



COLORADO

Department of Health Care
Policy & Financing

FORMAL RECOMMENDATION RESPONSE

November 8, 2021

1. Background

The Participant Directed Programs Unit received a Formal Recommendation from the Participant Directed Programs Policy Collaborative (PDPPC) regarding Consumer Directed Attendant Support Services (CDASS) and In-Home Support Services (IHSS) on September 22, 2021.

PDPPC Policy Recommendation: “As the Colorado DOL allows minors age 16 to work in various occupations including housekeeping, working for a parent as well as any non-family member and other non-hazardous jobs, as long as limited to no more than 40 hours per week. We believe this includes; homemaker, personal care and most health maintenance activities.”

PDPPC Operational Recommendation: “Based on the DOL allowable guidelines ([Youth Law | Department of Labor & Employment](#)) we recommend that that department of Healthcare Policy and Financing change the minimum age requirement from 18 years old to 16 years old to qualify for work in the IHSS and/or the CDASS state programs.

2. Analysis of Policy and Operational Recommendations

a. State and Federal Laws that Govern Employment of Minors

Both federal and state laws govern the employment of young workers. When both are applicable, the law with the stricter standard must be obeyed. In this case, that means that Colorado’s limitations for minor hours worked must be followed by employers.

In Colorado, a minor means any person under the age of eighteen, except an individual who has received a high school diploma or a passing score on the general educational development examination. Work permits are not required for minors; however, Colorado allows employers desiring proof of the age of any minor employee or prospective minor employee to submit an age certificate. Age certificates are issued by or under the authority of the school superintendent of the district or county in which the applicant resides.



Colorado law allows minors to work no more than eight (8) hours in any 24-hour period. Minors are limited to working 40 hours per week. Nightwork is allowed for minors. From a federal perspective, workers 16 and 17 years of age can be employed for unlimited hours in any occupation other than those declared hazardous by the Secretary of Labor.

The Fair Labor Standards Act (FLSA) includes limitations on the type of a work a minor can complete. [Child Labor Hazardous Occupations Order No. 7](#) (29 CFR § 570.58) prohibited children under 18 years of age from operating or assisting in the operation of several types of hoisting apparatus. The Wage and Hour Division adopted an enforcement position in 2011, allowing certain properly trained 16- and 17-year-old nursing aides or nursing assistants to assist trained adults in the operation of certain power-driven patient/resident hoists/lifts under certain conditions. The enforcement position is explained in the Wage and Hour Division Field Assistance Bulletin 2011-3 available at http://www.dol.gov/whd/FieldBulletins/fab2011_3.htm.

FLSA does not cover minors employed by parents. The Fair Labor Standards Act's (FLSA) minimum age requirements do not apply to minors employed by their parents, or by a person acting as their guardian. Minors employed by their parents or legal guardian are exempt from the Colorado Youth Employment Opportunity Act or CYEOA (C.R.S. 8-12-101 et seq.).

Due to the extensive requirements an employer must provide to comply with the above enforcement position, it is the Department's position that minors should not be permitted to operate floor-based vertical powered patient/resident lift devices, ceiling-mounted vertical powered patient/resident lift devices, and powered sit-to-stand patient/resident lift devices (lifting devices). In addition, the Department will not develop separate guidelines for minor children employed by their parent or guardian.

b. Background Check Implications

CDASS and IHSS require background checks for all employees. In addition, CDASS employers may not hire a prospective attendant if their background check identifies a conviction of a crime that may create a health and safety risk to the member. These crimes are referred to as [Criminal Barrier Crimes](#).

In order to obtain a background check on a minor, the employer must first obtain the consent of the minor's parent or guardian. This is because minors are generally not able to legally provide consent or enter legally binding agreements, with few exceptions.

Even when consent is obtained, not all records an employer usually requests in these screenings will be available for minors. For example, the majority of criminal records for minors are sealed, making them unattainable. An exception would be in limited situations



where a minor was convicted as an adult. However, past employment and educational records should be available, and personal references can also be obtained.

Employers using pre-employment screening information in hiring minors must have written policies and practices in place that dictate what additional verifications will be requested or required if they intend to hire minors.

c. Program and Policy Considerations

Colorado Statute for CDASS and IHSS do not have limitations on the age of attendants. The Colorado Department of Public Health and Environment, which licenses and certifies IHSS Agencies, does not have regulations establishing attendant age. Both CDASS and IHSS regulations (10 CCR 2505-10 Sections 8.510 and 8.552 respectively) state that an attendant must be at least 18 years of age or older. To note, this language was changed from 16 years or older in 2011 but there is no documentation or justification for the change.

The Department manages contracts for the Consumer Directed Training and Operations Vendor and Financial Management Services (FMS) vendors. Both contracts would require changes to implement a change in attendant age, requiring either a transmittal or an amendment. The contract changes would include new training requirements for employers, updates to program materials, and system processes to ensure compliance with state and federal law.

Regarding federal authority for CDASS and IHSS, several HCBS waivers include language stating the minimum attendant age is 18 years. Changing this information will require amendments to six HCBS waivers: BI, CHCBS, CMHS, EBD, SCI and SLS. The CMS Technical Guide does not outline minimum ages for attendants. In the state's approved Appendix K (Emergency Preparedness and Response), the Department is permitted to change the minimum attendant age to 16 years or older in response to the Public Health Emergency (PHE). The Appendix K is set to expire April 18, 2022. If the PHE is extended, Appendix K will be as well.

d. Risk Mitigation

In consideration of adopting this change in attendant age, there are areas of concern that increase risk to members/employers, particularly in CDASS. The Department has an obligation to identify when a member/employer may need additional training and support to hire and supervise minors. The key areas and suggestions for risk mitigation are as follows:

Training:

1. CDASS members/employers must complete a supplemental training through the Training and Operations vendor prior to hiring a minor.



2. The training vendor will maintain a selection of established resources available for employers to provide to minor attendants regarding workplace safety.

Background Checks & Barrier Crimes:

1. CDASS members/employers must sign an attestation that they are willingly and knowingly hiring a minor, which may limit background check information.
2. Employers using pre-employment screening information in hiring minors must have policies and practices in place that dictate what additional verifications will be requested or required if they intend to hire minors.

Hazardous Occupations:

1. Minor attendants will not be permitted to operate floor-based vertical powered patient/resident lift devices, ceiling-mounted vertical powered patient/resident lift devices, and powered sit-to-stand patient/resident lift devices (lifting devices).

3. Department Decision

The Department agrees with PDPPC's Recommendation submitted September 22, 2021 to change the minimum age for CDASS and IHSS from 18 years to 16 years. The current workforce shortage is a crisis; this is a potential solution to ensure that members receiving services in CDASS and IHSS have attendants willing and able to complete the tasks needed. In some cases, minors may be the only solution to remediate staffing shortages.

Implementation of this change will take time. The Department will work to make necessary changes outlined below over the next nine months. In the meantime, an interim process is needed and will be developed in collaboration with PDPPC stakeholders.

4. Department Responsibilities:

1. Coordinate and facilitate a PDPPC emergency workgroup to develop an interim process, with decisions made by December 15, 2021.
2. Amend language in the following waivers: BI, CHCBS, CMHS, EBD, SCI and SLS to be effective July 1, 2022.
3. Amend rule language for CDASS and IHSS effective April or May 30, 2022.
4. Modify all vendor contracts by July 1, 2022 to ensure compliance with state and federal law.
 - a. Training and Operations Vendor
 - i. Update training requirements
 - ii. Develop a supplemental training regarding employment of minors
 - iii. Update program materials



- b. FMS vendors
 - i. Update program materials
 - ii. Institute systems safeguards regarding employment of minors
 - iii. Update reporting requirements
- 5. Update Unit and Contractor requirements and procedures for fraud, waste, and abuse reporting.

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