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November 7, 2023

Acting Secretary Julie Su
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

RE: RIN 1235-AA39

Dear Acting Secretary Su:

On behalf of ADVancing States, I am writing to you in response to the Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees proposed rule (RIN 1235-AA39) (proposed rule.) ADVancing States is a nonpartisan association of state government agencies that represents the nation's 56 state and territorial agencies on aging and disabilities and Medicaid long-term services and supports (LTSS) directors. We work to support visionary state leadership, the advancement of state systems innovation, and the development of national policies that support home and community-based services (HCBS) for older adults and persons with disabilities. Together with our members, we work to design, improve, and sustain state systems delivering LTSS for people who are older or have a disability and their caregivers.

As stewards of public funds, our members play a crucial role in ensuring HCBS provider agencies have sufficient funding to meet their operating expenses, including compensation for their employees. Any increase in compensation required by this proposed rule will impact state agencies' budgets and policy decisions related to rate-setting. While there is significant variation among providers related to size, structure, and services offered, salaried employees for whom the current executive, administrative, or professional (EAP) exemption can be claimed are widespread. These employees play indispensable roles in the HCBS delivery system, including quality management, training support, and frontline supervision, which often includes the direct provision of services.

ADVancing States and our members support policies that aim to ensure direct care workers and other provider agency staff are fairly compensated for their contributions to the provision of services to Medicaid HCBS recipients. We are concerned, however, about the impact of the proposed rule on an under-resourced system that is already facing a workforce crisis of unprecedented proportions. While many industries may expect markets to adjust to new costs of doing business, Medicaid HCBS providers – primarily reliant on limited state and Federal funds – cannot simply raise prices to meet these new obligations.

Imposing new federal requirements on community providers and state budgets without commensurate federal funding endangers the system of community-based services for Medicaid HCBS recipients. The timing of this proposal, coinciding with the wind down of COVID relief funding and accompanying regulatory flexibilities, creates particularly acute challenges for HCBS provider networks and the state agencies that fund them.

We urge the Department to take measures to mitigate unintended consequences on individuals who rely on the Medicaid HCBS delivery system to remain in their communities, including:

Collaborating with Department of Health and Human Services agencies, such as the Centers for Medicare & Medicaid Services (CMS) and the Administration for Community Living (ACL), to assess the impact of this rule on Medicaid HCBS and develop sub-regulatory guidance and enforcement approaches designed to minimize disruption of this critical service system. The Department employed a similar approach with the implementation of its 2013 Final Rule, making changes to the Fair Labor Standards Act’s companionship exemption, and we encourage you to follow that model as you pursue implementation of the proposed rule.

Extending the implementation timeframe to allow providers reliant on Medicaid funding time to implement compliance strategies. Unlike other industries, they will not be able to simply raise their rates to meet new salary obligations. They will need to implement different strategies to achieve compliance, including hiring new staff or eliminating service offerings to defray overtime costs. Medicaid HCBS providers will require more than the proposed 60-day timeframe to effectuate these changes. To the extent that some providers will plan to reduce services in order to comply, state agencies will need sufficient time to find new providers for Medicaid recipients.

Aligning the effective date and ongoing updates with state legislative cycles. In the Medicaid HCBS delivery system, the equivalent to employers raising prices to meet new wage and hour obligations involves state Medicaid and operating agencies raising provider reimbursement rates. This will often necessitate an increase in the state agency’s budget to cover increased costs, which requires action by the state legislature. State legislatures are generally not in session year-round; many only meet for several months out of the year, and in several states the legislature only convenes every other year. To facilitate compliance with the rule through increased compensation for EAP employees, rather than service disruptions or lay-offs, the implementation timeframe should encompass approximately 18 months to two years, depending on date of publication, to ensure that each state legislature has the opportunity to take necessary action to raise reimbursement rates. Please note that a “non-enforcement period” for Medicaid HCBS providers would not achieve a similar purpose, since it would not obviate the private right of enforcement. While individual employers may be able to take a calculated risk that they will not be successfully sued during a published “non-enforcement period,” state government agencies do not have that flexibility with public funds.



We appreciate the opportunity to provide comment on this proposed rule. If you have any questions regarding this letter, please feel free to contact Rachel Neely at rneely@advancingstates.org.

Sincerely,

A handwritten signature in blue ink that reads "Martha Roherty". The signature is fluid and cursive.

Martha Roherty
Executive Director
ADvancing States