



February 3, 2012

Jason A. Helgerson  
Deputy Commissioner and Medicaid Director  
Office of Health Insurance Programs  
New York State Department of Health  
Corning Tower, Empire State Plaza  
Albany, New York 12237

Re: Home Care Worker Wage Parity Law

Dear Mr. Helgerson:

The Home Care Association of New York State, Inc. (“HCA”) and LeadingAge New York, health care associations that represent home care agencies and managed long term care plans throughout the State, submit this letter jointly to express our concerns about the interpretive guidance that the New York State Department of Health (the “Department”) recently posted on its website regarding the New York State Wage Parity Law (N.Y. Pub. Health L. §3614-c). A copy of the guidance, which is in the form of Frequently Asked Questions (“FAQs”), is attached herewith.

While we continue to strenuously advocate for adequate reimbursement to agencies and plans to support strong compensation and benefits for home care workers, we have repeatedly made it clear that we object to the validity of, and the policy underlying, the Wage Parity Law. We believe that the unfunded mandates under the law constitute a wrongheaded policy, particularly at a time when home care agencies are already facing disproportionately outsized cuts in their Medicaid reimbursement and further proposals to eliminate Medicaid inflationary adjustments entirely.

Nonetheless, since June, we have continually sought to obtain clear answers to questions we have sent to the Department regarding implementation of the Wage Parity Law so that our members can take the necessary steps to comply. Despite our numerous communications and the Department issuing three Dear Administrator Letters, two of which included FAQs, some very basic issues are still unresolved and have not been clarified by DOH. These include the hourly wage and health benefits requirements for aides under this law. Until this information is provided, we urge the Department to delay implementation of the Wage Parity requirements.

The FAQs released on January 24, 2012, unfortunately, raise new questions and issues and make compliance difficult, if not nearly impossible.

Here are our concerns:

- FAQ 1 and FAQ 23 are contradictory. FAQ 1 states that certain collective bargaining agreements supersede the Wage Parity Law. FAQ 23 states the opposite.
- FAQ 8 indicates that certified home health agencies, long term home health care programs and managed care organizations must submit attestations of compliance beginning on March 1, 2012. A certification of course may not be used to attest a future event; rather, it can be used to attest to a past or current event. In addition, DOH had initially stated that such certifications for the period March 1, 2012 through February 28, 2013 were due February 28, 2013 and we urge DOH to change the due date back to February 28, 2013. (FAQ 9 and FAQ 21 also contain references to this requirement).
- FAQ 9 indicates that covered home care agencies must receive attestations of compliance from their vendors beginning March 1, 2012, the effective date of the Wage Parity Law. We request confirmation that home care agencies need not obtain vendor certifications on March 1<sup>st</sup> but rather must obtain certifications covering service periods beginning on March 1, 2012, with the first certification to be obtained no later than June 1, 2012. (FAQ 8 and FAQ 21 also contain references to this requirement).
- FAQ 12 states that the Wage Parity Law does not apply to individuals providing services through the Consumer Directed Personal Assistance Program (CDPAP). However, a provision in the 2012-13 Executive Budget would require managed care plans to offer CDPAP services to their enrollees. If this proposal is enacted into law, would the answer to this question change?
- FAQ 15 and FAQ 16 recognize that a covered home care agency may offset the cost of certain benefits against the agency's obligations under the Wage Parity Law. Without citing the Wage Parity Law, however, FAQ 16 states that the offset may not be applied to any portion of the cash mandate. The distinction drawn in FAQ 16 is not supported by the terms of the Wage Parity Law.
- FAQ 20 attempts to define the Wage Parity Law reference to "working on a casual basis" as "working on an incidental, irregular, and or intermittent basis." This standard is still relatively vague and should be further clarified by references to number of hours of work, number of work days per week and/or some other more definitive measure.
- FAQ 22 states that qualifying health coverage should cost the employers no less than \$1.35 per hour and cites the New York City living wage law as the basis for this interpretation. The New York City living wage law requires that (i) employers pay the living wage amount (\$10 per hour) and (ii) provide health benefits or supplement their hourly wage by an amount no less than the health benefits supplement rate (\$1.50 per hour, which at 90% translates to \$1.35). Under this law, the health benefits supplement amount is the *alternative to* the requirement that a health benefit be provided; it does not subject the employer to that same cost as a minimum expense for the health benefit if the employer in fact provides the benefit instead of paying the supplement. Thus the Department's requirement that health coverage should cost no less than \$1.35 per hour is incorrect.

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It is also worth noting that the FAQs, taken together, reflect the Department's result oriented construction of the Wage Parity Law. The Department has interpreted the Wage Parity Law as incorporating the wage mandate for personal homecare services contained in section 6-109 of the Administrative Code of the City of New York. Section 6-109 (c) states, however, that the wage mandate in section 6-109 "shall only apply as long as the state and federal government maintain their combined aggregate proportionate share of funding and approved rates for homecare services in effect". Section 6-109 (c) obviously means that the wage mandate referenced in section 6-109 must be funded in order to be effective. Despite that rule, the Department selectively lifts the wage mandate language from section 6-109 into the Wage Parity Law and ignores the conditions that the New York City Code attached to the mandate. This underscores our argument that the law and its application will result in an inappropriate unfunded mandate.

At this point, due to the widespread confusion about the Wage Parity Law, it would be unfair to expect any affected provider or plan to comply with the Wage Parity Law, no less certify that it is in compliance. We therefore request that the Department rescind its FAQs immediately and delay implementation of any rules under, and enforcement of, the Wage Parity Law until further clarification is furnished.

We are also, once again, requesting to meet, in person, with the Department to discuss our myriad of questions about the Wage Parity Law. We believe that a meeting, with perhaps a follow-up communication, will be the most conducive forum to clear up the existing confusion about the law.

We look forward to your reply.

Sincerely,



Joanne Cunningham  
President  
Home Care Association of NYS



Daniel J. Heim  
Executive Vice President  
LeadingAge New York

cc: Hon. Nirav Shah, MD., Commissioner of Health  
James E. Dering, Esq., General Counsel, Division of Legal Affairs  
Mark Kissinger, Director, Division of Long Term Care

Enclosure

# Home Care Worker Wage Parity Frequently Asked Questions (FAQs) January 2012

These FAQs respond to questions that are not addressed in other Home Care Worker Wage Parity materials posted on the HCS, such as Dear Administrator Letters (DALs). Please consult these materials in conjunction with the following FAQs.

## General Questions

### **Q1. When do the terms of a collective bargaining agreement (CBA) supersede the requirements of the wage parity law?**

A1. The CBA must meet the following conditions:

- It must have been in effect on January 1, 2011 or be a successor to an agreement that was in effect on that date.
- It must provide for the provision of health benefits through payments to a jointly- administered labor management fund.

### **Q2. Will the Medicaid reimbursement rates also be increased for the Certified Home Health Agencies (CHHAs), Long Term Home Health Care Programs (LTHHCPs) and Managed Care Organizations (MCOs) to compensate for the increase in wage rates for home health aides?**

A2. No. Not at this time.

### **Q3. What is the minimum wage for home care aides in 2012?**

A3. For workers who are not subject to local living wage law, the minimum wage will rise from \$7.25 to \$10.35 starting on March 1, 2012, for workers that are subject to the Worker Parity Law.

**Q4. The living wage law of New York City states: "(d) In the case of city service contractors or subcontractors providing homecare services, the health benefits requirements of this section may be waived by the terms of a bona fide collective bargaining agreement with respect to employees who have never worked a minimum of eighty (80) hours per month for two consecutive months for that covered employer, but such provision may not be waived for any employees once they have achieved a minimum of eighty (80) hours for two consecutive months and no other provisions of this section may be so waived."**

**Does this apply and does this mean that we do not have to pay the \$1.35 for any employee that does not meet these criteria?**

A4. As long as the impacted providers are in compliance with their respective local living wage law, then they are also in compliance with the state law.

### **Q5. Do employers have a reporting responsibility to the State for employees who refused health benefits because they are currently receiving State-based health benefits?**

A5. No.

### **Q6. Are Nursing Home Transition and Diversion (NHTD) and Traumatic Brain Injury (TBI) waiver providers included under the wage parity law or are they only covered once they transition to managed care?**

A6. If workers, employed by NHTD or TBI providers, are providing assistance with activities of daily living (ADLs), instrumental activities of daily living (IADLs) or health-related tasks; as defined in section 3614-c(1)(d), and the provider is under contract with a CHHA, LTHHCP, or MCO, those individuals are covered under the law.

**Q7. Our reading of the living wage parity law is that it only applies to services provided by MCOs, CHHAs or LTHHCPs, or to services provided by their subcontractors. We don't see anything that would apply to LHCSAs that do not provide services through a CHHA, LTHHCP or MCO. Does this mean LHCSAs who are not a subcontractor of a CHHA, LTHHCP or MCO are exempt?**

A7. Yes. Entities that do not contract with a CHHA, LTHHCP or MCO for Medicaid reimbursed episodes are not required to comply with the living wage law. For further guidance, refer to section 3614-c(5) in conjunction with 3614-c(2) and (7).

**Q8. How should the certifications from Certified Home Health Agencies, Long Term Home Health Care Programs and Managed Care Organizations be submitted and when is this effective?**

A8. On an annual basis, CHHAs, LTHHCPs and MCOs must provide the Commissioner of the Department of Health written certification that all services provided are in full compliance with the terms of the Home Care Worker Wage Parity Law; the certification must include CBA status and identification of the entities the CBAs are with. Submissions for New York City providers are required beginning on March 1, 2012.

**Q9. How should the certifications from contracted entities be submitted and when is this effective?**

A9. On at least a quarterly basis, CHHAs, LTHHCPs and MCOs are required to obtain certifications from their vendors attesting that the contracted entity is in compliance with this provision. All providers must maintain records of compliance for at least 10 years and such records are to be made available to the Department upon request. CHHAs, LTHHCPs and MCOs are required to obtain these certifications beginning on March 1, 2012.

**Q10. Is it true that the requirement to pay the supplemental benefit rate of \$1.35 per hour in NYC for the period March 1, 2012 through February 28, 2013 only applies when the employer does not provide health benefits?**

A10. Yes.

**Q11. On "split-bill" cases, where the agency bills both Medicaid and Medicare, the Worker Parity law does not apply to a home care aide's time devoted to providing Medicare, not Medicaid services, right?**

A11. Correct. As indicated in the previous FAQ document, the home care worker wage parity law applies to cases that are Medicaid reimbursed either in whole or in part.

**Q12. Does the worker wage parity law apply to those providing services to individuals in the Consumer Directed Personal Assistance Program (CDPAP)?**

A12. The worker wage parity law does not apply to the CDPAP.

**Q13. Is it correct to assume that the types of information that LHCSAs must submit quarterly to CHHAs, LTHHCPs, and MCOs to verify that the LHCSA is in compliance with the Worker Parity law is to be determined by the providers?**

A13. As indicated in the Department's October 28, 2011 FAQ document, the Department created a form for CHHAs, LTHHCPs and MCOs to provide to LHCSAs with which they contract. CHHAs, LTHHCPs and MCOs can also create their own form as long as it includes the same critical elements captured in the attached document. However, additional requirements may be added to meet the needs of your agency.

**Q14. With regards to the "Schedule of Implementation": You indicate that for NYC, 3/1/2012 – 2/28/2013 – total compensation must be no less than 90% of the total compensation mandated by the living wage law of NYC. Does this mean that only 90% (\$9.00 + \$1.35=\$10.35 x .9= \$9.31) or \$9.31 has to be paid out between 3/1/2012 &**

## **2/28/2013? Would a minimum hourly wage of \$9.00 be in compliance with the law? Please clarify.**

A14. The NYC living wage law currently provides for wage + benefit supplement (\$10.00 + \$1.50) totaling \$11.50 and 90% of that is \$10.35. Section 3614-c(3)(a)(i) provides that for the period 3/1/12 to 2/28/13 NYC providers are required to pay at least 90% of the local living wage standard. Therefore, 90% of the total compensation required by the living wage law includes an hourly wage of \$9.00 plus health benefits or a benefit supplement rate of \$1.35.

## **Q15. Is there a requirement to provide benefits?**

A15. No, employers are not required to provide benefits in order to comply with the minimum wage, but starting March 1, 2012, they may be entitled to receive credit for benefits that they choose to provide to workers subject to the Worker Parity Law.

## **Q16. Is there a limit on the amount of credit that can be received for benefits?**

A16. Yes. The credit for benefits cannot be used to reduce the "cash" portion of the minimum rate of wages. Under state and federal minimum wage laws, benefits can never be used to reduce the requirement to pay at least \$7.25 per hour in cash wages. Under the New York City Living Wage Law, benefits cannot be used to reduce the requirement to pay at least \$10 per hour in cash wages. Under the Worker Parity Law, which sets the minimum wage by reference to 90% of the New York City Living Wage, the minimum cash wage is \$9.00 per hour (90% of \$10).

## **Q17. What benefits can be credited against the Worker Parity Law minimum wage?**

A17. Credit can be given for health, education or pension and supplements in lieu of benefits and compensated time off, without regard to whether such benefits are provided directly by the employer or through a plan or program. Credit can also be given for any other employee benefits that employers may choose to provide through a plan or program. No credit may be given for employer taxes or the employer portion of statutory benefits including but not limited to FICA, disability insurance and workers compensation.

## **Q18. What is the minimum overtime rate for home care aides?**

A18. There is no limit on the number of hours a home care aide can work under the Wage Parity Law. While most home health care workers covered by the Wage Parity Law are exempt from overtime under the federal law, they may still be entitled to overtime under the New York State Labor Law. (See, [FLSA Fact Sheet No. 25](#); See also, [NYS DOL Overtime FAQ](#).) While these occupations must be paid overtime, the New York State Labor Law requires an overtime rate not less than 1.5 times the state minimum wage for hours over 40, regardless of the amount of their regular rate of pay. For example, a FLSA exempt employee paid \$9 per hour must be paid at least \$10.875 per hour for all overtime hours worked.

## **Q19. Is there a minimum amount of hours that a Home Care Worker must work to be eligible to receive the \$9 per hour living wage and \$1.35 an hour Health Benefit, or does it apply to any Home Care Worker on an agency's payroll working on a Medicaid-reimbursed case.**

A19. There are no set minimum hours, though 3614-c(1)(d) does exempt aides "working on a casual basis" from compliance with its provisions.

## **Q20. Can you provide guidance on what is meant by "working on a casual basis" in connection with the exclusion from the definition of home care aide of an individual "working on a casual basis"?**

A20. Section 3614-c(d) defines home care aide to mean "a home health aide, personal care aide, home attendant 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..." The department interprets "working on a casual basis" to mean any worker who is working on an incidental, irregular, and or intermittent basis.

## **Q21. What is the deadline for filing the first certifications relating to CHHAs, LTHHCPs and MCOs compliance with the terms of the Home Care Worker Wage Parity Law?**

A21. The law takes effect with regard to services provided on and after March 1, 2012 in NYC. Pursuant to 3614-c(6),

no payments may be made for such services to any provider unless the provider has filed the required certifications.

**Q22. Is there a guideline on what constitutes \$1.35 in health benefits? How is it determined?**

A22. There is no sliding scale for benefits. In determining the value of health benefits for purposes of enforcing its living wage law, NYC looks to the per hour per employee premium cost of the coverage. Therefore, under 3614-c qualifying health coverage should cost the employers no less than \$1.35 per hour per employee in premiums.

**Q23. Does a CBA which meets the requirements supersede the wage and health insurance/health supplement requirements of the wage parity law?**

A23. No.

Revised: January 2012