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HOW DO NEW FEDERAL LABOR RULES IMPACT SELF-DIRECTION?

APPLYING THE RULES TO MARYLAND AND AROUND THE COUNTRY

HCBS Conference 2014

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Today:

1. Rule Overview
2. Medicaid Implementation
in Maryland
3. Veteran Directed Program
4. Action Steps for Advocates

What the FLSA requires:

- Minimum Wage
- Overtime
- Travel Time

See US Department of Labor home care website

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

What the new rule changes:

- Narrows companionship exemption
 - “Fellowship and protection”
 - 20% limit on ADLs and IADLs
- Who can claim the exemption?
 - Not third parties who are “joint employers”

See US Department of Labor home care website
<http://www.dol.gov/whd/homecare/>

Economic realities test:

- Power to hire and fire
- Control over the wage or other benefits
- Hours and scheduling
- Supervises, directs, or controls the work
- Payroll and other administrative functions
- Other factors

See NRCPS Toolkit

<http://www.bc.edu/content/bc/schools/gssw/nrcps/tools/flsahomecaretoolkit.html>

- **Department of Labor Rules**
Implementation Planning for Maryland

Maryland Medicaid's LTSS Structure

- Maryland has 8 HCBS waiver programs and 2 State Plan personal care options
- Implemented Community First Choice Option in January 2014
 - Pulled allowable services out of other programs
 - Offer all allowable services – personal assistance, nurse monitoring, transition funds, and items that substitute for human assistance,
 - Offer both agency and self-directed options for personal assistance services
- Personal assistance now consolidated and streamlined across programs

CFC Program Design

- All participants are assessed and given a flexible budget for personal assistance services
- Participants select between the agency and self-directed models, choose providers, and set payment rates when self-directing
- Plans of service must be approved by the State prior to implementation
 - The hours of service, selected provider, and rates are approved on the plan

CFC Self-Directed Personal Assistance

- The provider must enroll with Medicaid and meet minimum qualifications set by the State
- A fiscal intermediary handles payroll and
- The State pays workers compensation and employer taxes
- Independent providers are represented by a union with a collective bargaining agreement with the State
 - Collective bargaining covers rates and other benefits
- Providers must use the State's telephonic timekeeping system
 - In-Home Supports Assurance System (ISAS)
 - Providers to clock-in and out by phone
 - Participants do not sign time sheets

Is Maryland the Joint Employer?

- Maryland wrote a letter to DOL asking for clarification
- DOL agreed to host a conference call to offer verbal guidance
- DOL Response:
 - Only a court can officially determine this status
 - It is the opinion of DOL Maryland is the joint employer for the purpose of the provisions in the Fair Labor Standards Act for the CFC program
 - Opinion based on the standards in the economic realities test.

Factors Considered in DOL's Opinion

- Setting and verifying provider qualifications
- Approving service hours on plans of service, sometimes reviewing weekly schedules prior to approval
- Use of an electronic verification system
 - The participant does not approve the time sheets
- Setting the wage rate
 - Collective bargaining agreement with the union
 - Results in a set wage rate (\$12.58)
 - We have a rate range in which participants can set their own rate (\$11.75 - \$14.63)
 - May be interpreted as “so limiting that it essentially functions as a wage rate” (\$2.88/hr variance)

DOL Guidance on Travel Time

- The state can pay minimum wage for travel time even when the provider is paid a rate that is higher than the minimum wage for other services.
- A provider is considered fully released from their duties after 30 continuous minutes.
- Travel time is not paid for a split shift when both shifts are at the same location.
- The employer must pay reasonable estimates of travel time if the travel is not immediate and uninterrupted.

Overtime Payment Calculations

- When a provider works at two or more hourly rates during a workweek, a weighted average rate must be calculated.

$$\frac{(\text{Rate 1} \times \text{hours at Rate 1}) + (\text{Rate 2} \times \text{hours at Rate 2}) + (\text{Rate 3} \times \text{hours at Rate 3})}{\text{Total Hours}}$$

- Several systems changes would be required to accomplish the calculation and payment.
 - The overtime calculation would need to run for each work week.
 - Requires automation of process as calculation is different each week.
- The State would need to determine a process for claiming the costs.

CMS Guidance on Claiming

- Travel time cannot be directly claimed for a single participant given that the cost is not attributable to a single person.
- Overtime achieved by working for multiple participants can also not be claimed for a single participant
- Travel and OT cannot be claimed as an administrative cost
- These costs cannot be taken out of any individual's flexible budget.
- Total costs for travel and overtime must be aggregated and then distributed evenly across all participants.
- Some of the options for claiming include:
 - Total costs across all participants and then claim an equal portion for each participant
 - Utilize a FI with a capitated payment

Options for Implementation

- Several options have been identified and explored
 - Revert to an agency-only model
 - Limit providers work hours and travel to avoid payments
 - Pay the overtime and travel time with some limits
 - Cash and Counseling
- Per diem rates, exemptions, and contractor status were explored but were eliminated as solutions
- Analyzing costs and impacts
- Hosted discussions with stakeholders
 - Public meeting in July
 - Utilizing CFC Implementation Council

Agency Only Option

Description:

- Eliminate independent providers and only allow agencies to provide personal assistance services.

One-time start-up costs: \$0

Annual costs: \$0

Time to implement: 90 days

Program Impact:

- All participants currently using independent providers would need to choose an agency provider by January 1st.

Agency Only Option

Benefits:

- Avoids joint employer status for the State
- Can be implemented by January 1st with no additional State costs.

Drawbacks:

- Eliminates self-direction component of CFC and reduces consumer choice.
- Independent providers would need to work for agency providers in order to maintain payment for personal assistance services.
- Agency with Choice model not yet in place.
- Could cause some independent providers to drop out of the system and find other jobs.

Program Limits to Avoid OT and Travel Payments

Description:

- Limit providers to 40 hours per week and one location per day

One time start-up costs:

- \$250,000 for technology changes

Annual costs:

- \$100,000 for increased staffing to monitor claiming

Time to implement: 9 months

Program Impact:

- Providers would be limited to working 40 hours per week as an independent provider.

Program Limits to Avoid OT and Travel Payments

Benefits:

- Participants retain choice of providers.
- There is a low annual cost to the State.
- Workers would still have the option to work additional hours per week for an agency.

Drawbacks:

- Participants affected by the limitation will need to choose new providers or providers would need to convert to agency employees for hours worked over 40 per week.
- These limitations will require some participants to choose alternate providers.

Pay OT and Travel

Description:

- Pay Travel time and overtime
 - Includes options for limiting OT to 5 hours, 10 hours, or 20 hours per week
 - Another option is maintaining a current program limit of 40 hours per week per participant

Cost Range is \$5,000,000 to \$45,000,000

Time to implement: 18 months to 2 years

Program Impact:

- Preserves participant choice but adds some limitations.

Pay OT and Travel

Benefits:

- Participants retain choice of providers.
- Providers retain independent provider status.

Drawbacks:

- Putting any new restrictions will limit participant choice and require some participants to change their provider.
- Requires increased budget appropriation to avoid significant cuts to current services.
- This option has significant implementation barriers.
 - Contract changes for technology and fiscal intermediary vendors, CMS approval of changes and claiming process.

Cash and Counseling Option

Description:

- Implement full cash and counseling model to remove the State as the joint employer

One time start-up costs: Unknown

Annual costs: Minimal

Time to implement: 2 – 3 years

Program Impact:

- Would offer increased self-direction and options for participants and providers.
- Can be designed to designate the participant as the sole employer.

Cash and Counseling Option

Benefits:

- Increased self-direction and elimination of the State as the joint employer.
- Maintains independent provider network.

Drawbacks:

- Cannot be implemented by January 1, 2015.
- Unless this option completely replaces the current level of self-direction, would be need to be implemented along with one of the other options.
- Increases responsibility for participants, not all participants may choose this model.

Next Steps

- Continued discussions
 - Stakeholders – participants, providers, partners
 - State leaders
 - Union
 - DOL

Six action steps for advocates to avoid consumer harm:

See Disability and Aging Advocacy Groups' Action Steps for Consumers and Advocates Regarding the New Home Care Rule:

<http://www.bazelon.org/portals/o/Archives/HomeCareRule.pdf>

1. Push states to analyze the impact of the new rule on existing programs.

2. Consider asking for additional funding for FY 2016 and stop gaps for FY 2015.

3. Ensure your state complies with the rule in ways that benefit consumers and workers.

- Avoid harmful actions: prohibiting all overtime, restricting all or most travel, abandoning consumer-directed models

3. Ensure your state complies with the rule in ways that benefit consumers and workers.

- Consider the cost of restrictions (e.g. setting up a back up worker system) which may cost more than funding more overtime and travel

3. Ensure your state complies with the rule in ways that benefit consumers and workers.

- Create a policy or process allowing consumers who would be harmed by the new policies to be excepted as required by ADA and *Olmstead*

4. Make sure your state uses Medicaid to help with additional costs without impacting services.

- Ensure Medicaid reimbursement for overtime and travel does not come out of budgets allocated to individual consumers for purchasing services

See Center for Medicare & Medicaid Services Guidance:

<http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf>

5. Ask states to preserve consumer-directed programs.

- If seriously considering abandoning consumer-direction, be aware of alternate models where state is not joint employer:
 - Agency with choice
 - Hybrid Fiscal/Employer agent
 - Individual Budget models

6. Stay engaged even in programs where there is no joint employer.

- Individual consumers need to understand how to comply with the rule
- Consider developing education and assistance materials for consumers who are sole employers

1. Act now
2. Analyze
3. Protect consumers
and workers

Additional Resources:

US Department of Labor home care website:

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

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Disability and Aging Advocacy Groups' Action Steps for Consumers and Advocates Regarding the New Home Care Rule:

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National Resource Center for Participant Directed Services' FLSA Toolkit:

<http://www.bc.edu/content/bc/schools/gssw/nrcpds/tools/flsahomecaretoolkit.html>

Paraprofessional Healthcare Institute's FLSA Implementation State Toolkit:

<http://phinational.org/sites/phinational.org/files/flsa-implementation-state-toolkit.pdf>

QUESTIONS?

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