

A background image showing two people's hands at a wooden table. One person's hands are clasped, while the other's hand holds a pen over a document, suggesting a signing or agreement process.

The *Dunkelberger Decision* and ODP Guidance- What You Should Know

Background

The Office of Developmental Programs (ODP) issued [new guidance](#) after the *Dunkelberger v. DHS* court decision. The guidance is about the “40/60 rule” limiting paid family caregiving, overtime, travel, and updated Common Law Employer and Managing Employer agreements.

Participant-Directed Service Models

There are two participant-directed service models:

- Vendor Fiscal/Employer Agent model: This model uses a Common Law Employer.
- Agency With Choice model: This model uses a Managing Employer and an Agency With Choice provider.

ODP says updated Common Law Employer and Managing Employer agreements must be signed and submitted to continue using participant-directed services.

What is the 40/60 rule?

Prior ODP policy guidance – now embodied in ODP’s guidance – states that in participant-directed services:

- one Support Service Professional (SSP) (including a family member) generally may not work more than 40 hours per week;
- when more than one relative, legal guardian, or legally responsible person provides In-Home and Community Support, Companion, or both, the total generally may not be more than 60 hours per week;
- limited temporary exceptions may apply for certain unexpected staffing problems;
- those exceptions may apply for up to 13 weeks per fiscal year;
- the ISP team should meet to ensure coverage and staffing to support the participant.

What is the travel rule?

The updated ODP guidance and agreements state that participant-directed waiver services may be provided in Pennsylvania and states that border Pennsylvania (called contiguous states), which are: New York, New Jersey, Delaware, Maryland, West Virginia, and Ohio.

ODP’s policy provides that participant-directed waiver services may not be provided in non-contiguous states under the updated agreements, even though the current Waiver applications allow a few services to be temporarily provided in non-contiguous states.

ODP’s new policy does not prohibit travel by participants to non-contiguous states, but bars payment for Medicaid waiver-funded participant-directed services when the participant is traveling to non-contiguous states.

ODP has described the current travel restriction as interim (temporary) while future waiver and regulation changes are developed and approved. ODP guidance states that there is currently no maximum number of days for travel within Pennsylvania or contiguous states, as long as other waiver requirements are met.

Travel and the Individual Support Plan

Individual Support Plan (ISP) team discussion is not required before every routine trip, day outing, or travel that is part of the person's normal activities and supports.

The ISP team should discuss travel when the travel:

- is a significant distance from the person's primary residence or community;
- is for an extended period; or
- could affect health, safety, supervision, or service delivery.

A person may ask the Supports Coordinator and ISP team to document:

- where the person travels or needs to travel and for how many days;
- why the travel is important and whether it is a part of the individuals routine;
- what support is needed;
- what health and safety safeguards are needed;
- whether services were provided during similar travel before;
- what would happen if support is not available;
- whether alternatives were discussed.

Signing the Updated Agreements

ODP guidance states that the updated Common Law Employer or Managing Employer agreement is required to continue using participant-directed services.

The ODP guidance states if the participant does not return the updated agreement, it will institute a corrective action process before termination of the employer role.

The corrective action process includes:

- a notice of noncompliance giving 7 calendar days to return the agreement;
- a second notice giving 30 calendar days;
- a final notice giving another 30 calendar days;
- possible suspension of payroll or participant-directed service processing;
- possible involuntary termination of the Common Law Employer or Managing Employer role.



After termination of the employer role, ODP guidance states that the person has 30 days to identify a new Common Law Employer or Managing Employer, move to Agency With Choice if applicable, or transition to a traditional provider-managed model. The participant should not lose services or Medicaid eligibility.

Appeals and Written Notice

You may have appeal rights if your waiver services are denied, reduced, suspended, changed, or terminated. ODP guidance states that involuntary termination of the Common Law Employer or Managing Employer role is not subject to appeal. If that termination causes a real service loss or service disruption, ask for the decision in writing and ask what appeal or grievance rights apply.

If a person receives a written denial, reduction, suspension, or termination of waiver services, the person may ask whether the notice includes appeal rights and what deadlines apply.

The Common Law Employer and Managing Employer Agreements state that termination of the Agreements is not appealable. This is likely because Medicaid rules generally only provide the opportunity to appeal when eligibility, services, or benefits are denied, reduced, suspended, or terminated and ODP does not consider the termination of one of these Agreements to be a denial, reduction, suspension, or termination of eligibility or services/benefits because the client remains entitled to receive the services and benefits identified in their Individual Supports Plan but not to receive them through the participant-directed model.

If the termination of the Common Law Employer or Managing Employer Agreement results in interruption of services that perhaps could be viewed as a denial, reduction, suspension, or termination, then the participant might want to file a request for a fair hearing with the Department of Human Service's Bureau of Hearings and Appeals. The form can be found at:

<https://www.pa.gov/content/dam/copapwp-pagov/en/dhs/documents/docs/publications/documents/forms-and-pubs-odp/00-26-01-attachment-dp-0458-uf.pdf>.

The participant can also try to file a complaint with ODP if they believe that the termination was inappropriate (for instance if it was based on erroneous facts). The complaint can be filed by contacting ODP's Customer Service Line at 1-888-565-9435 or emailing RA-odpcontactdpw@pa.gov.



Stay Connected

If you need more information or need help, please contact Disability Rights Pennsylvania (DRP) at 800-692-7443 (voice) or 877-375-7139 (TDD). Our email address is: intake@disabilityrightspa.org.

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