

Policy Transmittal Aging and People with Disabilities



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Number: APD-PT-17-058

Issue date: 12/28/2017

Topic: Long Term Care

Due date:

Transmitting (check the box that best applies):

- New policy Policy change Policy clarification Executive letter
 Administrative Rule Manual update Other:

Applies to (check all that apply):

- | | |
|---------------------------------------------------------------------------|-------------------------------------------------------------------------------|
| <input type="checkbox"/> All DHS employees | <input type="checkbox"/> County Mental Health Directors |
| <input checked="" type="checkbox"/> Area Agencies on Aging: Types A and B | <input type="checkbox"/> Health Services |
| <input checked="" type="checkbox"/> Aging and People with Disabilities | <input type="checkbox"/> Office of Developmental Disabilities Services (ODDS) |
| <input type="checkbox"/> Self Sufficiency Programs | <input type="checkbox"/> ODDS Children's Intensive In Home Services |
| <input type="checkbox"/> County DD program managers | <input type="checkbox"/> Stabilization and Crisis Unit (SACU) |
| <input type="checkbox"/> ODDS Children's Residential Services | <input type="checkbox"/> Other (please specify): |
| <input type="checkbox"/> Child Welfare Programs | |

Policy/rule title:	Individuals managing Medicaid or OPI consumer employer duties		
Policy/rule number(s):	411-030	Release number:	
Effective date:	Upon transmittal release	Expiration date:	
References:			
Web address:			

Discussion/interpretation:

New Consumer-Employer Responsibility

Oregon Administrative Rule (OAR) [411-030-0040\(8\)](#) (In-Home Services rule) and [OAR 411-034-0040\(4\)](#) (State Plan Personal Care or SPPC) was revised to add a new responsibility for consumer employers receiving services through the Consumer-Employed Provider (CEP) program. These changes apply to Oregon Project Independence (OPI) individuals that are employing homecare workers (HCWs).

The current consumer employer responsibilities are as follows:

- Locate, screen, and hire a qualified HCW;
- Supervise and train the HCW;
- Schedule the HCW's work, leave, and coverage;
- Track the hours worked and verify the authorized hours completed by the HCW;
- Recognize, discuss, and attempt to correct any performance deficiencies with the HCW; and
- Discharge an unsatisfactory HCW.

Consumer-employers must also ensure the workplace is safe from harassment.

The [U.S. Department of Labor](#) considers harassing conduct a violation of law:

- First:
 - The harassing conduct is unwelcome and based on the victim's protected status; and
- Secondly:
 - The harassing conduct is subjectively abusive to the person affected; and
 - Objectively severe and pervasive enough to create a work environment that a reasonable person would find hostile or abusive

Harassment that does meet the above criteria may still fall under the other employer responsibilities. Additionally, individuals may not physically assault, sexually harass or abuse their HCWs.

- OAR [411-030-0050\(2\)\(c\)\(B\)\(ii\)](#) states: "Services cannot be provided safely or adequately by the service provider based on... the choices or preferences of the eligible individual or the individual's representative".

Situations may also be considered when the individual cannot safely manage their service plan.

- OAR [411-030-0050\(2\)\(c\)\(B\)\(ii\)](#) states: If, based on the case manager's (CMs) assessment, per OAR [411-030-0050\(1\)](#) and OAR [411-030-0050\(2\)\(b\)](#), the individual cannot or does not address their health and safety concerns or safely manage their service plan, the local office should staff with Central Office (CO) as outlined below.
- "Cannot or does not address their health safety" should be broadly interpreted to include cognitive limitations impacting informed decision-making, inability to mitigate potential risks or removing themselves from abusive or exploitive situations.

In-home care agencies (IHCAs) are a viable option for individuals who are unable to manage their consumer employer responsibilities. IHCAs are not appropriate for individuals with severe cognitive impairments who cannot ensure that their needs are being met unless there is someone close by to act as a representative for service

planning purposes. The representative must be close by (i.e., living in the same community as the consumer) and be able to check on the individual.

Process for mitigating and removing an individual from receiving services from a HCW

If the individual receiving in-home services (consumer) fails to manage their consumer employer responsibilities, OAR [411-030-0040\(8\)\(b\)](#) for in-home services and [OAR 411-034-0040\(9\)](#) for SPPC, the individual is ineligible for in-home services provided by a HCW.

However, the individual must receive due process. The following provides the steps that must be followed. Adjustments in the process may need to occur if appropriate to the situation.

Mitigation:

The following mitigation strategies must be used and documented in Oregon ACCESS (OA):

- Explain the specific concerns to the individual.
- Offer a STEPS referral to the individual.
 - The STEPS specialist should be notified on the reason why this referral is being made. Be clear and specific.
 - The outcome of the STEPS referral should be documented by the CM in narration. The STEPS specialist may also document the result if they have appropriate rights to OA, however this does not replace the responsibility of the CM.
 - If the individual refuses to participate in STEPS, document in narration and proceed to the next steps.
 - If the individual participates in STEPS but issues continue to occur, please staff with Central Office.
- Encourage the individual to appoint a representative to manage the consumer employer responsibilities.
 - This representative must be approved by the Department or AAA. To be approved, the representative must:
 - Be located in the individual's community;
 - Be able to verify that the HCW is working the hours they are claiming;
 - Be willing and able to perform all of the other duties assigned to the consumer employer; and
 - Not have criminal, protective service, credible allegations of fraud or collusion that impact their reliability as a representative.
 - The representative must not be their HCW. Additionally, the HCW may not act as if they were appointed as the consumer employer, appoint someone

to be the representative, or be a decision maker for service planning related duties.

- Local office staff may still speak to the HCW about the individual, the service plan, unmet needs etc. without allowing the HCW to make consumer employer decisions.
- A guardian may appoint themselves as the consumer employer representative, but may not also be the individual's HCW. A guardian cannot appoint someone to act as the consumer employer without discussing this with courts.
- Ask the individual if they would consider using only an IHCA or transition to community based care setting to meet their service needs.

If attempts to mitigate identified concern(s) are unsuccessful, the below actions must be taken. These actions should also be documented in OA.

For Medicaid:

Due Process prior to removing an individual from receiving services by a HCW

The following due process strategies must be used and documented in OA:

- Staff the issue with your manager and an appropriate Central Office [policy analyst](#) for individuals receiving in-home or SPPC services to determine if additional actions should be taken. The policy analyst must support the decision to move forward with the below steps or may take immediate action.
- If the individual is clearly unable to manage the consumer employer duties:
 - The Department may appoint a representative to manage the consumer employer responsibilities (a more formalized process on how this is determined will be explained in a future policy transmittal). The representative must have longstanding and current involvement in assuring the individual's health, safety, and welfare.
 - If such a person is not available to act as the representative, Central Office may take the final step as outlined below.
- If the individual is clearly unwilling to manage the consumer employer duties:
 - Provide a verbal warning to the individual of the need to properly manage the consumer employer responsibilities or otherwise face the possibility of not receiving services by a HCW. This verbal warning must be narrated in OA.
 - If issues continue to persist within 12-months of the verbal warning, provide a written warning to the individual of the need to properly manage the consumer employer responsibilities. The letter should be very clear that further issues will result in not allowing the individual to receive services by a HCW. An example of a letter is found at the end of this transmittal, which

must be modified to fit the specific situation. Central Office requires a review of the letter prior to being mailed out to the individual.

Decision to remove an individual from receiving services by a HCW

If issues continue to persist within 12-months of receiving the written warning, the final step is terminating the individual from receiving services from a HCW.

- If the individual is receiving services through in-home services or SPPC, a Notification of Planned Action (SDS 540), is needed (previously only a letter was required for this action). A sample of this notice will soon be provided in the [APD Worker Guide](#).
 - If there are no IHCAAs that are able or willing to provide services to the individual, a Notification of Planned Action (SDS 540) must also be sent to close services (after 14 business days for in-home services or 30 calendar days for SPPC) after an employment relationship between an individual and provider is discontinued.

For OPI:

Prior to removing an individual from receiving services by a HCW

The following due process strategies must be used and documented in OA:

- Staff the issue with your manager and an appropriate Central Office program analyst. The program analyst must support the decision to move forward with the below steps or may take immediate action.
- If the individual is clearly unable to manage the consumer employer duties:
 - The AAA may assist in locating a representative to manage the consumer employer responsibilities (a more formalized process on how this is determined will be established in a future policy transmittal). The representative must have longstanding and current involvement in assuring the individual's health, safety, and welfare.
 - If such a person is not available to act as the representative, Central Office may take the final step as outlined below.
- If the individual is clearly unwilling to manage the consumer employer duties:
 - Provide a verbal warning to the individual of the need to properly manage the consumer employer responsibilities or otherwise face the possibility of not receiving services by a HCW.
 - If issues continue to persist within 12-months of the verbal warning, provide a written warning to the individual of the need to properly manage the consumer employer responsibilities. The letter should be very clear that further issues will result in not allowing the individual to receive services by a HCW. An example of a letter is found at the end of this transmittal, which must be modified to fit the specific situation. The OPI program analyst must review of the letter prior to being mailed out to the individual.

Decision to remove an individual from receiving services by a HCW

If issues continue to persist within 12-months of receiving the written warning, the final step is terminating the individual from receiving services from a HCW.

- If there are no IHCAs that are able or willing to provide services to the individual, OPI closure notice and the local AAA grievance procedure must also be sent to the consumer when OPI services are discontinued.

Implementation/transition instructions:

Training/communication plan:

Local/branch action required: The above procedures must be followed by the local office prior to not permitting an individual from receiving In-home services.

Central office action required: An appropriate policy analyst must assist the local office by reviewing case information prior to determining if an individual is no longer eligible to receive services by a HCW.

Field/stakeholder review: Yes No

If yes, reviewed by: Policy and Operations, Program and District Managers

Filing instructions:

If you have any questions about this policy, contact:

Contact(s): Mat Rapoza, In-Home Policy Analyst Ben Sherman, SPPC Policy Analyst Sandy Abrams, OPI Policy Analyst	
Phone: 503-945-6985 Mat 503-602-3471 Ben 503-947-2391 Sandy	Fax:
Email: Mathew.G.Rapoza@state.or.us Ben.C.Sherman@state.or.us Sandy.H.Abrams@state.or.us	

Insert dates and info in the red sections

Agency Letterhead

Date

Dear <name of individual>:

This is a formal letter regarding the current home care worker situation that is continuing to occur. Our staff has discussed with you on **XX/XX/XXXX** regarding the situation of managing your home care workers on multiple occasions and we are still getting complaints that you are not managing your consumer employer responsibilities. You were advised to have someone designated to manage your plan if you were unable to do so.

To be eligible to participate in **the Medicaid or Oregon Project Independence** In-home Care program you must be able to comply with the following rule listed below, which is rule 411-030-0040(8):

Employer Responsibilities

(a) In order to be eligible for in-home services provided by a homecare worker, **an individual must be able to, or designate a representative to --**

(A) Locate, screen, and hire a qualified homecare worker;

(B) Supervise and train the homecare worker;

(C) Schedule the homecare worker's work, leave, and coverage;

(D) Track the hours worked and verify the authorized hours completed by the homecare worker;

(E) Recognize, discuss, and attempt to correct any performance deficiencies with the homecare worker;

(F) Discharge an unsatisfactory homecare worker; and

(G) Follow all employer responsibilities required by law to ensure the workplace is safe from harassment.

You have demonstrated that you are unable to manage: **<List employer responsibilities>** To remain eligible in-home care with a homecare worker, you must either designate a representative to manage these employer responsibilities (which we have to approve), or demonstrate that you are able to manage the responsibilities. We have the discretion to deny or approve any choice of

representative if our office feels they are unable to complete the employer representative responsibilities.

If you do not designate an approved representative or demonstrate the ability to manage the employer responsibilities by **XX/XX/XXXX**, we will move forward to not permit you to have any homecare workers work for you. At that point, if no in-home care agency is willing to work for you as well, then we will close **the Oregon Project Independence or the Medicaid in-home service program option** if you go more than 14 business days without a provider working for you. **If you receive Medicaid you will still have the option to choose a care setting to meet your needs.**

This is the final warning. Any new violation of the above employer responsibilities, as listed above, will result in not permitting you to have any homecare worker work for you, even if there is a representative in place. Please contact our office if you have any questions regarding this letter.

Worker Name