Agency with Choice

Key Components for Practical Implementation while Maintaining Participant Choice and Control

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I. Introduction
As publicly-funded programs seek to provide quality home and community-based services (HCBS), participant direction continues to offer accessible, high quality services by offering participants choice of and control over their long-term services and supports (LTSS). Within HCBS programs, participant direction can be configured in several ways, with varying degrees of participant control.

Significant work has been performed to define the employer/employee relationship and apply a set of principles to Financial Management Services (FMS) under the Fiscal/Employer Agent model. However, common strategies to operationalize participant direction with a focus on the Agency with Choice model have historically received less attention. According to a 2011 survey by the National Resource Center for Participant-Directed Services (NRCPDS), it is the only model used by 38 of 298 responding participant-directed programs (12.7%) and is an option in 19 others (6.4%). While AwC FMS is used in nearly 1/5 of programs, there is variation in how the model is implemented and operated. Without a universally accepted definition of the model, the level of participant-directedness varies across programs and some programs may be operating in a way that leaves the agency or participant vulnerable to unforeseen risk. Dissimilarity across AwC FMS currently in operation leads to difficulty in defining the AwC FMS model and in developing standards to ensure service quality.

This brief presents the benefits, challenges, and risks of AwC FMS and puts forth the NRCPDS’s list of key components for AwC FMS to be considered participant-directed, providing a model for consistency in future implementation of AwC FMS.

II. Background
Participant direction, also known as self direction or consumer direction, supports individual recipients to have a high degree of control over their lives and their care. According to most definitions, a program is “participant-directed” when individuals have the option to direct at least some of their program services. Most existing participant-directed programs allow individuals to select and manage their own staff, commonly referred to as the participant having “employer authority”. Many programs allow individuals to use flexible budgets to determine how their allocated program funds are used across approved goods and services, often referred to as “budget authority.” In programs with budget authority, participants may choose to use their budget to not only hire and direct workers, but also to purchase goods and services that will improve the individual’s ability to live independently, such as assistive equipment or home modifications. Programs have differing rules about how budgets can be used, with some programs allowing participants to decide how they spend their allotted funds across a broad array of approved services, while other budget authority is more limited. Some programs permit saving budget funds to purchase larger items in the future.

As choice and control increase, so do fiduciary responsibilities including those associated with being an employer, managing funds for services, and handling payroll and employer-related taxes and
Participant direction programs often implement solutions for the provision of Financial Management Services (FMS) to ensure employment-related tax and insurance compliance and program fiscal accountability. Most programs contract with a provider of Financial Management Services to provide the program and participants in the program with this important function. Accordingly, FMS providers reduce the employer-related task burden for participants, allowing them to focus on managing other aspects of their LTSS.

The Centers for Medicare and Medicaid Services (CMS) defines FMS as “[a] service/function that assists the family or participant to: (a) manage and direct the distribution of funds contained in the participant-directed budget; (b) facilitate the employment of staff by the family or participant by performing as the participant’s agent such employer responsibilities as processing payroll, withholding and filing federal, state, and local taxes, and making tax payments to appropriate tax authorities; and (c) performing fiscal accounting and making expenditure reports to the participant and/or family and state authorities.” While this language defines FMS for Medicaid purposes, the definition is commonly adopted for other funding sources including programs funded by the Older Americans Act, the Veterans Health Administration, states, and private funds.

Participant direction programs and policies differ; so too do the strategies to provide FMS.

A. What is Agency with Choice?
Agency with Choice (AwC) is one of the two major models of participant-directed FMS. At the core of AwC FMS is that a worker who provides services to a participant is jointly employed (also called “co-employed”) by the participant and an agency. The agency is usually a private entity. The participant and the agency are joint employers (also called “co-employers”) of the workers who provide service to the participant. An AwC model of FMS is used in programs in which participants receive services from workers who they select and supervise to some degree. Most participant direction program agencies implement AwC FMS intending for the agency to be a worker’s “primary” employer while the participant is the “managing” or “secondary” employer.

The duties respectively performed by the agency and participant may differ depending on the program and even on the individual participant. Certain functions are almost always handled by the agency as the primary employer. These include serving as a worker’s employer on employment paperwork, legally hiring and firing the worker, and managing payroll, taxes, insurance, and benefits. Many agencies are also responsible for ensuring that before paying for a service for a participant that the service is allowed in the participant’s budget and spending plan.3

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1 FMS is one of two support systems required to sustain a quality participant-directed program. The first, counseling, is highlighted in Chapter 6 of the Self-Direction Handbook.1
2 In AwC FMS, the agency does not strictly serve as the participant’s agent, but does meet the intent of CMS’ definition of FMS in that the agency supports the participant as a managing employer.
3 This may also be an “authorization”, or some other method of documenting what and how much goods or services the participant is permitted.
The “managing” or “secondary” employer functions may be shared by or distributed between the agency and participant (the joint employers) to varying degrees. These managing employer duties include recruiting workers; selecting workers; setting worker pay rates and benefits (although, these are sometimes established by the program administration agency rather than by either the agency or participant); training the worker; assigning worker tasks; and scheduling, supervising, evaluating, and dismissing a worker from the participant’s home. Dismissing a worker from the participant’s home differs from firing in that the participant notifies the agency and the worker that the participant no longer wishes to receive the worker’s services. That particular participant would at that point discontinue being served in any capacity by that specific worker. The worker is only fired, that is, no longer working for the agency, if the agency chooses not to continue to employ the worker to provide services to other participants or otherwise within the agency.

Agency with Choice differs from the other primary model of FMS, Fiscal/Employer Agent (F/EA) FMS, in a few key ways. First, under the F/EA model, the participant directly hires his/her own worker(s) and is the sole employer of the worker(s). The participant has the legal authority to hire, train, schedule, manage and fire the worker, as applicable. To support the participant in this role, the F/EA assumes liability under federal law for reporting and payment of federal taxes. The F/EA generally performs all tax, labor, and workers’ compensation policy responsibilities. This allows the participant to focus on the day-to-day responsibilities of directing his/her own services and supports. As in the AwC model, the F/EA verifies that payments to workers are authorized. For programs allowing individual budgets, the F/EA also confirms that purchases are allowed in the budget and spending plan before making them. There are two primary models of F/EA: Vendor F/EA and Government F/EA. For more information on these models, visit www.participantdirection.org.

B. Benefits
Program administrators have implemented the AwC FMS model in their participant direction programs for a variety of reasons. In some cases, the model was selected because of a perception

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4 The publicly-funded program may have some parameters about these employer duties. For example, in regard to the participant having control over whom to hire, the program may require that the worker pass a background check before he/she can be hired. Similarly, the program may have certain worker training requirements.

5 Within the Government F/EA model of FMS, a Government F/EA can contract with a subagent, who also shares liability with the Government agent and the employer for federal tax responsibilities. A Government agent and subagent may share any variety of the F/EA duties across the two entities. Vendor and Government F/EAs can choose to contract with a reporting agent to perform certain payroll duties, but reporting agents do not take on any federal tax liability. All liability remains with the Government or Vendor F/EA.
that AwC FMS is more straightforward for traditional direct service organizations to implement than the F/EA model. In other cases, programs had existing relationships in place with traditional direct service organizations and these organizations advocated for the use of the AwC FMS model. Some program administrators chose the AwC FMS model because they believed it offered more support to the participant than the F/EA model of FMS.

When AwC FMS is an optional model in a program (other options often include F/EA or the Fiscal Conduit\(^6\) models of FMS), some participants choose AwC because they wish to undertake some level of employer responsibility while retaining the support of an agency for others. For example, some individuals might be comfortable choosing and scheduling their workers but not hiring, training, or terminating them. Since the agency is the primary employer in AwC FMS, the agency can offer training or worker-related assistance because those functions are consistent with the agency being a joint employer. An F/EA, on the other hand, which is not an employer of the participant’s workers, might compromise that distinction if the F/EA directly trains the worker. Compromising the distinction regarding whether the F/EA or participant is the employer could open the F/EA to unplanned liability and limit the actual and perceived control of services for the participant. Other examples of worker-related assistance by an agency in AwC FMS include helping a participant recruit workers, scheduling workers, or helping participants to discipline workers. In the F/EA model, the F/EA or a counselor (also referred to as a support coordinator, support broker, skills trainer, options counselor and other terms) can support the participant in all of these areas, but cannot actually perform these duties for him/her. By contrast, under the AwC FMS model, the agency can actually perform these duties if the participant is unable to or does not wish to perform them.\(^7\)

Some participants report that they choose AwC FMS because their paperwork burden is less than with F/EA or Fiscal Conduit. This is true because the participant or his/her representative is not the legal employer as with F/EA and Fiscal Conduit, so the participant or his/her representative does not need to complete paperwork to apply for employer tax account numbers or assign the F/EA as his/her employer agent. Other participants report that they choose AwC FMS because they believe they are taking on less risk since the AwC is the primary employer of their workers. In Section III, Legal Issues, we will discuss the risks that a participant takes on in AwC FMS.

AwC FMS can be an advantageous model for offering workers employee benefits because the participants’ employees are all also employed by a single agency. This makes it possible for the agency to have group policies for health insurance, retirement benefits and more, thereby generally

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\(^6\) With a Fiscal Conduit model, a government entity or vendor disburses public funds via cash or vouchers to participants or representatives. If the participant chooses to directly hire workers, the participant is responsible for managing all payroll-related duties, including paying wages, tax withholding, calculating, depositing and filing and for doing so in compliance with federal, state, and local tax, and wage and hour rules and regulations. If the participant uses agency or vendor services, the participant is responsible for making payments to the agency or vendor.

\(^7\) In both AwC FMS and F/EA FMS, programs generally support participants to choose to have representatives. Representatives can help the participant with employer duties and, in the F/EA model, the representative can also be the legal employer of workers.
making such benefits more affordable than if a single participant employer (as in the F/EA model) procured employee benefit policies.

C. Challenges

The most significant challenge with the AwC model is the ambiguity that can exist with regard to which party is liable when claims are made against an employer. Many state laws and some federal laws do not recognize joint employment. Consequently, federal and state guidelines for properly structuring a joint employment relationship to appropriately safeguard both the agency and participant can be opaque or lacking. Both agencies and participants may have concerns about their liability within the joint employment relationship and the amount of risk taken on in this model can be unclear. By virtue of entering into a joint employment relationship, both parties may take on more risk than they realize. This is further discussed in Section III, *Legal Issues*.

Some agencies have structured their AwC FMS to avoid liability by only providing administrative services. Some also require participants to sign documents relieving the agency of any employer liability, despite the agency including workers as the agency’s own employees. NRCPDS considers this a risky and misleading practice that should be prevented whenever possible.

Furthermore, having two employers share employer responsibilities can make it difficult to ensure that services are truly participant-directed. In F/EA FMS, the participant or his/her representative is the legal employer and as such can make all decisions about hiring, firing, training and managing workers. By contrast, in AwC FMS, when employment is shared between a participant and an agency, both employers can make decisions about the employee and the services performed. This can infringe on the control that the participant has over his/her services, and therefore diminish the amount of participant-directedness. When both the participant and agency work to minimize their own potential employment liability, a participant’s direction and control over the services provided to the participant can be eroded. Historically, some agencies have sought to minimize risk by tightly controlling and overseeing how employee services are performed.

As discussed above, a general challenge of AwC FMS is that a participant’s and agency’s interests may be misaligned. As an example of this possible misalignment, some families using AwC FMS have reported agencies putting a limit on the number of personnel changes a participant is permitted to make. It can be costly to hire and terminate an employee within an agency, and terminations can impact an agency’s unemployment insurance rate, which can have a significant impact on the agency’s operating costs. It is not in the agency’s interest for a participant to regularly hire and discharge workers. However, families sometimes have trouble finding the right worker and discharge several staff before finding the right fit. Some families report being labeled “difficult” for discharging workers and getting dropped from agency services.

In early implementation of the Cash & Counseling\(^8\) model of participant direction, participants had major concerns about the joint employment relationship with the agency because they wanted to

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\(^8\) The Cash & Counseling program was a successful decade-long effort to introduce participant direction to 15 state Medicaid programs. For more information see: [http://www.bc.edu/schools/gssw/nrcpds/cash_and_counseling.html](http://www.bc.edu/schools/gssw/nrcpds/cash_and_counseling.html)
ensure their workers saw them as “the boss.” By sharing employer duties with an agency, some participants voiced that the perception of the worker could be that the agency was in control and the participant’s wishes in how services are performed could be ignored, thereby eroding a goal of participant direction.

III. Legal Issues

Employers have a variety of legal obligations to their employees; they must provide wages, withhold and pay employment taxes, ensure compliance with overtime and minimum wage requirements and labor and civil rights laws, provide workers’ compensation insurance, maintain a safe work environment, and more. An employer faces these obligations when the facts and circumstances establish a sufficient connection between that entity and a worker to warrant a legal duty to the worker.

The joint employer relationship between an agency and participant introduces additional legal complexity for AwC FMS. Not all regulations or regulatory bodies recognize that two entities can simultaneously be an employer of a worker. Joint employment is a key component of AwC FMS because the agency generally operates as the “primary” employer and the participant as the “managing”, or “secondary”, employer of workers who provide service to the participant. The joint employment structure can introduce a significant legal grey area because it can be unclear who is considered the employer for different purposes or under different regulations—it could be the agency, the participant, or both. When a claim is made against an employer and the regulation does not recognize joint employment, a court or hearing officer must determine which employer is liable for the claim.

Liability arising from a joint employment relationship generally is not “joint and severable.” This means that, in general, one employer cannot be held liable for the wrongful acts or omissions of the other, without regard to fault. Rather, each employer in a joint employment relationship has the liability that arises as a result of that employer’s own interactions with the employee.

We can generally split employer liability into two key areas: first, compensation, tax and insurance; and second, employment practices. Liability for wrongdoing in employee compensation and benefits is generally governed by the operational relationship between the employer and the worker. That is, in a joint employment relationship, to determine which employer is at fault for an issue related to compensation and benefits, courts and hearing officers will generally seek to determine which employer is directing and controlling the work and the agreements in place between employers and the employee. Three primary tests—the common law test, economic reality test, or a hybrid of those two tests—may be used to make this determination. The touchstone of determining who is an employer of a worker is the right to control the terms and conditions of employment based on the totality of circumstances, whether or not that right is exercised. That touchstone is

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9 See Appendix A, Employment Tests for a description of common tests to determine who an employer is or employers are. Under some laws, whether an individual or entity is the joint employer of an employee depends upon a factual inquiry into the totality of the working relationship of the parties, rather than application of an exacting test.
modulated by each statute addressing employer duties, so as to carry out the beneficial or remedial purpose of the particular law. The employer tests are generally malleable enough to permit considerable judicial flexibility in their application to particular facts. Different federal laws, for example, have resulted in somewhat different approaches to determining employment for purposes of coverage of the law. Joint employment is recognized under some of these laws (e.g. Fair Labor Standards Act) but not others (e.g. Federal employment tax law). Programs offering AwC FMS first must determine compliance with joint employment criteria under their state’s laws. Even within a state, such criteria may differ under multiple laws.

When employment practice wrongdoing takes place (e.g., unlawful discrimination or an unsafe work environment), each employer’s action or inaction in regard to the worker is reviewed.

The sections below delve into the primary regulatory arenas within the two key areas of employer liability.

A. Compensation, Tax, Insurance & Benefits

**Employment Tax**
The Internal Revenue Service (IRS), the agency to which employer withholding of employee federal income, Social Security and Medicare tax, and employer Social Security and Medicare tax is paid and filed, does not recognize joint employment or that there can be more than one employer of an employee simultaneously. If federal taxes that are the responsibility of the employer to file and pay do not meet requirements, the party that the IRS deems is the employer, after examining the facts and circumstances of the case, will be held liable for unpaid taxes, penalties and interest. The IRS uses the common law test (see Appendix A, Employment Tests) and will determine the common law employer on a case-by-case basis, examining the relationships of the parties involved.

In F/EA FMS, the participant and the F/EA execute an IRS Form 2678, Employer/Payer Appointment of Agent so that the F/EA takes on joint liability for federal taxes. This means that if there is a tax issue, the IRS has recourse to hold the F/EA liable. No such process exists for AwC FMS, so who the employer is for tax purposes, and who is held liable for unpaid taxes, penalties and interest, would be determined by a court or hearing officer in the event taxes are unpaid. Consider the following example.

_ABC Agency is serving as an agency providing AwC FMS. A new employee on ABC’s payroll team makes a mistake and significantly under-deposits IRS payments of income, Social Security, and Medicare taxes for employees who provide service to Jane, a participant. After this error is exposed, the IRS examines the situation to determine whether the participant or agency is the common law employer (based on the nature of the participant-employee and agency-employee work relationship and duties). The participant fears that she will be found to be the employer, and therefore liable for the taxes and penalties, and that ABC will be found to be merely an administrative agent._
**Practical Point 1**

Program administration agencies may consider including language in their contracts with AwC FMS agencies that stipulate that in the event a participant is found liable for unpaid taxes or penalties associated with the participant direction program that the agency pays them. Further, program administration agencies may consider requiring AwC FMS agencies to have bonds in place in the event the agency is insolvent at the time a participant is found liable for taxes or penalties associated with his/her involvement in the program.

Reviewing case law from joint employment cases involving unpaid employment taxes, we learn that, in general, the IRS holds the payer of the workers liable for tax noncompliance. Thus, for an agency providing AwC FMS, if employment tax noncompliance issues arise, the agency, rather than the participant, is likely to be held liable for penalties and interest in the majority of cases.

However, in other joint employment cases, the IRS has found that the payer of the workers was merely performing “administrative acts” and could not be held liable for unpaid employment taxes. In these cases, the employer who was directing the employees’ day-to-day activities was found to be the employer and was held liable for unpaid taxes.

It should be noted, however, that who (the agency, the participant, the program or some other party) pays the unpaid taxes or penalties is of no matter to the IRS, provided the unpaid taxes and penalties are paid. See Practical Points 1 and 2.

**Worker Classification**

A source of risk for any employer is misclassifying workers as independent contractors when they should be classified as employees. While this has always been a risk, in recent years, the IRS, United States Department of Labor and state equivalents of the Department of Labor have taken greater enforcement actions against payers who misclassify workers as independent contractors. If a participant is working with an AwC FMS agency who is paying workers as independent contractors, but the workers are performing duties and are in a relationship with the employer that would classify them as employees, the participant and agency are at risk of penalties and liability. Just as the IRS uses the common law test to determine who the employer is in a joint employment situation, the IRS also uses this test to determine if a worker is an employee or independent contractor. The vast majority of workers providing personal care and other home health services in participant direction programs should be considered employees. To protect the participant from possible liability, it is critical that workers are correctly classified. See Practical Point 3.
**Wage and Hour**

The Fair Labor Standards Act (FLSA) regulates minimum wage, overtime and employer recordkeeping requirements. The Act applies to any entity upon which a worker is dependent as a matter of “economic reality”. The Act not only recognizes joint employment, but also imposes joint employer obligations in specified circumstances.

In a situation in which an employer’s responsibility for overtime, minimum wage or recordkeeping requirements was in question and an agency, participant and employee relationship was examined, a court or hearing officer would determine whether the agency, participant or both are employers of the worker and, if so, which should be held liable if fault is found.

The economic reality test (see Appendix A, *Employment Tests*) has been used by both the Department of Labor and courts to determine whether an entity is a worker’s employer under the FLSA. Under the economic reality requirement, established in *Rutherford v. McComb*, these criteria must be viewed as pieces within the totality of a situation, not as positive or dispositive standards. The most relevant and applicable factors are listed in Appendix A, *Employment Tests*. In reality, many of these factors will vary by agency and program. Some of these factors, such as the agency’s maintenance of employment records and preparation of payroll, indicate that the agency is the employer. Others, such as the fact that the agency’s premises and equipment are not used for the work, indicate that it is not the employer. The FLSA also includes criteria in 29 CFR 791.2(b) (See Appendix A, *Employment Tests*) to determine if a joint employment relationship exists.

In *Bonnette v. California Health and Welfare Agency* (1983), the case most closely related to participant direction, the United States Court of Appeals for the Ninth Circuit used a list of four factors to determine that the counties paying chore workers under the California In-Home Supportive Services program were joint employers with the individuals receiving the in-home care (the “recipients”) under the FLSA. The four factors used to determine if a party was an employer in this case are outlined in Appendix A, *Employment Tests*. The court found that both the recipients and the counties were joint employers of the workers, and both parties were held liable for the minimum wage violations and ordered to pay the plaintiff for damages.

Consider the following example:

*Mary Jo provides personal care services to Betty, a participant in the XYZ participant direction program. ABC Agency is an AwC FMS provider in the program and includes Mary Jo in its books as an employee, pays Mary Jo based on timesheets signed by Mary Jo and Betty, withholds Mary Jo’s taxes and pays and files Mary Jo’s withheld*
Practical Point 4

Program administration agencies should develop program policies that address overtime and minimum wage and work with AwC FMS agencies to implement them. Specifically, program administration agencies should consider developing agreements with their AwC FMS providers about how overtime will be paid when a worker provides services to multiple participants and when a worker provides services that cannot be compensated within a participant’s authorization or budget. Further, program administration agencies should have systems in place to educate participants on the use of overtime. A participant could be liable under the law for directing a worker to work more than 40 hours per week if that worker is ultimately not paid for due overtime, perhaps because the participant’s budget or authorization does not support the additional cost of overtime.

Workers’ Compensation

Workers’ Compensation has the greatest volume of joint employment case law precedent and is the most commonly tried joint employment issue in courts. State law always governs workers’ compensation, so rules vary from state to state. The basic premise of workers’ compensation laws is to provide no-fault benefits to employees who are injured while working. With workers’ compensation in place, employees are barred from suing their employer for damages related to a sustained work injury. Legally, this means that workers’ compensation is usually the employee’s “exclusive remedy” for workplace injuries. The risk with joint employment and workers’ compensation is that if the state’s workers’ compensation laws do not cover one or both employers, exclusive remedy does not apply and a worker could sue the participant or the agency for negligence, or another tort claim.
Practical Point 5
Before starting a participant direction program with AwC FMS, program administration entities and their AwC FMS agencies should understand how the state’s law applies to joint employment and workers’ compensation. The program administration agency should ensure that participants are educated on any liability they could have and that the AwC FMS provider agreement supports the program administration entity’s understanding of how workers’ compensation will be handled in the joint employment situation.

In court cases, many states have extended the exclusive remedy provisions to both employers when joint employment is involved; some states have included these provisions in their workers’ compensation statutes. When states extend exclusive remedy for joint employers, one employer (the agency in the case of AwC FMS) is seen as the “general employer” and one employer (the participant for AwC) is seen as the “special employer”. The “general employer” is the worker's original employer and responsible for loaning the worker to another employer and the “special employer” is the employer who has been loaned a worker by another employer.

Other states strictly apply a common law employer rule (see Appendix A, Employment Tests) and require that the employer who directs the worker’s activity at the place of work serve as the employer for purposes of workers’ compensation. In an AwC FMS setting, this means that the participant is likely to be held liable for paying workers’ compensation benefits if an employee serving the participant is injured on the job. In these states, even if the AwC FMS has agreed to cover the cost of workers’ compensation benefits through its policy, it may not be permitted to. See Practical Points 5 and 6.

For example, in Indiana if a worker who is employed and paid jointly by multiple employers is injured, the employers must contribute to the workers’ compensation payments in proportion to their wage liabilities to the worker. As the worker’s payment comes entirely from the agency and the participant does not pay anything, if AwC FMS operates in Indiana, the agency’s workers’ compensation policy is responsible for the entire payment. Furthermore, the agency’s provision of such a policy precludes an injured worker from filing suit against the participant in the case of on-the-job injuries.

Practical Point 6
If the state only recognizes that a single employer exists for purposes of workers’ compensation, program administration agencies may consider working with their AwC FMS providers to add an “alternate employer endorsement” to their existing workers’ compensation policies. These policies can help to cover the participant if he/she is found to be the sole employer in a workers’ compensation case.
State Unemployment Insurance
Employers make contributions to a state’s unemployment compensation fund through payments for state unemployment insurance. Individual state rules govern how state unemployment insurance operates and whether joint employment is recognized. As with other liability issues for AwC FMS, if any required state unemployment insurance premiums are unpaid there can be ambiguity about which employer is liable. Risk exists that a participant could be held personally liable for unpaid state unemployment insurance costs or penalties.

State approaches vary. In some states, the payer of the workers (the agency) is always held liable, in other states common law rules are applied (increasing the likelihood that a participant could be held liable), and in others the state holds the employers jointly liable. See Practical Point 7.

Health and Retirement Plan Benefits
Current federal law does not require employers to provide their employees with health insurance or pensions. Tax law does, however, provide incentives for employers to offer employee benefits. To qualify for favorable tax treatment (including employers deducting the cost of benefits and employees not being taxed on benefits as income), an employer’s benefit plan must fairly cover employees.

The Employee Retirement Income Security Act (ERISA), the main legal authority on employee benefits, dictates that an employee’s eligibility to participate in a benefits plan is determined solely in accordance with the eligibility provisions set forth in the relevant benefit plan’s “Plan Document” or Summary Plan Description. An agency can therefore within legal limits, offer different plans to different classes of employees. See Practical Point 8.

Family and Medical Leave
The Family and Medical Leave Act (FMLA) was enacted in 1993. Qualifying employers are required to provide eligible employees with up to 12 weeks of unpaid, job-protected family and medical leave.

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10 We will review this section of the paper as the Affordable Care Act is implemented, specifically to examine the impact on AwC FMS.
in any 12-month period to employees who meet eligibility requirements.\textsuperscript{xvi} This applies to all public agencies and private-sector employers who employ 50 or more employees in a 75-mile radius in 20 or more workweeks in the current or preceding calendar year, including joint employers.\textsuperscript{11} The FMLA rules state that in determining whether a joint employment relationship exists, “the entire relationship is to be viewed in its totality.”\textsuperscript{xvii} Examination of the rules reveals that in a relationship operating as in AwC FMS, both employers (in our case, the agency and the participant) will ordinarily be deemed joint employers.

If a joint employment relationship is found to exist (and it is likely one would be found) both the participant and agency are liable under the FMLA if both employers meet the requirements. The agency must count any workers providing services to the participant that are also employed by the agency toward the 50 employee threshold. The participant must count only those employees providing service to the participant.

For employees to qualify for the FMLA, employees of a qualifying employer must: 1) have been employed by the employer for at least 12 months (not necessarily consecutively); 2) have worked at least 1,250 hours during the 12-month period immediately preceding the beginning of leave; and 3) be employed by a covered employer and work at a worksite within 75 miles of which that employer employs at least 50 people.\textsuperscript{xviii} All three components must be met for an employee to qualify for the FMLA.

While an agency could qualify as a covered employer under FMLA rules and a participant almost never would (it is highly unlikely to find a participant who employs 50 or more employees for 20 weeks in a year), many employees working in an AwC FMS model might not qualify for the FMLA. Due to the rule that the employee be employed at a worksite within a 75-mile radius of a covered employer with 50 or more employees, the worker would need the participant’s home (or other place of providing service) to be within a 75-mile radius of the agency and the agency would need to employ at least 50 employees at that work site.

\hspace{1cm}{
\begin{itemize}
    \item 1. Employee has been employed by the agency for at least 12 months
    \item 2. Employee has worked at least 1,250 hours in the 12-month period prior to the employee’s leave
    \item 3. The employee’s worksite (the participant’s home) is within 75 miles of a worksite where the agency employs at least 50 people
\end{itemize}}
Practical Point 9

Joint employment is recognized under FMLA, meaning both an agency and a participant could be liable under the Act. While a participant will rarely meet requirements to provide family and medical leave, if the agency with which the participant works qualifies, the participant is legally responsible to restore a worker to his/her previous position when the worker returns from leave. Participants should be educated on this responsibility. Legal action could be taken against participants who do not uphold their duty to restore a worker to a previous position. If at the time the employee returns from leave, the participant no longer works with the agency, the agency is still liable to try to find an equivalent position for the employee.

However, if an agency does qualify under the FMLA and the employee is a covered employee, the agency has obligations including giving required notices to employees, providing leave, and maintaining any health benefits during leave. A participant also has legal responsibilities under the FMLA if the agency and employee are covered, even if the participant him/herself is not covered. Under the “duty to restore to work” provisions of FMLA, the secondary employer (the participant in AwC FMS), must reinstate the employee immediately upon the employee’s return from leave, even if that means displacing another employee. The employee must be reinstated with equivalent pay, benefits, and other terms and conditions of employment. Additionally, if at the time the employee returns from leave, the participant no longer works with the agency, the agency is still liable to try to find an equivalent position for the employee. This can include providing service as an employee of the agency as the sole employer, providing service to another participant or some other position. The situation can be further complicated if the program permits participants to establish the rate of pay for their worker and other participants to whom the worker could be assigned are unwilling to pay the wage rate paid by the original participant. See Practical Point 9.

B. Employment Practices

Employee Authorization to Work in the United States

The Immigration Reform and Control Act (IRCA) requires an employer and employee to complete a USCIS Form I-9: Employee Eligibility Verification, to verify that prospective employees are authorized to work in the United States. In the case of a joint employer relationship, only one form must be completed but both employers are required to maintain compliance with I-9 requirements, including re-verification of identifying documents at their expiration dates. If they fail to do so, the Department of Homeland Security may impose monetary, civil, or criminal penalties on either or both parties. See Practical Point 10.

Joint employers, such as an agency and participant in AwC FMS, are both liable for maintaining compliance with USCIS Form I-9 rules. Therefore, program administration agencies should consider requiring that the agency, as the primary employer, collect completed I-9 forms, verify employee documentation and monitor authorization expiration on behalf of both the agency and participant.
**Equal Employment Opportunity**

The Equal Employment Opportunity Commission (EEOC) is a federal law enforcement agency that enforces laws against workplace discrimination. The Acts enforced by the EEOC regulate employment discrimination in its programs on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, and marital or familial status. Regulations enforced by the EEOC include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA) of 1990, and the ADA Amendments Act of 2008.

Title VII of the Civil Rights Act of 1964 prohibits discrimination against any individual because of the person’s race, color, religion, sex, or national origin. The Americans with Disabilities Act (ADA) of 1990 prohibits discrimination against a qualified individual on the basis of disability. Both acts recognize joint employment. To qualify as an employer under these laws, an employer must have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, including those employees who are jointly employed.

While most of the case law on employment relationships regulated by the EEOC involves claims brought under Title VII of the Civil Rights Act of 1964, which bans employment discrimination on the basis of race, color, religion, sex and national origin, these legal standards are applicable to all the Equal Employment Opportunity (EEO) laws. The key question under EEO laws as they relate to AwC FMS is: when two employers share an employee and an EEO claim is initiated, which employer is liable? In short, it depends.

**Could a participant be held liable under EEO Laws?**

In *Amaranare v. Merrill Lynch* (1984), the United States District Court of the Southern District of New York established that secondary employers can be held accountable if they unlawfully discriminate against a primary employer’s employees. However, to qualify as an employer under EEO laws, a participant must have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, including those employees who are jointly employed by the participant and the agency. While it is unlikely that most participants would have enough employees to qualify as an employer under the EEO laws, under Title VII, even if a participant could not be deemed an employer, he/she could still be held accountable for unlawful acts under Title VII. Title VII allows suits against persons “who are neither actual nor potential direct employers of particular complainants, but who control access to such employment and who deny access by reference of invidious criteria.” This means that if the participant’s misconduct interferes with the worker’s employment, the participant could be found liable under Title VII even if he/she does not qualify as the worker’s employer.

**Could an Agency be held liable under Equal Employment Opportunity (EEO) Laws?**

Some courts have ruled that an employer must control the details of the work at the worksite in order to be held liable as an employer under EEO laws. For AwC FMS to maximize participant-directedness, the agency should generally not be controlling the details of the work at the
Practical Point 11

Agencies should respond swiftly to any allegations of discrimination by a participant (or anyone else) or a hostile work environment to protect workers, and to minimize the agency’s liability under the EEO laws. Further, agencies should educate employees, encouraging them to report any issues to the agency immediately.

Practical Point 12

Program administration agencies should ensure that participants are educated about proper treatment of workers under EEO laws. Participants should understand that engaging in discriminatory practices could lead to legal actions against them. Further, program administration agencies should require that if an agency learns of a participant engaging in discriminatory practices, the agency informs the participant immediately that the participant is violating EEO laws and could be held accountable.

Workplace Safety

The Federal Occupational Safety and Health Act (OSH Act) and state workplace safety laws require employers to maintain a safe workplace. While the OSH Act does not apply to domestic service, 13 it

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12 Example modified from EEOC Guidelines on Application of EEO Laws to Contingent Workers (http://www.eeoc.gov/policy/docs/conting.html)

13 The OSH Act defines a domestic service employer as an individual who “privately employs persons for the purpose of performing for the benefit of such individuals what are commonly regarded as ordinary domestic household tasks, such
does apply to Home Health Care settings and therefore may apply to AwC FMS scenarios, because with the agency as an employer deploying workers to individuals’ homes, the agency could be defined as a home health care provider. The OSH Act applies to employers of all sizes.

In 1977, in Secretary of Labor v. Manpower Temporary Services, Inc., an administrative law judge with the Occupational Safety and Health Review Commission found that because the primary focus of the OSH Act is prevention, in a joint employment relationship, the Occupational Safety and Health Administration (OSHA) must first look to the employer that created the hazard and supervised the workers’ daily work. This precedent indicates that in an AwC FMS situation, if a participant created a hazard in his/her home and supervises the worker’s daily tasks, the participant could be held liable for a safety violation under the OSH Act. In memoranda to regional administrators within OSHA, offices of OSHA have been advised to cite the party in direct control of the workplace and the actions of the employees, in a joint employment situation. In American Dental Association v. Martin (1993), the Seventh Circuit restricted the application of blood borne pathogen standards when employees employed by an agency work in a home and the primary employer cannot control the safety conditions in the home. The court’s decision established that the primary employer will not be held liable for certain worksite specific violations that occur in the service recipient’s home.

An examination of the relevant guidance and case law reveals that an agency in an AwC FMS model is not likely to be held liable for safety violations within the participant’s home. However, a participant could be held legally responsible if the participant endangers the worker. See Practical Point 13.

**IV. NRCPDS Recommendations for a Participant-Directed Agency with Choice**

Agency with Choice is a model of FMS used in some participant direction programs. Like other Financial Management Services, AwC FMS is intended to support the participant to direct his/her own services. AwC FMS exists as one possible mechanism to support participant direction for

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**Practical Point 13**

Participants in an AwC FMS model could be held liable if they do not maintain a safe workplace for workers who provide service to them. Program administration agencies should ensure participants receive training on providing a safe workplace.

The OSHA Field Inspection Manual states in Chapter III, Inspection Documentation:

“Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question of who pays these employees may not be the determining factor. Determining the employer of an exposed person may be a very complex question.”

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as house cleaning, cooking, and caring for children,” and deems such employers “shall not be subject to the requirements of the Act with respect to such employment.” (29 CFR. Sec. 1975.6)
individuals. As discussed earlier, AwC FMS is a complex model of service delivery and program administration agencies are advised to develop policies and procedures to manage the challenges presented in III. Legal Issues prior to implementing the model.

When programs implement AwC FMS, a common reason is to provide participants support to employ workers and protection from legal liabilities. The AwC FMS model involves the agency and participant jointly employing the workers who provide service to the participant. The salient challenge is to implement a model wherein the agency is the primary employer of workers, the participant’s right to participant direct is not eroded, and neither the participant nor agency are vulnerable to significant legal liability beyond each party’s control.

In this section, NRCPDS puts forth the key components that we believe are needed for an AwC FMS model to qualify as “participant-directed.” These requirements seek to emphasize the participant’s role in managing his/her own services, without opening the participant or agency to exorbitant legal risk.

The NRCPDS recommends that participant-directed AwC FMS meet all of the following criteria. These components are intended to serve as our set of guidelines and recommendations. The NRCPDS recognizes that each program is unique, and some may not be able to implement all of the recommendations.

A. Model

The agency serves as the primary employer of the participant’s workers.
The agency providing AwC FMS should be the primary employer in the joint employment structure in order to meet the intent of providing the participant with support and some protection from legal liabilities. If the agency pays the employees’ wages, pays the employment taxes, and provides required statutory insurance coverage, but does nothing else, there is some risk that a court could hold that the agency is a payroll service provider and not an employer at all. If the agency is held to be a payroll agent rather than an employer, the participant could be found as the sole employer in cases of claims brought against an employer. In such a case, the participant must deal with legal responsibility that neither he/she nor the program administration agency expected.

In order to maintain the agency as the primary employer and the participant as the managing or secondary employer, the agency should maintain a particular role in key employer duties, including hiring, firing, scheduling, paying, and recordkeeping. How to optimally structure these duties across the agency and participant to maintain a participant-directed AwC FMS is discussed more specifically in this section.

AwC FMS operates only in states that recognize joint employment. State regulatory bodies differ in the extent to which they recognize co-employment or joint employment, and some states’
Departments of Labor or other tax agencies prohibit it or put restrictions on it. For example, Wisconsin’s Department of Workforce Development’s state unemployment insurance tax policy has historically not recognized an agency that jointly employs workers with a participant. Rather, the Department of Workforce Development will only recognize the participant as the employer of workers. Within this policy, the participant can continue to hire and manage workers, but the agency cannot be the employer of those workers. From a practical standpoint, the participant as employer is thus responsible for administrative duties, including payroll, tax filing, managing insurances, and holding a workers’ compensation policy. The participant could handle this himself or herself or the FMS provider could use the F/EA model of FMS and perform these duties as the participant’s agent (but not as the employer of the participant’s workers). An AwC FMS model is not permissible in a state that will not permit joint or co-employment of workers who provide service to the participant. State Bureaus of Workers’ Compensation also differ in whether they recognize joint employment. In states in which joint employment is not recognized for purposes of Workers’ Compensation, an AwC FMS model should be considered carefully (see Section III, Legal Issues). Before implementing this model, it is critical to review state law to ascertain if joint employment in this context is allowed by state labor, taxation and regulation agencies.

**AwC FMS and F/EA FMS are different and the operations of AwC FMS should reflect the differences.** There are several key distinctions between AwC and F/EA models of FMS. In the AwC model of FMS, a joint employment relationship exists between the agency and participant. In the F/EA model of FMS, the participant is the employer and the F/EA is his/her agent. For federal tax purposes, an F/EA executes an IRS Form 2678, Employer/Payer Appointment of Agent, with the participant and takes on joint liability for federal taxes.

Some agencies attempt to replicate the key components of the F/EA FMS model while calling it AwC FMS by structuring the participant-agency relationship so that the agency only handles payroll and tax responsibilities and has no relationship with the worker. These agencies may consistently tell the participant that he/she is the employer and will structure the relationship so that the participant performs all employer oversight duties, including, for example, reviewing employment paperwork and signing USCIS Form I-9, Employment Eligibility Verification, as the employer. When this occurs, the program is being structured with the participant as the sole employer but without the protections put in place by the F/EA model. It is not the intent of the AwC model of FMS for there to be a single employer. It is important that an agency providing AwC FMS is administered in such a way that it would likely pass the legal tests of employer (discussed further in Section III, Legal Issues) in order to shield the participant from legal penalties. Methods for ensuring this are discussed in Section III, Legal Issues.

**AwC FMS can operate under both employer and budget authority if the participant direction program allows.** Employer authority in participant direction is characterized by a participant (or his/her representative) selecting, scheduling and managing the workers of his/her choice. An AwC FMS model can support employer authority by ensuring the participant has a major role in each of those duties.
Under budget authority, the participant has control over how funds in his/her individual budget or authorization are allocated across services and providers. While not a requirement of budget authority, the participant often also has choice and control over what goods and non-employee services to purchase with his/her authorized program funds. AwC FMS can successfully operate within a budget authority context. The agency must maintain separate accounting for each participant and budget and, if applicable, make payments for goods and non-employee services. The agency should also prepare reports for program stakeholders showing participant spending against the individual budget. Under budget authority, the agency providing AwC FMS allows the participant full control over purchases as long as they are within the program’s parameters. An agency should not suggest particular services or providers to the participant or otherwise steer them in his/her choice of how to use his/her budget funds.

NRCPDS asserts that the most participant-directed programs offer both employer and budget authority.
## Division of Responsibility

This chart highlights the recommended division of responsibility for common Agency with Choice Financial Management Services model functions showing which party has responsibility for each given task. The more of the red bar in the entity’s column, the more responsibility that entity has for the function.

<table>
<thead>
<tr>
<th>Function</th>
<th>Participant</th>
<th>Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Selecting workers who serve the participant</td>
<td></td>
<td></td>
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<tr>
<td>Interviewing workers</td>
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<tr>
<td>Officially hiring workers</td>
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<tr>
<td>Discharging workers from serving the participant</td>
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<tr>
<td>Terminating workers</td>
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<tr>
<td>Training workers</td>
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<tr>
<td>Scheduling workers</td>
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<td></td>
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<tr>
<td>Managing the workers’ on-the-job work activities with the participant</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Determining the location of service provision</td>
<td></td>
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<tr>
<td>Setting the worker’s pay rate (this may be set or influenced by program rules)</td>
<td></td>
<td></td>
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<tr>
<td>Approving a worker’s timesheet</td>
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<tr>
<td>Ensuring service usage is approved in the participant’s spending plan prior to paying for it</td>
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<td></td>
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<tr>
<td>Paying workers and vendors</td>
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<td></td>
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<tr>
<td>Tracking funds in a participant’s budget</td>
<td></td>
<td></td>
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<tr>
<td>Tax and insurance reporting and payment</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
B. Recruiting, Interviewing, Hiring and Discharging Workers

The participant selects the workers of his/her choice.

One of the primary tenets of participant direction is that participants can receive services from the workers of their choice. It is critical that this is upheld for an AwC FMS program to be participant-directed. While the agency will serve as the official and primary employer of workers, the participant will be the managing employer and should take a lead role in selecting the workers who will provide service to him or her.

Ideally, the participant is identifying prospective workers within his/her community or circle of support, including friends and neighbors. If the program allows, and many do, the participant may choose a family member as a worker. The participant can also recruit workers, using formal or informal means. Once a participant has identified workers that he/she would like to provide service to him/her, the participant refers the workers to the agency, where they complete the official hire process (see below).

In some circumstances, a participant may neither be interested in identifying workers from his/her own community or circle of support nor in recruiting workers. In these cases, the agency may provide prospective workers from a registry or suggest several workers, who may already be employees of the agency. The participant can select the workers of his/her choice from this registry or suggestions. In a participant-directed AwC FMS model, the agency should suggest prospective workers sparingly. Most participants should identify workers and refer them to the agency, rather than the agency referring workers to the participant.

The participant has a primary role in interviewing prospective workers, but the agency also interviews.

Participant-directed AwC FMS seeks to offer participants maximum choice and control over their services and supports, while upholding a joint employer relationship between agency and participant. For maximum participant direction, the ideal is that the participant is the sole interviewer of prospective employees, but this practice can result in unintended legal risk. AwC FMS is structured so that the agency is the primary employer of workers rather than a mere administrative agent. 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.

Therefore, 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. A suggested practice is that the participant first interviews the worker and upon determining that he/she would like the worker to provide services, the participant refers the worker to the agency for hire, at which point the agency interviews the worker. The agency’s interview may be structured quite differently than the participant’s. The agency may have a short interview, wherein certain pre-determined questions are asked, or may
choose to have a more robust interview. The key is that, as the primary employer, the agency does have some interaction with the prospective employee prior to hire. As further discussed in Section III, Legal Issues, this is to support the agency to maintain its role as a joint employer and not a mere administrative agent.

_**An agency officially hires the participant’s workers as its own employees.**_

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. The hiring process involves many steps, including the major pieces listed below:

- Collecting, reviewing and acting on an employee-completed IRS Form W-4, _Employee’s Withholding Allowance Certificate_
- Verifying that a worker is authorized to work in the United States, collecting, reviewing and processing an employee-completed USCIS Form I-9, _Employment Eligibility Verification_ and completing the employer section of the USCIS Form I-9 as the employer
- Conducting background and registry checks on workers as required by state and program regulations and requested by participants
- Reporting the employee as the agency’s own employee per the state’s new hire reporting requirements
- Setting the employee up in the agency’s systems to be paid as an employee of the agency and have employee taxes appropriately withheld and employer taxes paid

These tasks will vary by state and program.

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.

_The participant can discharge the worker from providing service to him/her at any time._

As the managing employer, the participant manages the worker in his/her home, or wherever service is provided. 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.\(^\text{14}\) This is a key element of employer authority and is critical for AwC FMS to be participant-directed. A major difference between participant-directed services and traditional services is that the participant has choice of who provides service to him/her. In participant-directed AwC FMS, if a worker is not meeting a participant’s expectations, the participant can choose to discharge that worker from providing service to him/her and recruit another worker.

In AwC FMS, with the joint employer structure, this practically means that a participant can elect for the worker to no longer provide service to him/her. The participant would notify the agency that

\(^{14}\) This does not necessarily mean the worker is “fired.” As is explained later, the agency ultimately decides whether a worker should be terminated from employment with the agency.
the participant no longer wishes to receive services from the particular worker. Both the participant and agency would ensure that the worker discontinues providing service to the participant. The agency, however, continues to be the primary employer of the worker, as explained below.

NRCPDS recommends that, wherever possible, the AwC FMS provider not discharge an employee without consultation with the participant.

The agency terminates or re-assigns workers who are discharged by the participant.

As the primary employer, the agency ultimately decides whether a worker should be terminated from employment. While the participant may decide that he/she no longer wants to receive services from a worker, this does not mean that the worker is necessarily terminated from employment with the agency. 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. If the worker is made available to other participants in the AwC FMS model, the worker should be selected by those participants rather than assigned to them. If the agency provides traditional services in addition to AwC FMS, the agency may decide to assign the worker to a participant who is not in the participant direction program. If the agency has no other duties for the worker to perform, the agency may decide to terminate the worker.

As discussed in Section III, Legal Issues, 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.

C. Training, Scheduling and Managing Workers and Services

The participant has a major role in training or designing the training for his/her own workers.

Per participant direction philosophy, the participant knows best how his/her services should be provided to meet his/her needs. Therefore, the participant (or his/her family, spouse, friends or representative, if applicable) know best about how the worker should perform services for the participant. 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, which may be provided by people or entities other than the participant. This training is likely to occur in the participant’s home, or wherever services are being provided, but could also occur in other locales.

The agency may have some worker training requirements.

As the primary employer, it is perfectly reasonable for the agency to have some training requirements for the worker. In fact, by the agency ensuring some that training of the worker is performed, the agency is better positioned as the primary employer and not a mere administrative agent (see Section III, Legal Issues).
However, in order to uphold participant direction philosophy, the agency’s training requirements should not be so onerous as to make the position untenable for a worker that the participant has selected, nor should agency-required training detract from the training that the worker receives directly from the participant. For example, the agency may reasonably provide general training in first aid, CPR and safe transfer practices, but the agency should not provide training on how to specifically provide services to a particular participant, as that training should be provided by the participant himself/herself.

To prevent duplication of effort and to empower both the participant and agency in their roles as employers, if the agency does train the worker, information about that training should be shared with the participant. Similarly, in order to make the agency’s training most efficient, the participant should share with the agency any information on training that the participant has provided.

The participant determines when services are performed and schedules 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. This supports the participant to ensure his/her needs are met on a schedule that works with the participant’s lifestyle and priorities, rather than on a schedule dictated by an external party. Some participants may choose to receive services during the late night or early morning hours, or on holidays and weekends. If a worker will not or cannot provide service when a participant determines the service is needed, the participant may recruit and hire another worker.

When the participant chooses non-worker services, again the participant should determine when and where goods or services are delivered.

The participant supervises and manages the worker when the worker provides services to the participant. A key element of participant direction is that the participant can direct how the work provided for him/her is performed. Acting as the managing employer in the joint employer model of AwC FMS supports the participant’s access to this key element. 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. In other words, 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, if any, role in managing the regular duties at the participant’s worksite (which is usually his/her home).

Goods and services are provided in locations dictated by the participant. Participant direction is an approach for delivering home- and community-based service. 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. Based on the desires of the participant, services may be provided in the home, work,
school, church, or other location. If a participant uses his/her budget to purchase goods, the participant should elect from where those goods are purchased.

D. Financial Operations

The participant and agency play a role in setting the worker’s rate of pay. To achieve maximum participant direction, the participant would be the sole determiner of the worker’s rate of pay. However, 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, so it is unlikely that most participants would have complete control over the rate of pay in a participant direction program. 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. The program and agency should also allow exceptions to that range in certain circumstances.

The participant approves timesheets and submits them to the agency for payment. As the managing employer, the participant knows when the worker performed services. The participant should also actively manage his/her budget and spending plan and therefore must only direct the worker(s) to work amounts that are covered by the budget and spending plan. When a pay period ends, the participant should review the worker’s timesheet. 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. A common method of documenting this approval is for the participant to sign a paper timesheet, but analogous processes with telephonic or electronic time capture are also possible. Participant-approved timesheets should be submitted to the agency for review and payment. Agencies should not pay workers using a participant’s budget funds unless the participant approved the time recorded as worked.

In programs where it is allowed, an agency performs the financial duties for the participant to procure goods and non-employee services. The agency should support participants with the financial components of procuring goods and non-employee services. While paying employees is critical in participant direction, many programs also permit participants to use their individual budgets or authorizations to purchase goods and non-employee services. When this occurs, the agency must process invoices and make payments to the selected providers of goods and non-employee services. This includes ensuring that goods and services vendors complete an IRS Form W-9, Request for Taxpayer Identification Number and Certification and any program-specific paperwork, such as an Agreement for Goods and/or Services or a Purchase Request. Some program funding sources also require a provider agreement. The agency should not have a role in directing or suggesting what goods and non-employee services a

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15 Timesheets can be paper, electronic, telephonic, or another method, provided the participant can approve them prior to payment.
participant purchases (a counselor, however, may support the participant to determine which goods and services to purchase), but rather will manage the administrative duties associated with their proper and timely invoice processing and payment.

**The participant approves invoices and submits them to the agency for payment.**
As with employee time worked, when a participant plans to use his/her budget funds to purchase goods or non-employee services, the participant must approve the purchase prior to the agency paying the invoice. After the participant has documented that he/she approved the purchase, the agency can process the invoice.

**The agency tracks each participant’s budget & spending plan on an individual basis.**
As the FMS provider, the agency is responsible for tracking the funds in each participant’s budget. 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. In AwC FMS, employees and other service providers should not be paid from timesheets or invoices submitted directly to the agency without the participant approving the timesheet or invoice.

**An agency manages the accounting for participants to save portions of their budgets, if the program allows.**
Some participant-directed programs allow participants to save or “bank” portions of their individual budgets. This enables participants to accrue funds to make large purchases or to use at a later date. In such programs, the agency must be prepared to support the participant in creating and maintaining savings in their budgets and to provide periodic reports showing spending and balance data.

**The agency handles all tax and insurance reporting and payment.**
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. While the employee portion of required taxes must be withheld from employee pay, the employer portion of required taxes must not. The funding for the employer tax and insurance costs may be different depending on the program or agency. Some programs or agencies may have the employer taxes paid by the agency, while others may fund the employer tax costs from the participant’s individual budget or another funding source. It is not a requirement that the agency fund the employer tax and insurance costs merely because the agency is performing the financial operations make the payments.
The agency should also furnish a workers’ compensation policy to cover workers in the participant’s home. This provides protection for workers in the event of workplace injury in the form of wage replacement and medical benefits in exchange for mandatory relinquishment of the worker’s right to sue for tort of negligence (see Section III, Legal Issues). It is also appropriate for a portion of this cost to be deducted from the participant’s budget. The agency should determine how the cost of the workers’ compensation policy can be fairly divided across participants or workers to manage this accounting.

*The agency can elect to provide benefits to workers as its own employees.*

An advantage of the AwC FMS model is that it allows for the agency to provide benefits to workers as its own employees. This may make the work more attractive to potential workers, which helps participants recruit and retain qualified support. As an example, one known AwC FMS provider offers every AwC employee benefits, including group vision coverage and a $10,000 life insurance policy. See Section III, Legal Issues for more information on considerations when an agency provides benefits to workers.

### E. Agency Support of Participant

*The agency should understand participant direction and be able to communicate with individuals with disabilities.*

The agency should be able to accommodate communication with participants with varying disabilities. Participants with disabilities must be able to exchange information with the agency and express any complaints or concerns. Agency staff should understand the philosophy of participant direction and be trained in person-first language and person-centered planning. Furthermore, agency staff should recognize their role as administrative support for the participant-directing individual and provide service to the participant in a manner that supports that.

*The agency has systems in place to support the participant with responsibilities that the participant is unwilling or unable to perform.*

Unlike the F/EA model of FMS, a major benefit of the AwC model of FMS is that the FMS provider can support the participant with the employer duties that the participant is unable or unwilling to perform. While the participant generally plays the primary role in recruitment, worker selection, scheduling, supervision, training, evaluation, and worker dismissal, the agency should also have systems in place to help the participant with any of these tasks if he/she is unable or unwilling to perform them. This provides support for participants while strengthening the case for the agency as a joint employer.

### F. Agency Payment

*The agency is paid at either a transaction-based or a Per Participant Per Month rate.*

In existing programs, several methods for paying agency providers for their administrative services exist. We recommend that an agency be paid on either a transaction-based or a Per Participant Per Month rate because these reimbursement methods ensure the greatest level of transparency and tie
the payment most closely to the actual services that the agency performs. For more information on different payment approaches and examples of each, see Appendix B, Agency Payment Methods.

G. Risk Mitigation

The agency obtains professional liability insurance, general liability insurance, and workers’ compensation policies that cover workers serving participants.

It is vital that an agency recognize and minimize the potential liability to which it and the participants that it serves are exposed. This includes the procurement of professional liability and general liability insurance policies as the common law employer of homecare workers. Furthermore, the agency must provide workers’ compensation insurance for its workers in order to protect against injury in the workplace.

The agency does not require the participant to sign an agreement accepting liability.

In some cases, existing agencies have had participants sign documentation declaring that the participant is the employer of the workers or absolving the agency from any legal responsibility associated with the participant having workers in his/her home. This is not an acceptable business practice, as it exposes the participant to a significant level of risk in the event that the agency makes a mistake. From a legal standpoint, having all parties involved declare the worker an employee of the participant and of no relation to the agency is unlikely to absolve the agency from liability and it constitutes a misrepresentation of the legal rights and obligations of the parties.16

V. Conclusion

Agency with Choice (AwC) is a model of Financial Management Services (FMS) in which an agency and a participant are joint employers of workers who provide service to the participant. AwC FMS offer certain benefits to participants and program administration entities as a model of FMS that can be participant-directed while incorporating additional support for participants. However, AwC FMS introduce legal ambiguity that can make it difficult for participants, program administration entities and FMS providers to navigate their own and others’ risk within the model. Further, because the participant or his/her representative is not the sole employer of workers who provide service to the participant, key components of participant direction can erode if programs are not structured with controls in place to ensure participant choice and control. Finally, ensuring participant choice and control must be balanced with managing participant and agency risk in this joint employment model of FMS.

In this brief, the authors have outlined the key legal issues and ambiguities in AwC FMS and practical approaches for minimizing and educating parties on them. The authors have also put forth

16 Declaring in a contract that a party is or is not an employer is not a sufficient determination of employer. In Real v. Driscoll Strawberry Associates Inc. (1979), the United States Court of Appeals for the Ninth Circuit found that despite the fact that all parties had signed an agreement delineating a team of workers as independent contractors and citing that the contracting agency assumed no right to supervision or control, the economic reality of the situation indicated otherwise. The contract alone was insufficient to establish the agency’s status a contractor and not an employer.
key components for ensuring an Agency with Choice model of Financial Management Services is maximally participant-directed, while balancing legal risk for all parties.
End Notes


vi Rutherford Food Corp. v. McComb - 331 U.S. 722 (1947)


ix FL Statutes Annotated, Sec. 440.11(2) – Workers’ Compensation

x IRMI.com, Insurance and Risk Glossary, September 22, 2012

xi English v. Lehigh County Authority, 286 PA Superior Court; Virginia Polytechnic Institute and State University v. Frye, 6 VA. App. 589, 371 S.E. 2d (VA Ct. App. 1986)

xii MO. REV. STAT. Sec. 288.032

xiii MINN. STAT. Sec. 268.065

xiv NEB. REV. STAT. Sec. 48-648


xvii 29 CFR Sec. 825.106(b)


xix 29 CFR sec. 825.106(c)

xx 60 Fed. Reg at 2214.


xxii Amarnare v. Merrill Lynch, 611 F. Supp. 344 (SDNY 1984), aff’d 770 F.2d 157 (2d Cir. 1985)

xxiii Ibid.


xxv Memorandum to regional administrators from Richard P. Wilson, deputy director, federal compliance and state programs, OSHA, Department of Labor (July 5, 1977).

xxvi Memorandum from John B. Miles, Jr., OSHA Director, Feb. 28, 1985.

xxvii 984 F.2d 823 (7th Cir.), cert. denied, 510 U.S. 859 (1993)


Appendix A: Employment Tests

Common Law Test

The Internal Revenue Service uses a three-factored common law test to determine the degree of control and independence maintained by the entity and the worker.\(^1\) Facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties.

**Behavioral Control**

*Facts that show whether the entity has a right to direct and control how the worker does the task for which the worker is hired, including instructions that the entity gives to the worker, such as:*

- When and where to do the work
- What tools or equipment to use
- What workers to hire or to assist with the work
- Where to purchase supplies and services
- What work must be performed by a specified individual
- What order or sequence to follow
- Training that the entity gives to the worker, i.e. an employee may be trained to perform services in a particular manner.
- Even if no instructions are given, sufficient behavioral control may exist if the entity has the right to control how the work results are achieved

Note that the key consideration in this instance is whether the entity has retained the right to control the details of a worker’s performance or instead has given up that right.

**Financial Control**

*Facts that show whether the entity has a right to control the business aspects of the worker’s job, such as:*

- Extent to which the worker has unreimbursed business expenses
- Extent of the worker’s investment
- Extent to which the worker makes his/her services available to the relevant market
- How the business pays the worker
- Extent to which the worker can realize a profit or loss

**Type of Relationship**

*Evidence that demonstrates the kind of relationship that exists between the entity and the worker, including the following:*

- Written contracts describing the relationship the parties intended to create
- Whether or not the business provides the worker with EE-type benefits, such as insurance, a pension plan, vacation pay, or sick pay
- The permanency of the relationship
- The extent to which services performed by the worker are a key aspect of the regular business of the company
**Economic Reality Test**

In *United States v. Silk*, 331 U.S. 704 (1947), the Supreme Court set forth the following criteria to be used for determining the legal nature of the employment relationship. These rules are collectively sometimes called the “Economic Reality Test.”

The following are factors used to determine whether an entity is a worker’s employer using the Economic Reality Test:

- The degree of control exercised by the employer over the manner in which the work is performed
- The extent of relative investments of the putative employee and employer
- The degree to which the purported employee’s opportunity for profit or loss is determined by the employer
- The skill and initiative required in performing the job
- The permanency of the relationship

**Four Factor Bonnette Test**

*Bonnette v. California Health and Welfare Agency* (1983) established a four-factor test for joint employment to determine whether an entity is a worker’s employer. It is important to realize that this test is not intended to be exhaustive.

According to *Bonnette*, factors used to determine whether an entity is a worker’s employer should include the following:

1. Whether the entity has the power to hire and fire employees
2. Whether the entity supervises and controls employee work schedules or conditions of employment
3. Whether the entity determines the rate and method of payment
4. Whether the entity maintains employment records

**FLSA Joint Employment Criteria**


- The employers share the services of the employee; or
- One employer acts directly or indirectly in the interest of the other employer in relation to the employee; or
- The employers share control of the employee because one employer controls, or is controlled by, the other employer, or all of the employee’s employers are controlled by another company
Appendix B: Agency Payment Methods

1. Transaction-Based: The AwC FMS provider bills for each specific task or transaction that they undertake based on a pre-established fee schedule. This method provides transparency, as the agency clearly delineates for the funding entity the exact cost of each service provided. For example, the initial enrollment setup is assigned one fee, one hour of Personal Care Attendant service is assigned another, etc.

An example of an invoice from an AwC FMS provider billing in this method might look like this:

<table>
<thead>
<tr>
<th>Paul Participant</th>
<th>01/01/2011 – 01/31/2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Service</td>
<td>Units</td>
</tr>
<tr>
<td>Enrollment in Program (one time fee)</td>
<td>1 unit</td>
</tr>
<tr>
<td>Paying Workers</td>
<td>4 Checks</td>
</tr>
<tr>
<td>Human Resources Support</td>
<td>1 hour</td>
</tr>
<tr>
<td>Personal Care Attendant Services</td>
<td>40 hours</td>
</tr>
<tr>
<td>Employer Taxes and Insurance</td>
<td>1 unit</td>
</tr>
<tr>
<td><strong>Total Cost January 2011</strong></td>
<td><strong>$630.40</strong></td>
</tr>
</tbody>
</table>

2. Per Participant Per Month (PPPM): The AwC FMS provider bills the funding entity a flat fee for each member each month. This fee is set to accommodate the average anticipated cost of providing services. A common complaint about this method is that not all participants incur the same cost to the agency; however, if the agency provides transparent reporting of all expenditures to the funding entity, this can result in the same overall cost as the transaction-based method. Some agencies also bill on a per-participant-per-day basis.
An example of an invoice from an AwC FMS provider billing in this method might look like this:

<table>
<thead>
<tr>
<th>Service</th>
<th>Units</th>
<th>Cost per Unit</th>
<th>Line Item Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Per Member Per Month Fee</td>
<td>1 unit</td>
<td>$75</td>
<td>$75</td>
</tr>
<tr>
<td>Personal Care Attendant Services</td>
<td>40 hours</td>
<td>$12/hour</td>
<td>$480</td>
</tr>
<tr>
<td>Employer Taxes and Insurance</td>
<td>1 unit</td>
<td>$62.40</td>
<td>$62.40</td>
</tr>
</tbody>
</table>

**Total Cost January 2011** $617.40

Some programs utilize more opaque reimbursement methods. These are not recommended because reimbursement is not tied as closely to the actual services that the agency performs.

1. **Bundled Rate:** The AwC FMS provider is reimbursed at a standard rate for each unit of direct service (e.g. there is a set reimbursable rate for Personal Care Attendant Services and the agency charges that for each hour of that service that a participant uses). This rate is set at a level to include all program costs, including worker wages and administrative fees. This method provides the lowest level of transparency and incentivizes the agency to set the worker’s pay rate at a low level, even if the participant wishes to do otherwise. The Centers for Medicare & Medicaid Services (CMS) do not permit this payment method in the F/EA model.

An example of an invoice from an AwC FMS provider billing in this method might look like this:

<table>
<thead>
<tr>
<th>Service</th>
<th>Units</th>
<th>Cost per Unit</th>
<th>Line Item Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal Care Attendant Services</td>
<td>40 hours</td>
<td>$15.50/hour</td>
<td>$620</td>
</tr>
</tbody>
</table>

**Total Cost January 2011** $620

2. **Percent of Budget:** The AwC FMS provider is reimbursed a set percentage of the participant’s budget. This method is not recommended because the amount of effort and resources required by the AwC FMS provider is not directly related to the amount of services needed by a participant. For example, it is not necessarily ten times more costly for an AwC FMS provider to administer a participant with a monthly budget of $20,000 than one with a monthly budget of $2,000. CMS does not recognize this payment method in the F/EA model.
An example of an invoice from an AwC FMS billing in this method might look like this:

<table>
<thead>
<tr>
<th>Paul Participant</th>
<th>01/01/2011 – 01/31/2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Service</td>
<td>Units</td>
</tr>
<tr>
<td>AwC FMS Admin Fee</td>
<td>6% of $1,250 budget</td>
</tr>
<tr>
<td>Personal Care Attendant Services</td>
<td>40 hours</td>
</tr>
<tr>
<td>Employer Taxes and Insurance</td>
<td>1 unit</td>
</tr>
<tr>
<td><strong>Total Cost January 2011</strong></td>
<td><strong>$603.00</strong></td>
</tr>
</tbody>
</table>