

Secretary Tom Perez
U.S. Department of Labor
Frances Perkins Building
200 Constitution Ave, NW
Washington, DC 20210

RE: U.S. Wage and Hour Division
Administrative Interpretation 2014-1
Administrative Interpretation 2014-2

Dear Secretary Perez:

I am writing to describe the adverse effects that the new Department of Labor rule for direct service workers will have on individuals in Kansas who receive in-home services, on the providers of those services, and on the state's current system for delivering the services. The rule to which this letter refers is: Application of the Fair Labor Standards Act to Domestic Service, Federal Register Volume 78, Number 190, scheduled to take effect January 1, 2015.

The State of Kansas requests that you address these concerns before the new rule is imposed, and that the effective date of the new rule be delayed until states can devise a workable solution to the impediments to home-based services that the new rule imposes.

The new rule will affect about 10,722 individuals, or 41 percent of the Medicaid participants in Kansas who receive personal attendant care in their homes. These are individuals with intellectual and developmental disabilities, people with physical disabilities and the frail elderly, all of whom can currently continue to live in their homes and home communities with these services. We believe a majority of these individuals will be negatively impacted by the new rule.

Here are our concerns:

- Implementation of the new DOL rule, in its current form, could force many Kansas Medicaid waiver program participants into institutional settings, which are both more restrictive and more costly to the state and to the federal Medicaid program. This will undo a decade's worth of efforts to maintain disabled individuals in the least restrictive environment necessary to meet their needs.
- Fewer of these consumers will be able to self-direct their own care because of the administrative complications that arise from the rule.

- The new rule will create workforce shortages in rural areas.
- Gaps in service will result, placing those in need of home-based care at additional risk.
- The new rule will reduce the earning potential of direct service workers.
- Current direct service workers will have an incentive to leave the field because the immediate effect of the new rule will be to limit the number of hours they are allowed to work, and hence the amount of money they are allowed to earn.
- The new rule will force consumers to use multiple direct service workers, which we think will have a disruptive impact on consumers and their families.
- Individuals who previously only had one or two workers to provide authorized services on their individualized service plan of care may now require several workers to meet their needs.
- Family members will find it difficult to maintain outside employment because they could have to fill the gaps in care that occur when service workers' hours are restricted.
- Sleep-cycle support for 1,400 consumers could be reduced or eliminated.
- Sleep cycle support is an extremely cost-effective service provided in all the KanCare waiver programs. Without this service, more consumers would be forced into institutions.
- If the waiver program costs increase, the state would be hampered in its efforts to reduce the waiting lists for these services.

Although webinars that have been provided by DOL offered insight into the interpretations and the hypothetical examples were helpful to the state, there are still questions as to how the interpretations will or will not apply to the particular service delivery model that Kansas has worked to develop over decades. In order to assist us to comply with the new rule and its interpretations, the State of Kansas requests that technical assistance be provided to:

- Determine how the interpretations apply to the Kansas model of service delivery
- Explore and identify possible exemptions as they relate to the home care service provider industry
- Identify steps that can be taken to effectively implement required changes in a manner that is the least disruptive to our vulnerable consumers.

To assist in the understanding of the Kansas model of service delivery, the following background and details are provided:

The Kansas Department for Aging and Disability Services (KDADS) operates seven HCBS programs under the authority of the Social Security Act section 1915(c). These programs serve more than 25,000 Kansans who are aging and/or disabled and many of these individuals rely upon the services of direct service workers (DSW), known also as personal care attendants (PCAs). PCAs assist individuals in completing critical activities for daily living or provide overnight sleep cycle support. Kansas provides these critical Medicaid services through the state's managed care system, KanCare. Under KanCare, the State of Kansas contracts with three health plans, or managed care organizations (MCOs), to coordinate integrated health care for nearly all Medicaid beneficiaries. The MCOs are responsible for reimbursement of providers and to pay for waiver services as they are billed.

When consumers begin receiving Medicaid services, they choose one of two options for personal attendant services:

- 1) Agency-directed services, in which a provider agency will be responsible for the management of the individual's care and caregivers; or
- 2) Self-directed services, in which the individual can "self-direct" their care and hire their own caregiver.

Kansas would agree that under the agency-directed option, providers should adhere to the DOL regulation related to wage-and-hour and overtime requirements for direct service workers. Their employer is the agency, and they perform their work at the agency's direction.

However, Kansas is seeking an exemption or delay for those who choose the self-directed option because the consumer is the employer, and the direct service worker performs his or her tasks at the direction of the individual consumer (or his or her representative). Within this self-directed model and Kansas state law (K.S.A. 39-7,100), consumers have the right to "make decisions about, direct the provisions of, and control the attendant care services by such individuals including, but not limited to selecting, training, managing, paying and dismissing of a direct support worker." The consumers or their representatives have decision-making authority over their support and services and take direct responsibility to manage these services with the assistance of support agencies. A contracted Financial Management Service (FMS) provider is included in these supports.

Consumers who choose to self-direct can select from one of more than three dozen qualified FMS providers for administrative, payroll and clerical support. The FMS provider is listed on the individualized service plan of care, and the administrative functions of the FMS provider are reimbursed by the MCO as a waiver service.

Kansas Model under Managed Care (KanCare)

KDADS

1. Sets the range of pay for DSWs.
2. Sets limited minimum qualifications for a DSW (Minimum age, CPR training, background checks, etc.).

MCO

1. Determines the method of payment.
2. Reimburses providers

FMS

1. Handles payroll duties and processes timesheets.
2. Maintains employment records.
3. Assists with clerical and administrative duties

Client

1. Hires and fires DSW.
2. Trains DSW.
3. Directs care to be provided by DSW.

Under self-direction in Kansas, the policy states that "the consumer must exercise responsibility for making choices about attendant care services, understand the impact of the choices made and

assume responsibility for the results of their choices. By choosing self-direction, the consumer assumes the responsibility of hiring, training, monitoring and terminating their personal care attendants.” The specific functions that must be performed by the consumer (or the consumer’s representative) include:

1. Recruiting personal care attendants (PCAs) and back-up PCAs;
2. Collecting information to develop an employee file including information for a criminal background check;
3. Selecting PCAs, assigning hours within the limits of the service authorization, and referring them for payroll registration;
4. Maintaining continuous PCA coverage in accordance with the authorization for service for vacation, sick leave or other absences of the attendant;
5. Dismissing the attendant when necessary and notifying the provider/payroll agent of the termination;
6. Providing each PCA with orientation sessions and training on the general duties of a PCA and the specific tasks and procedures to be performed. The training that PCAs undergo will not qualify them to serve any other consumer;
7. Transmitting information to the PCA(s) in regard to pay, time and leave schedules, and time sheets;

FMS providers assist consumers in submitting background checks, obtaining information about the program, locating other PCAs, and completing and submitting timesheets to the Managed Care Organizations. The MCO pays the FMS provider a monthly fee for carrying out these administrative duties, and the FMS submits the workers’ timesheets to the MCO that pays the consumer’s employee.

The recent interpretations of the new rule have led Kansas to assume that the state oversight agency, and/or the MCO, and/or the FMS provider would be considered joint-employers along with the consumer. Under this scenario, a personal care attendant working for one or more consumers and working more than 40 hours per week would be eligible for overtime benefits.

Kansas is confused by the apparent conflict with the determining factors other federal agencies use in identifying an employer. The Internal Revenue Service uses the common law employer factors for determining who the employer of a direct support worker will be. While multiple factors are generally applied, the IRS simplifies it by stating that “under common law rules, anyone who performs services for you is generally your employee if you have the right to control what will be done and how it will be done . . . the substance of the relationship, not the label, governs the worker’s status.” The State of Kansas focuses on the nature of the relationship, not on the structure or funding of a program, to govern the worker’s status as an employee of the consumer.

Under current law, in-home workers (often referred to as direct service workers, personal attendants, or personal care workers) who provide services to self-directing Medicaid waiver consumers are exempt from minimum wage and overtime compensation rules. The exemptions as they apply to Medicaid waivers are referred to as the “Companion Rule” and the “Live-In Domestic Services Rule”.

If Kansas understands the new rule correctly, it would appear the interpretations that will go into effect January 1, 2015 will nullify the companionship rule and live-in domestic services rule for personal care workers/direct service workers in Kansas due to the potential "joint-employer" relationship between the State, MCO, FMS and the consumer.

The impact of this would have the opposite effect of the intent of providing "an allowance for certain care services in order to support consumers in living independently in their homes." The rule, while intended to improve the lives of some, will have a harmful impact on those who are aging, disabled, and poor.

Therefore, Kansas requests that DOL exempt the state's self-directed HCBS consumers from the requirements of the new rule.

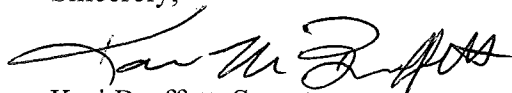
Details in the Kansas model of service delivery support the accuracy of the assumptions documented in this letter, and if no exemptions can be identified, the following is being sought:

1. Kansas requests that DOL provide information to clarify the employer/joint employer relationship as it applies to the Kansas model and, if the DOL determines a joint employer relationship is present in the Kansas Model, provide a resolution to the apparent conflict between the DOL and IRS interpretations as they relate to determining the responsible employer.
2. Kansas requests guidance is to assist Kansas in the development and documentation of procedures necessary in identifying who is responsible for tracking and reporting the total hours worked for each consumer and which consumer is responsible for payment of overtime.
3. Kansas also requests guidance in devising a method in which the costs can be documented in order to meet Medicaid match requirements.
4. Kansas requests that consideration be given for granting a delay necessary for Kansas to effect an orderly transition to meet the requirements of the administrative interpretations of the new rule and the law.

We want to avoid the great deal of harm these new rules will do to Kansas consumers who receive home health services.

Thank you for your consideration and guidance.

Sincerely,



Kari Bruffett, Secretary
Kansas Department for Aging and Disability Services

CC: U.S. Senator Pat Roberts
U.S. Senator Jerry Moran
U. S. Representative Lynn Jenkins
U.S. Representative Tim Huelskamp
U.S. Representative Mike Pompeo
U.S. Representative Kevin Yoder
Kansas Americans with Disability Act Coordinator Anthony Fadale