



DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



JUN 03 2014

TO: All Medicaid Fraud Control Unit Directors

/S/

FROM: Brian P. Ritchie
Acting Deputy Inspector General
for Evaluation and Inspections

SUBJECT: State Fraud Policy Transmittal No. 2014-1
Employment and Reimbursement of Full- and Part-Time Staff and Performance
of Non-MFCU Duties

This transmittal supersedes Policy Transmittal 89-1 (January 13, 1989), regarding the employment of full-time and part-time employees by Medicaid Fraud Control Units (MFCUs or Units), and clarifies the policy of the Office of Inspector General (OIG) regarding the Federal Financial Participation (FFP) eligibility of costs associated with part-time staff. The transmittal also addresses the outside employment of professional employees, the temporary assignment of professional employees to perform non-MFCU duties, and the employment of part-time administrative and support staff.

Overview

As set out below, a MFCU may claim FFP for professional employees who work less than a traditional full-time workweek, as defined by the MFCU's State, as long as (1) the Unit maintains a core of qualified individuals; (2) the part-time employees work exclusively on MFCU matters while on duty, and (3) the Unit ensures that the outside employment, if any, of the MFCU part-time staff presents no conflict with the Unit's mission or operations. A MFCU may also direct professional staff to perform temporary urgent non-MFCU State government duties, if specifically approved by the Unit. If an employee is approved to perform non-MFCU duties, the Unit may not charge the wages and other expenses associated with those activities to the grant. A MFCU is not expected to seek approval from OIG when the MFCU assigns staff to work on non-MFCU duties on a temporary basis, although OIG provides criteria for the MFCU to consider when making such assignments.

Finally, this transmittal—like the 1989 policy—describes requirements for MFCU part-time administrative and support staff. A MFCU is not required to ensure that these staff members work exclusively on MFCU matters, but the parent agency is permitted to allocate such staff time

and effort between MFCU and non-MFCU duties, as long as the MFCU grant is charged only for MFCU-related work and no ethical conflict is presented by the work.

Background

Section 1903(q) of the Social Security Act (Act) establishes the requirements that a Unit must meet to be certified and eligible to receive FFP. Among other requirements, Units must employ “such auditors, attorneys, investigators, and other necessary personnel . . . as is necessary to promote the effective and efficient conduct of the entity’s activities.”¹ The Federal regulation implementing this requirement, found at 42 CFR § 1007.13, states that Units must employ at least one experienced attorney, at least one experienced auditor, and an experienced senior investigator capable of supervising and directing the investigative activities of the Unit. For the purposes of this transmittal, we refer to auditors, attorneys, and investigators as “professional staff.” The wording at 42 CFR § 1007.13(a) requires only a minimum number of professional staff for certification purposes; however, it is not intended to suggest that Units that are budgeted for substantial investigational capacities may maintain merely the minimum number of staff. The regulation also states that a Unit must employ professional staff who are knowledgeable about the Medicaid program and health care providers. OIG evaluates professional staffing levels in accordance with Performance Standard 2 at 77 Fed. Reg. 32645–32646 (June 1, 2012).

The regulation at 42 CFR § 1007.1 defines “employ or employee” to mean “full-time duty intended to last at least a year. . . .” Under 42 CFR § 1007.19(e)(4), FFP is not available for expenditures attributable to “[t]he performance by a person other than a full-time employee of the unit of any management function for the unit, any audit or investigation, any professional legal function, or any criminal, civil, or administrative prosecution of suspected providers. . . .” OIG has referred to these regulations collectively as the “full-time rule.”

In the preamble to the regulations that are currently codified at 42 CFR part 1007, the Department of Health and Human Services explained that the purpose of requiring the Units to have full-time professional employees “is to prohibit both the contracting out of vital functions and the use of employees whose responsibilities are split between two agencies.”²

In Policy Transmittal 89-1, OIG interpreted the full-time rule to require that MFCU professional employees “(1) work exclusively on MFC[U] matters and (2) work under the supervision and direction of the Unit.” Therefore, the policy permitting part-time employment of professional staff, as described in this transmittal, is consistent with our longstanding written policy that focuses on the need for MFCU employees to devote themselves exclusively to MFCU activities.

OIG continues to be concerned about the sharing of professional duties between the MFCU and their parent and other agencies, as well as the potential compromise—real or perceived—of the Unit’s independence that may occur if MFCU professionals divide their time between MFCU activities and other missions of the State.

¹ Section 1903(q)(6) of the Act.

² 43 Fed. Reg. 32078 (July 24, 1978).

OIG further understands that professional employees who work less than a traditional full-time workweek are unlikely to present such concerns for a MFCU. For example, professional staff may have a part-time work schedule to accommodate family care needs or may have outside employment with a private company that presents no conflict with their MFCU duties. Such arrangements to meet work-life balance needs can be addressed under State employment rules and through each Unit's policy.

When MFCU professional employees are directed to perform non-MFCU governmental duties, it raises different concerns, including concerns that MFCU grant funds may be improperly spent on non-MFCU activities. However, OIG recognizes that MFCU professional employees' skills may be needed to conduct non-MFCU activities on a temporary basis to aid in situations such as a Statewide emergency.

OIG Clarification of the "Full-Time Rule" for Professional Employees

OIG interprets the MFCU "full-time rule" to require that professional employees work exclusively on MFCU activities for their salaries to be eligible for FFP under the grant. MFCUs may choose to employ professional staff on a part-time basis, and section A below describes those conditions that apply when they do so.

Section B below describes the conditions that apply to permitting a professional employee—either part-time or full-time—to accept employment outside the MFCUs.

Finally, section C below addresses concerns that apply if the MFCU chooses to allow professional staff to engage in temporary non-MFCU assignments.

A. Part-time employment of MFCU professional staff

A MFCU may permit a MFCU professional employee to work part-time. Employment of MFCU professional staff on a part-time basis is subject to the following:

- (1) The part-time employee devotes himself or herself exclusively to MFCU duties during his/her on-duty hours;
- (2) FFP is claimed only for the hours that the part-time employee is on duty for the Unit;
- (3) The Unit employs sufficient staff from each of the three required professions (attorney, auditor, and investigator) to ensure that, at a minimum, the Unit employs a full-time equivalent devoted to each of these professions—for example, two attorneys who each work 20 hours a week; and
- (4) The part-time status of any employee will be reported to OIG through the budget approval process.

Finally, you should be mindful of the certification requirement that a MFCU "employ sufficient professional, administrative, and support staff to carry out its duties and responsibilities in an

effective and efficient manner.”³ Unit management must evaluate whether employing all or some professional staff on a part-time schedule undermines the Unit’s ability to have a core of employees who operate in an effective and efficient manner.

B. Outside employment of MFCU professional staff

A MFCU may permit an employee to maintain separate employment outside of State government if State law allows it and if MFCU management ensures that no conflict of interest is presented by the outside employment. The Unit should follow its State’s process to ensure that any proposed outside employment is in accordance with applicable professional standards and State ethics rules or policies. In the absence of a State process, the MFCU should develop its own process to avoid conflicts of interest between a professional employee’s outside employment and the work of the MFCU.

C. Temporary non-MFCU duty assignments performed by MFCU professional staff

The MFCU may permit professional employees to engage in temporary, non-MFCU duty assignments without violating the “full-time rule.” These temporary, non-MFCU assignments are not eligible for FFP and must be funded solely by the State.

If a MFCU permits temporary, non-MFCU duty assignments, the Unit must document and maintain records of all hours devoted to the assignment and ensure that the hours are excluded from the MFCU’s financial status reports for purposes of receiving FFP. These records must be made available to OIG upon request.

The MFCU must also ensure that the non-MFCU duties are truly temporary and are a limited part of the employee’s activities. If OIG determines that the non-MFCU assignments of an employee have become his or her primary duties over the course of the fiscal reporting period, the full salary and associated costs of the employee could be subject to disallowance on the basis that the employee no longer works exclusively for the MFCU.

To ensure that the temporary, non-MFCU assignments do not pose a conflict with the employee’s MFCU responsibilities, the following are a set of factors that a Unit should consider in deciding whether to allow a professional employee to perform temporary non-MFCU duties:

- (1) Is the assignment of a limited and defined duration?
- (2) Does the assignment pose any conflict with MFCU operations?
- (3) Are the skills and expertise of the employee necessary for the assignment?

The following four examples describe temporary, non-MFCU duties that are permitted under this policy transmittal but are ineligible for FFP.

Example 1. A governor declares a state of emergency after a natural disaster, and all State law enforcement personnel—including MFCU investigators—are ordered to deploy for a limited

³ 42 CFR § 1007.13(a).

number of days. MFCU staff are deployed for a 3-day period to secure the safety of nursing home residents in the State. *In this case, the MFCU may support the deployment because (1) the activity will last for a limited amount of time, (2) the activity presents no conflict with MFCU operations, and (3) the investigators' knowledge of law enforcement and health care will be used.*

Example 2. The Office of the Attorney General (AG), parent agency of the MFCU, is conducting a consumer protection initiative to test whether a business is engaging in deceitful conduct and needs a large number of AG employees to visit those businesses across the state. MFCU investigators are asked to participate and visit the target businesses on 4 separate dates. *In this case, the MFCU may participate in the initiative because (1) the initiative is limited to 4 specific dates, (2) the activity presents no conflict, and (3) the visits require law enforcement or regulatory expertise.*

Example 3. An attorney from the parent agency is transferred to the MFCU. Her former bureau, rather than reassign a litigation matter that she has been involved in since the matter's inception, requests that she continue to handle it. *In this case, the attorney's skills and expertise in the litigation are obvious. The attorney may participate as long as MFCU management confirms that the litigation will be of limited duration and that no conflict is presented.*

Example 4. An attorney conducts pro bono work that is short-term and not related to the mission of the MFCU as part of a State bar association program. *The attorney may conduct the pro bono work because (1) the work is limited in duration and (2) no conflict is presented.*

The following example describes a temporary, non-MFCU assignment that OIG would consider a violation of this policy transmittal:

Example 5. Because it is short-staffed, the MFCU's parent agency requests that an investigator be reassigned to another agency bureau for several weeks to conduct one or more nonemergency investigations. Once the assignment is completed, the investigator is expected to continue to support any criminal or civil prosecution through testimony, witness preparation, or other followup work. *Such a reassignment, leading to future non-MFCU duties, would constitute a violation of the policy. The assignment, although not presenting a conflict with MFCU operations, is of extended duration and does not rely on the expertise and skills of the investigator.*

Part-Time Nonprofessional Staff

Staff not defined by the regulation as professional, including but not limited to, secretaries, data analysts, interns, and paralegals, are not subject to the Full-Time Rule and thus may be assigned to non-MFCU duties in the parent agency or other State agency without the same set of considerations described above for professional staff. OIG no longer requires Units to obtain written OIG permission for these types of arrangements.

However, as with professional staff, administrative and support staff should avoid other assignments and outside employment that could pose a conflict of interest with the work of the MFCU. For example, it would not be appropriate for a Unit's part-time data analyst to also be

assigned to the single State agency and be involved in reviewing data necessary for determining whether to make a referral to the MFCU. The Unit must have a process to avoid any ethical or other conflicts of interest for administrative or other support staff, similar to the process for avoiding ethical or other conflicts by professional staff. As is the case for costs associated with professional staff, the costs associated with administrative and other support staff in violation of this rule could be subject to disallowance.

To ensure that FFP is not charged for personnel costs related to non-MFCU support duties, the MFCU must maintain strict time distribution records that will be made available to OIG upon request. A failure to maintain such records could result in the disallowance of the employee's complete salary and associated costs. See 2 CFR part 225, App. B, section 8(h)(4).

This transmittal is effective on the date of issuance. If you have any questions, please contact Richard Stern, Director, Medicaid Fraud Policy and Oversight Division. He may be reached at (202) 619-0480.