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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation(s)	12 VAC 30-120-731, 12 VAC 30-120-924, 12 VAC 30-120-1021
Regulation title(s)	Amount, Duration, and Scope of Services: EPSDT Services; Waiver Services: Consumer-Directed Special Requirements (DD Waiver); Covered services; Limits on Covered Services and Consumer-Directed Special Requirements (ID Waiver)
Action title	No Coverage of Overtime Hours for CD Personal Assistance, Respite and Companion Services
Date this document prepared	October 12, 2016

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Subject matter and intent

Please describe briefly the subject matter, intent, and goals of the planned regulatory action.

This action establishes that DMAS will not authorize or reimburse for more than 40 hours per week for consumer-directed personal assistance, respite and companion services for any one provider working for any one consumer. An attendant may exceed 40 hours of work in a week working for multiple consumers. (Consumers may receive more than 40 hours of service, if authorized, if more than one provider delivers that care.) This limit will not apply to live-in attendants consistent with the U.S. Department of Labor's requirements (Fact Sheet 79B). This change has been required by the 2016 session of the Virginia General Assembly and eliminates

inconsistencies regarding pay for services in excess of 40 hours. This action applies to EPSDT-covered attendant services as well as waiver-covered attendant services.

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

The *2016 Acts of Assembly, Chapter 780 Item 306 PPPP* states that, "The Department of Medical Assistance Services shall amend the state plan under Title XIX of the Social Security Act, and any necessary waivers, to reflect that no authority is provided for the payment of overtime for Medicaid-reimbursed consumer-directed personal assistance, respite and companion services. The Department shall implement the necessary regulatory changes and other necessary measures to be consistent with federal approval of any appropriate state plan and/or waiver changes, and prior to the completion of any regulatory process undertaken in order to effect such change."

Purpose

Please describe the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, please explain any potential issues that may need to be addressed as the regulation is developed.

The purpose of this regulatory action is to clarify that no authority is provided for the payment of overtime for Medicaid-reimbursed consumer-directed personal assistance, respite and companion services and to clarify requirements that will be used to establish "live-in" status as defined by the U.S. Department of Labor. This regulation is essential to protect the health, safety, and welfare of citizens in that it clarifies DMAS' authority to adhere to requirements set forth in the 2016 Appropriation Act.

From January 1, 2016 to June 30, 2016, DMAS paid over \$11 million in overtime payments alone (this figure does not include the normal rate paid for these services) to approximately 7,000 providers. The 2016 Appropriation Act disallowed the payment of overtime for Medicaid-reimbursed consumer-directed services beginning on July 1, 2016. The U.S. Department of

Labor, however, requires that states provide an exemption to the overtime rule for attendants who live with the individual for whom they provide care.

Since this law went into effect, an increasing number of providers have claimed the exemption under the Department of Labor rules for live-in attendants. In December, 2015, less than 1000 individuals claimed this exemption (and received overtime payments) but that number increased to over 3,000 individuals by the end of July, 2016.

Live-in attendants are not paid an overtime rate for hours worked in excess of 40 per week; however, live-in attendants may work more than 40 hours per week at the standard rate. DMAS is considering options relating to the documentation or other requirements that will be required to establish "live-in" status as defined by the Department of Labor Ruling.

Substance

Please briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.

This action affects the Amount, Duration, and Scope of Services: Early and Periodic Screening, Diagnosis and Treatment Services as well as DMAS' home and community based waiver programs that offer consumer directed services. Waiver Services: Family and Individual Supports (FIS) (12 VAC 30-120-700 et seq.), Elderly or Disabled with Consumer Direction (EDCD) (12 VAC 30-120-900 et seq.), and Community Living (CL) (12 VAC 30-120-1000 et seq.).

Currently, all three affected waivers (FIS, EDCD, and CL) allow individuals to obtain personal assistance, respite, and companion services through either the agency-directed or consumer-directed models of service delivery. The agency-directed model relies on businesses whose employees provide the approved hands-on care of personal care services, respite services, and companion services. The consumer-directed model relies on the Medicaid-eligible individual to hire his own personal assistant or attendant while the individual or a family member performs employer functions (as the employer of record). The Medicaid-eligible individual is allowed to choose either the agency-directed model or the consumer-directed model or some combination of both.

Consumer-directed personal assistance, respite, and companion services are also covered for children via the Early and Periodic Screening, Diagnosis, and Treatment benefit (12 VAC 30-50-130 B) in the State Plan for Medical Assistance.

The current policy in all three affected waivers (DD, EDCD, ID) and EPSDT is silent concerning the provision of overtime pay for assistants or attendants of consumer directed personal care, respite care and companion services. DMAS is currently receiving a consistent number of reimbursement requests that exceed 40-hours per week for assistants or attendants who serve a single consumer. Currently, no regulatory authority exists to authorize, reimburse, or deny

reimbursement to assistants or attendants who exceed the 40-hour per week limit. The General Assembly provides no authority nor funding for overtime pay.

The intent of this action is to ensure that Medicaid authorization and reimbursement for consumer-directed personal care, respite and companion services is limited to 40 hours per week for an attendant serving a single consumer. Attendants are still permitted to serve multiple consumers and be paid for more than 40 hours per week of work for multiple individuals. This limit will not be applied to live-in assistants or attendants consistent with the U.S. Department of Labor's requirements, under the authority of the Fair Labor Standards Act, as set out in Fact Sheet 79B.

DMAS is complying with the legislative mandate contained in the *2016 Acts of Assembly* previously referenced by proposing the 40-hour per week limit for reimbursement.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

There are no alternatives that would meet the requirements of the General Assembly mandate.

Public participation

Please indicate whether the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency's contact if you're interested in serving on the panel is _____; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.

The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, phone, or email to **Emily McClellan**,

**Regulatory Supervisor, DMAS, 600 E. Broad Street, 804-371-4300,
Emily.McClellan@dmas.virginia.gov.** Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public hearing will not be held following the publication of the proposed stage of this regulatory action.