

Title of Rule: Revision to the Medical Assistance Act Rule concerning Base Wage Requirement for Direct Care Workers, Section 8.511
Rule Number: MSB 21-08-05-A
Division / Contact / Phone: Benefits & Services Management / Erin Thatcher / 303-866-5788

STATEMENT OF BASIS AND PURPOSE

1. Summary of the basis and purpose for the rule or rule change. (State what the rule says or does and explain why the rule or rule change is necessary).

The rule requires all Direct Care Workers to receive a minimum base wage of \$15 per hour for services named within and effective January 1, 2022. The rule requires providers to notice eligible staff and provide required reporting. The purpose of this rule is to enforce the base wage requirement, enforce provider reporting responsibilities, and utilize the unique funding opportunity of the American Rescue Plan Act (ARPA) to increase and bolster the direct care workforce. Colorado is one of the nation's fastest aging states, 70% of older adults will need long-term care, and they increasingly seek Home and Community-Based services. The need for workers has been outpacing the supply for many years. Additionally, impacts of the COVID-19 pandemic on the direct care workforce has highlighted that these workers bear great health and safety risks while earning some of the state's lowest wages. Colorado will continue to lose necessary workers and fail to adequately recruit new workers if it does not raise wages to align with the value and importance of these workers' critical services.

2. An emergency rule-making is imperatively necessary

to comply with state or federal law or federal regulation and/or
 for the preservation of public health, safety and welfare.

Explain:

An emergency rule is imperative because the Department has state and federal approval to use ARPA funding to increase Direct Care Worker wages as of January 1, 2022 and needs to ensure that it is implemented correctly and efficiently. Waiting until a later date to establish this rule would further strain these workers who are, and have been, persisting on less than a living wage and contribute to less accessible HCBS for community members. Without this rule to support bolstering the direct care workforce, members will not receive critical care and will face greater health and safety risks. Additionally, the Department seeks to immediately align with Governor Polis's directive for a base wage of \$15 per hour per press release "Colorado Increasing the Minimum Wage for Workers" issued September 21, 2021.

3. Federal authority for the Rule, if any:

4. State Authority for the Rule:

Initial Review		Final Adoption	
Proposed Effective Date	01/01/2022	Emergency Adoption	12/10/2021
			DOCUMENT #13

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Sections 25.5-1-301 through 25.5-1-303, C.R.S. (2021); Senate Bill 21-286 contained in 25.5-6-18 C.R.S. (2021) FY 2022-23 Department Budget Request approved by JBC on November 1, 2021.

Initial Review

Proposed Effective Date

01/01/2022

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REGULATORY ANALYSIS

1. Describe the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

Direct Care Workers are the most impacted by this proposed rule. They will benefit from an increased base wage, which will promote stability for the workers themselves, HCBS providers and members receiving services. The Department has increased reimbursement rates to offset costs to HCBS provider agencies in implementation of this rule. Provider agencies and Department staff will be impacted in the effort to implement and monitor compliance with this rule.

2. To the extent practicable, describe the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons.

Probable quantitative and qualitative impact of the proposed rule upon Direct Care Workers include reducing the financial gap between current hourly median wage and hourly wage needed to achieve adequate economic security, enabling workers to forgo second or third jobs to earn additional wages, and increasing community awareness for the impact and importance of these workers. HCBS provider agencies will be more likely to retain current staff and become more competitive in their recruitment, will better meet service needs of their members, and may experience their local communities seeking their services. HCBS providers may incur penalties and recoupment if they do not comply with the necessary reporting requirements of this rule as these requirements are intended to ensure providers are equally committed to supporting and growing their direct care workforce.

3. Discuss the probable costs to the Department and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The Department will utilize funding authorized through ARPA to fund the associated rate increases and complete the auditing requirements needed for the implementation of this rule. No additional budgetary impact is expected from the implementation of this rule.

4. Compare the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.

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The Department received authority from the state and federal government to mitigate the growing crisis impacting the direct care workforce utilizing ARPA funds. Increasing workers' base wage will improve retention and recruitment in this field and better meet the needs of HCBS members. Providers are receiving a rate increase to offset the cost of the base wage and are only required to provide minimal administrative processing and reporting to ensure the base wage is implemented correctly. If we do not implement this, our members will be at risk of decompensation and institutionalization. HCBS providers rely on a steady and qualified population of workers to serve a diverse community of members in community settings. If a provider is unable to hire and retain qualified staff, members will go without the necessary services that enable them to live independently. As the pandemic continues, we must ensure that members are able to avoid hospitalization due to gaps in care and access to care.

5. Determine whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

There are no less costly solutions to achieve the purpose of this proposed rule.

6. Describe any alternative methods for achieving the purpose for the proposed rule that were seriously considered by the Department and the reasons why they were rejected in favor of the proposed rule.

This rule is needed to ensure that the funding is allocated per the Department's approved ARPA spending plan. Reimbursement rates have been increased to offset provider costs associated with the base wage, and providers must report their compliance with funding parameters. There is no other way to achieve purpose of this rule outside of implementing a rule.

1 **8.511 BASE WAGE REQUIREMENT FOR DIRECT CARE WORKERS**

2 **8.511.1 DEFINITIONS**

3 Definitions below only apply to Section 8.511.

4 A. Base Wage means the minimum hourly rate of pay of a Direct Care Worker for the provision of
5 Home and Community-Based Services (HCBS). For the purposes of this rule, the base wage
6 shall be \$15.00 effective January 1, 2022.

7 B. Department means the Colorado Department of Health Care Policy and Financing, the single
8 State Medicaid agency.

9 C. Direct Care Worker means a non-administrative employee or independent contractor of a
10 Provider Agency or Participant Directed Program Employer of Record who provides hands-on
11 care, services, and support to older adults and individuals with disabilities across the long-term
12 services and supports continuum within home and community-based settings.

13 D. Minimum Wage means the rate of pay established in accordance with Section 15 of Article XVIII
14 of the State Constitution and any other minimum wage established by federal or local laws or
15 regulations. In addition to state wage requirements, federal or local laws or regulations may apply
16 minimum, overtime, or other wage requirements to some or all Colorado employers and
17 employees. If an employee is covered by multiple minimum or overtime wage requirements, the
18 requirement providing a higher wage, or otherwise setting a higher standard, shall apply.

19 E. Plan of Correction means a formal, written response from a provider agency to the Department
20 on identified areas of non-compliance with requirements listed in Section 8.511.4.

21 F. Participant Directed Program means a service model that provides participants who are eligible
22 for Home and Community-Based Services the ability to manage their own in-home care, or have
23 care managed by an authorized representative, provided by a direct care worker. Participant
24 Directed Program participants, or their authorized representative, operate as Employers of
25 Record with an established FEIN.

26 G. Provider means any person, public or private institution, agency, or business enrolled under the
27 state Medical Assistance program to provide medical care, services, or goods and holding, where
28 applicable, a current valid license or certificate to provide such services or to dispense such
29 goods. Pursuant to this rule, a provider that renders qualifying service(s) accepts responsibility to
30 ensure qualifying Direct Care Workers currently under their employment are paid, at a minimum,
31 the base wage.

32 H. Per Diem wage means daily rate of pay for Direct Care Workers for the provision of Home and
33 Community-Based Services (HCBS). For purposes of this rule, the per diem wage shall apply to
34 Direct Care Workers of residential service providers.

35 **8.511.2 QUALIFYING SERVICES**

36 A. Effective January 1, 2022, the Department will increase reimbursement rates for select Home and
37 Community-Based Services. Providers must use this increased funding to ensure all Direct Care
38 Workers are paid the base wage or higher. Services requiring Direct Care Workers to be paid at
39 least the base wage are as follows:

40 1. Adult Day Services

- 1 2. Alternative Care Facility (ACF)
- 2 3. Community Connector
- 3 4. Consumer Directed Attendant Support Services (CDASS)
- 4 5. Group Residential Support Services (GRSS)
- 5 6. Homemaker
- 6 7. Homemaker Enhanced
- 7 8. In-Home Support Services (IHSS)
- 8 9. Individual Residential Support Services (IRSS)
- 9 10. Job Coaching
- 10 11. Job Development
- 11 12. Mentorship
- 12 13. Personal Care
- 13 14. Prevocational Services
- 14 15. Respite
- 15 16. Specialized Habilitation
- 16 17. Supported Community Connections
- 17 18. Supported Living Program
- 18 B. In the event that a Direct Care Worker, based on state or local minimum wage laws, is eligible for
19 a minimum wage that exceeds the base wage requirement, the Provider is required to
20 compensate at the higher wage.
- 21 C. In the event that a Direct Care Worker is eligible for a per diem wage, the Provider is required to
22 increase the Direct Care Worker's per diem wage effective January 1, 2022 by the percent of the
23 Department's January 1, 2022 reimbursement rate increase.
- 24 **8.511.3 PROVIDER RESPONSIBILITIES**
- 25 A. The Provider must ensure that contact information on file with the Department is accurate;
26 information shall be utilized by the Department to complete oversight responsibilities per Section
27 8.511.4.
- 28 B. Providers shall notify Direct Care Workers who are affected by the base wage requirement each
29 fiscal year up to and including Fiscal Year 2023-2024.
- 30 1. Provider shall utilize the Department provided letter.

1 C. Providers shall publish and make readily available the Department's designated contact for Direct
2 Care Workers to submit questions, concerns or complaints regarding the base wage requirement.

3 D. On or before June 30, 2022 and June 30, 2023, providers shall attest to the Department that all
4 Direct Care Workers receive at a minimum the required base wage or per diem wage increase.

5 1. Providers with Direct Care Workers eligible for the base wage must attest that the base
6 wage has been applied. The attestation must include information regarding all eligible
7 Direct Care Workers to include but not limited to:

8 a. Full-time or part-time employment status.

9 b. Whether the Direct Care Worker is an Employee or Independent Contractor.

10 c. Employee start date if after January 1, 2022.

11 d. Direct Care Workers' hourly base wage as of November 1, 2021 and current
12 hourly base wage.

13 e. Current service(s) provided by each employee.

14 2. IRSS Providers and/or Providers with Direct Care Workers earning a per diem wage must
15 attest to the per diem wage increase. The attestation must include information regarding
16 all eligible Direct Care Workers to include but not limited to:

17 a. Full-time or part-time employment status.

18 b. Whether the Direct Care Worker is an Employee or Independent Contractor.

19 c. Employee start date if after January 1, 2022.

20 d. Direct Care Workers' per diem wage as of December 1, 2021 and per diem wage
21 as of January 1, 2022.

22 3. CDASS Authorized Representatives/Employers of Record are exempt from attestation
23 requirements.

24 E. Providers shall keep true and accurate records to support and demonstrate that all Direct Care
25 Workers who performed the listed services within Section 8.511 received at a minimum the base
26 wage or a per diem wage increase.

27 F. Records shall be retained for no less than six (6) years and shall be made available for inspection
28 by the Department upon request. Records may include, but are not limited to:

29 1. Payroll summaries and details

30 2. Timesheets

31 3. Paid time off records

32 4. Cancelled checks (front and back)

33 5. Direct deposit confirmations

1 6. Independent contractor documents or agreements

2 7. Per diem wage documents

3 8. Accounting records such as: accounts receivable and accounts payable

4 **8.511.4 REPORTING & AUDITING REQUIREMENTS**

5 A. The Department has ongoing discretion to request information from providers to demonstrate that
6 all Direct Care Workers received the wage (base or per diem) increase. All records related to the
7 base wage requirement received by the Provider for the services listed in Section 8.511.2 shall be
8 made available to the Department upon request, within specified deadlines.

9 B. Providers shall respond to the Department's request for records to demonstrate compliance
10 within the timelines and format specified by the Department.

11 C. Failure to provide adequate documents and timely responses may result in the Provider being
12 required to submit a plan of correction and/or recoupment of funds.

13 D. If a plan of correction is requested by the Department, the Provider shall have forty-five (45)
14 business days from the date of the request to respond. The Provider must notify the Department
15 in writing within five (5) business days of receipt of the request if they will not be able to meet the
16 deadline. The Provider must explain the rationale for the delay and the Department may or may
17 not grant an extension in writing.

18 E. Upon the Department's receipt of the plan of correction, the Department will accept, request
19 modifications, or reject the proposed plan of correction. Modifications or rejections will be
20 accompanied by a written explanation. If a plan of correction is rejected, the Provider must
21 resubmit a new plan of correction along with any requested documentation to the Department for
22 review within five (5) business days of notification.

23 F. The Department may recoup part or all of the funding resulting from the base wage increase if the
24 Department determines the Provider is not in compliance with Section 8.511.

25 G. If such determination is made to recoup funds, the Provider will be notified by the Department. All
26 recoupments will be conducted pursuant to C.R.S. Section 25.5-4-301 and 10 C.C.R. 2505-10,
27 Section 8.050.6, Informal Reconsideration and Appeals of Overpayments Resulting from Review
28 or Audit Findings.

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