LHCSA RFO Scheduled for Implementation on May 1, 2022
Is your Agency Ready for the RFO?

Recently, the New York State Department of Health published its FY 2023 "Medicaid Scorecard" that outlines various Medicaid-related initiatives for the upcoming year. Of interest to home care providers, the Scorecard was updated to state that the LHCSA RFO "re-estimate[d]" "implementation date" will be May 1, 2022. There was no explanation of what this practically means. It is impossible for the State to issue a Request for Offers from interested LHCSA applicants, collect responses, and evaluate them all in time to implement the RFO by May 1, 2022. Thus, this May 1, 2022 might be a target date by which the State intends to issue the actual requests for proposals. We've been hearing for months that the actual RFO application for LHCSA is done and under legal review. The State has been steadfast that the RFO will be issued, eventually. However, if the CDPAP RFO is any indication, it will be years before the LHCSA RFO is actually implemented.

Nonetheless, the LHCSA RFO is unlikely to be repealed in this year's budget bill. And the Executive's proposal for MLTC RFOs evidences the State's interest in consolidating the home care market, among providers and payors. Thus, with no immediate repeal of the LHCSA RFO in sight, LHCSA providers will have to go through the process of responding to the request for proposals.

As a reminder, per the State's law, all LHCSA RFO responses will have to address the following categories:

1. Licensure under Article 36 (which appears to mean that entities that wish to be licensed but that are not licensed cannot apply);
2. The ability to appropriately serve Medicaid recipients, "as determined by the Commissioner;"
3. Geographic distribution of LHCSAs to ensure access statewide, including in rural and underserved areas;
4. Demonstrated cultural and language competencies specific to the population of recipients and those of the available workforce;
5. Ability to provide timely assistance to recipients;
6. Experience serving individuals with disabilities;
7. Efficient and economic administration of LHCSA services; and
8. Demonstrated compliance with all applicable federal and state laws and regulations, including wage and labor standards, compliance with EEO and anti-discrimination laws.

If you have any questions about the LHCSA RFO or wish to discuss preparation for the RFO, please do not hesitate to reach out to our firm.

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Reminder to subscribe, follow, and share the Home Care Forum Podcast, which is available on iTunes and ApplePodcasts for download every week. Lead FI and LHCSA Owner Sasha Guillaume and I record a new podcast episode every week, sharing with our listeners the newest New York and federal home care developments, from a legal and business sense.

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From all of us at Poricanin Law, Happy International Women's Day

Wage Parity Certifications are on the Horizon How to Best Prepare

Our firm has received numerous questions over the last several days as the June 1, 2022 deadline for wage parity compliance certification approaches. This year will be the first time that providers will be submitting documentation evidencing their compliance with the wage parity law. Here are some FAQs that we have received from clients on this topic:

Why are Plans Asking us for Compliance Information Now? Isn't Our Deadline to Provide this Information June 1, 2022?

Providers and payors have different obligations insofar as this year's certifications are concerned. The providers (i.e., LHCSAs and FIs) must produce LS300, LS301 forms, and any supporting documentation to each payor with which they do business, at some point in time

before June 1, 2022. The deadline by which this information must be submitted to the payors will be set by the payor, but it will be some date before June 1, 2022. The providers will also have to certify to compliance online. **Conversely**, payors (e.g., CHHAs and MLTCs) need to evaluate the compliance of the providers that they contract with and certify to those providers' compliance with wage parity by June 1, 2022. The reason that payors will be requesting providers' wage parity information now versus later is because payors need time to review the providers' data and be in a position to certify to those providers' compliance by June 1.

What are Plans Going to do with the Wage Parity Information Received from Providers?
Payors are required to report any "reasonably suspected" violations of the wage parity law to the New York Department of Labor ("DOL"). The State, without resources to adequately audit and monitor providers' compliance with the Wage Parity Law requirements, has effectively outsourced this function to the payors. Home care providers and FIs are advised to carefully prepare their LS300 and LS301 forms, in order to avoid triggering any referral of their agency to the DOL. In view of the immense responsibility for verifying wage parity compliance that has been delegated to the payors by the State, payors may be inclined to take the "better safe rather than sorry" approach and over-report providers that they suspect of noncompliance.

Who can serve as an Independent Auditor?
Providers' wage parity hours and expenditures have to be audited and the providers' compliance has to be certified by an independent auditor. The term "independent" is defined by "GAAP according to Financial Accounting Standards Board (FASB)." The provider does not define what "independent" means. The independent auditor that has to sign off on the LS301 has to certify that they are in fact independent.

How many LS300s do we need to fill out?
Providers must complete a single LS300 for every plan that they contract with.

For entities that are both a FI and a LHCSA under one EIN, the hours and payments reported will be aggregated in a single LS300 per plan.

Providers are advised to seek counsel about how to report benefits on a per-plan basis. Benefits are accrued based on all hours worked, regardless of what plan's hours were worked. Thus, providers have no clear way of separating out, for example, PTO that was earned under hours worked for plan ABC versus plan XYZ.

Are Overtime Hours and Spending Reported?
It is our position that overtime hours and spending are reported, since overtime hours are also considered wage parity hours. Thus, providers will report overtime pay under wages paid, and under overtime hours of care.

How Should Providers Separate out "Universal" Benefit Programs for Purposes of Reporting?
This is a bigger topic than this blog allows. Benefits that are governed by the Internal Revenue Code are generally required to be maintained separately, as each benefit is subject to its own rules on accruals, usage, forfeiture, annual limits, etc. Comingling benefits is generally not allowed. Benefit programs that are structured improperly carry the risk of losing their nontaxable status, which means that the NYS Department of Taxation or the IRS could claim that payroll tax should have been paid on those benefits. And from a wage parity standpoint, the Wage Parity Law reporting requires that each benefit's spending be separately reported as its own "line item." Comingling transit benefits with prescription coverage, for example, prevents the provider from reporting how much was spent by the provider per benefit.

NYC COVID Restrictions Lifted. Vaccine Mandate Remains in Effect

New York City Mayor Adams recently announced that effective March 7, 2022, a number of COVID-related restrictions in NYC will be lifted. Indoor venues, including restaurants, will no longer be required to check for proof of vaccination before customers enter. Masks will no longer be required on public school grounds for kindergarten to 12th grade students. However, as we had previously reported, the New York City vaccination mandate, implemented by former Mayor DeBlasio, that has been in effect for all businesses in New York City and potentially applies to fiscal intermediaries, subject to certain exceptions, will continue to be in effect for now. As a reminder, CHHAs and LHCSAs are already covered by the NYS DOH vaccination mandate, which also continues to be in effect.

Remote Aide Supervision Extended Until March 31

On March 1, Governor Hochul signed Executive Order 4.6 which extended various regulatory waivers for home care providers. Of importance, the EO allows LHCSAs and CHHAs to conduct in-home supervision of aides as soon as practicable after the initial service visit or to conduct such supervision through indirect means, including telephone and video communication. The EO is scheduled to expire March 31. Although the EO could be extended, given the State's attempts to "return to normal," providers should prepare for the possibility that the EO will not be extended when it expires on March 31.

Biden Signs Law Limiting Agreements and Waivers Covering Sexual Assault and Harassment Claims

On March 3, 2022, President Joe Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "Act"), which limits the use of pre-dispute arbitration agreements and class action waivers covering sexual assault and sexual harassment claims. As we had previously written, the Act amends the Federal Arbitration Act (FAA) to give employees who are parties to arbitration agreements with their employers the option of bringing claims of sexual assault or sexual harassment either in arbitration or in court.

The Act amends the FAA to include a new section, which states, in part:

[A]t the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

The Act gives employees the option to invalidate arbitration agreements and class or collective action waivers with respect to sexual assault and sexual harassment claims. This means employees may choose to either arbitrate these claims or pursue them in court regardless of any contractual agreements with their employers.

The Act applies to all claims that arise or accrue after March 3, 2022, regardless of the date of the agreement at issue. The Act, however, does not affect claims that arose or accrued before March 3, 2022.

The Act does not affect otherwise valid arbitration agreements for claims that are not related sexual assault and sexual harassment.

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