, 519 (Colo. 1997)

6. C.R.S. 12-38-101. In general, the "administering treatments and medications" and performing "delegated medical functions" are forms of practical nursing and professional nursing. The unlicensed practice of either is unlawful. C.R.S. 12-38-123 (1) (a)

7. C.R.S. 12-38-125.

8. C.R.S 12-21-202.

9. C.R.S, 13-80-103.7.

10. For example, Colorado has a Motor Vehicle ("No Fault") Insurance statue which significantly affects how those injured are compensated for their loss. See, C.R.S. 10-4-701.

11. Floyd R. Mechem, Outlines of the Law of Agency, sec 13 (B), quoted in *Grease Monkey International, Inc. V. Montoya*, 904 P. 2d 468 (Colo. 1995).

12. Cottom v. First Baptist Church of Boulder, 756 F. Supp. 1433, 1438 (D.Colo. 1991).

13. Huddleston b. Union Rural Elec. Ass'n, 841 P.2d 284, 287 (Colo. 1992).

14. Cottom v. First Baptist Church of Boulder, 756 F. Supp. 1433, 1439 (D.Colo. 1991).

15. DeStafano v. Grabian, 763 P.2d 275, 286 (Colo. 1988).

16. DeStafano v. Grabian, 763 P.2d 275, 287 (Colo. 1988).

17. Spencer v. United Mortgage Company, 857 P.2d 1342 (Colo. App. 1993), in which the court cited Connes v. Molalla Transport.

System, Inc., 831 P. 2d 1316 (Colo. 1992) nothing that the court approved the "view that when an employee commits and intentional tort against a customer, such conduct is almost invariably outside the scope of employment."

18. Moses v. The Diocese of Colorado, 893 P.2d 310 (Colo. 1993), cert.denied, ____ U.S. _____, 114 S.CT. 2153 (1994). The court acknowledged that "(a)lmost invariably, in a claim for negligent hiring, the tort committed by the employee for which the employer may be held liable is an intentional tort committed outside the scope of employment."

19. Connes v. Molalla Transports System, Inc. 831 P.2d 1316 (Colo. 1992).

20. See, e.g., Winkler v. Rocky Mountain Conference of the United Methodist Church, Colorado Court of Appeals, No. 94CA0652 and 0661, Nov. 9, 1995.

21. Moses v. The Diocese of Colorado, 893 P.2d 310 (Colo. 1993), cert.denied, ____ U.S. _____, 114 S.CT. 2153 (1994).

22. Moses v. The Diocese of Colorado, 893 P.2d 310 (Colo. 1993), cert.denied, ____ U.S. _____, 114 S.CT. 2153 (1994).

23. C.R.S. 24-10-101.

24. C.R.S. 13-21-117 protects for liability under "failure to warn or protect" causes of action.

25. C.R.S. 13-21-117.5 protects a variety of professionals and others for the failure to warn or protect third parties against the violent behavior of a person with developmental disabilities or for failure to predict such violent behavior.

26. C.R.S. 13-21-116(2)(b).

27. C.R.S. 13-21-115.7.

28. C.R.S. 13-21-108(1).

29. C.R.S. 13-21-115.5.

30. C.R.S. 13-21-116 (2.5).

31. C.R.S. 8-40-101.

32. C.R.S. 8-40-202(2) (a).

33. C.R.S. 8-40-202 (2)(a).

34. C.R.S. 8-40-302(4)

35. Connor v. Zelaski, 839 P.2d 501, (Colo. App. 1992) in which definition of full time is provided.

36. As will be discussed under financing the risk, insurance policies must be carefully read to determine what individuals and actions are covered. For example, in Swentkowski v. Dawson, no. 93CA0128 (April 21, 1994), a Colorado appellate court, with respect to a specific homeowner's policy, found that it might not cover the intentional torts of a family member (in this case the policy holder's son was accused of molesting a third party).

37. Barge v. Industrial Claim Appeals Office, No. 94 CA1884 (Colo. Ct. App. Sept. 28, 1995) Colorado Employment Security Act is found at C.R.S. 8-70-102 et seq.

38. Brighton Scoll District v. Lyons, 873 P. 2d 1228 (Colo. App. 1993).

39. Aspen Highlands Skiing Corp v. Apostolou, 866 P.2d 1384 (Colo. 1994).

40. CRS sec. 8-40-20-(1)

41. Heil Valley Ranch, Inc. v Simkin, 784 P.2d 781 (1989).

42. Colorado Constitution, Art. XI sec. 1.

43. For example, a screening test may inquire about age of friends, frequency of moves, and hobbies and interests.

Appendix A

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Appendix B

## Employer Liability
## Under Federal Tax and Benefit Law

This report addresses personal injury and property damage liability (torts). Another type of liability involves federal and state tax and benefit laws. Under the federal laws, employers have a number of responsibilities. Failure to meet them may result in financial penalties. These responsibilities include:

- Income tax withholding and reporting (FETA – Federal Employment Tax Act)
- Payment of Social Security (FICA – Federal Insurance Contribution Act)
- Payment of federal (and state) unemployment insurance (FUTA – Federal Unemployment Tax Act)
- Payment of minimum wages and overtime (FLSA – Fair Labor Standards Act).

The federal laws and regulations are complex. Whether any or all of these programs apply to your agency (or to the parents you serve) depend upon a number of factors, including the existence of an employer-employee relationship, wage thresholds, treatment on non-cash payments, and treatment of "domestic workers." Respite care agencies should seek guidance from experienced employment lawyers.

Whether the respite care agency is responsible for any of the items listed above depends first and foremost upon the existence of an employer-employee relationship. For purposes of tort liability, this relationship is defined by state law. For federal tax and benefit purposes, federal law controls. Furthermore, definition of employee may vary by federal program. The IRS definition and guidelines for tax withholding and reporting purposes is the most developed and instructive, and often relied upon as the first step deciding whether an individual is an employee or independent contractor.

Under the IRS, and "employer" is defined as "the person for whom an individual performs or performed any service of whatever nature," but if the person does not have control of the payment of wages for such services, than employer means the person having the control of the payment of such wages (IRC, 26 USC sec. 3401 (d)). "Wages" is defined as "remuneration for services performed by an employee for his or her employer, including the cash value of all benefits paid in any medium other than cash."

The IRS has identified 20 factors to consider in determining whether an employer-employee relationship exists. In determining whether respite care providers are your employees, you may want to take this test, adapted from the 20 factors:

1) Do you instruct the respite care provider, or have the right to instruct her, about when, where, and how to do the job (control)?
2) Do you train the respite care provider to perform the services in a particular way?
3) Does the respite care provider have to personally perform the services (as opposed to delegating the services to another)?
4) Do you hire, supervise, and pay assistants who work with the respite care provider?
5) Do you have a continuous relationship with the respite care provider, e.g., the arrangement contemplates continuing or recurring work, even if part-time?
6) Do you set hours of work of the respite care provider?
7) Does the respite care provider work exclusively or full time for you?
8) Do you control where the work takes place?
9) Do you set the sequence of work to be done by the respite care provider?
10) Do you require the respite care provider to submit regular oral or written reports?
11) Do you pay the respite care provider by the hour, week, or month (as opposed to by the job or commission)?
12) Do you pay the respite care provider for her business and travel expenses (but not routine commuting expenses)?
13) Do you provide the respite care provider with tools and materials to do the job?
14) Does the respite care provider work only for you?
15) Does the respite care provider not make her services available to the general public?
16) Can you fire the respite care provider?
17) Can the respite care provider quit without owing you any damages?
18) Is the respite care provider free of risk of financial gain or loss due to the services rendered?

The more questions you answered with a yes, the more likely you are to be considered an employer. If most of the answers are no, the respite care provider is more likely to be either an independent contractor or an employee of the parent who uses these services. It is worth noting that the presence of a written agreement indicating independent contractor status does not control.

The IRS test is not conclusive. Depending on the circumstances, the factors may be weighted differently. If you wish a formal determination of worker's employment status, the IRS will give a written opinion upon submission of a completed IRS Form SS_*, Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding.

Some frequently asked questions by respite care agencies:

Q. What if I merely provide a referral service?
A. Under the 20 factor test, you are not likely to be an employer.

Q. What if I provide a referral service and train the respite care providers?
A. Still under the 20 factor test you are not likely to be an employer.

Q. What if I only provide vouchers to parents, who in turn engage a respite provider?
A. Again, under the 20 factor test, almost all the answers would be no and you would probably not be considered an employer.

Q. I understand, as part of "nanny gate", the rules for domestic employees have changed. How does this affect respite care services in the home?
A. The Social Security Domestic Employment Reform Act of 1994 simplifies payment of unemployment taxes of domestic workers. The threshold for withholding and paying unemployment and social security taxes was raised to $1000 annually. In addition, individuals who hire domestic workers need no longer file quarterly forms, but as part of their own yearly tax return can pay FICA, federal unemployment taxes, and agreed upon federal income tax withholding. The definition of "domestic service" in a private home is sufficiently broad so it may include the types of services provided by a respite care provider. However, if the respite care agency is the employer, and not the family, this act will not apply. Many of the thither federal benefit laws have special provision for domestic workers; again you are well advised to consu7lt with an employment lawyer on these matters.

Q. If we only provide a referral service, but the parent (consumer) selects and pays the respite provider, is the parent the employer for federal tax and benefit law purposes?
A. Maybe. The same analysis, using the IRS test, would have to be applied to the parent. However, many benefit laws have exceptions or special rules for domestic help, which may include respite providers.

Q. If parents receive vouchers from our agency to use to pay for respite services, must they report this as income for their own personal income tax purposes?
A. As of this writing, there is no definitive answer to this question from the Internal Revenue Service. According to one 1993 report from the American Bar Association, payments received from a "legislatively provided social benefit program for promotion of general welfare objectives: are excluded from a recipient's gross income. (Avoiding Legal Pitfalls in the Funding of Family Support Services: An Analysis Prepared by the American Bar Association's Commission on Mental and Physical Disability Law, at page 16, quoting from an IRS Revenue Ruling 74-205, 1974-1 C.B. 20) Arguably, cash assistance to parents to help pay for respite care services falls under this exception, and therefore is not taxable.

**National Association of State Directors of Developmental Disabilities Services, Inc.**

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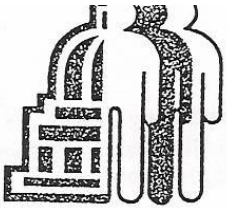

MEMORANDUM

TO: All State Directors

FROM: Robert M. Gettings
Executive Director

SUBJECT: Tax, Liability and Legal Issues in Consumer-Directed Services

During the Governmental Affairs Forum at the Association's recent Mid-Year Meeting in Scottsdale, Arizona, several state directors mentioned that a wide variety of tax, liability and other legal issues often imposed major barriers to implementing consumer-directed services. This complex, often arcane area of government policy is of particular interest to officials in states which are attempting to put consumers and family members in control of their own service budgets.

Concerns have arisen around the effects of federal and state wage and hour rules, tax laws, liability coverage, and workmen's compensation policies when consumers or families choose to employ their own support workers. While no one seems to have solved these problems completely, materials are now available which summarize the steps that have been taken in selected states to address the complex barriers faced by individuals and families who wish to employ their own support staff. As a follow-up to the Scottsdale discussion, the purpose of this memorandum is to provide a few sources of information which state MR/DD officials may find useful in designing consumer-directed services.

The most comprehensive publication currently available is entitled Consumer-Directed Attendant Services: How States Address Tax, Legal and Quality Assurance Issues. This report was prepared by Susan Flanagan of Systemetrics, Inc. for the U.S. Department of Health and Human Services. The report details the approaches which selected states/localities have used in determining employer-employee relationships and establishing a fiscal intermediary. This report also describes four employer models and addresses workmen's compensation and legal liability issues. It also contains a useful bibliography. Copies of the report may be obtained from the:

National Technical Information Service
Department of Commerce
5385 Port Royal Road
Springfield, VA 22161

Cheryl McDuffie, Office of Disability, Aging and Long-Term Care in the Office of the Assistant Secretary (HHS) for Planning and Evaluation, is listed as the contact person for information concerning this report. Her telephone number is 202/690-6613.

The United Seniors Health Cooperative has published a paper entitled, "International and Domestic Programs Using 'Cash and Counseling' Strategies to Pay for Long-Term Care." This paper is the result of a research project designed to examine national and international efforts that allow consumers to make their own decisions about purchasing care. This paper can be obtained from:

Dr. James Firman
United Seniors Health Cooperative
1331 H Street Suite 500
Washington, DC 20005-4706
Telephone: 202/393-6222
Fax: 202/783-0588

Attached you will find a short paper entitled, "Overview of Legal Requirements for Hiring Individual Home Care Workers." This paper, prepared by Glenn Silverberg of the Wisconsin Department of Health and Social Services, offers a brief explanation of the key issues and various documents needed to employ an individual home care worker. While the details of the paper are based on Wisconsin law/policies, it offers a succinct description of the legal requirements involved in consumer-employed service workers.

Additional materials also are available from the Wisconsin Department of Health and Social Services which describe the responsibilities of fiscal intermediaries, offer timesheet formats for keeping track of employee hours, a sample employee and consumer/employee agreement and other materials describing applicable rules. These materials can be obtained from:

Cecelia Geis
Bureau of Long-Term Support
Wisconsin Dept. of Health and Social Services
1 West Wilson Street
P.O. Box 7851
Madison, WI 53707
Telephone: 608/267-2923
Fax: 608/267-2923

We trust that you will find this information helpful as you plan and implement consumer-managed services. If you have further questions about this policy area, please feel free to contact Robin Cooper at 608/231-2121 or by e-mail at Windfiend@aol.com.

Attachment: "Overview of Legal Requirements for Hiring Individual Home Care Workers", Wisconsin Department of Health and Social Services, October, 1993.

NUMBER: 10

October 26, 199

# INFORMATION ..... community options program

## Overview of Legal Requirements for Hiring Individual Home Care Workers

Glenn Silverberg developed the attached guide primarily for private pay individuals seeking to hire their own workers. However, you may find the overview useful for a variety of purposes in public programs.

**So You Want to Hire Your Own Home Care Worker?**
**Legal Requirements and Considerations**

1. Verify Employment Authorization- The Immigration Reform and Control Act of 1986 requires that you hire only U.S. citizens and persons from other countries who are authorized to work in the U.S. To comply with this requirement, Form I-9, *Employment Eligibility Verification Form*, must be completed for each worker. Employers are exempted from this verification if the worker is an independent contractor (see 2 below) or provides domestic service on a casual basis in a private home. "Casual" domestic service is sporadic, irregular or intermittent. Home care workers are in the category of domestic services workers, but most, except those providing seasonal chores or working small amounts of time for an employer, would not meet the casual exemption.

   Unless an employer is clearly exempted, at the time of hire the employee completes section 1 of Form I-9, "Employee Information and Verification." Then, within three business days, the employee must present for your review documents to establish both identity and eligibility to work legally in the U.S. After examining the document(s), you complete section2, "Employer Review and Verification," and retain the form. This too must be done within three business days of hire. If the worker cannot provide the documents in three days, she must provide proof within that period that she has applied for the documents and must provide them within 21 days of hire.

   For establishing both *identity and employment authorization* you may use one of the following:

   - *US Passport* (unexpired or expired),
   - *Certificate of U.S. Citizenship* (INS Form N-560 or N-61),
   - *Certificate of Naturalization* (INS Form N-550 or N-570),
   - *Unexpired Foreign Passport* with either an unexpired stamp reading "processed for I-551" or a Form I-94 attached with an unexpired work stamp whose restrictions are not in conflict with the job,
   - *Alien Registration Receipt Card* (INS Form I-151),
   - *Resident Alien Form* with worker's photo (INS Form I-551),
   - *Unexpired Temporary Resident Card* (INS Form I-688),
   - Unexpired *Employment Authorization Card* with photo (INS Form I-688 A),
   - Unexpired *Reentry Permit* (INS Form I-327),
   - Unexpired *Refugee Travel* document (INS Form I-571), or
   - Unexpired *Employment Authorization* document with photo (INS Form I-688B).

To establish *identity* only use one of the following:

- *Driver's license* issued by a state with either a photo or personally identifying information,
- *Identification card* issued by a federal, state, or local government agency with a photo or personally identifying information.
- *School identification card* with a photo.
- *Voter's registration card*
- *Veterans Discharge* form or proof of active duty or reserve status in the military,
- *Military dependent's identification card,*
- *Native American tribal documents*, or
- *Canadian driver's license.*

For establishing *employment authorization* only use one of the following:

- *Social Security Card,*
- *Birth Certificate* (original or certified copy),
- *Native American tribal document,*
- *U.S. Citizen Identification Card* (INS Form I-197),
- *Resident Citizen Identification Card (INS Form I-179),* or
- *Unexpired employment authorization document* issued by the INS.

2. Establish Whether the Worker is an Employee or and Independent Contractor (Self-Employed)- The general rule is that if a worker performs services that are subject to your direction and control, as to both what must be done and how it must be done, that worker is your employee. This is known as the common low control test. It does not matter whether you exercise this control as long as you have the legal right to control both the method and result of the service. Three of the usual characteristics of an employer are that she or he has the right to discharge the employee, the right to determine when, where and how the employee works, and supplies the employee with tools and a place to work.

   Self-employed people are in business for themselves. Such persons carry on an independent business, contract to do work according to their own means and methods and are subject to control only as to results. Factors suggesting independent contractor status include but are not limited to, the worker: having opportunity for profit or loss, having a significant investment in facilities for doing the work, supplying the tools or materials for the work, hiring, supervision and paying assistants independent of the employer, working for a number of people or firms at the same time, making the services available to the general public, and determining the order or sequence in which the work is done and the hours which it is done. The

judgment of employment status is based on a consideration of all factors in the relationship that show employer control over details of work balanced against those factors indicating an independent contractor status. You may request the IRS to make the determination for you by submitting *Form SS-8* on which you describe various aspects of the relationship.

If you follow the common law test, most home care workers are employees, not independent contractors. If the worker is self-employed you are not liable for payment of the social security or unemployment insurance taxes described below. (Note: Under Wisconsin unemployment compensation law, a worker is self-employed only if her work is both free from the direction and control of an employer and is performed in an independently established trade, business or profession. This is somewhat more restrictive than the common law test. The test for independent contractor status is also more restrictive in wage and hour law. See 9 below.)

3. Obtain a Federal Employer Identification Number - If you are a household (also called domestic worker) employer, obtain an employer identification number by filling *Form SS-4* with the IRS. If you have not applied fro or received this number by the time you must pay social security taxes, you can get the number by indicating "none" or "applied for" in the space for employer number on the return you file. (See 4 below.)

4. Pay Social Security Taxes- You must pay social security taxes for each household employee you pay at least $50 in wages in a calendar quarter. You deduct 7.65% from wages as the employee share and add an equivalent amount as the employer share. You file Form 942, *Employer's Quarterly Tax Return*, with the payment, within one month of the end of the quarter. One return is filed even if you have more than one employee.

5. Determine Whether You Will Withhold Federal and State Income Taxes- You do not have to withhold income tax on wages paid to household employees, unless the employee asks for it and you agree to it. If you are going to withhold income tax, the employee must complete form W-4; *Employees Withholding Allowance Certificate*. You determine the amount to be withheld from the W-4 and the tables in Publication 15 (Circular E), *Employer's Tax Guide*. You pay and report the withholding quarterly together with Social Security taxes on Form 942. On the reasonable assumption that employers of home care workers will not withhold income tax, I will not cover state income tax withholding. Contact the Department of Revenue if this assumption is incorrect.

6. Notify Worker About Earned Income Tax Credit and Pay in Advance if Requested – If the employee does not have any federal income tax withheld, you must notify the employee that she may qualify for the earned income tax credit (EITC). Generally, an employee who earns less than $23,050 in 1993 and supports a dependent child is eligible. To notify the employee, give her a copy of Notice 797, Notice of a Possible Federal Tax Refund Due to the Earned Income Tax Credit. Your employee may request advance payment of the credit by giving you a completed Form W-5, Earned Income Tax Credit Advance Payment Certificate. If so, when you pay the employee, include the advance payment, which is taken from the social security taxes (and withheld income tax, if any) that you would otherwise pay to the IRS. Figure the amount from tables in Publications 15. You deduct the total advance payments made in the quarter on Form 942 and pay IRS the net.

7. Pay Unemployment Insurance Taxes if Required- you are required to pay unemployment insurance taxes in you pay cash wages of $1,000 or more to your household employees in any calendar quarter this year or last year. Even if no single worker is paid $1,000 in a quarter, if the total you pay to all household employees is $1,000 or more you incur a tax liability. Both state and federal taxes must be paid. These are paid by the employer and no part may be deducted from wages. To pay state taxes, contact the UC Division of DILHR to set up an account Obtain Form UCT-5332, Domestic Service Employer's Report, which you submit to get an account number and tax rate. Pay the tax quarterly, submitting Form UC-101, *Quarterly Report of Employment and Wages Paid*, reporting covered wages and tax paid by the end of the month following the quarter.

Pay and report federal unemployment tax using Form 940 or 940-EZ, Employer's Annual Federal Unemployment Tax Return. This is due one month after the year ends. However, you have to make a deposit of tax due before filing the return if the balance due at the end of any quarter is more than $100, in which case you must deposit the tax in an authorized financial institution by the end of the next month. You get a credit against federal tax due for the state taxes you pay.

8. Give Completed Form W-2 to Each Worker and Send to Social Security – You must give a completed Form W-2, Wage and Tax Statement, to each employee by January 31, or if the person stops work before the end of the year and requests it earlier, within 30 days of the request or last wage payment, whichever is later. By February 28, send Copy A of Forms W-2 with Form W-3, Transmittal of Income and Tax Statements, to the Social Security Administration. If you have only one employee, send only Form W-2.

9. Comply with Federal and State Wage and Hour Regulations – Unless the worker is an independent contractor (and the great majority of home care workers are not under the Fair Labor Standards Act), or is specifically exempted, you must pay at least the minimum wage of $4.25 an hour for all hours worked. There is a permissive exemption if the worker resides in the employer's household, spends no more than 20% of her weekly work time on general household work and has minimal training. Such exempt workers (providing "companionship services" can be paid a negotiated amount that translates to less than minimum wage for hours worked. (However, how much training would disqualify use of this exemption is unclear and in dispute.) There is a second exemption for persons performing chore services such as mowing lawns, raking leaves, shoveling snow and other odd jobs on an irregular or intermittent basis for no more than 15 hours per week for one employer ("casual employment").

You are not required to pay overtime (time-and-a-half the regular pay rate) for hours worked over 40 in a week if the worker either resides in the employer's residence, or provides "companionship services" whether or not on a live-in basis. You may take deductions from cash wages for meals or lodging provided to and voluntarily accepted by the employee, not to exceed $51.00 per week or $2.45 per meal and $34.00 per week or $4.85 per day for lodging. To deduct meals, the meal period must be at least 30 minutes and the worker must be completely free from duties.

Determining actual house worked can be difficult in home care because overnight workers may sleep while in the home, and because there is often time when the worker provides only supervision or is not providing service but is on call or needs to be there "in case." The employer and employee should negotiate a written, signed agreement stating work hours, which may exclude such sleep time, meal time and free time as the parties agree. Wage and hour authorities will accept such an agreement in the event of a complaint. Without such an agreement, state regulations provide that unless the worker lives in or is on duty for 24 hours or more, the worker must be paid for all time she is in the home, including sleep time, unless she has complete freedom to leave the premises.

10. Consider Whether to Purchase Worker's Compensation Insurance- Worker's compensation insurance, which pays for medical expenses and lost income in the event the worker is injured on the job, is not required when you hire your own home care worker. However, if you purchase a policy, by law you are protected against lawsuit, since an injured worker cannot sue the holder of the policy. Policies are purchased from insurance companies; however, if an insurer rejects you, you may apply to the Wisconsin Compensation Rating Bureau, which operates a high-risk pool. The rates for part-time domestic service workers in 1993 are $106 per worker

with a minimum premium of $266; for full-time workers, the rate is $246 per worker with a minimum premium of $406. They change (go up) each year. If you have homeowner's insurance that may provide some compensation for an injured worker, depending on the policy, but it will not bar a lawsuit.

10. Keep Records – For employment tax purposes the following records should be kept at least 4 years after the tax is paid or the due date of the return, whichever is later:

- Federal employer identification number and state UC account number,
- Copies of all returns and forms filed,
- Dates and amounts of any deposits or payments made
- Each employee's name, address, and social security number,
- Dates each employee was employed,
- Copies of Forms W-4,
- Copies of Forms W-5,
- Amount of social security tax collected for each payment and the date collected, and
- If the wage payment and the amount subject to social security taxes, unemployment taxes, or withholding are not equal, the reason why.

For wage and hour purposes, in addition to the above the following information should be kept at least 3 years;

- Each employee's date of birth and sex,
- Beginning and ending times of work each day and of uncompensated meal periods,
- Total hours worked per day and per week (the written agreement described above can substitute for this and the item above),
- Rate of pay and wages paid each payroll period,
- Date of payment and pay period covered, and
- Amount of and reason for each deduction from wages.

For employment authorization purposes, for each worker hired keep a completed form I-9, *Employment Eligibility Verification Form*, for either three years after hire or one year after the worker leaves your employment, whichever is greater.

**Some Notes on the Above**

1. These requirements apply to individuals employing their own home care workers. The requirements are somewhat different if an agency provides the services. In that situation, the agency employs the worker, not you and note of this is your responsibility. However, agency-provided services are more expensive.
2. If you receive Community Options Program funds to purchase services, the county agency is obligated to act as you agent in meeting employer responsibilities. If you receive other public funds, the county agency may but is not required to act as your agent.
3. If you can't manage all the administrative tasks on your own, perhaps a family member or friend can assist, even being the employer of record. If you can afford it, you could hire a bookkeeper or accountant to act as you agent in handling these duties.
4. Enforcement of these requirements is primarily complaint-driven. If the workers you hire do not complain to or file for a benefit with the responsible agency, you are unlikely be discovered if you don't comply with a requirement. If discovered, you will be liable for back payments of taxes and/or wages plus interest and penalties. Sometimes penalties are waived. It is reasonable, at least where public funds are not involved, to balance strict compliance with other considerations such as securing the help you need to continue to live at home, if you are fair to the persons providing the services. It is one thing where persons of little or modest means hire help out of necessity because of a disability. It is quite another where wealthy persons hire help by choice and out of convenience but to do not bother to comply with the law in spite of ample resource to determine and meet requirements.
5. There is legislation pending in Congress that would raise the threshold for when social security taxes must be paid for household workers from $50 in a quarter to probably about $1000 in a year, with the threshold to be indexed to wage growth. Quarterly payments and filings would be eliminated and replaced with annual payment and accounting as part of filing an income tax return. Hearings will be held by the senate Finance Committee (as part of a larger bill to make the Social Security Administration a separate agency) within the next few months.

FOR ADDITIONAL INFORMATION

IRS Publication 926; *Employment Taxes for Household Employers*
IRS Publication 15 (Circular E), *Employers Tax Guide*
Immigration and Naturalization Service, Publication M-274, *Handbook for Employers*
U.S. Department of Labor, WH Publication 1409, Regulations, Part 552: Application of the Fair Labor Standards Act to Domestic Service (Title 29, Part 552, Code of Federal Regulations)
Wisconsin Administrative Code, Chapter Ind 72, MINIMUM WAGES

***Prepared by Glen Silverberg, Bureau of Long Term Support, Division of Community Services, (608) 266-6890 (10/93)***

**Twenty Factors Determining Employee Status**

**Workers who meet some or all of the following 20 criteria are normally judged by the IRS to be employees.**

1. **The worker is told where, when and how to work.**
2. **The organization trains the worker or requires him to attend meetings.**
3. **The worker's services are integrated into the organization's operations, thus implying that the organization controls his actions.**
4. **The worker must render his services personally. This implies that the organization is interested in his methods and want to control them.**
5. **The person hiring the worker generally has the authority to hire and supervise assistants.**
6. **The hiring person and the worker have a continuing relationship. This implies that an employer-employee relationship exists.**
7. **The organization sets the hours the worker must work.**
8. **The worker must devote substantially full-time to the organization's work.**
9. **The worker works on the organization's premises.**
10. **The worker works in a sequence set by the person he is performing work for.**
11. **The organization requires the worker to submit oral or written reports.**
12. **The worker is paid by the hour, week, or month.**
13. **The organization pays the worker's business or traveling expenses.**
14. **The organization supplies the worker with most of his tools and materials.**
15. **The worker has no outside office or place of business.**
16. **The organization shields the worker from any chance of real economic loss or gain resulting from his work.**
17. **The worker works primarily for one firm and has no other clients.**
18. **The worker does not consistently make his services available to the general public.**
19. **The organization has the right to discharge the worker at any time.**
20. **The worker has the right to terminate his relationship with the organization with no liability.**