

# STATE OF NEW YORK

5374

2021-2022 Regular Sessions

## IN SENATE

March 3, 2021

Introduced by Sen. MAY -- read twice and ordered printed, and when printed to be committed to the Committee on Health

AN ACT to amend the public health law, the social services 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:

1 Section 1. The public health law is amended by adding a new section  
2 3614-f to read as follows:

3 § 3614-f. Fair pay for home care. 1. For the purpose of this section,  
4 "home care aide" shall have the same meaning defined in section thirty-  
5 six hundred fourteen-c of this article.

6 2. The minimum wage for a home care aide shall be no less than one  
7 hundred and fifty percent of the higher of: (a) the otherwise applicable  
8 minimum wage under section six hundred fifty-two of the labor law, or  
9 (b) any otherwise applicable wage rule or order under article nineteen  
10 of the labor law.

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

15 § 2. Paragraph (c) of subdivision 4-a of section 365-f of the social  
16 services law is amended by adding a new subparagraph (v) to read as  
17 follows:

18 (v) (A) The department shall analyze the certified cost reports of  
19 each fiscal intermediary, grouped by regions, to establish a regional  
20 minimum rate of reimbursement for each region. The regions shall be  
21 established by the commissioner, provided that for areas subject to  
22 section thirty-six hundred fourteen-c of the public health law, each

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

LBD10145-01-1

1 area with a different prevailing rate of total compensation, as defined  
2 in that section, shall be its own region.

3 (B) For the purposes of this section, "regional minimum rate of  
4 reimbursement" means a reimbursement rate reflecting the average  
5 combined costs associated with the provision of direct service, reason-  
6 able administrative costs as defined by the commissioner, allowances for  
7 capital costs, the development of profit or reserves as allowable by law  
8 or regulations of the commissioner, and any additional supplemental  
9 payments. The regional minimum rate of reimbursement shall be the mini-  
10 imum reimbursement rate for fiscal intermediaries providing services  
11 under this section and shall be the minimum allowable reimbursement that  
12 may be deemed adequate from a managed care provider, under section three  
13 hundred sixty-four-j of this chapter or a managed long-term care plan,  
14 under section forty-four hundred three-f of the public health law.

15 (C) In the first two years after an increase in the minimum wage has  
16 been established, analysis for the regional minimum rate of reimburse-  
17 ment shall factor in costs that were not captured in cost reports that  
18 result from (A) that increase; and (B) wage compression from that  
19 increase.

20 (D) The regional minimum rate of reimbursement shall be modified annu-  
21 ally, based on cost reports submitted for the prior fiscal year, as  
22 modified under this paragraph. If the minimum rate of reimbursement has  
23 not been calculated prior to the start of the fiscal year, the previous  
24 year's rate shall remain in place until the new rate is calculated,  
25 provided that retroactive adjustments shall be made to the beginning of  
26 the fiscal year.

27 § 3. Subdivision 8 of section 3612 of the public health law is amended  
28 by adding a new paragraph (e) to read as follows:

29 (e)(i) The department shall analyze the certified cost reports of each  
30 licensed home care services agency, grouped by regions, to establish a  
31 regional minimum rate of reimbursement for each region. The regions  
32 shall be established by the commissioner, provided that for areas  
33 subject to section thirty-six hundred fourteen-c of this article, each  
34 area with a differing prevailing rate of total compensation, as defined  
35 in that section, shall be its own region.

36 (ii) For the purposes of this section, "regional minimum rate of  
37 reimbursement" means a reimbursement rate reflecting the average  
38 combined costs associated with the provision of direct service, reason-  
39 able administrative costs as defined by the commissioner, allowances for  
40 capital costs, the development of profit or reserves as allowable by law  
41 or regulations of the commissioner, and any additional supplemental  
42 payments. The regional minimum rate of reimbursement shall be the mini-  
43 imum reimbursement rate for fiscal intermediaries providing services  
44 under authorization by a local department of social services and shall  
45 be the minimum allowable reimbursement that may be deemed adequate from  
46 a managed care provider under section three hundred sixty-four-j of the  
47 social services law or a managed long term care plan under section  
48 forty-four hundred-f of this chapter.

49 (iii) In the first two years after an increase in the applicable mini-  
50 imum wage has been established, determination of the regional minimum  
51 rate of reimbursement shall factor in costs that were not captured in  
52 cost reports that result from (A) that increase; and (B) wage  
53 compression from that increase.

54 (iv) The regional minimum rate of reimbursement shall be modified  
55 annually, based on cost reports submitted the prior fiscal year, as  
56 modified under this paragraph. If the minimum rate of reimbursement has

1 not been calculated prior to the start of the fiscal year, the previous  
2 year's rate shall remain in place until the new rate is calculated,  
3 provided that retroactive adjustments shall be made to the beginning of  
4 the fiscal year if reimbursements to licensed home care service agencies  
5 by any party were below the new rate.

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

9 § 3614-d. Universal standards for coding of payment for medical  
10 assistance claims for long term care. Claims for payment submitted under  
11 contracts or agreements with insurers under the medical assistance  
12 program for home and community-based long-term care services provided  
13 under this article, by fiscal intermediaries operating pursuant to  
14 section three hundred sixty-five-f of the social services law, and by  
15 residential health care facilities operating pursuant to article twenty-  
16 eight of this chapter shall have standard billing codes. Such insur-  
17 ers shall include but not be limited to Medicaid managed care plans and  
18 managed long term care plans. Such payments shall be based on universal  
19 billing codes approved by the department or a nationally accredited  
20 organization as approved by the department; provided, however, such  
21 coding shall be consistent with any codes developed as part of the  
22 uniform assessment system for long term care established by the depart-  
23 ment and shall include, for any entity operating pursuant to this arti-  
24 cle or section three hundred sixty-five-f of the social services law  
25 that is unable to control the cumulative hours worked by an individual  
26 in a given payroll period, a code that is specific to the hourly cost of  
27 services at an overtime rate.

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

30 § 91-h. Fair pay for home care fund. 1. There is hereby established in  
31 the joint custody of the commissioner of taxation and finance and the  
32 comptroller, a special fund to be known as the "fair pay for home care  
33 fund".

34 2. The fund shall consist of:

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

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

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

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

53 3. Monies of the fund shall be distributed to the commissioner of  
54 health, or the commissioner's designee, for the purpose of increasing  
55 medical assistance reimbursements under title eleven of article five of  
56 the social services law to entities operating under article thirty-six

1 of the public health law and section three hundred sixty-five-f of the  
2 social services law for wages of home care aides, as defined in section  
3 thirty-six hundred fourteen-f of the public health law.

4 § 6. The opening paragraph and paragraph (a) of subdivision 3 of  
5 section 2802 of the public health law, as amended by chapter 609 of the  
6 laws of 1982, is amended to read as follows:

7 Subject to the provisions of paragraph (b) of subdivision two of this  
8 section, the commissioner in [~~approving~~] determining whether to approve  
9 or deny the construction of a hospital shall take into consideration and  
10 be empowered to request information and advice as to (a) the availabili-  
11 ty of facilities or services such as preadmission, ambulatory or home  
12 care services which may serve as alternatives or substitutes for the  
13 whole or any part of the proposed hospital construction, and better  
14 enable the state to meet its obligations to provide services in the  
15 community set forth in Olmstead v L.C. (by Zimring) 527 U.S. 581 (1999);

16 § 7. Paragraphs (c) of subdivision 18 of section 364-j of the  
17 social services law, as added by sections 40-c and 55 of part B of  
18 chapter 57 of the laws of 2015, are amended to read as follows:

19 (c) (i) In setting such reimbursement methodologies, the department  
20 shall consider costs borne by the managed care program to ensure actuarially  
21 sound and adequate rates of payment to ensure quality of care for  
22 its enrollees and shall comply with all applicable federal and state  
23 laws and regulations, including, but not limited to, those relating to  
24 wages, including compression from increases in the minimum wage, labor,  
25 and actuarial soundness.

26 [~~(e)~~] (ii) The department [~~of health~~] shall require the independent  
27 actuary selected pursuant to paragraph (b) of this subdivision to  
28 provide a complete actuarial memorandum, along with all actuarial  
29 assumptions made and all other data, materials and methodologies used in  
30 the development of rates, to managed care providers thirty days prior to  
31 submission of such rates to the centers for medicare and medicaid  
32 services for approval. Managed care providers may request additional  
33 review of the actuarial soundness of the rate setting process and/or  
34 methodology.

35 (iii) Any contract for services under this title by a managed care  
36 provider with a long term care entity shall ensure that resources made  
37 available by the payer under such contract will support the recruitment,  
38 hiring, training and retention of a qualified workforce capable of  
39 providing quality care, including compliance with all applicable federal  
40 and state laws and regulations, including, but not limited to, those  
41 relating to wages and labor. A managed care provider with a long term  
42 care entity shall report its method of compliance with this subdivision  
43 to the department as a component of cost reports required under section  
44 forty-four hundred three-f of the public health law.

45 (iv) A long term care entity that contracts with a managed care  
46 provider shall annually submit written certification to the department  
47 as a component of cost reports required under section thirty-six  
48 hundred twelve of the public health law and sections three hundred  
49 sixty-five-a and three hundred sixty-seven-q of this title, as applica-  
50 ble, as to how it applied the amounts paid in compliance with  
51 this subdivision to support the recruitment, hiring, training and  
52 retention of a qualified workforce capable of providing quality care  
53 and consistent with section three hundred sixty-five-a of this title.

54 § 8. Subdivision 8 of section 4403-f of the public health law, as  
55 amended by section 21 of part B of chapter 59 of the laws of 2016, is  
56 amended to read as follows:

1 8. Payment rates for managed long term care plan enrollees eligible  
2 for medical assistance. The commissioner shall establish payment rates  
3 for services provided to enrollees eligible under title XIX of the  
4 federal social security act. Such payment rates shall be subject to  
5 approval by the director of the division of the budget and shall reflect  
6 savings to both state and local governments when compared to costs which  
7 would be incurred by such program if enrollees were to receive compara-  
8 ble health and long term care services on a fee-for-service basis in the  
9 geographic region in which such services are proposed to be provided.  
10 Payment rates shall be risk-adjusted to take into account the character-  
11 istics of enrollees, or proposed enrollees, including, but not limited  
12 to: frailty, disability level, health and functional status, age,  
13 gender, the nature of services provided to such enrollees, and other  
14 factors as determined by the commissioner. The risk adjusted premiums  
15 may also be combined with disincentives or requirements designed to  
16 mitigate any incentives to obtain higher payment categories. In setting  
17 such payment rates, the commissioner shall consider costs borne by the  
18 managed care program to ensure actuarially sound and adequate rates of  
19 payment to ensure quality of care and shall comply with all applicable  
20 laws and regulations, state and federal, including ~~[regulations as to]~~,  
21 but not limited to, those relating to wages, labor and actuarial sound-  
22 ness ~~[for medicaid managed care]~~.

23 § 9. Paragraph (c) of subdivision 1 of section 92 of part H of chapter  
24 59 of the laws of 2011 amending the public health law and other laws  
25 relating to known and projected department of health state fund Medicaid  
26 expenditures, as amended by section 1 of part CCC of chapter 56 of the  
27 laws of 2020, is amended to read as follows:

28 (c) Projections may be adjusted by the director of the budget to  
29 account for any changes in the New York state federal medical assistance  
30 percentage amount established pursuant to the federal social security  
31 act, changes in provider revenues, reductions to local social services  
32 district medical assistance administration, minimum wage increases,  
33 increases to the mandatory base wage for home care workers pursuant to  
34 article 36 of the public health law, and beginning April 1, 2012 the  
35 operational costs of the New York state medical indemnity fund and state  
36 costs or savings from the basic health plan. Such projections may be  
37 adjusted by the director of the budget to account for increased or expe-  
38 dited department of health state funds medicaid expenditures as a result  
39 of a natural or other type of disaster, including a governmental decla-  
40 ration of emergency.

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

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

50 § 11. Subparagraph (iv) of paragraph (b) of subdivision 3 of section  
51 3614-c of the public health law, as amended by section 1 of part 00 of  
52 chapter 56 of the laws of 2020, is amended and a new subparagraph (v) is  
53 added to read as follows:

54 (iv) for all periods on or after March first, two thousand sixteen,  
55 the cash portion of the minimum rate of home care aide total compen-  
56 sation shall be ten dollars or the minimum wage as laid out in paragraph

1 (b) of subdivision one of section six hundred fifty-two of the labor  
2 law, whichever is higher. The benefit portion of the minimum rate of  
3 home care aide total compensation shall be three dollars and twenty-two  
4 cents[-];

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

11 § 12. Severability. If any provision of this act, or any application  
12 of any provision of this act, is held to be invalid, that shall not  
13 affect the validity or effectiveness of any other provision of this act,  
14 any other application of any provision of this act, or any other  
15 provision of any law or code amended by this act.

16 § 13. This act shall take effect immediately; provided, however, that  
17 the amendments to section 364-j of the social services law made by  
18 section seven of this act and the amendments to section 4403-f of the  
19 public health law made by section eight of this act shall not affect the  
20 repeal of such sections and shall expire and be deemed repealed there-  
21 with.