

MEMORANDUM

July 21, 2017

TO: County Council

FROM: Josh Hamlin, Legislative Attorney 

SUBJECT: **Introduction:** Bill 28-17, Human Rights and Civil Liberties – County Minimum Wage – Amount - Annual Adjustment

Bill 28-17, Human Rights and Civil Liberties – County Minimum Wage – Amount - Annual Adjustment, sponsored by Lead Sponsor Councilmember Elrich, and Co-Sponsors Councilmembers Leventhal, Riemer, Huckler and Navarro, is scheduled to be introduced on July 25. A public hearing will be scheduled at a later date.

Bill 28-17 would:

- increase the County minimum wage by a certain amount;
- require the Chief Administrative Officer to adjust the County minimum wage rate each year; and
- require the Office of Legislative Oversight to conduct an annual analysis of the the impact of the County minimum wage.

Background

In 2013, the Council enacted Bill 27-13,¹ which established a County minimum wage for private sector employees working in the County, unless the State or federal minimum wage is higher. The County minimum wage established under Bill 27-13, as amended, was phased in over several years. The rate was set at \$8.40 per hour effective October 1, 2014, and increased to \$9.55 per hour on October 1, 2015, \$10.75 on July 1, 2016, and \$11.50 per hour on July 1, of this year. There are no requirements in County law for further increases in the County minimum wage.

¹ The County minimum wage law has been amended twice since being established by Bill 27-13. Bill 59-14 modified some of the effective dates for increases, and Bill 24-15 modified the method for calculating the “tip credit” allowed to employers of tipped employees.

The County minimum wage does not apply to a worker who is exempt from the State or federal minimum wage, is under the age of 19 years and is employed no more than 20 hours per week, or subject to an “opportunity wage” under the State or federal law. Employers of tipped employees may include in the computation of their wage amount a “tip credit” not exceeding the County minimum wage less \$4.00 per hour.

In 2014, the Maryland General Assembly enacted a law raising the State’s minimum wage from \$7.25 to \$10.10 per hour over four years, with incremental increases to \$8.25 in 2015, \$8.75 in 2016, \$9.25 in 2017, and \$10.10 in 2018. The federal minimum wage is \$7.25 hour and has not changed since 2009.² There is a nationwide effort to increase the minimum wage at the federal, state, and local levels to \$15.00 per hour, which has thus far had some success.³ California and New York have enacted statewide laws that would increase the minimum wage in those states to \$15.00 per hour over a period of years. In addition, several local jurisdictions and the District of Columbia have passed laws gradually increasing their minimum wage to \$15.00 per hour.

Bill 12-16

In January of this year, the Council enacted Bill 12-16,⁴ which would have extended the incremental increases set in County law by Bill 27-13 to go up to \$15 per hour. The scheduled increases under Bill 12-16 were based on the size of the employer: workers whose employers have 26 or more employees would reach \$15.00 per hour by 2020⁵ and those of employers with 25 or fewer employees by July 1, 2022.⁶ Bill 12-16 would also have required, beginning in 2023, annual adjustments to the minimum wage by the annual average increase, if any, in the Consumer Price Index for urban wage earners and clerical workers for the previous calendar year.

Bill 12-16 also included a “safety-valve” provision that would allow the County Executive the ability to pause implementation of a scheduled increase under certain adverse economic conditions. These conditions included: if total private employment for Montgomery County decreased by 1.5 percent over the period from April 1 to June 30 of the previous year; total private employment for Montgomery County decreased by 2.0 percent over the period from January 1 to June 30 of the previous year; the Gross Domestic Product of the United States experienced negative growth for the preceding two quarters; or the National Bureau of Economic Research determined that the United States economy is in recession.

² A chart showing the federal minimum wage rates from 1938-2009 is at:

<http://www.dol.gov/whd/minwage/chart.htm>

³ A summary of jurisdictions approving some form of minimum wage increase in 2016 is at:

<http://raisetheminimumwage.com/21-states-localities-approved-minimum-wage-increases-in-2016/>

⁴ The packet for Council action on Bill 12-16 is at:

http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/bill/2016/Packets/20170117_6.pdf

⁵ The scheduled increases in the minimum wage paid by employers of 26 or more employees under Bill 12-16 were: \$12.50/hr. effective July 1, 2018; \$13.75 in 2019; and \$15.00 in 2020.

⁶ The scheduled increases in the minimum wage paid by employers of 25 or fewer employees under Bill 12-16 were: \$12.00/hr. effective July 1, 2018; \$12.75 in 2019; \$13.50 in 2020; \$14.25 in 2021; and \$15.00 in 2022.

On January 23, 2017, the Executive vetoed Bill 12-16. In a memorandum explaining his veto (©8-10), he expressed support for “the effort to move toward \$15 per hour” but indicated that the enacted Bill went “too far, too fast.” The Executive expressed hope that a new bill, with broader support, could be introduced “in the near future,” and called for a study, to be completed by July of this year, examining the anticipated fiscal and economic impact of an increased County minimum wage. In addition to the study, the Executive cited exemptions for small businesses and youth workers, and the provision for reaching a \$15/hour minimum wage by 2022, as preconditions for him to fully agree with a new bill increasing the minimum wage.

Bill 28-17

Bill 28-17 would replicate the changes that would have been implemented under Bill 12-16, but with two key distinctions aimed at addressing issues that were raised during that Bill’s consideration. Under Bill 28-17, two additional classes of employers would be subject to the slower phase-in schedule for smaller employers (i.e., \$15.00/hr by 2022). This schedule would apply to employers who: (1) employ 25 or fewer employees; (2) have tax exempt status under Section 501(c)(3) of the Internal Revenue Code; or (3) provide “home health services” or “home or community-based services,” as defined under federal Medicaid regulations (see ©11-19), and receive at least 75% of gross revenues through state and federal medical programs. The third group (Medicaid funded employers) would have to be determined eligible by the Office of Human Rights. Bill 28-17 would retain the annual adjustment based on increases in the Consumer Price Index and the requirement that the Office of Legislative Oversight provide the Council with an annual analysis of the impact of the County minimum wage on the local economy. The Bill will also include the “safety-valve” provisions of Bill 12-16, which allow the Executive to temporarily suspend scheduled increases during the phase-in.

Legal Authority

Montgomery County can set its own minimum wage by law even though the State of Maryland has a minimum wage law. In *City of Baltimore v. Sitnick*, 254 Md. 303 (1969), the Maryland Court of Appeals upheld a city ordinance establishing a minimum wage standard that was higher than the State standard. In that case, the plaintiffs argued that State law had preempted the field of minimum wage. In rejecting that argument, the Court held that the City of Baltimore could pass its own minimum wage law based on the city’s exercise of concurrent power because the city law did not conflict with the State law.

This packet contains:	<u>Circle #</u>
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Bill No. 28-17
Concerning: Human Rights and Civil Liberties – County Minimum Wage – Amount – Annual Adjustment
Revised: 07/13/2017 Draft No. 2
Introduced: July 25, 2017
Expires: January 25, 2019
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Elrich
Co-Sponsors: Councilmembers Leventhal, Riemer, Hucker and Navarro

AN ACT to:

- (1) increase the County minimum wage by a certain amount;
- (2) require the Chief Administrative Officer to adjust the County minimum wage rate each year;
- (3) require the Office of Legislative Oversight to conduct an annual analysis of the impact of the County minimum wage; and
- (4) generally amend the laws governing the minimum wage

By amending

Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Article XI. County Minimum Wage
Section 27-68

By adding

Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Article XI. County Minimum Wage
Section 27-70A

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec 1. Section 27-68 is amended and Section 27-70A is added as follows:**

2 **27-68. Minimum Wage Required.**

3 (a) *County minimum wage.* Except as provided in Subsection (b), an
4 employer must pay wages to each employee for work performed in the
5 County at least the greater of:

- 6 (1) the minimum wage required for that employee under the Federal
7 Act;
8 (2) the minimum wage required for that employee under the State
9 Act; or
10 (3) [\$11.50] \$15.00 per hour.

11 (b) *Annual adjustment.* The Chief Administrative Officer must adjust the
12 minimum wage rate required under Subsection (a)(3), effective July 1,
13 2023, and July 1 of each subsequent year, by the annual average
14 increase, if any, in the Consumer Price Index for Urban Wage Earners
15 and Clerical Workers, CPI-W, or a successor index, for the previous
16 calendar year. The Chief Administrative Officer must calculate the
17 adjustment to the nearest multiple of five cents, and must publish the
18 amount of this adjustment not later than March 1 of each year.

19 (c) *Exclusions.* The County minimum wage does not apply to an employee
20 who:

- 21 (1) is exempt from the minimum wage requirements of the State or
22 Federal Act;
23 (2) is under the age of 19 years and is employed no more than 20
24 hours per week; or
25 (3) is subject to an opportunity wage under the State or Federal Act.

26 [(c)](d) *Retaliation prohibited.* A person must not:

- 27 (1) retaliate against any person for:

- 28 (A) lawfully opposing any violation of this Article; or
- 29 (B) filing a complaint, testifying, assisting, or participating in
- 30 any manner in an investigation, proceeding, or hearing
- 31 under this Article; or
- 32 (2) obstruct or prevent enforcement or compliance with this Article.

* * *

33
34 **27-70A. Annual impact analysis.**

35 The Office of Legislative Oversight must submit a report to the Council, by
36 January 31 of each year, analyzing the impact of the County minimum wage on the
37 local economy.

38 **Sec. 2. Transition.**

39 Notwithstanding Section 27-68, as amended in Section 1, except when the
40 scheduled increases are suspended under subsection (e), the County minimum wage,
41 until July 1, 2022, must be the greater of the minimum wage required under the
42 Federal or State Act or:

- 43 (a) for an employer who employs 26 or more employees:
 - 44 (1) effective July 1, 2018, \$12.50 per hour;
 - 45 (2) effective July 1, 2019, \$13.75 per hour; and
 - 46 (3) effective July 1, 2020, \$15.00 per hour.
- 47 (b) for an eligible employer under subsection (c):
 - 48 (1) effective July 1, 2018, \$12.00 per hour;
 - 49 (2) effective July 1, 2019, \$12.75 per hour;
 - 50 (3) effective July 1, 2020, \$13.50 per hour; and
 - 51 (4) effective July 1, 2021, \$14.25 per hour.
- 52 (c) An employer is eligible for the implementation schedule in subsection
 - 53 (b) if the employer:
 - 54 (1) employs 25 or fewer employees;

- 55 (2) has tax exempt status under Section 501(c)(3) of the Internal
- 56 Revenue Code; or
- 57 (3) provides:
- 58 (A) “home health services” as defined by 42 C.F.R. § 440.70
- 59 or “home or community-based services” as defined by 42
- 60 C.F.R. § 440.180;
- 61 (B) receives at least 75% of gross revenues through state and
- 62 federal Medicaid programs; and
- 63 (C) is certified by the Office of Human Rights as meeting the
- 64 requirements of subparagraphs (A) and (B).
- 65 (d) For the purposes of subsections (a) and (b), an employer’s number of
- 66 employees must be calculated based upon the employer’s average
- 67 number of employees per calendar week during the preceding
- 68 calendar year for each week at least one employee worked for
- 69 compensation. For employers that did not have any employees during
- 70 the preceding calendar year, the employer’s number of employees
- 71 must be calculated based upon the average number of employees who
- 72 worked for compensation per calendar week during the first 90
- 73 calendar days of the current year in which the employer engaged in
- 74 business.
- 75 (e) (1) On or before January 31 of each year beginning in 2018
- 76 through 2022, to ensure that economic conditions can support a
- 77 minimum wage increase, the Director of Finance must
- 78 determine and certify to the Executive and Council if:
- 79 (A) total private employment for Montgomery County
- 80 decreased by 1.5% over the period from April 1 to June
- 81 30 of the previous year. The calculation must compare

82 total private employment in June to total private
 83 employment in April, as reported by the Maryland State
 84 Department of Labor, Licensing, and Regulation's
 85 Quarterly Census of Employment and Wages data series;

86 (B) total private employment for Montgomery County
 87 decreased by 2.0% over the period from January 1 to
 88 June 30 of the previous year. The calculation must
 89 compare total private employment in June to total private
 90 employment in January, as reported by the Maryland
 91 State Department of Labor, Licensing, and Regulation's
 92 Quarterly Census of Employment and Wages data series;

93 (C) the Gross Domestic Product of the United States, as
 94 published by the U.S. Department of Commerce, has
 95 experienced negative growth for the preceding two
 96 quarters; or

97 (D) the National Bureau of Economic Research has
 98 determined that the United States economy is in
 99 recession.

100 (2) If, in any year, the Director of Finance certifies that a condition
 101 in subparagraphs (A) through (D) of paragraph (1) occurred, the
 102 Executive may, on or before February 10 of that year, suspend
 103 the minimum wage increases scheduled under subsections (a)
 104 and (b) for that year.

105 (3) If the Executive suspends the scheduled minimum wage
 106 increases for a year, all dates specified in subsections (a) and
 107 (b) that follow the temporary suspension must be postponed by
 108 an additional year.

109 (4) The Executive must not suspend scheduled minimum wage
110 increases under this Section more than two times.

111 **Sec. 3. Effective Date.**

112 This Act takes effect on July 1, 2018.

LEGISLATIVE REQUEST REPORT

Bill 28-17

Human Rights and Civil Liberties – County Minimum Wage – Amount - Annual Adjustment

DESCRIPTION:	The Bill would increase the County minimum wage that must be paid to certain employees working in the County for a private sector employer or the County government to \$15.00 per hour by 2020 for employers with 26 or more employees. Employers who (1) employ 25 or fewer employees (2) have tax exempt status under Section 501(c)(3) of the Internal Revenue Code; or (3) provide “home health services” or “home or community-based services,” as defined under federal Medicaid regulations and receive at least 75% of gross revenues through state and federal medical programs would be required to pay at least \$15.00 per hour by 2022. It would also require annual adjustments to the County minimum wage each year beginning in 2023.
PROBLEM:	The existing County minimum wage of \$11.50 per hour is insufficient to support a full-time worker in the County, and existing law does not provide for annual increases based on inflation.
GOALS AND OBJECTIVES:	To maintain a reasonable living wage for workers in the County when the State and federal minimum wage is insufficient.
COORDINATION:	Human Rights Commission, Office of Management and Budget, Department of Finance
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Josh Hamlin, Legislative Attorney, 240-777-7892
APPLICATION WITHIN MUNICIPALITIES:	To be researched.
PENALTIES:	Class A civil citation and equitable relief.



OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

MEMORANDUM

Isiah Leggett
County Executive

January 23, 2017

TO: Roger Berliner, President
County Council

FROM: Isiah Leggett, County Executive 

SUBJECT: Bill 12-16, Human Rights and Civil Liberties – County Minimum
Wage – Amount – Annual Adjustment

There continues to be a great deal of discussion since the passage of Bill 12-16, Human Rights and Civil Liberties – County Minimum Wage – Amount – Annual Adjustment, and my position regarding this bill. I understand that there is a strong interest by some councilmembers to even reconsider the bill. However this is no longer a possibility since this bill has been signed and transmitted to the executive branch. At present, I have only three options: sign the bill and it becomes law as is, not sign the bill and it will go into effect without my signature or veto the bill. The only way to express my position regarding this bill at this time is to reluctantly veto and return it to you with what I believe is a more reasonable path to moving the County to a \$15 wage.

That said, I wish to congratulate the County Council on the very full and thoughtful discussion it held on the bill. In particular, I want to commend Councilmember Elrich for his commitment to the issue. I respect his very principled position on a matter that is extremely important to our County and the nation as a whole.

As I have said on numerous occasions, I support the effort to move toward \$15 per hour over an appropriate timeframe and under certain conditions. And that sentiment was expressed by you and your Council colleagues who voted against the bill. Indeed, the Council unanimously passed Bill 27-13, the 2013 Minimum Wage bill, and we celebrated together with a public bill signing ceremony. But this year's effort became much more contentious and divided resulting in only a 5-4 majority. Many believed it went too far, too fast, and I am disappointed that we did not find a broader consensus.

It is my hope that a modified bill can be introduced in the near future and, similar to the 2013 bill, receive greater support. Such an effort would send a stronger and clearer message to our County and to the rest of the State.

Roger Berliner, President
January 23, 2017
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While the Council adopted several amendments intended to address some of the issues I raised in my November 22, 2016 memorandum, I do not believe they went far enough to address the very serious issues that I am concerned about or to gain more widespread support. I wish to thank the Council for adopting my recommendation for the so-called "off ramp" to address concerns about increasing the minimum wage during economic downturns. Other issues, however, were not addressed satisfactorily.

As mentioned previously, Montgomery County has already put itself in the forefront on the minimum wage issue and several other initiatives to assist our more vulnerable residents. Montgomery County's minimum wage is, and will continue to be, higher than both the federal and State minimum wage, as well as that in all surrounding jurisdictions except the District of Columbia. I remain concerned, however, about the competitive disadvantage Bill 12-16 would put the County in compared to our neighboring jurisdictions. Additionally, we must realize that Bill 27-13 would put our County in a different position compared to the few jurisdictions that have already passed a \$15 minimum wage. Unlike Seattle or New York City, we are not a "destination city" that draws great numbers of business travelers or tourists that will be able to afford higher costs for short-term visits. Our residents will essentially shoulder the bulk of the cost. Also, in California the \$15 minimum wage does not go effect until 2022, and there is an additional one-year phase-in for small businesses with less than 26 employees. For this reason and others, we must act in a more measured way based on the best information available and the potential unintended negative impacts to Montgomery County.

While some experts may disagree, I believe in an expeditious and timely study of relevant issues on the fiscal and economic impact of an increase in the minimum wage on Montgomery County, I maintain that a study will better inform the Council on the direct and indirect impacts on private employers' bottom line as well as the impact on County government. As you know, there are very few jurisdictions that provide the array of health and human services to help vulnerable populations at the same level that Montgomery County does. For example, all things remaining equal, if the Council continues the policy of providing financial support to our non-profit partners for imposed legislated wage adjustments, when the minimum wage reaches \$15, there will be a significant financial impact to the County. The County's budget for Developmental Disability providers alone would be \$21.1 million over the current FY17 base of \$13.8 million. Based on our current budget projections, this would be a very difficult amount to absorb, and this does not address the challenge faced by all of our non-profit partners.

Another example of the financial impact of the increase in the minimum wage comes from our Medicaid providers. I will send to you separately a letter and data I received a few days ago. In sum, they estimate that the move to \$15/hour will result in an approximate 5.5% increase in the cost of operations each year. Unlike some businesses, Medicaid providers

Roger Berliner, President
January 23, 2017
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cannot legally pass these increases on to the consumer and will be unable to absorb the significant increased costs.

It is my view that a study addressing these issues can be accomplished in a relatively short time. I propose that it be completed by no later than July of this year. This study would give the Council ample time to propose and enact a new bill long before the first new increment under Bill 12-16 would have taken effect.

In my November 22, 2016 memorandum, I urged the Council to consider a longer timeframe for raising the County minimum wage, noting that California would not reach \$15 until 2022. While the Council provided an extension to 2022 for small employers (25 or fewer employees), the bill retained 2020 as the date for the County minimum to reach \$15/hour for all other employers. I think that is too fast and believe we should not reach \$15/hour for all employees until 2022. In addition, small employers will be hit particularly hard, and thus should be exempted entirely from the increased minimum wage requirement.

In summary, for me to fully agree with a bill, it should:

- Be based on an expeditious study on the direct and indirect financial impacts on private employers, non-profits and County government;
- Include an exemption for small business, the definition of which can be informed by the study;
- Include an exemption for youth workers; and,
- Provide for reaching \$15/hour in 2022.

It is clear that there is broad support in the community and on the Council for an increase in the minimum wage to \$15/hour. The real questions are how quickly we get there and what exemptions should be made. By adopting a revised bill that addresses these issues, I believe we can work toward a broader consensus and a better outcome for Montgomery County residents and businesses.

Code of Federal Regulations

Title 42. Public Health

Chapter IV. Centers for Medicare & Medicaid Services, Department of Health and Human Services (Refs & Annos)

Subchapter C. Medical Assistance Programs

Part 440. Services: General Provisions (Refs & Annos)

Subpart A. Definitions

42 C.F.R. § 440.70

§ 440.70 Home health services.

Effective: July 1, 2016

Currentness

(a) "Home health services" means the services in paragraph (b) of this section that are provided to a beneficiary—

(1) At his place of residence, as specified in paragraph (c) of this section; and

(2) On his or her physician's orders as part of a written plan of care that the physician reviews every 60 days, except as specified in paragraph (b)(3) of this section.

(b) Home health services include the following services and items. Paragraphs (b)(1), (2) and (3) of this section are required services and items that must be covered according to the home health coverage parameters. Services in paragraph (b)(4) of this section are optional. Coverage of home health services cannot be contingent upon the beneficiary needing nursing or therapy services.

(1) Nursing service, as defined in the State Nurse Practice Act, that is provided on a part-time or intermittent basis by a home health agency as defined in paragraph (d) of this section, or if there is no agency in the area, a registered nurse who—

(i) Is currently licensed to practice in the State;

(ii) Receives written orders from the patient's physician;

(iii) Documents the care and services provided; and

(iv) Has had orientation to acceptable clinical and administrative recordkeeping from a health department nurse.

(2) Home health aide service provided by a home health agency,

(3) Medical supplies, equipment, and appliances suitable for use in any setting in which normal life activities take place, as defined at § 440.70(c)(1).

(i) Supplies are health care related items that are consumable or disposable, or cannot withstand repeated use by more than one individual, that are required to address an individual medical disability, illness or injury.

(ii) Equipment and appliances are items that are primarily and customarily used to serve a medical purpose, generally are not useful to an individual in the absence of a disability, illness or injury, can withstand repeated use, and can be reusable or removable. State Medicaid coverage of equipment and appliances is not restricted to the items covered as durable medical equipment in the Medicare program.

(iii) A beneficiary's need for medical supplies, equipment, and appliances must be reviewed by a physician annually.

(iv) Frequency of further physician review of a beneficiary's continuing need for the items is determined on a case-by-case basis, based on the nature of the item prescribed;

(v) States can have a list of preapproved medical equipment supplies and appliances for administrative ease but States are prohibited from having absolute exclusions of coverage on medical equipment, supplies, or appliances. States must have processes and criteria for requesting medical equipment that is made available to individuals to request items not on the State's list. The procedure must use reasonable and specific criteria to assess items for coverage. When denying a request, a State must inform the beneficiary of the right to a fair hearing.

(4) Physical therapy, occupational therapy, or speech pathology and audiology services, provided by a home health agency or by a facility licensed by the State to provide medical rehabilitation services. (See § 441.15 of this subchapter.)

(c) A beneficiary's place of residence, for home health services, does not include a hospital, nursing facility, or intermediate care facility for individuals with intellectual disabilities, except for home health services in an intermediate care facility for Individuals with Intellectual Disabilities that are not required to be provided by the facility under subpart I of part 483. For example, a registered nurse may provide short-term care for a beneficiary in an intermediate care facility for Individuals with Intellectual Disabilities during an acute illness to avoid the beneficiary's transfer to a nursing facility.

(1) Nothing in this section should be read to prohibit a beneficiary from receiving home health services in any setting in which normal life activities take place, other than a hospital, nursing facility; intermediate care facility for individuals with intellectual disabilities; or any setting in which payment is or could be made under Medicaid for inpatient services that include room and board. Home health services cannot be limited to services furnished to beneficiaries who are homebound.

(2) Additional services or service hours may, at the State's option, be authorized to account for medical needs that arise in the settings home health services are provided.

§ 440.70 Home health services., 42 C.F.R. § 440.70

(d) “Home health agency” means a public or private agency or organization, or part of an agency or organization, that meets requirements for participation in Medicare, including the capitalization requirements under § 489.28 of this chapter.

(e) A “facility licensed by the State to provide medical rehabilitation services” means a facility that—

(1) Provides therapy services for the primary purpose of assisting in the rehabilitation of disabled individuals through an integrated program of—

(i) Medical evaluation and services; and

(ii) Psychological, social, or vocational evaluation and services; and

(2) Is operated under competent medical supervision either—

(i) In connection with a hospital; or

(ii) As a facility in which all medical and related health services are prescribed by or under the direction of individuals licensed to practice medicine or surgery in the State.

(f) No payment may be made for services referenced in paragraphs (b)(1) through (4) of this section, unless the physician referenced in paragraph (a)(2) of this section or for medical equipment, the allowed non-physician practitioner, as described in paragraph (f)(3)(ii) through (v), with the exception of certified nurse-midwives, as described in paragraph (f)(3)(iii) documents that there was a face-to-face encounter with the beneficiary that meets the following requirements:

(1) For the initiation of home health services, the face-to-face encounter must be related to the primary reason the beneficiary requires home health services and must occur within the 90 days before or within the 30 days after the start of the services.

(2) For the initiation of medical equipment, the face-to-face encounter must be related to the primary reason the beneficiary requires medical equipment and must occur no more than 6 months prior to the start of services.

(3) The face-to-face encounter may be conducted by one of the following practitioners:

(i) The physician referenced in paragraph (a)(2) of this section;

(ii) A nurse practitioner or clinical nurse specialist, as those terms are defined in section 1861(aa)(5) of the Act, working in collaboration with the physician referenced in paragraph (a) of this section, in accordance with State law;

- (iii) A certified nurse midwife, as defined in section 1861(gg) of the Act, as authorized by State law;
 - (iv) A physician assistant, as defined in section 1861(aa)(5) of the Act, under the supervision of the physician referenced in paragraph (a) of this section; or
 - (v) For beneficiaries admitted to home health immediately after an acute or post-acute stay, the attending acute or post-acute physician.
- (4) The allowed non-physician practitioner, as described in paragraph (f)(3)(ii) through (v) of this section, performing the face-to-face encounter must communicate the clinical findings of that face-to-face encounter to the ordering physician. Those clinical findings must be incorporated into a written or electronic document included in the beneficiary's medical record.
- (5) To assure clinical correlation between the face-to-face encounter and the associated home health services, the physician responsible for ordering the services must:
- (i) Document the face-to-face encounter which is related to the primary reason the patient requires home health services, occurred within the required timeframes prior to the start of home health services.
 - (ii) Must indicate the practitioner who conducted the encounter, and the date of the encounter.
- (6) The face-to-face encounter may occur through telehealth, as implemented by the State.
- (g)(1) No payment may be made for medical equipment, supplies, or appliances referenced in paragraph (b)(3) of this section to the extent that a face-to-face encounter requirement would apply as durable medical equipment (DME) under the Medicare program, unless the physician referenced in paragraph (a)(2) of this section or allowed non-physician practitioner, as described in paragraph (f)(3)(ii) through (v) of this section documents a face-to-face encounter with the beneficiary consistent with the requirements of paragraph (f) of this section except as indicated in paragraph (g)(2) of this section.
- (2) The face-to-face encounter may be performed by any of the practitioners described in paragraph (f)(3) of this section, with the exception of certified nurse-midwives, as described in paragraph (f)(3)(iii) of this section.

Credits

[43 FR 45224, Sept. 29, 1978, as amended at 45 FR 24888, April 11, 1980; 62 FR 47902, Sept. 11, 1997; 62 FR 49726, Sept. 23, 1997; 63 FR 310, Jan. 5, 1998; 81 FR 5566, Feb. 2, 2016]

SOURCE: 43 FR 45224, Sept. 29, 1978; 51 FR 41338, Nov. 14, 1986; 77 FR 29028, May 16, 2012, unless otherwise noted.

AUTHORITY: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

§ 440.70 Home health services., 42 C.F.R. § 440.70

Notes of Decisions (35)

Current through July 6, 2017; 82 FR 31277.

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Code of Federal Regulations

Title 42. Public Health

Chapter IV. Centers for Medicare & Medicaid Services, Department of Health and Human Services (Refs & Annos)

Subchapter C. Medical Assistance Programs

Part 440. Services: General Provisions (Refs & Annos)

Subpart A. Definitions

42 C.F.R. § 440.180

§ 440.180 Home and community-based waiver services.

Effective: March 17, 2014

Currentness

(a) Description and requirements for services. "Home or community-based services" means services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this chapter.

(1) These services may consist of any or all of the services listed in paragraph (b) of this section, as those services are defined by the agency and approved by CMS.

(2) The services must meet the standards specified in § 441.302(a) of this chapter concerning health and welfare assurances.

(3) The services are subject to the limits on FFP described in § 441.310 of this chapter.

(b) Included services. Home or community-based services may include the following services, as they are defined by the agency and approved by CMS:

(1) Case management services.

(2) Homemaker services.

(3) Home health aide services.

(4) Personal care services.

(5) Adult day health services.

(6) Habilitation services.

(7) Respite care services.

(8) Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.

(9) Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization.

(c) Expanded habilitation services, effective October 1, 1997—

(1) General rule. Expanded habilitation services are those services specified in paragraph (c)(2) of this section.

(2) Services included. The agency may include as expanded habilitation services the following services:

(i) Prevocational services, which means services that prepare an individual for paid or unpaid employment and that are not job-task oriented but are, instead, aimed at a generalized result. These services may include, for example, teaching an individual such concepts as compliance, attendance, task completion, problem solving and safety. Prevocational services are distinguishable from noncovered vocational services by the following criteria:

(A) The services are provided to persons who are not expected to be able to join the general work force or participate in a transitional sheltered workshop within one year (excluding supported employment programs).

(B) If the beneficiaries are compensated, they are compensated at less than 50 percent of the minimum wage;

(C) The services include activities which are not primarily directed at teaching specific job skills but at underlying habilitative goals (for example, attention span, motor skills); and

(D) The services are reflected in a plan of care directed to habilitative rather than explicit employment objectives.

(ii) Educational services, which means special education and related services (as defined in sections 602(16) and (17) of the Education of the Handicapped Act) (20 U.S.C. 1401 (16 and 17)) to the extent they are not prohibited under paragraph (c)(3)(i) of this section.

(iii) Supported employment services, which facilitate paid employment, that are—

(A) Provided to persons for whom competitive employment at or above the minimum wage is unlikely and who, because of their disabilities, need intensive ongoing support to perform in a work setting;

(B) Conducted in a variety of settings, particularly worksites in which persons without disabilities are employed; and

(C) Defined as any combination of special supervisory services, training, transportation, and adaptive equipment that the State demonstrates are essential for persons to engage in paid employment and that are not normally required for nondisabled persons engaged in competitive employment.

(3) Services not included. The following services may not be included as habilitation services:

(i) Special education and related services (as defined in sections 602(16) and (17) of the Education of the Handicapped Act) (20 U.S.C. 1401 (16) and (17)) that are otherwise available to the individual through a local educational agency.

(ii) Vocational rehabilitation services that are otherwise available to the individual through a program funded under section 110 of the Rehabilitation Act of 1973 (29 U.S.C. 730).

(d) Services for the chronically mentally ill—

(1) Services included. Services listed in paragraph (b)(8) of this section include those provided to individuals who have been diagnosed as being chronically mentally ill, for which the agency has requested approval as part of either a new waiver request or a renewal and which have been approved by CMS on or after October 21, 1986.

(2) Services not included. Any home and community-based service, including those indicated in paragraph (b)(8) of this section, may not be included in home and community-based service waivers for the following individuals:

(i) For individuals aged 22 through 64 who, absent the waiver, would be institutionalized in an institution for mental diseases (IMD); and, therefore, subject to the limitation on IMDs specified in § 435.1009(a)(2) of this chapter.

(ii) For individuals, not meeting the age requirements described in paragraph (d)(2)(i) of this section, who, absent the waiver, would be placed in an IMD in those States that have not opted to include the benefits defined in § 440.140 or § 440.160.

Credits

[46 FR 48540, Oct. 1, 1981; 50 FR 10026, March 13, 1985; 59 FR 37716, July 25, 1994; 65 FR 60107, Oct. 10, 2000; 71 FR 39229, July 12, 2006; 72 FR 38690, July 13, 2007; 79 FR 3029, Jan. 16, 2014]

SOURCE: 43 FR 45224, Sept. 29, 1978; 51 FR 41338, Nov. 14, 1986; 77 FR 29028, May 16, 2012, unless otherwise noted.

AUTHORITY: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Notes of Decisions (19)

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