

**Common Sense
Initiative****Mike DeWine**, Governor
Jon Husted, Lt. Governor**Carrie Kuruc**, Director

Business Impact Analysis

Agency, Board, or Commission Name: Ohio Department of Developmental Disabilities**Rule Contact Name/Contact Information:** Becky.Phillips@dodd.ohio.gov, 614-644-7393**Regulation/Package Title (a general description of the rules' substantive content):**

Homemaker/Personal Care Rate Increases

Rule Number(s): 5123-9-30 and 5123-9-32**Date of Submission for CSI Review:** September 15, 2020**Public Comment Period End Date:** September 22, 2020**Rule Type/Number of Rules:**☐ New/___ rules☒ Amended/ 2 rules (FYR? No)☐ No Change/___ rules (FYR? ___)☐ Rescinded/___ rules (FYR? ___)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Reason for Submission

1. R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.

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**Which adverse impact(s) to businesses has the agency determined the rule(s) create?
The rule(s):**

- ☒ a. Requires a license, permit, or any other prior authorization to engage in or operate a line of business.
- ☒ b. Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.
- ☒ c. Requires specific expenditures or the report of information as a condition of compliance.
- ☐ d. Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.

Regulatory Intent

2. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

The Individual Options, Level One, and Self-Empowered Life Funding (SELF) waivers are Medicaid Home and Community-Based Services (HCBS) waivers available to Ohioans with developmental disabilities so they may receive services in their own homes as an alternative to receiving services in an institutional setting. The Medicaid HCBS waiver program is authorized by Section 1915(c) of the Social Security Act. The program permits a state to furnish an array of services that assist Medicaid beneficiaries to live in the community. Waiver services complement and/or supplement the services that are available to participants through the Medicaid State Plan and other federal, state, and local public programs as well as the support that families and communities provide. An individual with developmental disabilities is enrolled in a specific waiver based on his or her needs. As of September 1, 2020, more than 41,000 individuals were enrolled in waivers administered by the Department:

- Individual Options Waiver = 24,083
- Level One Waiver = 15,371
- SELF Waiver = 2,030

Additional information about the waivers administered by the Department is available at:

<https://dodd.ohio.gov/wps/portal/gov/dodd/waivers-and-services/welcome/>

House Bill 166 of the 133rd General Assembly represented a historic investment in Direct Support Professionals, the people who provide critical homemaking and personal care services to Ohioans with developmental disabilities. An investment of \$253 million increased the average reimbursement rate for Direct Support Professionals who provide Homemaker/Personal Care services to \$12.82 by January 1, 2020, and to \$13.23 by January 1, 2021. To effect the payment rate increase slated for January 1, 2021, the Department is amending two rules governing waivers administered by the Department:

- Rule 5123-9-30 (Home and Community-Based Services Waivers - Homemaker/Personal

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Care Under the Individual Options and Level One Waivers) defines Homemaker/Personal Care and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the services. The rule is being amended to increase the rates paid to providers of the service. Additional amendments are being made to update citations to administrative rules.

- Rule 5123-9-32 (Home and Community-Based Services Waivers - Participant-Directed Homemaker/Personal Care Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) defines Participant-Directed Homemaker/Personal Care and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the services. The rule is being amended to increase the rates paid to providers of the service. Additional amendments are being made to:
 - Add a statement that a provider of Participant-Directed Homemaker/Personal Care delivered in fifteen-minute billing units shall utilize electronic visit verification in accordance with Ohio Department of Medicaid rule 5160-1-40 (Electronic Visit Verification); and
 - Update citations to administrative rules.

3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.

5123.04, 5123.045, 5123.049, 5123.16, 5123.161, 5123.1611, and 5166.21

4. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program? If yes, please briefly explain the source and substance of the federal requirement.

Yes; the rules implement Medicaid HCBS waivers. Rules codify requirements of the federally-approved waivers.

5. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

Not applicable; the rules do not exceed the federal requirement.

6. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

Rules are required to implement Medicaid HCBS waivers approved by the federal Centers for Medicare and Medicaid Services.

7. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

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The Department measures the success of rules governing Medicaid HCBS waivers in terms of the number of individuals enrolled in and receiving services through the waivers, the health and welfare of individuals enrolled in the waivers, individuals' satisfaction with the services they receive, and Ohio's compliance with the federal Medicaid HCBS program and the approved waivers.

- 8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**

If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.

No.

Development of the Regulation

- 9. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

If applicable, please include the date and medium by which the stakeholders were initially contacted.

The plan for increasing payment rates for Homemaker/Personal Care as funded by House Bill 166 of the 133rd General Assembly was discussed at meetings of the Department's Waiver Workgroup on February 25, April 29, June 24, and July 25, 2019. The payment rates being implemented at this time were shared with Workgroup members on September 1, 2020. The Waiver Workgroup includes representatives of:

Advocacy and Protective Services, Inc.
The Arc of Ohio
Ohio Association of County Boards Serving People with Developmental Disabilities
Ohio Department of Medicaid
Ohio Developmental Disabilities Council
Ohio Health Care Association/Ohio Centers for Intellectual Disabilities
Ohio Provider Resource Association
Ohio Self Determination Association
Ohio Superintendents of County Boards of Developmental Disabilities
Ohio Waiver Network
Values and Faith Alliance

Through the Department's rules clearance process, the rules and the Business Impact Analysis form are disseminated to representatives of the following organizations for review and comment:

Advocacy and Protective Services, Inc.
The Arc of Ohio
Autism Society of Central Ohio
Councils of Governments

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Disability Rights Ohio
Down Syndrome Association of Central Ohio
Family Advisory Council
The League
Ohio Association of County Boards Serving People with Developmental Disabilities
Ohio Council for Home Care and Hospice
Ohio Department of Medicaid
Ohio Developmental Disabilities Council
Ohio Health Care Association/Ohio Centers for Intellectual Disabilities
Ohio Provider Resource Association
Ohio Self Determination Association
Ohio SIBS (Special Initiatives by Brothers and Sisters)
Ohio Superintendents of County Boards of Developmental Disabilities
Ohio Waiver Network
People First of Ohio
Values and Faith Alliance

The rules and the Business Impact Analysis form are posted at the Department's *Rules Under Development* webpage during the clearance period for feedback from the general public:
<https://dodd.ohio.gov/wps/portal/gov/dodd/forms-and-rules/rules-under-development/2-proposed-rules-for-review-and-comment>

10. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

Homemaker/Personal Care and Participant-Directed Homemaker/Personal Care provide essential supports to individuals with developmental disabilities. These services advance an individual's independence within his or her home and community and help the individual meet daily living needs. Individuals and families who receive the services and the developmental disabilities service delivery system have been united regarding the need to increase the rate paid to providers of Homemaker/Personal Care and Participant-Directed Homemaker/Personal Care. A broad array of stakeholders supported increased funding for Direct Support Professional wages included in House Bill 166 of the 133rd General Assembly.

11. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

The Department utilizes data published by the United States Bureau of Labor Statistics to develop the reimbursement rate model for Homemaker/Personal Care. The data are used to develop a rate on par with wages paid to workers in similar occupations.

12. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

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None. The Department is amending the rules to increase the rates paid to providers of Homemaker/Personal Care and Participant-Directed Homemaker/Personal Care. The Department is adding a requirement to rule 5123-9-32 to require providers of Participant-Directed Homemaker/Personal Care to utilize electronic visit verification in accordance Ohio Department of Medicaid rule 5160-1-40 (Electronic Visit Verification) which implements federal requirements set forth in the 21st Century Cures Act.

13. Did the Agency specifically consider a performance-based regulation? Please explain.
Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

No; the federal Centers for Medicare and Medicaid Services requires Ohio to implement Medicaid HCBS waivers in a uniform, statewide manner.

14. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

In accordance with Section 5166.21 of the Revised Code and an Interagency Agreement with the Ohio Department of Medicaid, the Ohio Department of Developmental Disabilities is responsible for promulgating rules regarding Medicaid HCBS waivers it administers. Department staff collaborate with staff of the Ohio Department of Medicaid when developing rules governing waivers.

15. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The Department will widely communicate information about the amendments through its publications. The final-filed rules will be posted at the Department's website and directly disseminated to providers of services, county boards of developmental disabilities, and the approximately 3,000 persons who subscribe to the Department's Rules Notification listserv.

Adverse Impact to Business

16. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community; and
- b. Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance); and
- c. Quantify the expected adverse impact from the regulation.
The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a "representative business." Please include the source for your information/estimated impact.

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The amendments being made to the rules impact providers of two services (Homemaker/Personal Care and Participant-Directed Homemaker Personal Care) to individuals enrolled in Medicaid HCBS waivers administered by the Department. The services are provided by Agency Providers (an entity that employs staff to provide services) and Independent Providers (a self-employed person who provides services and does not employ anyone else to provide the services).

	<u>Agency Providers</u>	<u>Independent Providers</u>
Certified to provide Homemaker/Personal Care	1,578	7,760
Certified to provide Participant-Directed Homemaker/Personal Care	988	6,126
Certified to provide Homemaker/Personal Care and Participant-Directed Homemaker/Personal Care	981	5,930

The rules require providers of the services to be certified by the Department and hold a Medicaid Provider Agreement from the Ohio Department of Medicaid. The rules require providers to submit information and maintain service documentation regarding the services provided. Providers are subject to sanctions if they fail to comply with the rules.

The amendments being made to the rules increase the rate paid to providers of the services and will result in increased revenue for providers. The amendments are not expected to increase the adverse impact of the rules on providers of services. Services provided on or after the effective date of the rules will be reimbursed at the new higher rates.

17. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

The rules are intended to ensure services provided to individuals enrolled in Medicaid HCBS waivers are compliant with federal requirements and to ensure the health and safety of individuals with developmental disabilities who are enrolled in the waivers.

Regulatory Flexibility

18. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

No; providers of services must meet requirements in the federally-approved Medicaid HCBS waivers.

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19. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

It is the policy of the Department to waive penalties for first-time or isolated paperwork or procedural regulatory noncompliance whenever appropriate. The Department believes the waiver of these penalties is appropriate when:

1. Failure to comply does not result in the misuse of state or federal funds;
2. The regulation being violated, or the penalty being implemented, is not a regulation or penalty required by state or federal law; and
3. The violation does not pose any actual or potential harm to public health or safety.

20. What resources are available to assist small businesses with compliance of the regulation?

Staff of the Department's Division of Medicaid Development and Administration are available to provide technical assistance as necessary.