



## Department of Health

ANDREW M. CUOMO  
Governor

HOWARD A. ZUCKER, M.D., J.D.  
Commissioner

SALLY DRESLIN, M.S., R.N.  
Executive Deputy Commissioner

JAN 26 2016

Re: Non-NYC Personal Care FLSA Rate  
Adjustment

Dear Administrator:

A copy of the revised 2015 personal care and consumer directed program Medicaid payment rates effective October 13, 2015 are now available on the Health Commerce System (HCS) website.

In accordance with the provisions of Section 367-q of the Social Services Law, the Department is authorized to make rate adjustments for non-NYC personal care agencies under the recruitment and retention provisions to address increased compensation expenses stemming from federal labor requirements under the US Department of Labor's (DOL) recently published Final Rule on minimum wage and overtime protections.

### **Background**

The US Department of Labor's (DOL) Final Rule concerning companionship exemption under the Federal FLSA brings minimum wage and overtime protection to the personal care and consumer directed workers. Based on the US **Court of Appeals** August 21, 2015 **unanimous opinion affirming the validity of this Final Rule**, the US DOL has confirmed it to be effective October 13, 2015.

This Final Rule contains several significant changes from the prior Federal regulations, including:

- 1) Overtime – A significant effect of the Final Rule is that more NYS home care service workers will be protected by the FLSA's minimum wage, overtime, and recordkeeping provisions. Specifically for NYS, the rule requires payment of overtime at time and one half of wage versus the former requirement of overtime paid at time and one half of minimum wage.
- 2) Travel Time – The Final Rule states that travel within a day's work for an employee between clients or on behalf of a client such as to the grocery store or post office are compensable hours.
- 3) Live-in Rules – For live-in workers who previously were only allowed to bill up to 13 hours of care per day, the Final Rule allows for additional billable hours in the event that the worker's meal periods, sleep time, or other periods of free time are interrupted by a clients' needs.

### **Rate adjustments**

The Department of Health's Office of Health Insurance Programs (OHIP) has done an expeditious assessment and determination of the initial additional Medicaid funding that may be necessary to assist providers in ensuring that the new FLSA requirements for overtime are properly implemented for home care workers.

The Department has determined to expedite rate relief to fee-for-service home care programs retroactive to October 13, 2015, in accordance with Social Services Law Section 367-q. Based on consultation with Mercer (the Department's actuary), the Department has determined to uniformly apply the home care industry standard that 10% of total hours worked are associated with overtime. It will also include additional funding for new FLSA employee travel and live-in requirement noted above. The total per hour adjustment is estimated to be an increase of \$0.34 per hour across all aide hours.

For the enclosed non- NYC personal care and consumer directed fee-for-service rates, the determined per hour amount of \$0.34 has been incorporated into the rates as an additional recruitment and retention adjustment retroactive to October 13, 2015.

It was necessary to convert the determined dollar per hour adjustment to a percentage adjustment for application to the recruitment and retention methodology in accordance with SSL 367-q. This has been done by first determining a total dollar value of the \$0.34 times the estimated non-NYC personal care hourly units for the period 10/13/15-12/31/15. This amount was determined by an appropriate proration of the latest statewide non-NYC personal care hourly units in the calendar year 2014 personal care cost reports to the period 10/13/2015-12/31/2015. The resulting uniform percentage adjustment was then further adjusted to insure, to the greatest extent possible, that the recruitment and retention adjustment yields a minimum of a \$0.34 per hour increase to all hourly personal care and consumer directed rates. The resulting determined uniform percentage for the recruitment and retention adjustment for FLSA is 8.70%; which has been incorporated into your enclosed rates.

It is important to note that this additional funding is provided under the recruitment and retention methodology authorized by SSL Section 367-q and as such, to the extent such funding is not utilized to meet new overtime and travel requirements, agencies must use such funds for the purpose of recruitment and retention of non-supervisory personal care services workers only and agencies are prohibited from using such funds for any other purpose. The funding is subject to all existing statutory requirements of SSL Section 367-q.

In addition, for both personal care and consumer directed services, the Department has made an adjustment to increase the regional direct care ceilings in the enclosed rates for both live-in personal care and consumer directed services to be based on 13 hours of care; rather than the previously determined ceilings based on 12 hours of care. This adjustment is consistent with the requirements of MLTC Policy 14-08. This policy, based on guidance issued by both the Federal and NYS DOL's, stated that managed long term care plans and fee-for service providers are required to provide a payment that is based on at least 13 hours of care for live-in services. The revised Live-In ceilings are included in the enclosed personal care and consumer directed live-in rates effective 10/13/2015.

### **FLSA Survey**

As previously communicated, the Department is developing a survey in conjunction with Mercer actuaries and with input from the NYS home care associations to gather data on this important issue that will provide a more accurate impact of the FLSA final rule adjustment for 2016. The survey is intended to be distributed to home care agencies shortly via a separate letter. Results from the survey will be reviewed by the Department and Mercer in the coming months to more accurately evaluate the scope of hours impacted by FLSA and to assess the potential need for any revised adjustment in final 2016 and subsequent rates.



The rates on the attached schedule have been forwarded to the Department's eMedNY system for payment. If you have any questions related to the methodology utilized in the calculation of your 2015 Medicaid rates or the accuracy of your rate, please contact Kathy Omecinsky or Tim Casey at (518) 473-4421.

Sincerely,

A handwritten signature in dark ink, appearing to read "Steve Simmons", with a stylized, flowing script.

Steve Simmons  
Director  
Bureau of Managed Long Term Care  
Office of Health Insurance Programs  
1 Commerce Plaza-Room 1430  
99 Washington Avenue  
Albany, New York 12210

Enclosure