

**CHAPTER 411
DIVISION 31**

**HEMOCARE WORKERSE ENROLLED IN THE CLIENT-EMPLOYED
PROVIDER PROGRAM**

411-031-0020 Definitions

(Adopted 6/1/2004)

(1) "Activities of Daily Living" (ADL) means those personal, functional activities required by an individual for continued well-being, which are essential for health and safety. Activities may include eating, dressing/grooming, bathing/personal hygiene, mobility, bowel and bladder management, and cognition.

(2) "Adult Protective Services" means a service to be provided in response to the need for protection from harm or neglect to an aged, disabled, or blind person 18 years of age or older regardless of income, as described in 411-020-0000 through 411-020-0050.

(3) "Area Agency on Aging" (AAA) means the Department of Human Services (DHS) designated agency charged with the responsibility to provide a comprehensive and coordinated system of services to the elderly and possibly the disabled in a planning and service area. For purposes of these rules, the term Area Agency on Aging (AAA) is inclusive of both Type A and Type B Area Agencies on Aging as defined in ORS 410.040 through 410.300.

(4) "Burden of proof" means that the existence or nonexistence of a fact must be established by a preponderance of the evidence.

(5) "Business days" means Monday through Friday and excludes Saturdays, Sundays and state-sanctioned holidays.

(6) "Case Manager" means a person who ensures client entry, assessment, service planning, service implementation, and evaluation of the effectiveness of the services.

(7) "Client" means the individual eligible for in-home services.

(8) "Client-Employed Provider Program" (CEP) refers to the program wherein the provider is directly employed by the client and provides either hourly or live-in services. In some aspects of the employer/employee relationship, the Department of Human Services acts as an agent for the client-employer. These functions are clearly described in OAR 411-031-0040.

(9) "Companionship Services" means those services which are designated by the Department of Labor as meeting the personal needs of a client and which are exempt from federal and state minimum wage laws.

(10) "Contracted In-Home Care" means a service provided through a contractor, which consists of minimal or substantial assistance with activities of daily living and self-management tasks.

(11) "Contracted In-Home Care Agency" means an incorporated entity or equivalent, licensed in accordance with OAR 333-536-0000 through 333-536-0095 that provides hourly contracted in-home care to clients of the Department or Area Agency on Aging.

(12) "Department" means the Department of Human Services, Seniors and People with Disabilities.

(13) "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

(14) "Fiscal Improprieties" means the Homecare Worker committed financial misconduct involving the client's money, property or benefits. Improprieties include, but are not limited to, financial exploitation, borrowing money from the client, taking the client's property or money, having the client purchase items for the Homecare Worker, forging the client's signature, falsifying payment records, claiming payment for hours not worked, or similar acts intentionally committed for financial gain.

(15) "General Household Work" means, according to federal law, housecleaning, chore services, and other household tasks.

(16) "Homecare Worker" (HCW) means a provider, as described in OAR 411-031-0020 and 411-031-0040, who is directly employed by the client and provides either hourly or live-in services to eligible clients. The term Homecare Worker includes providers in the Spousal Pay Program. Independent Choices Program providers and Personal Care Attendants enrolled through Developmental Disability Services or Mental Health Services are excluded from the term Homecare Worker.

(17) "Hourly Services" means the in-home services, including activities of daily living and self-management tasks, which are provided at regularly scheduled times.

(18) "Imminent Danger" means there is reasonable cause to believe a person's life or physical well-being is in danger if no intervention is initiated immediately.

(19) "In-Home Services" means those services that assist a client to stay in his/her own home.

(20) "Lack of skills, knowledge and ability to adequately or safely perform the required work" means the Homecare Worker does not possess the skills to perform services needed by Department clients. The Homecare Worker may not be physically, mentally, or emotionally capable of providing services to seniors and persons with disabilities. Their lack of skills may put clients at risk, because they fail to perform, or learn to perform, their duties adequately to meet the needs of the client.

(21) "Live-In Services" means those Client-Employed Provider Program services provided when a client requires ADL, self-management tasks, and twenty-four hour availability. Time spent by any live-in Homecare Worker doing self-management and twenty-four hour availability are exempt from federal and state minimum wage and overtime requirements under the Companionship Services definition outlined in this rule. To ensure continuity of care for the client, live-in service plans should include at least one HCW providing 24-hour care for a minimum of five (5) days in a workweek.

(22) "Minimal Assistance" means the client is able to perform a majority of a task, but requires some assistance.

(23) "Office of Administrative Hearings" means the panel established within the Employment Department under section 9, chapter 849, Oregon Laws, 1999, that conducts contested case proceedings and other such duties on behalf of designated state agencies.

(24) "Oregon Project Independence" (OPI) means the program of in-home services defined in OAR chapter 411, division 032.

(25) "Preponderance of the evidence" means that one party's evidence is more convincing than the other party's.

(26) "Provider" means the individual who actually renders the service.

(27) "Provider enrollment" means a Homecare Worker's authorization to work as a provider employed by the client, for the purpose of receiving payment for authorized services provided to Department clients. Provider enrollment includes the issuance of a provider number.

(28) "Provider number" means an identifying number, issued to each Homecare Worker who is enrolled as a provider through the Department.

(29) "Provider Payments Unit" means the Seniors and People With Disabilities unit responsible for processing provider number requests.

(30) "Respite" means securing a paid temporary replacement worker to perform the authorized duties normally performed by the primary provider, in order to allow the primary provider interim relief from providing care to the client.

(31) "Self-Management" means those activities, other than activities of daily living, required by an individual to continue independent living; i.e., medication and oxygen management, transportation, meal preparation, shopping, and client-focused housekeeping.

(32) "Seniors and People With Disabilities (SPD)" means the part of the Department of Human Services responsible for rules and policy for programs associated with seniors and persons with disabilities.

(33) "Services are not provided as required," means the Homecare Worker does not provide the services to the client as described in the service plan authorized by the Department.

(34) "Twenty-Four Hour Availability" means the availability and responsibility of a Homecare Worker to meet Activities of Daily Living and self-management needs of a client as required by that client over a twenty-four hour period. These services are provided by a live-in Homecare Worker and are exempt from federal and state minimum wage and overtime requirements.

(35) "Unacceptable conduct at work" means the Homecare Worker has repeatedly engaged in one or more of the following behaviors: delay in their arrival to work or absences from work not prior-scheduled with the client, which are either unsatisfactory to the client or which neglect the client's care needs; or inviting unwelcome guests or pets into the client's home, which results in the client's dissatisfaction or inattention to the client's required care needs.

(36) "Unacceptable criminal history" means that a criminal history check and fitness determination have been conducted pursuant to Administrative Rules 410, Division 007, finding the Homecare Worker unfit.

(37) "Violation of a drug-free workplace" means there was a substantiated complaint against the Homecare Worker being intoxicated by alcohol or drugs while responsible for the care of the client, while in the client's home, or while transporting the client.

(38) "Violations of Protective Service and abuse rules" means the Homecare Worker violated protective service and abuse rules as described in 411-020-0002, Section 1. Abuse includes physical assault, use of inappropriate or derogatory language, financial exploitation, inappropriate sexual advances, neglect of care, and denying medical care or treatment. Abuse also includes the use of medications or physical restraints when used to discipline the client or for the convenience of the provider.

Stat. Auth.: ORS 409.050, 410.070 & 410.090

Stats. Implemented: ORS 410.010, 410.020 & 410.070

411-031-0030 Scope

(Adopted 6/1/2004)

These Administrative Rules establish the standards and procedures governing Homecare Workers and the fiscal services provided on behalf of Department clients to Homecare Workers enrolled in the Client-Employed Provider Program. Homecare Workers provide home and community-based waiver, state plan and Oregon Project Independence in-home support services to clients of the Department of Human Services and Area Agencies on Aging. In-home support services supplement the ability of Department/AAA clients to continue to live in their own homes.

Stat. Auth.: ORS 409.050, 410.070 & 410.090

Stats. Implemented: ORS 410.010, 410.020 & 410.070

411-031-0040 Client-Employed Provider Program

(Adopted 6/1/2004)

The Client-Employed Provider Program contains systems and payment structures to employ both hourly and live-in providers. The live-in structure assumes that the provider will be required for activities of daily living and self-management tasks and twenty-four hour availability. The hourly structure assumes that the provider will be required for activities of daily living and self-management tasks during specific substantial periods. Except as indicated, all of the following criteria apply to both structures:

(1) Employment Relationship: The relationship between the provider and the client is that of employee and employer.

(2) Job Descriptions: Each client/employer, in cooperation with the case manager, or if present, contracted Registered Nurse, may create a job description for the potential employee. Such descriptions will make it clear that general household work will comprise less than 20% of the live-in employee's time.

(3) Homecare Worker Liabilities: Homecare Workers bear sole responsibility for state and federal income taxes due on earnings as an employee of the client/employer. The Department will not deduct personal income tax withholdings from the Homecare Worker's check. Homecare

Workers are not state employees. The only benefits available to Homecare Workers are those negotiated in the collective bargaining agreement between the Home Care Commission and the Service Employee's International Union, Local 503, OPEU. This agreement does not include participation in the Public Employees Retirement System.

(4) Interruption of Services

(a) When a client is absent from the home due to an illness or medical treatment and is expected to return to the home, a live-in provider, who is the only live-in provider for a client, may be retained to ensure his/her presence upon the client's return or to maintain the client's home for up to 30 days at the rate of pay immediately preceding the client's absence. Spousal Pay Providers are not eligible for payment during a client absence.

(b) The required meals and lodging expenses of the provider, while providing these services fifty miles or more from the client's residence, will be covered. Such expenses, including mileage allowed under Section (11) of this rule, will be covered by the Office of Medical Assistance Programs, whenever possible.

(5) Selection of Homecare Worker: The client carries primary responsibility for locating, interviewing, screening, and hiring his/her own employees. The right to employ the individual of his/her choice stands without regard to any limitations established by the legislature or federal government, except for Bureau of Citizenship and Immigration Services Rules.

(6) Employment Agreement: The client/employer retains the full right to establish the employer/employee relationship at any time after Bureau of Citizenship and Immigration Services papers have been completed and identification photocopied. The Department will not guarantee payment for those services until all acceptable enrollment standards have been verified and both the employer and Homecare Worker have been formally notified in writing that payment by the Department is authorized.

(7) Termination of Employment: Terms of dismissal or resignation notice are the sole responsibility of the employer to establish at the time of employment.

(8) Provider Enrollment

(a) Enrollment Standards: A Homecare Worker must meet all of the following standards to be enrolled with the Department's Client-Employed Provider Program:

(A) The Homecare Worker must maintain a drug-free work place.

(B) The Homecare Worker must have an acceptable criminal history as defined in OAR chapter 410, division 007.

(C) The Homecare Worker must have the skills, knowledge, and ability to perform, or to learn to perform the required work.

(D) The Homecare Worker's U.S. employment authorization must be verified.

(E) The Homecare Worker must be 18 years of age or older. DHS Central Office may approve limited enrollment, as described in (8)(d) of this rule, for a Homecare Worker who is at least sixteen years of age.

(F) The Homecare Worker must complete an orientation as described in Section (8)(e) of this rule.

(b) The Department may deny an application for provider enrollment in the Client-Employed Provider Program when:

(A) The applicant has a history of violating protective service and abuse rules;

(B) The applicant has committed fiscal improprieties;

(C) The applicant does not have the skills, knowledge or ability to adequately or safely provide services;

(D) The applicant has an unacceptable criminal history;

(E) The applicant is not 18 years of age;

(F) The applicant has been excluded by the Health and Human Services, Office of Inspector General, from participation in Medicaid, Medicare and all other Federal health care programs; or

(G) The Department has information that enrolling the applicant as a Homecare Worker would put vulnerable clients at risk.

(c) Criminal History Clearance rechecks: Criminal History clearance re-checks will be conducted at least every other year from the date the Homecare Worker is enrolled. Re-checks may be conducted at the discretion of the Department/AAA.

(d) Limited enrollment: SPD/AAA may approve a limited enrollment for a Homecare Worker to provide services exclusively to a client or to specific clients. Generally, limited enrollment would be approved for Homecare Workers providing services exclusively to clients who are family members, friends or neighbors. To be authorized to work for clients in general, a Homecare Worker must complete a Criminal History clearance re-check.

(e) Homecare Worker Orientation: Homecare Workers must participate in an orientation arranged through an SPD/AAA office. The orientation should occur within the first 30 days after becoming enrolled in the Client-Employed Provider Program and prior to beginning work for any specific SPD/AAA clients. When completion of an orientation is not possible within those timelines, orientation must be completed within 90 days of being enrolled. If a Homecare Worker fails to complete an orientation within 90 days of provider enrollment, their provider number will be inactivated and any authorization for payment of services will be discontinued.

(f) A Homecare Worker's provider enrollment may be inactivated when:

(A) The Homecare Worker has not provided any paid services to any client in the last twelve months;

(B) The Homecare Worker fails to complete a criminal history clearance authorization requested by the Department;

(C) The Homecare Worker informs the Department they will no longer be providing Homecare Worker services in Oregon; or

(D) A complaint is being investigated against a Homecare Worker who, at the time, is not providing any paid services to clients.

(9) Paid Leave

(a) Live-in Home Care Workers: The Department will authorize one twenty-four hour period of leave each month when a live-in Homecare Worker or Spousal Pay Provider is the only provider during the course of a month. For any part of a month worked, the live-in Homecare Worker will receive a proportional share of that twenty-four hour period of leave authorization. A prorated share of the 24 hours will be allocated proportionately to each live-in when there is more than one live-in provider for a client.

(A) Accumulation and Usage: A provider may not accumulate more than 144 hours of accrued leave. The employer, Homecare Worker, and case manager will coordinate the timely use of these hours. Usage may be in one-hour increments.

(B) Transferability of Paid Leave: The Homecare Worker retains the right to earned paid leave when terminating employment with one employer, so long as the Homecare Worker is employed with another employer as a live-in within one year of termination.

(b) Hourly Homecare Workers: On July 1st of each year, active Homecare Workers who worked eighty (80) authorized and paid hours in any one (1) of the three (3) previous months of active employment will be credited with one eight (8) hour block of paid leave to use during the current fiscal year (July 1 through June 30). One eight (8) hour block of paid leave will be credited to each eligible Homecare Worker, irrespective of the number of clients they serve. Such leave will not be cumulative from year to year. Such time off

must be utilized in one (1) eight (8)-hour block subject to authorization. If the Homecare Worker's normal workday is less than eight (8) hours, such time off may be utilized in blocks equivalent to the normal workday. Any remaining hours that are less than the normally scheduled workday may be taken as a single block. If the leave hours are not used within the fiscal year, the balance will be reduced to zero (0). Homecare Workers will not be compensated for paid leave unless the time off work is actually taken.

(10) Department Fiscal and Accounting Responsibility.

(a) Direct Service Payments: The Department will make payment to the provider on behalf of the client for all in-home services. This payment will be considered full payment for the services rendered under Title XIX. Under no circumstances is the Homecare Worker to demand or receive additional payment for these Title XIX-covered services from the client or any other source. Additional payment to Homecare Workers for the same services covered by Oregon's Title XIX Home and Community Based services waiver is prohibited.

(b) Timely Submission of Claims: In accordance with OAR 410-120-1300, all claims for services must be submitted within 12 months of the date of service.

(c) Ancillary Contributions:

(A) FICA: Acting on behalf of the Client/Employer, the Department will apply any applicable FICA (Federal Insurance Contributions Act) regulations and will:

(i) Withhold the provider/employee contribution from payments;

(ii) Refund previously withheld amounts when it is determined the provider/employee is not subject to withholdings; and

(iii) Submit the Client/Employer contribution and the amounts withheld from the provider/employee to the Social Security Administration.

(B) FICA is not deducted for Spousal Pay Program providers.

(C) Benefit Fund Assessment: The Workers' Benefit Fund assessment pays for programs that provide direct benefits to injured workers and their beneficiaries and that assist employers in helping injured workers return to work. The Department of Consumer & Business Services sets the Workers' Benefit Fund assessment rate for each calendar year. DHS calculates the hours rounded up to the nearest whole hour and deducts an amount rounded up to the nearest cent. Acting on behalf of the Client/Employer, the Department will:

(i) Deduct the employee/providers' share of the Benefit Fund Assessment rate for each hour or partial hour worked by each paid Homecare Worker.

(ii) Collect the client/employer's share of the Benefit Fund Assessment for each hour or partial hour of paid services received.

(iii) Submit the client and provider's contributions to the Workers' Benefit Fund.

(D) The Department will pay the employer's share of the Unemployment Tax.

(d) Ancillary Withholdings. For purposes of Section (10)(c) of this rule, "labor organization" means any organization that has, as one of its purposes, representing employees in their employment relations.

(A) The Department will deduct from the provider's monthly salary or wages the specified amount for payment to a labor organization.

(B) In order to receive this payment, the labor organization must enter into a written agreement with the Department to pay the actual administrative costs of the deductions.

(C) The Department will pay the deducted amount monthly to the designated labor organization.

(11) Homecare Worker Expenses Secondary to Performance of Duties

(a) Providers may be reimbursed at the published state mileage rate when they use their own car for service plan related transportation, if prior authorized by the case manager. If unscheduled transportation needs arise during non-office hours, an explanation as to the need for the transportation must be provided and approved prior to reimbursement.

(b) Medical transportation through the Office of Medical Assistance Programs (OMAP), volunteer transportation, and other transportation services included in the service plan will be considered a prior resource.

(c) DHS is not responsible for vehicle damage or personal injury sustained while using a personal motor vehicle for OMAP or service plan-related transportation, except as may be covered by workers' compensation.

(12) Workers' Compensation and health insurance are available to eligible Homecare Workers as defined in the Home Care Commission's bargaining agreement with the Service Employee's International Union.

(13) Overpayments

(a) An overpayment is any payment made to a Homecare Worker by the Department that is more than the person is authorized to receive.

(b) Overpayments are categorized as follows:

(A) Administrative Error Overpayment: Occurs when the Department failed to authorize, compute or process the correct amount of in-home service hours or wage rate.

(B) Provider Error Overpayment: Occurs when the Department overpays the Homecare Worker due to a misunderstanding, unintentional or intentional error.

(C) Fraud Overpayment: The Department of Justice, Medicaid Fraud Unit will determine when fraud has occurred and it has resulted in an overpayment.

(c) Overpayments are recovered as follows:

(A) Overpayments will be collected prior to garnishments, such as child support, IRS back taxes, and educational loans.

(B) Administrative or Provider Error Overpayments will be collected at no more than five percent (5%) of the Homecare Worker's gross wages.

(C) Fraud Overpayments: The Department of Justice, Medicaid Fraud Unit will determine when a fraud overpayment has occurred and the manner and amount to be recovered.

(D) Providers no longer employed as Homecare Workers, will have any remaining overpayment deducted from their final check. The provider is responsible for repaying the amount in full when the final check is insufficient to cover the remaining overpayment.

Stat. Auth.: ORS 409.050, 410.070 & 410.090

Stats. Implemented: ORS 410.010, 410.020 & 410.070

411-031-0050 Administrative Review and Hearing Rights

(Adopted 6/1/2004)

This rule establishes the appeal and hearing rights for Homecare Workers when the Department suspends or terminates the HCW's provider enrollment.

(1) Exclusions to Appeal and Hearings Rights:

(a) The following are excluded from this administrative review and hearing rights process:

(A) Terminations based on criminal history. The Homecare Worker has the right to a hearing within OAR 410-007-0200 through 410-007-0380.

(B) Homecare Workers that have not worked in the last twelve months. The provider enrollment may become inactivated but will not be suspended or terminated. To activate the provider enrollment number, the HCW must complete an application and criminal history clearance.

(C) Homecare Workers that fail to complete a criminal history recheck.

(D) Homecare Workers that are denied a provider enrollment number at the time of initial application.

(E) Homecare Workers not currently providing services to any clients whose provider enrollment is inactivated while an investigation is being completed.

(F) Homecare Workers who have been excluded by Health and Human Services, Office of Inspector General, from participation in Medicaid, Medicare and all other federal programs.

(b) These rules only apply to Homecare Workers as defined in OAR 411, Division 031. These rules do not include any other providers enrolled, licensed or otherwise registered by the Department of Human Services.

(2) Violations Suspending or Terminating Provider Enrollment

(a) The Department may suspend or terminate the Homecare Worker's provider enrollment number when a Homecare Worker:

(A) Violates the requirement to maintain a drug-free work place;

(B) Has an unacceptable criminal history as defined in OAR chapter 410, division 007,

- (C) Lacks the skills, knowledge, and ability to adequately or safely perform the required work,
- (D) Violates protective service and abuse rules, as defined in OAR chapter 411, division 020;
- (E) Commits fiscal improprieties;
- (F) Fails to provide services as required;
- (G) Engages in unacceptable conduct at work; or
- (H) Has been excluded by the Health and Human Services, Office of Inspector General, from participation in Medicaid, Medicare and all other federal health care programs.

(3) Suspension: The Department may suspend a provider enrollment immediately, prior to the outcome of the administrative review when an alleged violation presents imminent danger to current or future clients. The Homecare Worker may file an appeal of this decision directly to DHS Central Office.

(4) Burden of Proof: The Department of Human Services has the burden of proving the allegations of the complaint by a preponderance of the evidence. Evidence submitted for the administrative hearing is governed by OAR 137-003-0050.

(5) Administrative Review Process: The Administrative Review process allows an opportunity for the program manager or DHS Central Office to review and reconsider the decision to terminate or suspend the Homecare Worker's provider enrollment. The appeal may include the provision of new information or other actions that may result in the Department changing its decision.

(a) At the time a suspension or proposed termination of the Homecare Worker's provider enrollment is made, the Department will issue a written notice that will include:

- (A) An explanation of the reasons for suspension or proposed termination of the provider enrollment;

(B) The alleged violation as listed in OAR 411-031-0050; and

(C) The Homecare Worker's appeal rights, including the right to union representation, and where to file the appeal.

(b) For suspensions or terminations based on substantiated protective services complaint, the letter may only contain the limited information allowed by law.

(c) Informal Conference: At the first level of appeal, an informal conference, (described in OAR 461-025-0325), if requested by the Homecare Worker, will be scheduled with the Homecare Worker and any union representative. The Program Manager, or designee, will meet with the Homecare Worker, review the facts, and explain why the agency decision was made. The informal conference may be held by telephone.

(d) The Homecare Worker must specify in the request for review the issues or decisions being appealed and the reason for the appeal. The appropriate party, as stated in the notice, must receive the request for review within ten (10) business days of the decision affecting the worker. The Homecare Worker may file an appeal in the following order:

(A) The Program Manager (or designee) at the local office;

(B) DHS Central Office;

(C) Office of Administrative Hearings:

(i) A Homecare Worker can file a request for a hearing with the Office of Administrative Hearings if all levels of review have been exhausted, and the Homecare Worker continues to dispute the Department's decision. The request can be filed through the local office with the Office of Administrative Hearings, as described in OAR 137, division 003. The request for the hearing must be filed within 30 calendar days of the written notice from DHS Central Office.

(ii) An Administrative Law Judge (ALJ) with the Office of Administrative Hearings will determine whether the Departments' decision to terminate the provider enrollment number is affirmed or reversed. The ALJ will issue a Final Order with the decision to all appropriate parties.

(iii) No additional hearing rights have been granted to Homecare Workers by this rule, other than the right to a hearing on the Department's decision to terminate the Homecare Worker's provider enrollment number.

(e) In the first two steps of the administrative review process, a written response of the outcome of the review will be sent to the Homecare Worker within ten business days of the review date.

(f) If the Administrative Review determines that the decision to immediately suspend the provider enrollment was unjustified, the reviewer or designee will contact Provider Payments Unit to restore the provider number. The written response will notify the Homecare Worker that the provider enrollment will be restored from suspended status.

(6) Termination if No Appeal Filed: The decision of the reviewer will become final if the Homecare Worker does not appeal within ten business days of the notice of the decision affecting the Homecare Worker. Once the time period for appeal has expired, the reviewer or designee will contact the Provider Payments Unit to terminate the provider number.

(7) Request for Extension to Deadline: The Department or the Homecare Worker may request an extension of the 10-day deadline for circumstances beyond their control, if further information needs to be gathered to make a decision or there is difficulty in scheduling a meeting between the parties.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 410.070