

# UPDATE ON THE EXECUTIVE BUDGET PROPOSAL

*Home Care Alert*  
January 23, 2019

As we reported several days ago, the State Executive Budget proposes significant changes to the current fiscal intermediary structure. The State recently published a summary of the Executive's Proposal and, in relation to fiscal intermediaries, the summary states: "There are currently over 500 fiscal intermediaries receiving differing levels of reimbursement for providing various administrative and payroll services to self-directing Medicaid recipients receiving personal care. The Executive Budget seeks to consolidate and establish uniform reimbursement for these services." The reference to consolidation could mean that the State proposes to force all currently operating fiscal intermediaries to meet one of the newly proposed definitions of fiscal intermediary (see our previous alert, where we discussed the proposed new definition for fiscal intermediaries). This would mean that any fiscal intermediary that does not meet this new definition for a fiscal intermediary would cease to exist. Or, the reference to consolidation could simply be an open-ended indicator of the State's plan to somehow reduce the number of currently operating fiscal intermediaries. Indeed, the State seems poised to reduce and limit the fiscal intermediary program, but it is unclear how it will accomplish that. The explosion of the fiscal intermediary program in the last few years has surpassed what the State anticipated, what the State can manage through the DOH, and what the State's taxpayers can finance. Thus, some reduction of the program is likely. Lobbying is under way to influence the final legislation and prevent the complete elimination of the program as it exists today. The final results on this issue might not be known until April 1, at the latest, which is the deadline for the State to pass its budget.

## **MLTCs are Auditing – Sometimes Incorrectly – Fiscal Intermediary Claims**

A number of MLTCs have been auditing fiscal intermediary claims that were paid out to fiscal intermediaries and, based on their audits, these MLTCs have begun to demand repayment of claims. Most often, the basis for demanding that the fiscal intermediary repay the money is an alleged defect with timesheets that the fiscal intermediary collected for FI services. The OMIG protocols for CDPAP, issued by OMIG in January 2018, are the only tool for measuring compliance with claim requirements, and in some cases MLTCs have misconstrued those OMIG protocols.

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Fiscal intermediaries who are under audit by a MLTC should take any request for information from the MLTC seriously, and provide the requisite paperwork. However, all demands for repayment by the MLTC should be scrutinized to ensure the MLTC is basing its decision on the correct legal standards.

### **DOH Has Started Approving FI Applications**

After more than one year of pending applications and silence, the NYS DOH has finally started issuing authorization letters to fiscal intermediaries who submitted their applications. The approval letters do not correlate to the application number or any other seeming factor. Interestingly, a number of providers have also received rejection letters on the basis that the provider failed to provide a timely response to the DOH's questions. Representatives of the DOH, however, have informally stated that the "rejection" letters would not prohibit the provider from billing for fiscal intermediary services pending the re-submission of a new application.

### **DOH is Enforcing LHCSA Registration Requirements**

DOH surveyors have begun visiting offices of dormant LHCSAs that have not registered with the NYS DOH, per new requirements, and demanding information about the LHCSAs operations. As we had previously reported, all LHCSAs were required to register no later than January 1, 2019. LHCSAs who have not registered will be required to pay a fine and file a registration application. LHCSAs who are not currently operational, however, may face more severe consequences. DOH regulations require the surrender of nonoperational licenses. Through this new LHCSA registration and audit process, the DOH is likely to start forcing dormant LHCSAs to formally close down.

### **Andryeyeva Update**

As the countdown to the Court of Appeals hearings continues, it's important to note that the New York Department of Labor (DOL) has maintained its support of the 13-hour rule. The DOL has filed an amicus brief with the Court, arguing for various reasons why the Court should uphold the DOL's longstanding practice of requiring only 13 hours of pay for 24-hour shifts, assuming all the conditions for the 13-hour shift were met. The DOL will also be making oral arguments to the Court on February 12, 2019, when the Andryeyeva and Moreno cases are heard by the Justices.

If you have any questions about the topics contained within this alert, please contact any member of our Home Care Practice.