



Home and Community Based Waiver (HCBS) Changes

Community Supports &
Programs Commission

Settings, Person-Centered Plans, Conflict Free Case Management

HCBS FINAL RULE

October 22, 2014



Summary of the Rule

- Issued: January 2014
- Effective: March 17, 2014 (PCSP, CFCM) or within 5 years for the Settings Transition Plan
 - States have until March 17, 2015, to complete a comprehensive transition plan to come into compliance with the final rule for settings
- Basic Rule:
 - Person-Centered Support Planning
 - Conflict Free Case Management (afternoon)
 - HCBS Settings Transition Plan
 - States must assess settings and ensure compliance or transition to compliant **residential** and **non-residential** settings within 5 years of the effective date (Mar 17, 2014)

Why the change?

- After five years of public comments CMS issued final rule 2014 that requires states to evaluate HCBS setting to meet new rule definition
- The rule speaks to the CMS concern of the health and welfare of waiver participants and calls out the Secretary's authority and the process that would be used to terminate waivers that CMS determines are out of compliance.



What does this mean?

- The HCBS rule places new requirements on housing which is owned or operated by a service provider by describing the elements a home or community based setting must meet for a waiver participant to redeem their benefits through such a provider.
- The new HCBS rule requires waiver participants in provider controlled housing to have control over their home environment and hold protections over that domain comparable to someone owning or renting a housing unit and must also exercise rights in choosing their service provider.

Home and Community Based Settings Characteristics

FEDERAL REQUIREMENTS FOR HOME AND COMMUNITY-BASED SETTINGS

Settings that ARE Home and Community-Based must be integrated in and support full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.

Home and Community-Based Settings must have the following characteristics:

- Chosen by the individual from among setting options including non-disability specific settings (as well as an independent setting) and an option for a private unit in a residential setting.
 - Choice must be identified/included in the person-centered service plan
 - Choice must be based on the individual's needs, preferences, and, for residential settings, resources available for room and board.
- Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.
- Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.
- Facilitates individual choice regarding services and supports, and who provides them.

State must assess and ensure Kansas provider settings meet the qualities of the HCBS Setting Rule

HCBS Characteristics

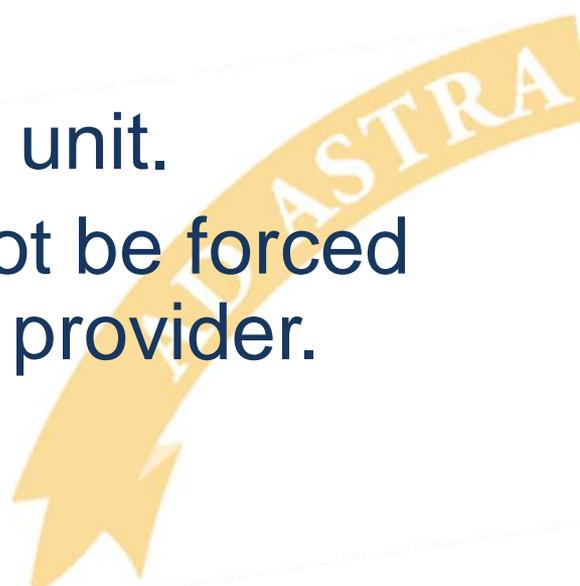
In a provider-owned or controlled residential* setting, in addition to the qualities specified above, must have:

- Have a lease or a written agreement with eviction and appeals rights
- Provide privacy in sleeping and living units
- Provide individuals with freedom and support
- Allows visitors at any time of their choosing
- The setting is accessible for the consumer, including ADA compliant

** KDADS is still waiting for non-residential guidance from CMS for day and employment services*

Waiver participants must be assured . . .

- A lease agreement.
- Protections comparable to the local jurisdiction's landlord tenant act, specifically including options for appeal of discharge/eviction.
- Unrestricted access to food.
- A locked door to the participant's unit.
- Choice of service provider/ cannot be forced to receive services from housing provider.

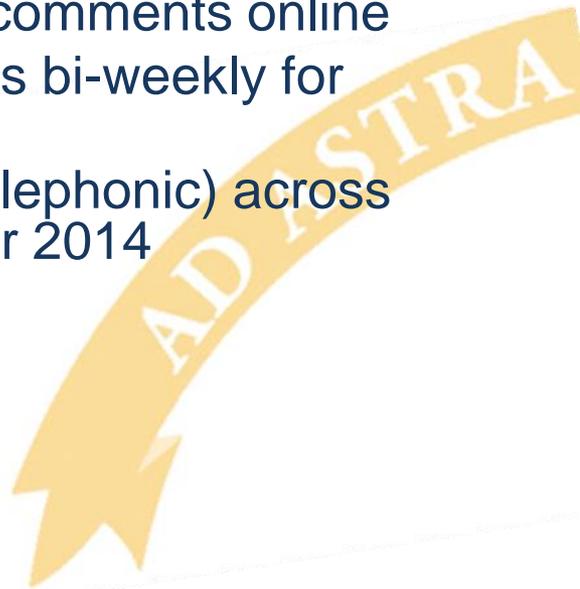


Who is affected?

- Consumers receiving HCBS services
 - Autism (Children who start serves prior to age 6 years)
 - Frail Elderly (Ages 65 and older)
 - Intellectual Developmental Disabilities (Ages 5 and older)
 - Technology Assistance (Ages 0 – 21 years)
 - Traumatic Brain Injury (Ages 16 – 64 years)
 - Physical Disabilities (Ages 16 – 64 year)
 - Severe Emotional Disturbance (Ages 4 – 18 years)
- Individuals who want to move out of an institution
- Various settings (licensed and unlicensed day, residential, congregate, employment)
- HCBS service Providers

KDADS Transition Plan

- To meet the new CMS requirements, KDADS took several steps to allow the consumers, parents, guardians, family, friends, providers and stakeholders to learn about the new rules and provide input into the process and the plan to ensure Kansas complies with the new rules:
 - Tribal/Public Notice about the Transition Plan
 - Statewide and Program-specific Transition Plans – online
 - Public Comment Sessions (in person and telephonic) across Kansas – 30 days (June 14-July 15, 2014) – comments online
 - Provider and Consumer Lunch and Learn calls bi-weekly for questions and answers
 - Public Information Sessions (in person and telephonic) across Kansas – April 2014, August 2014, September 2014



KANSAS Home and Community Based Services (HCBS) Programs Transition Plan – Settings Analysis

YES – Settings presumed fully compliant with HCBS characteristics

Type of Setting	Standard for Review
Member owns/leases home, which is not provider-owned or controlled, and where services are provided in person's home	State Review of Settings
Supported Employment provided in an integrated community setting/competitive employment	State Review of Settings
Foster Family Homes	Licensure/Certification

NOT YET – Settings may be compliant, or with changes will comply with HCBS Characteristics

Type of Setting	Standard for Review
Children's Residential/Foster Care Settings	State Review of Settings
Provider-owned/controlled homes and apartments for individuals with specific disabilities	State Review of Settings
Sheltered Employment/Disability-Specific Work Crews	State Review of Settings
Assisted Living Facilities	Licensure/Certification
Home Plus Facilities	Licensure/Certification
Boarding Care Homes	Licensure/Certification
Adult Day Care Facilities – Stand-a-lone	Licensure/Certification
IDD Residential – Shared Living/Host Homes/Extended Family Teaching Model	Licensure/Certification
IDD Residential – Group Home Settings (4-8 bed locations)	Licensure/Certification
IDD Day Services – Congregate Settings, located in building that also provides disability-specific services or where provider offices are located	Licensure/Certification
Apartment Complexes where the majority of residents receive HCBS	Licensure/Certification
Disability-specific camp/day settings (except Respite)	State Review of Settings
Multiple locations on the same street, apartment, location, operated by same provider (including duplexes and multiplexes)	State Review of Settings

NOT YET – Settings is presumed non-HCBS but may present evidence to CMS for heightened scrutiny

Type of Setting	Standard for Review
Residential Care Facilities (RCFs) (of any size)	Licensure/Certification
Adult Day Care Facilities – In institution/hospital/nursing facilities	Licensure/Certification
Any setting on the grounds of or adjacent to a public institution	State Review of Settings
Settings that isolate participants from the broader community or were created for specific disabilities	State Review of Settings

NO – Settings do not comply with HCBS characteristics

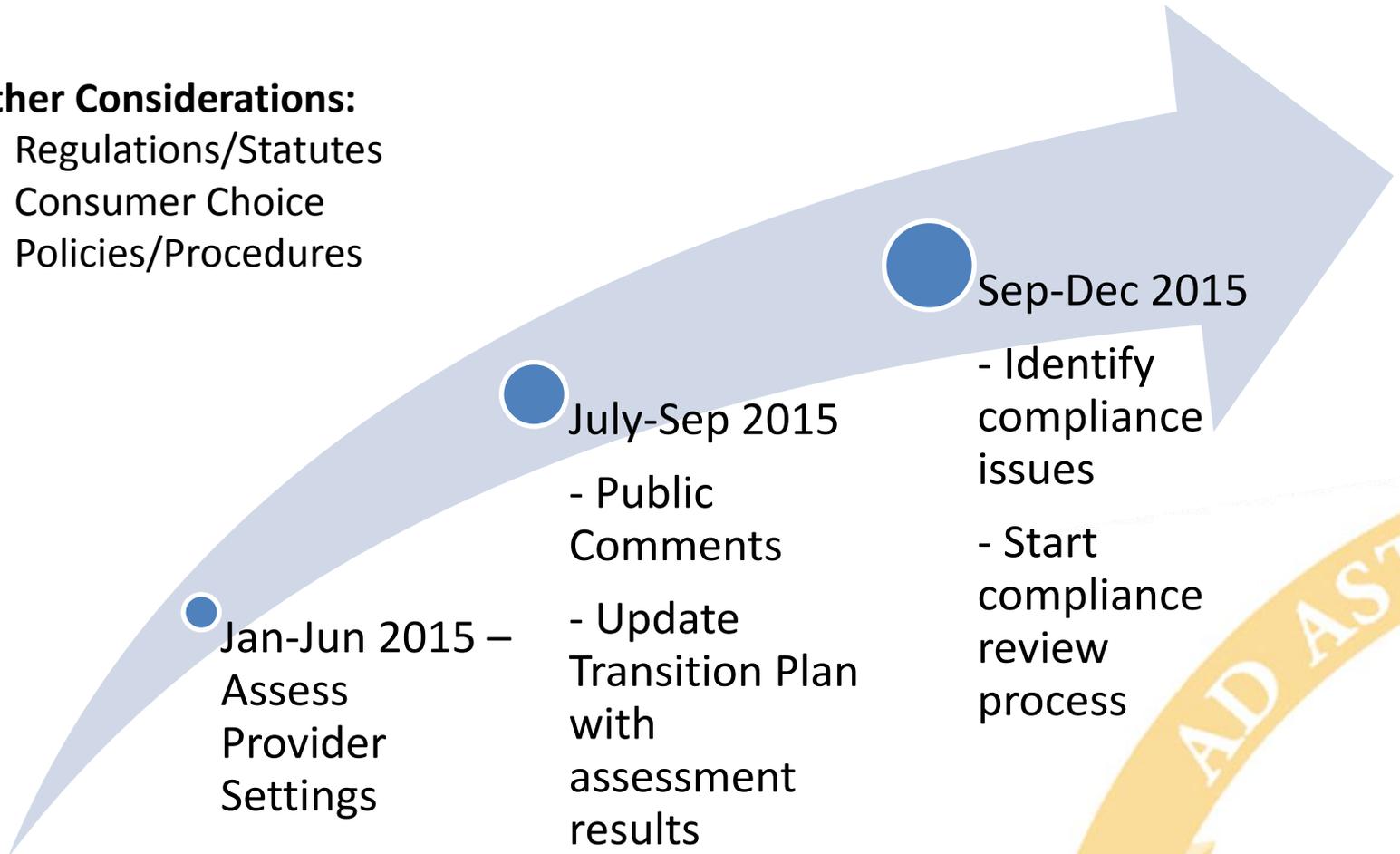
Type of Setting	Standard for Review
Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF-IIDs)	Licensure/Certification
Nursing Facilities/Skilled Nursing Facilities	Licensure/Certification
Institutions, including for Mental Disease and Psychiatric Residential Treatment Facilities	Licensure/Certification
Hospital/State Hospitals (Parsons, Larned, Osawatomie, KNI)	Licensure/Certification

** The KDADS Settings Analysis is general in nature and does not imply that any specific provider or location is noncompliant solely by classification in this analysis. Final determination will depend upon information gathered through all assessment activities outlined in the transition plan, including but not limited to, onsite reviews, provider annual self-assessments, consumer surveys, provider surveys, audits and quality reviews.*

Transition Plan (cont'd)

Other Considerations:

- Regulations/Statutes
- Consumer Choice
- Policies/Procedures



Jan-Jun 2015 –
Assess
Provider
Settings

July-Sep 2015
- Public
Comments
- Update
Transition Plan
with
assessment
results

Sep-Dec 2015
- Identify
compliance
issues
- Start
compliance
review
process



KDADS Transition Plan (cont'd)

- Assess all settings (licensed, unlicensed day, residential, employment)
- Compliance
 - Address characteristics that effectively isolate
 - Identify settings that cannot comply
 - Identify or develop alternative options
- Propose remedial strategies & timelines
- Evaluate system designs and practices



Kansas proposed remedial strategies and timelines

- Evaluate system design
- Come into compliance
- Transition individuals from non-compliant to compliant setting
- Provide public comment period and input opportunities

Where We Are Now

- New rule was effective March 17, 2014
 - Kansas was required to submit a transition plan for all of the HCBS Programs (Autism, TA, IDD, FE, TBI, and PD) within 120 days of submitting a renewal or amendment.
 - Kansas submitted the renewals for IDD and TBI in early April, but worked with CMS on the Transition plan an delayed submission until additional guidance is provided by CMS on the new rule
- CMS will review the plans and determine if the State has plans to bring all settings into compliance
 - 2015 will allow the state adequate time to assess and develop a long-term plan for sustainable compliance and transitions
 - Timelines for benchmarks for compliance will be finalized by CMS and transitions will be completed between 1-5 years.
- The new rule applies to all settings where an individual may receive HCBS services and looks at the quality of their life and access to and integration with the greater community

Companionship, Joint Employment, Shared Living

DEPARTMENT OF LABOR RULE

October 22, 2014

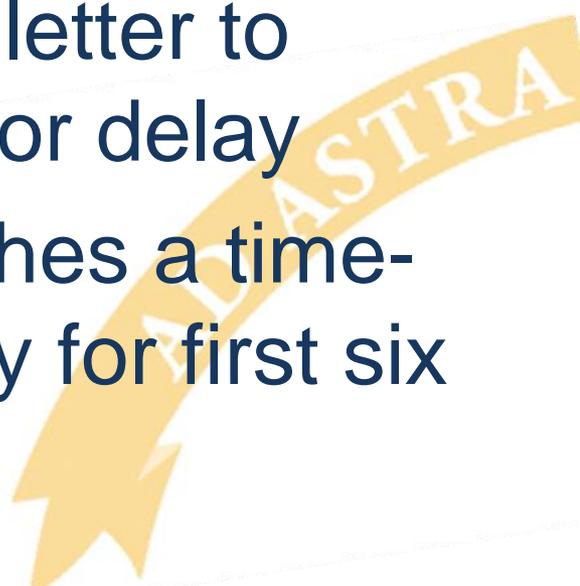


Companionship Rule

- **Effective January 1, 2015**, most direct care workers will be required to receive federal minimum wage and overtime pay protections.
- Direct care workers are workers who provide home care services, such as certified nursing assistants, home health aides, personal care aides, caregivers, and companions.

Brief Timeline

- **October 2013** – DOL publishes Final Rule on Companionship/Home Care exemption
- **June 2014** – DOL publishes Administrative Interpretation on Joint Employment
- **August 2014** – Kansas sends letter to DOL requesting an exemption or delay
- **October 7, 2014** – DOL publishes a time-limited Non-Enforcement Policy for first six months of 2015.



Background

The Fair Labor Standards Act requires:

- Employers to pay employees the minimum wage,
 - Workers to work only 40 hours per week, and
 - Employers to pay overtime for hours worked above 40.
-
- For the last 40 years, direct care workers, including personal care attendants, providing companionship and care services to elderly people or to people with illness, injury, or disability, were exempt from following these rules.



What is Changing?

- In October 2013, the U.S. Department of Labor extended this rule to include those who provide personal care attendant (PCA) services, supportive home care (SHC) services, and personal assistant services (PAS) to aging and disabled people on Medicaid. In most cases, consumers and providers who employ domestic service workers will now have to follow these rules.
- U.S. DOL has interpreted the rule to mean that states, MCOs, and FMS providers may be considered the joint employer and responsible for additional employment tasks.
 - However, in Kansas on the self-direction regulation, the consumer is the manager of the employer functions (recruiting, hire, fire, schedules, trains, manages, set rates) of the employee.
 - Kansas continues to have regular discussions with DOL for clarification on the Joint Employer interpretation

Companionship Rule

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- Direct care workers are workers who provide home care services, such as certified nursing assistants, home health aides, personal care aides, caregivers, and companions.

Companionship Exemption

Current Law-

Under current law (29 CFR 522.109), DSWs serving self-directing Medicaid Waiver clients are exempt from minimum wages and overtime compensation. This is because one of two exemptions usually apply to Medicaid Waivers:

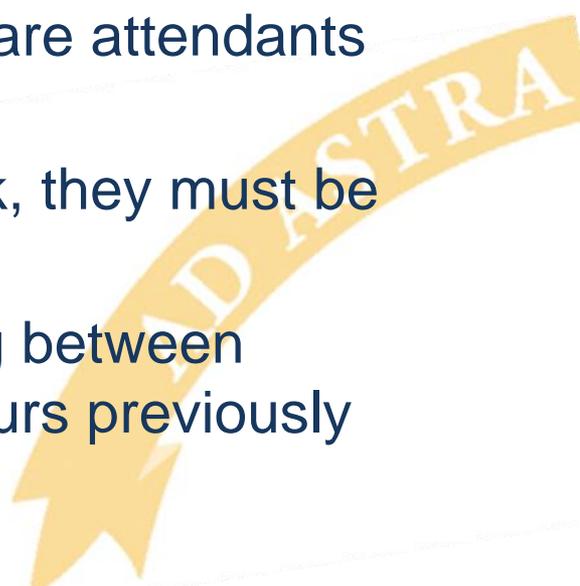
1. Companionship rule
2. Live-in domestic services rule

Changes made by Amended Regulation-

As of January 1, 2015, the companionship rule and live-in domestic services rule will only apply to a DSW who is the sole employee of a person or family member of a person. If a DSW is employed by an governmental agency, non-profit organization, or a for profit organization the old exemptions and rules will not apply. Moreover, if a DSW has more than one employer (joint-employment arrangement as determined by the DOL), the exemptions will not apply and the DSW will be eligible for the minimum wage and overtime benefits.

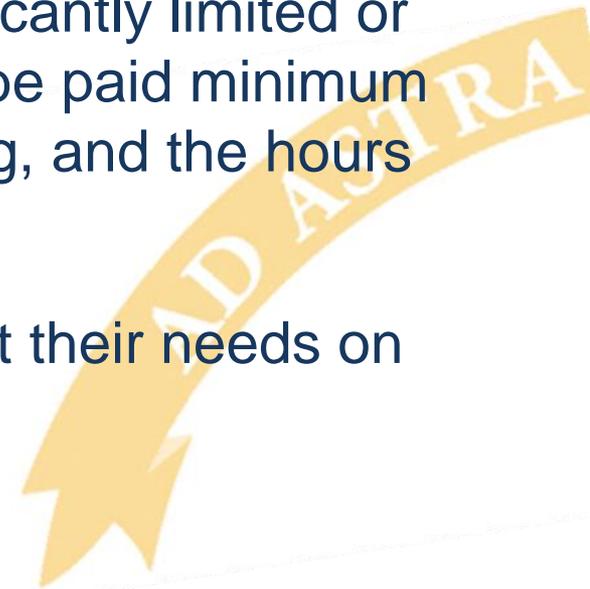
Potential Results of Rule

- As of January 1, 2015, the DOL Final Rule becomes effective. This may force the state of Kansas to place certain limitations on personal care attendant services to make sure that we are following the rules of the U.S. Department of Labor and the Medicaid program. Possible changes could include:
 - Any worker providing personal attendant services (PAS), supportive home care (SHC) and personal care attendants (PCAs) may only work 40 hours per week.
 - If they work more than 40 hours per week, they must be paid overtime.
 - The 40 hours may include time for driving between multiple consumers, waiting time, and hours previously included in sleep cycle support



Potential Results of Rule (cont.)

- Workers may be limited to only working for one Financial Management Services (FMS) provider AND one consumer.
- Additional services may need to be added to AuthentiCare® or other monitoring system to ensure compliance with the labor laws
- Sleep cycle support may be changed, significantly limited or eliminated because workers would need to be paid minimum wage for overnight supports, even if sleeping, and the hours would count toward the 40 hours per week.
- Consumers may need more workers to meet their needs on their plan of care.



Joint Employment

- June 2014 – DOL issued an Administrative Interpretation describing Joint Employment
 - The primary issue is determining a DSW’s employment status under the self-directing model adopted by KanCare.
 - If the DSW is the **sole employee** of KDADS or an MCO through a contracted FMS provider, then the DSW is eligible for the minimum wage and overtime benefits.
 - If a DSW is the **joint-employee** of KDADS, an MCO, an FMS provider, a self-directing client, or any combination thereof, then the DSW is eligible for the minimum wage and overtime benefits.
- Even prior to KanCare, the DOL’s amended rule would still have posed a problem for the FMS system. In the typical FMS self-directed model, the FMS provider handled payroll and the client chose/directed the DSW. This could be a strong indicator for joint employment under DOL’s new regulation.



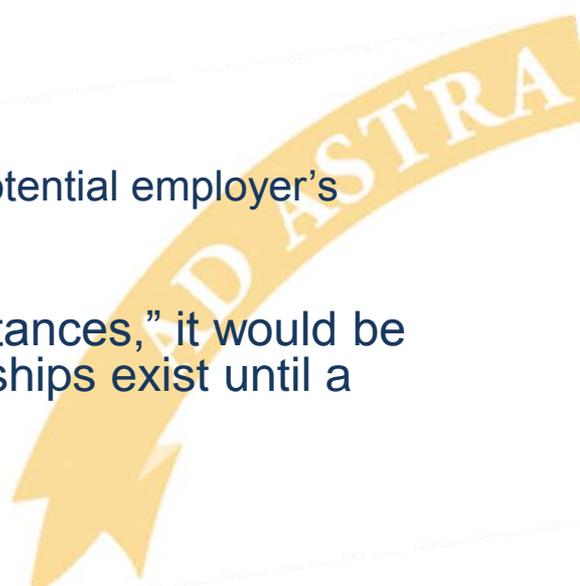
Complex Issue

- The discussion about joint employment under DOL starts with the question:
 - Who is the employer?
 - FMS provider?
 - Consumer?
 - MCO or State?



Joint Employment

- To determine who the employer is, the DOL uses the court-created “economic realities,” WHICH involves weighting several factors similar to determining who the employer. Those factors are:
 - The potential employer’s ability to hire and fire employees;
 - The potential employer’s level of supervision over the employee’s work;
 - The potential employer’s ability to determine a pay rate;
 - The potential employer’s ability to determine the method of payment;
 - The maintenance of employment records;
 - The employee’s opportunity for profit or loss;
 - The permanence of the working relationship;
 - The degree of skill required to perform the work; and
 - The degree to which the work is an integral part of the potential employer’s business
- If a court chooses to look at the “totality of the circumstances,” it would be impossible to know for sure what employment relationships exist until a court makes a judicial determination.



How are Overtime and Travel Time managed

- Who manages them? (Employers, FEA's, MCO's?)
- What data does each need to carry out its role?

What controls can be used to limit Overtime and Travel Time

- DOJ guidance is that states cannot refuse to have Overtime because of the possibility of emergency situations requiring it ("at least an exception process to allow it is required").
- What limitations can be placed on worker selection (e.g. not allowing an employer to hire a worker that is overbooked)?
- If work is not scheduled, how do potential employers know a worker is overbooked?
- What limitations can be placed on employer scheduling or direction of work?
- How would an employer know a worker has a schedule conflict?
- What data about worker employment with other employers and FEAs is an employer or FEA allowed to see?

How are Overtime Premium and Travel Time treated as shared costs?

- How are these to be billed?
- If more than one FEA, how are costs allocated for billing?
- How do MCO's get reimbursed?
- How does KDADS pull down Medicaid operating funds (CMS guidance)?

How is the worker Wage and Overtime Premium rate determined?

- Fixed wage rate per hour – fixed overtime premium?
- Wage rate depends on services delivered –
 - Fixed overtime premium based on highest service rate?
 - Variable overtime premium based on services delivered that week?
 - Another method?
- If different FEA's pay different rates, how is overtime premium calculated?
 - Allocate overtime hours first, then pay them at each FEA's rate?
 - Another method?

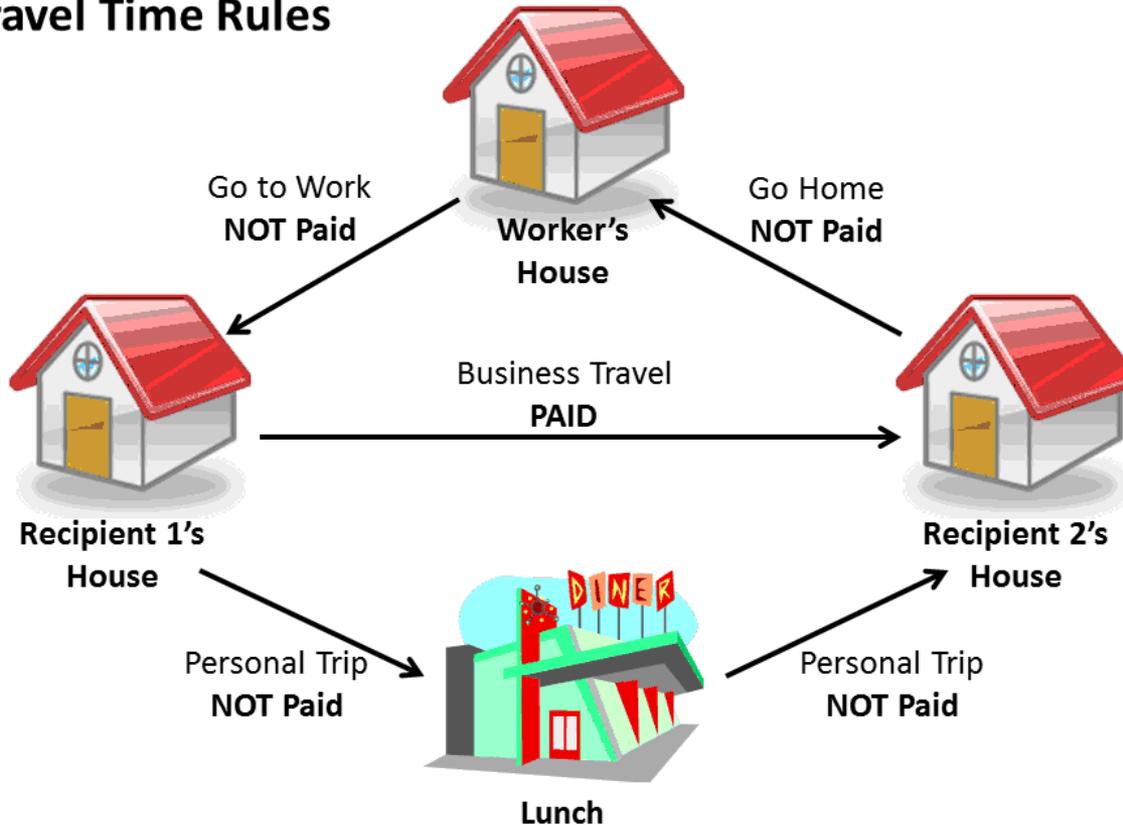
October 22, 2014

New Things to consider:

- Travel Time
- Overtime
- Sleep Time
- Waiting Time

AD ASTRA

Travel Time Rules



Considerations:

- Travel time is to be billed as a shared cost and not attached to a recipient (Medicaid billing issue?)
- Billing is to be for **time** and not miles traveled
- A standard travel time (e.g. from Google) between two addresses is acceptable as long as it is “reasonable”

AD ASTRA

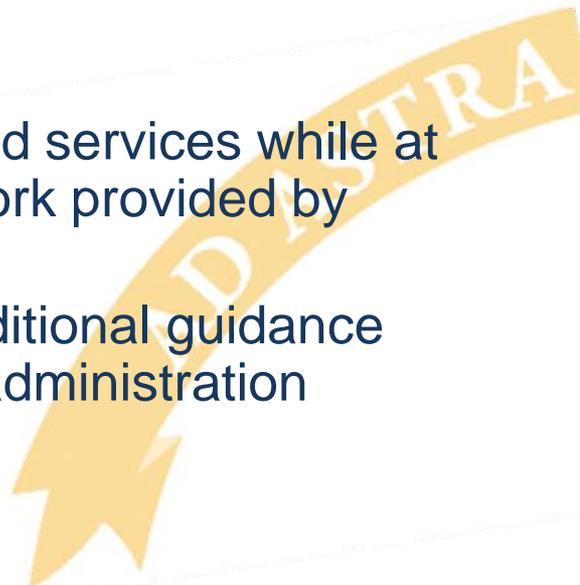
Where We Are Now

- Kansas meets with Department of Labor on a regular basis for technical assistance on complicated scenarios such as:
 - The use of electronic visit verification
 - Sleep time support and minimum uninterrupted sleep
 - Care vs companionship vs medically-related activities
 - Managing and monitoring rule requirements



Non-Enforcement

- On October 7, 2014, the Department of Labor announced a six month delay in enforcement of the Final Rule related to minimum wage and overtime. This delay will allow states to work towards compliance and find solutions to preserve protections for aging and disabled individuals receiving Medicaid-funded supports and identify strategies to ensure workers receive the protections under the FLSA.
- DOL remains committed to two principles:
 - the importance of maintaining person-centered services while at the same time recognizing the value of the work provided by home care workers
 - Kansas will continue to work with DOL for additional guidance and clarification on the rule and subsequent administration



Enforcement of Affordable Care Act, Employer Taxes

INTERNAL REVENUE SERVICE

October 22, 2014

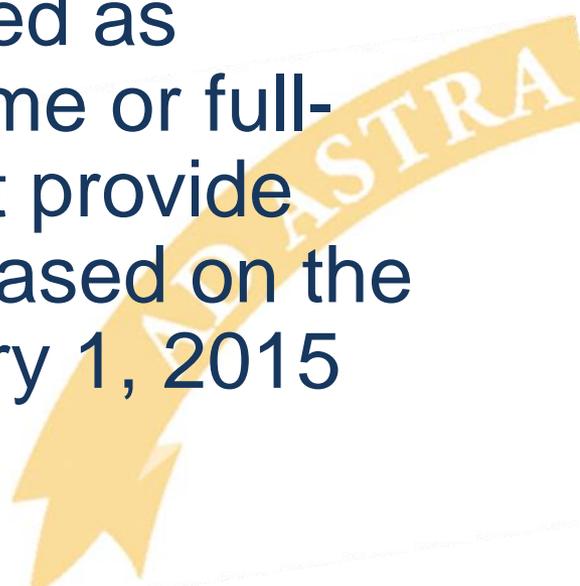


Federal Mandates

- **Effective January 1, 2015**, employers with 50 or more full-time employees are required to provide health insurance for certain workers or pay a penalty for not paying it.
- FMS providers, concerned about the potential impact on consumer services and FMS business practices, participated in a workgroup that submitted a proposal to KDADS in December 2013.

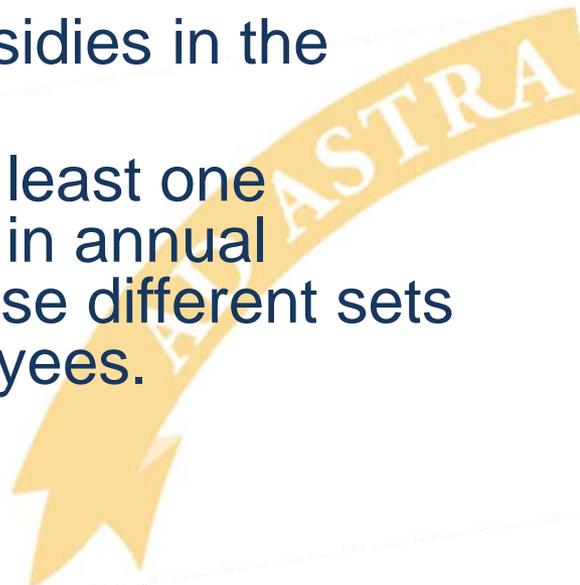
Brief Timeline

- **January 1, 2014:** Affordable Care Act provisions related to healthcare became effective; however, the large employer mandate was delayed until 2015.
- **February 10, 2014:** Under the Affordable Care Act, large employers, defined as employers with 50 or more full-time or full-time equivalent employees, must provide health insurance to employees based on the average number effective January 1, 2015



Summary of the Rule

- **Employer Mandate Penalties Depend on Four Questions.**
 - (1) Is this employer “large” or “small”?
 - (2) If the employer is large, does it offer qualified health insurance to substantially all full-time employees (FTs)?
 - (3) How many, if any, FTs receive subsidies in the health insurance exchanges?
 - (4) If the employer is large and has at least one subsidized FT, how much does it owe in annual penalties? The different calculations use different sets of data from varying subsets of employees.



Penalties

- If an employer doesn't offer FTs insurance, and if at least one FT receives federal insurance subsidies in the individual exchange, the business will pay \$2,000 per FT (minus the first 30). Example: a business with 50 FTs, two of whom are subsidized, would pay $\$40,000 = \$2,000 \times (50 - 30)$.

Complex Issue

- The discussion about large employers and health insurance starts with the question:
 - Who is the employer?
 - FMS provider?
 - Consumer?
 - Both?

Common Law Employer Test



Common Law Employer Test

- Facts that provide evidence of the degree of control and independence fall into three categories:
 - behavioral control,
 - financial control, and
 - type of relationship of the parties.
- This standard is different from the “economic realities” test that DOL uses



The Concerns

The FMS Workgroup identified potential concerns related to the current FMS model

- CMS waiver language under the current model indicates the FMS agent is a “co-employer” for the consumer
- Consumers are not required to have a federal employer identification number (FEIN)
- Most FMS providers do payroll for more than 50 individual workers on behalf of consumers



Financial Management Services

Kansas has a workgroup that has been looking at the two options, and the workgroup has asked the state to look at changing the options and going to the Fiscal Employer Agent because of changes to federal laws

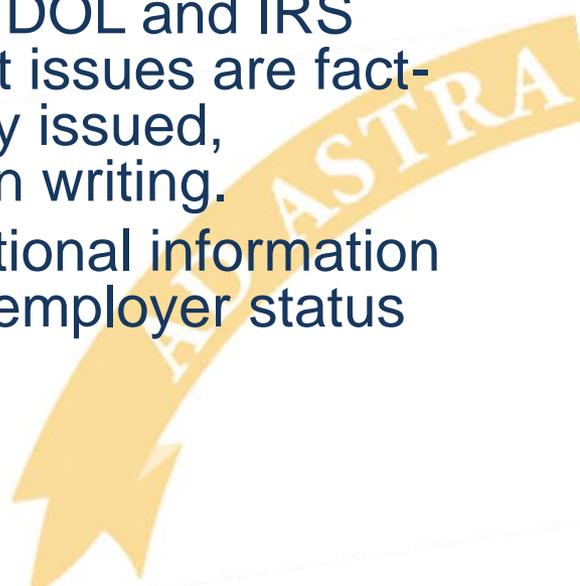
Agency with Choice

Vendor Fiscal Agent

	Agency with Choice	Vendor Fiscal Agent
Hires Workers	Consumer +The FMS can assist the person with recruiting and hiring workers	The FMS does not assist with recruiting and hiring
Worker's "Boss"	The Consumer is the boss, but the FMS can assist and provide supports	The consumer is the boss and is responsible for hiring, firing, training, and managing workers
Consumers will	Choose and schedule workers, but may want some help from the FMS to recruit, train, or fire workers	Choose, schedule, train , manage and discharge workers
Worker Training	Consumer trains the worker to meet his or her needs, but the FMS can assist with worker training for most things including AuthentiCare®	Consumer directs worker's training and can give the worker an option to receive additional training (CPR) from another source
Background Checks	FMS explains the background rules, and the Consumer can still choose to hire the worker in some cases.	Consumer plays a major role in choosing if certain crimes on a worker's background check should keep the worker from working for the consumer
Medicaid Programs	Consumers are likely to stay in Medicaid or HCBS programs for foreseeable future	Consumers are likely to stop using Medicaid or HCBS in the future and will private pay for services
Employer ID Number	The Consumer does not need a federal EIN	The consumer must get a federal EIN from the IRS, guardians may have a limited ability to self-direct and be the paid provider

Where We Are Now

- Kansas has proposed to CMS a hybrid FMS model that features self-directed consumers serving as the employer, akin to the V/EA model, but that preserves the critical participant supports of the current model, including FMS provision of Information and Assistance.
- The federal agencies are the only entities which may issue binding interpretations of federal law, and even those would be subject to judicial interpretation and application in individual cases. In numerous contacts with DOL and IRS representatives, it has been emphasized that issues are fact-specific and advisory opinions are not usually issued, although we continue to request responses in writing.
- Kansas will continue to meet IRS to get additional information and clarification on the need for an EIN and employer status





Prioritizing the Competing Interests

SO WHO'S ON FIRST

October 22, 2014



Competing Federal Rules

CMS

Final Rule
issued Jan
2014

Rule effective
Mar. 17, 2014

DOL

Final Rule
issued Oct
2013

Rule effective
Jan. 1, 2015

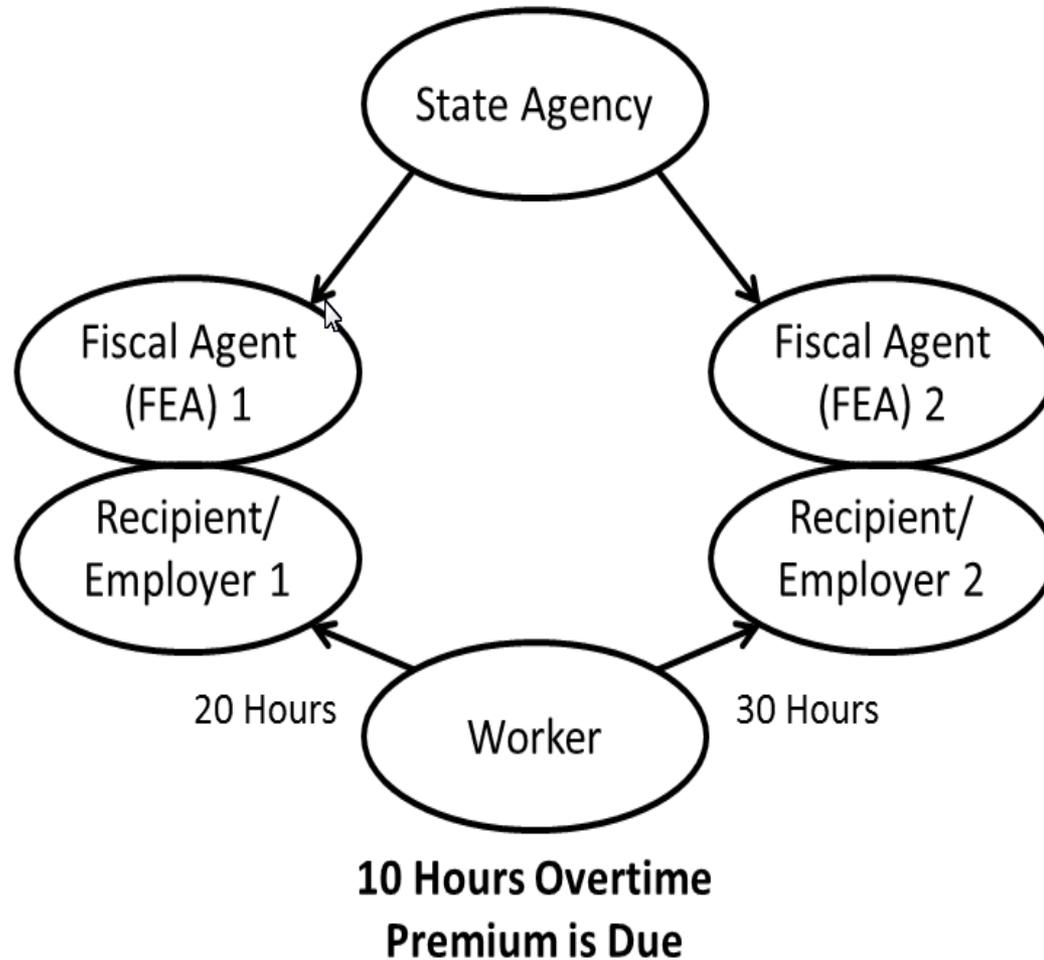
IRS

ACA large
employer
mandate

Rule effective
Jan. 1, 2015

Sample Type 3 Program:

(www.participantdirection.org)



Roles:

State Agency:

- Plans of care/hours allowed
- Sets rates for services
- Sets qualifications
- Program oversight

Fiscal Agents:

- Manages ER, EE taxes
- Validates worker hours
- Files claims for payment

Employers:

- Hire/fire
- Supervise, control work

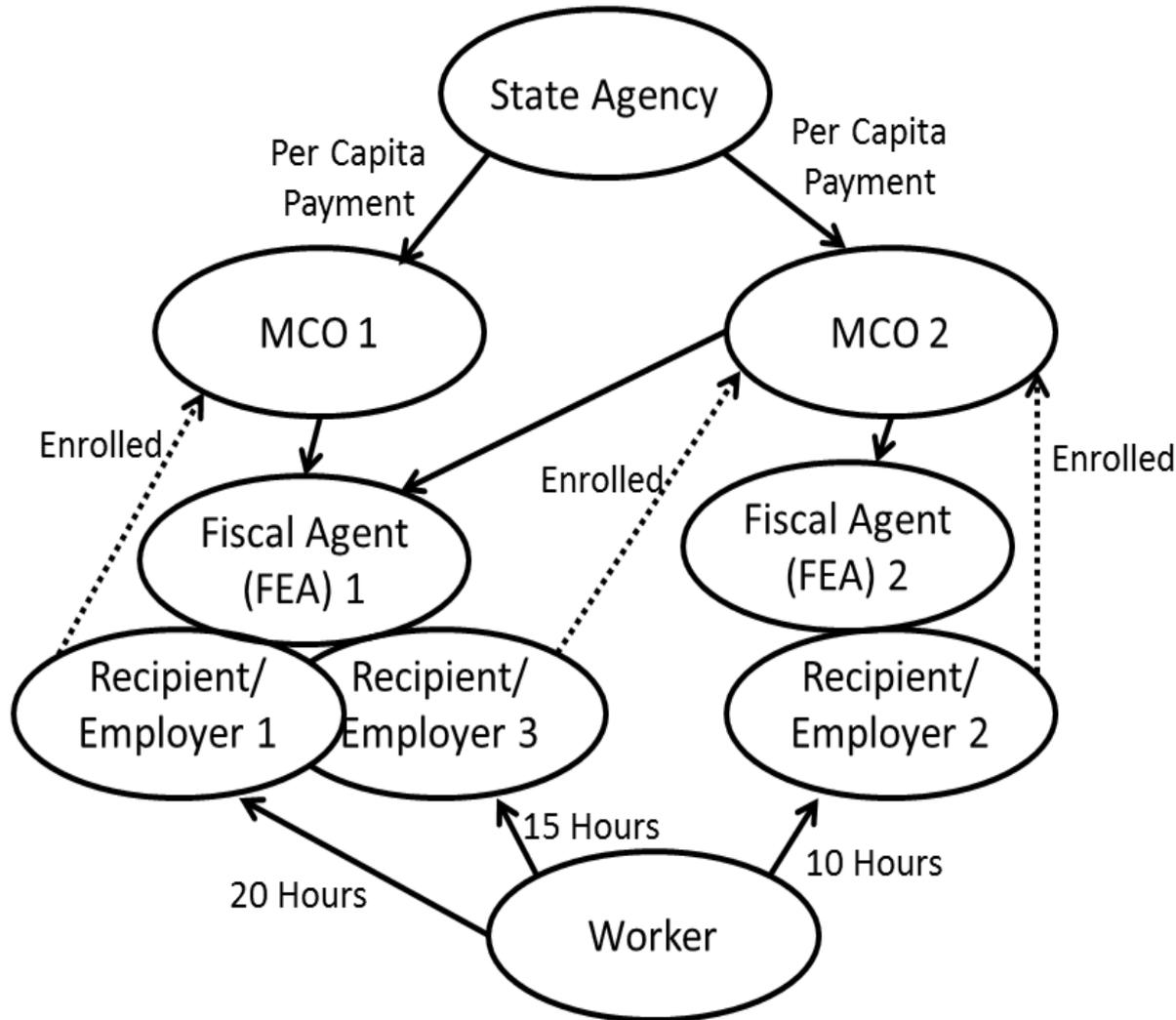
Result:

Employers of Record (IRS):

- Employer 1, Employer 2

Co-Employers (DOL Wage –Hour):

- Employer 1, Employer 2
- FEA 1, FEA 2
- State Agency



5 Hours Overtime Premium is Due?

Does having a common FEA make MCO's co-employers with each other?

Roles:

State Agency:

- Program oversight
- Per capita payment to MCO's

Managed Care Org. (MCO)

- Plans of care/hours allowed
- Sets rates for services
- Sets qualifications

Fiscal Agents:

- Manages ER, EE taxes
- Validates worker hours
- Files claims for payment

Employers:

- Hire/fire
- Supervise, control work

Possible Result (is this correct?):

Employers of Record (IRS):

- Employer 1, Employer 2, Employer 3

Co-Employers (DOL Wage-Hour):

- Employer 1, Employer 2, Employer 3
- FEA 1, FEA 2
- MCO 1, MCO 2

3 Rules. 3 Masters

Ctrs for Medicare & Medicaid Services

CMS Final Rule

- Rule regarding non-residential and residential settings
- Conflict Free Case Management
- Person Centered Planning

Department of Labor (DOL)

DOL Final Rule

- Fair Labor Standards Act
- Companionship (Home Care) Rule
- Joint/Co-Employment
- Shared Living

Internal Revenue Service (IRS)

Tax Mandates

- Affordable Care Act (ACA) large employer health-care mandate
- Employer Tax Administration procedures
- *Impact on FMS*

For more information...

- Details available at the following link:
<http://www.aging.ks.gov/>

Contact Aquila “Q” Jordan:
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- By Phone: 785-296-4986
- By Email: HCBS-KS@KDADS.KS.GOV

