

Maximum Number of Hours per Week of In-Home and Community Support and/or Companion Services that Relatives and Legal Guardians May Provide (the “40/60 Rule”) Restored

ODP Announcement 23-041

AUDIENCE:

- Providers of In-Home and Community Support and/or Companion services in the Consolidated, Person/Family Directed Support (P/FDS), and/or the Community Living Waivers.
- Administrative Entities (AEs)
- Supports Coordination Organizations (SCOs)
- Common-Law Employers (CLEs)
- Managing Employers

PURPOSE:

The purpose of this announcement is to:

- notify stakeholders of the restoration of the maximum number of hours per week of In-Home and Community Support and/or Companion services that multiple relatives and legal guardians may provide, effective **November 11, 2023**.

- Clarify the maximum number of hours per week of In-Home and Community Support and/or Companion services that relatives and legal guardians may provide.

DISCUSSION:

In-Home and Community Support and Companion services may be provided by relatives¹ and legal guardians² in the Consolidated, P/FDS, and Community Living Waivers. Any one relative or legal guardian may provide a maximum of 40 hours per week of authorized In-Home and Community Support or a combination of In-Home and Community Support and Companion. If multiple relatives/legal guardians provide the service(s), each participant may receive no more than 60 hours per week of authorized In-Home and Community Support or a combination of In-Home and Community Support and Companion from all relatives/legal guardians. This is commonly referred to as the “40/60 Rule.”

For services that are not participant-directed, the provider is responsible for ensuring that the maximum allowable number of hours-of-service delivery by relatives and legal guardians is not exceeded. For services that are participant-directed through the Agency with Choice (AWC) model, the AWC is responsible. For services that are participant-directed through the Vendor Fiscal / Employer Agent (VF/EA) model, the CLE is responsible.

The 40/60 Rule has been in place since 2016 but was suspended beginning in March 2020 as part of the national emergency and public health emergency declarations issued in response to the COVID-19 pandemic. **The requirement for any one relative/legal guardian to provide a maximum of 40 hours per week of authorized services went back into effect within 45 calendar days of the county the individual lived in at the time moving to the green phase (generally between July and October of 2020). ODP has elected to reinstate the requirement for multiple relatives/legal guardians to provide no more than 60**

¹ A relative includes any of the following: a spouse, parent of an adult (a person who is 18 or older), a stepparent of an adult child, grandparent, brother, sister, half-brother, half-sister, aunt, uncle, niece, nephew, adult child or stepchild of a parent or adult grandchild of a grandparent with an intellectual disability.

² A legal guardian is a person who has legal standing to make decisions on behalf of a minor or adult (i.e., a guardian who has been appointed by the court). The definition of a legal guardian does not apply to agency providers but does apply to the person actually rendering service to an individual within the provider organization.

hours per weeks of authorized services on November 11, 2023, the latest date allowable under federal requirements, to ensure adequate time to return to compliance.

Emergencies and Unplanned Departures

An exception may be made to the limitation on the number of hours of In-Home and Community Support and Companion provided by relatives and legal guardians at the discretion of the employer³ if there is an emergency or an unplanned departure of a regularly scheduled worker. Emergencies and unplanned departures generally include:

- Explain the exceptional circumstances that will permit relatives and legal guardians to provide In-Home and Community Support and/or Companion beyond the maximum allowed hours per week.
- Establish how often exceptions are allowed and how to track exception use.
- Unexpected circumstances such as inclement weather, sudden illness or the unplanned extension of medical leave that prevents a worker from arriving at the job site and where another worker/unpaid caregiver is not immediately available to work;
- The sudden loss of an unpaid caregiver which kept the provision of paid services by relatives and legal guardians at or below 40/60 hours per week; or
- A worker unexpectedly quits or is terminated from employment such that relatives and legal guardians must perform paid work in excess of the 40/60 limitation.

The waivers allow an exception for up to 90 calendar days in any fiscal year. For fiscal year 2023-2024 the 90-calendar day exception for multiple relatives/legal guardians to provide more than 60 hours of services per week applies from November 11, 2023 through June 30, 2024. Days between July 1, 2023,

³ Bulletin 00-20-02 outlines requirements for managing employers and AWC organizations in scheduling relatives/legal guardians more than the 40/60 rule.

and November 10, 2023, (when the suspension of this requirement was in effect) are not counted toward the 90-day exception.

When an emergency or unplanned departure occurs, and the maximum number of hours is exceeded, the entire work week in which the limit was exceeded will be counted towards the allowable 90 calendar days. In other words, there can be up to 13 workweeks where the 40/60 Rule can be exceeded, if necessary, in any fiscal year.

Example 1

	Sunday (Begin)	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday (End)	Total Hours Worked
Hours Worked:	0	9	10	12	12	8	0	51

The relative or legal guardian exceeds the maximum of 40 hours per week on Thursday. Each calendar day during that week (Sunday through Saturday) is counted toward the 90-day limit. Seven (7) days are counted towards the exception maximum.

Example 2

	Sunday (Begin)	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday (End)	Total Hours Worked
Hours Worked (Relative A)	0	10	5	5	5	10	0	35
Hours Worked (Relative B)	0	8	0	0	12	10	10	40
Total Hours Worked:	0	18	5	5	17	20	10	75

The relatives and/or legal guardians exceed the maximum of 60 hours per week on Friday. Each calendar day during that week (Sunday through Saturday) is counted toward the 90-day limit. Seven (7) days are counted towards the exception maximum.

Backup Plans

All individuals are required to have a backup plan to address situations when a worker does not report to work for any reason. When extenuating circumstances occur that require relatives or legal guardians to exceed the 40/60 Rule, the backup plan should be reviewed to determine whether revisions are necessary to prevent recurrence.

Additionally, if the services are participant-directed, an individual's Supports Coordinator (SC) must be notified after the 40/60 Rule is exceeded three (3) times in any given fiscal year. The SC will determine if the backup plan was reviewed and revised, as necessary, and if the backup plan was implemented. If the individual is using the AWC model, the AWC is responsible to notify (or to ensure that the Managing Employer notifies) the SC. If the individual is using the VF/EA model, the CLE is responsible to notify the SC.

The SC and the Individual Support Plan (ISP) team are responsible for discussing whether alternative or additional services or supports are needed to avoid further exceptions to the limitation of hours.

CONTACT:

Questions about this announcement should be directed to the appropriate ODP Regional Office.

OBSOLETE

This announcement obsoletes ODP Communication Number 069-16, *Clarifying the Provision of Home and Community Habilitation and/or Companion Services by Relatives and Legal Guardians in the Consolidated and P/FDS Waivers*