Family Members as Caregivers

Saturday, May 11, 2019

Pro Bono and Tax Clinics Committee
ABA Section of Taxation May Meeting
Presenters

- Victoria J. Driscoll  IRS Office of Chief Counsel
  Income Tax & Accounting

- Christine Speidel  Villanova University
  Charles Widger School of Law, Federal Tax Clinic

- Wayne Turner  National Health Law Program

- Camille Edwards  IRS Office of Chief Counsel
  Bennehoff  Income Tax & Accounting
Why this topic?

• Individuals with disabilities and their families navigate tricky intersections
  – Federal, state, and county programs with varying eligibility rules and administrative structures
  – Tax uncertainties
  – Benefits administration constraints
  – Tax administration constraints

• Complex policy implications
SECTION 131 & DIFFICULTY OF CARE BASICS
IRC § 131 Exclusion from Gross Income

• Qualified Foster Care Payments
  – Made pursuant to a foster care program of a State or its political subdivision;
  – Paid by a state, political subdivision, or qualified foster care placement agency; and
    • Paid to a foster care provider caring for a qualified foster care individual in the foster care provider's home; or
    • A difficulty of care payment
What is a Difficulty of Care payment?

• Compensation for additional care required because of “a physical, mental, or emotional handicap” of the service recipient

• Designated as such by the payor

• Care provided in the home of the foster care provider

• Service recipient has been “placed” in the home
  – by an agency of a State or its political subdivision
  – or by a qualified foster care placement agency
MEDICAID, MEDICAID WAIVERS, AND STATE PROGRAMS FOR IN-HOME CARE
Basic Features of Medicaid

- Federal-state partnership with many state options
- Mandatory coverage groups and optional coverage groups
- Mandatory services and optional services
- Medicaid state plans v. Medicaid waivers

- Bottom line: there are 51 different Medicaid programs in the United States, and each one can include multiple programs
Development of State Programs for In-Home Care

• Medicaid & Social Services Block Grants (Social Security Act, Titles XIX and XX)
• 1981 HCBS Medicaid Waiver option
• 1990s
  – Pilot projects & Medicaid options for self-directed care
• 2010 Affordable Care Act
  – Amended State Medicaid plan HCBS options
Home & Community Based Services

• HCBS options under the Social Security Act:
  – 1915(c) Home and Community-Based Waivers
  – 1915(i) State Plan Home and Community-Based Services
  – 1915(j) Self-Directed Personal Assistance Services Under State Plan
  – 1915(k) Community First Choice

• 47 states and Washington, D.C. are operating at least one 1915(c) waiver
Figure 1

State policy choices about Medicaid HCBS program authorities, FY 2017.

Number of states covering benefit:

- **Mandatory**
- **Optional**

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<th>State plan services</th>
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**NOTE:** *Includes states with Section 1115 HCBS waivers without any accompanying Section 1915 (c) waivers.

**SOURCE:** Kaiser Family Foundation Medicaid HCBS Program Surveys, FY 2017.
Family caregiving: generally independent home care

- **Personal care**
  - Activities of daily living, without which employment and community living are impossible
    - Non-medical services
    - Bathing, food preparation, eating, laundry, dressing

- **Delivered at home**
EVOLUTION OF “DIFFICULTY OF CARE” UNDER SECTION 131
Background and Context of Notice 2014-7

• *Bannon v. Comm’r*, 99 T.C. 59 (1992)
• PMTA 2010-007
2014 Difficulty of Care Guidance

• IRS Notice 2014-7
  • Payments made under SSA § 1915(c) HCBS Medicaid Waiver programs can be difficulty of care payments under Section 131
  • Payments must be made by state to "individual care provider for nonmedical support services provided under a plan of care to an eligible individual (whether related or unrelated) living in the individual care provider’s home."

- IRS website FAQ
  www.irs.gov/individuals/certain-medicaid-waiver-payments-may-be-excludable-from-income

- Disabled person and caregiver must live in the same home

- Notes worker classification and employment tax issues
PLRs applying Notice 2014-7

• Only two states have requested private letter rulings applying Notice 2014-7’s reasoning to non-1915(c) programs

• PLR-127776-15 (3/1/16)
• PLR-131836-15 (3/11/16)
THE ACA’S IMPACT ON CAREGIVERS
Federal Poverty Level %
Coverage – Full ACA Implementation

Insurance coverage after ACA, fully implemented

Who is in the Medicaid Expansion?
Federal Poverty Level % Coverage without the Medicaid Expansion

Insurance Coverage under the ACA...
Medicaid Expansion: Key Unheralded Facts

• Medicaid expansion provides coverage & key supports for millions of people with disabilities.
• Medicaid expansion covers parents & caretakers who previously fell through the coverage gaps.
• Many family member and direct care workers who support people with disabilities depend on Medicaid expansion for their own coverage.
• Most enrollees in the Medicaid expansion are working or have a working spouse.
• Expansion coverage helps people find work and continue working.
A TALE OF FIFTY-ONE STATES*
Uncertainties and administrative complications

• Does the benefit program qualify?
  – Medicaid waiver programs not under SSA § 1915(c); non-waiver Medicaid programs; and solely state funded programs

• Which payments qualify?
  – Identifying difficulty of care payments within the overall plan of care
Administrative complications (cont.)

• Financial Management Services entities

• Some states and some FMS entities ignore sec. 131 and treat all caregiver income as taxable

• Workaround for incorrect W-2s: Difficulty of Care FAQ Question 11
State examples
Why does this matter?

- Caregiver access to health insurance
- Family resources available for unfunded care
- Incentives/disincentives for community care
- Dignity, agency, and autonomy
Policy considerations

• Who should bear responsibility for tax compliance in this context?

• Divergent interests of caregivers
  – Non-Medicaid-expansion states have a health insurance coverage gap
  – Refundable credits require earned income

• How can the tax system support innovations in health care and community living?