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Home Care Rule Advocacy Fact Sheet:

How to Prevent Service Cuts and Protect Consumer-Directed Programs

The U.S. Department of Labor (DOL) issued a rule in late 2013 that affects home care services for people with disabilities and seniors. After extensive litigation, an appeals court in Washington, DC, upheld the rule on August 21, 2015. This means the rule will go into effect soon, and may impact some of your state's long-term care programs. Of particular concern are "consumer-directed" programs which allow the person receiving services to hire his/her own worker (oftentimes family members or close friends) and direct the care the worker provides, and "shared living" programs where the consumer and provider live together.

The rule narrows the types of home care workers who are exempt from the Fair Labor Standards Act's (FLSA) minimum wage and overtime requirements, meaning more home care workers will be entitled to these protections. Some states, however, may consider actions that would technically bring them into compliance with the new rule but would undermine its goals and could lead to cuts in critical community services for consumers, workforce shortages, and even the abandoning of the consumer-directed programs for which people with disabilities and seniors have long fought. **Consumers and advocates must take immediate action to make sure that your state is ready to implement this new rule in a way that helps and does not harm people with disabilities and seniors and their home care workers.**

To help consumers and advocates take action, we created a guide, *Action Steps for Consumers and Advocates Regarding the New Home Care Rule: How to Prevent Service Cuts and Protect Consumer-Directed Programs*. Below is an overview of the advocacy steps that consumers and advocates should take in their states, which are described in more detail in the guide:

- **Make sure your state is aware of and preparing now for the new home care rule to take effect.** Many states have not been focused on this rule and its impact, even though the Department of Labor may begin enforcing the rule as early as mid-November 2015.¹ It is critical to make sure this rule is a priority in your state.

¹ U.S. Dep't of Labor, *We Count on Home Care*, <http://www.dol.gov/whd/homecare/litigation.htm> (last visited Sept. 4, 2015).

- **Push your state to analyze which programs the rule affects and what the budget impact will be for these programs.** Your state will need to determine which of its consumer-directed programs have home care workers employed by anyone other than the consumer or his/her household (known as a “third-party employer”). DOL has said that most states’ programs have a third-party employer together with the consumer, known as a “joint employer.” If there is a joint employer, your state will need to determine and budget for the cost of paying overtime to workers (including people who provide services to more than one consumer) and the time for workers travelling between sites for different consumers. If the joint employer it is an entity other than the state, such as a Managed Care Organization (MCO) or Fiscal Management Service organization / Fiscal Intermediary (FMS/FI), the state will need to estimate rate increases necessary to allow for travel and overtime. Your state will also need to closely examine its shared living programs. These programs may be impacted if there is a third-party employer, if the worker no longer qualifies as a companion, or by the clarified sleep-time rules. DOL has issued detailed guidance about joint employment and shared living programs² and offered technical assistance to states.

- **Advocate for additional funding in impacted programs.** The rule will take effect in the middle of most states’ Fiscal Year 2016 budget cycle. You should explore whether your state has any way to add money to these programs outside the regular budget cycle. In addition, most state agencies are already preparing their Fiscal Year 2017 budget requests. It is critical that you advocate now for additional funding in the Fiscal Year 2017 budget.

- **Make sure your state does not comply with the rule in ways that cause harm to consumers and workers.** States could take actions that technically comply with the rule but hurt consumers and home care workers. These actions include prohibiting all overtime and restricting all or most travel or taking no action, which could lead to cuts in services for consumers and reductions in income to home care workers. Federal agencies have warned that policies leading to service cuts that place people at serious risk of institutionalization could violate the Americans with Disabilities Act and the Supreme Court’s decision in *Olmstead v. L.C.*³ States remain responsible for ensuring compliance with *Olmstead* even if their home care programs are operated through

² U.S. Dep’t of Labor, *We Count on Home Care: Joint Employment*, http://www.dol.gov/whd/homecare/joint_employment.htm (last visited Sept. 4, 2015); U.S. Dep’t of Labor, *We Count on Home Care: Medicaid Shared Living Programs*, http://www.dol.gov/whd/homecare/shared_living.htm (last visited Sept. 4, 2015).

³ “Dear Colleague” Letter from U.S. Dep’t of Justice and U.S. Dep’t of Health and Human Services (Dec. 15, 2014) (“DOJ/HHS Dear Colleague Letter”), <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/community/2014hhsdojdearcolleagueletter.pdf> (last visited Sept. 4, 2015); Letter from U.S. Sec’y of Labor to State Governors (Sept. 2, 2015), <http://www.dol.gov/whd/homecare/letter-to-governors-sept.pdf> (last visited Sept. 4, 2015).

private entities like an MCO or FMS/FI.⁴ Push your state to create an “exceptions process” from any new restrictive policies for consumers who would be harmed. If an entity other than the state is the joint employer, then the state must ensure sufficient reimbursement rates so they can have travel and overtime policies that avoid placing people at serious risk of institutionalization. Inform your state policy makers that the additional costs of implementing restrictive policies (such as hiring additional workers, setting up backup worker systems, and hiring staff to explain and enforce the restrictions) may be more expensive than having more generous travel and overtime policies.

- **Ensure that your state uses Medicaid to help with additional costs but without impacting individuals’ access to services.** Your state can use federal Medicaid to help defray the costs of complying with this rule. But make sure your state plans to use Medicaid to cover overtime and travel costs in a way that does not come out of money allocated to individual consumers for purchasing services. Otherwise, consumers will lose services they are entitled to receive. The Centers for Medicare & Medicaid services has issued guidance on Medicaid funding options⁵ and offered technical assistance to states.
- **Do not allow your state to abandon consumer-directed programs.** If your state is seriously considering abandoning its consumer-directed programs altogether, make sure your state is aware of the different program models, described in more detail in *Action Steps*, and the rule’s impact on each.
- **Make sure your state educates individual consumers about the rule even if the state is not a “joint employer” in the program.** Advocates should work with your state to develop materials to assist consumers who are the only employer in their consumer-directed programs.

See [Action Steps for Consumers and Advocates Regarding the New Home Care Rule](#) (PDF or [plain text](#)), with more detailed guidance. For more information, visit the Department of Labor’s website for guidance on the home care rule (<http://www.dol.gov/whd/homecare/>).

⁴ *Id.* footnote 11, at 3 (“A state’s obligation to make reasonable modifications to its policies, procedures, and practices applies even when a home care program is delivered through non-public entities.”)

⁵ U.S. Dep’t of Health and Human Services, CMCS Informational Bulletin “Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes,” (July 3, 2014), <http://www.medicare.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf> (last visited Sept. 4, 2015).