November 7, 2023

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

RE: Proposed *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees,* RIN 1235-AA39
Submitted to regulations.gov

Dear Acting Secretary Su:

On behalf of the American Network of Community Options and Resources (ANCOR), and the more than 2,100 community-based providers ANCOR represents, thank you for the opportunity to provide feedback to the U.S. Department of Labor (DOL) on the proposed rule *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees* (Overtime Rule).

We appreciate and support policies that will strengthen our nation's workforce. However, mandating significant new expenses for community-based providers without ensuring commensurate Medicaid funding has the potential to completely collapse the system of community-based services for people with intellectual and developmental disabilities (I/DD) and put the very workforce DOL is seeking to protect at further risk. Because of the nature of Medicaid as a state-federal partnership, with reimbursement rates set by states and matching funds contributed by the federal government, community-based providers do not have the ability to unilaterally increase funding to meet increased operating costs.

Safeguards must be in place prior to any significant increase to the salary threshold to prevent damaging access to community-based services:

- DOL must collaborate with other federal agencies and community partners to ensure that policies that will result in and direct appropriate funding for community-based providers to meet the requirements of the rule are in place prior to any significant increase to the salary threshold.
- The notice of final rulemaking must include explicit language that supports and urges the Centers for Medicare and Medicaid Services (CMS) and state governments to respond by creating adjustments to reimbursement rates to meet newly mandated overtime expenses. The notice must also include a commitment from DOL to create an

interagency group with CMS and the Administration for Community Living (ACL) to monitor the implementation and, in conjunction with interested parties, propose solutions to mitigate any negative impact on the ability of Medicaid funded providers to deliver services to people with I/DD.

- The final rule must not include automatic adjustments without further rulemaking and the effective date for any final rule increasing the salary threshold must be at least two years after its finalization with a phased implementation timeframe of three to five years to afford states sufficient time to allocate appropriate funding.
- If the above safeguards are not guaranteed in the final rule, at the very minimum, DOL must issue a three-year delay in enforcement for Medicaid-funded providers supporting people with I/DD to mitigate any loss of access to community-based services. Absent adequate safeguards in place prior to the effective date, exceeding an updated 15th percentile directly impacts community-based providers and risks their ability to deliver community-based services.

ANCOR offers additional detail, supporting data, and recommendations below in response to the proposed Overtime Rule. We have organized our feedback by section below, touching upon broad themes and specific recommendations that arise within those topics.

ANCOR

Founded more than 50 years ago, ANCOR is a national, nonprofit association representing more than 2,100 private community-based providers of long-term supports and services to people with I/DD, as well as 54 state provider associations. Combined, our members support more than one million individuals with I/DD across their lifespan and are funded almost exclusively by Medicaid. Our mission is to advance the ability of our members to support people with I/DD to fully participate in their communities.

ANCOR's Prior Engagement with DOL and the Overtime Rule

ANCOR has actively engaged with the administration on changes to the Overtime Rule in the past. We provided comment on the 2015 and 2019 proposed rules impacting overtime regulations, submitted comments for the 2017 request for information from DOL, and met with the Office of Management and Budget in 2016, 2019, and 2023 respective to proposals to increase the salary threshold. As consistently voiced throughout our comments and meetings with the administration, community-based providers supporting people with I/DD cannot adjust their cost of services and are beholden to expenses which reimbursement rates permit. Thus, when there is any local, state, or federal mandate to adjust service delivery expenses, there must always be a corresponding policy in place to ensure that Medicaid rates are adequately adjusted or access to community-based services will diminish.

It was this feedback that in 2016 led to increased dialogue between DOL and the U.S. Department of Health and Human Services (HHS) and culminated in an enforcement delay for

community-based providers supporting people with I/DD.[1] In its notice of policy published to the Federal Register, DOL acknowledged the need for interagency dialogue to address how "[p]roviders in this subset of Medicaid-funded residential homes and facilities face a unique combination of challenges in balancing the goal of shifting care of individuals with intellectual or developmental disabilities to small community-based settings and meeting the timeline for implementing the HHS [HCBS Settings] rule impacting HCBS providers, with the fact that these facilities are small, dependent on Medicaid funding in state budgets, and serve vulnerable populations."[2] The HHS rule contemplated by DOL in 2016 remains challenging for states to comply with, given the growing direct support workforce crisis and diminished access to services. CMS offered corrective action plans to states in response to the drastic exacerbation of the workforce crisis through the COVID-19 pandemic,[3] and nearly every state is currently under a corrective action plan due to their inability to comply with the HCBS Settings Rule.[4] Thus, the challenges present in 2016 remain consistent today—and in fact, have only been exacerbated by the pandemic.

While we were grateful in 2016 for additional time to come into compliance, the direct support workforce crisis and access to services has significantly worsened since that time. More must be done to ensure the viability and sustainability of access to community-based services through significant increased expense.

Fiscal Impact of the Proposed Rule

ANCOR commissioned Avalere Health to estimate and project the first-year fiscal impact of the proposed Overtime Rule for community providers serving people with I/DD.[5] Avalere estimated that the proposed salary threshold increase would have a first-year fiscal impact of **$1.05 billion** for community providers and **$1.11 billion** if finalized in the first quarter of 2024.

Key findings from Avalere's Cost Impact Assessment:

- Proposed Overtime Rule would lead to $1.05 billion in additional overtime costs for community-based providers;
- Proposed Overtime Rule would lead to $1.10 billion in additional overtime costs for community-based providers if finalized in the fourth quarter of 2023;

---

[1] 81 Fed. Reg. 32,390(May 23, 2016)(to be codified at 29 C.F.R. pt. 541).
[2] *Id.*
[3] CTRS. FOR MEDICARE & MEDICAID SERVS, HCBS SETTINGS RULE IMPLEMENTATION - MOVING FORWARD TOWARD MARCH 2023 & BEYOND (last visited November 7, 2023) ("CMS staff have been in regular communication with states and stakeholders over the course of the COVID-19 public health emergency (PHE) and have consistently heard about the stress the pandemic has put on individuals and families, states and their staff, and the already fragile direct service workforce."). *See also id.* ("CMS, in partnership with the Administration for Community Living (ACL), is moving forward with a strategy that aligns the focus of federal support and state compliance activities with the realities of the direct-service workforce crisis exacerbated by the COVID-19 PHE.").
[4] CTRS. FOR MEDICARE & MEDICAID SERVS, STATEWIDE TRANSITION PLANS (last visited November 7, 2023).
[5] *See* AVALERE HEALTH, COST IMPACT ASSESSMENT OF DOL PROPOSED SALARY (Oct. 31, 2023).

- Proposed Overtime Rule would lead to $1.11 billion in additional overtime costs for community-based providers if finalized in the first quarter of 2024;
- Estimated impact to Medicaid spending would be an average annual cost of $95,000 per person due to loss of access to community-based services; and
- Approximately $1.10 billion in additional Medicaid spending to support people with I/DD in unnecessary and more costly institutional settings.

Avalere also projected the first-year cost impact for salary thresholds lower than that proposed by this rule. The projected first-year cost impact to meet an updated 20th percentile alone is estimated to be $378 million in additional service delivery expenses for community-based providers. Given the significant cost to community-based providers and absent adequate safeguards to ensure access to community-based services, surveyed community-based providers indicated a better ability at current funding levels to comply with a salary threshold increase of approximately $40,000, which we understand to correspond more closely with the projected 15th percentile for the first quarter of 2024.

The findings from Avalere's analysis are interwoven throughout these comments for additional data and context.

Direct Support Workforce Crisis and Decreased Access to Community-Based Services

ANCOR supports policies that will uplift workers, increase wages, and provide economic stability through monetary compensation and other quality benefits. However, if this rule is finalized without policies in place to ensure commensurate funding, it has the potential to harm the very workers it seeks to protect. Moreover, it also has the potential to impact a significant number of workers beyond its scope, including direct support professionals (DSPs) and people with I/DD who rely on this segment of the workforce in order to live and thrive in their homes and communities.

There is, and has been for many decades, a workforce crisis in community-based settings, due to insufficient reimbursement rates and the inability of providers to offer wages that enable them to compete with industries offering entry-level positions, such as fast-food restaurants or retail and convenience stores. This crisis is the greatest barrier to accessing community-based support and services for people with I/DD. The effects of underinvestment in the direct support workforce can be seen in turnover rates of approximately 44% nationally.[6] The onset of COVID-19 brought new pressures and hazards of providing essential, close-contact services and further exacerbated and accelerated the workforce crisis with full-time vacancy rates rising to 16.5% in 2021—a roughly 94% increase from 2019.[4]

Without sufficient and qualified staffing, community-based providers have been forced to close programs and reject referrals at a rapid pace. The recent results of ANCOR's *The State of*

[6] NAT'L CORE INDICATORS INTELLECTUAL & DEVELOPMENTAL DISABILITIES, 2021 STATE OF THE WORKFORCE SURVEY REPORT (2022).

America's Direct Support Workforce Crisis found that 83% of providers are turning away new referrals, 92% of providers are struggling to achieve quality standards, and 71% of case managers are struggling to find available providers to connect families with services.[7] As a direct consequence of the workforce crisis, 63% of providers are discontinuing services now with 55% of providers considering additional service discontinuations at the current rate of turnover and vacancy.[8] This represents a staggering 85.3% increase in service closures since the beginning of the COVID-19 pandemic. According to a recent Kaiser Family Foundation analysis, 43 states reported permanent closures of HCBS providers within the past year alone.[9]

Simultaneous with the workforce crisis and resulting closures is an increased demand for the provision of Medicaid funded home and community-based services for seniors and people with disabilities. The job demand for home and community-based services is expected to increase by 35 percent in the next decade, adding more than 1 million new jobs for direct care workers from 2021 to 2031–more new jobs than any other single occupation in the country.[10] Given the direct care workforce crisis, and accounting for turnover and vacancies, there will be an estimated 9.3 million total job openings in direct care from 2021 to 2031.[11] However, low rates beyond the control of providers make direct support work one of the lowest reimbursed in the services industry, earning a median hourly wage of $14.50, despite requiring a high degree of skill and dedication deserving of robust compensation.[12] Providers want to offer better compensation, but are powerless to raise wages to a competitive level without reducing services and shuttering programs.

ANCOR has consistently proven to be an open and transparent partner in bringing forward these concerns to this administration. We have previewed early findings from *The State of America's Direct Support Workforce Crisis* and shared quotes and testimonials from community providers closing services and programs. These briefs and survey findings are often cited by the White House, Centers for Medicare and Medicaid Services (CMS), and the Administration for Community Living (ACL) in presentations, reports, and grant proposals which identify the direct support workforce crisis and its impact on access.[13] We continue now, as we have always, to urge collaborative solutions to addressing stagnant and insufficient Medicaid payment rates which prevent competitive wages for all workers.

---

[7] *Id.*

[8] AM. NETWORK OF CMTY. OPTIONS & RES, THE STATE OF AMERICA'S DIRECT SUPPORT WORKFORCE CRISIS 2022 (Oct. 2022)[ANCOR 2022 SURVEY].

[9] KAISER FAMILY FOUNDATION, PAYMENT RATES FOR MEDICAID HOME- AND COMMUNITY-BASED SERVICES: STATES' RESPONSES TO WORKFORCE CHALLENGES (Oct. 24, 2023), *available at* https://www.kff.org/medicaid/issue-brief/payment-rates-for-medicaid-home-and-community-based-services-states-responses-to-workforce-challenges/.

[10] PHI, DIRECT CARE WORKERS IN THE UNITED STATES: KEY FACTS 2023; (analyzing U.S. Bureau of Labor Statistics, Employment Projections, *available at* https://data. bls.gov/projections/nationalMatrixHome?ioType=i).

[11] *Id.*

[12] 2021 STATE OF THE WORKFORCE SURVEY REPORT (2022).

[13] *E.g.,* Exec. Order No. 14,095 88 Fed. Reg. 24,669 (2023); ADMIN. FOR CMTY LIVING CTR FOR INNOVATION & P'SHIP, STRENGTHENING THE DIRECT CARE WORKFORCE: A TECHNICAL ASSISTANCE AND CAPACITY BUILDING INITIATIVE (2022).

Increasing Expenses without Increased Funding

Without commensurate funding to meet increased expenses, the proposed Overtime Rule forces community-based providers to choose between support for raising the salary threshold and access to community-based services for people with I/DD. Community-based providers supporting people with I/DD rely almost exclusively on Medicaid funding and there is no private pay or commercial insurance equivalent which offers these crucial services. Medicaid-funded providers do not control the reimbursement rates for which their services are funded, nor can they request or unilaterally increase reimbursement to account for new federally mandated expenses. As a result, the community-based provider network is in a precarious state and unable to incur new expenses without risking further closures of service and diminished access for people with I/DD.

1. *Community-based providers cannot control the funding of services provided.*

State governments, in partnership with CMS, which oversees and approves state Medicaid programs, determine rate reimbursements for community-based providers. Because of the nature of Medicaid as a state-federal partnership, with rates set by states and matching funds contributed by the federal government, private providers do not have the ability to pass on increased operating costs to the state, the federal government, the individuals served, or any other entity. Providers have no power to negotiate rates, and efforts to judicially enforce adequate rates within states have been unsuccessful.[14]

Moreover, increased costs of delivering services at a time of diminishing funding has the potential to further exacerbate the workforce crisis and access to services. This proposal comes at a time of increasing uncertainty as community-based providers simultaneously grapple with the wind down of critical COVID relief funding and the expiration of regulatory flexibilities meant to help temper the impact of the workforce crisis. Temporary funding provided through the American Rescue Plan Act was overwhelmingly invested by states and providers alike in stabilizing the workforce crisis in recognition of its crippling impact on the ability of providers to remain in operation at current rates.[15] Unfortunately, many states have already exhausted the limited available funds and the use of ARPA funds is set to expire March 31, 2025.[16] As further described in the recent Kaiser Family Foundation report, "[m]any of the payment rate increases and bonuses for retention and recruitment were funded by extra federal funding available

[14] *See Armstrong v. Exceptional Child Center*,575 U.S. 320(2015).
[15] Nat'l Assoc. of State Directors of Developmental Disabilities Servs, *State Workforce Initiatives: ARPA Spending Plan Topical Analysis*(2021) *available at* https://www.nasddds.org/wp-content/uploads/2021/09/NASDDDS-ARPA-Workforce-Topical-Analysis_September2021-publish.pdf.
[16] CTRS FOR MEDICARE AND MEDICAID SERVS, STATE MEDICAID DIRECTOR # 22-002 RE: UPDATED REPORTING REQUIREMENTS AND EXTENSION OF DEADLINE TO FULLY EXPEND STATE FUNDS UNDER AMERICAN RESCUE PLAN ACT OF 2021 SECTION 9817, (June 3, 2022).

through the American Rescue Plan Act, but as that funding expires, states will have to find alternative funding sources if they want to maintain spending levels."[17]

2. *Without adequate funding and safeguards in place, the proposed salary threshold increase will result in additional closures, lost employment, and decreased access to community-based services for people with I/DD and increased federal and state Medicaid expenditures.*

Community-based providers are also uniquely impacted by increases to the salary threshold due to the number of exempt employees they employ, reduced availability of funding, and high rates of turnover and vacancies. Community-based providers are Medicaid-funded organizations delivering services to people with disabilities in their homes and communities, leading to a significant number of individualized and small settings each requiring systems of executive, administrative, and professional oversight and response. Additionally, state and federal policy and regulation often require employment of several more positions of clinical and specialized care for residential and community support settings to meet a supported individual's medical, behavioral health, and community integration needs. Community-based providers further rely on and employ case managers and service coordinators to connect people with I/DD to the corresponding services and resources to meet their goals, desires, and needs. In order to promote higher degrees of quality assurance, community-based systems of care also often require a significant number of exempt workers necessary to meet the individualized, and often complex, needs of people with I/DD.

Due to decades of underinvestment in the community-based services system, community-based providers are unable to incur additional expenses at current rates of funding without reducing the workforce or reducing services. Because of the various factors contributing to a insufficiency of qualified workers in our field, providers are constantly seeking ways to attract new workers. To compete with other industries, providers often increase starting wages for direct support workers or offer cash incentives for new workers, despite not having the budget to do so without reducing all other operational expenses not required by statute or regulation. This should not be construed as a lack of support for raising wages for professional and other exempt employees; rather it is recognition that there is no remaining available source to redirect funding from.

Relying on data from the federally funded Residential Information Systems Project (RISP) for FY 2019, Avalere estimated the increased Medicaid spending necessary to provide more costly and unnecessary institutional services for individuals who may lose access to community-based services. To move people who have lost access from the community to institutional settings, Avalere estimated would cost an average of $95,000 more per person per year, and a total increased expense of $1.10 billion in state and federal funds. While this represents the fiscal impact, it pales in comparison to the losses experienced by families without access to services in

[17] KAISER FAMILY FOUNDATION, PAYMENT RATES FOR MEDICAID HOME- AND COMMUNITY-BASED SERVICES: STATES' RESPONSES TO WORKFORCE CHALLENGES (Oct. 24, 2023) *available at* https://www.kff.org/medicaid/issue-brief/payment-rates-for-medicaid-home-and-community-based-services-states-responses-to-workforce-challenges/..

their homes and communities. Furthermore, there are already waiting lists of more than 480,000 people with I/DD waiting to receive home and community-based service.[18]

3. *In addition to closing services, without policies for adequate funding and safeguards in place the current proposed salary threshold will have an unintentionally negative impact on worker satisfaction and turnover rates.*

ANCOR appreciates and supports policies that will better compensate employees in our field. Providers understand the importance of providing adequate monetary compensation and quality benefits to attract, train, and retain a qualified workforce. However, due to insufficient reimbursement rates, Medicaid-reliant providers are often at a significant disadvantage in paying wages that commercial industries can. If the rule is finalized at the current proposed salary threshold without adequate safeguards in place, many community-based providers will be forced to implement mitigation strategies to remain operational and reduce the accelerated loss of access for people relying on their services.

ANCOR collected survey responses from providers to gauge the impact this rule would have on agencies, their employees, and the individuals they serve as currently proposed. According to survey responses, approximately 61 percent of providers would employ a mitigation strategy of converting currently exempt salaried workers to hourly workers. Fifty-six percent of providers stated they would increase the salary of full-time exempt workers to meet the projected threshold. Additionally, 49 percent of providers surveyed would prohibit or significantly restrict certain overtime permitted, and 33 percent indicated the necessity of reducing salaried full-time employees. As clear from the survey responses, providers would most likely employ a mix of these mitigation strategies, with a variety of concerning impacts on employees.

What this data shows is that almost 40% of all providers are unable to raise the salaries of exempt workers, and instead must look to strategies for compliance that minimize the fiscal impact to preserve the ability to remain in operation. The unfortunate consequence of this reality is lower job satisfaction, higher turnover, and a further reduction in the pool of workers who choose to work in the community-based services field as a long-term career path. It may also result in lower wages and the elimination of raises and bonuses as providers attempt to come into compliance while continuing to deliver services to people in their homes and communities.

Though hourly and other non-exempt workers are beyond the scope of this rule, it is important for DOL to understand the impact this rule will have on community-based providers as employers of hundreds of thousands of frontline workers. As previously noted, Medicaid-funded providers cannot control the rates or funding levels set by states. Any increase in operational costs, whether for increased salaries, increased benefits, or increased overhead, must take funds away from another area. Many respondents to the impact survey from ANCOR indicated that if the rule was finalized as proposed without safeguards in place, it would have a severe and negative impact on non-exempt worker wages, health insurance coverage, and other employee

[18] AM. NETWORK OF CMTY. OPTIONS & RES & UNITED CEREBRAL PALSY, THE CASE FOR INCLUSION ON OUR NATION'S PROMISE OF COMMUNITY INCLUSION FOR ALL (2023), *available at* https://caseforinclusion.org/application/files/7316/7753/8320/The_Case_for_Inclusion_2023_Making_Good_on_Our_Nations_Promise_of_Community_Inclusion_for_All.pdf..

benefits. Furthermore, as providers reduce and close services in response to the proposed rule, all related employees, regardless of exempt status, risk losing employment.

4. *If implemented without adequate funding and safeguards in place, the proposed salary threshold will disproportionately impact rural areas.*

The proposed rule would increase the salary threshold uniformly, without considering regional variances in costs of living. This is problematic, as it would disproportionately impact workers and providers in less prosperous areas where state-determined Medicaid rates are correspondingly lower. The effect of this rule, if finalized without adequate safeguards, will disproportionately harm workers and individuals living in states that are the least able to absorb additional costs running contrary to the administration's efforts to increase health equity. The administration and CMS are aware of the unique challenges faced by people supported by community-based services in rural areas, including limited transportation options, shortages of health care services, and an inability to fully benefit from remote and broadband dependent supports and services, which often result in worse health outcomes and higher rates of preventable illness than for those living in urban areas.[19] Moreover, rural America faces a "fragmented heath care delivery system, stretched and diminishing rural health workforce, affordability of insurance, and lack of access to specialty services and providers."[20] People with I/DD and the community providers in rural areas that support them face these same challenges and would be further disadvantaged if this proposed salary threshold were implemented without commensurate funding, running further afoul of the CMS Framework for Health Equity.

Interagency Dialogue Necessary to Address an Overburdened System

DOL must meet with HHS and other interested parties, prior to finalizing any regulation, regarding the unique impact the proposed Overtime Rule has on Medicaid-funded providers supporting people with I/DD and HHS' policy priorities to ensure access to community-based services. Given the current fragility of the community-based services system, and with recognition for increased pending regulation currently proposed by CMS, any new policy initiatives with a significant fiscal impact on community-based providers must be approached cautiously and with adequate funding to preserve remaining access to services. We strongly urge DOL to collaborate with other federal agencies and community partners to ensure that policies that will result in appropriate funding are in place to meet the requirements of the rule prior to its finalization.

In addition to the 2016 enforcement delay, interagency discussion between DOL and HHS is further precedented by the delayed effective date in the *Application of the Fair Labor Standards Act to Domestic Service* which also addressed the unique impact of DOL overtime policy on Medicaid-funded community-based providers.[21] In extending overtime protections to Medicaid-

[19] CTRS. FOR MEDICARE & MEDICAID SERVS, COMMUNITY HEALTH ACCESS AND RURAL TRANSFORMATION(CHART) MODEL (last visited Nov. 7, 2023).
[20] *Id*.
[21] Application of the Fair Labor Standards Act to Domestic Service; Announcement of 30-Day Period of Non-Enforcement, 78 Fed. Reg. 60,454 (Sept. 9, 2015) (to be codified at 29 C.F.R. pt. 552).

funded providers supporting individuals in their homes, DOL recognized that an "extended effective date is reasonable due to the integral role played by complex federal and state systems that are a significant source of funding for home care work, and the needs of the diverse parties affected by [the] Final Rule."[22] DOL further recognized that "[f]ederal, state, and local agencies, as well as private entities, may need to implement new protocols, apply for changes to their Medicaid programs, adjust funding streams, and legislatively address budgetary and programmatic changes."[23]

Increased dialogue and collaboration with other federal agencies to address the direct support workforce crisis and align approaches which support access to home and community-based services is consistent with President Biden's recent Executive Order on Increasing Access to High-Quality Care and Supporting Caregivers.[24] The order explicitly directs the Secretary of Labor and the Secretary of Health and Human Services to work jointly, in consultation with relevant agencies and external experts and organizations, in addressing impacts to the home- and community-based workforce. This work is critical to informing policies, as demonstrative in this proposed rule, which act on community-based services without data or plans in place to ensure it does not have the unintended effect of reducing access.

Engagement with HHS and community partners is also essential to ensure rulemaking across both agencies does not unintentionally conflict with the result of negatively impacting the provider network and reducing access to services. This interagency collaboration is especially necessary now, as both agencies engage in substantial rulemaking impacting this workforce. For example, CMS recently released the proposed rule, *Ensuring Access to Medicaid Services,* which includes proposals for substantive systems reform and significant limits on Medicaid spending beyond direct care worker compensation for certain services.[25] *As the workforce impacted by the proposed Overtime Rule falls outside of the direct support workforce, this would simultaneously increase the expense of employing exempt workers while limiting the ability to fund it*. Without alignment across agencies, this has the potential to conflict with and conflate the fiscal impact of increasing the salary threshold on community-based providers.

With recognition that the service delivery system is significantly overburdened, we recommend that the threshold not be significantly increased until these interagency discussions can take place and adequate funding can be assured and supported through interagency initiatives for Medicaid-funded community-based providers. Provider organizations and their employees are keenly focused on providing exceptional supports while managing within very constrained financial realities.

Effective Dates and Automatic Adjustment of Salary Threshold

ANCOR acknowledges the intention of DOL to simplify existing rules by creating a mechanism that will automatically update the threshold, minimizing what oftentimes are sudden and large

---

[22] *Id*.
[23] *Id*.
[24] Exec. Order No. 14,095 88 Fed. Reg. 24,669 (2023).
[25] 88 Fed. Reg. 27,960 (May 3, 2023)(to be codified at 42 C.F.R. pts. 431, 438, 441, 447).

increases. However, we cannot support an automatic three-year adjustment outside of the rulemaking process and without a public notice and comment period. Without a corresponding plan to ensure adequate and commensurate reimbursement with each adjustment, the current proposed threshold is markedly too high for compliance and will only prove more damaging to the provider network with time and subsequent increases. Providers remain in a precarious position due to insufficient reimbursement rates and without statute, regulation, or policy dictating commensurate funding, there will similarly be no ability to comply with automatic increases in the future. The immediate impact would be to reduce the workforce, reduce compensation, and reduce services thereby increasing the risk for hospitalization and institutionalization for people with I/DD.

Since funding for providers is linked to state budgets, we recommend that the effective date of any new federal policymaking which increases service delivery expenses corresponds with state budget cycles. The vast majority of states have a budget cycle that ends in June while the Federal Medical Assistance Percentage (FMAP) (the rate of federal funding match for state Medicaid programs) has a fiscal cycle of October 1 to September 30. Crucially, many states also utilize biennial budget cycles setting budgets which cover funding for a two-year period, with at least 16 states in the 2021 legislative session enacting a biennial budget through 2023.[26] This variation in budget cycles underscores the need for a thoughtful and well-timed approach to ensure that any new federal policymaking aligns with state budget cycles and doesn't disrupt access to the critical services provided to individuals with intellectual and developmental disabilities.

States must be given sufficient time to allocate and appropriate funding to any new threshold. As previously noted, many states have a two-year budget cycle, which means that a state’s ability to react to a rule that requires additional funding may take up to 24 months. The effective date for the final rule must be at least two years after its finalization to afford states sufficient time to allocate appropriate funding. In order to give providers sufficient time necessary to advocate for adequate funding, ANCOR also strongly recommends a phased implementation timeframe, allowing a period of at least three to five years to ramp up to increased salary threshold.

If a phased in timeframe cannot be accomplished across the entirety of the workforce, at the very minimum, a committed three-year delay in enforcement for Medicaid-funded providers supporting people with I/DD will be necessary to mitigate the loss of access to community-based services. While additional time to come into compliance will be necessary, we recognize the limitations of delayed enforcement when other industries are offering higher pay and benefits. In the event of delayed enforcement, we urge DOL to consider stronger language in the notice of policy recognizing the impact on community-based providers coming into compliance.

Conclusion

ANCOR appreciates the commitment of this administration towards investing in our nation’s workforce and supporting access to home and community-based services. We continue to believe these are both critically important priorities that are not inconsistent with one another. However,

---

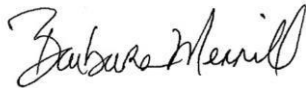
[26] Nat’l Conference of State Legislatures, *FY 2023 State Budget Status*, *available at* https://www.ncsl.org/fiscal/fy-2023-state-budget-status(last visited Nov, 7, 2023).

we are extremely concerned that this rule would have negative unintended consequences for many workers and many people with disabilities without policies in place to ensure feasibility and adequate funding for community-based providers. While we applaud the intent of DOL, we seek to ensure that other issues that would prevent the rule from operating as envisioned are addressed prior to any significant increase to the salary threshold.

As Medicaid-funded entities, providers are dependent on state Medicaid programs to set appropriate rates, state legislatures to appropriate funding, and CMS to provide strong oversight of Medicaid programs. We strongly urge you to adopt the safeguards necessary to avoid unintended consequences to community-based service providers, and ultimately – and most importantly – to the people with disabilities relying on these crucial services.

Thank you for your work and the opportunity to share this feedback with you. Please do not hesitate to reach out if we can provide additional information or clarification of the above and we look forward to continuing to work together to offer support and solutions to people with I/DD and the workforce they rely on.

Sincerely,



Barbara Merrill, Chief Executive Officer