



Financial Management Services (FMS) Updates

October 22, 2015

KDADS Supports Self-Direction

- Participant is the Sole Employer (K.S.A. 39-7,100)
 - Recruits, hires, fires, supervises, trains, manages
 - Sets schedules and wage rates for their employee
- Kansas has taken steps to support self-direction
 - Realigned FMS model
 - Vendor Fiscal Agent model with information and assistance
 - Federal Employer Identification Number
 - Changes within AuthentiCare
 - Single Worker identifiers updated in system
 - Employer functions anticipated (completion by Jan 2016)
- MCOs and FMS providers are expected to support self-directing participants employing direct support workers with information/assistance

Overview

- **Updates on DOL**
 - Changes to the FLSA have not been legally tested and any action would be a case of first impression
 - Information contained in this presentation represents KDADS interpretations
 - DOL and Court may have varying interpretations
 - Information in this presentation should not be construed as legal advice
 - Providers will need to confer with their attorneys
- **Updates on Next Steps**
 - Waiver Amendments & Changes
 - FMS Reviews and Contracts
 - Roles and Responsibilities

Changes to the FLSA (DOL Final Rule)

Effective October 13, 2015, most direct care workers are required to receive federal minimum wage and overtime pay protections under the Fair Labor Standards Act (FLSA)

- Limitations on Companionship Exemption
- Removal of exemption for Third-Party Employers (agency-directed and self-directed services)

29 U.S.C. §§ 201 et seq; 29 CFR 522.109 (2015),



DOL Final Rule Timeline

- **October 2013** – DOL published Final Rule
- **June 2014** – DOL published Administrative Interpretation on Joint Employment
- **October 7, 2014** – DOL published a time-limited Non-Enforcement Policy for 2015.
- **December 22, 2014** – DC District Court issued partial order and delayed effective date (1/1/15)
- **January 14, 2015** – DC District Court vacated key portions of related to FLSA and companionship

DOL Final Rule Timeline (cont'd)

- **October 13, 2015** – Court issued mandate making Final Rule effective
- **November 12, 2015** – DOL may begin discretionary enforcement under second phase of its time-limited non-enforcement policy
- **January 1, 2016** – DOL begins enforcement

Additional Information:

- www.dol.gov/whd/homecare
- [https://www.kdads.ks.gov/commissions/csp/home-community-based-services-\(hcbs\)/federal-guidelines](https://www.kdads.ks.gov/commissions/csp/home-community-based-services-(hcbs)/federal-guidelines)

Companionship Exemption

Regulatory Framework prior to the DOL Final Rule

DSWs serving self-directing Medicaid waiver participants were exempt from FLSA requirements because one of two exemptions usually applied:

1. Companionship rule
2. Live-in domestic services rule

Current Regulatory Framework

- The new rule narrows the DOL definition of “companionship services,” which has the effect of limiting the scope of the FLSA’s companionship-services exemption.
- Among other adjustments, the regulation now states that “[t]he term companionship services . . . Includes the provision of care” such as “meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care” – only if that care “does not exceed 20 percent of the total hours worked.” (20 U.S.C. § 552.6(b)(2015))

Joint Employment

Regulatory Framework prior to the DOL Final Rule

Until recently, the Department of Labor interpreted the statutory exemptions for companionship services and live-in workers to include employees of third-party providers who are assigned to provide care in a home.

Current Regulatory Framework

- DOL recently adopted regulations reversing its position on whether the FLSA's companionship-services and live-in worker exemptions should reach employees of third-party agencies
- The new regulations remove those employees from the exemptions and bring them within the FLSA's minimum-wage and overtime protections.

Next Steps

- Waiver Amendments
 - Clerical Fix for TBI and IDD waivers
 - Realignment to Sleep Cycle Support for all HCBS Programs with this service
- FMS Contract
 - Current contract expires 12/31/15
 - Amendments to some sections

Overnight Support

- Clarify Service Definition
 - In home, overnight support
 - Individual must require a minimum of 6 hours of overnight support
- Increase the rate for overnight support
- MCOs will assess participants receiving sleep cycle support
 - Flexibility of KanCare allows the MCOs to use a variety of tools to meet a participant's assessed need for overnight supports

Role of MCOs

In accordance with existing contracts, MCOs will assess the needs of current participants receiving sleep cycle support

- Identify supports required based on assessment
- Provide appropriate services to meet assessed needs for paid overnight support
 - Use combination of services and supports
 - Tools utilized may include personal care services, sleep cycle, “in lieu of” services, etc.

Role of FMS Providers

- Provide information to participants about employer duties and responsibilities
 - FEIN and IRS requirements
 - Wage range and limits
 - FMS policies (termination for non-compliance)
- Provide assistance
 - Ministerial duties: payroll and tax withholding
 - Background checks and notification of results
 - Administrative tasks to support employer

FMS Provider Readiness Reviews

- Ensure compliance with waiver changes, FMS Manual, and DOL Final Rule
- Validation of Process
 - Readiness Review Tool
 - Review of Provider Manuals

Questions

- KDADS is seeking recommendations on strategies supporting effective communication with participants
- KDADS will answer as many questions as possible during the information session
- Responses
 - Kansas will group and summarize responses for a public response available online
 - KDADS will not post or summarize questions that may require legal, tax or other professional or individualized advice