HINMAN STRAUB PC
ATTORNEYS AT LAW

121 State Street
Albany, New York 12207-1693
Tel: 518-436-0751
Fax: 518-436-4751

TO: **Memo Distribution List**

FROM: Hinman Straub P.C.

RE: 2021 State Budget Amendments to the Wage Parity Law

DATE: June 8, 2020

NATURE OF THIS INFORMATION: This is information explaining new requirements you need to be aware of or implement.

HINMAN STRAUB CONTACT PEOPLE: Sean Doolan and Jennie Shufelt

THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:
Category: #9 Medicaid and Medicare Suggested Key Word(s):

On April 2, 2020, Governor Andrew Cuomo and legislative leaders announced an agreement on the State Budget for New York State's Fiscal Year (SFY) 2021 (the "2021 Budget"). The 2021 Budget includes several important changes to the Wage Parity Law (the "WPL"), that directly impact the operations of Long Term Home Health Care Programs ("LTHHCP"), Managed Care Organizations ("MCO"), Certified Home Health Agencies ("CHHA"), Licensed Home Care Services Agencies ("LHCSA") and Fiscal Intermediaries ("FIs") that arrange for or provide home care aide services funded by Medicaid. These changes are summarized below.

Required Modifications to Wage Parity Benefit Packages

The WPL, originally enacted in 2011 as Section 3614-c of the New York Public Health Law, sets forth a minimum compensation requirement for home care aides[1] applicable to episodes of care funded in whole or in part by the Medicaid program. The minimum compensation requirements can be satisfied through the payment of wages, or a combination of wages and benefits.

Prior to the amendments contained in the 2021 Budget, providers had little guidance with respect to the types of benefits that could be used to satisfy the WPL, other than a series of FAQs issued by the N.Y. Department of Health ("DOH"). As a result, a variety of benefits packages have been developed by agencies to satisfy the obligations of the WPL, often including a combination of paid time off, health benefits, flexible spending cards, transit benefits and other types of benefits. Most agencies have elected not to pay the full minimum compensation via wages, because of implications for overtime rates and additional payroll taxes.

The 2021 Budget included language that added a layer of financial accountability and transparency that will likely alter the types of benefits packages that agencies are permitted to use to satisfy the WPL. In particular, the 2021 Budget amendments prohibit a return of any portion of funds spent in satisfying the WPL minimum compensation requirement to the LTHHCP, MCO, CHHA, LHCSA, FI, or any other related persons or entities, other than when the funds are distributed to a home health aide to whom the wage or benefit was owed. Specifically, the Legislature added a new subsection 5-a to the WPL as follows:

> 5-a. No portion of the dollars spent or to be spent to satisfy the wage or benefit portion under this section shall be returned to the certified home health agency, licensed home care services agency, long term home health care program, managed care plan, or fiscal intermediary, related persons or entities, other than to a home care aide as defined in this section to whom the wage or benefits are due, as a refund, dividend, profit, or in any other manner.

[1] "Home care aide" is defined as "a home health aide, personal care aide, home attendant, personal assistant performing consumer directed personal assistance services pursuant to section three hundred sixty-five-f of the social services law, or other licensed or unlicensed person whose primary responsibility includes the provision of in-home assistance with activities of daily living, instrumental activities of daily living or health-related tasks; provided, however, that home care aide does not include any individual (i) working on a casual basis, or (ii) (except for a person employed under the consumer directed personal assistance program under section three hundred sixty-five-f of the social services law) who is a relative through blood, marriage or adoption of: (1) the employer; or (2) the person for whom the worker is delivering services, under a program funded or administered by federal, state or local government." N.Y. PHL § 3614-c(1)(d).

Subsection 5-a of the WPL appears to be intended to ensure that funds used to satisfy WPL requirements are used entirely for the home care aide and to preclude unused funds from being returned or retained by the agency. The amendment requires agencies that provide benefits other than paid compensation through which the agency could receive a return of any unused funds, whether by dividend, refund, profit or in any other manner, to distribute such funds (hereinafter "Surplus Funds") to home health aides, to the extent the Surplus Funds were needed to satisfy the WPL requirements. Given the catch-all language "or in any other manner," this language would likely be interpreted to include retention of the value of an unused benefit (i.e. the dollar amount of the "credit" taken by the agency towards satisfaction of the WPL obligation in offering the benefit).

It is unclear at this time whether the Legislature intended Subsection 5-a to require a return of Surplus Funds, dollar for dollar, to the particular aide that earned the benefit, or whether use of such Surplus Funds to provide benefits in general to an agency's aides (e.g. through deposit in a pooled benefit fund) would be permissible. The language of Section 5-a requires any Surplus Funds that are returned to the agency to be distributed to "**a** home care aide as defined in this section **to whom the wage or benefits are due**." This language could be interpreted as merely requiring the Surplus Funds to be distributed to a home health aide eligible for wage parity benefits, or it could be interpreted more restrictively, requiring a specific accounting and proportionate distribution to the actual aide(s) that performed services for the particular episode(s) of care that generated the wage parity obligation and the resulting Surplus Funds.

The prohibition on a return of the dollars spent to satisfy wage parity to CHHAs, LHCSAs, LTHHCPs, MCOs, and FIs in any manner has significant implications for wage parity benefit structures, discussed in more detail below.

Implications for Self-Insured and Captive Benefit Plans

The amendment will have an impact on agencies offering health insurance and other benefits through self-insured arrangements, or any other arrangements through which any portion of the benefits paid in to satisfy wage parity could be returned to the agency, whether by dividend, refund, profit or in any other manner. Under the law, to the extent such funds are used to satisfy the WPL requirements, the Surplus Funds are to be distributed to home care aides. The new language added by the 2021 Budget does not per se prohibit self-funding or other arrangements (e.g. captive arrangements) but it prohibits the participating agencies from retaining any Surplus Funds they receive to the extent those funds are necessary to satisfy WPL requirements.[2]

It is unclear whether the 2021 Budget language would also preclude the purchase of fully insured health coverage in that the premiums paid on the policy could be "returned" to shareholders (to the extent that such shareholders include the LTHHCP, MCO, CHHA, LHCSA, FI or a related

[2] Of note, substantial questions exist regarding whether the WPL, as amended, and in particular its significant impact on the structure and viability of self-employed benefit plans, is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), given its significant impact on the benefit structure and administration of ERISA-governed plans, and the alternative enforcement mechanisms it creates to enforce such requirements. *N.Y.S. Conf. of the Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

party) in the form of a dividend, if the policy contributes to the profitability of the insurance company. While it is unlikely that the language was intended to address that scenario, it is a conceivable interpretation based on the literal reading of the statute. Further guidance is being sought on this issue. In any event, it is advisable to review all funding arrangements, other than direct cash compensation to aides, to ensure compliance with this new law.

Developing a benefits policy that provides for the distribution of Surplus Funds may be a viable approach, particularly if agencies are permitted to re-deposit the Surplus Funds in a pooled benefit fund for future use for aides. However, such an approach would require administrative and accounting diligence if providers will be expected to return Surplus Funds to the particular aides who earned the funds, either through cash payments or the provision of additional benefits (such as additional paid time off). Agencies should be mindful of potential implications for the calculation of the base wage for overtime purposes, as well as potential employment taxes, in considering options for distribution of Surplus Funds.

Implications for other Wage Parity Benefits

Many agencies satisfy a portion of their WPL minimum compensation obligations through the provision of paid sick leave and other paid time off. In addition, some agencies offer benefits such as flexible spending accounts, transit benefits, and education benefits. All of these benefits remain potentially viable options for satisfying the WPL, as amended. However, these benefit packages must also be reviewed and amended in light of the restriction on the return of unused funds to the agency.

For example, the New York City Paid Sick Leave Act only requires an employer who provides paid sick leave on an accrual basis to allow the employee to carry over 40 hours of unused time at the end of a calendar year. While the employer is permitted to cash out any excess accrual above 40 hours, it is not required to do so by the New York City Paid Sick Leave Act. Thus, some employers may have a "use it or lose it" policy, in which home care aides forfeit unused sick leave in excess of 40 hours. Similarly, the New York City Paid Sick Leave Act does not require a pay-out of unused accruals upon termination of employment. Thus, employers are permitted to provide for the forfeiture of paid sick leave upon termination.[3] Similar policies may be in place for other paid time off, such as vacation and personal time.

However, because of the new prohibition against a return of any unused wage parity funds to the agency, including through "profit" or "in any other manner" these use-it-or-lose it policies likely run afoul of the WPL, as amended. Funds set aside for the payment of these benefits and/or credit taken towards an agency's wage parity obligation that go unused cannot be returned to the agency in "any manner." As such, paid time off policies should be reviewed and revised to either remove carry-over caps (so that the aides retain the accrued benefit year to year), or to provide for pay-out of unused accruals in excess of permitted carryover.[4] Based upon a recent US DOL Final Rule issued this spring, the payout of the unused paid leave such as vacation, sick or personal time at

[3] Subject to requirements for reinstatement of accruals in the event an employee returns to employment within six months.

[4] Employers subject to New York City's Paid Sick Leave Act must carry over 40 hours of unused sick leave. Thus, only accruals in excess of 40 hours can be paid out.

the end of the year, would not require employers to include these amounts in calculating overtime rates, thereby making it more attractive to provide for annual payout of these unused benefits to employees.

Similarly, any "credit" taken for wage parity purposes for other unused benefits, such as unused transit benefits, flexible spending benefits, and educational benefits, cannot be retained by an agency. If, for example, the employer offers educational benefits and counts the value of that benefit as a credit towards satisfaction of the WPL minimum compensation, and those benefits go unused, the agency cannot retain the value of the credit for itself and must distribute the Surplus Funds to the aides, as discussed above.

We recommend that agencies review their wage parity benefits packages in their entirety, in consultation with counsel, and implement any changes necessary to comply with the amended WPL. As discussed below, as part of the WPL amendments, the Legislature has also added new penalties and sanctions for non-compliance, and strengthened oversight mechanisms to ensure compliance. Please note that the effective date of the above-referenced amendment is **April 1, 2020**, so any changes that are implemented to benefits structures should be made retroactively effective as of April 1, 2020.

Increased Oversight of Wage Parity Law Compliance, and Enhanced Penalties and Sanctions for Non-Compliance.

In addition to the substantive changes to benefits packages permissible under the WPL discussed above, the 2021 Budget added or amended several additional provisions intended to increase oversight and accountability for WPL compliance. These changes, which take effect **October 1, 2020**, are discussed in more detail below. These changes have important implications for not only agencies employing home care aides, but to LTHHCPs, MCOs and CHHAs that contract with LCHSAs and FIs.

Amendments to Certification Process

Prior to the 2021 Budget amendments, the WPL prohibited Medicaid payments to CHHAs, LTHHCPs, managed care plans, and the consumer directed personal assistance program ("CDPAP") unless such entity delivered prior written certification to the commissioner of health, certifying that all services provided under each episode of care were in full compliance with the WPL (the "DOH Certification"). Further, if these entities elected to contract with a LCHSA or other third party for the provision of home care aide services, they were required to obtain a certification from the LHCSA or other contracted entity, on a quarterly basis, of compliance with the WPL (the "Contractor Certification"). The certification process has been substantially revised as a result of the 2021 Budget Amendments. The changes discussed below are effective **October 1, 2020.**

With respect to the DOH Certification, the WPL was amended to add LCHSAs and FIs to the list of entities that must complete the DOH Certification. Thus, LHCSAs and FIs will now have to certify to DOH, as well as to the LTHHCPs, MCOs and CHHAs with which they contract.

The substance of the required DOH Certification has also been significantly modified. The revised certification must now specifically state that no portion of the dollars spent or to be spent to satisfy the wage or benefit portion of the law shall be returned to the CHHA, LHCSA, LTHHCP, MCO, or FI, or any related person or entity, other than to a home care aide to whom the benefits are due. Thus, the DOH Certification will require certification of compliance with the new substantive requirements of subsection 5-a discussed above. In addition, with respect to the DOH Certification submitted by CHHAs, LTHHCPs, and MCOs, these entities must certify that they have received from any contracted LHCSA, FI or other third party providing home health care aide services, the annual statement of wage parity expenses and independently-audited financial statement verifying such expenses, now required as part of the Contractor Certification (discussed below).

The 2021 Budget Amendment also modifies the Contractor Certification process in several important ways. **First**, the amendments add MCOs as one of the entities that must obtain Contractor Certifications, and adds FIs as one of the contractors for whom Contractor Certifications must be obtained.

Second, CHHA, LTHHCP, and MCO contracts with LHCSAs, FIs and other third parties providing home care aide services must include language in their provider contracts requiring the contracted provider to: (1) provide a written certification, verified under oath, on forms prepared by DOH in consultation with the Department of Labor ("DOL"), attesting to the contractor's compliance with the WPL, and (2) provide the CHHA, LTHHCP or MCO with all information necessary to verify compliance with the WPL, including specifically an annual compliance statement of wage parity hours and expenses, on a form provided by DOL and accompanied by an independently-audited financial statement verifying such expenses. CHHAs, LTHHCPs, and MCOs should review their provider contracts and amend these contracts to incorporate appropriate language, if necessary. Further, although not specifically required in the WPL, CHHAs, LTHHCPs, and MCOs may want to include language requiring contracted providers to certify as to their compliance with Section 5-a of the WPL specifically, given that they will have to make such certification as part of the DOH Certification.

Third, the WPL Amendments provide that any LCHSA, FI or other third party who submits a certification, under oath, that is known by such party to be false "shall be guilty of perjury and punishable as provided by the penal law." In light of the potential penalties for such false certifications, providers submitting Contractor Certifications must carefully review their certifications, compliance statements and independently-audited financial statements, verify the accuracy of those submissions, and confirm their compliance with the WPL.

Interestingly, as noted above, the WPL amendments do not explicitly require that the Contractor Certification include a certification of compliance with the new subsection 5-a (prohibiting a return of any portion of the dollars spent to the agency). However, DOH and DOL will likely include such a statement in the Contractor Certification forms, given that (1) the employers of the home care aides for whom the WPL applies are, for the most part, employed by these contractors, and (2) it will be difficult for CHHAs, LTHHCPs, and MCOs to make this certification without receiving a concomitant verification of compliance from its contracted providers.

Finally, the WPL amendments include new subdivision 6-a, which states that "the [CHHA, LTHHC, or MCO] will review and assess annual compliance statement of wage parity hours and expenses and make a written referral to the department of labor for any reasonably suspected failures of [LHCSAs, FIs] or third parties to conform to the wage parity requirements of this section." Under the amended WPL, a MCO, CHHA, or LTHHC will not be liable to the State for a provider's noncompliance if the MCO, CHHA or LTHHC "reasonably and in good faith collected certifications and all information required pursuant to this section and conducts the monitoring and reporting required by this section."

Thus, as a result of the new subdivision 6-a, MCOs, CHHAs and LTHHCPs have a heightened obligation to evaluate and assess contracted providers' compliance with the WPL, and are required to report noncompliance to the state. To avoid WPL liability, MCOs, CHHAs and LTHHCPs must now carefully review and assess provider compliance statements and audited financial statements, make a determination about whether the contract provider is in compliance with the WPL, and, if not, make a referral to DOL. In addition, this new structure creates a complicated system in which LHCSAs and FIs attempting to structure and implement a uniform wage parity benefit package may face varying opinions about the permissibility of their wage parity benefits structure, and their compliance with the WPL.

Amendments to Labor Law Requirements in WPL Amendments

As part of the amendments to the WPL, the New York Labor Law was amended to require that "Notice of Pay Rate" notices (i.e. Wage Theft Prevention Act Notices) state the "benefit portion of the minimum rate of home care aide total compensation…Where such…home care aide benefits are provided, the notice shall identify for each type of supplement claimed or each type of home care aide benefits provided: (i) the hourly rate claimed; (ii) the types of…home care aide benefits, including, when applicable, but not limited to, pension or healthcare….; (iii) the names and addresses of the person or entity providing …such home care aide benefits; and (iv) the agreement, if any, requiring or providing for such…home care aide benefits, together with information on how copies of such agreements or summaries thereof may be obtained by an employee." DOL will be preparing Notice of Pay Rate forms to be used by providers subject to the WPL.

In addition, the New York Labor Law was revised to require that paystubs for covered employees list: "the benefit portion of the minimum rate of home care aide total compensation…[and] identify… "the type of each home care aide benefits provided . . .." Wage notices and paystubs typically have to be retained for 6 years. However, because the WPL record retention requirement is 10 years, and wage notices and paystubs may be needed to prove compliance with the WPL requirements, providers should revise their record retention policies to ensure retention of Notices of Pay and paystubs for 10 years.

These provisions take effect **October 1, 2020.**

Increased Penalties for Non-Compliance

In addition to adopting the aforementioned substantive changes to the WPL, the Legislature also strengthened the potential penalties and sanctions that can be imposed for WPL non-compliance, including the potential for criminal penalties and sanctions for false certifications of compliance with the WPL. These changes take effect **October 1, 2020.**

Specifically, the WPL now provides that any CHHA, LTHHCP, MCO, LHCSA, FI or other third party found to willfully pay less than required in the WPL shall be guilty of a misdemeanor and subject, for a first offense, to a fine of $500 or 30 days' imprisonment. A second offense carries a $1,000 fine and forfeiture of the contract on which the violation occurred. Moreover, no person or corporation found guilty may receive any sum for work done upon any contract on which the CHHA, LTHHCP, MCO, LHCSA, FI or other third party has been convicted of a second offense. Further, as discussed above, the WPL, as amended, now also provides that any LHCSA, FI, or other third party who shall, upon oath, verify any statement required to be transmitted under the law or any implementing regulations, which is known by such party to be false, shall be guilty of perjury and punishable as provided by the penal law.

Finally, as noted previously, the WPL amendments impose an obligation on MCOs, CHHAs, and LTHHCPs to review the annual compliance statements from LHCSAs and FIs, make a determination of whether the provider is in compliance with the WPL, and make a written referral to DOL for any reasonably suspected WPL non-compliance. Potential referral to DOL, in turn, increases the probability of a larger DOL labor law audit, particularly if in reviewing a WPL referral, DOL identifies potential general labor law violations.

Conclusion

In light of the substantial changes to the Wage Parity Law and, in particular, the prohibition of a return of any portion of wage parity funds to the provider or a related entity, as well as the significant penalties that can result from non-compliance, providers employing home care aides should carefully review their wage parity benefits packages with counsel and make any changes necessary to bring their benefits packages into compliance with the WPL. In addition, CHHAs, LTHHPs and MCOs should begin developing contract amendments to incorporate the required provider contract language, and discussing systems and processes for evaluating provider WPL compliance and making and documenting referrals to DOL. Such documentation will be critical to protect CHHAs, LTHHCPs and MCOs from liability for contracted provider WPL violations.

We expect additional guidance to be issued by DOH and DOL in the future, particularly with respect to the changes to the certification and referral processes discussed above, and will continue to monitor the implementation of these aspects of the WPL amendments.