Title

Comments on Rule Proposed by the Centers for Medicare and Medicaid Services (CMS) Prohibiting Homecare Workers from Making Paycheck Deductions for Union Dues

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August 9, 2018

DELIVERED ELECTRONICALLY

The Honorable Seema Verma, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2413-P, P.O. Box 8016
Baltimore, MD 21244-8016

RE: CMS-2413-P: Medicaid Program; Reassignment of Medicaid Provider Claims

Dear Ms. Verma:

We submit this comment in response to the notice of proposed rule-making (NPRM), issued by the Centers for Medicare and Medicaid Services (CMS) and published in the Federal Register on July 12, 2018. The proposed rule would repeal a current regulatory provision affirming that the Medicaid prohibition on reassignment of provider claims at 1902(a)(32) of the Social Security Act does not preclude states from making deductions from provider payments for costs such as health care and skills training. The NPRM also states that CMS is repealing this rule specifically to block the current practice of allowing Me33dicaid home care providers to elect to have their union dues deducted from their payments.

Medicaid funded homecare plays a critical role in our society, allowing the elderly and people with disabilities to maintain their independence and maximize their quality of life. The ability of homecare workers to choose to join a union and have dues deducted from their pay has led to important improvements in an industry historically marked by low wages and high worker turnover. The proposed rule would not only harm workers, it would have a deleterious effect on care quality and undermine the objective of home and community based services of providing seniors and people with disabilities a viable alternative to institutional settings. We urge you to withdraw this rule.

The Building Workforce Shortage in Homecare

The United States is experiencing a crisis in caregiving for the elderly and people with disabilities. There is wide agreement among experts that the root of the problem is the low wages and few benefits that result in high turnover and a shortage of care workers.[1]

Homecare workers are among the lowest paid in the US, with median hourly earnings at only $10.49.[2] Because their earnings are so low, about half of homecare workers nationally have to rely on some kind of public support program, such as the Earned Income Tax Credit (EITC) or Supplemental Nutrition Assistance Program (SNAP).[3]

Homecare work is often very challenging. Assisting consumers with mobility is physically strenuous and injury rates are much higher than for other occupations.[4] Homecare workers also develop close relationships with those they care for, and it can be emotionally difficult to deal with erratic behaviors related to dementia, watch a consumer suffer from pain, or grieve their death.[5] Low wages make homecare jobs less attractive relative to other similar-paying jobs that aren't as demanding.

A wide body of research has shown that the primary reason homecare workers leave the profession is that the wages are too low to make homecare a viable job option.[6] Turnover in homecare jobs is

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1 PHI, "Care Gap: US Facing Shortage of Direct Care Workers," October 15, 2012, https://phinational.org/charts/care-gap-us-facing-shortage-direct-care-workers; Paul Osterman, *Who Will Care For Us? Long-Term Care and the Long-Term Workforce* (New York: Russell Sage Foundation, 2017); H. Stephen Kaye, Charlene Harrington, and Mitchell P. LaPlante, "Long-Term Care: Who Gets It, Who Provides It, Who Pays, And How Much?," *Health Affairs* 29, no. 1 (January 1, 2010): 11–21, https://doi.org/10.1377/hlthaff.2009.0535; Candace Howes, "Raising Wages for Home Care Workers: Paths and Impediments," Fair Labor Standards Act (FLSA) Working Paper Series (Department of Labor (DOL), February 25, 2014), https://www.dol.gov/asp/evaluation/reports/FLSAPaperSeries.pdf#page=245; Department of Health and Human Services' Office of the Assistant Secretary for Planning and Evaluation et al., "The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation," Report to Congress, May 14, 2003, https://aspe.hhs.gov/basic-report/future-supply-long-term-care-workers-relation-aging-baby-boom-generation.

2 Stephen Campbell, "U.S. Home Care Workers: Key Facts" (PHI, September 6, 2017), http://phinational.org/sites/phinational.org/files/phi-home-care-workers-key-facts.pdf.

3 Analysis by Ian Perry, UC Berkeley Labor Center, of 2010-2012 Current Population Survey and American Community Survey data, as well as administrative data on EITC and SNAP programs.

4 Bureau of Labor Statistics, "Occupational Outlook Handbook, Home Health Aides and Personal Care Aides," October 24, 2017, https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm#tab-1.

5 Sandra S. Butler et al., "Why Do They Leave? Factors Associated With Job Termination Among Personal Assistant Workers in Home Care," *Journal of Gerontological Social Work* 53, no. 8 (October 28, 2010): 665–81, https://doi.org/10.1080/01634372.2010.517236; Department of Health and Human Services' Office of the Assistant Secretary for Planning and Evaluation et al., "The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation."

6 Butler et al., "Why Do They Leave?"; Howes, "Raising Wages for Home Care Workers: Paths and Impediments"; Department of Health and Human Services' Office of the Assistant Secretary for Planning and Evaluation et al., "The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation."

much higher than in other occupations, including those in health care.[7] A 2017 survey of 646 private sector homecare agencies found a medium turnover rate of 66 percent.[8]

Conversely, multiple studies—across a wide range of industries[9] and in homecare occupations specifically—have demonstrated that improving job quality reduces turnover. For example, a study by Ko et al. found that turnover was lower in California counties where homecare workers were paid more.[10]

The last several decades have seen explosive growth in the homecare industry as our population becomes disproportionately older, making personal care aide and home health aide two of the fastest growing occupations in the US.[11] However, low wages are making it impossible to recruit enough new workers to meet the growing demand. Consumers and homecare agencies report that it is increasingly difficult to recruit and retain homecare workers.[12] In a 2017 survey of homecare agencies, respondents reported worker shortages and high turnover as the top two threats to the growth of their business.[13] This problem is expected to worsen significantly in the coming decades as the demand for homecare is projected to continue growing rapidly. Paul Osterman of the Massachusetts Institute of Technology (MIT) estimates that under current trends there will be a shortage of more than 350,000 homecare workers by 2040.[14]

Worker shortages and high turnover create a significant burden for consumers, who rely on homecare workers to maintain their independence and meet their everyday needs. When consumers do not get the care that they need because they cannot find a homecare worker, their health suffers. Researchers have documented that lack of sufficient care leads to negative health outcomes such as missing

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[7] Osterman, *Who Will Care For Us? Long-Term Care and the Long-Term Workforce*.

[8] Home Care Pulse and Home Care Association of America, "Home Care Benchmarking Study 2017," 2017, https://benchmarking.homecarepulse.com/.

[9] Heather Boushey and Sarah Glynn, "There Are Significant Business Costs to Replacement Employees" (Center for American Progress, 2012), https://cdn.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf.

[10] Michelle Ko et al., "California's Medicaid Personal Care Assistants: Characteristics and Turnover among Family and Non-Family Caregivers" (San Francisco: UCSF Health Workforce Research Center on Long-Term Care, 2015), https://healthforce.ucsf.edu/sites/healthforce.ucsf.edu/files/publication-pdf/Report-Characteristics_and_Turnover_among_Family_and_Non-Family_Caregivers.pdf.

[11] Bureau of Labor Statistics, "Table 1.3 Fastest Growing Occupations, 2016 and Projected 2026," April 11, 2018, 3, https://www.bls.gov/emp/tables/fastest-growing-occupations.htm.

[12] Sarah Thomason and Annette Bernhardt, "California's Homecare Crisis: Raising Wages Is Key to the Solution" (Center for Labor Research and Education, University of California, Berkeley, November 2017), http://laborcenter.berkeley.edu/pdf/2017/Californias-Homecare-Crisis.pdf; Judith Graham, "Severe Shortage of Home Health Workers Robs Thousands of Proper Care," Kaiser Health News, April 26, 2017, https://khn.org/news/severe-shortage-of-home-health-workers-robs-thousands-of-proper-care/; Chris Farrell, "The Shortage Of Home Care Workers: Worse Than You Think," Forbes, April 18, 2018, https://www.forbes.com/sites/nextavenue/2018/04/18/the-shortage-of-home-care-workers-worse-than-you-think/.

[13] Home Care Pulse and Home Care Association of America, "Home Care Benchmarking Study 2017."

[14] Osterman, *Who Will Care For Us? Long-Term Care and the Long-Term Workforce*.

meals, dehydration, falls, burns, wetting or soiling clothes, and making a mistake in taking medication.[15]

If Medicaid funded homecare programs are unable to recruit sufficient numbers of workers, a larger proportion of the elderly and people with disabilities served by those programs are likely to end up in more expensive long-term care options such as nursing homes, greatly increasing the total cost of their care. In 2017, the annual cost of nursing home care ($86,000) was nearly double the cost of homecare ($48,000).[16] In a recent study, nearly 20 percent of homecare workers reported that if they stopped caring for their consumer, the individual would likely end up in a nursing home.[17]

Unions improve wages, benefits and access to training

Homecare is provided through two main modes: through agencies and through independent providers. Some states have established homecare public authorities which enabled workers in the IP mode to join unions. Today an estimated 600,000 homecare workers are represented by a union, the vast majority through the IP mode in states like California, Oregon, Washington, Illinois and Massachusetts, and would be affected by the proposed rule.[18]

Homecare workers that have organized unions have been able to win higher wages and better benefits. For example, under the current union contract in Washington State, individual providers will receive a minimum of $15 an hour by 2019, and the most experienced workers will receive $17.65 an hour. Workers will also receive one hour of paid time off for every 25 hours worked, and 15 minutes paid administrative time each pay period. The contract also provides funding for safety training and safety equipment. In California, union wages are set at a county level, and range from $11 to $15 an hour.[19] San Francisco provides health benefits to independent providers through an innovative County HMO.

The higher wages that homecare workers earn when they have a union are critical for maintaining high quality of care for consumers. Research has shown that union coverage reduces turnover, across our economy and in homecare occupations specifically (Rhee and Zabin). A 2017 survey of homecare workers by the National Employment Law Project found that those represented by a union

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[15] Mitchell P. LaPlante et al., "Unmet Need for Personal Assistance Services: Estimating the Shortfall in Hours of Help and Adverse Consequences," *The Journals of Gerontology. Series B, Psychological Sciences and Social Sciences* 59, no. 2 (2004): S98–108, https://doi.org/10.1093/geronb/59.2.S98; Susan M. Allen, Elizabeth R. Piette, and Vincent Mor, "The Adverse Consequences of Unmet Need Among Older Persons Living in the Community: Dual-Eligible Versus Medicare-Only Beneficiaries," *The Journals of Gerontology: Series B* 69, no. Suppl_1 (November 1, 2014): S51–58, https://doi.org/10.1093/geronb/gbu124.

[16] Genworth Financial Inc., "Long Term Care Costs & Cost of Care in 2017," August 14, 2017, https://www.genworth.com/about-us/industry-expertise/cost-of-care.html.

[17] Candace Howes, "Wages, Benefits and Flexibility Matter: Building a High-Quality Home Care Workforce," *Washington, DC: Institute for the Future of Aging Services, American Association of Homes and Services for the Aging and Connecticut College*, 2006, http://nasuad.org/sites/nasuad/files/hcbs/files/95/4739/ConnCollege.pdf.

[18] Osterman, *Who Will Care For Us? Long-Term Care and the Long-Term Workforce*.

[19] "County IHSS Wage Rates," California Department of Social Services, July 2018, http://www.cdss.ca.gov/inforesources/IHSS/County-IHSS-Wage-Rates.

were more likely to expect to be in their same profession in a year's time and were less likely to be looking for work outside of homecare.[20] A 2005 study of San Francisco homecare workers found that the annual retention rate of new workers increased by 89 percent between 1997 and 2002 as the workers won wage increases and access to health benefits largely as a result of their union (Howes 2005). For each dollar increase in wages, increased the probability of a worker remaining for a year by 17 percent points and the additional of health care increased retention by 21 percent points.

Greater training and professionalization is identified as another essential element of improving home and community based services.[21] States with unionized homecare workforces have begun to improve training.[22] The most advanced training program for homecare workers is in the State of Washington, largely due to the efforts of SEIU 775. The union worked with the state to establish the Washington State Long-Term Care Workers Training Workgroup which set up advanced training for homecare workers. A union sponsored initiative increased training standards for workers providing services to seniors and people with disabilities. The state pays for the training costs for state subsidized workers.

The proposed rule would have a major impact on states with unionized homecare workforces which utilize the independent provider mode. By making it more difficult for homecare workers to voluntarily contribute to their union it could result in lower worker wages, higher worker turnover, greater worker shortages, poorer quality of care, and an increase in the overall cost of long-term care. These factors should be considered in a cost-benefit analysis of the rule.

No Clear Rationale for the Rule

The rule provides little rationale for the proposed change. The CMS press release accompanying the proposed rule notes that it will end the ability of states to "divert Medicaid payments away from providers" and claims that it is "designed to ensure that taxpayer dollars dedicated to providing healthcare services for low-income vulnerable Americans are not siphoned away for other purposes." This is a mischaracterization of how union dues are paid. Workers receive payments from the state for the services they provide. The workers use those wages and voluntarily contribute to the union as they might to the United Way. The funds used to pay workers are the property of the worker, not the state. The claim in the press release accompanying the rule stands in direct contradiction to the recent United States Supreme Court rulings in *Janus v. AFSCME* and *Harris v. Quinn* which are premised on the theory that union dues are paid out of workers' wages. If union dues were paid out of taxpayer

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[20] Anastasia Christman and Caitlin Connolly, "Surveying the Home Care Workforce" (National Employment Law Project, September 22, 2017), https://www.nelp.org/publication/surveying-the-home-care-workforce/.

[21] President's Committee for People with Intellectual Disabilities, "America's Direct Support Workforce Crisis: Effects on People with Intellectual Disabilities, Communities and the U.S. Economy," Report to the President 2017, 2017, https://nadsp.org/wp-content/uploads/2018/02/PCPID-2017_-Americas-Direct-Support-Workforce-Crisis-low-res.pdf; Nari Rhee and Carol Zabin, "The Social Benefits of Unionization in the Long-Term Care Sector," in *Academic on Employee Free Choice: Multidisciplinary Approaches to Labor Law Reform*, ed. John Logan (UC Berkeley Center for Labor Research and Education, 2009), http://laborcenter.berkeley.edu/homecare/pdf/efca_essays09.pdf.

[22] Rhee and Zabin, "The Social Benefits of Unionization in the Long-Term Care Sector."

dollars not workers' wages, than workers could not have been compelled to fund the union, and there would be no basis for the rulings.[23]

The proposed rule creates a real potential for harm to homecare providers, consumers, and states with homecare public authorities and has no clear policy rationale.

Sincerely,

Ken Jacobs
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UC Berkeley Center for Labor Research and Education

Sarah Thomason
Research and Policy Associate
UC Berkeley Center for Labor Research and Education

[23] Benjamin Sachs, "Hypocrisy on Agency Fees: Why the CMS Home Care Rule Is Arbitrary and Capricious," On Labor, July 13, 2018, https://onlabor.org/hypocrisy-on-agency-fees-why-the-cms-home-care-rule-is-arbitrary-and-capricious/.