

## What Does This Mean To Me?

October 2019

### Participant Directed Services (PDS) Edition

In March 2019, the Kentucky Department for Medicaid Services (DMS) released amended 1915(c) Home and Community Based Services (HCBS) waiver applications for public comment. Those amended applications included an updated policy on allowing participants to hire legally responsible individuals (LRIs) as PDS employees. This document is designed as an explanation of the updated policy.

#### Who is a Legally Responsible Individual (LRI)?

The Centers for Medicare and Medicaid Services (CMS) tells each state it can define who is considered an LRI. DMS defines an LRI in the following ways:

| Minor Child (Under Age 18)                                                                                                                                       | Adult (Age 18 or older)                                                                                         |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• Parent</li> <li>• Stepparent</li> <li>• Adoptive parent</li> <li>• A Kentucky Court Appointed Legal Guardian</li> </ul> | <ul style="list-style-type: none"> <li>• Spouse</li> <li>• A Kentucky Court Appointed Legal Guardian</li> </ul> |

Parents of adult participants are not considered LRIs. This means they can be hired as PDS employees without DMS approval, however, they are still subject to the provider and background check qualifications all PDS employees are required to meet.

#### Why does DMS approve LRIs before they deliver services to participants?

CMS gives states the option to allow LRIs to serve as PDS employees. Kentucky chose to allow LRIs to become PDS employees to provide families more options for care. However, CMS requires DMS to establish criteria to determine when it is appropriate for LRIs to become a PDS employee. DMS' criterion is based on CMS guidance provided on pages 108 through 110 of the 1915(c) HCBS Waiver CMS Instructions, Technical Guide and Review Criteria<sup>1</sup> and summarized below:

#### CMS Definition of "Extraordinary Care":

"By extraordinary, CMS means care exceeding the range of activities that a legally responsible individual would **ordinarily perform in the household on behalf of a person without a disability or chronic illness of the same age**, and which are necessary to assure the health and welfare of the participant and avoid institutionalization."

<sup>1</sup> Centers for Medicare and Medicaid Services, Application for a 1915(c) Home and Community-Based Waiver. Instructions, Technical Guide and Review Criteria. January 2019. page 108-112. Available at: <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/downloads/technical-guidance.pdf>

1. CMS asks states to confirm the legally responsible employee is providing “**extraordinary care**” rather than the care they are expected to provide by law. Care is considered “extraordinary” when it involves tasks above and beyond what you would do for a typical child of the same age or for an adult.
2. Because LRIs can impact the participant’s financial interests, CMS asks states to put safeguards in place to make sure waiver participants are not taken advantage of by those individuals. To meet CMS’ guidelines, DMS decided on criteria for hiring LRIs as PDS employees. This allows Kentucky to continue receiving funding for the 1915(c) HCBS waiver programs.

### How can a participant and their LRIs get approved by DMS?

LRIs are responsible for making decisions in the best interest of the participant. The criteria are necessary to limit the possibility of conflicts of interest that may arise when that LRI is paid to provide care<sup>2</sup>. To meet CMS requirements, DMS has developed the following steps and criteria:

#### Step: 1 Determine Need for Extraordinary Care (Participants under the age of 18 only)

The **first step** is around the care needs of the child. They must need more help with their functional abilities than another child of the same age in **ONE** of the following:

| # | Criteria                                                                                                                                                                                          | Example                                                                                                                                        |
|---|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | The child’s dependency in performing <b>activities of daily living</b> (ADLs) must be directly related to his or her disability and exceed that of his or her age matched peers.                  | A child of seven years who still needs help using the bathroom, as a direct result of a disability.                                            |
| 2 | The child demonstrates <b>destructive or injurious behaviors</b> exceeding that of his or her age matched peers and such behaviors represent a risk of serious injury or death to self or others. | A child becomes angry and, due to a disability, is unable to control their anger and tends to hit others with an object or part of their body. |

#### Step: 2 Demonstrate Situational Need for LRI as PDS Employee (All Participants)

<sup>2</sup> Centers for Medicare and Medicaid Services, Application for a 1915(c) Home and Community-Based Waiver. Instructions, Technical Guide and Review Criteria. January 2019. page 108-112. Available at: <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/downloads/technical-guidance.pdf>

The **second step** for children, and **only step for adult participants**, demonstrates that the LRI is an appropriate employee based on the participant's circumstances. Again, the participant and LRI must meet **ONE** of the following:

| # | Criteria                                                                                                                                                                                                                                       | Example                                                                                                                                                                                                                                                                                                            |
|---|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | The participant's care needs have reduced or eliminated the legally responsible individual's <b>ability to maintain paid employment</b> in the past and there is not an alternative caregiver who is functionally able to provide care.        | A mother is called at work because her child with a disability hits a schoolmate. She picks up the child and takes them home for the rest of the day. This happens often enough that she can't keep her job. The mother doesn't have anyone else to help with her child. In this case, she may meet this criteria. |
| 2 | The legally responsible individual can demonstrate <b>attempts within the first 30 days to recruit a qualified provider</b> (traditional or PDS) but cannot secure one.                                                                        | A family in a very rural area doesn't have a personal support provider within sixty miles. No agency is able to find a caregiver near them or who will drive to their location. In this case, the LRI would meet the criteria.                                                                                     |
| 3 | The participant has a <b>communication barrier</b> that impacts his or her ability to effectively communicate needs and wishes.<br><br><b>Note:</b> Communication barriers of minor children must exceed that of his or her age matched peers. | A child uses sign language to communicate, but providers can't find a caregiver who knows sign language in the area. Using the LRI who knows sign language might be the best way to support this child.                                                                                                            |
| 4 | The participant has a sincerely held <b>religious belief</b> and cannot secure a provider (traditional or PDS) who is culturally competent or shares the same religion.                                                                        | The participant can only eat foods prepared using a specific method based on their religious beliefs. The family can't find a caregiver willing to prepare food this way.                                                                                                                                          |

### Will all LRIs currently employed by a participant need DMS approval to continue doing their job?

Current PDS employees who are an LRI on the **HCB or SCL** waivers will **NOT** be required to go through this process because they have undergone a screening in the last several years.

Current PDS employees who are an LRI on the **ABI, ABI-LTC, or MPW** waivers have not gone through this process before and will be required to go through it once the amended waivers are effective.

### What are the DMS PDS employee background check requirements?

If a PDS employee can provide a copy of a background check from the last twelve months, they don't have to get a new one. If a PDS employee's background check comes back and there are minor offense, like a misdemeanor, the PDS can make the choice to hire that employee anyway.

A PDS participant can make the choice on whether their caregivers obtain CPR and first aid certifications. Everyone must have an annual tuberculosis risk screening done by a licensed medical professional.

### How will these requirements be implemented?

Participants and LRIs will be asked to **provide evidence** that they meet the criteria. DMS is making a plan to implement these policies and will notify stakeholders with more information, including instructions and what evidence is acceptable, later in 2019.

### When will these requirements be implemented?

Implementation of the criteria will begin after the waiver amendments are approved by CMS. DMS anticipates CMS will approve the waiver amendments in **late 2019 or early 2020**.