

## Commissioner's Open Letter December 12, 2014

### Key Information on Self-Direction, Proposed Changes and the Department of Labor's Final Rule

Last year, the U.S. Department of Labor released a [Final Rule](#) related to personal care attendants under the Fair Labor Standards Act (FLSA) that extended wage and overtime protections to home care workers and personal support workers. This rule is expected to become effective on January 1, 2015.

- Kansas offers a self-directed option in its home and community based services (HCBS) programs that allows aging and disabled Kansans to be the employer of their own workers. Under the common-law test of employer status, Kansas self-directed consumers are the employers of their workers, for example by hiring, firing and setting hours for their employees. Consumers who are sole employers are considered exempt from certain FLSA requirements, including overtime.
- The new DOL interpretation, which uses a different test of employer status, has introduced an element of uncertainty into the program. The State of Kansas still considers self-directed consumers to be the employers of their workers, but because of the unique nature of the Kansas program and the nature of the test the DOL applies, it was unclear whether the federal government would share that interpretation.

In August, the State proposed changes that were presented for public feedback. The Kansas Department for Aging and Disability Services (KDADS) hosted several public comment sessions with consumers, providers and advocates who reinforced the State's design of our self-directed services: the consumer is the employer and responsible for hiring, firing, managing, directing, and scheduling their direct service workers. The State asked the Department of Labor for guidance on this matter in a [letter](#).

- KDADS sent language to DOL that reinforces the State's position that the consumer is the employer and serves as the sole-employer role in the HCBS Program under the self-directed model.
- Over the last few months, Kansas has met with the DOL and other federal agencies to discuss the effect of the Final Rule on home- and community-based services. To date, the State has received no definitive response.

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 of these new provisions due to the fact that it is complex for states to change systems and comply with the new rule.

- This delay will allow states to find solutions to preserve protections for aging and disabled individuals receiving Medicaid-funded supports and identify strategies to ensure compliance with the Final Rule.
- KDADS is working diligently with federal agencies to assess the HCBS programs during the six-month delay period.

Kansas supports self-directing consumers who employ direct support workers for personal care services. Until the State has a more definitive answer from DOL, we are not making a change to our current

model. Additionally, there is no new authority in our current waivers or waiver renewals to restrict or limit services and supports beyond the standard limits on units.

While KDADS cannot indemnify a person and/or entity or guarantee the outcome of a federal rule or mandate, it will continue to support the above referenced model unless and until it is determined that it is either not feasible or is not in the best interest of waiver participants. KDADS will continue to communicate, advocate and work with not only the DOL, but also with the consumer employers and FMS providers who are providing services to Kansas HCBS waiver consumer employers.

At this time, KDADS has not proposed significant changes to the personal care services under the HCBS programs; however, a significant amount of work is being done to ensure that Kansas HCBS Programs are in compliance with the Final Rule. Waiver renewals and summaries are posted on the KDADS website at [www.KDADS.ks.gov](http://www.KDADS.ks.gov).

- KDADS is making changes to aid self-directing consumers in exercising their role as employers. These changes will begin January 1, 2015.
- Over the next three months, FMS Providers will be updating information in KS AuthentiCare® to prepare for improvements in the system to help consumers access information about their employees. They may be contacting you to get additional information about your employees. In early 2015, personal care attendants will be issued new KS AuthentiCare® ID numbers to make reporting information to consumers about their employees easier.
- To comply with IRS policy, consumers will be asked to get a Federal Employer Identification Number (FEIN) to assist FMS Providers in filing taxes for the consumer's employees. Consumers can get the FEIN from the IRS or ask for information and assistance from the FMS Provider. Consumers will be expected to have the FEIN by March 15, 2015, and share it with the FMS Provider for administrative and tax purposes.
- FMS Provider Agreements have been updated to include clear language about the role of the financial management service available to assist self-directing consumers who hire personal care attendants and other direct service workers to assist them with their activities for daily living.

In the meantime, KDADS will continue to regularly engage a diverse group of stakeholders regarding implementation of the DOL Final Rule.

KDADS's goals related to any potential programmatic changes are to:

- Minimize impact on consumers served;
- Ensure the health, safety, and welfare of consumers; and
- Minimize negative impact on providers and direct service workers.

**For More Information about the DOL Final Rule visit:** [www.dol.gov/whd/homecare](http://www.dol.gov/whd/homecare)

**For Information about the current HCBS Program Renewals visit:** [www.KDADS.ks.gov](http://www.KDADS.ks.gov)

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