

## **\*\*\*Post Clearance Revisions - August 5, 2022\*\*\***

### **5123-9-05 Home and community-based services waivers - retention payments for direct support professionals.**

#### **(A) Purpose**

This rule establishes requirements and processes for retention payments to benefit direct support professionals providing specific home and community-based services.

#### **(B) Definitions**

For the purposes of this rule, the following definitions apply:

- (1) "Adult day support" has the same meaning as in rule 5123-9-17 of the Administrative Code.
- (2) "Agency provider" has the same meaning as in rule 5123-2-08 of the Administrative Code.
- (3) "Career planning" has the same meaning as in rule 5123-9-13 of the Administrative Code.
- (4) "Department" means the Ohio department of developmental disabilities.
- (5) "Direct support professional" means:
  - (a) An independent provider;
  - (b) A person who is employed by an agency provider or a residential facility in a "direct services position," as that term is defined in section 5123.081 of the Revised Code, regardless of the person's job title, and who is engaged in provision or supervision of direct support for at least fifty per cent of the hours the person worked for the employing agency provider or residential facility ~~in~~ the applicable quarter during the quarter used by the department for determination of the amount of a retention payment; or
  - (c) A person who is under contract with an agency provider to provide shared living.
- (6) "Good standing" means a provider is not the subject of an action initiated by the department to deny, suspend, or revoke the provider's certification or license.
- (7) "Group employment support" has the same meaning as in rule 5123-9-16 of the Administrative Code.
- (8) "Home and community-based services" has the same meaning as in section 5123.01 of the Revised Code.
- (9) "Homemaker/personal care" has the same meaning as in rule 5123-9-30 of the Administrative Code and includes on-site/on-call homemaker/personal care provided in accordance with that rule.

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- (10) "Homemaker/personal care daily billing unit" has the same meaning as in rule 5123-9-31 of the Administrative Code.
- (11) "Independent provider" has the same meaning as in rule 5123-2-09 of the Administrative Code.
- (12) "Individual employment support" has the same meaning as in rule 5123-9-15 of the Administrative Code.
- (13) "Intermediate care facility for individuals with intellectual disabilities" has the same meaning as in section 5124.01 of the Revised Code.
- (14) "Non-medical transportation" has the same meaning as in rule 5123-9-18 of the Administrative Code.
- (15) "Participant-directed homemaker/personal care" has the same meaning as in rule 5123-9-32 of the Administrative Code.
- (16) "Provider" means an independent provider, an agency provider, or a residential facility that provides one or more of the home and community-based services listed in paragraphs (B)(19)(a) to (B)(19)(k) of this rule.
- (17) "Quarter" means one of four three-month spans of each calendar year, that is:
  - (a) January first through March thirty-first;
  - (b) April first through June thirtieth;
  - (c) July first through September thirtieth; or
  - (d) October first through December thirty-first.
- (18) "Residential facility" means a residential facility licensed by the department pursuant to section 5123.19 of the Revised Code, other than an intermediate care facility for individuals with intellectual disabilities.
- (19) "Retention payment" means a payment intended to directly benefit direct support professionals which the department may issue on a quarterly basis to a an eligible provider in an amount determined by the department based on a percentage of the provider's reimbursed claims during the preceding quarter for provision of:
  - (a) Adult day support;
  - (b) Career planning;
  - (c) Group employment support;
  - (d) Homemaker/personal care;
  - (e) Homemaker/personal care daily billing unit;

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- (f) Individual employment support;
  - (g) Non-medical transportation;
  - (h) Participant-directed homemaker/personal care;
  - (i) Shared living;
  - (j) Transportation; and
  - (k) Vocational habilitation.
- (20) "Shared living" has the same meaning as in rule 5123-9-33 of the Administrative Code.
- (21) "Transportation" has the same meaning as in rule 5123-9-24 of the Administrative Code.
- (22) "Vocational habilitation" has the same meaning as in rule 5123-9-14 of the Administrative Code.
- (C) Eligibility for retention payment - providers
- (1) An independent provider ~~in good standing~~ that has been reimbursed for provision of one or more of the home and community-based services listed in paragraphs (B)(19)(a) to (B)(19)(k) of this rule during the ~~applicable~~ quarter used by the department for determination of the amount of the retention payment and that is in good standing at the time the department issues the retention payment, is eligible and will receive a retention payment ~~for that quarter~~. The independent provider need not take any action to participate in the retention payment program; the department will issue retention payments to eligible independent providers in accordance with paragraph (F)(1) of this rule.
  - (2) An agency provider or residential facility ~~in good standing~~ that has been reimbursed for provision of one or more of the home and community-based services listed in paragraphs (B)(19)(a) to (B)(19)(k) of this rule during the ~~applicable~~ quarter used by the department for determination of the amount of the retention payment and that is in good standing at the time the department issues the retention payment, is eligible to receive a retention payment ~~for that quarter~~ when the agency provider or residential facility:
    - (a) Opts to participate in the retention payment program by affirming, via the department's web-based portal for the retention payment program, on or before the fifteenth day of the first month of the quarter ~~for which it will begin to participate~~ following the quarter used by the department for determination of the amount of the retention payment, its intent to participate and assurance that it will comply with this rule;
    - (b) Disburses to each of its eligible direct support professionals, ~~on or before the~~

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~~fifteenth day of the third month of the quarter, a portion~~ the direct support professional's share of the retention payment issued by the department, as calculated by one of the methods described in paragraph (F)(3) in accordance with paragraph (F) of this rule; and

- (c) Submits, via the department's web-based portal for the retention payment program, on or before the fifteenth day of the first month of the quarter following the quarter in which the department issued the retention payment:
  - (i) Information requested by the department regarding the retention payment program including, but not limited to:
    - (a) Disbursement of the retention payment to its direct support professionals; and
    - (b) Any portion of a retention payment used to cover costs associated with implementation or administration of the retention payment program and therefore not disbursed directly to its direct support professionals.
  - (ii) An attestation that the retention payment was used and disbursed to direct support professionals in accordance with this rule.
- (D) Eligibility for retention payment - direct support professionals engaged by agency providers and residential facilities
  - (1) A direct support professional engaged by an agency provider or a residential facility is eligible to receive a retention payment when the direct support professional:
    - (a) Provided or supervised provision of direct support while employed by the agency provider or residential facility or was under contract to provide shared living during the ~~applicable~~ quarter used by the department for determination of the amount of the retention payment; and
    - (b) Is employed by the agency provider or residential facility or under contract to provide shared living on the day the agency provider or residential facility disburses the retention payment to its direct support professionals.
  - (2) Owners and management staff of agency providers and residential facilities (e.g., directors of operations, administrators, or operators) are not eligible to receive a retention payment unless they meet the definition of "direct support professional" in paragraph (B)(5) of this rule and the criteria set forth in paragraph (D)(1) of this rule.
  - (3) A direct support professional who has separated from employment with the agency provider or residential facility or is no longer under contract to provide shared living is not eligible to receive a retention payment.
- (E) Use of retention payments

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- ~~(1) At least eighty-two per cent of a retention payment made to an agency provider or residential facility is to be directly disbursed to its eligible direct support professionals in accordance with one of the methods described in paragraph (F)(3) of this rule.~~
- (1) An agency provider or residential facility is to disburse a retention payment to its eligible direct support professionals in accordance with one of the methods described in paragraph (F)(3) of this rule. At least eighty-two per cent of the retention payment is to be disbursed to direct support professionals or used to cover the employer's share of the associated payroll taxes.
- (2) An agency provider or residential facility may use up to eighteen per cent of a retention payment for costs associated with implementation or administration of the retention payment program, additional employee compensation, or other activities that benefit its direct support professionals and/or improve service delivery.
- (3) An agency provider or residential facility will not use a retention payment to fund programs or incentives the agency provider or residential facility had in place prior to the effective date of this rule unless:
- (a) ~~The programs or incentives meet the criteria described in paragraph (E)(2) of this rule; and~~
- (b) ~~The retention payment program funds are used to increase, not replace, the funding available for the programs or incentives prior to the effective date of this rule~~ ceases to be available.
- (4) An agency provider or residential facility is to maintain records sufficient to demonstrate compliance with this rule for a period of six years from the date of receipt of a retention payment or until an initiated audit is resolved, whichever is longer.
- (F) Disbursement of retention payments to direct support professionals
- (1) ~~The department will issue retention payments to eligible independent providers and eligible agency providers and residential facilities that have opted to participate in the retention payment program; providers~~ via electronic funds transfer on or before the fifteenth day of the second month of the quarter following the quarter used by the department for determination of the amount of the retention payment.
- (2) An agency provider or residential facility will disburse ~~a portion of the retention payment~~ to each eligible direct support professional, on or before the fifteenth day of the third month of the quarter following the quarter used by the department for determination of the amount of the retention payment, the direct support professional's share of the retention payment.
- (3) An agency provider or residential facility is to choose from two methods for determining ~~the portion of the retention payment to be disbursed to~~ each direct support ~~professional~~ professional's share of the retention payment:

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- (a) Each eligible direct support professional receives the same percentage adjustment of total wages, including standard pay and overtime pay, or compensation for the quarter (total amount of retention payment / total wages or compensation = percentage adjustment disbursed to each eligible direct support professional); or
- (b) Each eligible direct support professional receives the same dollar amount (total amount of retention payment / number of eligible direct support professionals = amount disbursed to each eligible direct support professional).

### **(G) Recoupment of a retention payment**

- (1) If the department determines that a provider received a retention payment for which it was not eligible or otherwise failed to comply with ~~the provisions of~~ this rule, the department may initiate recoupment. When such a determination is made, the department will notify the provider by certified mail, return receipt requested. The notice will explain the amount due and the basis for the recoupment and inform the provider of the provider's right to request a hearing on the proposed recoupment pursuant to Chapter 119. of the Revised Code. The provider will have thirty ~~calendar~~ days from the date the notice is mailed to request a hearing which, if timely requested, will be held in accordance with Chapter 119. of the Revised Code.
- (2) When a provider does not request a hearing in accordance with paragraph (G)(1) of this rule, the amount of the recoupment is due and payable within thirty ~~calendar~~ days of the provider's receipt of the notice.
- (3) At the department's discretion, a provider may make repayment:
  - (a) In a lump sum payment to the department; or
  - (b) In a single deduction from the provider's next scheduled medicaid payment as long as the deduction will equal the total amount due to the department.
- (4) The department may charge interest on the amount of the recoupment beginning on, as applicable:
  - (a) The date the recoupment is due and payable in accordance with paragraph (G)(2) of this rule; or
  - (b) The thirtieth ~~calendar~~ day following an adjudication issued by the director of the department ordering recoupment of the retention payment.
- (5) A provider that has been subject to recoupment may be ineligible to receive future retention payments.

### **(H) Waiving provisions of this rule**

For good cause, the director of the department may waive a condition or specific requirement of this rule. The director's decision to waive a condition or specific requirement is not subject to appeal.