

## **Notice 2014-7**

### ***Foster care payment, Medicaid waivers***

#### **PURPOSE**

This notice provides that certain payments received by an individual care provider under a state Medicaid Home and Community-Based Services Waiver (Medicaid waiver) program, described in this notice, are difficulty of care payments excludable under § 131 of the Internal Revenue Code.

#### **BACKGROUND**

##### ***Qualified foster care payments***

Section 131(a) excludes qualified foster care payments from the gross income of a foster care provider.

Section 131(b)(1) defines a qualified foster care payment, in part, as any payment under a foster care program of a state or a political subdivision that is either (1) paid to the foster care provider for caring for a qualified foster individual in the foster care provider's home, or (2) a difficulty of care payment.

Section 131(b)(2) defines a qualified foster individual as any individual who is living in a foster family home in which the individual was placed by an agency of a state or political subdivision or by a qualified foster care placement agency.

Section 131(b)(3) defines a qualified foster care placement agency, in part, as a placement agency that is licensed or certified for the foster care program of a state or political subdivision of a state.

Section 131(c) defines a difficulty of care payment as compensation to a foster care provider for the additional care required because the qualified foster individual has a physical, mental, or emotional handicap. The provider must provide the care in the provider's foster family home, a state must determine the need for this compensation, and the payor must designate the compensation for this purpose. In the case of any foster home, difficulty of care payments are not excludable to the extent that the payments are for more than 10 qualified foster individuals who have not attained age 19 or 5 qualified foster individuals who have attained age 19. See § 131(c)(2).

##### ***State Medicaid waiver programs***

Under § 1915(c) of the Social Security Act (42 U.S.C. § 1396n(c)), a state may obtain a Medicaid waiver that allows the state to include in the state's Medicaid program the cost of home or community-based services (other than room and board) provided to individuals who otherwise would require care in a hospital, nursing facility, or intermediate care facility

(eligible individuals). Home or community-based services include personal care services, habilitation services, and other services that are “cost effective and necessary to avoid institutionalization.” See 42 C.F.R. § 440.180. Personal care services are defined under rules of the Centers for Medicare and Medicaid Services to include assistance with eating, bathing, dressing, toileting, transferring, maintaining continence, personal hygiene, light housework, laundry, meal preparation, transportation, grocery shopping, using the telephone, medication management, and money management. Skilled services that only a health professional may perform are not personal care services. Habilitation services, defined in 42 U.S.C. § 1396n(c)(5)(A), assist individuals in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community-based settings.

Medicaid waiver programs generally do not compensate a family member for providing personal care services to an eligible individual if the family member is legally responsible for the individual (for example, a minor child). See 42 C.F.R. § 440.167(a)(2) and (b). Some states compensate family members, as well as unrelated individual care providers, for residential habilitation, foster/companion care, or transportation services provided as a part of an eligible individual’s plan of care. A plan of care is a term defined by the state, but generally means an individualized plan of treatment, services, and/or providers.

A state, directly or indirectly through an agency under contract with the state, certifies individuals and entities as Medicaid providers to provide services to eligible individuals. An entity that is a certified Medicaid provider may contract with an individual care provider to care for an eligible individual in the care provider’s home. A state or an agency under contract with the state approves the plan of care for the eligible individual in the provider’s home and monitors the eligible individual’s care.

State agencies, certified Medicaid provider entities, and individual care providers have asked whether Medicaid waiver payments for the care of eligible individuals, who are related or unrelated to the individual care provider, in the individual care provider’s home may be treated as difficulty of care payments excludable under § 131.

### ***Current treatment of government-funded payments for home care***

The Service historically has challenged the excludability of payments to individual care providers caring for related individuals in the provider’s home. See *Alexander v. Commissioner*, T.C. Summary Opinion 2011–48, filed April 12, 2011 (Medicaid waiver payments to taxpayers caring for a taxpayer’s parents residing in the taxpayers’ home are not excludable under § 131 because the taxpayers did not show that they operated a “foster family home” under state law and the parents were not “placed” in the taxpayers’ home by the state). See also *Bannon v. Commissioner*, 99 T.C. 59 (1992) (payments received by the taxpayer for caring for her adult disabled daughter residing in the taxpayer’s home under a state program for in-home supportive services are not excludable under the general welfare exclusion) and *Harper v. Commissioner*, T.C. Summary Opinion 2011–56, filed May 2, 2011 (following *Bannon*). Similarly, Program Manager Technical Advice (PMTA 2010–007) concludes

that a biological parent of a disabled child may not exclude payments under § 131 because the ordinary meaning of foster care excludes care by a biological parent.

Section 131 does not explicitly address whether payments under Medicaid waiver programs are qualified foster care payments. Medicaid waiver programs and state foster care programs, however, share similar oversight and purposes. The purpose of Medicaid waiver programs and the legislative history of § 131 reflect the fact that home care programs prevent the institutionalization of individuals with physical, mental, or emotional handicaps. See 128 Cong. Rec. 26905 (1982) (stating that “[difficulty of care payments] are not income to the [foster] parents, regardless of whether they, dollar for dollar only cover expenses. [These] parents are saving the taxpayers’ money by preventing institutionalization of these children.”); S. Rep. No. 97-139 at 481 (1981) (describing the purpose of the amendment to 42 U.S.C. section 1396n, allowing Medicaid waivers for home and community-based services, as “[permitting] the Secretary to waive the current definition of covered [M]edicaid services to include certain nonmedical support services, other than room and board, which are provided pursuant to a plan of care to an individual otherwise at risk of being institutionalized and who would, in the absence of such services be institutionalized”). Both programs require state approval and oversight of the care of the individual in the provider’s home. The programs share the objective of enabling individuals who otherwise would be institutionalized to live in a family home setting rather than in an institution, and both difficulty of care payments and Medicaid waiver payments compensate for the additional care required.

## **GUIDANCE**

### ***Treatment of qualified Medicaid waiver payments under § 131***

To achieve consistent federal tax treatment of Medicaid waiver payments among the states and individual care providers, this notice provides that as of January 3, 2014, the Service will treat qualified Medicaid waiver payments as difficulty of care payments under § 131(c) that are excludable under § 131, and this treatment will apply whether the care provider is related or unrelated to the eligible individual. Accordingly, as of January 3, 2014, the Service will no longer assert the position in PMTA 2010-007, or apply *Alexander, Bannon, or Harper*, to conclude that a caregiver of a biological relative receiving qualified Medicaid waiver payments may not qualify as a foster care provider under § 131. For purposes of this notice, qualified Medicaid waiver payments are payments made by a state or political subdivision thereof, or an entity that is a 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.

Section 131(c) defines a difficulty of care payment as compensation to a foster care provider for the additional care required because the qualified foster individual has a physical, mental, or emotional handicap. Qualified Medicaid waiver payments compensate a care provider for providing the additional care required because of an eligible individual’s physical, mental, or emotional handicap for which a state has determined that there is a need for additional

compensation. Thus, the treatment of qualified Medicaid waiver payments as “difficulty of care payments” is consistent with the definition under § 131(c).

Under § 131, payments are excludable as difficulty of care payments only if the care is provided to a “qualified foster individual,” meaning any individual who is living in a “foster family home” in which the individual was “placed” by an agency of a state or a political subdivision thereof, or a qualified foster care placement agency. Section 131(b)(2). The term “foster family home” is not defined under § 131. However, the Tax Court has concluded that, for purposes of § 131, “a person’s ‘home’ is where he resides.” See *Stromme v. Commissioner*, 138 T.C. 213, 218 (2012), citing *Dobra v. Commissioner*, 111 T.C. 339 (1998). Therefore, an eligible individual receiving care under a Medicaid waiver program lives in a “foster family home” because the eligible individual is a qualified “foster” individual who receives care in a “family home” setting, as opposed to an institution, where the individual care provider also resides. 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.

Similarly, the term “placed” is not defined in § 131. Under state foster care programs, a state or political subdivision thereof, or a qualified foster care placement agency, may assist in locating a home that meets the qualified foster individual’s needs, negotiate or approve the foster care payment rates, and contract with the foster care providers for the provision of foster care. The Tax Court has determined that these activities constitute “placement” for purposes of § 131(b)(2). *Micorescu v. Commissioner*, T.C. Memo 1998–398. States perform similar activities with respect to individuals participating in Medicaid waiver programs. Under a Medicaid waiver program, a state, an agency of a state or political subdivision thereof, or a certified Medicaid provider may assist in locating a home for an eligible individual or approve the eligible individual’s choice to reside in the individual care provider’s home, approve an eligible individual’s plan of care, assess the suitability of the home for fulfilling the eligible individual’s plan of care, and enter into a contract or other arrangement with the individual care provider for services provided to the eligible individual. Thus, an eligible individual receiving care in the home of the individual care provider under the Medicaid waiver program will be treated as “placed” by an agency of a state or political subdivision thereof, or a qualified foster care placement agency, for purposes of § 131. Accordingly, an eligible individual receiving care in the individual care provider’s home under a Medicaid waiver program is a “qualified foster individual” under § 131(b)(2).

Section 131(d)(2) provides that a provider may not exclude payments for the care of more than 10 eligible individuals under age 19 or more than five eligible individuals who are age 19 or over. Because qualified Medicaid waiver payments are difficulty of care payments, they are subject to these limits.

This notice does not address whether qualified Medicaid waiver payments excluded from income under this notice may be subject to tax under the Federal Insurance Contributions Act (FICA) or the Federal Unemployment Tax Act (FUTA) in certain circumstances.

## **EFFECTIVE DATE**

This notice is effective for payments received on or after January 3, 2014. Taxpayers may apply this notice in taxable years for which the period of limitation on claims for a credit or refund under § 6511 has not expired.

## **DRAFTING INFORMATION**

The principal author of this notice is Victoria J. Driscoll of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice, contact Ms. Driscoll at (202) 317-4718 (not a toll-free number).