DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF DIRECTOR

ACTION REFERRAL

TO	DATE
Day	8-22-14

DIRECTOR'S USE ONLY	ACTION REQUESTED
1. LOG NUMBER 000051	[ ] Prepare reply for the Director's signature DATE DUE ______
2. DATE SIGNED BY DIRECTOR ______	[ ] Prepare reply for appropriate signature DATE DUE ______
CC: Mr. Keck, Kost, Deps, CMS file	[ ] FOIA DATE DUE ______
	[X] Necessary Action

APPROVALS (Only when prepared for director's signature)	APPROVE	* DISAPPROVE (Note reason for disapproval and return to preparer.)	COMMENT
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DEPARTMENT OF HEALTH & HUMAN SERVICES
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CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICAID & CHIP SERVICES

CMCS Informational Bulletin

DATE: July 3, 2014

FROM: Cindy Mann, Director
Center for Medicaid and CHIP Services

SUBJECT: Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes

This informational bulletin is intended to assist states in understanding Medicaid reimbursement options that will enable them to account for the cost of overtime and travel time that may be compensable as the result of the changes to the Department of Labor's regulations regarding domestic service employment under the Fair Labor Standards Act (FLSA).

In the Final Rule, Application of the Fair Labor Standards Act to Domestic Service, 78 FR 60454 (Oct. 1, 2013), the Department of Labor (DOL) revised its 1975 regulations pertaining to the FLSA's companionship services exemption from minimum wage and overtime, and the live-in domestic service worker exemption from overtime. These regulatory revisions, which will become effective on January 1, 2015, have implications for Medicaid home and community-based programs, including the fact that they may contribute toward a more stable personal care workforce. Notably, DOL modified the "third party employment" regulation, 29 C.F.R. 552.109, to prohibit employers, other than the individuals receiving services or their families or households, from claiming the companionship services exemption from minimum wage and overtime or the live-in domestic service employee exemption from overtime (78 FR 60480-85). [1]

The Medicaid program provides states with the ability to offer individuals receiving home and community based services the choice to direct their own services through several options under the State Medicaid Plan and waivers found at http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Self-Directed-Services.html. These models represent an important option for individuals and have helped Medicaid long term services and supports (LTSS) programs better meet the needs and preferences of individuals served. Based on the law described in new DOL guidance, referenced below, it is anticipated that many states will determine that, for purposes of the FLSA, home care workers in self-direction programs have joint third party employer(s) in addition to being employed by the beneficiary. In self-direction models where there is a third party joint employer, the DOL regulation states that all work is subject to minimum wage and overtime requirements.

[1] Descriptions of these FLSA domestic service employment exemptions can be found at: http://www.dol.gov/whd/homecare/factsheets.htm

Potential Options When the State Sets the Rates and Authorizes the Number of Hours or Other Units an Individual Receives

The following are examples of reimbursement approaches a state Medicaid program could use when the state sets the rates and authorizes the number of hours or other units of service a beneficiary can receive. They are based on use of an hourly or other unit reimbursement rate rather than an overall service budget controlled by the beneficiary.

Option 1. The FMS or other designated entity, through an employment agreement, receives a unit service rate, which includes reimbursement developed to reflect both the FMS activities and the workers' pay (including overtime and travel compensation). This would be a flat unit rate across all beneficiaries.

Considerations:

a. Would be consistent with other community based unit payment methods.
b. The FMS may restrict some beneficiary preference for workers, where the FMS would be at risk for high overtime costs.

Option 2. The state develops tiered payment rates or modifiers to a base rate, which may include multiple factors such as: incremental compensable overtime, distance from town or county center, acuity factors, and provider availability (to account for overtime and travel if needed). A state may choose to implement this as modifiers to procedure codes. This is essentially risk adjustment to Option 1, above, to account for individuals where factors that would increase cost are present.

Considerations:

a. States may already have such systems in place for shift differentials or other added cost.
b. May be administratively complex to monitor appropriate use of modifiers and to control costs to valid use. The state will need to develop documentation standards to properly account for the additional payments.
c. May be administratively complex to determine which individuals qualify for each separate modifier, who can authorize each modifier, and develop and monitor these processes.

Payment When the Individual is the Sole Employer

When a beneficiary is considered a sole employer under the economic realities test as described in the DOL AI, s/he may have new obligations to pay minimum wage and/or overtime compensation due to the new rule's narrowed definition of "companionship services."[7] If the services provided by the worker do not meet this new definition, the DOL guidance clarifies that the beneficiary must now pay minimum wage and overtime compensation for all hours worked,

[7] Descriptions of FLSA domestic service employment exemptions can be found at: http://www.dol.gov/whd/homecare/factsheets.htm.

Potential Reimbursement Options When Self Direction Programs Involve Direct Service Workers who Provide Services to More than one Individual per Week

The following two options are examples of approaches states may use in self-direction programs where there is a third party joint employer and an individual beneficiary controls a service budget. We note some benefits and deficits of each option that states might consider in deciding how to approach reimbursement design:

Option 1. The state designs a new reimbursement option under which a financial management services agency would submit claims for each self-directed consumer to the Medicaid agency that includes: 1) the actual service costs incurred from each individual (to be deducted from his/her authorized self-directed budget, which could include, if authorized, overtime costs incurred just for that individual beneficiary); and 2) a per member/per month service fee negotiated with the state to cover expected overtime and travel costs across the FMS' book of business.

Considerations:

a. Individuals would still be able to control a budget for individually controllable costs and the rate development would be similar to that of agency-based care.
b. In order to keep actual costs of overtime and compensable travel time at or below the per member/per month fee, the FMS may have an incentive to restrict some individuals' preference for workers.
c. This will also necessitate the ability to create PMPM rate setting that will be new to implement and review.

Option 2. The state/program operating agency/FMS allocates the actual compensable overtime and travel costs that workers accrue across all of the beneficiaries that received Medicaid reimbursable services from the third party employer.[6] Medicaid would reimburse actual overtime and travel costs as a cost of providing service, divided amongst beneficiaries, but the costs would not be deducted from individual self-directed budgets. Under Medicaid, as noted above, the compensable travel and/or overtime costs cannot be billed as an administrative cost. Therefore, the payments for shared overtime and travel will be factored into service cost across all beneficiaries. The overtime and travel time becomes a FFS reimbursement from Medicaid to the operating agency.

Considerations:

a. A formula-based system may be easier than attempting to more discretely allocate shared costs to specific individuals who share a worker.
b. As a fee for service reimbursement from the Medicaid program to the agency, budgeting for the program would be less predictable.

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[6] When a third party employer (such as a state or operating agency) has multiple entities who process payroll, the employer will need to have a mechanism to track whether employees are receiving pay from more than one entity and thus possibly should be paid overtime and/or compensable travel between beneficiaries.