

# Home Care Developments

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## OHIP Issues Important Guidance to CHHAs and Plans Regarding Wage Parity

The Wage Parity Law was amended in 2020 to expressly require MLTCs to "review and assess" providers' annual compliance statement of wage parity hours and expenses, and to make a written referral to the NYS DOL for any "reasonably suspected" failure of a FI or a LHCSA to comply with the Wage Parity Law requirements. Per these requirements in the law, the DOH had issued guidance elaborating on the MLTCs' obligation to "review and assess" providers' LS300 and LS301 forms and their compliance with the Wage Parity Law. In essence, the State - through the Wage Parity Law amendments - had designated MLTCs as the auditors of providers' wage parity compliance.

Based on plans' concerns about how much auditing and, more precisely, the extent of auditing that plans would have to do with respect to providers' wage parity compliance, the DOH recently issued a short [Guidance Document](#) that provides:

*In response to questions and feedback on the Annual Certification of Compliance with Home Care Wage Parity (the Wage Parity Certification) from Managed Care Organizations (MCOs) that are required to certify under Section 3614-c of the Public Health Law, the Department hereby clarifies that with regard to Paragraph 1 of the Wage Parity Certification an **MCO** should continue to certify as to whether its payments to contracted providers, including licensed home care services agencies, certified home health agencies, fiscal intermediaries and long-term home health care programs (if any), are in compliance with the Home Care Worker Wage Parity law, and **may appropriately continue to rely on sub-certifications issued by, or other information collected from, these contracted providers.***

***Such certification need not be based on personal knowledge as to whether the compensation paid by contracted providers to their employees is compliant.***

This Guidance Document seems to suggest that plans and CHHAs can simply take their providers' LS 300 and LS301 forms and, based on their providers' certification of compliance, certify to New York State that the plans' or the CHHAs' providers are compliant with Wage Parity. However, CHHAs and plans should be leery about reading the State's Guidance in this manner. The Guidance does not expressly relieve CHHAs and plans of doing their due diligence on the LS300 and LS301 forms that providers are submitting to the CHHAs and the plans. Critically, the Guidance and the DOH **cannot** relieve the CHHAs and plans of doing their due diligence on providers' certification because the Wage Parity Law itself expressly imposes on the payors the obligation to "review and assess" the compliance certifications that providers are submitting to the plans and CHHAs. And, as plans and CHHAs will recognize, ultimately, OMIG and the New York Attorney General Medicaid Fraud Unit can disregard (or interpret differently) this DOH guidance and hold plans and CHHAs fully responsible for not doing enough to audit and evaluate their providers' compliance with wage parity.

We will seek more guidance from the State on this matter and provide further insights as they become available. In the meantime, however, payors (plans and CHHAs) should prepare for next year's arduous burden of reviewing and assessing the wage parity information of the home care providers in their network.

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# Updated EVV Guidelines and Reminders

In response to multiple questions about how providers should handle missed clock-ins and clock-outs for purposes of EVV, the New York Department of Health EVV Program Guidelines and Policy manual (available [HERE](#)) has been updated to address this issue. In relevant part, the EVV manual now states (with the underlined language being the newly added language):

*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.*

As we have addressed in prior alerts, EVV is mandatory for personal care services as of January 1, 2021 unless an exception to EVV applies (e.g., where the worker permanently resides with the patient). We still receive many questions from providers as to whether EVV applies to CDPAS or LHCSAs. However, there should be no uncertainty here by any provider; EVV is mandatory for all providers of personal care services.

Further, as we have also reported, the State expects providers to provide training to caregivers, consumers, and office staff of covered EVV providers, with such training to be completed for all “current” employees by August 1, 2021. Providers cannot rely on their EVV vendors’ brochures to provide this training. Instead, as per the EVV guidelines, the training has to cover certain requirements involving the EVV program that are not addressed by EVV vendor brochures, which generally focus on the logistics of utilizing EVV. Providers should take the time now to design and write proper training manuals, to ensure that they have sufficient time to train all their employees by the August 1, 2021 deadline.

Lastly, we take this opportunity to remind providers that EVV is intended to verify that the patient and caregiver were in the same location for the duration of the billed hours of service. EVV does not replace or somehow negate other requirements that providers must meet in order to be able to bill government payors (and Medicaid MLTCs) for services. Therefore, providers still have an obligation to ensure that they are complying with all the conditions and requirements for billing for their services. Specifically, and as an example, for LHCSAs, separate and apart from providers’ obligation to conform to the EVV requirements, providers must also continue to ensure that the services provided by caregivers comport with the plan of care for each and every hour of service. And for fiscal intermediary services, irrespective of EVV requirements, providers must continue to have consumers verify the hours worked by their personal assistants.

If you have any questions about EVV, please do not hesitate to contact us.

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## Have Questions about Wage Parity?

The NYS FY 20-21 budget included several changes to the wage parity compliance and reporting requirements for providers and payors in New York City, Long Island and Westchester.

In this program, we will review the key changes to the Wage Parity Law, requirements of compliance **certifications which are due by June 1, 2021**, and offer strategies for home care providers on how to update policies and procedures to comply with the new requirements.

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**Wage Parity  
Regulatory Update**

The FY 20-21 New York State budget included a series of provisions altering the compliance requirements pertaining to wage parity requirements for home care agencies providing aide services in New York City, Long Island and Westchester. In this program, industry experts Paul Essner, CFP, CLU, ChFC and Emina Poricanin, Esq. will review the key changes to the Wage Parity Law and offer strategies for home care providers on how to update your policies and procedures to comply with the new requirements.

Presented by



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*Paul Essner brings over 25 years of experience to his position in Employee Benefits, Corporate and Personal Financial Planning and individual insurance; he specializes providing employee benefit design and consulting services to the home health care industry. Paul also holds the prestigious Certified Financial Planner, designation from the CFP board in Washington, DC as well as Chartered Life Underwriter (CLU) and Chartered Financial Consultant (ChFC) from the American College in Bryn Mawr, PA.*

*With her roots in big firm law, Founder and Chairwoman of Poricanin Law, P.C., Emina Poricanin, established Poricanin to provide excellent, timely, and specialized consulting and legal services for clients in niche industries. One of the core and founding principles at Poricanin Law is that efficient and effective legal counsel can only be provided by attorneys who already know and regularly provide counseling services within their clients' industries. Poricanin focuses on servicing clients on legal and business matters in industries where it has deep experience and knowledge, ensuring that our clients are able to advance their unique business and legal goals, always and in all ways.*

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## OIG Announces Intent to Audit Providers for Compliance with the Cares Act Provider Relief Funding Program in 2022

During the pandemic, a number of providers – in addition to PPP funding – applied for and received distributions through the Cares Act Provider Relief Fund from the U.S. Department of Health and Human Services.

The U.S. Office of Inspector General recently updated its Work Plan (available [HERE](#)), and the plan now affirmatively states that the U.S. Office of Audit Services will be auditing providers for compliance with the Provider Relief Fund requirements. Specifically, the government will “perform a series of audits of funds related to the three phases of the General Distribution to determine whether payments were: (1) correctly calculated for providers that applied for these payments, (2) supported by appropriate and reasonable documentation, and (3) made to eligible providers.” The audit activity is expected to be initiated sometime in 2022. The OIG website, however, does not specify when in 2022 such audits will begin.

Providers that have applied for and received Provider Relief Funds should take the time now to work with counsel and accountants to properly document the expenditures of any Provider Relief Funds, to ensure that they can justify the expenditure to government regulators in the event of an audit. There may be adverse legal consequences based on who applied for and received the funds, and how the funds were spent. Thus, providers would be well served by taking the time to seriously prepare their books for any potential audit into their receipt and expenditure of Provider Relief Funds. In preparing their records for an audit, providers should strive to shield from the government all documentation, information, and discussions regarding the Provider Relief Funds through the attorney-client privilege. Generally, information shared by providers with accountants or consultants is not protected by any privilege, and providers may be required to disclose to government regulators any information (or potentially incriminating discussions, such as emails) with accountants or consultants. However, in certain circumstances, the “Kovel Doctrine” will allow the attorney-client privilege to extend to conversations with third-party consultants and accountants. Thus, to the extent sensitive issues need to be discussed and strategized regarding the Provider Relief Funds, providers should work closely with counsel to ensure that the attorney-client privilege is properly implemented and extends to all parties (including consultants) who may be involved in assisting the provider.

If your agency has received Provider Relief Funds and you need assistance in preparing for an audit regarding those funds, please let us know.

# Home Care Alert

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## Employees Returning to the Office? Vaccination and Mask Considerations

New York State issued guidance advising that, effective May 19 and in accordance with CDC guidance, fully vaccinated individuals do not need to wear masks or be socially distanced, but unvaccinated individuals must continue to wear masks and be socially distanced in most settings. Home care employers have raised several questions about the implications of these new standards for their employees. In response, we offer some key principles, recommendations and rules, at a high level:

- Healthcare providers are not covered by the New York State Reopening New York Guidance. The guidance applies to an array of establishments, but it expressly excludes “healthcare settings.” Arguably, home care agency offices where no patients are served at any time are not considered “healthcare settings” for these purposes and can be treated as offices. However, until the DOH confirms this point, there is uncertainty in lifting the mask and social distancing restrictions for office staff per CDC guidance. Prudent and conservative providers should continue to follow the DOH’s pre-existing COVID-19 health guidelines.
- All employers, including home care providers, have an obligation under OSHA (and, soon, the NY Hero Act) to provide a safe workplace. Lifting the social distancing and mask requirements without express DOH approval exposes the employer to a claim under OSHA for providing an unsafe workplace.
- For home care providers that choose to follow the Reopening Guidance in their offices and allow fully vaccinated employees relief from the mask and social distancing requirements, we remind such providers that the loosened restrictions only apply to fully vaccinated individuals.
- While New York guidance allows employers to either require proof that an employee was vaccinated or to rely on employees’ self-reporting, employers should confirm the vaccination status of their employees as a condition of excusing those employees from the requirement to wear a mask. Again, should there be a claim by an employee that the company has not provided a safe workplace, the employer will have to prove that it has taken reasonable measures to ensure a safe workplace and collecting proof of vaccination status would be simply one factor in the employer’s arsenal to prove

that the employer has done its due diligence.

- HIPAA does not apply to the employer and employee relationship. As a general matter, HIPAA applies when there is a patient-provider relationship, and that is not the nature of home care providers' relationship with their employees. However, the Americans with Disabilities Act and the New York Human Rights Law impose confidentiality obligations, requiring employers to maintain the confidentiality of employees' medical information. Employers may ask employees whether or not the employee is vaccinated; such questions do not run afoul of the confidentiality laws. However, employers cannot ask their employees follow-up questions regarding vaccinations as freely. For purposes of providing a safe workplace, thus, employers can ask employees to present proof of vaccination status.



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