



Policy Update – Employment, Health Care and Disability: June 29, 2016 Newsletter

June 29, 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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First ABLÉ Account Programs Open in Ohio and Tennessee

On June 1, 2016, the state of Ohio became the first state to launch a disability savings account program authorized by the federal Achieving a Better Life Experience Act (ABLE), which passed

in December 2014. On June 13, 2016, the state of Tennessee launched ABLE TN and became the second state to launch a program. The ABLE Act allows states to sponsor tax-advantaged investment accounts that will give individuals with disabilities the opportunity to save and invest up to \$14,000 per year in an ABLE account without losing eligibility for income-contingent federal benefits programs, such as Medicaid and Supplemental Security Income (SSI). Ohio's accounts, known as [STABLE accounts](#), and [Tennessee's ABLE TN](#) accounts will enable people with disabilities across the United States to save money for qualified disability-related expenses. Anyone meeting the eligibility criteria is eligible for the ABLE account programs in these states, as there is no residency requirement. The ABLE Act limits eligibility to individuals with significant disabilities with an age of onset of disability before turning 26 years of age.

All earnings on savings in ABLE accounts are tax-deferred, which means that they are only taxed if and when the money is spent on something other than a "qualified disability expense." Therefore, earnings are not taxed when they are used to pay for any "qualified disability expenses." Qualified disability expenses can include housing and basic living expenses, transportation services, healthcare, wellness services, employment training, employment support services related to the person's disability, and other employment-related expenses. People can save money in ABLE accounts while remaining eligible for Medicaid-funded health care and home and community-based services (HCBS) including employment supports. By saving money, workers with disabilities can also retain the housing and transportation stability they need in order to maintain jobs in their communities. It is anticipated that CMS will issue guidance on how the existence of state ABLE account programs impacts Medicaid beneficiaries.

Ohio Treasurer Josh Mendel announced the launch of the STABLE account program in a Cincinnati press conference. Ohio self-advocate Jenny Cunningham said at the launch: "Now I, and millions of persons with disabilities, can save for our future." Tennessee State Treasurer David H. Lillard, Jr., at the launch of Tennessee's program in Nashville, commended the General Assembly for passing the legislation and for protecting the lives of Tennessee citizens with disabilities. In total, 47 states have enacted ABLE-related legislation. Several other states are expected to launch their ABLE programs later in 2016 or 2017. It is anticipated that final Treasury regulations will be issued by the end of 2016. These final regulations, issued by Treasury and developed by the Internal Revenue Service (IRS), will serve as formal guidelines in which various state ABLE programs will implement, develop, and maintain their programs. Currently, the inaugural programs are operating under the proposed regulations that were published in June of 2015. While there may be some differences, we don't anticipate there to be any significant changes not already addressed in recent notices published by Treasury and IRS.

For general information about the ABLE Act and ABLE accounts, please visit the [ABLE National Resource Center](#). Learn more about [Ohio's STABLE account program](#) and its eligibility requirements by visiting the Ohio Treasurer's STABLE account website. For more information on

Tennessee's ABLE TN accounts, read the [Tennessee Treasury Department press release](#) or visit the [ABLE TN website](#).

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CMS Grants Initial Approval to HCBS Transition Plans for Kentucky and Ohio

On June 2, 2016, the Centers for Medicare and Medicaid Services (CMS) granted initial approval to the Home and Community-Based Services (HCBS) Transition Plans of Kentucky and Ohio. Kentucky and Ohio are now the second and third states to receive initial approval from CMS.

In its approval letter for the Kentucky Transition Plan, CMS noted that the state had completed its systemic assessment of all settings (including settings providing employment services) and taken material steps to bring all settings into compliance with CMS' regulations requiring that services be provided in integrated settings that maximize autonomy, provide support for people to achieve competitive integrated employment, and more. The state revised several of its regulations to comply with the requirements of HCBS settings rule. Kentucky's Transition Plan specifically emphasizes that, in order for providers to comply with its Transition Plan, they must provide opportunities for individuals with disabilities to seek and maintain employment. CMS also requested that Kentucky take steps to ensure that all of its personnel and existing infrastructure for investigating compliance are trained in all aspects of CMS' final rule, so that they can effectively evaluate the compliance of settings in their state.

In its approval of Ohio's Transition Plan, CMS also noted that the state had made an extensive effort to ensure that all state stakeholders, including those with and without disabilities, were involved in the development of its Transition Plan. Ohio's plan affirms the state's commitment to provide employment services in the most integrated environment possible. That is, the Transition Plan responded to concerns of some constituents regarding Ohio's move away from facility-based services by stating that community-integrated supported employment options would provide the same or a greater level of support services, and would also provide the benefits that individuals with disabilities can only gain by working independently and being integrated with people without disabilities.

In its letters, CMS reiterated the need for both states to address three concerns it had with both state Transition Plans in order to receive final approval. First, CMS stated that reverse integration, a practice by which individuals not receiving HCBS are brought over to participate in activities with HCBS beneficiaries, is not by itself enough to comply with CMS' community integration requirements in the final rule. Second, CMS noted that both states must show that they are building up the state's capacity for offering non-disability-specific residential and non-residential settings. An example of a non-residential, non-disability-specific setting would be Medicaid-funded supported employment services provided in a competitive, integrated employment setting. Finally, CMS reaffirmed the need for both states to reassess compliance of

all group non-residential settings, including group supported employment and group community-based day services.

For more information on Kentucky, read the [Kentucky Transition Plan](#) or view the [CMS letter announcing initial approval of the Kentucky plan](#). For more information on Ohio, read the [Ohio Transition Plan](#) or view the [CMS letter announcing initial approval of the Ohio plan](#).

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Tennessee's Bureau of TennCare and Department of Intellectual and Developmental Disabilities Release Memo Detailing Major Changes to Authorization of Facility-Based Day Services Under Its Section 1915(c) Intellectual Disability Waivers

On June 20, 2016, Tennessee's Bureau of TennCare and the Department of Intellectual and Developmental Disabilities, released a memo detailing major changes to the way in which the state will authorize facility-based day services, including employment services, under Section 1915(c) waivers. The Bureau's stated reason for the change, which will go into effect July 1, 2016, is to ensure the state's compliance with its [HCBS Transition Plan](#), CMS' final rules for HCBS settings, and CMS' 2011 guidance on employment or employment-related settings. The memo's development was informed by the many technical resources that were provided by the [Office of Disability Employment Policy \(ODEP\)'s Employment First State Leadership Mentoring Program](#).

TennCare has stated that facility-based day services may now only be provided in a non-community-based facility setting in one of two circumstances: (a) an individual needs pre-vocational training that is time-limited, when such training is not available at their job; or (b) an individual, through their person-centered planning process, chooses to participate in a facility-based setting and the training provided there is specifically designed to address the individualized, specific employment or community living skills detailed in the person's individualized service plan (ISP).

If an individual chooses to participate in a facility-based setting for the purpose of developing employment or community living skills, the person's ISP must describe in detail the person's employment or community living goals, the specialized skills the person will be working on developing in the facility-based day program, and how and when the skills the person is learning will help them prepare to move to the next steps in pursuing and achieving their employment or community living goals. Service notes and planning activities, submitted for review, must clearly document the progress being made towards the goals in the individual's ISP.

Pre-vocational training in a facility-based setting will now only be approved if the person's final and ultimate goal is competitive, integrated employment in the community and if all facility-based training is designed to facilitate that goal. Employment in a sheltered workshop can,

according to TennCare, never be authorized for these purposes and thus can no longer be funded using a Section 1915(c) intellectual disability waiver.

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Department of Health and Human Services Issues Final Regulations Implementing the Nondiscrimination Provisions of the Affordable Care Act, Including Impact on Employee Health Benefit Programs

The Department of Health and Human Services' (DHHS) Office of Civil Rights (OCR) recently issued a final rule implementing Section 1557 of the Patient Protection and Affordable Care Act. Section 1557 provides that no individual shall be discriminated against in any health program or activity receiving federal financial assistance on the basis of race, color, national origin, sex, age, and disability. This includes employers with employee health benefit programs (i.e., insurance plans, self-insured plans, employer-sponsored wellness programs, employer-provided health care clinics, and other long-term care coverage) that receive federal financial assistance in order to fund those programs. Health plans might receive federal financial assistance when, for example, a hospital sponsors an employee health benefit program and the hospital receives federal financial assistance or an employer purchases health insurance coverage for its employees on the ACA Marketplace. The final rule only applies when the health plan itself benefits from federal financial assistance. Employee health plans are not necessarily covered by the rule if the employer receives federal government funding for some other purpose than its health plan.

The final rule will protect many workers with disabilities from discrimination by their employer-sponsored health plans, which will help ensure that they can access quality health care while working. For example, an employer-sponsored health plan would not be allowed to cover a certain type of surgery or transplant for some employees but not others. The final rule also explicitly incorporates Section 504's ban against unnecessary segregation or differentiation based on disability, so that all health services would have to be provided in the most integrated setting possible.

The final rule requires that health programs provide effective communication services to individuals with disabilities, including any auxiliary aids and services the person needs to be able to communicate effectively with their health care provider, regardless of disability. Finally, the rule requires that health care facilities must conform to the Americans with Disabilities Act (ADA) accessible design standards and that all electronic communications from health care providers must be accessible to persons with disabilities.

More information:

- [HHS Issues Health Equity Final Rule | Health Affairs Blog](#)
- [Nondiscrimination in Health Programs and Activities - Final Rule](#)

- [Fact Sheet - Section 1557: Ensuring Effective Communication with and Accessibility for Individuals with Disabilities](#)

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Study by Dartmouth Health Researchers Finds That People with Mental Illness Who Receive Supported Employment Services Have Improved Quality of Life

On June 6, 2016, the Dartmouth Institute for Health Policy and Clinical Practice released [a study showing that most people with serious mental illness can improve the quality of their lives if they are given sufficient employment supports](#) in the form of individual placement and support services. Under the individual placement and support (IPS) model, an employment specialist helps an individual with a mental health disability find and hold down a job, working closely with the individual's mental health service providers. Robert Drake, a professor of psychiatry at Dartmouth, reports that finding work led to increased self-esteem, community participation, and social integration for individuals with mental illnesses. Earlier studies have shown that individuals who find employment through supported employment services also use fewer health services than those who have not found work.

The study also found that approximately 60 percent of individuals with mental illnesses could obtain employment if they had access to supported employment services. However, according to the study's researchers, most individuals do not have access to these services due to a lack of funding. Medicaid is the nation's largest source of funding for mental health care, but does not pay for supported employment services in all states.

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OPM Proposes Regulations to Implement the Wounded Warriors Federal Leave Act, Giving Disabled Veterans Who Are Federal Employees Access to New Type of Leave for Medical Appointments

On June 6, 2016, the [Office of Personnel Management \(OPM\)](#) proposed final regulations implementing a statute that increases the availability of medical leave for [United States veterans with disabilities](#). The Wounded Warriors Federal Leave Act of 2015 gives 104 extra hours of sick leave to veterans with disabilities (i.e., veterans with a disability rating of 30 percent or more) who work in the federal government to enable them to attend medical appointments related to their disability. This leave time, which would be available for 12 months beginning on the start date of employment, would be referred to as "disabled veteran leave." This leave time is designed to cover the time period during which veterans have not been at a federal job long enough to earn ordinary sick leave. Veterans with disabilities, due to the need for regular medical appointments, tend to run out of ordinary sick leave quickly. The new law attempts to address several of these concerns.

OPM's regulations make several useful additions to the law's implementation. First, it extends immediate eligibility to disabled veterans who worked for a short time in the federal government before the law was implemented (before November 5, 2016), then left and were rehired after the law was implemented (after November 5, 2016). Ordinarily, only disabled veterans with an employment start date after November 5, 2016 would be eligible. OPM indicated in its proposed regulation that it did not feel that Congress intended to exclude such individuals. The proposed regulations also define several terms used by the statute which clarify Congress' intent, such as stating that "disabled veteran leave" only refers to medical appointments for the veteran's service-caused disability.

For more information, read the [Government Executive](#) article describing many of the major actions OPM intends to take in the regulations.

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EEOC Issues Guidance on Employee Wellness Programs, Clarifying How the Programs Can Remain in Compliance with the ADA

The Equal Employment Opportunity Commission (EEOC) recently released a final rule amending its regulations implementing Title II of the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act of 2008 (GINA). The final rule sets forth the requirements for employer wellness programs to ensure compliance with disability and genetic information non-discrimination requirements.

According to the EEOC, "the ADA and GINA generally prohibit employers from obtaining and using information about employees' own health conditions or about the health conditions of their family members, including spouses. Both laws, however, allow employers to ask health-related questions and conduct medical examinations, such as biometric screenings to determine risk factors, if the employer is providing health or genetic services as part of a voluntary wellness program." The Americans with Disabilities Act prohibits employers from discriminating against employees who do not participate in the wellness program. The EEOC's final rule, however, takes the position that participation incentives do not violate the ADA if they are not "coercive." The EEOC's guidelines classify incentives as coercive only if they exceed 30 percent of the cost of self-only coverage under the group health plan. Employers are also required to provide reasonable accommodations to employees who want to participate in the wellness program and earn the incentives, but cannot do so due to a disability. Finally, employers are required to provide employees with a written notice stating what health information would be retrieved as part of the program and the limited purpose of retrieving such information. Employers would still be required to comply with the Health Insurance Portability and Accountability Act (HIPAA).

The GINA-related amendments to the final rule explain that, while GINA's prohibition against obtaining genetic information does not apply to employer-sponsored wellness programs, they must be designed in a fair manner. For example, an employer could not penalize an employee if

the employer finds out that an employee's spouse has a chronic condition, and no incentives are allowed in exchange for current or past genetic information on a spouse or children. They can, however, tailor wellness program incentives towards ameliorating the impact of the condition on their employee or the employee's spouse. The GINA-related amendments also contain the same restriction of incentives for joining employer wellness programs to 30 percent of the cost of self-only coverage under the group health plan.

The final rules therefore decrease the likelihood that employer wellness programs will be administered in a way that is discriminatory toward employees with disabilities, or employees who have dependents with disabilities, by ensuring they are designed in a fair manner that is not unduly coercive. The final rules may increase the likelihood of the participation of employees with disabilities, or employees who have dependents with disabilities, in employer wellness programs.

More information:

- [EEOC press release on the final rules](#)
- [EEOC Issues New Guidance On Employee Wellness Programs | Mondaq.com](#)

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