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**TO:** **EMILY MCCLELLAN**  
Policy, Regulation, and Member Engagement Division Director  
Virginia Department of Medical Assistance Services

**FROM:** **MICHELLE A. L'HOMMEDIEU**   
Assistant Attorney General

**DATE:** **October 27, 2023**

**SUBJECT:** **Fast-Track Regulations – Paid Sick Leave for Consumer Directed Attendants (5805/9375)**

I have reviewed the attached fast-track regulations regarding paid sick leave for Consumer-Directed Attendants. You have asked the Office of the Attorney General to review and determine if the Department of Medical Assistance Services (“DMAS”) has the legal authority to amend the regulations and if the regulations comport with state and federal law.

I have reviewed these regulations. Virginia Code § 40.1-33.3 *et seq.* set forth the requirement that certain employees receive paid sick leave, consumer-directed attendants fall within the definition of such employees. Based on my review, it is my view that the Director of DMAS, acting on behalf of the Board of Medical Assistance Services, under Virginia Code §§ 32.1-324 and 325, has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act (“APA”) and has not exceeded that authority.

Pursuant to Virginia Code § 2.2-4012.1, if an objection to the use of the fast-track process is received within the public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the Virginia Department of Social Services shall (i) file notice of the objection with the Registrar of Regulations for publication in the Virginia Register,

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and (ii) proceed with the normal promulgation process set out in this article with the initial publication of the Fast-Track regulation serving as the Notice of Intended Regulatory Action.

It is my understanding that the proposed changes will not amend the State Plan and therefore approval by CMS is not necessary. If you have any questions, please contact me at 786-6005.

cc: Kim F. Piner, Esq.

Attachment

**Project 6917 - Fast-Track**

**Department of Medical Assistance Services**

**Consumer-Directed Attendants**

Part XVIII

Consumer-Directed Attendants

**12VAC30-130-3040. Definitions.**

The following words and terms when used in this part shall have the following meanings unless the context clearly indicates otherwise:

"Consumer-directed attendant" or "CD attendant" means a person who provides, via the consumer-directed model of services, personal care, companion services, or respite care, or any combination of these three services. "Consumer-directed" or "CD" means the model of service delivery for which the individual enrolled in the waiver or benefit program or the individual's employer of record, as appropriate, is responsible for hiring, training, supervising, and firing of the attendant or attendants who render the services that are reimbursed by DMAS.

"DMAS" means the Department of Medical Assistance Services.

"Employer of Record" or "EOR" means the person who performs the functions of the employer in the consumer-directed model of service delivery. The EOR may be the individual enrolled in the waiver or benefit program, a family member, caregiver, or another person.

"Fiscal/Employer Agent" or "F/EA" means a state agency or other entity as determined by DMAS that meets the requirements of 42 CFR 441.484.

**12VAC30-130-3050. Scope.**

A. The paid sick leave benefit for consumer-directed attendants applies to any CD attendant who works an average of 20 hours per week or at least 90 hours per month in the fiscal year quarter in which the CD attendant's eligibility is determined.

B. The paid sick leave benefit shall only apply to CD attendants who perform consumer-directed services in accordance with the requirements under the following programs or waivers:

1. Early Periodic Screening, Diagnostic, and Treatment benefit program (12VAC30-50-130);
2. Medicaid Works benefit program (12VAC30-60-200);

3. Commonwealth Coordinated Care Plus Waiver (12VAC30-120-900.);

4. Community Living Waiver (12VAC30-122-250); or

5. Family and Individual Supports Waiver (12VAC30-122-260).

**12VAC30-130-3060. Eligibility and Use.**

A. The F/EA shall have the responsibility of determining eligibility for paid sick leave each state fiscal year quarter.

1. A CD attendant shall be determined eligible to earn paid sick leave based on a quarterly evaluation of the CD attendant's hours worked for the EOR.

2. The F/EA shall calculate the average number of hours the CD attendant worked for the EOR during the quarter. CD attendants who work an average of 20 hours per week or at least 90 hours per month for the quarter shall be eligible to earn paid sick leave.

3. Work shift entries shall be submitted by the CD attendant and approved by the EOR within twenty days of the end of the preceding quarter in order to be included in the eligibility determination.

B. The F/EA shall have the responsibility of documenting the accrual and use of sick leave hours by the CD attendant. The benefit shall be available to eligible CD attendants no later than the first day of the second month after the quarter has concluded.

1. Once a CD attendant has been determined eligible to accrue the paid sick leave benefit, the CD attendant's eligibility shall remain in effect for the duration of the state fiscal year (July 1 to June 30).

2. Eligible CD attendants shall accrue the paid sick leave benefit in accordance with § 40.1-33.4 in the Code of Virginia at the rate of 1 hour for every 30 hours worked.

3. No eligible CD attendant shall accrue more than 40 hours of paid sick leave benefit in a state fiscal year. Any amount of paid sick leave benefit carried over from the previous state fiscal year shall not count towards accrual in the current state fiscal year.

4. In accordance with § 40.1-33.4 of the Code of Virginia, any unused paid sick leave benefit shall be carried over to the state fiscal year following the state fiscal year in which it was accrued. No unused paid sick leave benefit shall be carried over for more than one state fiscal year.

5. Any CD attendant who qualified and accrued a paid sick leave benefit in the immediately prior fiscal year shall be entitled to use the benefit in accordance with § 40.1-33.3 through § 40.1-33.6 in the Code of Virginia, even if the CD attendant is not eligible for the benefit in the current state fiscal year.

6. Should a CD attendant be determined not eligible to accrue the benefit, the F/EA shall re-evaluate the CD attendant's eligibility upon the conclusion of the next quarter.

C. Any use of this paid sick leave benefit by an eligible CD attendant shall not be counted as hours worked for purposes of the following:

1. Calculation for overtime pay;

2. Accrual of additional paid sick leave benefit hours; or

3. Determination of future eligibility for this paid sick leave benefit.

D. Allowable uses of this paid sick leave benefit by a CD attendant shall be in accordance with § 40.1-33.5 of the Code of Virginia.

1. The CD attendant shall not be required to identify a replacement for any hours in which the CD attendant uses this paid sick leave benefit. When a CD attendant uses the paid sick leave benefit, it shall be the responsibility of the EOR to utilize the documented backup plan for the individual who receives CD services.

2. The EOR shall not require the CD attendant to make up any hours missed providing CD services for hours that the CD attendant used paid sick leave.

E. Pursuant to § 40.1-33.6 of the Code of Virginia, the EOR shall not engage in any retaliatory action because of an eligible CD attendant's request or use of the paid sick leave benefit or because of an allegation the EOR has violated a provision of § 40.1-33.3 through § 40.1-33.6 of the Code of Virginia.