Consumer Affairs

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Centers for Medicare & Medicaid Services
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August 13, 2018

Re: File Code CMS-2413-P; U.S. Department of Health and Human Services – Medicaid Program; Reassignment of Medical Provider Claims

Dear Secretary Azar:

The New York City Department of Consumer Affairs ("DCA") submits these comments to the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services ("CMS") in opposition to its proposal to remove 42 C.F.R. § 447.10(g)(4) from the Rules implementing §1902(a)(32) of the Social Security Act (the "Proposed Rule"). By eliminating this sub-section, the Proposed Rule would effectively eliminate the ability of home care workers to make voluntary contributions from their paychecks for "benefits customary to employees," including health insurance and union membership. As explained in more detail below, the Proposed Rule would undermine the financial and employment security of thousands of home care workers across the United States by making it more difficult for them to access healthcare and obtain workplace protections through collective bargaining. As such, DCA strongly opposes its adoption and implementation.

Home care workers are a critical and growing part of our national economy, yet they remain a vulnerable and exploited workforce. They work long and emotionally trying days, receive compensation that pales in comparison to the worth of their work, and are denied the most basic workplace rights and protections. Financial insecurity and poverty-level wages for home care workers are a troublesome reality.[1] Workers' demographic profiles – overwhelmingly female and workers of color – contrast sharply with those for whom they provide care.[2] That their work is performed in private homes, out of public view, further exacerbates the power imbalance between worker and employer.

[1] In New York City, the mean annual earnings for a home care aide are just under $20,000; more than a quarter live below the poverty line; and over a third receive at least one form of public assistance. *See Lifting up Paid Care Work: Year One of New York City's Paid Care Division,* N.Y. Dep't Consumer Affairs, at 15-17 (March 2018), *available at* https://www1.nyc.gov/assets/dca/downloads/pdf/workers/Lifting-up-Paid-Care-Work.pdf (citing 2016 American Community Survey, obtained from IPUMS-USA, University of Minnesota, www.ipums.org and the 2015 American Community Survey Public Use Micro Sample as augmented by NYC Opportunity.)
[2] In New York City, 93% of home care workers are women and 88% are workers of color. *Id.*

To better address the distinct needs of care workers, the City of New York opened a first-of-its-kind Paid Care Division within DCA in February 2017. DCA's Office of Labor Policy & Standards ("OLPS") houses the Paid Care Division ("Division"), the only governmental office in the United States charged with raising job standards in paid care industries, including the home health care industry. To meet this challenging but critical mandate, the Division works in partnership with paid care worker organizations, employers, and other stakeholders. DCA has conducted enforcement, outreach and education, policy development, and original research that has reached tens of thousands of home health aides, giving DCA a vital window into the day-to-day concerns that home care workers currently face. In less than four years of enforcing the Paid Safe and Sick Leave Law, OLPS has recovered over $625,000 in restitution for 6,845 home care workers and nearly $240,000 in penalties to date. In March, DCA released a report, *Lifting up Paid Care Work: Year One of New York City's Paid Care Division,* with a companion study, *Making Paid Care Work Visible: Findings from Focus Groups with New York City Home Care Aides, Nannies, and House Cleaners* by Professor Ruth Milkman of The City University of New York (CUNY). These reports represent a year's worth of research, including discussions with 115 paid care workers about their work, in addition to the broader work of the Division during its first year.

Repealing 42 C.F.R. § 447.10(g)(4) will do great harm to workers' rights to collective bargaining: workplace protections achieved through collective bargaining are essential to improving the conditions of an undervalued workforce

The Proposed Rule would eliminate the provision that currently allows home care workers paid through Medicaid funds to make payments to third parties for "benefits such as health insurance, skills training and other benefits customary for employees."[3] In doing so, it would prohibit home care workers from *voluntarily* choosing to have union fees and health insurance payments deducted from their pay. This prohibition will add to the existing proscription against the deduction of mandatory union fees by a union that represents home care workers.[4] By making it more difficult for workers and their unions to ensure that union fees are actually paid, the Proposed Rule weakens unions by removing a critical source of financial support. In the wake of *Janus v. AFSCME*, the Proposed Rule represents yet another blow to workers' rights to organize and collectively bargain.[5]

In New York City and more broadly in New York State, (collectively, "New York") most home care aides are employed by home health agencies and are covered by federal, state, and local labor and employment laws. These workers are paid by their employer, the home health agency, and not directly through Medicaid. Nevertheless, home care workers in New York will be negatively affected by the Proposed Rule's weakening of unions. Even with the protections afforded through New York workplace laws and union representation, violations of wage and hour and other employment laws are rampant in this industry.[6] The situation is even more dire in other states.

Outside of New York, workers have little recourse outside of unions. In many states, home care workers are considered "independent contractors" who contract directly with the individual(s)

[3] 42 C.F.R. § 447.10(g)(4).
[4] *See Harris v. Quinn*, 573 U.S. ___, 134 S. Ct. 2618 (2014).
[5] *See Janus v. American Federation of State, County, and Municipal Employees*, 585 U.S. ___, 138 S. Ct. 2448 (2018)(ruling that union fees in the public sector violated the first amendment.)
[6] *See Lifting up Paid Care Work* at 29-34.

they serve and are paid through public Medicaid funds.[7] As "independent contractors," they are excluded from virtually all labor and employment laws, including the Fair Labor Standards Act, the National Labor Relations Act, and state workers' compensation laws.[8] Certain states have created mechanisms that allow home care aides to join unions and engage in collective bargaining.[9] In these states, workers and their unions have won important victories: the resulting agreements have provided home care aides with rights that did not necessarily exist under the law, including wage increases, health benefits, and workers' compensation coverage.[10] By effectively depriving workers of their ability to financially support their collective bargaining representative, and, in this fashion, hampering unions' financial viability, workers' ability to collectively win and retain the kinds of improvements in workplace standards described above will be severely compromised.

CMS' Proposed Rule hurts home care workers and the clients they serve.

If CMS adopts the Proposed Rule, home care workers will also lose the ability to purchase affordable health insurance plans offered through their unions.[11] Instead, each worker will have to individually navigate and negotiate for coverage under the Affordable Care Act or, where they qualify, state Medicaid assistance. Workers' ability to obtain quality health care will be compromised – even eliminated altogether – because they will face significant obstacles in obtaining affordable health care as individuals rather than as part of a group health insurance plan offered through their unions. This is unconscionable. Home care workers are *providing health care* to families' loved ones; yet the Proposed Rule would significantly constrain their ability to obtain health insurance for themselves, creating risks to the workers' health and, by extension, that of their patients.

It is estimated that 72 million Americans will be sixty-five or older by 2030.[12] As the elderly population grows, so will the need for home care services. Rapid growth in demand for home care workers, and high turnover due in part to poor working conditions can make it a serious challenge to secure high quality care,[13] hurting not just workers, but those who rely on their care. Inadequate care can result in negative consequences for the sick and elderly, including hospitalization or the need to be transferred to an institution such as a nursing home.[14] Studies indicate that under current conditions, approximately half of all home care workers quit their jobs each year,[15] leaving a supply gap in the face of ever-increasing demand that would only worsen with the Proposed Rule.

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[7] *See* Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1402-03.
[8] *Id.*
[9] Several states, including California, Massachusetts, Michigan, Illinois, Oregon, and Washington, have designated the state, counties, or a state agency as the employer of record for purposes of collective bargaining.
[10] In Michigan, workers won wage increases of nearly 20 percent, and 34 percent in Illinois. In Oregon and Washington, collective bargaining achieved wage increases for workers, along with health benefits, worker's compensation coverage, and paid leave. *See* Smith at 1413.
[11] *See* Michael Hiltzik, *Targeting Home Healthcare Workers, the Trump Administration Opens Another Front in Its War on Public Employees*, L.A. Times (Jul. 30, 2018) *available at* http://www.latimes.com/business/hiltzik/la-fi-hiltzik-home-health-20180730-story.html.
[12] *See* Smith at 1394.
[13] *See* Smith at 1395-1396.
[14] *Id.*
[15] *Id.*

CMS' Analysis of the Regulatory Impact is Insufficient.

Executive Orders 12866 and 13563 instruct federal agencies to promulgate only those regulations required by law, necessary to interpret the law, or necessary to address a compelling public need, such as protecting "the health and safety of the public... or the well-being of the American people."[16] Agencies are directed to assess all costs and benefits of proposed regulations, and regulatory approaches should maximize net benefits, "including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity."[17] In determining whether a rule can be considered economically significant, an agency must look at the financial impact of the regulation on the economy as well as its broader effects.[18] CMS has acknowledged that it lacks sufficient data to provide an analysis of the direct dollar impact of the regulation; instead, it relies on assertions from a single newspaper article to support a speculative and preliminary estimate.[19] The Notice of Proposed Rulemaking also lacks any discussion of the broader impact of the rule. A full analysis of the economic ramifications would include an assessment of the impact on GDP of workers leaving the workforce to care for family members because they cannot obtain paid care as a result of increased worker shortages. DCA urges CMS to conduct and publish an analysis of these issues before finalizing this rule.

Conclusion

The federal government should be implementing polices that make it easier, not more difficult, for workers to achieve a sustainable living wage that supports them and their family. This benefits workers, the clients they serve, and the economy as a whole. Accordingly, DCA urges CMS to withdraw the Proposed Rule and leave in place the existing provisions, which help a vital but exploited workforce, obtain and access basic protections not otherwise available to them.

Respectfully submitted,

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Commissioner
New York City Department of Consumer Affairs

[16] 58 F.R. No. 190, Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, Section 1(a).
[17] *Id.*
[18] *Id.* ("Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.")
[19] 83 F.R. 32254.