

# Client Alert

## October 15, 2024

### **New York Election Law: Mandatory Paid Time Off to Vote**

With Election Day just a few weeks away, New York employers should be aware of the obligation to provide eligible employees with paid time off to vote under the New York Election law under certain circumstances.

Generally, under the New York State Election Law an employee is eligible for up to two hours of paid time off to vote if they do not have “sufficient time to vote.” An employee is deemed to have “sufficient time to vote” if the employee has four consecutive hours to vote either from the opening of the polls to the beginning of their work shift, or four consecutive hours between the end of a work shift and the closing of the polls. For example, if an employee is scheduled to work from 9 am to 5 pm, and the polls are opened from 6 am to 9 pm, the employee is not eligible for paid time off to vote, because the polls are open for four consecutive hours after the employee’s shift ends at 5 pm. However, if an employee is scheduled to work from 9 am to 6 pm, then the employee is eligible for paid time off to vote, because the employee only has three consecutive hours off in the beginning of their shift and end of their shift.

While two hours is the maximum paid time off allowed under the Election Law, the amount of paid time off required for an employee to vote must be determined on a case-by-case basis as waiting times at polls, traffic conditions, and other factors may vary.

An employee must notify an employer at least two working days prior to their intention to take paid time off to vote, but not more than ten working days. Employees cannot be required to utilize any other form of earned leave time to vote, including “personal time off.”

### **OMIG Annual Report**

The Office of the Medicaid Inspector General (OMIG) has released its 2023 Annual Report which details, among other things, how an Agency’s compliance plan is evaluated and what its self-disclosure obligations are for any Medicaid overpayments.

#### **Compliance**

New York State Medicaid program providers who are categorized as hospitals, residential health care facilities, home care services agencies, providers of developmental disability services, providers of mental disability services, managed care plans, and managed long-term care plans, regardless of the amount claimed or received from the Medicaid program should already have an effective compliance program in place. Beyond these service categories, any enrolled provider that claims or receives \$1 million or more directly or indirectly (such as managed care network participating providers) from the Medicaid

program must have an effective plan in place as well.

Compliance plans should be generally effective in preventing, detecting, and correcting fraud, waste, abuse, and non-compliance with Medicaid program requirements. OMIG's review focuses on determining whether the provider adopted, implemented, and maintained an effective compliance program that satisfied the Medicaid program requirements during the review period. OMIG scores each compliance plan, with a score of 60% or greater being satisfactory, and a score of less than 60% being unsatisfactory.

An unsatisfactory score may also result in penalties, including:

- ▶ up to \$5,000 for each month that a provider fails to adopt, implement, and maintain an effective compliance program (this amount may increase to \$10,000 per month if a penalty was previously imposed within the past five years);
- ▶ recoupment of monies paid to the provider during the period in which it did not have a compliance program;
- ▶ termination of the provider's enrollment in the Medicaid program; and
- ▶ sanctions, up to and including exclusion from participation in the Medicaid program.

### Self-Disclosure

Clients should also revise their Self-Disclosure process to reflect OMIG's updated Self-Disclosure guidance and FAQs which were released in August 2023. The updated self-disclosure process includes an Abbreviated Process which allows providers to easily and conveniently disclose overpayments resulting from human or transactional errors. It also includes the option for providers to report on a monthly basis. Clients should be aware that if they receive Medicaid funds or are involved in the receipt of Medicaid funds, they have a State and Federal obligation to self-disclose Medicaid overpayments within 60 days of being identified.

In 2023, OMIG issued 73 notification letters for compliance program review.

The 2023 annual report details findings which include Personal Care Aide provider failures to complete requisite annual in-home visits, nursing supervision visits while the personal care aide was not present, and missing certificate of immunizations. In 2023, OMIG issued one audit summation, finalized 10 audits identifying overpayments of more than \$470,000, and recovered more than \$1.2 million in the audit area.

OMIG's Traumatic Brain Injury Services audit included one finalized audit identifying overpayments of more than \$6.5 million which had findings of failure to obtain an Authorized Practitioner's signature within the required timeframe, billing more hours than documented, and overlapping services not authorized in the patient's service plan. OMIG recovered more than \$1.6 million in this audit area in 2023.

If you need assistance creating or updating your compliance plan and/or self-disclosure process, reach out to our office.

### **Home Care Agency Ordered to Pay \$400,000 to Settle the EEOC's Claim that it Discriminated against Home Health Aides Based on Race-Based Requests by Patients**

Last week, ACARE HHA dba Four Seasons Licensed Home Health Care ("Four Seasons") entered into an agreement ("Decree") with the United States Equal Employment Opportunity Commission ("EEOC") in connection with a lawsuit where Four Seasons was accused of engaging in a pattern of discrimination against Black and Hispanic home health aides ("Aides") because of their race and/or national origin. Four Seasons was accused of terminating assignments to accommodate race-based requests by patients or patient family members for an Aide of a different race or national origin in violation of the Civil Rights Act, which prohibits employers from discriminating against employees on the basis of race and national origin, including in the making of job assignments based on biased client preference.

The Decree ordered Four Seasons to:

- Stop discriminating against Aides in all aspects of work assignments, including assigning them to patients or removing them from assignments on the basis of their race or national origin.
- Post the EEOC's "Know Your Rights: Workplace Discrimination is Illegal Poster," in its

office in English, Spanish, and Haitian Creole.

- Update its policies and procedures to comply with Civil Rights Act requirements. This will include the issuance of a policy that Aide assignments/reassignments cannot be based on race or national origin-based preferences of clients and that Four Seasons will inform any client that it will not comply with any such request. The policy will also state that employees are to immediately notify Four Seasons of any discriminatory treatment.
- Track and maintain an electronic record of instances when a patient or agent acting on behalf of a patient makes a request for reassignment of an Aide, and the reasons for reassigning or removing any Aide.
- Track and maintain any and all complaints related to any allegations of race or national origin-based discriminatory reassignment of Aides, compile an investigative file for each reported complaint, and report to the EEOC on a semi-annual basis of any such instance.
- Provide two (2) hours of interactive training (live, in-person or via video/virtual platform) to all coordinators, and any other employee in any human resources, management, supervisory, or similar positions who have the authority to make decisions relating to Aide assignment, or who supervise those involved in decisions relating to Aide assignments.
- Pay \$400,000 for the benefit of Eligible Claimants.
- Provide semi-annual reports to the EEOC and certify that it is complying with the Decree.

A review of the Decree could leave employers wondering how they balance a patient's rights while not discriminating against employees. In New York State, patients have a right to know who is providing care, participate in planning, be treated with consideration and with dignity, and voice complaints (10 NYCRR § 766.1). Furthermore, an agency providing personal care services must consider a patient's cultural background, primary language and personal characteristics while making assignments (18 NYCRR 505.14). So, while employers can generally honor a patient's request for placement, a patient has no right to make that decision based on race and/or national origin or to commit discriminatory acts against an Aide. Agencies have an obligation to balance both the patient's and employee's rights and should carefully assess a request for an Aide to be removed from a case before any action is taken.

Given the severity of the monetary penalty and steps to be taken by Four Seasons under the Decree, clients are advised to ensure safeguards are in place to prevent discrimination based on race and/or national origin.

Agencies are urged to ensure that there are policies and procedures in place and that workers undergo appropriate training to help eliminate allegations of bias and discrimination. For assistance implementing safeguards, and updating your policies and trainings, contact our office.

### **Eight People Charged in a \$68M Social Adult Day Care and Home Health Care Scheme**

Eight individuals in the Eastern District of New York have been charged for their alleged roles in a scheme to defraud Medicaid of approximately \$68 million through the operation of two social adult day cares (SADC) and a home health care fiscal intermediary that were paying kickbacks and bribes for services that were allegedly not provided.

According to the unsealed indictment, Zakia Khan and Ahsan Ijaz owned two SADCs, Happy Family Social Adult Day Care Center Inc. (Happy Family) and Family Social Adult Day Care Center Inc. (Family Social), and a fiscal intermediary, Responsible Care Staffing Inc. (Responsible Care).

Beginning in October 2017, the defendants allegedly:

- Paid kickback and bribes in the form of cash to Medicaid recipients to induce them to enroll in SADC and CDPAP services;
- Paid kickbacks and bribes to induce recruiters to refer Medicaid recipients to enroll with Happy Family, Family Social and Responsible Care;
- Received kickback and bribes in exchange for the referral of Medicaid recipients to Happy Family, Family Social and Responsible Care and;
- Submitted false and fraudulent claims to Medicaid MLTC plans for SADC and CDPAP

services that were medically unnecessary, not provided and/or were induced by the payment and receipt of illegal kickbacks and bribes.

The defendants are alleged to have orchestrated a years-long scheme to defraud Medicaid, while most of the Medicaid recipients did not actually receive services. Employees of the businesses allegedly managed the scheme and the marketers used the businesses to launder the fraud proceeds and generate the cash used to pay kickbacks and bribes.

The defendants face charges of fraud and conspiring to collect kickbacks, while Khan also faces additional money laundering charges. Each could be sentenced to decades in prison, if convicted.

This should serve as a stark warning of the severe criminal penalties for defrauding Medicaid. To assist in implementing checks and balances in your business that will prevent fraud from occurring, contact our office.

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