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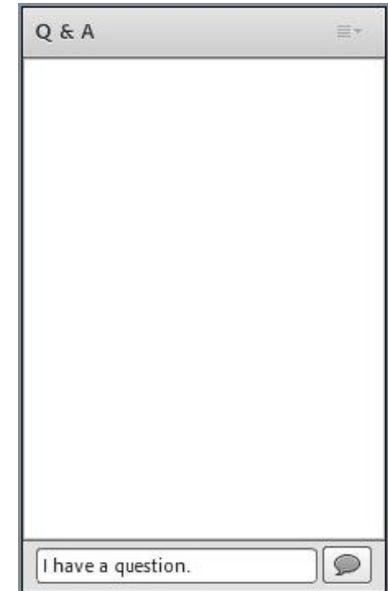
*Agency with Choice: Key Components for  
Practical Implementation while Maintaining  
Participant Choice and Control*

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December 11, 2012

# Welcome

- Share your questions and comments via the Q&A pod in the webinar room
  - Ask about technical issues (ex. can't hear)
  - Submit your questions/comments about the presentation
- Please remember to take our survey at the end of the webinar



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# NRCPPDS Team Introduction



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# Special Thanks To

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# Purpose of the White Paper

- Present liability information for Agency with Choice
- Present practical strategies for navigating legal challenges and risks
- Present required components for Agency with Choice to be participant-directed
- Not a purpose: comparing Agency with Choice and Fiscal/Employer Agent

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# Agency with Choice includes Joint Employment

- Agency is primary employer
- Participant is managing employer
- Both are joint employers of worker
- Joint employment introduces legal ambiguity in some cases
- Joint employment is sometimes also referred to as co-employment

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# Legal Issues

- Compensation, tax and insurance
  - To determine which employer is at fault for an issue related to compensation and benefits, courts and hearing officers will seek to determine which employer is directing and controlling the work and the agreements in place between employers and the employee.
- Employment practices
  - When employment practice wrongdoing takes place (e.g. unlawful discrimination, an unsafe work environment), each employer's action or inaction in regard to the worker is reviewed.

# Compensation, Tax, and Insurance

- Employment Tax
  - Generally, the payer (agency) is held liable for issues
- Worker Classification (independent contractor vs. employee)
  - Agency or participant could be held liable
- Wage and Hour (overtime, minimum wage, etc.)
  - Agency and participant could be held liable
- Workers' Compensation
  - Depends on state

# Compensation, Tax, and Insurance (cont'd)

- State Unemployment Insurance
  - Depends on state
- Health and Retirement Plan Benefits
  - Should be structured so that agency maintains tax benefits; seek professional review
- Family and Medical Leave
  - Both have some responsibility

# Employment Practices

- Employee Authorization to Work in US
  - Both agency and participant could be held liable
- Equal Employment Opportunity
  - Each can be held liable for their wrongdoing. Agency could be held liable for not responding to employee complaints of participant discrimination or for complying with participant discrimination
- Workplace Safety
  - Both agency and participant could be held liable, depending on which party created the safety hazard

# Participant-Directed Agency with Choice

- We are trying to avoid:
  - Erosion of participant control because the agency tries to manage its own risk
  - OR
  - The participant having more risk than he/she understands

# Division of Responsibility: *Worker Selection*

	Participant	Agency
Selecting workers who serve the participant		

- One of the primary tenets of participant direction is that participants can receive services from the workers **of their choice**.
- Ideally, the participant identifies prospective workers within his/her community or circle of support, including friends and neighbors.
- Participants may recruit workers.
- Some participants may neither be interested in identifying workers from his/her own community or circle of support nor in recruiting workers.
- The agency may provide prospective workers from a registry or suggest several workers, who may already be employees of the agency.

# Division of Responsibility: *Interviewing Workers*

	Participant	Agency
Interviewing workers		

- For maximum participant direction, the ideal is that the participant is the sole interviewer of prospective employees, but if the agency does not have a role in interviewing workers, the agency may appear more like an administrative agent of the participant as the sole employer. This can make the participant vulnerable to liabilities for which protections are not in place.
- A participant should have a primary role in interviewing workers as the participant will use that experience to make an informed decision about the quality of the prospective worker and whether that worker will be a good fit for the participant.
- As the primary employer, the agency should also have a role in interviewing the worker.

# Division of Responsibility: *Officially Hiring Workers*

	Participant	Agency
Officially hiring workers		

- As the primary employer of the workers who provide service to participants, the agency will officially hire the participant's selected workers as its own employees.
- See page 27 of the white paper for key employment paperwork and steps that should be completed.
- To remain a participant-directed AwC FMS provider, the agency should not have hiring criteria that make it difficult for most workers referred by participants to be hired. While the agency does make the final hiring decision, ideally the hiring criteria are structured such that the vast majority of workers referred by participants are hired by the agency.

# Division of Responsibility: *Discharging Workers*

	Participant	Agency
Discharging workers from serving the participant		

- If the participant determines that the worker's services are not satisfactory, the participant can discharge the worker from further providing services to the participant.
- The participant notifies the agency that the worker's services are no longer requested for the participant.
- Both the participant and agency ensure that the worker discontinues providing service to the participant.
- This does not necessarily mean the worker is "fired."
- The agency, however, continues to be the primary employer of the worker, as explained on the next slide.

# Division of Responsibility: *Terminating Workers*

	Participant	Agency
Terminating workers		

- As the primary employer, the agency ultimately decides whether a worker should be terminated from employment.
- As the primary employer, the agency can decide whether to terminate the worker from employment with the agency or to re-assign the worker to perform other duties or provide services to other individuals when the worker is discharged from providing service to a particular participant.
- The agency should ensure that the worker was not discharged by the participant for a discriminatory or otherwise illegal reason. If the participant discharged the worker for a discriminatory or illegal reason and the agency subsequently terminates the worker from employment, the agency could be held liable.

# Division of Responsibility: *Training Workers*

	Participant	Agency
Training workers		

- The participant knows best how his/her services should be provided to meet his/her needs.
- The participant, or his/her family, spouse, friends, or representative, should have a major role in training the worker to provide the specific services to the participant or in determining the training that the worker needs.
- As primary employer, the agency may have some training requirements for the worker. This also supports the agency's role as primary employer, rather than as a mere administrative agent.
- The agency's training requirements should not be overly onerous, nor should agency-required training detract from the training that the worker receives directly from the participant.

# Division of Responsibility: *Scheduling Workers*

	Participant	Agency
Scheduling workers		

- As the managing employer in a participant-directed AwC FMS model, the participant should have the primary role in scheduling the worker's hours with the participant.
- Ideally, the agency has little to no role in scheduling when the worker provides services to the participant.
- To maximize participant-directedness, the participant and worker should work together to agree on when the worker will perform services.
- If a worker will not or cannot provide service when a participant determines that the service is needed, the participant may recruit and hire another worker.

# Division of Responsibility: *Managing Workers' Daily Activities*

	Participant	Agency
Managing the workers' on-the-job work activities with the participant.		

- A key element of participant direction is that the participant can direct how the work provided for him/her is performed.
- As the managing employer, the participant can and should direct how work is performed, including providing the worker with feedback about elements that should be improved or done differently.
- The participant should direct and control the day-to-day work duties performed by the worker when the worker is providing services to the participant.
- The agency should have a very minor role, if any, in managing the regular duties at the participant's worksite (which is usually his/her home).

# Division of Responsibility: *Determining Location of Service Provision*

	Participant	Agency
Managing the workers' on-the-job work activities with the participant		

- All services directed by participants should be provided in the participant's home or community, or in a location otherwise chosen by the participant, including services provided by employees, contractors and vendors.
- If a participant uses his/her budget to purchase goods, the participant should generally elect from where those goods are purchased.

# Division of Responsibility: *Setting Workers' Pay Rate*

	Participant	Agency
Setting the workers' pay rate		

- To achieve maximum participant-directedness, the participant would be the sole determiner of the worker's rate of pay.
- In order to preserve the joint employer relationship of the agency and participant, the agency must also have some role in setting the worker's pay.
- Practically, most participant direction programs have parameters for permissible rates of pay.
- We recommend that the agency or program establish an allowed and reasonable minimum and maximum rate of pay and that the participant determine the appropriate rate to pay their worker within that range. Some exceptions may be permitted.

# Division of Responsibility: *Approving a Worker's Timesheet*

	Participant	Agency
Approving a worker's timesheet		

- When a pay period ends, the participant should review the worker's recorded time worked.
- If the timesheet does not reflect the participant's understanding of the time worked, the participant and the worker should work together until the timesheet reflects their shared understanding of the time worked.
- Once the participant approves the timesheet, that approval should be documented.
- Participant- and worker-approved timesheets should be submitted to the agency for review and payment.

# Division of Responsibility: *Matching Service to Spending Plan*

	Participant	Agency
Ensuring service usage is approved in the participant's spending plan prior to paying for it		

- The agency confirms that expenditures are in line with the spending plan, and provides regular reports to the participant and funding entity, as applicable.
- The agency must provide separate accounting for each participant's budget and process participant-approved invoices and timesheets in accordance with the budget's permitted expenditures and the program's rules.
- In general, the agency should use the participant's budget funds to pay employees only when the participant has approved the time worked.
- Similarly, the agency should only use the participant's budget funds to pay for goods and non-employee services purchases when the participant has approved them.

# Division of Responsibility: *Paying Workers and Vendors*

	Participant	Agency
Paying workers and vendors		

- The agency pays the workers and vendors who provide services (and in some cases, goods) to the participant at the participant's direction.
- In general, the agency should ensure the payment is in accordance with the participant's spending plan and is first approved by the participant.

# Division of Responsibility: *Tax and Insurance Payments*

	Participant	Agency
Tax and insurance reporting and payments		

- The agency withholds from employee pay, files, and deposits all relevant federal, state, and local taxes (Social Security, Medicare, Federal Income Tax, State Income Tax, Unemployment Taxes, local taxes, etc.) using its own Employer Identification Number and State Account numbers.
- The agency is responsible for all operations of tax and insurance filing and payment.
- The funding for the employer tax and insurance costs may be different depending on the program or agency. Funds may be from the participant's budget, the agency or some other funding source.
- The agency should also furnish a workers' compensation policy to cover workers in the participant's home.

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# Other Key Agency with Choice Components

- The agency can elect to provide benefits to workers as its own employees. The Affordable Care Act may further impact this.
- The agency should understand participant direction and be able to communicate with individuals with disabilities.
- The agency has systems in place to support the participant with responsibilities that the participant is unwilling or unable to perform.

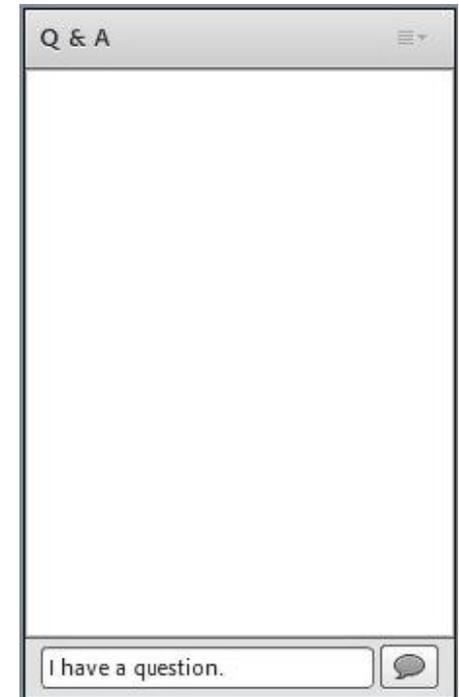
# Risk Mitigation

- The agency obtains professional liability insurance, general liability insurance, and workers' compensation policies that cover workers serving participants.
- The agency does not require the participant to sign an agreement accepting liability.

# Questions?

- Please type your question or comment in the “Q&A” box found in the lower left-hand corner of your screen.
- If we are unable to answer your question at this time, it will be included in our follow-up Q&A document to be posted on our website:

[www. participantdirection.org](http://www.participantdirection.org)



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# Thank You!

- Additional questions? Please contact us at [training@participantdirection.org](mailto:training@participantdirection.org)
- Our services include:
  - Membership
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