



# Policy Update – Employment, Health Care and Disability: May 31, 2016 Newsletter

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**May 31, 2016**

The LEAD Center Policy Update – Employment, Health Care and Disability is a monthly update focusing on the intersection of disability, employment and health care policy. Its purpose is to provide policymakers, disability service professionals, individuals with disabilities and their families with information about relevant policy developments regarding Medicaid, the Affordable Care Act and related topics, with a focus on improving employment outcomes for individuals with disabilities.

The LEAD Center Policy Update – Employment, Health Care and Disability is a project of the LEAD Center in collaboration with the [Autistic Self Advocacy Network](#).

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## **EEOC Issues New Resource Related to Getting Employees Crucial Disability-Related Employment Leave, Including Medical Leave**

On May 9, 2016, the Equal Employment Opportunity Commission (EEOC) issued a new resource

document discussing and clarifying the rights available to individuals who request work leave as a reasonable accommodation under the Americans with Disabilities Act (ADA). The document is titled *Employer-Provided Leave and the Americans with Disabilities Act*. The resource is designed to educate employers and employees on leave policies, including policies for medical and other healthcare-related leave that are compliant with the ADA. According to the EEOC, disability-related complaints regarding discriminatory employer leave policies have increased within the last six years.

The resource responds to common questions that employers and employees have about the interactive leave process. Examples of these questions include whether and when the employee's disability entitles them to leave as a reasonable accommodation, how much and what the employee must communicate about their disability in order to receive leave as an accommodation, and when leave would likely be an "undue burden" on the employer. The resource does not create new law, but instead explains how the ADA applies to the specific situation of leave-as-reasonable-accommodation.

EEOC Chair Jenny Yang states that the provision of medical or disability-related leave, particularly when the person is recovering from medical treatment, can be a critical reasonable accommodation in the workplace. Commissioner Victoria Lipnic adds that medical and disability leave issues are among the most complicated faced by employers and that the document provides a clear statement of how the EEOC will treat cases relating to it.

For more information, [read the press release](#).

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## **National Core Indicators Reports (NCI) Released for 2014-15, with Statistical Indicators Connecting Health Care and Employment to the Well-Being of Consumers with I/DD, in Addition to NCI's Data Briefs and Webinars**

National Core Indicators (NCI), a collaborative effort between the National Association of State Directors of Developmental Disability Services (NASDDDS) and the Human Services Research Institute (HSRI) to evaluate the performance of developmental disability service providers, recently released its 2014-15 Core Indicators Reports. The reports track the survey responses of service recipients and their families asking them about the effectiveness of the programs in which they participate. The staff survey reports have not yet been released.

NCI's final Adult Consumer Survey Report for 2014-15 can provide insight as to the connection between availability of health care services, including Medicaid waiver services; successful employment; and the well-being of people with intellectual and developmental disabilities (I/DD). Users can access data on individuals' access to self-determination, inclusion in the community, health, and employment status, including the type of employment and hours worked. This information can be used to assess the quality of developmental disability services.

Although the adults who were surveyed were generally in good health, only about 17 percent reported having a paid job in the community. NCI's survey report notes that having a paid job in the community is the primary employment goal for the people surveyed.

NCI is also producing other resources that address the Core Indicators and links between disability, health, and employment. A recent May 2016 NCI data brief, *Working in the Community: The Status and Outcomes of People with Intellectual and Developmental Disabilities in Integrated Employment - Update 2*, uses the National Core Indicators to describe the employment status of individuals with intellectual and developmental disabilities supported by state developmental disability agencies, comparing how many beneficiaries in each state were in different types of community-based employment. The data shows that, although most beneficiaries were involved in some kind of activity during the day, only 14.8 percent were engaged in employment activities in the community. NCI also found that beneficiaries living in independent apartments or other community-based settings had higher rates of community-based employment than did beneficiaries in Intermediate Care Facilities (ICF) institutions.

A [National Core Indicators webinar](#) will be held on June 29, 3:00-4:00 p.m. EDT on Employment.

For more information, [visit the NCI reports webpage](#), which lists all the reports currently available from the 2014-15 survey period.

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## **CMS Releases Its Final Rule Addressing Long-Term Supports and Services (LTSS), including Employment LTSS, Under Managed Care Plans**

On April 25, 2016, the Centers for Medicare and Medicaid Services (CMS) released a comprehensive Final Rule on Medicaid and Children's Health Insurance Program (CHIP) managed care programs. The rule is the first major overhaul of the managed care rules in more than a decade and, according to CMS, is designed to deliver "better care and smarter spending" to the millions of people currently enrolled in managed care plans through these two programs. The Final Rule includes requirements for delivery of managed long-term supports and services (MLTSS). Long-term supports and services can include services that directly promote employment, including supported employment and job coaching for transition age youth. They also can include services that enable beneficiaries to work, such as home health care and transportation.

CMS' Final Rule requires the States to establish an independent beneficiary support system designed to help managed care beneficiaries navigate the delivery system for their MLTSS. The rule also requires that MLTSS providers use person-centered planning when determining which services they will cover. According to CMS, requiring MLTSS providers to use person-centered planning will ensure that the MLTSS provided are tailored to each beneficiary's interests, choices, and desire for independence. These changes may significantly improve the variety of

different types of LTSS delivered under managed care change and may reduce the risk of “one-size-fits-all” plans.

The Final Rule also includes improved oversight of MLTSS providers and the provider network. CMS requires ongoing monitoring of MLTSS programs, and the rule sets standards for evaluating the provider networks that offer MLTSS. CMS specifically addresses the issues of provider accessibility and the credentials and qualifications of each provider to deliver MLTSS.

For more information on the new rule, read:

- [the CMS page on the full managed care rule](#),
- [CMS’ MLTSS-specific summary of the changes](#), and
- [the text of the rule](#).

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## **U.S. Department of Labor (DOL) Announces Publication of Final Rule on Overtime in the Fair Labor Standards Act (FLSA)**

On May 18, 2016, President Obama and Labor Secretary Perez announced the publication of the Department of Labor’s Final Rule on overtime exemptions under The Fair Labor Standards Act (FLSA). Under FLSA, employers are required to pay most employees overtime pay for hours worked in excess of 40 hours per week. However, certain employees whose income falls above a certain minimum threshold are exempt from overtime pay, which is frequently referred to as the “Executive, Administrative, Professional” (EAP) or “white-collar” exemption. The Final Rule would double the minimum income threshold for exemption from \$23,660 annually to \$47,476, providing the right to overtime pay to 4.2 million white collar workers. The Final Rule would also set the Highly Compensated Employee (HCE) income threshold, previously at \$100,000 a year, at \$134,004 per year. Employees with salaries above this threshold are exempt from overtime rules regardless of job duties.

The Final Rule also factors inflation and economic change into the regulations. It establishes a mechanism for updating the income thresholds for both categories every three years to account for inflation and to ensure that they continue to be effective.

Many of these regulations may have an impact on service professionals with disabilities and those who provide people with disabilities with supports and services, including services that people with disabilities need to maintain employment. Even when schedules are designed to avoid overtime work through the use of multiple providers working in shifts, people with disabilities may require their providers to work overtime. In order to avoid service disruptions, states must evaluate their overtime policies and ensure that they have allocated adequate budgetary resources for overtime worked by LTSS providers who were previously exempt from the overtime rule. This change has the potential to significantly alter the way in which

professional workers are assigned hours and compensated.

For more information, read the [Department of Labor’s extensive list of resources on the Final Rule](#) and the [Federal Register entry on the Final Rule](#).

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## **CMS Releases Planned Construction and Person-Centered Planning Requirements in HCBS Settings Requirements Compliance Toolkit**

CMS has recently released a new section of its Settings Requirements Compliance toolkit, titled *Frequently Asked Questions on Planned Construction and Person-Centered Planning Requirements*. The resource addresses a number of questions that people have had, about how person-centered planning may impact the requirements of the final rule on home and community-based services (HCBS). This guidance may have significant impact on health care, residential, and supported employment service providers.

The resource advises that, when assessing planned construction of a setting, it is impossible for CMS to determine in advance whether the setting will be fully compliant with the HCBS rule until it is fully constructed and individuals with disabilities have moved in. As noted in the Final Rule, all presumptively institutional settings in which individuals receive HCBS-funded services must pass a “heightened scrutiny” review by CMS in order for CMS to be able to determine whether the setting overcomes the presumption and is compliant with the Final HCBS Settings Rule. CMS also gives further guidance as to which settings may require heightened scrutiny. CMS notes that some unique exceptions may apply, such as settings that were newly operational in a congested area at the time the final rules were released. It advises individuals in the process of constructing a new setting to contact CMS early in the planning stage to discuss any concerns they have about ensuring the setting’s compliance with the HCBS Settings rule.

With regard to person-centered planning, CMS explains the process for making individualized exceptions to certain HCBS rule requirements. The HCBS Settings rule allows exceptions to some of its requirements if they are (1) set forth in an individual’s person-centered plan, and (2) limited to that individual and not applied to all individuals in the setting. However, CMS stresses that these modifications are allowable only on an individualized basis and only when non-restrictive alternatives have already been tried and failed to support the safety and well-being of the person. The modifications should be directly proportional to the need of the person.

For further information, view the [HCBS’ Settings Requirements Compliance Toolkit](#).

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## **Unclear Language in Iowa’s Health Care Budget Bill Prevents \$750,000 from**

## Being Spent on Supported Employment

Iowa's Department of Health and Human Services announced on May 9, 2016 that, due to an unclear statement of how money was to be spent in a 2015 health care budget bill, \$750,000 initially allocated to increase supported employment has not been spent. The money instead went toward Iowa's general Medicaid budget. Human Services Director Chuck Palmer has stated that, while he knew that state legislators intended for the funds to be spent on supported employment, he did not feel he had the legal authority to allocate the funds in that manner without specific language assenting to it in the budget bill.

The redirected funding frustrated many Iowa legislators. Senator Pan Dochum, who has a daughter with an intellectual disability, claims that the funding was specifically allocated to supported employment at one point, but the allocation was edited out in later revisions. Iowa legislators did not allocate any new funds to supported employment during the current year's legislative sessions.

For more information on this issue, read [The Gazette article](#).

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## CMS & ACL Partner with Tennessee To Host Webinar for Advocates and External Stakeholders on Tennessee's State HCBS Transition Plan

The Centers for Medicare and Medicaid Services (CMS) and the Administration on Community Living (ACL) partnered with the state of Tennessee on May 26th to host a webinar on Tennessee's State HCBS Transition Plan titled, *HCBS Implementation and the Statewide Transition Plan*. Tennessee was the first state to receive full approval of its Home-and Community-based Services (HCBS) Transition Plan, produced in accordance with CMS' final HCBS rules.

The webinar featured state officials in Tennessee, who discussed how they produced their state's HCBS Transition Plan and the approach they decided to take for bringing the state of Tennessee into compliance with the Final Rule. This session was intended to help state officials, advocates, and other external stakeholders looking to engage in state implementation of the HCBS rule and produce revised State Transition Plans to submit to CMS for approval.

Other speakers discussed how external stakeholders and advocates in the state can meaningfully engage with the state in its HCBS implementation process. The webinar intended to encourage stakeholders, service providers, including supported employment and health care service providers, to engage with state officials on the development and implementation of the state's Plan. Presenters included the Director of the Tennessee Council on Developmental Disabilities Wanda Willis, senior officials from Tennessee's Medicaid program (TennCare) Patti Killingsworth and Michelle Jernigan, and Ralph Lollar, Director of Long-Term Services and Supports at CMS.

ACL has made available a copy of the [presentation slides](#) and an [archived recording of the webinar](#) to the public. To learn more about Tennessee's HCBS Transition Plan, visit the [Tennessee webpage for the New Federal Home and Community-Based Services rules](#) for the full list of Transition Plan documentation.

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