



TO: Office of Community Living Stakeholders

FROM: Lori Thompson, Assistant Director, Program Services

DATE: March 9, 2016

SUBJECT: Communication Brief – Internal Revenue Services (IRS) Difficulty of Care Payments Bulletin and Shared Living Guidance

Purpose:

To provide information regarding Internal Revenue Bulletin 2014-4, Notice 2014-7 (Jan. 21, 2014) as it relates to Host Homes and other shared living settings, and to rescind the Memorandum that was issued by the Department of Human Services, Division for Developmental Disabilities on July 12, 2002.

Background:

Under Section 131 of the Internal Revenue Code, gross income for purposes of the federal income tax “shall not include amounts received by a foster care provider . . . as qualified foster care payments.” 26 U.S.C. § 131(a). A qualified foster care payment is one that is “made pursuant to a foster care program of a State or political subdivision”; is paid by a State, political subdivision, or qualified foster care placement agency; and is (a) a difficulty of care payment OR (b) paid to the foster care provider for caring for a qualified foster individual (*i.e.*, an individual who has been placed by a State, political subdivision, or qualified foster care placement agency) in the foster care provider’s home. *Id.* § 131(b).

Difficulty of care payments are compensation for providing additional care to a qualified foster individual which is “required by reason of a physical, mental, or emotional handicap of such individual,” where the care is “provided in the home of the foster care provider,” and the payments are designated by the payer as difficulty of care payments. *Id.* § 131(c).



Invoking Section 131, parents and other family members of disabled individuals have sometimes sought to exclude from their taxable income the Home and Community Based Services (HCBS) waiver payments that they received for providing in-home care to their relatives. The IRS historically challenged these efforts.

Information:

IRS Bulletin 2014-4

The IRS changed course in Internal Revenue Bulletin 2014-4, Notice 2014-7 (Jan. 21, 2014). In this Bulletin, the IRS announced that it “will treat qualified Medicaid waiver payments as difficulty of care payments . . . that are excludable under § 131, and [that] this treatment will apply whether the care provider is related or unrelated to the eligible individual.” For this purpose, qualified Medicaid waiver payments are payments made by a state, political subdivision, or certified Medicaid provider “under a Medicaid waiver program to an 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.” *Id.*

In support of its new policy, the IRS reasoned that “Medicaid waiver programs and state foster care programs . . . share similar oversight and purposes,” including the prevention of the institutionalization of individuals; that “both difficulty of care payments and Medicaid waiver payments compensate for the additional care required” for the individuals receiving care; that a home where both a Medicaid provider and an eligible individual receiving care under a Medicaid waiver program reside qualifies as a “foster family home”; and that such an individual is effectively “placed” by the state, political subdivision, or agency in the provider’s home.

Guidance for shared living arrangements

The Department considers HCBS waiver payments made to individual direct service providers for providing nonmedical care in their own homes to individuals who are eligible and enrolled in waivers as qualified Medicaid waiver payments and as difficulty of care payments under Section 131 of the Internal Revenue Code. As contemplated by the IRS Bulletin, such payments are made by the Department (directly or indirectly—*e.g.*, through provider agencies or financial management services) under a Medicaid waiver to an individual direct service provider for nonmedical support services provided under a plan of care to an eligible individual living in the provider’s home. Consistent with the IRS Bulletin, this consideration is effective for payments received on or after January 3, 2014.



Additional guidance for host home providers

On July 12, 2002, the Department of Human Services, Division for Developmental Disabilities—the predecessor of the Department of Health Care Policy and Financing, Division for Intellectual and Developmental Disabilities—issued a memorandum providing for the certification of Individual Residential Support Services (IRSS) agencies as qualified foster placement agencies. This certification process is no longer necessary in light of the IRS Bulletin, and the Department hereby rescinds the 2002 memorandum.

Additional guidance for other providers (e.g., family caregivers and personal care attendants who live with their clients)

The Department describes below its understanding of certain issues, while cautioning providers that it is not providing tax advice:

- “[F]or purposes of § 131, ‘a person’s home is where he resides.’” Internal Revenue Bulletin 2014-4 (some internal quotation marks omitted) (citing *Stromme v. Commissioner*, 138 T.C. 213, 218 (2012), and *Dobra v. Commissioner*, 111 T.C. 339 (1998)). It would therefore appear that if a caregiver and a client share a home—whether the caregiver lives in a home belonging to the client, the client lives in a home belonging to the caregiver, the sharing is a natural consequence of a family relationship, or some other arrangement—then payments for waiver services provided in the home may be excluded under Section 131.
- The particular kind of shared living arrangement and the particular array of services provided may, however, be relevant under other statutes. For example, the Department of Labor (DOL) has stated that for purposes of Fair Labor Standards Act (FLSA), a provider who brings a client into the provider’s home usually is not an employee of the consumer, whereas a provider who moves into the client’s home usually is. *See* DOL, Administrator’s Interpretation, No. 2014-1 and DOL Fact Sheet No. 79G (March 2014) (also describing the narrowing of the companionship services exemption). Agencies should consult DOL guidance and attorneys regarding the FLSA.



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- “Medicaid waiver payments made to a provider for care outside of the home where the provider resides are not qualified Medicaid waiver payments and are not excludable under § 131.” Internal Revenue Bulletin 2014-4.
 - Difficulty of care payments are not excludable from gross income to the extent that such payments are made for more than 10 qualified foster individuals under age 19, and 5 qualified foster individuals age 19 or older. 26 U.S.C. § 131(c)(2).

This policy analysis does not constitute legal or tax advice. Persons needing such advice should consult the appropriate professional. The Department does not oversee nor regulate employment or tax laws.

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Attachments/links: Internal Revenue Bulletin 2014-4, Notice 2014-7 (Jan. 21, 2014) (available at https://www.irs.gov/irb/2014-4_IRB/ar06.html).

