STATE OF NEW YORK

6329--A

2021-2022 Regular Sessions

IN ASSEMBLY

March 16, 2021

Introduced by M. of A. GOTTFRIED, REYES, DINOWITZ, FRONTUS, GONZALEZ-ROJAS, BURGOS, CARROLL, KIM, BURDICK, JACOBSON, SIMON, GUNTHER, ABINANTI, CYMBROWITZ, BRABENEC, GALEF, EPSTEIN, KELLES, MAMDANI, PAULIN, QUART, MITAYNES, LUPARDO, BICHOTTE HERMELYN, STECK, L. ROSENTHAL, TAGUE, ENGLEBRIGHT, SOLAGES, FALL, RAMOS, HUNTER, CRUZ, GALLAGHER, CAHILL, FORREST, M. MILLER, JONES, JEAN-PIERRE, SEPTIMO, BARRON, STERN, DICKENS, O'DONNELL, CLARK, FERNANDEZ, LUNSFORD, BRONSON, SEAWRIGHT, MEEKS, JOYNER, HYNDMAN, DARLING, McDONOUGH, HEVESI, STIRPE, DURSO, SILLITTI, McDONALD, SMITH, CUSICK, PERRY, WOERNER, OTIS, ZEBROWSKI, PRETLOW, DE LA ROSA, SAYEGH, J. A. GIGLIO, PHEFFER AMATO, TAPIA, BUTTENSCHON, FAHY, ANDERSON, PEOPLES-STOKES, RAJKUMAR, LAVINE, J. D. RIVERA, NIOU -- read once and referred to the Committee on Health -- reported and referred to the Committee on Ways and Means -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the public health law, the state finance law and part H of chapter 59 of the laws of 2011, amending the public health law and other laws relating to known and projected department of health state fund Medicaid expenditures, in relation to fair pay for home care aides

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The public health law is amended by adding a new section 3614-f to read as follows:

§ 3614-f. Fair pay for home care. 1. For the purpose of this section, "home care aide" shall have the same meaning defined in section thirty-six hundred fourteen-c of this article.

2. Beginning January first, two thousand twenty-three, the minimum wage for a home care aide shall be no less than one hundred and fifty percent of the higher of: (a) the otherwise applicable minimum wage under section six hundred fifty-two of the labor law, or (b) any other-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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wise applicable wage rule or order under article nineteen of the labor law.

3. Where any home care aide is paid less than required by this section, the home care aide, or the commissioner of labor acting on behalf of the home care aide, may bring an action under article six or nineteen of the labor law.

4. (a) The commissioner shall establish a regional minimum hourly base reimbursement rate for all providers employing workers subject to the minimum wage provisions established in subdivision one of this section. The regional minimum hourly base reimbursement rate shall be based on regions established by the commissioner, provided that for areas subject to section thirty-six hundred fourteen-c of this article, each area with a different prevailing rate of total compensation, as defined in that section, shall be its own region.

(b) For the purposes of this section, "regional minimum hourly base reimbursement rate" means a reimbursement rate that reflects the average combined costs associated with the provision of direct service inclusive of, but not limited to, overtime costs; all benefits; all payroll taxes, including but not limited to federal insurance contributions act, medicare, federal unemployment tax act, state unemployment insurance, disability insurance, workers' compensation, and the metropolitan transportation authority tax; related increases tied to base wages such as compression; reasonable administrative costs as defined by the commissioner; allowances for capital costs; the development of profit or reserves as allowable by law or regulations of the commissioner; and any additional supplemental payments.

5. (a) The initial regional minimum hourly base reimbursement rate shall be no less than the following:

(i) thirty-eight dollars and fifty cents per hour in the wage parity region, encompassing all counties subject to section thirty-six hundred fourteen of this article; and

(ii) thirty-eight dollars and eighteen cents per hour for the counties in the remainder of the state.

(b) For consumer directed personal assistance services provided under section three hundred sixty-five-f of the social services law, the initial regional minimum hourly base reimbursement rate shall reflect the rates established in paragraph (a) of this subdivision, provided that the commissioner may reduce such rates by no more than twelve and nine-tenths percent. In the event that such reduction occurs, a per member, per month increase reflective of actual administrative and general costs, adjusted to reflect regional differences as regions are defined in this section, shall be made to fiscal intermediaries administering such programs. If the department or a managed care organization chooses not to utilize the per member, per month payment established pursuant to this paragraph, the regional minimum hourly base reimbursement rate for that region, as defined in paragraph (a) of this subdivision, shall apply.

6. No payment made to a provider who employs home care aides subject to this section that is less than the regional minimum hourly base reimbursement rate established by the commissioner for a region for services provided under authorization by a local department of social services, a managed care provider under section three hundred sixty-four-j of the social services law, or a managed long-term care provider under section forty-four hundred-f of this chapter shall be deemed adequate.

(a) The commissioner shall submit any and all necessary applications for approvals and/or waivers to the federal centers for medicare and medicaid services to secure approval to establish minimum hourly base reimbursement rates and make state-directed payments to providers for the purposes of supporting wage increases.

(b) Directed payments shall be made to such providers of medicaid services through contracts with managed care organizations where applicable, provided that the commissioner ensures that such directed payments are in accordance with the terms of this section.

(c) The commissioner shall ensure that managed care capitation is adjusted to ensure rate adequacy for the managed care organizations.

7. Nothing in this section shall preclude providers employing home care aides covered under this section or payers from contracting for services at rates higher than the regional minimum hourly base reimbursement rate if the parties agree to such terms.

8. The commissioner shall publish and post regional minimum hourly base reimbursement rates annually and shall take all necessary steps to advise commercial and government programs payers of home care services of the regional minimum hourly base reimbursement rates and require other state authorized payers to reimburse providers of home care services at the minimum hourly base reimbursement rate.

9. Following the initial established regional minimum hourly base reimbursement rate established under this section, the commissioner shall annually adjust the regional hourly base reimbursement rate for each region to reflect costs or other increases in wages, benefits, or other requirements. The commissioner shall develop a methodology for annual increases, taking into consideration relevant data sources, including but not limited to information from certified cost reports and statistical reports submitted to the department by providers employing individuals subject to this section for the prior calendar year, consumer price index increases; subsequent pandemic or other public health emergencies; and other relevant economic factors. Prior to finalizing such methodology, the commissioner shall establish a public workgroup that shall include provider, consumer, managed care organization, and labor representatives from each geographical region in which there is an established regional minimum hourly base reimbursement rate; statewide associations; and other stakeholders to inform the process. The commissioner shall publish and take public input on the proposed methodology to be used to update regional minimum hourly base reimbursement rates.

10. Annual increases to the regional minimum hourly base reimbursement rates shall be issued and posted by the department by September thirtieth of the prior calendar year to when such rates shall take effect.

11. For years in which rate adjustments to the regional minimum hourly base reimbursement rate have not been calculated prior to the start of the calendar year, the previous year's rate shall remain in place until the new rate is calculated. If it is determined that retroactive rate adjustments are necessary, payment adjustments will be made as a direct pass through to providers within sixty days of the adjusted rate.

§ 2. Section 3614-d of the public health law, as added by section 49 of part B of chapter 57 of the laws of 2015, is amended to read as follows:

§ 3614-d. Universal standards for coding of payment for medical assistance claims for long term care. Claims for payment submitted under contracts or agreements with insurers under the medical assistance program for home and community-based long-term care services provided under this article, by fiscal intermediaries operating pursuant to

section three hundred sixty-five-f of the social services law, and by residential health care facilities operating pursuant to article twenty-eight of this chapter shall have standard billing codes. Such insurers shall include but not be limited to Medicaid managed care plans and managed long term care plans. Such payments shall be based on universal billing codes approved by the department or a nationally accredited organization as approved by the department; provided, however, such coding shall be consistent with any codes developed as part of the uniform assessment system for long term care established by the department **and shall include, for any entity operating pursuant to this article or section three hundred sixty-five-f of the social services law that is unable to control the cumulative hours worked by an individual in a given payroll period, a code that is specific to the hourly cost of services at an overtime rate**.

§ 3. The state finance law is amended by adding a new section 91-h to read as follows:

§ 91-h. Fair pay for home care fund. 1. There is hereby established in the joint custody of the commissioner of taxation and finance and the comptroller, a special fund to be known as the "fair pay for home care fund".

2. The fund shall consist of, but not be limited to:

a. revenues and federal medical assistance percentage reimbursements in excess of the standard reimbursement received by the department of health pursuant to section thirty-seven of part B of chapter fifty-seven of the laws of two thousand fifteen;

b. an amount equal to savings from the permanent conversion or decertification of residential health care facility beds, as defined in section twenty-eight hundred one or twenty-eight hundred two of the public health law;

c. any unspent monies from the New York works economic development funds or a life sciences initiative created by section one of chapter fifty-four of the laws of two thousand seventeen which were originally appropriated prior to the two thousand nineteen state fiscal year which have not been bound by a contract as of April first two thousand twenty-one and which are not otherwise legally required to be spent on capital projects under bonding requirements through the dormitory authority of New York state or other bonding entity; and

d. any grants, gifts or bequests received by the state for the purposes of the fund under this section.

3. Monies of the fund shall be distributed to the commissioner of health, or the commissioner's designee, for the purpose of increasing medical assistance reimbursements under title eleven of article five of the social services law to entities subject to minimum wage requirements for home care aides under section thirty-six hundred fourteen-f of the public health law, provided that the monies of this fund shall be utilized to offset general fund expenses related to implementation and ongoing costs of section thirty-six hundred fourteen-f of the public health law and shall not be the sole source of funds made available to meet the requirements established by such section.

§ 4. Paragraph (c) of subdivision 1 of section 92 of part H of chapter 59 of the laws of 2011 amending the public health law and other laws relating to known and projected department of health state fund Medicaid expenditures, as amended by section 1 of part CCC of chapter 56 of the laws of 2020, is amended to read as follows:

(c) Projections may be adjusted by the director of the budget to account for any changes in the New York state federal medical assistance

percentage amount established pursuant to the federal social security act, changes in provider revenues, reductions to local social services district medical assistance administration, minimum wage increases, **increases to the mandatory base wage for home care workers pursuant to article 36 of the public health law,** and beginning April 1, 2012 the operational costs of the New York state medical indemnity fund and state costs or savings from the basic health plan. Such projections may be adjusted by the director of the budget to account for increased or expedited department of health state funds medicaid expenditures as a result of a natural or other type of disaster, including a governmental declaration of emergency.

§ 5. Paragraph (a) of subdivision 3 of section 3614-c of the public health law is amended by adding a new subparagraph (v) to read as follows:

(v) for all periods on or after January first, two thousand twenty-three, the cash portion of the minimum rate of home care aide total compensation shall be the minimum wage for home care aides in the applicable region, as defined in section thirty-six hundred fourteen-f of this article. The benefit portion of the minimum rate of home care aide total compensation shall be four dollars and eighty-four cents.

§ 6. Subparagraph (iv) of paragraph (b) of subdivision 3 of section 3614-c of the public health law, as amended by section 1 of part OO of chapter 56 of the laws of 2020, is amended and a new subparagraph (v) is added to read as follows:

(iv) for all periods on or after March first, two thousand sixteen, the cash portion of the minimum rate of home care aide total compensation shall be ten dollars or the minimum wage as laid out in paragraph (b) of subdivision one of section six hundred fifty-two of the labor law, whichever is higher. The benefit portion of the minimum rate of home care aide total compensation shall be three dollars and twenty-two cents[~~.~~]**;**

(v) for all periods on or after January first, two thousand twenty-three, the cash portion of the minimum rate of home care aide total compensation shall be the minimum wage for the applicable region, as defined in section thirty-six hundred fourteen-f of this chapter. The benefit portion of the minimum rate of home care aide total compensation shall be three dollars and eighty-nine cents.

§ 7. Severability. If any provision of this act, or any application of any provision of this act, is held to be invalid, or to violate or be inconsistent with any federal law or regulation, that shall not affect the validity or effectiveness of any other provision of this act, or of any other application of any provision of this act which can be given effect without that provision or application; and to that end, the provisions and applications of this act are severable.

§ 8. This act shall take effect immediately.