



CMCS Informational Bulletin

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Subject: Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes

The Centers for Medicare & Medicaid Services (CMS) is re-releasing this Informational Bulletin, originally published on July 3, 2014, to assist states in understanding how they may amend their current 1915(c) waivers and state plan (1905(a), 1915(i), 1915(j), and 1915(k)) personal care services to implement Fair Labor Standards Act (FLSA) changes in a timely way, and in understanding Medicaid reimbursement options that will enable them to account for the cost of overtime and travel time during the workday that are likely compensable as the result of the DOL home care final rule.

Background

Since the publication of the Department of Labor's (DOL) Home Care Final Rule on October 1, 2013, the Centers for Medicare & Medicaid Services (CMS), DOL, and other federal partners have worked collaboratively to help ensure states have the information they need to prepare for compliance with this final rule, which is in effect and places obligations on employers of most home care workers under the Fair Labor Standards Act (FLSA). While the Informational Bulletin concentrates on home care programs using self-directed service options, be advised that FLSA implications also exist for services furnished through agency-delivered models.

Amending 1915(c) waivers and 1905(a) Personal Care, 1915(i), 1915(j) and 1915(k) State Plan Amendments

CMS continues its commitment to offer technical assistance to states seeking to make adjustments to current or future HCBS or other home care programs to accommodate FLSA related costs in Medicaid reimbursement design. All state plan amendments may be approved retroactive to the first day of the quarter in which the amendment is submitted. Therefore, any amendment to adjust a rate methodology to accommodate the FLSA rules that is submitted on or before March 31, 2016 for a state plan service can be approved with an effective date of January 1, 2016. The 1915(c) waiver rate methodologies cannot be approved retroactively. However, when the methodology must be changed due to the FLSA, CMS commits to approve within a month an amendment submitted that is limited to the following language:

“Waiver (*fill in the service title*) rates will be adjusted to comply with the FLSA regulations. The specific rate methodology will be submitted to CMS in an amendment or renewal no later than 180 days after this amendment approval date.”

It should be noted that if any other amendments to the waiver are requested, the review will require, at a minimum, the full 90 day review period.

In conclusion, CMS reminds states that they should consult DOL's guidance and seek legal counsel in determining where and how FLSA impacts direct care programs operating under Medicaid. CMS is available to offer technical assistance to states seeking to adjust Medicaid reimbursement and other program policies to appropriately support FLSA compliance in home and community based LTSS. Additionally, DOL is continuing to provide extensive, individualized technical assistance. To ensure the most efficient response, state officials seeking further assistance from DOL may contact Laura Tatum at Tatum.Laura@dol.gov. All others may contact homecare@dol.gov. Further information regarding DOL's final rule is available at: <http://www.dol.gov/whd/homecare/>.