



November 1, 2023

Acting Secretary Julie Su  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

**RE: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, RIN 1235-AA39**

Dear Acting Secretary Su:

I am writing on behalf of The Arc of the United States, a national organization dedicated to advocating for the rights and well-being of individuals with intellectual and developmental disabilities (IDD). We appreciate the opportunity to provide comments on the Notice of Proposed Rulemaking, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*.

The Arc of the United States has nearly 600 state and local chapters across the United States. These chapters provide a wide range of services for people with intellectual and developmental disabilities (IDD), including individual and systems advocacy, public education, family support, systems navigation, support coordination services, employment, housing, support groups, and recreation. The Arc chapters are committed to improving the lives of people with IDD and their families.

The Arc supports the Department of Labor's (DOL) efforts to expand overtime protections to more workers. People with disabilities, including those with IDD, are part of the general workforce and will likely benefit from these protections. In addition, service providers who provide residential, employment and other critical supports to people with disabilities require a well-trained and appropriately compensated workforce in order to provide individualized, person-centered support.

However, we urge you to work closely with the Centers for Medicare and Medicaid Services (CMS) and the Administration for Community Living (ACL) to implement these changes in the context of Medicaid home and community-based services (HCBS). Without proper implementation, people with disabilities could experience a major loss of HCBS, putting their livelihoods at risk.

## **Background: Medicaid Home and Community Based Services**

Many people with disabilities, including those with IDD, require assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs). ADLs include activities such as feeding, dressing, bathing, and walking. IADLs include tasks such as managing finances, shopping and meal preparation, as well as housecleaning. Traditional health insurance and Medicare does not cover these services. Many people with disabilities must therefore rely on the Medicaid program.

Created in 1965, Medicaid is a joint federal and state program to provide coverage for “the delivery of primary and acute medical services, as well as long-term services and supports (LTSS).<sup>1</sup>” To receive federal funds, a state must meet certain federal statutory and regulatory requirements in the administration of its Medicaid program. Unlike nursing homes, HCBS is optional and over 650,000 people are on waitlists for these services.<sup>2</sup> A person with IDD waits on average 5.5 years to get services in a state with a waiting list.<sup>3</sup> This means some individuals are unnecessarily institutionalized and many rely on unpaid family supports. Many family members providing care often leave the workforce, causing enormous economic distress to these families. Moreover, even if someone gets off the waitlist, many are not getting the services they need due to major workforce shortages.

Low reimbursement rates are endemic across the Medicaid program, particularly HCBS.<sup>4</sup> Insufficient reimbursement rates have led to low wages for direct care workers and other support staff. For example, the average hourly wage of a direct care worker was just \$14.27 in 2021.<sup>5</sup> This low reimbursement rate makes it difficult to attract staff and maintain services. Many staff that will fall under these expanded overtime protections, such as front-line supervisors, are filling in gaps and working overtime due to the direct care workforce crisis. While providing these workers with expanded overtime protections is commendable and well-deserved, additional state allocations of funds for HCBS will be necessary to offset the increased costs and prevent major loss of services.

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<sup>1</sup> Congressional Research Service, "*Medicaid: An Overview*," R43357, February 8, 2023, <https://crsreports.congress.gov/product/pdf/R/R43357>.

<sup>2</sup> Kaiser Family Foundation, "*Medicaid HCBS Waiver Waiting List Enrollment, by Target Population and Whether States Screen for Eligibility*," <https://www.kff.org/medicaid/state-indicator/medicaid-hcbs-waiver-waiting-list-enrollment-by-target-population-and-whether-states-screen-for-eligibility/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>, accessed June 25, 2023.

<sup>3</sup> Kaiser Family Foundation, "*A Look at Waiting Lists for Home and Community-Based Services from 2016 to 2021*," <https://www.kff.org/medicaid/issue-brief/a-look-at-waiting-lists-for-home-and-community-based-services-from-2016-to-2021/>, accessed June 25, 2023.

<sup>4</sup> Kaiser Family Foundation. *Medicaid to Medicare Fee Index*. Retrieved from <https://www.kff.org/medicaid/state-indicator/medicaid-to-medicare-fee-index/>.

<sup>5</sup> PHI, *Direct Care Workers in the United States: Key Facts*, available at <https://www.phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-3/>

### **Proper Implementation is Critical to Prevent Major Loss of Services**

The DOL should work closely to implement the final rule with the Centers for Medicare and Medicaid Services (CMS) and The Administration for Community Living (ACL) to prevent the potential for a major loss of HCBS for people with disabilities. We recommend an effective date for the final rule that will allow time for coordination between federal agencies and their state counterparts. We also recommend considering a phased implementation timeline to give state legislatures the ability to appropriate the additional funds necessary to meet the additional expenses to the HCBS delivery system associated with this rule. A similar approach to increasing the salary threshold was attempted in 2016, which led to increased dialogue between DOL and HHS regarding shared initiatives and culminated in an enforcement delay for community-based providers.<sup>6</sup>

Given the current fragility of the HCBS delivery system, any new policy initiatives with a significant fiscal impact on HCBS providers must be implemented carefully to preserve access to services. As such, we urge you to meet with your colleagues at CMS and ACL as soon as possible to ensure commensurate funding and technical guidance is available to mitigate the loss of access to HCBS in the final rule.

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The Arc appreciates the opportunity to provide these comments. If you have any questions please contact David Goldfarb, Director of Long-Term Supports and Services Policy at [goldfarb@thearc.org](mailto:goldfarb@thearc.org).

Sincerely,

David Goldfarb  
Director of Long-Term Supports and Services Policy  
The Arc of the United States

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<sup>6</sup> Federal Register Volume 81, Issue 99 (May 23, 2016), pgs. 32390-32391, noting “*From December 1, 2016 to March 17, 2019, the Department will not enforce the updated salary threshold of \$913 per week for the subset of employers covered by this non-enforcement policy. Throughout the duration of this non-enforcement policy, the Department will engage in outreach and technical assistance efforts, including to providers of services in settings covered by this policy. This non-enforcement policy does not apply to providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential care facilities with 16 or more beds.*” Available at: <https://www.govinfo.gov/app/details/FR-2016-05-23/2016-11753>.