



*Agency with Choice: Key Components for Practical Implementation
while Maintaining Participant Choice and Control*
Questions & Answers from the NRCPS Webinar

December 11, 2012

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Please email [Casey Sanders DeLuca](mailto:Casey.Sanders.DeLuca@nrcps.org) if you have any additional questions.

Q: Your white paper says that the IRS only recognizes that one person can be the employer and uses common law rules to determine who that employer is. There is a scenario in the paper that talks about an error being made with the taxes and the participant being afraid she will be found liable. Is this realistic? What can be done to ensure that a participant is never found liable for unpaid taxes.

A: Most of the time, according to the case law we reviewed, the payer of workers and taxes would be held liable if a mistake was made. In the case of Agency with Choice, this is the agency. The IRS does not recognize that there would be more than one employer at once. They use common law employer rules to determine employer liability when there is an issue. If the agency makes a mistake paying taxes and, when the IRS looks into the unpaid taxes the agency is nowhere to be found, the participant could be held liable. If the IRS has not been paid taxes they are owed, and in reviewing the employment relationship, the IRS could find the participant to be the common law employer, and therefore liable for any unpaid employer taxes due to the IRS.

Program administration agencies can have a major role in preventing this. Program administration agencies can and should put controls in place to collect data from the agencies to verify that taxes are being correctly and timely deposited. In the agreement or contract with the agency, program administration agencies should have a stipulation that if there is a situation where a mistake is made with the IRS or something is not deposited and the IRS is trying to hold the participant liable for it, that the agency will pay what is due plus penalties and interest. The IRS does not care who pays; The IRS cares if they get paid.

Q: We're an Agency with Choice provider and we do not ever interview the worker that the participant hires, but we do have the worker fax us an employment application and an I-9 and if everything looks ok, we put the employee on our books and begin treating them as our employee. Is this ok?

A: A faxed I9 is not acceptable. If there is ever a question about someone's work authorization, a faxed I9 is not likely to be sufficient. An I9 needs to be held by the employer as the original copy and a fax will not work. You want to end the practice of accepting faxed I9s and instead get original I9s.

Q: Can Agency with Choice be used in the VD-HCBS program?

A: In the VD-HCBS program, federal agencies have made the determination that they want to use the Fiscal/Employer Agent model of FMS only unless there is a state law that prohibits Fiscal/Employer Agent from being used. Fiscal/Employer Agent cannot be used in New Hampshire or Montana by state law, so Agency with Choice is used.

Q: Can a participant use Agency with Choice in one program and F/EA in another?

A: Yes. In Agency with Choice, the participant does not need to have their own Employer Identification Number. They can have an employer identification number for their Fiscal/Employer Agent program and use Agency with Choice for a different program and not have any tax or other problems as a result of being served by Agency with Choice and Fiscal/Employer Agent simultaneously.

Q: Could a participant be served by two agencies in Agency with Choice at once?

A: Yes. If a participant is in two programs and each program is served by a different Agency with Choice, that participant could receive services from both of those agencies. It probably is not going to make sense if a participant was in a single program and was served by two agencies simultaneously. Presumably a participant has just one budget or service authorization and it could be confusing if you have multiple agencies managing a single budget. If a participant was in two programs and therefore had two budgets or service authorizations, being served by two Agencies with Choice would be acceptable.

Q: Can Agency with Choice work with budget authority?

A: Yes. Budget authority is when a participant has control over how the funds or services allocated to them are used. It can be as simple as a participant setting the pay for their workers. Maybe the participant has \$500 for personal care services and they can then determine how much to pay their workers resulting in more or less hours of personal care services. It could mean something much more robust where the participant has funds and they can decide how to use those funds across an array of goods and services. All of that can work within budget authority. One of the things I would suggest, however, is that the agency that is providing the Agency with Choice, if they are providing services for a program with budget authority, the agency should not also be a provider of services that are purchased with a participant's budget. That might lead to conflict of interest issues where potentially the agency could be encouraging the participant to use more goods or services from that agency. The goal for budget authority is for the participant to be able to manage their own budget and choose what combination of goods and services will best meet their needs. If an agency is steering the participant due to a conflict of interest, budget authority is eroded.

Q: What should the qualifications and standards for providers of this model be?

A: We have put forth what we see as the key components of Agency with Choice in the second half of our white paper in order for it Agency with Choice to maintain participant choice and control without producing too much risk for anyone involved. There is more we could say about standards and qualifications. Some of that would depend on what the goals are of the program in having Agency with Choice.

Q: Will it apply to all states under the Consumer-Directed Program?

A: Certainly Agency with Choice is an allowable service model in each of the waiver authorities: (1915(c), 1915(i), 1915(j) 1915(k), and 1115). VD-HCBS uses it on an exception basis. It can be used for most consumer-directed programs depending on how the state has applied for their waiver and whether they have included Agency with Choice in their waiver. If the state has not put Agency with Choice in their waiver, it cannot be used for programs within the waiver.

Q: Am I correct in thinking that the Senior Aide's Program is an Agency with Choice Program?

A: We would need more information about this program to answer the question. We'd be happy to discuss this with you one and one and you can reach the paper's primary author, Mollie Murphy, at mollie.murphy@annkissam.com

Q: When you speak of participant does the agency with choice model also allow participants to have an authorized representative?

A: Certainly. An authorized representative in the Agency with Choice model is someone appointed by the participant to help the participant in their role as managing employer. An authorized representative might help the participant recruit, identify and select workers, train and supervise those workers, or provide feedback to the workers. If the program has budget authority, an authorized representative might help the participant decide how to use his or her budget.

Q: Are there advantages in choosing an Agency with Choice model over a FEA model?

A: Sure there can be; it depends on the person and program. Sometimes it's easier to find an FMS provider; some providers are more willing to do Agency with Choice than F/EA. Some traditional providers feel like they are more readily able to do Agency with Choice than F/EA because the payroll operations in Agency with Choice are similar to those for traditional services. There are other benefits such as some participants really don't like the idea of being the sole employer and want to share that employment responsibility with an agency for the additional help that comes along with that. Some participants do not want anything to do with the paperwork that's required as a common Law employer using the F/EA model. The agency in Agency with Choice can help with human resources activities, whereas in F/EA it is more difficult for the FMS provider to support the employer with human resources activities since the F/EA is not actually an employer of the participant's workers. For each of the positives with Agency with Choice, some people may see some of those as having a downside. Group benefits like health and retirement plans can be easier to provide through Agency with Choice, too.

Q: Who is responsible for a criminal records check?

A: That depends on how the program is designed and what requirements the program administration agency has for criminal background checks. If background checks are required, most of the time the state requires that the agency perform the checks so they can have one point of contact and to make sure service is not provided or paid for until the background check is complete. There is nothing wrong with the participant doing the criminal background check if there is not a state law that prohibits it. Some state laws require that a criminal background check needs to be done on the employee for state funds to be used to pay for something. If that is the case, then the criminal background check needs to be done by someone in a way that the state can monitor that the background check is being performed. By law, a criminal background check does not have to be done if the agency, participant, and program administration agency is not interested in it and no state law requires it.

Q: Will the agency need to obtain a federal and state EIN for each participant?

A: No. In Agency with Choice, the only EIN used is that of the Agency as the primary employer. IN an Agency with Choice model of FMS, participants do not obtain or use their own EINs.

Q: Can Agency with Choice be used in CDPAANYS?

A: Yes. The current model of FMS used in CPDAANYS is Agency with Choice.

Q: Has there been any indication or concern from the IRS that an accommodation for joint employers for the Employer responsibility provisions of the ACA may undermine (or create incentive contrary to the goals) of the ACA? Any tea leaves on how they will go?

A: The legislation that has been released so far is less than illuminating on whether in a co-employment situation, the count of employees for the primary employer or managing employer will count toward the 50 employee count that requires an employer to offer health insurance to employees. NRCPS is watching this issue very closely and will be analyzing and sharing analysis when we understand more.

Q: What do FMS/FEA's do when it comes to overtime? The reimbursement compensation is often not high enough to handle time and a half. So many agencies simply prohibit working over 40 hours. In our area, the aides work for 2 agencies. 1 agency handles the 40 hours, the other agency handles the hours over 40. And a participant doesn't have any money to pay for overtime or other costs. It's not a big deal since it hasn't come up, but this joint employer situation is sort of false when the participant doesn't have this kind of savvy. Health & Retirement are not a reality in any home health situation that I've seen. Not for aides, barely for nurses

A: Overtime gets handled using a variety of approaches. In some cases, if a participant chooses to use a worker for more than 40 hours of work in a week, the overtime due the worker is paid from the participant's budget. It is important to educate participants about how overtime works and the impact it has on their budget so they can be informed about how they choose to use their budgeted funds. In some cases, if two participants both utilize the services of a worker and the worker works more than 40 hours a week across the two participants, the cost of overtime is deducted from each participant's budget at the ratio that each participant used the services of the worker that week. In other programs, the participant who incurred the hours over 40 pays the entire cost of the overtime from his or her budget. Still, in some programs, overtime is strictly forbidden. Overtime can be handled a variety of ways depending on the structure and priorities of the program, but a key element is to ensure that participants and workers are well educated on how it will work.