

Client Alert

March 25, 2021

CDPAP Update

On February 11, 2021 the Department of Health announced its selection of Lead Fiscal Intermediaries under RFO 20039. Offerors were advised through letters of their right to a debriefing regarding their individual offer. The Department then issued written debriefings which were argued by many offerors to be deficient. As a result of this, the Department held two WebEx sessions that included a summary of the evaluation process that was utilized, an overview of the evaluation tool that was used, and how to seek additional information. The Department sent out a Technical Proposal Score Tool and a rubric with individual metrics in advance of these sessions. The Department also extended the time for filing a protest, which is the later of five business days after the WebEx session that the vendor registered for, or, the vendor's 15-minute additional meeting.

On March 5, Senator Mannion formally introduced 2021 New York Senate Bill No. 5458 which authorizes the Commissioner to reoffer contracts and provide additional awards to qualifying entities. According to the Bill, “the Commissioner shall reoffer contracts to ensure that there are at least two fiscal intermediaries headquartered in each county with a population of two hundred thousand or more.” Thus, reoffers of contracts may happen in counties that have at least two hundred thousand people and were awarded fewer than two fiscal intermediaries. The Commissioner may also provide for additional awards in two instances. The first is to ensure “regional choice and experience serving individuals with developmental disabilities.” The second instance is to ensure “regional choice and experience serving racial and ethnic minorities.”

On March 18, Assembly Bill A6479 was introduced. A6479 allows fiscal intermediaries that have been providing services throughout the Coronavirus emergency declaration to continue providing services until April 1, 2022, and if signed into law, within sixty (60) days of the effective date, the Commissioner will issue a new request for applications for contracts. This new request will not interrupt the granting of contracts already under way and the validity of those contracts.

DOH Issues Guidance on FI Rate Structure

On March 11, the Department of Health published two guidelines for the

“Implementation of Fiscal Intermediary (FI) Rate Structure Enacted in the SFY 2019-2020 NYS Budget.” The guidelines, one for fee for service CDPAP providers (accessible [here](#)) and the other for managed long-term care (accessible [here](#)), explain the changes to Medicaid fee for service reimbursement that were implemented by final rule on January 13, 2021. These guidelines are effective April 1, 2021, and Fiscal Intermediaries should start billing under the new PMPM methodology on or after May 1, 2021 for administrative services performed on or after April 1, 2021.

EVV Training Requirements Updated

The NYS DOH Electronic Visit Verification (EVV) Program Guidelines and Requirements have been updated to now include minimum training requirements that provider agencies and fiscal intermediaries must adhere to when training their EVV system staff and caregivers.

All providers and fiscal intermediaries must provide training to their caregivers, agency staff and EVV system users submitting EVV data to the state Department of Health. Training may be delivered in any format, including instructor led, webinars and self-service online training.

All providers and fiscal intermediaries must provide training to all users of the system prior to any user submitting EVV data and must 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. Providers must ensure that their EVV training programs meet the new requirements by August 1, 2021.

All providers and fiscal intermediaries must maintain documentation of EVV training, including a list of all caregivers and staff users of the system, and:

- the training that caregivers and staff users of the system have received,
- the training materials and content,
- the date(s) the individual attended training,
- the format of the training (e.g., in person, online, etc.) and
- the date training was successfully completed.

All providers and fiscal intermediaries must also ensure and document in the member’s service plan that the Medicaid member has seen and understands the EVV Fact Sheet "*What You Should Know About Electronic Visit Verification (EVV)*," which is posted on the Department’s EVV website and accessible [here](#).

Transgender Inclusivity

Over the years inclusivity has become an integral part of the workplace. Today, this includes protections on the basis of actual or perceived gender identity. In New York State these rights are protected by the Division of Human Rights. In the federal circuit, these rights are safeguarded by Title VII of the Civil Rights Act of 1964, which as of last summer includes discrimination on the basis of sexual orientation and gender identity. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020). Most recently the Biden Administration reaffirmed its commitment to combat discrimination on the basis of gender identity with its January 20, 2021 Executive Order Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.

Because of these and other changes in our social landscape, employers should continue

to strive to foster an environment that embraces their employee's differences and actively fights against discrimination. Employers should consider the adoption of a Transgender Inclusion Policy; the goals of which are to affirm the rights of trans persons while delineating the company's response to gender issues. By structuring your policy to accomplish these twin aims, you not only reiterate the company's commitment to a discrimination free workplace, but you provide your staff with an invaluable tool for promptly and appropriately addressing highly sensitive issues when they arise.

Sick Leave for COVID-19 Vaccination

The New York State Legislature recently passed bills two bills, [Bill S2588A](#) and [A3354B](#), that would provide all public and private employees in New York with up to four hours of paid leave to obtain the COVID-19 vaccine. The legislation is expected to be signed by Governor Cuomo shortly.

Under the new law, an employee will be entitled to up to four hours for each COVID-19 vaccination through December 31, 2022. The law will expressly prohibit employers from discriminating against, retaliating against, or interfering with an employee's rights under the law, including an employee's request for paid time off to get vaccinated. Employers will need to immediately review the law and promptly implement compliant vaccination leave policies.

OSHA's COVID-19 National Emphasis Program

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has launched a National Emphasis Program (NEP), accessible [here](#), "to ensure that employees in high-hazard industries or work tasks are protected from the hazard of contracting SARS-CoV-2."

Enforcement efforts will be focused on companies that put the largest number of workers at serious risk of contracting the coronavirus and companies that retaliate against workers for complaints about unsafe or unhealthy conditions, or for exercising other rights protected by federal law. [OSHA National News Release, March 12, 2021](#). Sites that are to be inspected will be selected from two Master Lists generated from OSHA's Primary and Secondary Target Industries; home health care services is a primary target industry.

The NEP is slated to remain in effect for up to one year from its issuance date, though OSHA has the flexibility to amend or cancel the program as the pandemic subsides. In a related action, OSHA also updated its Interim Enforcement Response Plan, accessible [here](#).

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REPRESENTING HOME HEALTH CARE AGENCIES
IN NEW YORK STATE

60 Cutter Mill Road ♦ Suite 608 ♦
Great Neck, NY 11021

P: 516.304.5858 ♦ F: 516.304.5855
www.glaserweiner.com

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