

Client Alert

June 18, 2021

New York State Department of Health Issues CDPAP RFO 20039 Survey

On June 15, 2021, the New York State Department of Health issued the “Survey of Qualified Offerors,” (the “Survey”), to all Fiscal Intermediary applicants, in connection with CDPAP RFO 20039. As previously reported in our [Client Alert](#), the Survey will provide the Department with the information necessary to enable it to make additional awards based on the updated selection criteria. The Survey provides the first timeline and insight into the Department’s plans to implement the RFO results. All qualified applicants, including the Awardees, must respond to the Survey.

The Survey asks for information such as:

- the Offeror’s name, FEIN and MMIS;
- the Offeror’s address as provided on the organization’s latest filed state tax return;
- whether the Offeror is a NYS Certified Minority or Women Business Enterprise;
- whether the Offeror is a not-for-profit organization;
- whether the fiscal intermediary (FI) began providing FI services to CDPAP consumers prior to January 1, 2012;
- whether the Offeror is currently authorized, funded, approved or certified to deliver state plan or home and community based waiver supports and services (HCBS) to individuals with intellectual and developmental disabilities by the Office for People with Developmental Disabilities (OPWDD); and
- whether the Offeror has historically provided FI services to CDPAP consumers and personal assistants who are racial, ethnic, religious minorities or new Americans as defined by Section 94-b of the Executive Law.

It is important to note that this Survey has been put out for "inspection," and DOH will issue the final Survey to Qualified Offerors on June 30, 2021. Completed Surveys must be emailed to OHIPContracts@health.ny.gov prior to the Deadline, which is July 30, 2021 at 5:00 p.m. The initial 68 awardees should be aware that the Survey document

states that DOH will not proceed to the contracting process with *any* awarded fiscal intermediary, until the Survey process is complete, and the total number of awards have been made.

The Department will host two question and answer webinars, one on June 21 at 2:00 p.m. and the other on June 23 at 11:00 a.m., and will also take additional written questions until June 25, 2021 at 5:00 p.m.

Information on the Survey, and RFO 20039 can be found on the Department's website, [here](#). Please contact our office with any questions.

Update on the HERO Act

As previously reported in our [May 7 Client Alert](#), Governor Cuomo signed the HERO Act on May 5, 2021, which amends Section 218-b of the Labor Law and directs the Department of Labor, in consultation with the Department of Health, to create and publish, model airborne infectious disease prevention standards for all work sites, differentiated by industry, and to establish minimum requirements for preventing exposure to airborne infectious diseases in the workplace in order to protect the public and the workforce.

Since that time, the Legislature has issued Amendments, (the “Amendments”), which make various changes to the law. These updates include:

Timing

The Labor Commission in conjunction with the Department of Health now have until July 5, 2021, to publish the model standards. Once these standards are issued, employers will have thirty (30) days to implement their own infectious disease exposure prevention plan by: (1) adopting the model standard relevant to their industry, or (2) establishing an alternative plan that equals or exceeds the minimum standards provided in the model standard.

The plan must be provided to employees in writing, in English, and in the language identified by each employee as their primary language:

- within thirty (30) days of the employer’s adoption of the plan,
- within fifteen (15) days after reopening after a period of closure due to airborne infectious disease and,
- to any newly hired employee upon hiring.

For those employers permitted to operate as of July 5, 2021, the prevention plan must be provided to all employees no later than sixty (60) days after the Commissioner publishes the model general standard and applicable industry standard.

Employee and Worksite

The Amendments update the definitions of “employee” and “worksite.” Employees are “individuals working for digital applications or platforms.” A worksite is “any physical space, including a vehicle (though an employer’s prevention plan need not be posted in a vehicle), that has been designated as the location where work is performed, over which an employer has the ability to exercise control.” Based on this language, the private homes of individuals (including patients and others), will not likely be

considered a “worksite” under the Act. If the private home does not qualify as a worksite, then the Act’s safety standards will not govern the space.

Notably, the Amendments specifically include language that a worksite does not include a telecommuting or telework site, unless that employer has the ability to exercise control of such site. Thus, employees’ homes, where employees are working remotely, will not generally be covered or subject to the Act’s requirements.

Private Right of Action

Employees have a private right of action against employers for alleged violations of the Act. Under the Amendments, employees must give notice to the employer of alleged violation(s). Employees may not bring the action until thirty (30) days after giving the employer such notice. Employees are exempt from providing notice however, where the employee alleges with particularity, that the employer has demonstrated an unwillingness to cure a violation in bad faith. Employees may not bring the action if the employer corrects the alleged violation. Lastly, the action must be brought within six (6) months of the date the employee had knowledge of the violation alleged in the action.

The Amendments eliminate a prior provision of the Act that authorized courts to order payment of liquidated damages of no greater than \$20,000, unless the employer proved a good faith basis to believe that the established health and safety measures were in compliance with the applicable airborne infectious disease standard. The Amendments also permit employers to seek attorneys' fees and costs from an employee bringing a frivolous action.

Please contact our office with any questions regarding the HERO Act and/or the Amendments.

New York State Department of Health Issues Letter on Character and Competence Review Policy

On June 11, 2021, the New York State Department of Health issued DAL 21-14, DHCBS 21-08, NH21-15 on “Submitting False or Inaccurate Information or Omitting Material Information.” The purpose of the letter is to inform individuals submitting certificate of need applications, licensed home care services agency (LHCSA) applications, adult care facility (ACF) common applications, or transfer of ownership interest notices, that the Department of Health has adopted a policy regarding the review of an applicant’s character and competence when that applicant has provided false or inaccurate information, or has omitted material information, at any point during the course of the review.

As part of the policy, the Department will maintain a database of all applicants who have received a character and competence review in connection with a Certificate of Need Application, LHCSA Application, ACF Common Application, or Transfer of Ownership Interest Notice, and the results of that review. This information will be viewable by DOH, for seven (7) years in relation to applications or notices submitted for Article 36 home care agencies, and for ten (10) years in relation to all other applications and notices.

Effective immediately, applicants whom the Department has discovered submitted a false affidavit in lieu of an application schedule or submitted false or inaccurate

information or failed to disclose material information anywhere in an application or at any point in the application process, will have such fact noted in the character and competence database. This information will be a factor in determining whether the Department will recommend approval of the applicant in any concurrent or subsequent character and competence review undertaken on other applications filed by the applicant.

Applicants will be given an opportunity to provide the Department with a written explanation or supplementary materials to account for any discrepancies identified in their submission. Applicants must submit this written explanation or supplementary material within seven (7) calendar days from the date the Department notifies the applicant of the identified discrepancies. If an affidavit is found to be false, or the applicant fails to provide a reasonable written explanation or supplementary materials addressing the false or inaccurate information, an automatic recommendation of disapproval of the applicant's character and competence may occur for a period of three years. The three-year period will begin on either the date of the Department's discovery of the falsehood, or the date of the Department's determination that the written explanation or supplementary materials are unreasonable, whichever is later.

The submission of false or inaccurate information, or the failure to disclose material information, will continue to be a factor, among others, in determining whether the Department will recommend approval of the applicant's character and competence, beyond any three-year period of automatic recommendation of disapproval, for as long as this information is maintained in the database.

Please contact our office with any questions regarding this letter or character and competence review generally.

New York State Department of Labor Issues Guidance on Paid Sick Leave for COVID-19 Vaccine Recovery

The New York State Department of Labor has issued guidance that employees may use accrued paid sick leave for the recovery of COVID-19 vaccine side-effects.

Under the law employees are entitled to use sick leave "for mental or physical illness, injury, or health condition, regardless of whether it has been diagnosed or requires medical care at the time of the request for leave." Because the COVID-19 vaccine may cause side effects, employees may take accrued paid sick leave to recover, and employers "are obligated to honor" such use request.

EEOC Issues Updated and Expanded Guidance on COVID-19 Vaccines

On May 28, the U.S. Equal Employment Opportunity Commission (EEOC) issued updated and expanded guidance for employers regarding COVID-19 vaccinations and employees. This updated guidance supplants prior guidance and focuses on four topics: (1) mandatory vaccination policies; (2) accommodations; (3) information about employee vaccination status; and (4) vaccine incentives.

“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” is posted on the EEOC's website and can be accessed [here](#).

OSHA Issues COVID-19 Healthcare Emergency Temporary Standard

The U.S. Department of Labor (DOL) Occupational Safety and Health Administration (OSHA) has issued an [Emergency Temporary Standard](#), or ETS, setting workplace safety standards for employers in the health care sector for the duration of the COVID-19 pandemic. The full text of the ETS can be found [here](#).

The ETS is aimed at protecting workers facing the highest COVID-19 hazards- those working in healthcare settings where suspected or confirmed COVID-19 patients are treated, and thus the ETS applies to all settings, where any employee provides healthcare services or healthcare support services. This includes hospitals, nursing homes, assisted living facilities, home healthcare workers, emergency responders, and employees in ambulatory care facilities where suspected or confirmed COVID-19 patients are treated. There are exceptions, where the ETS will not apply, for example, in workplaces where all employees are fully vaccinated, and all non-employees are screened prior to entry. Otherwise, employers in the health care sector are expected to maintain social distancing protocols, make sure that patients are properly screened for symptoms, and give workers paid time off to get vaccinated and recover from vaccine side effects.

Employers are encouraged to review [OSHA's Flow Chart](#) to determine whether or not their workplace is covered by the ETS. The ETS takes effect on the date it is published in the Federal Register, although the exact date has not yet been determined.

Please contact our office with any questions regarding OSHA's ETS.

New York State Department of Health Confirms August 1 Completion Date for EVV Training

According to the New York State Department of Health (DOH), provider agencies and fiscal intermediaries must meet EVV training program requirements by August 1, 2021.

All providers and fiscal intermediaries (FIs) must provide training to their caregivers, agency staff, and EVV system users submitting EVV data to DOH. Training may be delivered in any format, including instructor led, webinars and self-service online training.

The training requirements are included in the [EVV Program Guidelines and Requirements document](#), pages 12 to 14.

All providers and FIs must provide training to all users of the system prior to any user submitting EVV data and provide training refreshers annually to all users. When major changes to the EVV program occur, training on such changes must be included in the next annual training cycle if not sooner. The training materials must always be available to train any new users upon their starting in a position that requires use of

EVV. All providers and FIs must maintain documentation of the training, including a list of all caregivers and staff users of the system.

The EVV Program Guidelines and Requirements document includes a list of topics that should be part of any training for caregivers, other provider staff and data submitters, and training documentation requirements.

Please contact our office with any questions regarding EVV training requirements.

Issues to Consider with a Remote Workforce

As greater numbers of employees work from home, and for longer periods of time, employers are reminded to revisit, review, and update their current “work from home” policies and procedures. Remote working policies and procedures should be relevant, applicable, and maintain the confidentiality and business integrity of the organization. Some additional measures for employers to consider as they review their policies and procedures include the following.

- Update all outward facing documents to reflect current and emergent 'work from home' policies, including Handbooks, Notices, Bulletins, and the Policies & Procedures themselves.
- Provide training on best practices, safeguards, and updates.
- Ensure that all devices being used to work remotely are equipped with all necessary security protections, such as anti-virus software, password protection, and a secure Wi-Fi network.
- Establish security measures for devices and networks, including multi-level authentication, password strength, and automatic log-out.
- Provide screen protectors designed to limit what others can see on the screen if not sitting directly in front of it.
- Choose a safe and secure conferencing application for conducting virtual meetings. Enable all potential security features, including password protected access, different meeting IDs, host control and waiting room features. Be aware of who attends each meeting and eject anyone not invited.
- Prohibit the use of certain unsecure programs and applications.
- Require devices that are used for remote work to be kept in a secure and private location and to be used by the employee only.

Please contact our office with any questions regarding remote working policies and procedures and maintaining confidentiality.

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