

Guidance on FLSA Implementation in Medicaid Programs

Disabled and Elderly Health Program Group
Center for Medicaid and CHIP Services



Definitions

- Fair Labor Standards Act (FLSA)
 - Legislation providing legal rights and protections to many workers nationally including rights around minimum wage, overtime, and travel compensation. The regulation underwent changes that will be effective on January 1, 2015. The DOL recently announced a non-enforcement period of up to a year.
- Companionship and Live-In Worker Exemptions
 - Services that meet a companionship definition are exempt from overtime and minimum wage, and live-in workers are exempt from overtime pay. These exemptions will not apply when there is a third party employer other than the individual or direct family/household

FLSA Impact Areas on Medicaid

- There is a more stringent definition of Companionship Services – has an effect on many agency-based and self-directed services
- Companionship and live-in exemptions can no longer be used when there is a third party employer – has an effect on many programs considered by Medicaid to be self-directed
- Travel time between work sites counts as work time under a third party employer
- States may need to develop plans to address this change and to preserve the ability of individuals to self-direct services and receive the services identified in their person-centered plan

Third Party Employers

- DOL guidance on determining if workers have a third party employer in [Administrator's Interpretation No. 2014-2](#)
- Test of employment relationship is based on the economics reality test, which examines a number of factors regarding the employment relationship”
- States and other potential joint employers should review DOL guidance and consult legal counsel

FLSA and Medicaid Self-Direction Program for States

- Need to ensure compliance with FLSA
- May incorporate the provisions for overtime and travel into their program structures & policies when needed.
- May also implement policies to limit the use of overtime and/or to minimize compensable travel time
- If implementing limitations on overtime or the use of compensable travel time, **must** protect individuals' access to the services and supports authorized in their person-centered plans

State Medicaid Obligations

- Assure that individuals are able to receive all services identified in their person-centered plan
- Know what the impact may be on home health agencies as well as self-directed programs – are there new costs for overtime?
- Consider program policies and processes to assure smooth continuation of needed supports

Program Issues

- Two major cost issues facing 3rd party employer
 - Cumulative hours of OT not attributable to any one beneficiary
 - Travel time between beneficiaries
- Cannot be considered Medicaid administrative costs
- Must be allocated only as reasonable costs of delivering covered Medicaid services
- Overtime and travel costs beyond an individual's control should not be deducted from the self-directed budget

Potential Reimbursement Option One – Individual Budgets

- Situation: 3rd party employer & individual beneficiary are both employers
- Financial management services agency submits claims for each self-directed consumer including:
 - Actual individually controlled Service Costs- deducted from self-directed budget
 - A per member/ per month (PMPM) service fee to cover expected overtime and travel costs, but is not deducted from the individual budget
 - This amount may be a projected average over time – risk negotiated

Potential Reimbursement Option One – Individual Budgets

- Individuals continue to control their self-directed budget
- Rate development of the shared overtime/travel component similar to agency-based service rates that include this component
- This may incent the FMS to restrict some individuals' preferences for workers in order to keep costs within fees
- May use PMPM methodology

Potential Reimbursement Option Two – Individual Budgets

- Allocate accrued compensable overtime and travel costs across all the beneficiaries – actual costs of these elements are reimbursed
- These costs are not deducted from individual self-directed budgets and not billed as an administrative cost
- This system may be easier than discretely allocating costs to specific individuals sharing a worker
- Budgeting for the program is less predictable for the state with this actual cost reimbursement

State Sets Rates and Hours: Option One

- FMS or other entity receives a unit service rate that includes FMS activities and workers' pay with overtime and travel compensation
 - Rate components must be transparent
- A flat unit rate across all beneficiaries
- Consistent with home health agency unit payment methodology
- FMS may restrict some beneficiary preference for workers where they will be at risk for costs exceeding reimbursement

State Sets Rates and Hours: Option Two.

- State develops tiered payment rates or modifiers to a base rate based on factors such as regional worker availability or travel distance to home.
- May implement this as modifiers to procedure codes
- States may already have similar systems in place for shift differentials, etc.
- May be administratively complex to monitor modifiers and control costs. Calls for documentation standards to account for additional payments

Payment When the Individual is Sole Employer

- A beneficiary may have obligations to pay minimum wage and/or overtime compensation if the services do not meet the companionship definition or the worker is not a live-in employee
- Cost considerations for overtime must meet state program rules and should be factored into the individual's self-directed budget when individually controlled

Payment When the Individual is Sole Employer

- States currently have different overtime policies
- If a worker earns overtime working for just one person, that cost can be allocated to that person and be considered part of the consumer-directed budget.
- Commuting time (travel time from home to work site and back home) is not required to be paid

Questions?

- CMS is offering technical assistance to states in regard to FLSA issues
- Consult DOL's guidance and seek legal counsel in determining the effects of FLSA on direct care programs at the state level under Medicaid

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