Employment, Health Care and Disability Policy Update: February 2017 Newsletter

February 27, 2017

The LEAD Center's Policy Update – Employment, Health Care and Disability is a monthly update focusing on the intersection of disability, employment and health care policy. The LEAD Center's Policy Update – Employment, Health Care and Disability provides 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.

In This Issue

Equal Employment Opportunity Commission (EEOC) Releases Final Rule, Which Clarifies Affirmative Action Obligations of Federal Employers towards People with Disabilities

On January 3, 2017, the Equal Employment Opportunity Commission released its Final Rule, "Affirmative Action for Individuals with Disabilities in Federal Employment." The Final Rule

requires federal agencies to take a number of specific steps to increase the number of people with disabilities working in the federal government.

The Rule requires federal agencies to create an affirmative action plan to ensure qualified people with disabilities are employed at every level of the federal government. The Rule lists steps that agencies should take as part of their affirmative action plan, including: (1) taking advantage of federal programs that allow for noncompetitive hiring and (2) making connections with organizations that provide disability-related job assistance.

The Rule sets four hiring goals for people with disabilities: (1) 12 percent of all agency employees at the GS-11 pay level and above must be persons with disabilities, (2) 12 percent of all agency employees at or below the GS-10 pay level must be persons with disabilities, (3) 2 percent of all agency employees at the GS-11 pay level or above must be persons with targeted (usually meaning "significant") disabilities, and (4) 2 percent of all agency employees at or below the GS-10 pay level must be persons with targeted disabilities. Each agency must take steps to increase the number of people with disabilities in its workforce until these goals are attained. The agency must also record their progress towards these goals and the details of its affirmative action plan.

The Rule requires federal agencies to provide personal assistant services (PAS) to any federal employee who needs these services to perform their job. Personal assistant services are tasks such as helping a person with a disability to eat, remove or put on clothing, and other activities of daily living. Although PAS under the regulations do not include medical services, they do include assistance that might ordinarily be covered under Medicaid-funded long-term services and supports (LTSS).

For more information, read the Final Rule as published in the Federal Register.

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HCBS Transition Plans Update

State Medicaid agencies are in the process of revising their Home and Community-Based Services (HCBS) transition plans, to fully reflect the Centers for Medicare and Medicaid Services (CMS) Final Rule, issued on January 10, 2014, which requires all states to ensure that settings and services receiving Medicaid HCBS funding are truly integrated in the community, with specifics detailed in the Final Rule. The states must also produce HCBS Transition Plans that show how they will alter existing Medicaid-funded HCBS settings, rules, administrative codes, regulations, and training to comply with the Rule. The Rule applies to non-residential settings and programs, including employment programs, as well as residential programs and settings. CMS found that the states of Hawaii, New Mexico and Rhode Island had completed their systemic assessments and clearly outlined the remediation strategies they would use to address the issues identified in that assessment.

Hawaii

On January 13, 2017, the Center for Medicare and Medicaid Services (CMS) granted initial approval to Hawaii's HCBS Transition Plan.

Several issues of compliance that Hawaii rectified in its latest revisions to the Plan relate to employment. First, Hawaii is revising many of the employment-related services offered under its I/DD waiver, which was renewed effective July 1, 2016. Hawaii is ending Prevocational Services and Group Employment Services. Prevocational Services have been replaced with a new service, "Discovery and Career Planning," which must be fully compliant with the Rule. This is because prevocational services had previously been delivered in congregate, non-competitive settings that were not compliant with the Rule. Second, Hawaii added several requirements of the Rule into the state's regulations, including the requirement that beneficiaries have opportunities to seek competitive integrated employment.

For more information, read Hawaii's initial approval letter from CMS.

New Mexico

On January 13, 2017, CMS granted initial approval to New Mexico's HCBS Transition Plan.

According to CMS, there are still several compliance-related issues that remain before New Mexico can receive final approval. First, all nonresidential settings in which beneficiaries are clustered together in order to receive services, including group supported employment and day programs, must be included in the Transition Plan. Second, New Mexico's onsite visits, designed to determine whether a provider is required to undergo heightened scrutiny, rely too heavily on provider/site responses to state examiner questions and not heavily enough on consumer/beneficiary responses. CMS stated that New Mexico cannot rely exclusively on provider self-assessments when determining whether a setting is compliant with the Final Rule. CMS reiterated previous points it had made on reverse integration, including that nonresidential settings providing employment or day services were required to offer beneficiaries opportunities to interact with the community.

For more information, read New Mexico's initial approval letter from CMS.

Rhode Island

On January 13, 2017, CMS granted approval to Rhode Island's HCBS Transition Plan.

Several issues of compliance that Rhode Island rectified in its latest revisions to the Plan relate to employment. First, the state confirmed that all existing sheltered workshops in Rhode Island will close by 2023. The state also explained the transition process through which all providers who run the sheltered workshops will now provide Supported Employment services in integrated settings in the community. All day programs, including day/employment programs and adult day programs, will be required to incorporate more integration into their models. Second, Rhode Island updated the rules and regulations pertaining to several developmental disability

organizations that run day programs. One of the updates ensures that day programs serve as places where people receiving services will be referred to employment and volunteer opportunities in the community.

For more information, read Rhode Island's initial approval letter from CMS.

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Equal Employment Opportunity Commission Releases Guidance on the Legal Rights of Persons with Mental Health Disabilities in the Workplace

The EEOC's recently released policy guidance titled, "Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights," which explains the rights that people with psychiatric disabilities have at work, including potential reasonable accommodations a person with a psychiatric disability could receive.

The guidance states that an employer cannot fire an individual solely based on a mental health condition, unless the employee is a direct threat to safety or there is objective, reliable evidence that the individual cannot perform their job duties because of it. It also explains that a person with a disability can keep their condition private if they wish, and that the employer may only ask questions about their disability in four situations: (a) when the person asks for a reasonable accommodation; (b) after the employer has made a job offer, but before employment begins; (c) when engaging in affirmative action to hire more people with disabilities; and (d) on the job, when there is objective evidence that the person's condition is interfering with their ability to perform their job. The guidance describes how to get a reasonable accommodation for a mental health condition and gives examples of the different forms of reasonable accommodations a person could receive. Reasonable accommodations could include altered work schedules, a quiet work environment, specific shifts, and permission to work from home. A mental health condition does not need to be "permanent or severe" for the person to receive a reasonable accommodation.

For more information, read the EEOC's mental health guidance.

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Collaborative on Health Reform and Independent Living (CHRIL) Commences Study of the Affordable Care Act and the Employment of People with Disabilities

Researchers at the Collaborative on Health Reform and Independent Living (CHRIL) have begun a unique study of the Patient Protection and Affordable Care Act (ACA). The $2.5 million grant project will examine, over the course of five years, how the ACA affects the employment of people with disabilities. It will look at: (1) whether the ACA allows people with disabilities to gain better quality insurance, and (2) how it affects independent living, access to services employment, and other factors. It is funded by the National Institute on Disability, Independent

Living, and Rehabilitation Research (NIDILRR) in the U.S. Department of Health and Human Services.

Jae Kennedy, professor and chair of Washington State University's Department of Health Policy and Administration, stated that they wanted to focus on working-age people because they are typically the population that relies on employer-provided insurance. People with chronic conditions were often unable to obtain individual insurance before the establishment of the ACA.

For more information, read CHRIL's announcement of the study.

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American Journal of Public Health Releases Study on the Effects of the Medicaid Expansion on the Workforce Participation of People with Disabilities

The American Journal of Public Health (AJPH) recently released the results of a study, "Effect of Medicaid Expansion on Workforce Participation of People with Disabilities." The study examined the Urban Institute's Health Reform Monitoring Survey, a nationally representative survey of 7,400 working-age adults and found that people with disabilities living in Medicaid expansion states were 7 percent more likely to be employed. They were also significantly less likely to be unemployed because of disability. In Medicaid expansion states, 39 percent did not work due to disability. In states where Medicaid was not expanded, 48 percent did not work due to disability.

AJPH hypothesized that, before the Affordable Care Act was passed, people with disabilities were more likely to be uninsured if they were employed. AJPH noted that Medicaid expansion improves employment outcomes of people with disabilities because they are now able to get health care while earning money at levels that previously would have made them ineligible for Medicaid. The study has two major health and policy implications: (1) in Medicaid expansion states, working adults with disabilities no longer must be completely impoverished to gain publicly funded health insurance; and (2) to the extent that increased earnings leads to decreased reliance on public benefits, Medicaid expansion could potentially lead to long-term health care cost savings as persons with disabilities further their careers.

For more information, read the AJPH study.

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Center for Medicare and Medicaid Services (CMS) Releases Guidance on the Community First Choice State Plan Option

On December 30, 2016, CMS released guidance to state Medicaid directors on Section 1915(k) of the Social Security Act, also known as the "Community First Choice" state plan option. Section 1915(k) allows a state to amend their state plan so they can provide personal attendant services (PAS) and related support services in their home or community. The guidance describes each of the provisions of the new Community First Choice (CFC) option and explains what the state will

need to do to comply with each one.

CMS states that one of their major goals in encouraging the use of Section 1915(k) as an option has to do with streamlining funding for PAS across different populations that are normally covered by different service models and that use different eligibility criteria and assessment tools. PAS are services are useful across all conditions and disabilities. Funding all PAS through the Community First Choice option allows people with disabilities to gain access to these services faster.

The guidance goes into detail on the type of PAS provided under the Community First Choice State Plan option. It funds all services needed to provide help with activities of daily living and instrumental activities of daily living, all health related tasks, and all tasks necessary to improve the ability of an individual with a disability to do any of these tasks independently. Although the guidance does not specifically mention support so that people can be employed, PAS support can, for example, enable a person to prepare for their work day in the community and assist people who may work from home. States can also elect to cover tasks necessary to help the individual transition into the community and technology that substitutes for human assistance.

An example of the latter is an electric seat lift that would help a person with a disability get out of or onto a chair without human assistance, which also might be useful in a workplace. The guidance also describes certain regulatory requirements of home and community-based services (the HCBS Settings Rule and Person-Centered Planning), and the oversight mechanisms for CFC services.

For more information, read the guidance.

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National Institute on Disability, Independent Living and Rehabilitation Research at ACL Creates Proposed Long-Range Plan for Years 2018-2023

The National Institute on Disability, Independent Living and Rehabilitation Research (NIDILRR) under the Administration on Community Living (ACL) at the U.S. Department of Health and Human Services issued a proposed long range plan for years 2018-2023. It is soliciting public comments prior to close of business on March 20, 2017 and has held several town hall meetings for stakeholders.

The Long-Range Plan describes NIDILRR as an agency that conducts research that contributes to the nation's community living policy. It discusses several of the long-term concerns of people with disabilities, including underemployment, access to affordable housing, rising healthcare costs, and lack of transportation. NIDILRR's research from 2018-2023 will focus on three areas: (1) health and health care reform, (2) employment, and (3) community engagement and factors that contribute to it, including housing and transportation.

On health and health care reform, NIDILRR plans to research: (1) programs that address the

poor health of persons with disabilities, particularly those that have psychiatric disabilities that do not lead to poor health on their own; (2) the impact of health care policy on access to health care; (3) person-centered planning and services; and (4) ways to turn existing health care research into evidence-based practice. On employment, NIDILRR's primary focus will be on how to integrate persons with psychiatric disabilities into the workforce, employing youth with disabilities, and how to reduce employment disincentives and employer bias. On community living and engagement, NIDILRR will research access to transportation for people with disabilities, disability statistics research on community engagement, accessible technology, and systematically tracking LTSS in the community as more people receive it.

For more information on NDILRR's past research and to review and submit comments, read the Long-Range Plan.

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