MDCEP
MARYLAND CENTER ON ECONOMIC POLICY

MAY 2017

Expanding Home Care Options in Maryland

Paying Independent Home Care Aides Appropriately Would Bring Real Benefits at an Affordable Price

1. Introduction and Summary

Home care aides provide vital care to thousands of Marylanders who have difficulty with daily tasks because of their age, a disability, or a health condition. These workers help their clients with a wide variety of critical daily tasks, such as bathing, dressing, and eating. This care enables many to remain in their homes rather than moving to a nursing home or other institution. As Maryland's population ages, home care is likely to become increasingly important for the health of older Marylanders and people with disabilities, as well as for our state economy. Because Medicaid pays for more than half of all home care services delivered nationwide, state policies have an important role in determining the kind and quality of home care services available.

Unfortunately, Maryland recently limited the ways aging adults and Marylanders with disabilities can obtain Medicaid-funded home care services by canceling its independent provider program. This program allowed people who receive home care services to exercise a significant degree of control over their own care, and canceling it is likely to harm both Medicaid participants and home care aides. Although the state initially projected that this program would become dramatically more costly as a result of changes in federal labor regulations, an analysis by the Maryland Center on Economic Policy shows that these costs would be relatively small. To ensure quality care for older Marylanders and Marylanders with disabilities, the state should reinstate the independent provider program.

KEY FINDINGS

- Maryland's former independent provider home care program **BENEFITTED AGING ADULTS** and **MARYLANDERS WITH DISABILITIES** by increasing the degree of control they had over their essential home care services.
- If the state reinstates the independent provider program, the additional costs of paying home care aides appropriately for overtime and travel time would be modest: **$3.3 MILLION** per year, or **0.1 PERCENT** of state Medicaid spending.
- Paying home care aides appropriately for their work could potentially **REDUCE TURNOVER**, **IMPROVE PERFORMANCE**, and **INCREASE SPENDING** at Maryland businesses.

Context

For many years home care aides were denied federal minimum wage and overtime protections because of regulations based on an antiquated misinterpretation of labor laws. As a result, many home care aides struggle to

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afford basic necessities despite working long hours, leading to fatigue and high turnover. This has the potential to jeopardize the quality of care these aides are able to provide.

Regulations from the U.S. Department of Labor that went into effect in 2015 mean that Maryland has an opportunity to improve living standards for the state's home care aides and improve services for older adults and people with disabilities by embracing both the spirit and letter of the Fair Labor Standards Act (FLSA). The revised rules clarify the proper application of certain exemptions that historically excluded many home care aides from standard wage and overtime protections. For the first time, it is clear that home care aides, like other hourly employees, are entitled to minimum wage and overtime pay under federal law. Moreover, the state, when its Medicaid agency acts as an employer, is responsible for ensuring these aides are paid for time they spend traveling between clients. The state should seize this opportunity to improve its Medicaid-funded home care programs to ensure better pay for home care aides and quality care for Medicaid participants.

For the first time, it is clear that home care aides, like other hourly employees, are entitled to minimum wage and overtime pay under federal law.

These Department of Labor's rules have three main impacts. Extending minimum wage and overtime protections to the nation's 2 million home care aides—a workforce largely consisting of women of color[1]—will help these aides make ends meet and allow them to spend more time with their families. The rules are also likely to improve the quality of care clients receive by reducing turnover and improving morale among home care aides. The rules also mean that Maryland and other states must ensure all home care aides employed by state Medicaid agencies are paid properly. Because Medicaid pays for more than half of all home care services delivered nationwide,[2] effective state implementation is essential to ensure that aides and Medicaid participants see the benefits of the revised rules.

To date, Maryland has taken an imperfect approach to implementing the new rule. Rather than recognize its employer responsibilities and budget the money needed to allow the state Department of Health and Mental Hygiene to pay home care aides fully and appropriately for the care they provide to Medicaid recipients, Maryland sought to distance itself from its obligations to home care aides. It did so by terminating the independent provider program through which it had previously paid some home care aides and requiring those serving Medicaid participants to seek employment with private home care agencies. Since

[1] Number of home care aides nationwide reported in "U.S. Home Care Workers: Key Facts," *Paraprofessional Healthcare Institute*, 2016, http://phinational.org/home-care-workers-key-facts. Analysis of 2010–2014 American Community Survey data shows that 94 percent of home care aides in Maryland are women, compared to 51 percent of working age adults. Sixty-eight percent of home care aides in our state are people of color (defined as all racial and ethnic combinations other than non-Hispanic whites), compared to 47 percent of working age adults. For this analysis, home care aides were defined using the methodology employed in Sarah Leberstein, Irene Tung, and Caitlin Connolly, "Upholding Labor Standards in Home Care: How to Build Employer Accountability into America's Fastest-Growing Jobs," *National Employment Law Project*, December 2015, http://www.nelp.org/content/uploads/Report-Upholding-Labor-Standards-Home-Care-Employer-Accountability.pdf.

[2] Erica Reaves and MaryBeth Musumeci, "Medicaid and Long-Term Services and Supports: A Primer," *The Henry J. Kaiser Family Foundation*, December 15, 2015, http://kff.org/medicaid/report/medicaid-and-long-term-services-and-supports-a-primer/.

this sudden change in 2015, the state no longer pays the home care aides directly for their work. Rather, it now reimburses the home care agencies, as the new employers of the home care aides, for the work their employees provide.

This policy decision likely had negative consequences for Medicaid participants in Maryland. While the goal was to shift responsibility for complying with federal law onto private employers, people receiving home care services through agencies generally have limited control over those services. Research shows that participants in self-directed home care services like Maryland's previous independent provider program often use more of the services they need and are entitled to, and can experience better outcomes as a result.[3] The state's decision to eliminate the option for self-directed care may make it harder for some Medicaid participants to adequately meet their needs through home care, and in some cases could make it harder for them to continue living at home.

Findings and Recommendation

To ensure that older adults and people with disabilities in Maryland have access to a variety of care options to meet their specific needs, the state should reinstate its independent provider home care program, in which participants could design their own plan of care in consultation with the state. This would require budgeting enough money to pay aides for overtime as well as time spent traveling between clients when necessary, but these costs would be reasonable. A MDCEP analysis using data obtained from the state Department of Health and Mental Hygiene found that the state's share of overtime and travel costs would total $3.3 million, or about 0.1 percent of current state Medicaid spending.[4] This modest investment would promote better care options for Marylanders who rely on Medicaid-funded services to stay in their homes and a better employment options for the aides who provide those services and supports.

2. The Fair Labor Standards Act and Home Care Aides

When the Fair Labor Standards Act (FLSA) established minimum wage and overtime protections in 1938, most domestic workers were excluded in a nod to Southern senators unwilling to endorse a law that would expand labor protections to a largely African-American workforce.[5] Congress amended the law in 1974 to extend protections to domestic workers, but limited these protections

[3] Sunderland, "Self-Determination for Persons with Developmental Disabilities."

[4] "FY 2017 Fiscal Digest (Approved Operating Budget)," *Maryland Department of Budget and Management*, January 13, 2016, http://www.dbm.maryland.gov/budget/Pages/operbudget/2017-FiscalDigest.aspx.

[5] Paul Sonn, Catherine Ruckelshaus, and Sarah Leberstein, "Fair Pay for Home Care Workers: Reforming the U.S. Department of Labor's Companionship Regulations under the Fair Labor Standards Act," *National Employment Law Project*, August 2011, http://nelp.3cdn.net/ba11b257b1bb32f70e_4rm62qgkj.pdf. Domestic workers employed at large enterprises were initially covered. For more on the racial origins of the domestic worker exclusion in the 1938 law, see Sheila Bapat, *Part of the Family? Nannies, Housekeepers, Caregivers and the Battle for Domestic Workers' Rights* (Brooklyn: Ig Publishing, 2014), 58–59.

with an exclusion known as the companionship exemption.[6] Under this exemption, workers whose chief duty is to provide "companionship services" are excluded from minimum wage and overtime protections. When the Department of Labor initially wrote the regulations needed to enforce domestic worker protections, it used an inappropriately broad interpretation of the companionship exemption. Regulators extended the exemption to include tasks such as preparing meals and doing housework—activities that go beyond both the ordinary concept of companionship and likely congressional intent.[7] In addition, the department applied the exemption to workers at any employer, regardless of size. This interpretation took labor protections away from some domestic workers who were protected before the 1974 amendment, because the FLSA originally covered employees of large enterprises.[8]

Because of the Labor Department's actions, most home care aides were excluded from basic labor protections for the next 40 years. The Department of Labor remedied this situation by issuing new rules on domestic workers in 2013. The new rules included two major provisions:[9]

- The companionship exemption was narrowed to include only tasks fitting into an ordinary concept of companionship, such as conversation or accompanying a client on walks. Protective tasks, such as monitoring a client to ensure his or her safety, also remain within the exemption.
- The companionship exemption now applies only to aides who are employed solely by a private household. Home care aides who are employed by a third party, such as a private agency or state health department, are automatically covered by minimum wage and overtime protections.

At the same time, the Department of Labor clarified—though it did not change—the way employment relationships are defined under the FLSA. Under this definition, according to the DOL, whenever a worker is "economically dependent" on another person or entity for his or her employment, that person or entity is considered an employer and is responsible for complying with labor laws.[10] Several factors go into a finding of employer status, including right to control, hiring and firing power, wage setting, and whether the work is integrated into the

6 "Fact Sheet: Application of the Fair Labor Standards Act to Domestic Service," *U.S. Department of Labor*, September 2013, https://www.dol.gov/whd/regs/compliance/whdfsfinalrule.pdf.

7 Sonn, Ruckelshaus, and Leberstein, "Fair Pay for Home Care Workers," 3, 7. For example, one of the Senate sponsors of the amendment described the workers covered by the companionship exemption as "sitters" who are paid informally to keep older adults company. Under the regulations, formally employed workers whose responsibilities go far beyond keeping company would also be excluded from standard protections.

8 Ibid, 4.

9 "Application of the Fair Labor Standards Act to Domestic Service." The Labor Department's regulations also affected the application of another exclusion, known as the live-in exemption, which is beyond the scope of this report.

10 "Fact Sheet #79E: Joint Employment in Domestic Service under the Fair Labor Standards Act," *U.S. Department of Labor*, June 2014, https://www.dol.gov/whd/regs/compliance/whdfs79e.htm. The so-called "economic realities" test for employment under the FLSA was developed by courts as an interpretation of statutory language defining "employ" as "to suffer or permit to work." This definition is intentionally broad, far broader than common-law definitions that rely on control over the work. 29 U.S.C. 203 (g).

employer's business. An aide may have multiple "joint employers" for a single job if the entities share the right to control the work.

The Labor Department's clarification regarding joint employment is especially important for many home care aides who serve Medicaid participants. Medicaid-funded home care can be provided in one of two ways.[11] In the traditional agency model, aides work for a private agency that assigns aides to participants, sets wages, and oversees work. Alternatively, states have the option to create self-directed home care programs in which participants manage their own services with support from the state. This often includes hiring an aide, setting wages, and seeing that services included in their care plan are executed. With appropriate supports, self-directed programs can ensure that participants get the best care possible and have the specific services they need to continue living at home.[12]

Self-directed home care programs can ensure that participants get the best care possible and have the specific services they need to continue living at home.

Because participants in self-directed home care have significant control over their services, they are generally considered to be their aide's employer. However, if aides are also economically dependent on a state agency—for example, if the state agency sets wages or has the right to monitor aides' performance—it may be a joint employer along with the participant, and therefore responsible for complying with labor laws. Historically, state agencies paid little attention to whether they were employers of aides, since home care aides were almost always excluded from federal minimum wage and overtime protections. Under the new rules, states must determine whether they are joint employers in order to comply with minimum wage and overtime protections.[13]

When state agencies are employers, they have additional responsibilities if any home care aides work with multiple Medicaid participants.[14] First, because any time spent traveling between clients counts as work—since aides are not free from job responsibilities—home care aides must be paid for this time. Second, if an aide works with multiple clients in one week and his or her total work time exceeds 40 hours, the aide must be paid overtime for the excess. This is true even

[11] "Self-Directed Services," *Centers for Medicare and Medicaid Services*, accessed November 2016, https://www.medicaid.gov/medicaid/ltss/self-directed/index.html.

[12] Antonia Sunderland, "Self-Determination for Persons with Developmental Disabilities," *Robert Wood Johnson Foundation*, 2007, http://www.rwjf.org/content/dam/farm/reports/program_results_reports/2007/rwjf70028.

This evaluation of an early self-directed home care program found that self-direction empowered participants to take greater control of their care, allowed them to access more of the services they were authorized to use, and improved several measures of well-being.

[13] The Department of Labor and the Centers for Medicare and Medicaid Services have issued guidance to assist states with this determination.

David Weil, "Administrator's Interpretation No. 2016-1: Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Aide Protection Act," *U.S. Department of Labor*, January 20, 2016, https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf.

Cindy Mann, "Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes," *Centers for Medicare and Medicaid Services*, July 3, 2014, https://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf.

[14] "Application of the Fair Labor Standards Act to Domestic Service." There are many home care structures, as demonstrated in the National Employment Law Project's 2015 paper, *Upholding Labor Standards in Home Care*. http://www.nelp.org/publication/upholding-labor-standards-in-home-care-how-to-build-employer-accountability-into-americas-fastest-growing-jobs/

if no single participant receives more than 40 hours of care, because the aide works more than 40 hours as an employee of the state. Recordkeeping requirements also apply, as they apply to any employer under the FLSA. These requirements ensure that home care aides are paid for all the time they work and are properly compensated when they work long hours.

3. The Future of Home Care in Maryland

Because of the flexibility self-directed programs offer to older adults and people with disabilities who need home care services, they are a vital part of state Medicaid systems. However, Maryland currently offers only agency-based home care, despite having a self-directed program until 2015. To ensure that Medicaid participants in our state can access the supports they need to live safely at home—and to ensure that the aides who provide this care are paid appropriately—Maryland should reinstate its previous self-directed home care program and act as a joint employer.

Before the Department of Labor issued its new rules, Maryland's Medicaid program provided both agency-based and self-directed home care services. Aides in Maryland's self-directed program, known as independent providers, had union representation and were paid at an hourly rate well above the minimum wage. However, the state did not consider them to be state employees, did not provide them with employee benefits, and paid them the same wage for overtime hours as for the first 40 hours worked in a given week.[15]

After the new rules were issued, Maryland requested guidance from the Department of Labor on whether the state was a joint employer of aides in its independent provider program, which the department indicated it likely was. As a joint employer, the state would be responsible for paying overtime when aides worked more than 40 hours per week (whether this was the result of working with one participant or several) and paying for travel time when aides served multiple participants in a single day. Following an internal analysis claiming it would cost the state more than $33 million to pay overtime and travel time, Maryland suddenly discontinued the independent provider program and required all aides to join private agencies.[16] This decision shifted responsibility

[15] "HB 171 (Chapter 171 of the Acts of 2011) — Report on the Status of Independent Home Care Providers Participating in Waiver Programs," *Maryland Department of Health and Mental Hygiene*, January 20, 2015, https://mmcp.dhmh.maryland.gov/Documents/JCRs/hb171collectivebargainingJCRfinal12-14.pdf.

Even before the Department of Labor rules were released, home care aides in Maryland theoretically had minimum wage and (in many cases) overtime protections (Sonn, Ruckelshaus, and Leberstein, "Fair Pay for Home Care Workers," 24), but these protections were often not a reality due to inaccurate classification as independent contractors by employers ("Independent Contractor Classification in Home Care," *National Employment Law Project*, May 2015, http://www.nelp.org/content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf). Note that even if the state reinstated its independent provider program and acted as a joint employer for the purpose of federal labor law, aides would not receive state employee benefits.

[16] Mark Leeds, memo to Medicaid home care independent providers, *Maryland Department of Health and Mental Hygiene*, https://mmcp.dhmh.maryland.gov/longtermcare/Resource%20Guide/13.%20Letters,%20Memos%20and%20Transmittals/Independent%20to%20Agency%20Personal%20Assistance%20Provider%20-%20Transition%20Letters/Independent%20to%20Agency%20Only%20-%20Independent%20Aides%206.11.15.pdf.

for complying with labor laws from the state to private agencies and eliminated the option for Maryland Medicaid participants to self-direct their care.

The state's decision to end the independent provider program is harmful to both the aides who provided services through that program and the former program participants who received care through it. Workers and advocates report that many home care agencies in Maryland inaccurately classify aides as independent contractors rather than employees. Though illegal, such practices are seldom challenged, which effectively allows agencies to evade labor regulations and continue denying aides the pay they have earned for overtime and travel time.[17] Meanwhile, the state's decision limits the control Medicaid participants can exercise over their home care services. Research suggests that this makes people less likely to use services they need and are entitled to and ultimately can harm participants' well-being.[18] If the agency-based program does not adequately meet participants' needs, it could make it more difficult for some to continue living at home.

Reinstating the independent provider program and paying aides appropriately for their work would bring significant benefits. Like many other low-wage industries, home care work has characteristics that make it difficult to attract and retain qualified workers. Low wages mean that many aides struggle to make ends meet, and the part-time schedules common in home care further reduce pay. At the same time, many aides' hours vary widely from week to week. Unpredictable hours can make it difficult to plan ahead or work a second job, and long hours in some weeks lead to fatigue and diminished performance. This is especially concerning in light of the physical demands often associated with personal care and home health care. Although not directly comparable, data from the Bureau of Labor Statistics show that direct care aides in nursing and personal care facilities face nearly twice as many workplace injuries as construction workers.[19] As a result of these occupational stresses, turnover among home care aides nationwide is around 50 percent.[20]

The high rate of turnover among home care aides increases costs and leads to a lower quality of care. When an aide leaves a client, the client must find someone else to take his or her place—as well as a temporary aide, if they can't find a permanent replacement quickly enough. Once they find a replacement, the new aide needs training, and administrative tasks such as background checks must be

[17] When private agencies exert control over home care services in a way that makes aides economically dependent on them, classifying aides as independent contractors is a violation of federal labor law. Courts in Maryland have found that home care agencies improperly classified aides as contractors under state law in at least one case. (NELP's publication: "Independent Contractor Classification in Home Care"). Note that if agencies continue to misclassify aides as independent contractors, reinstating the independent provider program will not on its own ensure fair pay for all home care aides in Maryland. To do this, the state would have to take steps to ensure that labor laws are properly enforced both for independent providers and agency-employed aides.

[18] Sunderland, "Self-Determination for Persons with Developmental Disabilities."

[19] Dorie Seavey, "The Cost of Frontline Turnover in Long-Term Care," *Better Jobs Better Care*, October 2004, http://phinational.org/sites/phinational.org/files/clearinghouse/TOCostReport.pdf, 14.

[20] Karen Kahn, Abby Marquand, and Stephen Campbell, "Paying the Price: How Poverty Wages Undermine Home Care in America," *Paraprofessional Healthcare Institute*, February 2015, http://phinational.org/sites/phinational.org/files/research-report/paying-the-price.pdf, 4.

performed. Whether they are borne by a state agency or another entity, these costs are often significant. One review of turnover cost studies in the health care industry found that replacing a health care support worker such as a home care aide costs at least $2,500, including only the most direct, easily calculated costs.[21] In addition to these direct costs, high turnover means that aides are generally less experienced and less knowledgeable about their clients' individual needs. This can potentially lead to more mistakes and a higher risk of injury.

Finally, paying home care aides appropriately would increase tax revenues and boost the economy through spending at local businesses.[22] At the 2014 wage, an average aide in Maryland's self-directed home care program would earn about $17,000 per year, or about $3,000 less than the federal poverty line for a family of three.[23] Paying these aides appropriately for overtime and travel time would not on its own bring them into the middle class, but it would mean more money to spend on necessities such as food, clothing, and housing. When aides earn enough to purchase these necessities, they generate more sales for local businesses. Aides who take more money home also pay more in income and payroll taxes, strengthening state and local government finances. When aides are compensated for all the time they spend working, it benefits the entire economy.

To ensure a high quality of care for Marylanders with long-term health needs, and to ensure that the aides who provide this critical care are paid properly and fully for their work, Maryland should reinstate the independent provider program and act as a joint employer.[24] Not only would reinstating the independent provider program bring significant benefits, but MDCEP's recent analysis shows that the cost of doing so would be much smaller than the state's internal analysis claims.

4. The Costs of Compliance Are Insubstantial

As discussed above, the state's decision to end the independent provider program eliminated participants' choices and their ability to self-direct care. One apparent factor in this decision was an internal analysis by the state claiming that new federal labor regulations would have significantly raised the cost of the independent provider program. However, MDCEP's research shows that the state's internal analysis was flawed and that the costs to the state, should it reinstate the independent provider program and comply with current labor standards, would be insubstantial.

[21] Seavey, "The Cost of Frontline Turnover in Long-Term Care."

[22] "Giving Caregivers a Raise."

[23] DHMH data indicate that providers in the self-directed home care program worked an average of 1,354 hours per year. At a wage of $12.58 per hour, this translates into an annual income of $17,033.

[24] Although it is possible to administer a self-directed program without the state acting as a joint employer, this would come with significant costs. The Department of Labor Administrator's Interpretation on joint employment in home care (Weil, "Administrator's Interpretation No. 2016-1") discusses at length the considerations that would likely make a state agency a joint employer in a self-directed program. These include steps an agency may take to ensure that potential aides are well qualified, monitoring of aides' performance, and some managerial steps to ensure the integrity of payments. A self-directed program in which the state does not act as an employer would not be able to include many of these components.

MDCEP independently estimated the cost of paying overtime and travel time to aides in Maryland's independent provider program using data obtained from the state Department of Health and Mental Hygiene (DHMH). These are similar data to what the state used for its estimate. Table 1 summarizes these data.

TABLE 1. SUMMARY OF DHMH DATA ON INDEPENDENT HOME CARE INDEPENDENT AIDES

Length of sample period	188 days
Number of aides	3,694 aides
Total hours worked*	733,482 hours
Overtime hours worked*	128,940 hours
Annual hours worked**	5 million hours
Annual travel hours**	26,000 hours

Note: * Excludes aides in the Medical Assistance Personal Care (MAPC) program. Because MAPC aides were paid per diem rather than hourly, data on hours worked by these aides are not available.
** DHMH estimate. Includes estimated MAPC hours.

The state's cost for overtime and travel time is a combination of three components:[25]

- **COST OF OVERTIME:** The additional cost of paying aides overtime is equal to the annual number of overtime hours worked times the overtime premium—the additional amount owed for each hour of overtime, above what would be owed for an hour of straight-time work. Under state and federal law, the overtime premium is 50 percent of the straight-time wage.[26]
- **COST OF TRAVEL TIME:** The cost of paying aides for time spent traveling between participants is equal to the annual number of travel hours multiplied by the wage paid for travel time. This wage does not have to be equal to the wage paid for care, and can be as low as the state minimum wage.
- **FEDERAL REIMBURSEMENT:** Medicaid costs are shared between the states and the federal government, with the federal government generally paying half of costs in Maryland.[27] While the state may be responsible for paying up front, the federal share of Medicaid costs is ultimately not borne by the state.

[25] The current agency model and a reinstated independent provider program both include additional costs not addressed here such as administrative overhead, employer-side payroll taxes, and profits in the case of for-profit home care agencies.

[26] It would be inappropriate to attribute the full overtime wage—150 percent of the straight-time wage—as an additional cost of paying overtime, as these hours would be paid at the straight-time wage otherwise.

[27] "ASPE FMAP 2017 Report," *U.S. Department of Health and Human Services*, December 29, 2015, https://aspe.hhs.gov/basic-report/fy2017-federal-medical-assistance-percentages.

Self-directed home care funded by the Community First Choice Option created by the Affordable Care Act receives a higher federal reimbursement rate of 56 percent in Maryland (Laura Snyder and Robin Rudowitz, "Medicaid Financing: How Does it Work and What Are the Implications?" *The Henry J. Kaiser Family Foundation*, May 20, 2015, http://kff.org/report-section/medicaid-financing-how-does-it-work-and-what-are-the-implications-appendix/), which would further reduce the cost of paying overtime and travel time. This analysis assumes a 50 percent federal reimbursement for all services.

The Centers on Medicare and Medicaid Services have issued guidance on how the state can bill the federal government for travel time and overtime not attributable to a single participant (Mann, "Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes"). Because these costs are not within a participant's control, they should not be deducted from self-

MDCEP estimated the cost of paying overtime and travel time in three scenarios:

- **2014 WAGES:** Aides are assumed to earn $12.58 for normal working hours, as called for under the state's agreement with the union representing aides at the time. Travel time is paid at $7.25 per hour, the 2014 state minimum wage. This estimate is most directly comparable to the state's internal analysis. Each component of the cost estimate is explained below using 2014 wages.
- **2019 WAGES:** If the Department of Health and Mental Hygiene requests funds during the next budget cycle, the independent provider program can be reinstated in July 2018, the start of the 2019 fiscal year. To estimate costs in this scenario, MDCEP assumed 2.5 percent annual wage growth from 2014 levels, resulting in an hourly wage of $14.23. In this scenario, travel time is compensated at the long-term state minimum wage under current law, $10.10 per hour. This scenario represents the most likely cost of creating a self-directed home care program in the future.
- **$15 WAGE:** This scenario measures the additional cost of paying overtime and travel time if the regular wage for home care aides were $15 per hour.[28]

Cost of Overtime

MDCEP ESTIMATE: The state estimates that 5 million hours of home care were delivered in Maryland's self-directed program in 2014.[29] During a sample period lasting from July 1, 2013 to January 5, 2014, 18 percent of care hours worked would have been overtime.[30] At an overtime premium of $6.29 per hour (half of the 2014 wage of $12.58), the additional cost of overtime would be $5.6 million per year.

DHMH ESTIMATE: The state's internal estimate differs from the MDCEP estimate in two ways. First, the state estimated the number of overtime hours worked per year using aides in only one program, the Waiver for Older Adults. In this

directed budgets. Instead, the most effective approach is to track overtime and travel time and then divide these costs among all participants in reimbursement claims.

[28] For information on the benefits of raising wages for home care aides to $15 per hour, see "Giving Caregivers a Raise: The Impact of a $15 Wage Floor in the Home Care Industry," *National Employment Law Project*, February 2015, http://www.nelp.org/content/uploads/2015/03/Giving-Caregivers-A-Raise.pdf.

[29] Unless otherwise noted, all data in this section are from documents provided by the Department of Health and Mental Hygiene and all calculations are by MDCEP.

[30] That is, these care hours were provided by an aide who had already worked at least 40 hours during that week. This estimate does not include hours provided in the Medical Assistance Personal Care (MAPC) Program, in which aides were paid per diem rather than hourly. While it is possible that MAPC aides worked overtime more often than aides in other programs, this is not likely. While MAPC aides accounted for 77 percent of all aides in the self-directed program during the sample period, MDCEP estimates that they accounted for only 72 percent of care hours. In other words, MAPC aides worked fewer hours than other aides, on average. MDCEP estimated the MAPC share of hours worked on the basis of 733,482.25 hours worked by non-MAPC providers during the 188-day sample period and 5 million total hours worked per year, as estimated by DHMH. This estimate assumes that non-MAPC providers worked similar hours outside the sample period as during the sample period. The DHMH internal analysis also relies on the same assumption.

program, 35 percent of hours worked would have been overtime. In addition, the state's analysis counted the full overtime wage for these hours—$18.87—as an additional cost of paying overtime. However, these hours would have been paid at the regular rate of $12.58 per hour whether the state paid overtime or not. Together, these two inaccurate assumptions raise the estimated cost of overtime to $33.2 million.

Cost of Travel Time

MDCEP AND DHMH ESTIMATES: The MDCEP estimate and DHMH estimate used the same assumptions for the cost of travel time. The state estimates that aides in the self-directed program spent about 26,000 hours traveling between clients in 2014. At the 2014 state minimum wage of $7.25 per hour, the cost of travel time is $188,500.

Federal Reimbursement

MDCEP ESTIMATE: Because Maryland is a high-income state, the federal government reimburses the state for Medicaid spending at the lowest allowed rate, 50 percent. Although some Medicaid-funded home care programs feature higher federal reimbursement rates, this analysis errs on the side of caution by assuming that all increased costs are reimbursed at the lower default rate. At this rate, the federal government is expected to pay $2.9 million toward the cost of paying overtime and travel time.

DHMH ESTIMATE: The state's internal estimate does not account for federal reimbursement. While the state may be responsible for paying overtime and travel time costs up front, Marylanders do not ultimately bear the cost of payments that receive federal reimbursement. Therefore, an accurate estimate of the cost to the state of paying overtime and travel time should reflect the federal reimbursement.

Net Cost to the State

MDCEP ESTIMATE: The total estimated cost of paying overtime and travel time at 2014 wages is $5.8 million annually. After the 50 percent federal Medicaid reimbursement, the net cost to the state would be $2.9 million.

DHMH ESTIMATE: Because the state's internal estimate overstates the number of overtime hours worked per year, inaccurately counts the full wage for those hours as an additional cost of paying overtime, and does not account for federal reimbursement, this analysis reached a much higher estimated cost of $33.4 million.

Table 2 reports the estimated net cost to the state of paying overtime and travel time under all three scenarios. In the 2019 wages scenario, a reinstated independent aide program is estimated to cost the state $3.3 million more as a

result of overtime and travel pay. See the Box on page 13 for a summary of the inaccurate assumptions used in the state's internal estimate.

TABLE 2. ESTIMATED COST OF OVERTIME AND TRAVEL TIME

COST COMPONENT	SCENARIO		
	2014 Wages	2019 Wages	$15 Wage
Overtime	$5.6 million	$6.3 million	$6.6 million
Travel Time	$189,000	$263,000	$390,000
Federal Reimbursement	($2.9 million)	($3.3 million)	($3.5 million)
NET COST	$2.9 MILLION	$3.3 MILLION	$3.5 MILLION

5. Conclusion

The Department of Labor's rules governing wages and hours for home care aides are an important step toward good pay and working conditions for home care aides in Maryland. These rules are most effective, though, when states implement them through well-designed home care programs in their Medicaid systems. Maryland has an opportunity to make significant progress on this front by reinstating its independent provider program and recognizing its employer responsibilities. This step would ensure that home care aides in our state are fully and appropriately paid for their work and are better able to afford the basics like housing, utilities, and food.

It would also ensure that the Marylanders who depend on assistance from home health care aides to live safely in their homes and perform essential daily tasks have access to appropriate care that is attentive to their needs. Finally, while the benefits of paying home care aides appropriately for every hour they work are substantial, the costs are modest. By increasing the state's Medicaid spending by $3.3 million, or about 0.1 percent, Maryland can improve the lives of seniors, people with disabilities, and workers.

SUMMARY: PROBLEMS WITH THE INTERNAL STATE ESTIMATE

The state Department of Health and Mental Hygiene performed an internal analysis finding that it would cost more than $33 million per year to pay home care aides overtime and travel time—more than 10 times the cost estimated by MDCEP. However, the DHMH internal analysis has several problems that make it an inaccurate cost estimate.

INFLATED PROJECTION OF OVERTIME HOURS. DHMH estimated that 35 percent of hours worked by home care aides in the self-directed program would have been overtime. This estimate was based on hours worked by aides in the state's Waiver for Older Adults program. However, aides in the Living At Home Waiver program worked far fewer overtime hours than Waiver for Older Adults aides. Among all aides for whom hourly data are available, only 18 percent of hours would have been overtime in 2014.

INFLATED DEFINITION OF OVERTIME COSTS. DHMH calculated the cost of paying overtime by multiplying the number of overtime hours worked by 150 percent of the straight-time wage. This reflects the requirement that overtime be paid time-and-a-half under federal labor laws. However, two-thirds of this cost would have been paid even if the state did not pay overtime, because aides are always owed the regular wage for all hours worked. Only 50 percent of the regular wage—also known as the overtime premium—should be considered a cost of paying overtime.

NO ADJUSTMENT FOR FEDERAL REIMBURSEMENT. As with all other Medicaid costs, overtime and travel time payments to home care aides are shared between the state and federal governments. As a high-income state, Maryland is responsible for half of the cost of all Medicaid services, while the federal government pays the other half. While the state may have to pay up front for some services and wait for federal reimbursements to arrive later, Maryland should expected to ultimately bear only half the cost of paying overtime and travel time.

Note: The Centers on Medicare and Medicaid Services have issued guidance on how the state can bill the federal government for travel time and overtime not attributable to a single participant (Cindy Mann, "Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes," *Centers for Medicaire & Medicaid Services*, July 3, 2014, https://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf). Because these costs are not within a participant's control, they should not be deducted from self-directed budgets. Instead, the most effective approach is to track overtime and travel time and then divide these costs among all participants in reimbursement claims.

Acknowledgements

This report was supported in part by a grant from the Open Society Foundations and the National Domestic Workers Alliance.