

State Implementation of Department of Labor Home Care Rule

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Overview

- Background
 - Fair Labor Standards Act (FLSA) and Department of Labor (DOL) “home care rule”
 - Review challenges specifically with respect to Medicaid and other state-funded “self-directed” services.
 - Scope of this project:
 - National Key Informant Interviews
 - Environmental Scan
 - State Case Studies

Background - FLSA and Home Care Rule

- 1974 - Congress extended protections of FLSA to “domestic service” workers but:
 - Exempted from minimum wage and overtime provisions those who provide “companionship services” to seniors and individuals with disabilities
 - Exempted from overtime protections domestic service employees who reside in the household in which they provide services (“live-in” exemption)
- 2013 - DOL Final Rule:
 - Revised definition of “companionship services” to narrow the duties that fall within the term
 - Third-party employers (that is, employers other than care recipients or their families/households, e.g. home care agencies) cannot claim either the companionship or live-in exemption.
 - Entities that, for purposes of the FLSA, jointly employ workers through public programs in which the consumer/participant is an employer are considered third-party employers and are referred to as joint employers.
 - Whether or not there is a joint employer is determined by a multi-factorial “economic realities test;” where there is uncertainty or disagreement a definitive resolution could come from a court ruling.
- Effective January 1, 2015
- Extensive technical assistance from DOL
- Time-limited non-enforcement policy

Definition of Self-Directed Services

- Self-directed aide services offer an alternative to home care agency delivered services. Self-directing participants have more choice and control.
 - Instead of having agency-assigned aides, they recruit and supervise individual aides of their choosing.
 - These may (and often are) family members, including ones they live with. If they are dissatisfied with their aides, they may dismiss and replace them at will.
 - Whereas agencies may make an effort to honor clients' scheduling preferences and desire for continuity of care (the same regularly scheduled aide); agencies often require minimum 2 or 4 hour visits and they reserve the right to reassign aides. Self-directing program participants negotiate scheduling directly with their workers.
 - Self-directing program participants assign tasks and supervise their aides; agency aides are supervised by agency nurses or care managers.
 - Limited “employer authority” programs give participants no or very limited discretion to set workers' hourly wage rates. “Budget authority” programs allow participants to determine the number hours of aide service they will purchase and their aides' hourly pay.

Home Care Rule Implementation Challenges for States

- Implementation of the home care rule requirements poses challenges to Medicaid program administrators with regard to potential expenditure increases.
- Whether or not Medicaid costs go up and by how much depends in part on program design features, for example:
 - limited “employer authority” versus “budget authority”
 - Existence of third party “joint employer”
- States can make choices that minimize Medicaid cost increases but these could have unintended, adverse side-effects for self-directing program participants and their home care workers.
- Ensuring proper payment for compensable travel time and overtime hours worked requires investment in administrative systems – expenses beyond payments for overtime and travel time.

Balancing Conflicting Goals to Avoid Adverse Consequences

- States, self-directing program participants, and home care aides may have conflicting goals that must be balanced.
 - States have Medicaid cost control concerns.
 - Self-directing program participants tend to be more severely disabled compared to agency clients. They often need and are authorized to receive more than 40 hours per week. If they cannot recruit and retain workers to meet all their needs, they may risk of nursing home placement or adverse consequences for their health and well-being.
 - Aides need to earn enough so they do not take other jobs, exacerbating existing labor shortages.
- States can control Medicaid cost increases by capping authorized hours per worker or making other program design choices to reduce the likelihood of cost increases (e.g. avoiding “joint employment.”)

Striking a Better Balance Among Conflicting Goals

- DOJ and HHS issued written guidance to states urging them to take care in implementing the rule to ensure that efforts to contain potential Medicaid cost increases did not have unintended consequences of exacerbating rather than alleviating worker shortages.
- Restrictive worker hours policies (e.g. a “hard cap” of 40 hours per week, with no hardship exceptions are effective in preventing Medicaid cost increases, but are likely to adversely affect program participants’ access to workers).
- Hours caps above 40 hours and/or generous exceptions may achieve a better balance

Key Informant Interviews

Informant Type	Groups
Consumer Advocates	ADAPT The Arc National Council on Independent Living (NICL) Center for Public Representation (CPR)
Worker Advocates	The National Employment Law Project (NELP) Paraprofessionals Health Institute (PHI) American Network of Community Options and Resources (ANCOR) National Domestic Workers Alliance (NDWA)
State Associations	National Association of State Medicaid Directors (NAMD) National Association of States United for Aging and Disabilities (NASUAD) National Association of State Directors of Developmental Disabilities Services (NASDDDS)
Technical Assistance Providers	Applied Self-Direction (ASD)

Capture Qualitative Information On...

- Organization's efforts to learn about or influence DOL Notice of Proposed Rulemaking (NPRM, 2011)
- Initial concerns about effects of rule on groups and individuals they represent
- Efforts to track developments in implementation nationally
- Observations/data collected on impacts of rule implementation
- Expectations about ongoing involvement with members and with state and federal entities
- Recommendations for state case studies

Key Informant Findings (in Brief)

- Key informants supported home care rule goals, but expressed various concerns about the impact of state efforts to control Medicaid costs.
- Concern among some that states might end or cut back on self-direction in favor of traditional home care agency-delivered services because of cost concerns.
- Concern that states might decide to change the financial management services models required to pay self-directing program participants' workers.
 - For example, phase out the "Agency with Choice" model in favor of the "Fiscal/Employer Agent" approach to avoid costs associated with joint employment -- increasing the paperwork burden on participants and workers.
- Most especially, concern that states might choose to cap participant-directed workers' weekly Medicaid billable hours at 40, with no or few exceptions granted

Environmental Scan – Data Elements

- Purpose: Collect basic information on state implementation elements
 - Managed care vs. FFS
 - Employer authority
 - Budget authority
 - Caps on hours (state policy or decisions about hours limits delegated to others such as managed care organizations)
 - Exceptions policy to hours caps (for emergencies, complex needs, etc.)
 - Live-in exemption from overtime pay requirement
 - Travel time compensation
- Hypothesis testing through cross-tabulations

Caveats

- More than 200 programs across the country
 - We found information on about 75 programs (at least one in every state, including most of the largest).
 - Findings are based on a subset of programs and could differ from an analysis of the entire universe of programs.
 - Because largest programs were included, we have collected enough data to make inferences with a moderate degree of confidence.
- Challenges in gathering data reflect the timing of this exploratory study.
 - Many states had not posted publicly available documents about their policies on programs' websites.
 - Some states may not have explicit policies but make decisions about authorizing overtime hours on a case-by-case basis or delegate case-by-case decision making to others (e.g. managed care plans).
- We recognize our inferences must be provisional and may need to be revised as more data become available.

Environmental Scan - Data Elements	Yes	No/ Other	No Info	NA	Total
Employer Authority	38	1	12	0	51
Budget Authority	28	17	6	0	51
Union	9	42	0	0	51
Union Effort	18	33	0	0	51
MLTSS	23	28	0	0	51
Participants Set Wage Rates	18	12	21	0	51
Work Week Capped at 40 Hours[§]	17	27	7	0	51
Work Week Capped at More than 40 Hours[§]	27	17	7	0	51
Overtime Pay at Overtime Rates	23	11	16	1	51
Exceptions Policy	16	2	23	10	51
Live-in Exemption	13	23	15	0	51
Family Treated Differently (e.g. lower weekly hours cap)	6	16	29	0	51
Cross-Participant Travel Time Paid	9	25	16	1	51
Cross-Participant Travel Time Paid at Regular Hourly Rates	3	1	21	26	51

Key Descriptive Findings

- Thirty-eight states (74 %) have one or more programs that offer limited employer authority compared to 28 (62 %) that offer budget authority.
- Nearly half (45%) offer self-directed home care services (at least some but not necessarily all self-directed services programs) under an MLTSS model.
- Of the states that have a documented hours policy for home care workers, the majority do not impose a cap of 40 hours per week – either on how many hours a worker may work for a single individual or for multiple individuals. Nonetheless, a sizable minority of states (over one third) *do* set weekly caps at exactly 40 hours.
- Many of the states that allow overtime hours do so only if a self-directing program participant exercises budget authority and can afford OT pay without going over budget.
- Most states (89%) have programs with an exceptions policy for individuals who need more hours of home care service than the state's cap on worker hours ordinarily allows.
- Most states (64%) do not allow self-directing consumers who exercise budget authority to invoke the live-in exemption – although a sizable minority of states (36%) *do* allow them to invoke this exemption.

Descriptive Findings Suggest That States

- Have not moved away from self-direction. (Only one state, Maryland, dropped initial plans for their new CFC benefit as a result of the Home Care Rule).
- Have rarely adopted a “hard cap” on worker hours of 40 hours per week with no exceptions. Most allow for some overtime pay but limit their overtime pay liability (e.g. a sizable minority allowing for variable amounts of overtime without special permission, sometimes with additional hardship exceptions).
- States’ reluctance to allow the live-in exemption raises concerns – unless they have high caps on worker hours and/or generous exceptions to the caps.
 - In states that cap worker hours (especially if they set the cap at 40 per week maximum) with no or few exceptions, family caregivers may be especially disadvantaged.
 - Program participants living with paid family workers have, on average, more severe disabilities.
 - When live-in paid family workers hours are capped, they are likely to earn less per week and may have to provide more hours of informal (unpaid) care.

Hypothesis: States with a union representing home care workers at the time of the final rule will be less likely to have 40-hour caps on worker hours

		Union		
		<i>Yes</i>	<i>No</i>	<i>TOTAL</i>
Hours Cap	<i>40 Even</i>	1	15	16
	<i>40 Plus</i>	7	21	28
	<i>TOTAL</i>	8	36	44

True

Hypothesis: States that offer employer authority only will be more likely to cap weekly hours at 40

		Employer Authority Only		
		<i>Yes</i>	<i>No</i>	<i>TOTAL</i>
Hours Cap	<i>40 Even</i>	5	0	5
	<i>40 Plus</i>	7	0	7
	<i>TOTAL</i>	12	0	12

False

Hypothesis: States that offer budget authority will be less likely to cap weekly hours at 40

		Budget Authority		
		<i>Yes</i>	<i>No</i>	<i>TOTAL</i>
Weekly Cap	<i>40 Even</i>	9	6	15
	<i>40 Plus</i>	17	8	25
	<i>TOTAL</i>	26	14	40

True

Conclusions from Environmental Scan

- Most states have not imposed 40-hour caps on worker hours per week
- Most states have set up exceptions policies – though we often do not know what those are or how they are communicated
- Budget authority appears to be an important trend
- Most states provide FMS via the F/EA model. Some offer both AwC and F/EA (with AwC more common in programs targeted toward people with developmental disabilities. Only a few states offer AwC only).
- Of the eight states with unionized home care workers, seven set weekly caps at > 40 hours as compared to states without unionized home care workers
- Nevertheless, a fair number of states without unionized workers have been successful in allowing for some routine overtime beyond 40 hours without special permission.

Case Studies

- California
- Massachusetts
- Minnesota
- New York
- Ohio
- Wisconsin

Case Studies Highlight:

- State's assessment of whether or not it is a joint employer
- Key features of home care landscape:
 - Managed care vs. FFS
 - Unions (yes/no)
- Exceptions and exemptions policies
- Who makes which decisions
- Role of stakeholders in shaping policy
- Promising practices

California: Select Findings

- CA is a joint employer – primarily because union contracts set hourly worker wage rates, but also prior court decisions
 - Joint employment required state to implement costly administrative program changes (e.g. to be able to track travel time and to add up hours worked for multiple program participants to determine OT pay)
 - No live-in exemption to OT pay (but see below)
- Worker hours capped (66 hours/week), but those working for only one consumer capped at 70.5 hours
- Extra hours permitted for worker travel between program participants (limited to 7 hours per week)
- Exceptions to worker hours cap:
 - Live-in family members caring for 2 or more IHSS program participants allowed to work up to 90 hours/week
 - Extraordinary circumstances (complex conditions requiring live-in caregiver, rural area or foreign language limit available workers) - up to 90 hours/wk.
- Almost 1 in 4 (24%) of IHSS workers regularly receive OT pay

California: Select Findings (continued)

- Exceptions to caps - decisions are made by the California Department of Social Services
- Worker violations (filing claims above hours cap) trigger escalating sanctions (until removal from the program)
 - Concerns early on about workers violating caps and being suspended from program
 - Number of violations has been less of a problem than expected (and has decreased)
- Cost of home care rule implementation affected by:
 - phase-in of \$15/hour state minimum wage (by 2022)
 - restoration of 7% authorized hours reduction implemented during “Great Recession”
 - end of Coordinated Care Initiative in 2018 required counties to again cost share with state
- Costs resulting from exceptions to hours cap were lower than anticipated

California: Promising Practices

- CA began planning for implementation as soon as the Final Rule was released
- Implemented rule February 1, 2016
- Policies and procedures are clearly articulated:
 - Communicated explicitly to both program participants and workers and publicly transparent (accessible on web)
- State budgeting:
 - Governor's first budget after Final Rule (2014-15) capped weekly hours at 40
 - Strong pushback from consumers and unions convinced legislature to appropriate more funds to raise the cap and fund exceptions
- Cost of FLSA implementation has been affordable because of state's strong economic recovery - which also made it possible for the state to add paid time off as a new fringe benefit for IHSS workers (health insurance has long been available)
- Robust stakeholder engagement in development of worker cap exceptions policies, worker violations policies, travel time policies

Massachusetts: Select Findings

- MA accepted role as joint employer – primarily because of union contract that sets hourly worker wage rates
- MA has progressed in its policies:
 - Began with strict 40-hour cap; then allowed unlimited overtime, but found it was too costly
- Current policy:
 - Up to 50 hours
 - 50 to 66 hours for complex needs or live-in worker
 - Above 66 hours/week: only on emergency basis

Massachusetts: Promising Practices

- Like CA, MA began early to plan for implementation of the rule
- Listening sessions with public in late 2015/early 2016
- MA has allowed its policy to evolve...
 - as it got feedback from consumers and advocates
 - as it realized constraints in its own budget

Minnesota: Select Findings

- MN applied the “economic realities test” and does not see itself or MCOs as Joint Employers:
 - Workers unionized but hourly wage rate is floor
 - Program participants have flexible budget authority to set worker hours and hourly rates above negotiated floor
 - Live-in worker exemption to OT allowed, but claiming the exemption is the program participant’s decision
- Acute worker shortage in MN: Key informants believe home care rule has worsened the worker shortage

Minnesota: Promising Practices

- In MN, unionization of workers is compatible with program participants having “flexible budget authority”
- Contract with SEIU funded creation of newly launched “Direct Connect” home care worker jobs board:
 - Should make it easier for self-directing consumers to find workers and vice versa
 - One way to enhance the efficiency of the marketplace for self-directed home care services

New York: Select Findings

- NY does not appear to perceive itself as Joint Employer
- Key informant interviews suggest MCOs may be Joint Employers and FMS entities (AwC model) may also be Joint Employers (however, AwCs cannot afford to pay OT unless MCOs agree to pay it)
- MCOs and AwCs taking steps to prevent a consumer/employer from attempting to circumvent OT pay requirements and MCO/AwC limits on worker hours by signing a worker up with two different AwCs to give the erroneous appearance of two separate jobs
- No state policy on worker hours caps because decisions have been delegated to MCOs:
 - Seen as flexible but opaque
 - Capitated rates include money for OT and Travel Time (\$0.34/hour), but risk adjustment seen as inadequate for plans with high-needs members

(continues)

New York: Select Findings (continued)

- NY illustrates how state-specific circumstances interact with the home care rule in ways that make it challenging to see the impact of rule:
 - Litigation over “13 hour rule” – whether sleeping a small number of hours triggers a strict per-day limit on compensable hours
 - In managed care, effort to consolidate home care duties and home health duties:
 - Problem - wage inversion (home care workers were paid more despite needing less training)
 - Solution - wage parity law has increased home health pay to level with home care wages

New York: Promising Practices

- Working with Local 1199SEIU and other advocates, including PHI:
 - NY established a \$70 million fund to focus on quality home care services by rewarding plans that focus on investing in their network providers
 - Status unclear (funding not renewed last year), but interest is high among advocates
- New York City established a Paid Care Division in 2017:
 - Supports home care, child, and domestic workers by making referrals and providing training
 - Helps workers understand their rights
 - Helps consumers by enhancing home care workforce at no cost to them or to MCOs in NYC

Ohio: Select Findings

- Originally planned to move to a hard cap of 40 hours, with no exceptions for DD waiver program
- Repeated stakeholder pushback led to an increase in the cap, with a clear exceptions policy
- New cap: 60 hours/week
- Exceptions for Independent Providers (IPs):
 - If the additional hours have been authorized by the client's Service and Support Administrator through the county board of developmental disabilities; or
 - If there is an emergency

Ohio: Promising Practices

- Stakeholder involvement – especially by consumers – has convinced the legislature to appropriate more money
- Consumers successfully pressured the state without having a union to partner with
- Personal testimonies can be powerful and persuasive:
 - Kenyon College student with CP repeatedly testified in public, getting the attention of newspapers and state lawmakers

Wisconsin: Select Findings

- Home care rule seen as helping alleviate worker shortage by making home care more attractive as a profession
- Advocates pushed back against hard 40-hour/week cap
- New overtime policy:
 - Up to 60 hours/week OK (if authorized)
 - Exceptions granted:
 - through Service Support Administrator, approved by the county developmental disabilities board
 - in an emergency
- The state has codified its concern that working more than 40 hours/week should not jeopardize the health and safety of consumers or workers

Wisconsin: Promising Practices

- Similar to OH, stakeholders can be vocal and persistent enough to create change, even in the absence of a union partnership
- OH and WI were selected as case study states because some key informants had expressed concern that perhaps only states with unionized workers would allow workers to work more than 40 hours/week

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