

2023 *from your desk*
Self-Direction Conference
Virtual Series

An Untapped Funding Approach: Using Medicaid to Pay for Live-In Caregiver Housing and to Offset Wages for Care

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Background

- Many older adults and people with disabilities can remain successfully at home receiving ADL and IADL support from workers funded by Medicaid.
 - More Medicaid beneficiaries than ever are choosing to self-direct, in which they can hire/fire, train, schedule, and manage workers.
- A growing number of states permit family members to be hired as home care workers, leading to stability and continuity of care.
- But for many Medicaid beneficiaries, recruiting workers from the community is necessary when family members or friends are not available.



What Challenges Can Live-in Caregivers Help

Solve? (1 of 2)

- A subset of older adults and people with disabilities have intermittent care needs throughout the day, rather than continuous or 24/7 care needs.
- Recruiting and retaining workers for part-time/intermittent work has always been challenging, but is more so now than ever.
 - ❑ For workers who need full-time wages, going in and out of a Medicaid beneficiary's home to provide intermittent care for low pay is not attractive or even feasible.
 - ❑ Workers may face logistical barriers to filling their needed hours of compensation by visiting multiple homes throughout a day.
- Using a live-in caregiver may be the right choice in these circumstances, especially if there are economic advantages for both the beneficiary and caregiver.



What Challenges Can Live-in Caregivers Help Solve? (2 of 2)

- For some people, an in-home caregiver may feel invasive of their personal space and privacy.
- For others, a live-in arrangement may solve their fear of isolation, which is a frequent complaint of older adults living alone who may choose congregate care settings (assisted living, etc.) to avoid social isolation.
- An in-home caregiver also helps resolve the issue of nighttime coverage for someone who might need intermittent assistance (transferring, toileting, etc.), or may fear being alone at night.
- The biggest problem in employing an in-home caregiver, if not a family member or friend, is matching the caregiver to the individual and cultural attributes of the Medicaid beneficiary.
 - This is covered in a later section.



Economic Advantages of a Live-in Caregiver

- For individuals who cannot afford long-term care via private pay, Medicaid can cover costs of long-term care as long as the person meets the income limit.
- In most states this limit is called the special income rule, which equals 300% of SSI or less.
- In 2023, this limit is \$2,742 per month for an individual.
- There are other factors, including various income disregards and an asset limit of \$2,000.
 - Home and car ownership can also be discounted.
- Medicaid eligibility for long-term care also depends on a person meeting an institutional needs test, which varies from state to state.



Medicaid Eligibility: Considerations

- For a person meeting the income limit and institutional eligibility, states typically provide some level of Medicaid coverage for long-term care in community-based settings, including the person's own home.
- But Medicaid law expressly forbids using federal dollars to cover room and board (e.g. food, utilities, rent/mortgage payments, etc.).
- For a person expected to cover all their personal expenses plus room and board within their monthly income limit, they may be priced out of being able to receive Medicaid-funded services in their own home or apartment.
 - This can depend on whether a state, or how much a state, supplements a person's monthly SSI income, plus their area's cost of living.



Illustrating the Problem: An Example

- Jane is an older adult living on SSI. In Jane's city, renting a modest studio apartment costs \$800 a month. Renting a one-bedroom apartment costs \$1,200; a two-bedroom costs \$1,400.
- After factoring in costs of housing, Jane has very little left to cover food, utilities, and other expenses.
 - This can vary depending on any state supplemental SSI payment.
- Lack of room and board coverage makes it difficult or impossible for many people to stay at home and receive the type of care that people overwhelmingly prefer: in-home care.



How Can Medicaid Offer a Solution?

- Medicaid law makes an important exception to the room and board prohibition...
- Medicaid *will* pay for the room and board of someone who lives in the same household as the Medicaid beneficiary, provided that the person is not related to the beneficiary (42 U.S.C. §1396n).



Federal Citation: 42 U.S. Code § 1396n

The Secretary may by waiver provide that a State plan... may include as “medical assistance” under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan.

The term “room and board” shall not include an amount established under a method determined by the State to reflect the portion of costs of rent and food attributable to an unrelated personal caregiver who is residing in the same household with an individual who, but for the assistance of such caregiver, would require admission to a hospital...” (or institution)



Medicaid Rules for Covering a Caregiver's Room and Board

- In other words, the beneficiary must meet the institutional needs test for eligibility to have a caregiver's room and board covered by Medicaid.
- In its Medicaid waiver application, a state must describe:
 - its method of calculating how added room and board costs for a live-in caregiver are reasonably apportioned (in Appendix I-6), and
 - how these costs are separately calculated in the cost of waiver services (noted in the Factor D computation of Appendix J).
- **Note:** Federal match cannot be claimed if the beneficiary lives in the caregiver's home, or the residence is owned or leased by the provider of Medicaid services.



What Opportunity Does This Create? (1 of 2)

- Federal Medicaid coverage of the non-relative caregiver's room and board greatly expands a Medicaid beneficiary's access to housing and the rental market.
 - The beneficiary will only have to pay one-half of the rent for the typical cost of a two-bedroom apartment in a particular rental market otherwise outside of the beneficiary's income limits.
 - Additional costs of food, utilities, etc. can be easily calculated as a fixed amount as averaged over a period of months.



What Opportunity Does This Create? (2 of 2)

- In effect, the caregiver's room and board coverage acts as a rent subsidy.
- In many rental markets, this is the only way a Medicaid beneficiary can afford to live at home and receive in-home services.
 - **Note:** some states provide rent subsidies out of state general fund dollars to assure community housing access.
 - **Of further note:** The US Office of the Inspector General (OIG) has been cracking down on states for illegally using Medicaid dollars to offset room and board costs for Medicaid recipients.



Introducing the 3(m) Credit

- Under section 3(m) of the Fair Labor Standards Act (FLSA), an employer can legally credit the cost of lodging provided to an employee as wages.
- Because a self-directing participant is an employer under the FLSA, they can offer housing to a live-in caregiver that is covered by the Medicaid program and credit that cost toward the caregiver's pay.
- This credit, known as the **3(m) credit**, can be claimed if the following are met:
 - ❑ The free lodging is provided regularly to the employee/caregiver;
 - ❑ The caregiver accepts the lodging voluntarily;
 - ❑ Lodging in the employer's home is a condition of employment;
 - ❑ The employee is not forced to leave their existing home just to be on call for the employer.



What Outcomes Does This Create?

- Using the 3(m) credit, the cost of housing can be credited toward the caregiver's pay, creating the following cost-neutral outcomes:
 - ❑ The beneficiary can afford to live at home;
 - ❑ The caregiver has free housing; and
 - ❑ Covering the caregiver's cost of housing can be cost-neutral for states/managed care organizations (MCOs) via the 3(m) credit.



3(m) Credit Requirements

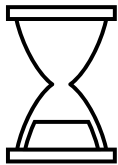
- Free lodging to the live-in caregiver must be adequate, e.g. they have their own bedroom, can leave their belongings there, they have access to the kitchen and bathroom and general living areas, etc.
- The 3(m) credit cannot exceed the reasonable cost or fair value of the portion of the housing costs attributable to the live-in caregiver.
- The cost of utilities can also be apportioned, e.g., as an average over multiple months.
- And most important for a Medicaid beneficiary/employer, the source of funds the employer uses to pay for the free housing to the in-home caregiver is not relevant.
 - Medicaid can cover these costs, as described earlier, and this arrangement is [explicitly approved by the Department of Labor](#).



Example: Putting It All Together



Jane is a 62-year-old woman who uses a wheelchair. SSI is her main source of income. Jane wants to live in her own place, but housing in her area is getting more and more expensive.



Jane is on a waitlist for subsidized housing, but it takes years for an accessible unit to open up.



Mary is Jane's longtime friend who has supported her informally in the past. Mary is also having a hard time affording the rising cost of housing. Jane trusts Mary and enjoys her company. Jane and Mary discuss the advantages of moving in together, and agree it sounds like a plan.



Example: Putting It All Together



Together, Jane and Mary sign a lease for an accessible two-bedroom unit that costs \$1,400 per month.



Jane enrolls as an employer in self-direction and hires Mary as a caregiver. Mary provides intermittent support, mostly during nighttime, when Jane's primary caregiver is not available.



Mary's portion of the rent, \$700, is included in Jane's monthly self-directed budget. Each month, Jane's FMS pays \$700 to the housing management company as they would any other invoice. Mary's wages for supporting Jane are legally deducted by \$700 each month, using the 3(m) credit.



Outcomes for Jane and Mary

- Through a combination of Medicaid live-in caregiver rules and the 3(m) credit, Jane now has access to housing in the community.
- Mary receives free housing as a benefit of supporting Jane on a part-time basis during times of day when it is especially difficult to hire a caregiver.
 - Mary can also provide backup coverage to Jane if her primary caregiver is not available.
- This outcome was achievable *without added cost for the Medicaid program*, because the cost of Mary's room and board is deducted from what she would otherwise have been paid as wages, via 3(m).



How is the 3(m) Credit Calculated?

- Calculating the hourly rate takes the value of the lodging (plus any other cash wages) divided by the hours worked in a given week.
- The credit goes to meeting the employer's minimum wage obligation and is also included in determining the worker's regular rate of pay for calculating any overtime compensation due.
- The 3(m) credit can stand alone as meeting an employer's obligation to pay employees as long as the minimum wage obligation is met and time-and-a-half payment for overtime is not due.



Calculating the 3(m) Benefit

- If the 3(m) credit equals \$225 per week, the live-in employee might be expected to work 31 hours in that week meeting a \$7.25/hr federal minimum wage calculation.
- At a higher wage calculation, the number of hours to be worked would be reduced to a level where overtime obligations do not kick in.



Calculating the 3(m) Benefit

- Again, the 3(m) credit may be the sole payment if it covers the employer's minimum wage obligation.
- In situations where there is a joint employer (e.g., an Agency with Choice FMS is involved as a co-employer along with the Medicaid recipient), the 3(m) credit may be used for their joint wage obligation.
- 3(m) credits may not be allowable if the employee is covered under a Collective Bargaining Agreement (depends on the specifics of the CBA).



Recordkeeping Requirements

- To comply with both Medicaid and labor laws, careful recordkeeping is critical.
- A written agreement of the arrangement between the Medicaid beneficiary and the live-in caregiver should be on file and signed by both parties.
- Careful records should be kept of the apportioned cost of the lodging utilities attributed to the live-in caregiver, since these costs are used to offset wages for hours worked.
- The average monthly costs of food attributed to the live-in caregiver can be added to the costs of lodging for Medicaid reimbursement.
- The state has its own obligation to describe the method of calculation how this part of the Medicaid rate is determined and how it is paid.



Summing Up: Using Medicaid Live-In Rules and 3(m) in Tandem (1 of 3)

- First, Medicaid payment for room and board of a live-in caregiver functions as a rent subsidy, which will greatly increase access of Medicaid beneficiaries to increasingly expensive rental markets.
 - This increases beneficiaries' access to support in their own homes.
- For many home care workers, access to affordable housing is difficult at typical earnings levels. For those workers willing to live in-home with a beneficiary, this can be a great benefit for the workers themselves.
 - In addition, under IRS rules (Reg. Sec. 1.119-1) the employee (worker) can exclude from gross income the value of employer-provided lodging and meals.



Summing Up: Using Medicaid Live-In Rules and 3(m) in Tandem (2 of 3)

- The 3(m) credit can also offset wage obligations for a worker who needs to be in proximity in case the beneficiary needs support.
 - DOL calls this time being “engaged to wait” where the worker must be compensated since they are not free to leave or use personal time away from the beneficiary.
- For beneficiaries who need many hours of support that may approach 24/7 in nature, the live-in caregiver (compensated by way of 3(m)) can provide a base of support on which additional hours of support can be built either by paying overtime to the worker or bring in additional workers throughout the day.



Summing Up: Using Medicaid Live-In Rules and 3(m) in Tandem (3 of 3)

- For the beneficiary needing close to or 24/7 support, the live-in worker can provide critical night time support.
 - DOL rules on sleep time must be followed. Sleep time does not need to be compensated unless there are interruptions during the night when the beneficiary needs assistance or when the worker cannot get 5 hours of uninterrupted sleep, in which case the whole night must be compensated.
- And for the beneficiary who is simply afraid to be alone at night, the live-in arrangement may be ideal.



Difficulty of Care Payments and Their Tax Advantages for Live-in Caregivers



Difficulty of Care Payments (1 of 2)

- An additional benefit of a Medicaid-funded live-in caregiver is access to a tax benefit known as “difficulty of care”.
 - In many, if not most cases, difficulty of care may be a more flexible and easier to administer methodology than 3(m).
- In IRS Notice 2014-7 states that payments made to people who live full-time for supporting a Medicaid waiver recipient are “difficulty of care payments” —not wages.
 - Difficulty of care payments are excludable from federal income, and are *not* subject to Federal Income Tax.
- Unlike the Medicaid authority to pay room and board for the caregiver, the difficulty of care payment can be used by family caregivers and can take place in the home of either the caregiver or the beneficiary.



Difficulty of Care Payments (2 of 2)

- Like the Medicaid authority to pay room and board for the caregiver, but without its restrictions, difficulty of care can be used to recruit live-in caregivers and match them with interested Medicaid beneficiaries.
- Caregivers whose pay is not subject to income tax can pay their portion of room and board, which in effect can act as a rent subsidy for the beneficiary, plus the caregiver benefits from affordable housing.
- **Note:** The difficulty of care exclusion applies only in 1915(c) waiver programs, unless a state has obtained a Private Letter Ruling to use it for Medicaid non-waiver programs.



Putting it All Together, Again (1 of 2)

- Jane lives in a two-bedroom apartment which rents for \$1,400 a month. Mary is her live-in caregiver, and Medicaid pays her portion of room and board. Food and utilities for the two of them averages about \$400.00 a month. Mary's portion of room and board comes to \$900.00 a month covered by Medicaid.
- Jane is assessed in her plan of care as needing 4 hours of personal care a day/28 hours per week to help meet her ADL and IADL needs.
- Using 3(m), Mary's wage requirements are covered for 60 hours a month or 15 hours a week at an hourly rate of \$15.00.
- To cover the balance of personal care hours Jane needs, Medicaid pays Mary \$15.00 an hour for 52 hours a month, or 13 hours a week.



Putting it All Together, Again (2 of 2)

- Medicaid pays Mary \$15.00 an hour for 112 hours of personal care per month, or 28 hours a week. Mary's net pay is \$1551.48 a month, from which she pays her share of \$900.00 a month for her portion of room and board costs, leaving her \$651.48 in monthly disposable income after Social Security and Medicare taxes.
- The difficulty of care payment makes housing more affordable for Mary and can act like a rent subsidy for Jane as well.
- Under either methodology, Jane benefits from the benefits of living independently with supports as well as the companionship of having a roommate.



Using 3(m) + Medicaid Room and Board	Using Difficulty of Care
Beneficiary cannot hire family members as live-in caregivers.	Beneficiary can hire family members as live-in caregivers.
Can be used by Medicaid beneficiaries with institutional level of care.	Cannot be used by Medicaid beneficiaries in non-waiver programs (unless state has a Private Letter Ruling from IRS.)
Payments for a live-in's room and board expenses can be exempted from taxes.	May be slightly more expensive for states. Difficulty of care payments are still subject to Social Security/Medicare taxes and Federal and State Unemployment Tax, unless live-in caregiver is an exempt family member of the participant.
Beneficiaries with extra space could use 3(m) to provide lodging for a live-in and potentially receive "private pay" hours at no cost.	Difficulty of care payments can be counted as wages for Earned Income Tax Credit, which is a significant benefit for low-income people.

Scalability in Self-Direction

- Despite the multiple possible benefits to using a live-in arrangement, are these arrangements scalable?
- For states or programs interested in scaling such arrangements, it might be advisable to set up special agencies that carefully help match live-in caregivers to consumers, complete the vetting process, assist in all the recordkeeping requirements, and perhaps provide support and training to both parties in these arrangements.



Resources for Further Information

- [42 CFR Part 441, Subpart 6](#): Federal Medicaid rules on room and board for live-in caregivers
- [CMS Informational Bulletin](#) on Medicaid Housing-Related Assistance for Individuals with Disabilities
- [Department of Labor FAQ](#) on 3(m) credit
- [IRS regulations](#) on excluding value of employer-provided lodging and meals from taxable income
- [IRS Notice 2014-7](#) on difficulty of care payments in Medicaid waiver programs
- [IRS Q&A](#) on difficulty of care/Notice 2014-7



Time for Q&A



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