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# State Implementation of Department of Labor Home Care Rule

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# Members of Project Team

- U.S. Department of Health and Human Services (ASPE):
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  - Pamela Doty, PhD
- Mission Analytics:
  - Contractor: Ed Kako, PhD
  - Subcontractors:
    - National Association of State Directors of Developmental Disabilities Services (NASDDDS)
    - National Association of States United on Aging and Disability (NASUAD)
    - Applied Self-Direction (ASD)
- DOL Advisors - Karen Livingston, Melissa Murphy, Sarah Marcus

# Overview

- Background
  - Fair Labor Standards Act (FLSA) and Department of Labor (DOL) “home care rule”
  - Review Challenges for States
  - Review the scope of this project:
    - Environmental Scan
    - National Key Informant Interviews
    - State Case Studies
- Because of limited time...we will introduce the Environmental Scan and Key Informant Interviews, but will focus on findings from the State Case Studies

# Background - FLSA and Home Care Rule

- 1974 - Congress extended protections of FLSA to “domestic service” workers but:
  - Exempted from minimum wage and overtime provisions those who provide “companionship services” to seniors and individuals with disabilities
  - Exempted from overtime protections domestic service employees who reside in the household in which they provide services
- 2013 - DOL published Final Rule:
  - Revised definition of “companionship” to narrow the duties that fall within the term
  - Third-party employers (that is, employers other than care recipients or their families/households, e.g. home care agencies)) cannot claim either the companionship or live-in exemption. Entities that jointly employ workers through public programs in which the consumer/participant is an employer are considered third-party employers and are referred to as joint employers.
  - Whether or not there is a joint employer is determined by a multi-factorial “economic realities test;” where there is uncertainty or disagreement a definitive resolution could come from a court ruling.
- Effective January 1, 2015
- Extensive technical assistance from DOL
- Time-limited non-enforcement policy

# Challenges for States

- In consumer-directed programs:
  - Determining whether the consumer is the sole employer or there is a joint employer, such as a government agency, managed care organization, or other entity.
  - Workers' right to minimum wage and overtime compensation may be impacted depending on whether the self-directing program participant is the workers "sole employer" or there is a joint employer.
- Applying protections to providers who live in a consumer's home. (If there is no "joint employer" live-in workers are not entitled to OT pay, but states may decide all workers should receive OT pay if they work more than 40 hours per week, even if the state believes the program participant is the worker's sole employer).
- Ensuring proper payment for compensable travel time and overtime hours worked. Requires investment in administrative systems – expenses beyond payments for OT and travel time.



# Environmental Scan

# Environmental Scan: Parameters

- Purpose: Collect basic information on state implementation parameters
  - Managed care vs. FFS
  - Employer authority
  - Budget authority
  - Cap on hours
  - Exceptions policy to hours caps (for emergencies, complex needs, etc.)
  - Live-in exemption from overtime pay requirement
  - Travel Time
- In process – we do not have information on all states yet



# Key Informant Interviews



# Groups Interviewed

Group Type	#	Perspective
Consumer advocates	4	concerns and lived experiences of those directly affected
Worker advocates	4	concerns and observations of groups that support workforce compensation, growth, and professionalization
State associations	3	concerns of state program officials; impetus for their implementation choices
Technical assistance providers	1	Issues that have arisen – and continue to arise – among state staff as well as vendors of home care-related services (including fiscal management services)

# Specific Groups Interviewed

Informant Type	Groups
Consumer Advocates	ADAPT The Arc National Council on Independent Living (NICL) Center for Public Representation (CPR)
Worker Advocates	The National Employment Law Project (NELP) Paraprofessionals Health Institute (PHI) American Network of Community Options and Resources (ANCOR) National Domestic Workers Alliance (NDWA)
State Associations	National Association of State Medicaid Directors (NAMD) National Association of States United for Aging and Disabilities (NASUAD) National Association of State Directors of Developmental Disabilities Services (NASDDDS)
Technical Assistance Providers	Applied Self-Direction (ASD)

# Key Informant Interviews

- Purpose - capture qualitative information on...
  - Organization's efforts to learn about or influence DOL Notice of Proposed Rulemaking (NPRM)(2011)
  - Initial concerns about effects of rule on groups and individuals they represent
  - Efforts to track developments in implementation nationally
  - Observations/data collected on impacts of rule implementation
  - Expectations about ongoing involvement with members and with state and federal entities
  - Recommendations for state case studies



# State Case Studies

# Criteria for Choosing Case Study States

- Interest - Identify Promising Practices. We relied on...
  - DOJ and DHHS Office of Civil Rights guidance to states
  - CMS guidance to states (urged states to permit some OT, not to impose 40 hour “hard cap” on worker hours without providing for hardship exemptions – otherwise program participants might be at increased risk of institutionalization or for adverse health and welfare consequences if they could not get all of their authorized hours due to lack of available workers)
  - NELP and PHI criteria for what good state implementation looks like (E.g. robust stakeholder engagement in developing policies)
  - Key Informant Recommendations
  - Mix of managed care and fee-for-service (FFS) programs
  - Unionized vs. non-unionized workers
  - Geographic variation

# State Case Studies

- Were informed by...
  - Documents available on state websites
  - Reports and web material produced by non-governmental organizations:
    - State and trade associations
    - Foundations
    - Worker advocate groups
    - Consumer advocate groups
  - Newspaper reports
  - Key informant interviews

# States Selected for Case Studies

- California
- Massachusetts
- Minnesota
- New York
- Ohio
- Wisconsin

# Case Studies Highlight

- State's assessment of whether or not it is a joint employer
- Key features of home care landscape
  - Managed care vs. FFS
  - Unions (yes/no)
- Exceptions and exemptions and policies
- Who makes which decisions
- Role of stakeholders in shaping policy
- Promising practices



# California: Background

- In-Home Supportive Services (IHSS) Program.
- Over 500,000 program participants, almost all self-directing
- They represent nearly half of all self-directing program participants (and their workers) nationally
- 70% hire family members
- Authorized hours per participant cannot exceed 383 per month (the average is 108)
- Almost all counties have a public authority that:
  - Engages in collective bargaining with unions (SEIU or AFSCME) on behalf of state and counties
  - Operates a registry of workers for consumers
  - Provides other services to support consumers/workers (e.g. voluntary training)

# California: Select Findings

- CA accepts role as Joint Employer – primarily because of union contracts that set hourly worker wage rates
  - Joint employment required state to implement costly administrative program changes (e.g. to be able to track travel time and to add up hours worked for multiple program participants to determine OT pay)
  - No live-in exemption to OT pay
- Worker hours capped (66 hours/week), but those working for only one consumer capped at 70.5 hours
- Extra hours permitted for worker travel between program participants (limited to 7 hours per week)
- Exceptions to worker hours cap:
  - Live-in family members caring for 2 or more IHSS program participants allowed to work up to 90 hours/week
  - Extraordinary circumstances (complex conditions requiring live-in caregiver, rural area or foreign language limit available workers) - up to 90 hours/wk.
- Over 1 in 5 IHSS workers regularly receive OT pay

## California: Select Findings (continued)

- Exceptions to caps - decisions are made by the California Department of Social Services
- Worker violations (filing claims above hours cap) trigger escalating sanctions (until removal from the program)
  - Concerns about workers violating caps and being suspended from program
  - Percentage of violations has been less of a problem than expected
- Cost of home care rule implementation affected by:
  - phase-in of \$15/hour state minimum wage (by 2022)
  - restoration in 2015 of 7% authorized hours reduction implemented during “Great Recession”
  - end of Coordinated Care Initiative in 2018 required counties to again cost share with state
- Costs resulting from exceptions to hours cap were lower than anticipated

# California: Promising Practices

- CA began planning for implementation as soon as the Final Rule was released
- Implemented rule February 1, 2016
- Policies and procedures are clearly articulated:
  - Communicated explicitly to both program participants and workers and publicly transparent (accessible on web)
- State budgeting:
  - Governor's first budget after Final Rule (2014-15) capped weekly hours at 40
  - Strong pushback from consumers and the unions convinced the legislature to appropriate more funds to raise the cap and fund exceptions
- Cost of FLSA implementation has been affordable because of state's strong economic recovery - which also made it possible for the state to add paid time off as a new fringe benefit for IHSS workers
- Robust stakeholder engagement in development of worker cap exceptions policies, worker violations policies, travel time policies

# Massachusetts: Background

- Over 40,000 self-directing Medicaid program participants, including 34,000 in FFS personal care program and 4000 in Senior Care Options (voluntary MLTSS)
- Exercise employer-authority (only)
- Participant-directed workers are unionized (SEIU)

# Massachusetts: Select Findings

- MA accepts role as joint employer – primarily because of union contract that sets hourly worker wage rates
- MA has progressed in its policies:
  - Began with strict 40-hour cap; then allowed unlimited overtime, but found it was too costly
- Current policy:
  - Up to 50 hours
  - 50 to 66 hours for complex needs or live-in worker
  - Above 66 hours/week (only on emergency basis)

# Massachusetts: Promising Practices

- Like CA, MA began early to plan for implementation of the rule
- Listening sessions with public in late 2015/early 2016
- MA has allowed its policy to evolve...
  - as it got feedback from consumers and advocates
  - as it realized constraints in its own budget

# Minnesota: Background

- Enrollment in MLTSS is mandatory for adults aged 65 and older; MCOs cover all HCBS since 2006
- Younger physically disabled adults and children/adults with developmental disabilities in FFS
- Prior to implementation of home care rule, self-direction was predominantly “employer-only authority” but some “budget authority”
- Estimated 27,000 participant-directed workers
- Many paid family members (percentage unknown)
- MN unionized participant-directed workers in 2013, but union contract only sets hourly wage floor



# Minnesota: Select Findings

- MN does not see itself or MCOs as Joint Employers:
  - workers unionized but hourly wage rate is floor
  - program participants have flexible budget authority to set worker hours and hourly rates above negotiated floor
  - live-in worker exemption to OT allowed, but claiming the exemption is the program participant's decision
- Acute worker shortage in MN, key informants believe that has been made worse by home care rule

# Minnesota: Promising Practices

- In MN, unionization of workers is compatible with program participants having “flexible budget authority”
- Contract with SEIU included creation of newly launched “Direct Connect” home care worker Jobs Board:
  - should make it easier for self-directing consumers to find workers and vice versa
  - is one way to enhance the efficiency of the marketplace for self-directed home care services

# New York: Background

- Statewide move to mandatory MLTSS began in 2011
- Estimated 20,000 self-directing program participants in *Consumer-Directed Personal Assistance Services Program* state plan personal care services benefit
  - number has increased substantially since MLTSS
  - “employer authority” only
- 10,000 self-directing IDD waiver participants (4,000 “budget authority”, 6000 “employer-only authority”)
- Agency with Choice fiscal intermediaries
- Participant-directed workers are not unionized, but NYC agency workers are unionized (not upstate agency workers)
  - Unions have considerable political power; wage/benefit gains also benefit participant-directed workers
- Gradual increase in minimum wage, leading to \$15/hour is underway

# New York: Select Findings

- NY does not perceive itself as Joint Employer, but MCOs and FI's may be Joint Employers (based on interviews)
- MCOs and FIs taking steps to prevent a consumer/employer from attempting to circumvent OT pay requirements and MCO/FI limits on worker hours by signing a worker up with two different Agency with Choice FIs to give the erroneous appearance of two separate jobs
- No state policy on worker hours caps because decisions have been delegated to MCOs
  - Seen as flexible but very opaque
  - Capitated rates include money for OT and Travel Time (\$0.34/hour), but risk adjustment seen as inadequate for plans with high-needs members
- NY illustrates how state-specific circumstances can interact with the home care rule in complex ways that make it challenging to see the impact of rule:
  - Litigation over “13 hour rule” – whether sleeping a small number of hours triggers a strict per-day limit on compensable hours
  - In managed care, effort to consolidate home care duties and home health duties:
    - Problem - wage inversion (home care workers were paid more despite needing less training)
    - Solution - wage parity law has increased home health pay to level with home care wages

# New York: Promising Practices

- Working with Local 1199SEIU and other advocates, including PHI:
  - NY established a \$70 million fund to focus on quality home care services by rewarding plans that focus on investing in their network providers
  - Status unclear (funding not renewed last year), but interest is high among advocates
- New York City established a Paid Care Division in 2017:
  - Supports home care, child, and domestic workers by making referrals and providing training
  - Helps workers understand their rights
  - Helps consumers by enhancing home care workforce at no cost to them or to MCOs in NYC

# Ohio: Background

- Workers unionized under previous Democrat Governor, but Republican Governor rescinded unionization
- Estimated 600 self-directing program participants in PASSPORT (HCBS waiver for adults 60+); 800 in IDD waiver

# Ohio: Select Findings

- Originally planned to move to a hard cap of 40 hours, with no exceptions for DD waiver program
- Repeated stakeholder pushback led to an increase in the cap, with a clear exceptions policy
- New cap at 60 hours/week
- Exceptions for Independent Providers:
  - If the additional hours have been authorized by the client's Service and Support Administrator through the county board of developmental disabilities; or
  - If there is an emergency

# Ohio: Promising Practices

- Stakeholder involvement – especially by consumers – has convinced the legislature to appropriate more money
- Consumers successfully pressured the state without having a union to partner with
- Personal testimonies can be powerful and persuasive:
  - A student from Kenyon College repeatedly testified in public, getting the attention of newspapers and state lawmakers



# Wisconsin: Background

- Enrollment in MLTSS is voluntary
- Long-tradition of self-direction going back to 1980s
- Self-direction – 100% of those enrolled in *I Respect, I Self-Direct* (IRIS) FFS; 17% enrollees in Family Care (MLTSS); 19% in *Partnership Managed Care* (fully Integrated Medicare/Medicaid plans).
- Estimated 16,000 program participants in IRIS, primarily younger physically disabled adults
- IRIS full budget authority (including purchase of goods and services)
- Acute shortage of home care workers in the state; progressively worsening
- Participant-directed workers were (briefly) unionized, but current Governor Scott Walker rescinded unionization authority
- Governor attempted, but failed several years ago, to abolish IRIS and county AAA-based Family Care managed care plans in favor of for-profit commercial MCOs

# Wisconsin: Select Findings

- Home care rule seen as helping alleviate worker shortage by making home care more attractive as a profession
- Advocates pushed back against hard 40-hour/week cap
- New overtime policy:
  - Up to 60 hours/week OK (if authorized)
  - Exceptions granted:
    - through Service Support Administrator, approved by the county developmental disabilities board
    - in an emergency
- The state has codified its concern that working more than 40 hours/week should not jeopardize the health and safety of consumers or workers

# Wisconsin: Promising Practices

- Similar to OH, stakeholders can be vocal and persistent enough to create change, even in the absence of a union partnership
- OH and WI were selected as case study states because some key informants had expressed concern that perhaps only states with unionized workers would allow workers to work more than 40 hours/week

# Next Steps

- Project on-going
- Drafting Final Report for ASPE
- Project concludes September 30, 2018
- Recommendation: continue tracking outcomes for home care worker policies

# Continue Tracking Outcomes of Home Care Worker Policies

- Capping hours – especially without exceptions and exemptions – could:
  - compromise coordination of care
  - compromise quality of care
- States should consider tracking more than is required under arrangements with CMS for HCBS waivers and managed care contracts
- Tracking outcomes can:
  - provide decision makers and consumers/advocates additional data about policy choices
  - allow for quality monitoring and improvement of those policies

Questions?

