



# Frequently Asked Questions (FAQ) on HCBS Settings Requirements, Part IV **Employment-Related Services**

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In 2014, the federal Centers for Medicare & Medicaid Services (CMS) published a [rule](#) requiring Home and Community-Based Services (HCBS) to be provided in settings that meet certain criteria. The criteria ensure that HCBS participants have access to the benefits of community living and live and receive services in integrated, non-institutional settings. The Department's [website](#) contains information about implementation of the federal settings criteria, including the [Statewide Transition Plan \(STP\)](#); the [Systemic Assessment Crosswalk](#) setting out planned changes to Colorado's statutes, regulations, and waivers; training materials; and additional guidance.

The Department has published responses to frequently asked questions (FAQs) regarding general requirements of the rule and various aspects of its implementation ([FAQ Part I](#); [FAQ Part II](#)) as well as the requirement of a lease or other written agreement protecting individuals from eviction ([FAQ Part III](#)).

This document addresses the following requirements for settings where employment-related supports are provided:

(i) The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.

(ii) The setting is selected by the individual from among setting options including non-disability specific settings . . . . The setting options are identified and documented in the person-centered service plan and are based on the individual's needs [and] preferences . . . .

[42 C.F.R. § 441.301\(c\)\(4\)](#). The numbering of the questions picks up consecutively from FAQ Part III.



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86. What employment-related services are covered by this FAQ?

This FAQ covers employment-related services such as Prevocational Services and Supported Employment Services (both Individual and Group Services) that are available under the HCBS-Supported Living Services and HCBS-Developmental Disabilities Waivers.

The scope of this FAQ is specific to services that are funded under these Medicaid HCBS waivers and does not include services for which the Division of Vocational Rehabilitation (DVR) pays under other authorities, such as the Workforce Innovations Opportunities Act (WIOA), and the FAQ is not intended to affect the way other authorities are applied.

87. Are services provided at sheltered workshops and segregated enclaves reimbursable?

No. In sheltered workshops, “individuals are supervised in producing goods or performing services under contract to third parties at a facility that prevents them from experiencing regular interaction with individuals without disabilities.”<sup>1</sup> Historically, some enclaves in Colorado operated similarly.

Reimbursement for HCBS at these kinds of settings is precluded under authorities that predate the HCBS Settings Final Rule:

- CMS has stated that “[w]aiver funding is not available for the provision of vocational services delivered in facility based or sheltered work settings, where individuals are supervised for the primary purpose of producing goods or performing services.”<sup>2</sup>
- In Colorado, the Division for Developmental Disabilities (DDD) within the Colorado Department of Human Services (CDHS) discontinued waiver funding for sheltered workshops in 2011.
- Colorado’s waivers and related regulations do not provide for payment for vocational services, that is, the teaching of job-task-specific skills required for a specific facility-based job, under any service definition.

In addition, reimbursement for HCBS at these kinds of settings is precluded under the HCBS Settings Final Rule, because these settings are designed to be segregated rather than integrated in the community.

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<sup>1</sup> CMS, *Technical Guide for HCBS Waivers*, at 121-22, 151 (2015).

<sup>2</sup> CMS, *CMCS Informational Bulletin*, attach. 1 (2011).

If a setting can operate consistently with the authorities summarized above and in the rest of this FAQ, it should not be called a sheltered workshop or enclave, as these terms connote segregation rather than integration.

88. How can a provider of employment-related services ensure sufficient community integration?

In addition to avoiding any type of segregated shelter or enclave, the provider should ensure that individuals receiving employment-related supports (whether Prevocational, Supported Employment, or any other kind of support) have regular interaction with individuals without disabilities.

Employment related services must include contact with individuals who are non-disabled, other than staff, as an integral part of the job or prevocational activity. This contact may include engagement with non-disabled co-workers, vendors, and/or members of the public. For example, individuals receiving services may have the chance to work with members of the public who shop at or receive services from the setting. Incidental contact with non-disabled members of the community, such as only during lunch or other limited parts of the workday, is not sufficient.

For a setting to be considered integrated under the HCBS Settings Final Rule, it is not required that individuals work “alongside” non-disabled co-workers (as may be required under WIOA), so long as other contact with non-disabled individuals is provided as stated above. Mobile crews or other small work crews are allowed if they are based in a typical business and integrated with the broader community. Supported Employment within an organization managed by people with disabilities and primarily employing people with disabilities is allowed if individuals have the opportunity for contact with the public, beyond other people who work for the organization, as a regular (non-incident) part of their work.

It is important to note that while the HCBS Final Setting Rule may not require “working alongside, non-disabled co-workers,” as required under WIOA’s Competitive Integrated Employment (CIE) regulation, the Department is committed to the principles of CIE and Employment First. In light of this commitment, the Department will continue to work with stakeholders to make changes to the HCBS Supported Employment services that will better support and promote CIE outcomes.

89. May individuals receive employment related services in a facility-based setting?

For Prevocational Services: Yes, provided that individuals make an informed choice to receive services in this kind of setting, based on their wishes and goals, and provided that the setting complies with all criteria of the HCBS Settings Final Rule, including that it be “integrated in and support[] full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not

receiving Medicaid HCBS.” If a provider delivers Prevocational Services in a facility-based setting, such as a building that houses other congregate day services, it should ensure that the setting encourages interaction with the general public (for example, through interaction with customers in a retail setting). Prevocational Services may be furnished in a variety of locations in the community, not just facility-based or site-based settings.

For Supported Employment Services (Individual and Group): No. Under authorities that predate the HCBS Settings Final Rule, providers of Supported Employment must abide by all departmental rules, with special attention paid to the following section:

Supported Employment includes intensive, ongoing supports that enable a client, for whom competitive employment at or above the minimum wage is unlikely absent the provision of supports, and who because of the client’s disabilities needs supports to perform in a regular work setting.

Supported Employment is work outside of a facility-based site, which is owned or operated by an agency whose primary focus is service provision to persons with developmental disabilities.<sup>3</sup>

#### 90. What is required for Prevocational services to comply with the rule?

As noted above and in prior FAQs, all settings where HCBS are provided must be non-institutional in nature, must not isolate individuals from the broader community, must support people to engage in community life, and must not be shelters or enclaves.

Under authorities that predate the HCBS Settings Final Rule, Prevocational Services should “provide learning and work experiences . . . where the individual can develop general, non-job-task-specific strengths and skills that contribute to employability in paid employment in integrated community settings.” These kinds of services “are delivered for the purpose of furthering habilitation goals such as attendance, task completion, problem solving, interpersonal relations and safety.” “Services are expected to occur over a defined period of time and with specific outcomes to be achieved,” with the **principal successful outcome being “[c]ompetitive, integrated employment in the community** for which an individual is compensated at or above the minimum wage, but not less than the customary wage and level of benefits paid by the employer for the same or similar work performed by individuals without disabilities.”<sup>4</sup>

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<sup>3</sup> 10 CCR 2505-10 8.500.5.B.9.c. (previously codified under 10 CCR 2505-10 8.500.94.A.14; expected to be codified under 8.500.5.B. 9.c as of April 30, 2019).

<sup>4</sup> Technical Guide at 150-51; CMCS Informational Bulletin, attach. 1.

Prevocational Services may involve work for which the individual receives less than the minimum wage or no wage (volunteering), *provided* that the level of compensation (if any) is consistent with all applicable laws, including the federal Fair Labor Standards Act (FLSA). Any employer compensating individuals at less than minimum wage must maintain an FLSA Section 14(c) Certificate from the U.S. Department of Labor. But “the provision of Prevocational Services is always delivered with the intention of leading to permanent integrated employment at or above the minimum wage in the community.”<sup>5</sup>

91. What is required for Group Supported Employment services to comply with the rule?

Under authorities that predate the HCBS Settings Final Rule, Group Supported Employment includes “services and training activities provided in regular business and industry settings for groups of two (2) to eight (8) workers with disabilities.” Examples include mobile crews and other business-based workgroups employing small groups of workers with disabilities in integrated employment in the community. The outcome of this service is sustained paid employment and work experience leading to further career development and individual integrated community-based employment for which an individual is compensated at or above the minimum wage, but not less than the customary wage and level of benefits paid by the employer for the same or similar work performed by individuals without disabilities.” “[S]mall group employment support must be provided in a manner that promotes integration into the workplace and interaction between participants and people without disabilities in those workplaces.”<sup>6</sup>

As noted above, the Group Supported Employment setting should not be a segregated enclave or sheltered workshop, which typically are designed to employ only individuals with disabilities and to segregate these workers from the larger community. As CMS has said, neither individual nor group supported employment includes “facility based, or other similar types of vocational services furnished in specialized facilities that are not a part of the general workplace.”<sup>7</sup>

A mobile work crew *may* satisfy the applicable criteria if it ensures that its waiver participants interact with non-disabled individuals (a) who are coworkers on the work crew or (b) members of the general public. Situation (a) is currently rare in Colorado, in that mobile work crews generally hire exclusively workers with disabilities. Situation (b) is also rare, in that mobile work crews generally clean workplaces at night or in a facility operated by the provider and therefore do not interact with the general public

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<sup>5</sup> Technical Guide at 152; *see also* CMCS Informational Bulletin, attach. 1 (“Prevocational services should be designed to create a path to integrated community based employment for which an individual is compensated at or above the minimum wage . . .”).

<sup>6</sup> Technical Guide at 154-55.

<sup>7</sup> Technical Guide at 153-55.

enough to qualify as integrated. Therefore, most mobile work crews will have to change how they operate in order to comply with the HCBS Settings Final Rule.

Finally, in connection with the HCBS Settings Final Rule, CMS suggests asking: "Do employment settings provide individuals with the opportunity to participate in negotiating his/her work schedule, break/lunch times and leave and medical benefits with his/her employer to the same extent as individuals not receiving Medicaid funded HCBS?"<sup>8</sup>

92. What is required for Individual Supported Employment services to comply with the rule?

Requirements for employment-related supports and Supported Employment in general are summarized above.

Again, in connection with the HCBS Settings Final Rule, CMS suggests asking "Do employment settings provide individuals with the opportunity to participate in negotiating his/her work schedule, break/lunch times and leave and medical benefits with his/her employer to the same extent as individuals not receiving Medicaid funded HCBS?"<sup>9</sup>

93. What are the requirements around minimum wage?

In acknowledging individuals' rights to have "opportunities to seek employment and work in competitive integrated settings," the HCBS Settings Final Rule supports people in pursuing competitive integrated employment (which includes minimum wage), but it does not change wage requirements.

Neither Individual nor Group Supported Employment Services include volunteer work. Volunteer work may, however, be supported as a component of Prevocational Services or Supported Community Connections Services.

94. What must providers and case managers do to ensure that people receiving HCBS become competitively individually employed?

The State of Colorado adheres to Employment First principles as well as the HCBS Settings Final Rule. Under these principles, the Department presumes that "all persons with disabilities are capable of working in Competitive Integrated Employment if they choose to do so." Under these principles, the preferred outcome is Competitive Integrated Employment (CIE), which is defined as "work paid directly by employers at

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<sup>8</sup> CMS, *Exploratory Questions to Assist States in Assessment of Non-Residential Home and Community-Based Service (HCBS) Settings*, #1 (2015).

<sup>9</sup> *Id.*

the greater of the state or federal minimum wage or prevailing wage with commensurate benefits, occurring in a typical work setting where the employee with a disability interacts or has the opportunity to interact continuously with coworkers without disabilities, not including supervisory personnel or individuals who are providing services to the employee with a disability, and the employee with a disability has an opportunity for advancement or job mobility, and is engaged, preferably, in full-time work.”<sup>10</sup>

Individual Supported Employment is the only HCBS waiver service that can currently fully support CIE under the State’s Employment First principles. Providers of Individual Supported Employment Services should provide “ongoing supports to participants . . . to obtain and maintain an individual job in competitive . . . employment or self-employment in an integrated work setting in the general workforce at or above the state’s minimum wage, at or above the customary wage and level of benefits paid by the employer for the same or similar work performed by individuals without disabilities.”<sup>11</sup> The provider must support individuals to seek employment and work in competitive integrated settings, with being independent in the job as the ultimate goal.

Individuals receiving Prevocational or Supported Employment-Group services, as well as others, should have assessments completed by the Prevocational or Supported Employment provider, with the individual, and determine individual goals, so they may pursue opportunities for individualized competitive employment. These assessments and goals should be used as a tool to support the person in finding CIE and must not be used as a mechanism to stop an individual from pursuing competitive employment.

It is not up to the provider to determine whether a person is “ready to work,” and “passing” an assessment is not required for someone to look for CIE. If an individual wants to find a CIE opportunity, the provider must support them in doing so, and goals should be updated by the provider to help the person do so, even if someone on the person’s Interdisciplinary Team (Person-Centered Planning Team) is opposed to it. Providers must not set out conditions that must be met prior to supporting a person in finding CIE. The case manager must document the updated CIE goals in the Person-Centered Support plan.

The Department is exploring, along with stakeholders, how to better support individuals to transition out of Prevocational Services and Group Supported Employment and into CIE.

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<sup>10</sup> C.R.S. 8-84-301; C.R.S. 25.5-10-204(1)(g)(I).

<sup>11</sup> Technical Guide, 152.