

Agency with Choice April 2010

Introduction

Agency with Choice is one model for supporting individuals in the MI Choice Waiver who are aged or have disabilities. The Agency with Choice model supports individuals in arrangements that support self-determination by enabling them to select and manage their workers and personal assistants. Self-determination incorporates a set of concepts and values that individuals who obtain services and support through MI-Choice Waiver must have freedom not only to define their lives, but also be supported to control and direct the assistance they require in pursuit of those lives.

The Agency with Choice model splits the employer duties between the Agency with Choice provider and the participant. The Agency with Choice provider serves as employer of record. *Employer of record* is a term that describes an agency or individual that handles the administrative aspects of being an employer (such as payroll, withholding and paying income and unemployment taxes and paying worker's compensation insurance). The participant serves as managing employer.¹ In the Agency with Choice model, the participant recruits, hires, supervises, and, if necessary fires, his or her own worker(s). The Agency with Choice and the participant enter into a three-party agreement with each support worker that explicitly lays out the duties and responsibilities of each party.

The Agency with Choice model has several advantages:

- Participants may value the additional layer of emergency back-up.
- The Agency with Choice may have the potential to offer fringe benefits, such as vacation time or health insurance to workers.
- Participants who are new to being employers may want to have another entity take responsibility for the complex human resources and administrative functions.
- Workers may be able to obtain full-time employment by working for several participants.

Agency with Choice is an important option for those who do not want to directly employ workers or who want to transition into direct employment. Consistent with the principles of self-determination freedom, authority, support, and responsibility, participants should be given the information, opportunity and freedom to manage the

¹ See Medstat, *Promising Practices in Home and Community Based Services, Kansas—Providing Choice among Providers of Financial Management Services, Issue: Consumer-Directed Care—Agency with Choice Model*, <http://www.cms.hhs.gov/promisingpractices/ksawc.pdf>

resources allocated for their services and supports and be supported to implement the methods that best meet their needs.

The Role of the Agency with Choice Provider

An Agency with Choice provider must develop a system and written policies and procedures that incorporate the philosophy and practice of self-determination, for guiding participants and/or their chosen legal representatives to recruit, interview and select workers and refer them to the Agency with Choice for employment.² Within that system, both the participant and the Agency with Choice have defined roles and functions.

In its role as the employer of record of workers, the Agency with Choice provider handles many of the employer duties.³

- Financial Management
 - Processing payroll and timesheets.
 - Withholding, filing and paying federal and state income tax withholding, FICA, FUTA and SUTA to the appropriate taxing authorities.
 - Paying workers' compensation insurance premiums.
 - Issuing Forms W-2.
 - Maintaining complete current financial records, copies of all agreements, and supporting documentation for each participant.

- Human Resources
 - Facilitating the completion of criminal background and reference checks.
 - Confirming that prospective workers have U.S. Citizenship or legal alien status.
 - Confirming that prospective workers meet provider requirements defined in the Medicaid Provider Manual.
 - Providing training to workers, as required by the waiver agent and/or the Agency with Choice provider and/or directed by the participant.
 - Handling fringe benefits (such as health insurance) for workers.

The Agency with Choice provider can set policies for the types of criminal backgrounds that would preclude employment and the types that would not. If the waiver agent has specific policies regarding criminal background, this can be part of the contract negotiating process. It can also set forth reasonable personnel policies that both the

² Id.

³ Susan Flanagan, *Suggested Promising Practice Policies and Procedures for Agency with Choice Providers*, http://www.pacounties.org/mhmr/lib/mhmr/Suggested_Promising_Practice_Policies_and_Procedures_for_Agency_with_Choice_Providers.doc

participants and the workers must follow. However, the Agency with Choice provider cannot penalize the participant or the worker financially if they decide that direct employment would be preferable and decide to leave the Agency with Choice arrangement.

The Agency with Choice provider may also provide supportive services aimed at achieving a successful outcome as determined by the waiver agent and the needs of the participant.⁴ For example, the participant can seek and obtain support from the Agency with Choice provider in recruiting, selecting and hiring workers. In some situations, that support may be provided by family, friends or the waiver agent supports coordinator.

The Role of the Participant

Although the Agency with Choice provider serves as the legal employer of workers, the participant is the managing employer of all of the workers that provide supports and services to him or her. As the managing employer, the participant is responsible for recruiting candidates and referring them for employment by the Agency with Choice provider. The Agency with Choice may offer assistance with recruiting workers. In addition to selecting workers, the participant assures that all training and guidance is provided to the worker including any special training related to the participant's unique situation. The participant supervises workers on an ongoing basis.

The participant may choose any support worker who meets the provider requirements.⁵ The Agency with Choice may assist by offering training to the chosen workers as part of their services. The participant is free to select qualified friends or family members or can recruit workers through word of mouth, advertisements, or other means. The participant determines the work schedule and job duties, and authorizes payment by the Agency with Choice providers to the support worker by signing timesheets.⁶ When the participant deems it necessary, the participant is responsible for terminating her/his workers. The participant may not terminate the worker on the basis of race, religion, sex, age, disability or other protected statuses under federal or Michigan law.

⁴ See Medstat, *Promising Practices in Home and Community Based Services, Wisconsin—Providing Choice among Providers of Financial Management Services, Issue: Consumer-Directed Care—Agency with Choice Model*, <http://www.cms.hhs.gov/promisingpractices/wiawc.pdf>

⁵The provider requirements do not allow a participant to hire a guardian or representative.

⁶ Id.

Role of the Waiver Agent

Waiver Agent provides information about the Agency with Choice option to participants. They are responsible for person-centered planning sessions that lead to an individual budget for participants in Self Determination. The waiver agent authorizes the plan of supports and services (care plan) as well as the individual budget. The waiver agent ensures that all AWC participants have a meaningful copy of the plan for supports and services and the individual budget. The waiver agent also ensures the provision of a monthly spending report based on the individual budget and services used. The waiver agent follows up with participants when spending is above or below 10% of monthly budget.

The waiver agent is responsible for the Self Determination agreement with the participant and sending enrollment information and a copy of the individual budget to MDCH.

Requirements

The Agreement between the Agency with Choice Provider and the Participant

The Agreement between the Agency with Choice provider and the participant lays out the roles and responsibilities of each of the parties, the assistance and support available to the participant and the methods available for problem resolution. The agreement should specifically state that the participant may select any qualified provider that he or she chooses and terminate any worker at any time, for any legal reason (workers are at-will employees). The agreement must prohibit any practices by the Agency with Choice that impose penalties or fines when a worker leaves the Agency with Choice to work directly for a participant. The agreement must account for how the participant will go about handling these managing employer tasks. It must be clear that the role of the Agency with Choice is not to co-supervise the support worker, or to monitor the participant's management of the worker.

The Employment Agreement

The Agency with Choice and participant must execute a three-party agreement with each worker that describes the roles and responsibilities of each party. The employment agreement must explicitly state the participant is the managing employer and has the ability to terminate employment. In fact, candidates should receive in writing a description of the nature of the interrelationship between the Agency with Choice provider, participant, and candidate during the interview process, if not beforehand. It

is essential that each party clearly understands these interrelationships for the participant to successfully supervise and manage their support worker.

Use of a Fiscal Intermediary

A hallmark of arrangements that support self-determination is control over the individual budget, which is accomplished by entrusting the funds in the participant's individual budget with a fiscal intermediary (FI). An FI is a neutral and independent entity that acts as a fiscal agent of the waiver agent for the purpose of assuring fiduciary accountability for the funds comprising a participant's individual budget. In addition to accountability, the FI provides an important monitoring and communication function by furnishing a monthly budget report to the participant and his or her supports coordinator. Without such reporting, it is not possible for the participant to meaningfully manage an individual budget. Therefore, to achieve self-determination, best practice is that the funds are entrusted with a fiscal intermediary.

In addition to the payment to the agency with choice, the Fiscal Intermediary will provide a monthly budget report to the participant so that he or she can effectively monitor and manage his or her individual budget.

When the Agency with Choice is the sole provider, another option is for the waiver agent to directly pay the Agency with Choice provider without using a fiscal intermediary. In this situation, the waiver agent must be prepared to assure that this portion of budgeted funds is easily transferable. The waiver agent must maintain portability of the participant's individual budget to the greatest degree possible to enable the participant to choose another agency or method for employing workers if he or she chooses to do so. In addition, the waiver agent or the Agency with Choice must develop a monthly reporting mechanism so that the individual can exercise his or her responsibility to manage the individual budget.

Selection Criteria

Each waiver agent may select one or more Agencies with Choice to provide MI Choice services. The waiver agent must assure that the Agency with Choice has the capacity to complete required duties. If the waiver agent contracts with more than one Agency with Choice provider, the participant may choose between or among the agencies.

There are three methods for the waiver agent to select and contract with Agency with Choice providers:

- Direct selection and contracting by the waiver agent;

- Selection by the participant as long as the waiver agent verifies that the agency meets the criteria identified in this technical advisory and can be a Medicaid provider;
- Placement of Agency with Choice providers that meet demonstrated competency in required functions and provider network requirements on the provider network.

The waiver agent should identify criteria for Agency with Choice and select and contract with agencies that meet those criteria. The Agency with Choice provider understands and embraces the philosophy of self-determination and has a history of supporting individual choice and control. The contract should clearly define the expectations of both the waiver agent and the Agency with Choice provider and should incorporate the assurances of the Medicaid Provider Agreement. Neither waiver agents, nor its subsidiaries or affiliated agencies, can serve as an Agency with Choice. The waiver agent must have a mechanism for monitoring and documenting the quality of the Agency with Choice functions so that it can obtain and act upon feedback from participants and allies.

Implementation Issues & Conflicts of Interest

The Agency with Choice model poses a potential conflict between the business interests of the agency and the choice and control of the participant. One challenge in implementing the Agency with Choice model is balancing the duties of the employer of record (the agency) and the managing employer (the participant). The more support the agency provides to the participant, especially in terms of recruiting, scheduling or managing workers, the greater the possibility that support could erode the participant's freedom and control. The Agency with Choice provider must be vigilant that its support enables the participant to direct and control rather than substituting itself in that role.

Another challenge is how the workers view the relationship they have with the Agency with Choice provider versus the participant as "managing employer." If a worker is employed to work for multiple participants, either at the same time or successively, she or he may have a tendency to view the Agency as the managing employer and attempt to resolve on-the-job difficulties through the Agency, rather than through communication with the participant. The Agency must be clear about its role with both the worker(s) and the participant. It must be cautious to refrain from intruding upon the participant's role in managing workers. Instead, its role is to support the participant by making him or her aware of challenges, offering assistance in problem solving, and alerting the Supports Coordinator when appropriate to the individual circumstance.

The Agency with Choice provider can support a participant in recommending worker candidates that meet worker characteristics identified for a specific participant during the person-centered planning process. The participant can interview the candidates to determine the best match for his or her needs. In supporting the participant in choosing their workers, the Agency with Choice provider should never make a choice for or on behalf of the participant.

With respect to employment tenure, when a worker who has been employed through the Agency with Choice provider has lost an employment situation, Agency with Choice staff may feel obligated to find the worker a new position. The placement of such workers must be balanced with the central purpose of the Agency with Choice model in supporting participants to be successful in their role as managing employers and having choice of and control over their workers. However, a certain amount of brokering and placement work may go a long way toward assisting participants with obtaining workers who “fit” with their needs and preferences.

Conclusion

As more participants discover the Agency with Choice option, the demand for it will increase. Traditional provider agencies may want to respond to this demand by becoming Agency with Choice providers. These agencies may find that this model reduces the responsibilities of the agency by shifting responsibility for recruiting, “hiring,” and managing workers to participants.

Waiver agents must provide participants with a range of options to direct and control resources. The Agency with Choice model can assist with many of the complex aspects of being an employer, while supporting the participant as managing employer. Participants with significant support needs have an additional layer of back-up support with the model. In addition, the participants may be able to offer their workers benefits, such as vacation and health insurance, which would not be economically feasible in direct employment. Thus, Agency with Choice provides an important option for supporting MI Choice waiver participants who choose self-determined arrangements to select and manage workers.

Prototype Agency with Choice Agreement

Notes in bold, italics and brackets are places where specific information must be inserted.

This agreement is made on [Insert date] between [Insert name of waiver agent] (the “waiver agent”) and [Insert name of Agency with Choice] (the “Agency with Choice”). The purpose of this contract is to define the roles and responsibilities of the parties in the use of the Agency with Choice’s services to assure the opportunity for participants in Self Determination in Long Term Care option to directly employ personal assistance services workers

This contract shall remain in effect until it is terminated or modified. Any party can initiate a termination or modification by providing 30 days written notice to the other party. The waiver agent shall respond to any such notice within seven (7) working days.

This agreement supersedes any previous agreements between these two parties. This agreement is entered into under authority granted by Public Act 258 of 1974, as amended, and in accordance with the rules and regulations of the Michigan Department of Community Health adopted and promulgated under Act 258. The policies of the waiver agent shall govern in any area not specifically covered in this Agreement and are available from the waiver agent for review upon request.

Article I Waiver Agent Responsibilities

The waiver agent agrees to the following:

1. To designate a liaison person, who shall be the primary contact person with the Agency with Choice.
2. The Agency with Choice is the employer of record directly employed by the participant and the participant is the managing employer.
3. The Agency with Choice will provide individualized support to the participant as managing employer.
4. To assist each assigned participant to assure that all necessary documentation is in place including but not limited, to all agreements required by the waiver agent, especially a Medicaid Provider Agreement between each provider of services and the waiver agent.
5. Provide the AWC with a copy of individual budget for the participant that includes the authorized supports and services.

Article II
Agency with Choice Responsibilities

The Agency with Choice agrees to the following:

1. To designate a liaison person, who will be the primary contact person and have responsibility for monitoring and ensuring that the terms of this contract are fulfilled.
2. To assist participants to understand and perform managing employer responsibilities.
3. To perform the financial administrative duties of employer. The Agency with Choice shall abide by all federal and state laws regarding payroll taxes and shall remain current with all payroll tax requirements. Both the waiver agent and the participant shall provide copies of all required employment documents including the Medicaid Provider Agreement to the Agency with Choice.
4. To pay providers only upon receipt of all required agreements including the Medicaid Provider Agreement and timesheets or invoices approved by the participant or his or her authorized representative.
5. To maintain complete current financial records, copies of all agreements, and supporting documentation verifying expenditures paid by the Agency with Choice on behalf of each participant. These records shall be retained for seven years from the start of Agency with Choice services.
6. To safeguard all confidential information including the results of any background checks, and/or other documents pertaining to providers of services as needed or requested by the participant and/or waiver agent.
7. To make records regarding participants available to the waiver agent as requested and to allow each participant access to his or her own records.
8. To indemnify the waiver agent and maintain a valid insurance policy for its role as an employer of record for workers.

The Parties also agree to the following

1. This agreement is subject to and governed by the laws of the State of Michigan.
2. Any notice to amend or terminate this contract shall be in writing by receipt of personal delivery or by first class mail, postage prepaid as follows:

[Insert contact information and person for the waiver agent.]

[Insert contact information and person for Agency with Choice.]

This agreement, with its attachments, sets forth the entire understanding and agreement between the parties regarding the provision of Agency with Choice services. This agreement supersedes any and all other agreements, either oral or in writing between the parties. No modification of the terms of this contract is valid unless it is in writing and signed by the parties.

Agency with Choice Representative

Date

Waiver Agent Executive Director

Date

Prototype

Agency with Choice

Employment Agreement

Notes in bold, italics and brackets are places where specific information must be inserted. To make the agreement clearer for the participant, his or her name and the employee's name should be used throughout the document.

This agreement is made on **[Insert date]** between **[Insert name of the Agency with Choice]** **[Insert name of participant directly employing the worker]** (“employer”) and **[Insert name of employee]** (“employee”) to describe the supports that the employee will provide to the employer and the terms and conditions of employment.

Article I **Employee Responsibilities**

I, **[Insert name of employee]** (employee) am aware and agree that my employment is conditioned on my employer's participation in Self Determination in Long Term Care option administered by the waiver agent. If my employer ends participation in Self Determination in Long Term Care, my employment may end. I agree to the following terms of employment:

1. During the term of this Agreement, I shall provide support to my employer by performing the duties outlined in this agreement and any attachments to it.
2. I agree to assist my employer in maintaining the documentation and records required by my employer, the Agency with Choice or the waiver agent. I agree to complete all necessary paperwork to secure mandatory payroll deductions from my pay. All records I may have or assist in maintaining are the property of my employer. I will keep these records confidential, release them only with the consent of my employer, and return them to my employer if my employment ends. In addition, I will complete illness and incident reports when necessary as required or requested by the waiver agent or my employer.
3. **[Optional Provision: I shall immediately notify (insert the name and contact information of the contact person chosen by the employer (for example, it may be an ally) if my employer experiences a medical emergency or illness. I will also notify (insert name of contact person) before taking my employer to the physician, except in case of an emergency.]**
4. I agree to participate in any meetings if requested to do so by my employer.
5. I agree to abide by all of my employer's rules and waiver agent regulations (described below) regarding my employment duties to the employer through the Self Determination in Long Term Care option and I acknowledge receipt of the following rules and regulations
 - a. Attachment A to this Agreement, which outlines the supports that I will provide to my employer.

- b. *[Employer should insert rules he or she may have (such as rules regarding phone usage or smoking in his or her home)].*
 - c. *[The Agency with Choice waiver agent shall insert its policies and/or procedures for the AWC or other policies that the employee needs to understand and follow].*
 - d. *[Insert reporting and documentation requirements for verifying hours worked].*
6. I understand that this is an employment at will relationship, which can be terminated by me or by my employer at any time. However, my employer cannot terminate my employment on the basis of my race, religion, sex, disability or other protected status under federal or Michigan law. In addition, I agree to give **[insert number of days]** days written notice to my employer if I terminate my employment.
 7. I understand and acknowledge that my employer is my managing employer and I should address any questions or concerns with my employer. The Agency with Choice is my employer of record that handles legal and tax aspects of my employment.
 8. I agree to not to sue the waiver agent for its role in administering the Self Determination in Long Term Care option.
 9. I agree to the following compensation for the services I shall perform: **[\$[Insert hourly wage]** an hour. *[Insert specific information about any benefits the employee shall receive and describe benefits that will be excluded].*

Article II

Employer Responsibilities

I, *[insert name of Employer]* (“Employer”) agree to the following:

1. I will provide the Agency with Choice with the necessary documentation to assure timely compensation of my employee.
2. I will compensate my employee in the following manner: \$ *[Insert hours wage]* an hour. *[Insert specific information about any benefits the employee shall receive and describe benefits that will be excluded.]* Payroll will be handled by the Agency with Choice, which will withhold all necessary tax, unemployment and other withholdings from the employee’s paychecks.
3. I will assure my employee receives appropriate training.
4. I will evaluate the performance of my employee and provide appropriate feedback to assure that I am receiving quality supports.
5. I will assure that my employee executes a Medicaid Provider Agreement with waiver agent.

Article III
Agency with Choice

The Agency with Choice will perform the following functions:

1. Issue payroll payments to workers hired directly by the participants;
2. Withhold income, Social Security, and Medicare taxes from payroll payments and make payments to the appropriate authorities for taxes withheld;
3. Make payments for unemployment taxes and worker's compensation insurance to the appropriate authorities, when necessary;
4. Serve as payment agent for vendors of services and supports chosen and retained by the participant;
5. Issue W-2 forms and tax statements;

Employee Signature

Date

Employer Signature^[7]

Date

Agency with Choice
Representative

Date

⁷ Some individuals may have a guardian or a chosen legal representative. If the employer has a guardian or a chosen legal representative, a place should be inserted for that person to sign and the appropriate documentation verifying that person's authority should be attached to that agreement.

Prototype
Self Determination Program Enrollment Agreement (AWC)

Name: _____
SSN: _____ DOB: _____

Medicaid ID #: _____

START DATE OF SERVICES: _____

I have reviewed the materials provided to me by [insert waiver agent] explaining the Self Determination Program, my responsibilities in directing my care, [waiver agent's] responsibilities to me, and the role of the Agency with Choice, and I have decided to participate in this program.

_____ I do not wish to designate a representative.

_____ I will designate a representative to work on my behalf B see below:

Representative Description:

A representative may be a guardian, a family member or other supporter who willingly accepts the participant's responsibilities in directing their services and supports.

My representative is willing to follow my wishes and respect my preferences while using sound judgment to act on my behalf. I name the following person as my representative:

Name: _____
Address: _____
Phone: _____

I understand that enrollment into this program is voluntary and that I have a right to withdraw any time I choose.

Participant: _____ Date: _____

Representative: _____ Date: _____

Supports Coordinator: _____ Date: _____