

Client Alert

May 21, 2021

Human Services Providers who Contract with New York City Now Required to Provide Sexual Harassment Disclosures to the Department of Investigation

On March 3, 2021, New York City Mayor Bill DeBlasio issued Executive Order No. 64 (EO 64). EO 64 went into effect immediately, and imposes new sexual harassment reporting requirements on "human services" providers who contract with New York City. Under EO 64, City agencies are directed to amend existing contracts to require human services providers to disclose certain information about sexual harassment complaints. Therefore, human services providers who contract with New York City will now be obligated to disclose certain information as described more fully below.

Human Services Providers

Human services is defined by Section 6-129 of the Administrative Code, and are services provided to third parties that include: (1) social services, such as day care, foster care, home care, homeless assistance, housing and shelter assistance, preventive services, youth services, and senior centers, (2) health or medical services, including those provided by HMOs, (3) legal services, (4) employment assistance services, vocational and educational programs, and (5) recreation programs.

Contract Amendments

Under EO 64, all City agencies that contract with outside entities for the provision of human services are to make best efforts to amend existing contracts, to require contractors to provide information about sexual harassment complaints, whether made by an employee, client, or other person. Specifically, these amendments will require contracted providers to make the following information available to the Department of Investigation (DOI):

- A copy of the contractor's sexual harassment policies, including complaint procedures, which shall be uploaded to PASSPort.
- A copy of any complaint or allegation of sexual harassment, or retaliation on the basis of a complaint of sexual harassment, brought by any person, against the

Chief Executive Officer or equivalent principal of the organization, in any venue, including through the provider's internal Equal Employment Opportunity process. This copy must be redacted as to the name and identifying information of such individuals, except the accused, and must be provided to the DOI by means to be determined and publicized by the DOI, within 30 days of receiving the complaint or allegation.

- The final determination or judgment concerning any such complaint, also redacted as to the name and identifying information of such individuals other than the accused.
- Any additional information the DOI requests in order to effectuate its review of any investigation or determination, including information that was previously redacted.

Amendments will also require the Board of Directors or equivalent authority to certify annually in writing, that such body has made all required reports available, or that such body has no information to report. This annual certification shall be uploaded to PASSPort.

Notably, these obligations do not relieve a provider of its duty to investigate any complaint or allegation, or of any other contractual obligations.

DOI Review and Reporting

Under EO 64, the DOI is directed to review materials related to any complaint or allegation of sexual harassment that is provided by contracted entities, and at the conclusion of such review, the DOI will provide its findings to all City agencies that contract with the provider.

City agencies may then consider findings reported by the DOI, as well as a provider's failure to furnish the information required by the Order when determining whether to continue, modify, amend, or renew a contract.

EO 64 can be read in full [here](#).

Update on the CDPAP Fiscal Intermediary RFO

As previously reported, the final state budget includes amendments to the Fiscal Intermediary (FI) contractor provisions, including a survey process for selecting new Lead FIs. To enable it to make the additional Lead FI selections, the Department of Health (DOH) has indicated that it hopes to issue the survey in June, to all entities that submitted applications under the Fiscal Intermediary Request for Offers (RFO) process. Based upon information from DOH, we anticipate that the surveys will be brief, request specific factual information, and it will not be an opportunity to add any additional information to applicants' earlier submission. DOH has indicated that it expects surveys to be submitted by FIs who were already awarded a contract and those who were not awarded a contract, but that the 68 Lead FI awardees will not be revisited or impacted by the survey and new selection process. To be considered, applicants must respond to the survey within 30 days. DOH will then review the new FI surveys and determine the additional awardees.

The DOH is not changing the process through which non-awarded FIs will have to transition consumers to Department-contracted FIs, as outlined in MLTC Policy 21.01,

accessible [here](#). The policy sets forth that any current FI can continue providing services until the Contract Notification Date, after which the non-awarded FI will have 90 days to cease FI operations. As the Contract Notification Date has not yet been determined, no current FIs are required to wind down operations and transition consumers at this time.

The final budget also included language clarifying that FI closure procedures apply to an FI that is acquired by, merges with, sells assets to, or engages in a similar type of transaction with an FI that was awarded a contract under the RFO process. DOH clarified that it will only enter into contracts with the entity that received an award through the RFO process. Therefore, the surviving legal entity must be the FI that received the award.

New York State EVV Program Guidelines and Requirements Language Updated

Section 5.10 'Manual/Paper Timesheet Entries' of the [New York State Electronic Visit Verification \(EVV\) Program Guidelines and Requirements](#) has been updated to include new language regarding manual and edited entry approval requirements.

- All EVV services are required to have complete EVV data in order to be considered a verified visit. In the circumstance that a visit was not electronically captured at the time of the visit, the provider agency or Fiscal Intermediary (FI) may manually enter the visit information. All manual and edited entries require agency management approval or CDPAS consumer approval prior to adjustment and submission to the NYS Aggregator. Manually entered visits should only be used when absolutely necessary.
- The provider agency or FI must retain and maintain documentation of the reason for the manual entry. The Office of the Medicaid Inspector General (OMIG) or the New York State Department of Health (DOH) will audit and monitor the use of manual or paper timesheets. It is the responsibility of the provider agency and/or FI to ensure that an earnest effort is made to capture EVV through a compliant method. Religious holidays or observances that impact the use of technology in capturing EVV in a compliant manner count as a manual entry.
- The DOH recommends that providers select vendor systems that offer an offline mode option. Offline mode ensures that the EVV system captures EVV data in the event of power outages or limited to no service. When the system comes back online, data that was captured is automatically sent/uploaded. If a provider selects a system without this capability, they may not be able to capture EVV data in a compliant manner at the time of service, making the visit invalid.
- If a provider agency or FI has a high rate of manual or paper time sheets and has not shown an improvement of compliance over time, the Department reserves the right to conduct a compliance review which may lead to the review and discovery of overpayments. Providers are required to maintain all documentation associated with manual or paper timesheet entries for review in the event of audit (see: Data Retention).
- The EVV solution must distinguish electronically captured data from manually entered, modified, or adjusted data and require documented justification for all manual data entries, modifications, adjustments, or exceptions made to

electronically captured data after the electronic data is captured.

Please contact our office with any questions regarding EVV and compliance.

**U.S. Department of Health and Human Services
Office for Civil Rights to Enforce Prohibitions on
Sex Discrimination Consistent with *Bostock v.
Clayton County***

On May 10, 2021, the U.S. Department of Health and Human Services (HHS) announced that the Office for Civil Rights will interpret and enforce Section 1557 of the Affordable Care Act (Section 1557) and Title IX's prohibitions on discrimination based on sex to include: (1) discrimination on the basis of sexual orientation, and (2) discrimination on the basis of gender identity. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in covered health programs or activities. Title IX prohibits discrimination on the basis of sex by any education program or activity receiving Federal financial assistance, with various enumerated exceptions.

The decision to interpret and enforce Section 1557 and Title IX in this manner is consistent with the U.S. Supreme Court's decision in *Bostock v. Clayton County*, which holds that Title VII's prohibition on employment discrimination includes discrimination on the basis of sexual orientation and gender identity.

HHS Secretary Xavier Becerra stated that, "The Supreme Court has made clear that people have a right not to be discriminated against on the basis of sex and receive equal treatment under the law, no matter their gender identity or sexual orientation. Fear of discrimination can lead individuals to forgo care, which can have serious negative health consequences. It is the position of the Department of Health and Human Services that everyone - including LGBTQ people - should be able to access health care, free from discrimination or interference, period."

Please contact our office with any questions regarding discrimination, sexual harassment, and if you need assistance drafting appropriate policies and procedures.

**OSHA Issues Announcement Referring Businesses to
the CDC's New Guidance on Fully Vaccinated
People and Mask Wearing**

The U.S. Department of Labor Occupational Safety and Health Administration (OSHA) issued an announcement referring businesses to the CDC's new guidance advising that fully vaccinated people no longer need to wear a mask or socially distance in non-healthcare settings. While this announcement does not amend the current guidance that is posted, it states that "OSHA is reviewing the recent CDC guidance and will update our materials on this website accordingly," signaling the changes to come regarding OSHA guidance in non-healthcare settings.

U.S. Department of Health and Human Services

Office of Inspector General Discovers Unallowable Payments in Excess of \$9 Million by New York State

On May 11, 2021 the U.S. Department of Health and Human Services Office of Inspector General issued [Report A-02-20-01007](#), revealing that New York State made unallowable Medicaid payments in excess of \$9 million, to the same managed care organization.

The Office of Inspector General (OIG) conducted the audit to determine whether the state claimed Medicaid reimbursement for managed care payments made to the same managed care organization (MCO) on behalf of beneficiaries who were assigned more than one Medicaid identification (ID) number. It comes as a result of a prior audit that discovered New York had made over \$10 million in unallowable Medicaid payments to different MCOs for the same month, for beneficiaries assigned more than one Medicaid ID number.

To conduct the audit the OIG reviewed Medicaid managed care payments totaling \$25.5 million (the Federal share) for 13,784 beneficiary-matches that New York made to the same MCO for the same month, during the period January 2015 through September 2019.

Based on their findings, the OIG has made a series of recommendations to New York, including issuing a refund of \$9,325,338 to the Federal Government, and identifying and recovering improper managed care payments made to the same MCO on behalf of beneficiaries with more than one Medicaid ID number prior to and after the audit period.

The FBI Reports Recent Cyber-Attacks

The Federal Bureau of Investigation (FBI) has alerted businesses about recent cyber-attacks that can threaten critical infrastructure, including valuable and protected information held by home care agencies. Notably, the FBI has issued an alert against healthcare organizations and urged them to be vigilant and stay active in monitoring cyber threats of any scale on their IT Infrastructure.

The law enforcement agency suspects that some state-funded hackers might target multinational entities with attack techniques such as remote desktop protocol attacks, exploiting vulnerabilities in server software and targeting C –level employees with email phishing campaigns.

Mitigation suggestions include keeping the operating systems up to date, keeping the device firmware up to date and then maintaining backups that can be used at the time of disaster to keep the data continuity intact. We strongly urge you to share this alert immediately with your Information Technology (IT) departments and advise all employees of techniques to mitigate cyber- attacks.

CMS Issues Guidance on Enhanced Federal Medical Assistance Percentage (FMAP)

On May 13, 2021, the U.S. Centers for Medicare and Medicaid Services (CMS)

released [guidance](#) on the implementation of Section 9817 of the American Rescue Plan. Section 9817 temporarily increases the federal medical assistance percentage (FMAP) by 10 percentage points, up to 95 percent, for allowable medical assistance expenditures for certain home and community-based services (HCBS) expenditures under the Medicaid program beginning April 1, 2021, and ending March 31, 2022.

Services that are eligible for enhanced FMAP include home health services, personal care, self-directed personal care, case management, rehabilitative services, private duty nursing, Programs of All-Inclusive Care of the Elderly (PACE), Managed Long Term Services and Supports, and more. Activities that states may use to enhance, expand or strengthen Medicaid HCBS include: increased rates for home health agencies and PACE, leave benefits, hazard pay, overtime pay, and shift differential pay for home health workers and direct support professionals that are not already included in the service rate/rate methodology, purchasing of PPE and COVID-19 testing supplies, activities to recruit and retain home health workers and direct support professionals, workforce training, support for family caregivers, assistive technologies, community transition support, COVID-19 specific support for individuals with HCBS needs and their caregivers, including assistance with scheduling vaccine appointments, providing transportation to vaccination sites, development of in-home vaccination options, and education and outreach, and more.

Senator Rachel May Introduces Bill to Repeal the LHCSA RFO

On May 10, 2021, Senator Rachel May introduced [Senate Bill S6640](#), which would repeal the LHCSA RFO in its entirety. S6640 joins Assembly Bill A7340, which was introduced on May 5, 2021 by Assemblyman Richard Gottfried. Our office previously reported on the details of A7304 in our May 7 Client Alert, accessible [here](#).

Department of Health Issues a Request for Information for Uniform Tasking Tool Solutions

The State Department of Health (DOH) has issued a Request for Information (RFI) for the authorized implementation of a uniform task-based assessment tool, or uniform tasking tool (UTT) solution, for use by Managed Care Organizations (MCO), including Managed Long-Term Care (MLTC) plans, and Local Departments of Social Services (LDSS) to help standardize service utilization as part of an approved plan of care. This includes the hours of personal care services (PCS), consumer directed personal assistance services (CDPAS), and other available community-based long-term care services.

The RFI can be found [here](#). Responses must be submitted by June 3, 2021, and anticipated demonstration dates are July 19, 2021 to July 23, 2021.

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