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

How to Prevent Service Cuts and Protect Consumer-Directed Programs

Introduction

The U.S. Department of Labor (DOL) issued a regulation in late 2013 governing home care services for people with disabilities and seniors. After extensive litigation, an appeals court in Washington, DC, upheld the rule on August 21, 2015. This means it will go into effect soon, and may impact some of your state's long-term care programs. Of particular concern are "consumer-directed" programs which allow the person receiving services to hire his/her own worker (oftentimes family members or close friends) and direct the care the worker provides.[1] The rule may also impact shared living programs – where the consumer and provider live together.

Consumers and advocates must be knowledgeable about this rule and **advocate to ensure your state implements it in a way that helps consumers and the important workers who provide services to them and does not cause unintended harms**, such as service cuts, the dismantling of programs that allow

[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, they key feature of consumer-directed programs is that the consumer has the ability to hire, fire, and direct the care the worker provides.

consumers to control their own care, or other actions that would negatively impact the home care workforce so critical to consumers.

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

- 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 both the companionship and live-in exemptions if there is a "third-party employer" of the worker, meaning any employer other than the consumer or his/her family or household.[3]

Additional DOL guidance says that in most (but not all) consumer-directed home care programs, a third party will be a joint employer with the consumer; therefore, those programs will no longer be exempt from FLSA.[4] As a result, the new rule will likely have a significant impact on most states' consumer-directed home care programs. Shared living programs may be impacted if there is a third party employer, if the worker no longer qualifies as a companion, or by the clarified sleep-time rules.[5]

States and other joint employers in home care programs must 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 its goals by hurting both consumers and workers, such as prohibiting all overtime, limiting hours, and restricting travel. These actions could lead to service cuts for consumers and income limitations for this critical workforce. **As consumers and disability and aging advocates, you must take immediate action to make sure your state is ready to implement this new rule in a way**

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[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.pdf.

[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] U.S. Dep't of Labor, *We Count on Home Care: Joint Employment*, http://www.dol.gov/whd/homecare/joint_employment.htm (last visited Sept. 4, 2015). 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] U.S. Dep't of Labor, *We Count on Home Care: Medicaid Shared Living Programs*, http://www.dol.gov/whd/homecare/shared_living.htm (last visited Sept. 4, 2015).

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 and Shared Living 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 of whether the state and/or any other entities, like Managed Care Organizations (MCOs) or Financial Management Service organizations/Fiscal Intermediaries (FMS/FIs), are joint employers in any of its consumer-directed programs, and whether there are any third-party or joint employers in its shared living programs.[6] DOL's Wage and Hour Division 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 concludes that it and/or any of its partners or subcontractors (such as MCOs or FMS/FIs) are joint employers in its consumer-directed programs, 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 historically have not collected data on worker hours, and virtually no state tracks travel time. Urge your state to develop a methodology to track, or at least estimate, overtime and travel time and investigate the resources 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.

States also will need to examine the structure of their shared living programs (including roommate situations, adult foster care/host homes, and life-sharing arrangements) to determine if there are any third-party or joint employers, and to ensure compliance with rules around sleep time and what is considered "hours

[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. FLSA's employment test looks at the actual program design and the relationship among the worker, the consumer, and other entities involved in the program.

worked." Again, states will need to estimate any new costs associated with compliance with the new rules.

Once your state completes an analysis of overtime hours, travel and other 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 impose restrictive policies – either directly or indirectly through inadequate rates to MCOs or FMS/FIs -- 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 2017.

Right now, many state agencies are preparing their initial requests for the Fiscal Year 2017 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 2017 budget.** You should ask your state whether it has included anything in its Fiscal Year 2017 budget on the wages, overtime and travel costs outlined above, and if it has not, push officials to include it. In programs where an entity other than the state (such as an MCO or FMS/FI) is the joint employer, you should advocate that the state budget for increases in reimbursement rates to allow for the payment of overtime and travel time. 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 2017 budget plans or a placeholder budget concept while it develops final numbers.

Ensure that Your State Uses Medicaid[7] 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 Medicaid federal matching dollars can be used to pay for overtime and travel costs without impacting individual access to services. This guidance includes strategies in which an entity other than the state, such as an MCO or

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

FMS/FI, is the joint employer. Ask your state officials if they have reviewed this guidance.[8] CMS has offered to provide technical assistance to states.

Encourage your state to 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.**

As agencies develop initial budget plans for Fiscal Year 2017, work to ensure that Medicaid assumptions help defray the added costs of complying with the new DOL rule.

Advocate for Stop-Gap Measures for your State's Fiscal Year 2016 Budget.

Now that the appeals court has upheld the rule, the DOL may begin enforcing it as early as mid-November 2015,[9] which falls in the middle of most states' Fiscal Year 2016 budget cycle. To date, only a few states have added new dollars to their Fiscal Year 2016 budget to cover these added costs.[10] Unfortunately, almost all states' Fiscal Year 2016 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, can it do an early appropriation to cover these costs during Fiscal Year 2016, even before the Fiscal Year 2017 budget is complete?

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[8] U.S. Dep't of Health and Human Services, Center for Medicaid and CHIP Services, *CMCS Informational Bulletin: Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes* (July 3, 2014), http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf (last visited Sept. 8, 2015).

[9] Dep't of Labor, *We Count on Home Care*, http://www.dol.gov/whd/homecare/litigation.htm (last visited Sept. 4, 2015). Although DOL will not begin enforcement against states until mid-November, private entities (such as private agencies, MCOs, and FMS/FIs) can be sued by private plaintiffs and held liable for back wages as soon as the rule becomes effective.

[10] As of September 2015, these states include California, New York, and Oregon. Advocates in these states, however, must continue to advocate for ongoing funds for Fiscal Year 2017.

Ensure that Your State Does Not Take Compliance Actions That Harm Consumers and Workers.

Some states may consider complying with the rule by simply prohibiting all overtime and restricting all or most travel. Other states, particularly those where another entity (such as an MCO or FMS/FI) is the joint employer, may consider complying by taking no action. Taking no action will likely translate to MCOs or FMS/FIs having to restrict travel and overtime. **You should advocate strongly to prevent the adoption of restrictive policies like these.** Although these policies might bring a state into technical compliance with the new rule, such policies could hurt consumers and workers and may violate other federal laws, including the Americans with Disabilities Act (ADA) and Medicaid law. Moreover, they undermine the very purpose of the rule.

The Americans with Disabilities Act

In *Olmstead v. L.C.*, the Supreme Court held that unnecessary segregation of individuals with disabilities violates the ADA. To avoid discrimination, states must provide services in the most integrated setting appropriate to an individual's needs – typically a person's own home or other community-based setting. States need to be aware of the ADA's "integration mandate" if they are considering compliance actions that will lead consumers to experience cuts in the number of service hours their home-care workers can provide. For some individuals, cuts in service hours may make it very difficult to remain in the community and avoid institutionalization, particularly if they cannot find additional workers to fill their hours. Moreover, some consumers may have medical or behavioral challenges so significant that they could experience negative health outcomes from having multiple workers provide services to them.

The federal government has emphasized that the ADA requires states to create an exceptions policy for consumers who face a serious risk of institutionalization as a result of states' policies implementing the home care rule.[11] **You should strongly advocate that your state create a policy or process that allows consumers who**

[11] *See* Letter from U.S. Sec'y of Labor to State Governors (Sept. 2, 2015) at 1, http://www.dol.gov/whd/homecare/letter-to-governors-sept.pdf (last visited Sept. 4, 2015); "Dear Colleague" Letter from U.S. Dep't of Justice and U.S. Dep't of Health and Human Services (Dec. 15, 2014) ("DOJ/HHS Dear Colleague Letter") at 3, http://www.hhs.gov/ocr/civilrights/resources/specialtopics/community/2014hhsdojdearcolleagueletter.pdf (last visited Sept. 4, 2015). *See also* Letter from the Department of Justice and Office of Civil Rights at the Department of Health and Human Services to Washington Governor Gregoire (Oct. 12, 2012) (advising that across-the-board cuts to personal care services could violate the ADA without an exemptions process to protect individuals from serious risk of institutionalization), http://www.ada.gov/olmstead/documents/ltr_gov_gregoire.docx (last visited Sept. 8, 2015).

would be particularly harmed by restrictive state policies to seek an exemption from those policies or for alternative services to be put in place for those consumers. For example, if a state institutes a cap on the amount of overtime a provider can work each month, consumers whom the cap would harm should be able to quickly apply for and receive an exemption.

In addition, states remain ultimately responsible for ensuring that consumers do not face a risk of unnecessary institutionalization even where states themselves are not joint employers, but their contracted MCOs or FMS/FIs *are* joint employers.[12] Thus, states must increase their capitated rates for MCOs and reimbursement rates to FMS/FIs so they can have travel and overtime policies that avoid placing people at serious risk of institutionalization.

Policies that risk *Olmstead* violations may also negatively impact the pool of skilled workers who provide home care services. Workers who now work more than 40 hours a week could experience a precipitous drop in income if states prohibit them from working overtime. Sometimes, workers are the consumer's family members who have chosen to forego other paid employment to provide care to their loved one; reducing their income could undermine the entire family's financial security. And restricting workers' travel time could significantly narrow the field of workers from which consumers can choose. This could compound worker shortages in some states.

Medicaid Law

Rigid state compliance actions could also undermine the new person-centered planning requirements issued pursuant to the Affordable Care Act.[13] Advocates should point out 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 simply may not be willing to pay unlimited overtime or travel costs. **If your state is considering limits on overtime or travel, you should work with policymakers to ensure that those limits are reasonable.** Ensure that your state considers not only the costs of paying for overtime and travel, but also the costs of implementing such restrictions. To avoid violating Medicaid law and endangering the health and well-being of Medicaid participants, the state may need to recruit

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[12] DOJ/HHS Dear Colleague Letter, footnote 11, at 3 ("A state's obligation to make reasonable modifications to its policies, procedures, and practices applies even when a home care program is delivered through non-public entities.")

[13] U.S. Dep't of Health and Human Services, Administration for Community Living, *Guidance to HHS Agencies for Implementing Principles of Section 2402(a) of the Affordable Care Act* (June 6, 2014), http://www.acl.gov/Programs/CIP/OCASD/docs/2402-a-Guidance.pdf (last visited Sept. 8, 2015).

additional workers, develop backup worker systems, and hire additional staff to explain and enforce state restrictions. Make sure your state has closely considered these extra costs. 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 plans to set new limits on overtime or travel, advocate that it have a "hold harmless" period, during which the state will not enforce new policies. Such a period will give consumers and workers time to adjust to the new legal landscape.

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

Some states that are joint employers with consumers in their consumer-directed home care programs may consider trying to comply with the new rules by dismantling their consumer-directed programs altogether and sending consumers back to traditional agency care. **You should fight to ensure that your state does not abandon consumer-direction.** This would reverse years of civil-rights and service-reform victories by people with disabilities and seniors to have more control over their lives and could conflict with CMS's guidance for states and managed care entities regarding consumer-directed services.[14]

First, make sure your state is aware that simply declaring that it is no longer a joint employer or making limited changes to the program design will not relieve the state of its responsibilities as a joint employer; joint employment is determined by the "economic realities test," which examines the actual level of control an entity has over the worker. Even if the state makes significant program changes such that only a private agency is a joint employer, the state still has legal obligations, including under the ADA and *Olmstead*, to ensure that private agencies have sufficient funding to comply with the rule in a way that does not place consumers at serious risk of institutionalization.

Second, if your state is seriously considering dismantling its consumer-directed programs altogether, you should ensure your state is aware that there is a range of models for consumer-direction, including some where an entity other than the state is the employer(s). Alternatives include a consumer- and mission-driven model in

[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), http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Downloads/1115-and-1915b-MLTSS-guidance.pdf (last visited Sept. 8, 2015).

which the agency (a subcontractor of the state or the managed care company) is the joint employer for purposes of FLSA, but the consumer remains 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" models in which 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] Alternative models have their own advantages and disadvantages – including the level of consumer control and flexibility, the responsibilities that are placed on consumers, and the protections afforded to workers – that need to be weighed carefully.

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

Some states may conclude, based on the "economic realities test," that there is no joint employer in their consumer-directed programs, meaning the consumer or household is the only employer. These programs will likely follow closely an individual budget model in which 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 DOL 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

[15] One type of "individual budget" model is "Cash and Counseling."
[16] For more information on shared living programs and the home care rule, *see* Dep't of Labor, *We Count on Home Care: Medicaid Shared Living Programs*, http://www.dol.gov/whd/homecare/shared_living.htm (last visited Sept. 8, 2015). For more information on consumer-directed care models, visit The National Resource Center for Participant-Directed Services, at http://www.bc.edu/schools/gssw/nrcpds/tools/flsahomecaretoolkit.html (last visited Sept. 15, 2015).

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.

Action Steps

People with disabilities and seniors have fought long and hard for service models that give them control of their own lives. Given the brief period of time left before the DOL home care rule goes into effect, not a moment can be wasted. States can implement the rule in ways that help consumers and workers, but only if people with disabilities, seniors and advocates act now.

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.medicaid.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

- **National Employment Law Project website**
  http://www.nelp.org/campaign/implementing-home-care-reforms/

- **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**
  Lisa Ekman: lekman@aapd.com

- **Association of University Centers on Disabilities**
  Kim Musheno: kmusheno@aucd.org

- **Bazelon Center for Mental Health Law**
  Alison Barkoff: alisonb@bazelon.org

- **Justice in Aging**
  Jennifer Goldberg: jgoldberg@justiceinaging.org

- **National Association of Councils on Developmental Disabilities**
  Cindy Smith: CSmith@nacdd.org

- **National Council on Independent Living**
  Kelly Buckland: kelly@ncil.org

- **National Disability Rights Network**
  Elizabeth Priaulx: elizabeth.priaulx@ndrn.org