



## **How the Department of Labor In-Home Care Rule Impacts Community Agency Providers & Individuals Served**

### **Issue**

Florida ARF and its member agencies seek legislative approval of funding for new rates for APD iBudget services impacted by the new Department of Labor (DOL) wage guidelines that became effective on October 13, 2015. The reimbursement rates affected by the DOL changes include the following services: Live-In Residential Habilitation daily rate, Personal Supports daily rate, and Companion services. If these rates are not adjusted, individuals with intellectual/developmental disabilities will have fewer choice options for residential living and many will likely require placement in more costly residential placements including nursing homes.

### **Background**

The Fair Labor Standards Act (FLSA) of 1938 accomplished the following: Established a federal minimum wage, guaranteed overtime paid at one-and-one-half the normal wage rate for certain jobs, prohibited child labor, and established a 40-hour seven-day workweek as a maximum before overtime must be paid.

In 1974 the FLSA was amended to add a companionship exemption, and many community agencies used this provision to serve individuals with intellectual disabilities in their own homes. In practice, the amendment created specific exemptions for “domestic service workers who provide companionship services” and “live-in domestic service workers.” The referenced exemption was applicable if employees were providing services to an individual in his or her private home. A provider did not have to pay hour-for-hour for services provided, did not have to pay overtime, and could also exempt all sleep time.

On September 17, 2013, the Department of Labor (DOL) issued rule RIN 1235-AA05, which altered application of the Fair Labor Standards Act (FLSA) for domestic service. The rule was to go into effect on January 1, 2015, but was delayed until October 13, 2015, because of legal challenges. Per the new rule, the “companionship exemption” that previously exempted individuals who provided home care/companionship services from wage and overtime laws that applied to other workers went away for agencies who employed home care/companion staff. Providers now have to pay employees hour-for-hour for all hours worked and unless certain limited conditions are met will also have to pay sleep time and for overtime hours worked in excess of 40 hours per week.

### **Purpose of Rule Modifications**

DOL justified the need to update the rule by saying, “the home care industry ... has undergone dramatic expansion and transformation in the past several decades,” due to several factors, including increased funding for home and community based services (HCBS), the rising cost of institutional care, and the disability civil rights movement. The increase in the number of direct care workers and the increased professionalization of the workforce led DOL to seek these changes to the regulations.” DOL explained “direct care workers are for the most part not the elder sitters that Congress envisioned when it enacted the companionship services exemption in 1974, but are direct care workers and the increased professionalization of the workforce led DOL to seek these changes to the regulations.” Further, DOL specified that it intended to construe the availability of the exemption narrowly.

DOL opined the rule would help reduce the rate of high turnover among direct care workers by extending wage and hour protections to them, and that the requirement to pay minimum wage would have a minimal impact as most direct care workers already earned minimum wages. However, the intended outcomes DOL described are not being seen by community provider agencies. The reported actual impact is the State is not covering the cost of hour-for-hour staffing. Disruptions of care for people served is being created because many individuals will either have to increase the number of direct care workers attending to them because of the need for shift staffing, or they will be forced to leave their homes and move into more cost efficient models.

### Impact of the New Rule

Floridians with intellectual/developmental disabilities have been receiving services through the APD Home and Community Based Service Waiver (HCBS) to assist them in living a meaningful, independent life for many years. Under this waiver, now known as the iBudget, individuals have the right to: live and work in the most integrated setting within their community; make their own decisions/choices; receive supports in an integrated setting that allows them access to the greater community; live in a home of their own; and, to receive support to increase their independence in making life choices.

For more than a decade, individuals have received Supported Living services in their homes and have been successfully supported in part because of the exemption from minimum wage and overtime payment requirements. Based on the new DOL rule, individuals that receive In-Home Supports may no longer have the opportunity to receive these services because of the increased cost of care. Unless adequate daily rates are approved, the choice options for about 1,719 individuals who receive Supported Living services at the daily rate are now in jeopardy.

In response to the DOL rule changes, the State commissioned an actuarial study known as the Milliman Report. The intent of the study was to evaluate the cost of implementation of the DOL rule for individuals receiving daily Personal Supports. The results were as follows:

Staffing Ratio for In Home Supports	Milliman Recommended Daily Rate for (agency, non-geographical)	iBudget Daily Rate Prior to DOL Rule (agency, non-geographical)	Milliman Average Cost per Person (agency, non-geographical)	iBudget Average Cost Prior to DOL Change	Annual Difference – Milliman compared to iBudget Rates
1:1	\$175.03	\$112.09	\$55,485	\$35,533	\$19,952
1:2	\$140.93	\$ 90.25	\$47,755	\$30,595	\$17,160
1:3	\$121.63	\$ 77.89	\$42,084	\$26,950	\$15,134

Per the Milliman study, the above rates would cover minimum wage requirements and were considered to be minimal estimates. The rates did not include program costs nor other factors such as geographic differentials. While the study has been criticized for limited responses, Florida ARF member agencies find the study to be representative of the models they run and the costs they incur. Even with the increased costs generated by the DOL rule changes, the Milliman daily rates are still well below the average cost of nursing home care at \$77,500 a year and Behavioral Residential Habilitation (Extensive 2) at \$74,064.48 per year.

### Programmatic Impact

Per "The Bill of Rights of Persons with Developmental Disabilities," Florida Statute 393.13 (2)(d)(7), Florida's service system for individuals with intellectual/developmental disabilities is: *"To fully effectuate the principles of self-determination through the establishment of community services for persons with developmental disabilities as a viable and practical alternative to institutional care at each stage of individual life development and to promote opportunities for community inclusion. If care in a residential*

*facility becomes necessary, it shall be in the least restrictive setting.”* Maintaining individuals in their own homes typically represents the least restrictive environment for an individual.

Preliminary results indicate the APD methodology for covering the costs for 1:1 and 1:2 staffing ratios is not adequate to cover the cost of care. Rather than adopting a new rate, the State is adding incremental units of Personal Support services per day to individual cost plans for individuals who previously received a daily rate. Providers report the new rates do not cover the cost of care that is being generated by the new DOL rule especially when the individuals served require overnight supervision in their homes. The current rate setting methodology is inadequate to cover the cost of care for approximately 1,313 individuals. This means that more individuals will have to move to 1:3 living models or seek placement in residential group homes.

In a December 2014 letter from the Offices of Civil Rights for the Departments of Justice and HHS, states were cautioned to make reasonable modifications to ensure that individuals with disabilities are not placed at serious risk of institutionalization when implementing the new rule. States were admonished they should not violate the Americans with Disabilities Act, Title II, in a manner that creates Olmstead infractions and were reminded that in *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court held that Title II’s integration mandate prohibits the unjustified segregation of individuals with disabilities. Compliance with Title II’s integration mandate requires that public entities reasonably modify their policies, procedures, or practices when necessary to avoid discrimination. States were also told the obligation to make reasonable modifications may be excused only where the public entity demonstrates that the requested modifications would “fundamentally alter” its service system. *Olmstead* decisions apply to persons at serious risk of institutionalization or segregation. For example, a public entity could violate *Olmstead* if it fails to provide community services, or reduces those services, in a way likely to cause a decline in health, safety, or welfare leading to an individual’s eventual placement in an institution.

In 2011, the State of North Carolina sought to implement cuts in In-Home services that offered assistance with bathing, dressing, toileting, mobility, and eating - cost-effective services on which individuals with disabilities depend on to avoid more costly placement in institutions. The action was litigated and in April 2013, the US Court of Appeals for the Fourth Circuit affirmed a decision made by US District Court Judge Terrence Boyle in 2011 to stop the State from implementing a new policy concerning Medicaid personal care services that “treats people with similar needs differently and puts North Carolinians who have been successfully living in their own homes...at risk of segregation, in the form of institutionalization.” The appeals court also rejected the State’s argument that budgetary concerns were a legitimate reason to discontinue providing In-Home Personal Care services to many people with disabilities, stating “financial constraints alone cannot sustain a fundamental alteration defense.”

We encourage Florida to learn from the experience of the North Carolina, and we encourage the state to move forward with implementation of reimbursement rates that ensure adequate funding for vital services that allow individuals to live in their own homes.

## **Impact**

The new DOL rule allows provider agencies to exempt an eight-hour sleep deduction for a 24-hour shift if certain conditions are met, meaning providers would have to pay staff 16 hours per day for a 24-hour shift worked unless the individual is away from the home. At today’s minimum wage, this equates to \$126.88 per day (without including employment taxes, unemployment, worker’s compensation insurance, benefits, overhead costs, and potential overtime). The waiver currently pays a rate of \$112.09 for provision of continuous supervision for 24 hours per day. The current reimbursement rates simply do not cover the cost needed by providers to meet the new DOL rule change.

Based on the Milliman Report, Personal Supports rates for Supported Living recipients would need to be at a minimum, and the geographic rate would need to apply to Monroe County:

1:1 Staffing \$175.03 per day  
 1:2 Staffing \$140.93 per day  
 1:3 Staffing \$121.63 per day.

Using August 2015 caseload data, the additional cost to implement the Milliman rates would be about \$12 million in additional General Revenue and about \$18 million in additional Medicaid Trust Funds, for a total cost of about \$30 million. Based on historical surpluses the APD program has reported over the last several years, most of the funding should be available within the existing appropriation.

The chart below shows the anticipated cost to implement the new DOL rule changes:

<b>Staffing Ratio</b>	<b># Served</b>	<b>Additional Cost: Milliman Rates</b>	<b>Total Additional Cost</b>	<b>GR Funding</b>	<b>Medicaid Trust</b>
1:1	711	\$19,952	\$ 14,185,872	\$ 5,674,349	\$8,511,523
1:2	602	\$17,160	\$ 10,330,320	\$ 4,132,178	\$6,198,192
1:3*	406	\$15,134	\$ 6,144,404	\$ 2,457,762	\$3,686,642
<b>Total</b>	<b>1,719</b>		<b>\$30,660,596</b>	<b>\$12,264,239</b>	<b>\$18,396,357</b>

\*One agency reports the 1:3 staffing ratio can be done for about \$104.79 per day based on efficiencies they have identified. For Monroe County, a geographic differential would need to be applied.

The above data likely represent overstated costs since providers are reporting funding decisions are pushing more individuals into 1:3 In-Home Supports models or group homes. We note the 1:1 and 1:2 models will always be needed to meet the needs of individuals who require individualized care. To accommodate the needs of these individuals, we encourage the state to adopt assessment criteria such as the Extensive 1 Behavioral criteria for individuals needing 1:2 ratios and the Extensive 2 Behavioral criteria for the 1:1 ratio.

NOTE: An additional 1,100 individuals are reportedly receiving Personal Supports Day Rates in settings other than independent living arrangements. This analysis does not address these individuals since it is unknown how their service needs are being addressed.

### **Florida ARF Position**

Provider agencies are having to determine if they can continue to provide Supported Living services if rate adjustments are not made to accommodate the cost of the recent DOL rule changes. The Milliman rates provide an acceptable rate structure, particularly for the 1:1 and 1:2 staffing ratios. Without these rates, the likelihood of the continuation of the Live-In model for individuals who require overnight staffing is in great jeopardy.

Florida ARF asks the Florida Legislature to approve rates that will cover the cost of the rule change which is estimated to be no more than \$12.3 million in state funding.