



Action Steps for Consumers and Advocates Regarding the New Home Care Rule:

How to Prevent Service Cuts and Protect Consumer-Directed Programs

Introduction

The Department of Labor (DOL) has issued a new regulation governing home care services for people with disabilities and seniors. This new rule may impact some of your state's long-term care programs, particularly "consumer-directed" programs where the person receiving services can hire his or her own worker (oftentimes family or close friends) and can direct the care provided by the worker.¹

Consumers and advocates must be knowledgeable about this rule and **advocate to ensure your state implements this rule in a way that helps consumers and the important workers who provide services to them and does not cause unintended harms**, such as cuts to services, dismantling of programs that allow consumers to control their own care, or further limiting this critical workforce.

Previously, most home care workers (also known as domestic service employees, personal attendants or home aids) were exempt from the Fair Labor Standards Act's (FLSA) minimum wage and overtime requirements. The new home care regulation expands the FLSA's requirements to most home care workers by:²

¹ For consistency with the Department of Labor's guidance, this document uses the term "consumer-directed program." States may use different names for their programs, including self-directed or participant-directed services, and these programs may have a variety of designs. For purposes of the regulation and this document, the key feature of consumer-directed programs is that the consumer has the ability to hire, fire, and direct the care provided by the worker.

² For advocates interested in a more detailed overview of the rule's major provisions, the Department of Labor has a number of resources available, including *Fact Sheet: Application of the Fair Labor Standards Act to Domestic Service, Final Rule*, <http://www.dol.gov/whd/regs/compliance/whdfsFinalRule.htm>.

- Updating and narrowing the definition of services that are considered “companionship services” exempt from the minimum wage and overtime requirements; and
- Eliminating the use of exemptions if there is a “third party employer” of the worker who provides care, meaning any employer other than the consumer or his/her family or household.³

Additional guidance recently issued by DOL says that in most (but not all) consumer-directed home care programs there will be a third party who is a joint employer with the consumer, and therefore those programs will no longer be exempt from the FLSA’s requirements.⁴ As a result, the new rule will likely have a significant impact on most states’ consumer-directed home care programs.

States and other joint employers in their home care programs have until the rule’s effective date of January 1, 2015⁵ to make budget adjustments and/or program changes to comply with the new rule. Some states may consider taking actions that would technically comply with the rule but would undermine the rule’s goals by hurting both consumers and workers, such as prohibiting all overtime, limiting hours, restricting travel, and other such actions. These actions could lead to cuts in services for consumers and limiting this critical workforce. **As consumers and disability and aging advocates, you must take immediate action to make sure that your state is ready to implement this new rule in a way that helps and does not harm consumers and their home care workers.** Here are suggested steps you can take:

Push State Officials to Analyze the Impact of the Rule on Your State’s Consumer-Directed Programs

Ask state officials (such as state Medicaid agencies, directors of state aging or disability departments or offices, and/or directors of operating agencies) whether they have completed, or at least begun, an analysis on whether the state and/or any

³ A worker can have more than one employer under the FLSA. A third party employer includes any entity that is a “joint employer” together with the consumer under the FLSA.

⁴ It may be a state, a Financial Management Services provider, managed care entity or an agency that meets the FLSA’s test for a “joint employer.”

⁵ The rule’s effective date is January 1, 2015. A number of stakeholders have requested an extension of the effective date to allow states more time to prepare for implementation. We will notify stakeholders and update this document if the effective date is changed.

other entities are joint employers in any of its consumer-directed programs.⁶ DOL's Wage and Hour Division has stated it is willing to provide technical assistance to states. **If your state officials are not focused on this new rule, push them to do an analysis of the impact now.**

If your state's analysis concludes that it and/or any of its partners or subcontractors are joint employers, the state must conduct an analysis of the fiscal impact, specifically projected overtime and travel costs. Ask state officials if they have completed, or at least begun, an analysis of how many home care workers are working overtime (including overtime by workers providing services to more than one consumer in the program) and how many workers travel between consumers.

Advocates should be aware that many states have not historically collected data by worker hours, and virtually no state tracks travel time. Ask your state whether it is developing a methodology to track, or at least estimate, overtime and travel time and what data sources might be available to assist with that analysis. Consider working with home care workers, worker advocates, and Financial Management Services to gather data about worker hours and travel time.

Once your state completes an analysis of overtime hours and travel costs, it will need to determine the increases in program budgets necessary to pay for these additional costs. Without planning for these additional costs, your state may put in place restrictive policies that could lead to cuts in services for consumers and loss of income to workers, discussed in detail below. You should offer to work with your state on this analysis. If they decline, you should, at a minimum, request that your state share any analysis it has done with you.

Advocate Now as Your State Is Developing Its Budget for Fiscal Year 2016

Right now, many state agencies are preparing their initial requests for the Fiscal Year 2016 budget. **It is absolutely critical that you advocate now for the additional funding necessary to comply with the rule in your state's Fiscal Year 2016 budget.** You should ask your state whether it has included anything in its Fiscal Year 2016 budget on the overtime and travel costs outlined above, and if it

⁶ States will need to do an analysis of their programs, even if governing state laws say that the consumer is the only employer in the program. The FLSA's employment test looks at the actual program design and the relationship between the worker, consumer, and other entities that are involved in the program.

is not, push officials to include it. Even if the state has not completed its analysis of the projected costs, you should suggest that your state include at least an estimate in its Fiscal Year 2016 budget plans or a placeholder budget concept while final numbers are being developed.

Ensure that Your State Uses Medicaid⁷ to Cover Overtime and Travel Costs Without Impacting Individual Access to Services

The Centers for Medicare & Medicaid Services (CMS) has issued guidance to the states on how overtime and travel costs can be reimbursed with Medicaid federal matching dollars without impacting individual access to services. Ask your state officials if they have read and digested this guidance.⁸

Encourage your state to reach out to and work with CMS to include Medicaid reimbursement for overtime and travel costs that do not come out of individual consumer's service budgets. **It is critical that consumers are not required to pay for worker overtime and travel out of money allocated to them for purchasing services. Otherwise, consumers will lose services they are entitled to receive.**

If initial budget plans are being developed for Fiscal Year 2016, work to ensure that Medicaid assumptions are included to help defray these added costs of complying with the new DOL rule.

Advocate for Stop-Gap Measures for your State's Fiscal Year 2015 Budget

The rule's effective date is January 1, 2015,⁹ which is in the middle of most states' Fiscal Year 2015 budgets. To date, other than California, no state has added new

⁷ This document focuses on programs funded by Medicaid. Programs funded by other sources may require different strategies.

⁸ *CMCS Informational Bulletin: Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes*, <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf>.

⁹ As noted in footnote 5, we will notify stakeholders and update this document if the effective date of the rule changes.

dollars to their Fiscal Year 2015 budget to cover these added costs.¹⁰ Unfortunately, almost all states' Fiscal Year 2015 budget cycles are closed.

You should explore in your state any possible vehicle to add money for these costs even though the regular budget cycle is closed. Does your state have a reserve fund to tap? Do the relevant state agencies have any savings they could apply? When your state legislature comes into session early next year, do they have any way of doing an early appropriation to cover these costs during Fiscal Year 2015, even before the Fiscal Year 2016 budget is completed?

Work to Ensure Your State Does Not Implement Compliance Actions That Cause Harm to Consumers and Workers

Some states may be considering complying with the rule by simply prohibiting all overtime and restricting all or most travel. **You should advocate strongly to prevent your state from adopting restrictive policies like these.** While these policies might bring a state into technical compliance with the new rule, such policies could hurt both consumers and workers and may violate other federal laws, including the Americans with Disabilities Act (ADA). Moreover, they undermine the very purpose of the rule. Consumers may experience cuts in their hours as a result of these policies, particularly if they cannot find additional workers to fill their hours. Some consumers may have medical or behavioral challenges so significant they could suffer harm by having multiple workers work for them. Workers who now work more than 40 hours could experience a precipitous drop in income. In some states, workers may be family members who have chosen to forego other paid employment in order to provide care, and reduction in their income could undermine the entire family's financial security. Restricting travel could significantly narrow the field of workers that consumers have to choose from. This could compound already existing worker shortages in some states.

¹⁰ California included additional funding for implementation of this rule in its Fiscal Year 2015 budget in large part in response to advocacy efforts by disability and worker advocates. These advocates may be a good resource as you begin advocacy efforts in your state.

If states adopt new compliance rules that reduce flexibility, these rules could also undermine the new person-centered planning requirements.¹¹ Advocates should argue that when consumers are prevented from receiving services from the provider or providers of their choice, it strips the person-centered planning process of meaning.

Many states may not be willing to pay unlimited overtime or travel costs. **If your state is considering policies to set some limits on overtime or travel, you should work with them to ensure that the policies are reasonable.** Ensure your state considers not only the costs of paying for overtime and travel but also the costs of implementing restrictions. In some cases, in order to avoid violating Medicaid law and endangering the health and well-being of Medicaid participants, the state may need to recruit additional workers, set up backup worker systems, and hire additional staff to explain and enforce state restrictions. Make sure your state has closely considered these extra costs. In many cases you may be able to advocate that these additional costs would be more expensive than having more generous overtime and travel policies. Also, if your state is going to set new limits on overtime or travel, advocate that it have a “hold harmless” period following the effective date, where it will not enforce new policies to give consumers and workers time to adjust.¹²

You should also strongly advocate that your state create a policy or process that allows consumers who would be particularly harmed by any restrictive state policies to be exempted from those policies or for alternative services to be put in place for those consumers. For instance, if a state institutes a cap on the amount of overtime that a provider can work each month, consumers who would be harmed by the cap should be able to quickly apply for and receive an exemption. Such an exceptions policy is required by the ADA and the Supreme Court’s *Olmstead* decision for consumers who would be at serious risk of institutionalization due to the policies, including those who are unable to find additional workers (for example, in rural and frontier areas of many states) or who might experience harm from having multiple workers due to their specialized needs.¹³ Both the Department of Justice and CMS have urged states to have such policies to prevent harm to consumers and to fulfill a state’s *Olmstead* obligations.

¹¹ *Guidance to HHS Agencies for Implementing Principles of Section 2402(a) of the Affordable Care Act*, <http://www.acl.gov/Programs/CDAP/OIP/docs/2402-a-Guidance.pdf>.

¹² In California, the hold harmless period will be three months.

¹³ For more information, see the October 12, 2012 letter from the Department of Justice and Office of Civil Rights at the Department of Health and Human Services to Washington Governor Gregoire, available at http://www.ada.gov/olmstead/documents/ltr_gov_gregoire.pdf.

Be Aware of Program Design Options if Your State Is Considering Abandoning Consumer-Directed Care

Some states may be unwilling to be a joint employer with consumers in their consumer-directed home care program. The same may be true for managed care entities with whom some states are now contracting to manage their long-term services and supports. If this is the case, **there could be a risk that consumer-directed models will be abandoned** and consumers then sent back to traditional home care agencies, where consumers neither have a choice over who their worker is, nor when and what tasks the worker performs. This would reverse years of civil rights and service reform efforts by people with disabilities and seniors to take control of their own lives. Furthermore, this could conflict with CMS's guidance for states and managed care entities regarding consumer-directed services.¹⁴

If your state is seriously considering dismantling its consumer-directed programs altogether, you should ensure your state is aware that there are alternative models of consumer-directed care where a state or managed care entity is not a joint employer. Alternative models all have their own advantages and disadvantages that advocates should weigh carefully when considering pushing for replacement models. Alternatives include a consumer- and mission- driven model in which the agency (a subcontractor of the state or the managed care company) is the joint employer for purposes of FLSA, but the consumer is still the common law employer and can still hire and fire, schedule and set the tasks, and maintain control of the services and supports he/she needs. It also can include models where an agency is the common law employer and an FLSA joint employer, while the consumer still has significant input into and control over hiring, firing, and managing his or her workers. Some states also use "individual budget" type models where the consumer is allocated an individual budget and can hire and fire their own workers, control the scheduling and the work performed, and set the rate of pay.¹⁵

Another possible option for states is to supplement consumer-directed programs with shared living programs. While consumers should be free to choose shared

¹⁴ CMS has stated that all states should consider offering consumer direction in their managed care long term services and supports (MLTSS) programs and that states that offer consumer direction in their fee for service programs are expected to continue them in their MLTSS programs. See Centers for Medicare and Medicaid Services, *Guidance to States using 1115 Demonstrations or 1915(b) Waivers for Managed Long Term Services and Supports Programs*, May 20, 2013, available at <http://www.medicare.gov/Medicare-CHIP-Program-Information/By-Topics/Delivery-Systems/Downloads/1115-and-1915b-MLTSS-guidance.pdf>.

¹⁵ One type of "individual budget" type model is known as "Cash and Counseling."

living if a shared living program is offered that meets their individual needs and preferences, advocates should make sure their states do not force consumers into this model by eliminating consumer-directed options.¹⁶

Advocate for Continued State Engagement Even in Programs Where There Is No Joint Employer

After your state has completed its joint employment analysis, some states may conclude that there is no joint employer in their consumer-directed programs. These programs will likely follow closely an individual budget model where consumers are given an individual budget and control every aspect or nearly every aspect of the employer role. Some states may expect that if there is no joint employer, there is nothing more the state needs to do in implementing the new rule. **Advocates should work with their state to develop education and assistance materials for consumers who are sole employers.** Are there individual consumers in the state who are using more than 40 hours per week of personal care services? Of those consumers, are any eligible for the companionship or live-in exemptions? If so, how will consumers be trained to use the exemption properly? If not, how will consumers be informed of their new obligation to pay overtime and other details of wage calculation under the rule, such as sleep time and wait time? Advocates should push states to ensure that the effects of the rule on programs that do not have joint employment are not forgotten in the focus on implementation of the rule for programs with joint employment.

Action Steps

People with disabilities and seniors have fought too long and hard for service models that give them control of their own lives. Given the brief period of time left before these rules and regulations go into effect, not a moment can be wasted. The new home care rule can be implemented in ways that help consumers and workers, but only if people with disabilities and those who advocate on their behalf act now.

¹⁶ For more information on shared living programs and the home care rule, see the DOL's guidance available at http://www.dol.gov/whd/homecare/shared_living.htm.

LINKS TO HELPFUL GUIDANCE ON THE HOME CARE RULE

- **US Department of Labor home care website**
<http://www.dol.gov/whd/homecare/>
- **US Department of Labor's joint employment guidance**
http://www.dol.gov/whd/homecare/joint_employment.htm
- **Center for Medicare & Medicaid Services Guidance**
<http://www.medicare.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf>
- **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>

ADVOCACY CONTACTS FOR MORE INFORMATION AND ASSISTANCE

- **American Association of People with Disabilities**
Eva LaManna: elamanna@aapd.com
- **Bazelon Center for Mental Health Law**
Alison Barkoff: alisonb@bazelon.org
- **National Centers for Independent Living**
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- **National Disability Rights Network**
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