



August 10, 2018

Centers for Medicare and Medicaid Services
Attn: CMS-2413-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, Maryland 21244-1850

Re: Formal Comment in Response to Notice of Proposed Rulemaking in CMS-2413-P

To the Centers for Medicare and Medicaid Services (“CMS”):

I write on behalf of the Fairness Center’s clients Donald Lambrecht and David Smith—a homecare worker and his participant-employer, respectively—to express support for the proposed removal of 42 C.F.R. § 447.10(g)(4) (“section 447.10(g)(4)”). Furthermore, CMS should consider adopting language that would ensure state or federal funds intended to pay for homecare assistance are not instead provided to union officials or to union-related third parties running costly “orientation programs” designed to recruit union support. As detailed below, Messrs. Lambrecht and Smith, together with the rest of Pennsylvania’s participant-directed homecare workforce, have been exposed to such schemes and would therefore benefit from clarification of federal law through rulemaking.

BACKGROUND

Congress has long insisted that Medicaid payments be made only to providers.¹ However, in 2012, CMS promulgated section 447.10(g)(4), allowing “reassignment” of Medicaid payments to “a class of practitioners for which the Medicaid program is the primary source of service revenue.”

Rather than serve homecare workers, section 447.10(g)(4) encouraged the growth of an existing market for those seeking to make money at the expense of homecare workers and those for whom they care.

In Pennsylvania, as detailed below, the promise of automatic reassignment enticed union officials to co-opt the state’s executive branch, skirt the legislative process, and violate court injunctions. Although individuals represented by the Fairness Center have done much to stop the damage they believe union officials have inflicted upon their industry, removing section 447.10(g)(4) and adding affirmative language to protect homecare workers would address one of the root causes of the problem.

¹ See 42 U.S.C. § 1396a(a)(32) (requiring states to “provide that no payment under the plan for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such care or service,” with limited exceptions).

UNIONIZATION OF HOMECARE WORKERS IN PENNSYLVANIA

For Pennsylvania’s participant-directed homecare workers, generally referred to as “Direct Care Workers,” unionization began with the stroke of a pen.² In 2015, Pennsylvania’s Governor issued Executive Order 2015-05 (“Executive Order” or “EO”) allowing a labor union to serve as the exclusive representative for Pennsylvania’s 20,000 Direct Care Workers. The Executive Order resembled existing statutes from at least ten other states;³ yet, by its nature, the Executive Order did not receive bicameral legislative approval.

The Executive Order also made it extraordinarily easy for union officials to seek and “win” an election. Under the Executive Order, a union official could secure contact information for all Direct Care Workers by showing that just 50 of them would support the union.⁴ A union official could then demonstrate entitlement to an election with just a 10% showing of support, rather than the 30% required under state and federal law.⁵ Finally, a union official could claim electoral victory under the Executive Order with a mere majority of *votes cast*,⁶ making election results hardly representative of the Direct Care Workers’ intent.

In fact, just 13% of the 20,000 Direct Care Workers across Pennsylvania voted to make the United Home Care Workers of Pennsylvania (“UHCWP”)—a joint project of the Service Employees International Union (“SEIU”) and the American Federation of State, County, and Municipal Employees (“AFSCME”)—the exclusive representative under the Executive Order.⁷

Regardless of minimal support among Direct Care Workers for UHCWP, the Executive Order would have required the state agency administering Pennsylvania’s Direct Care Worker programs to conduct regular “meet and confer” sessions with UHCWP, with the goal of implementing changes to Direct Care Workers’ terms and conditions of employment.⁸

Among other “issues” to be “discuss[ed]” at these sessions: “*Voluntary payroll deductions for Direct Care Workers.*”⁹

Such payroll deductions may have been implemented quickly had it not been for Messrs. Lambrecht and Smith and other litigants, who secured preliminary and permanent injunctions and a ruling preventing Pennsylvania’s Governor from implementing the Executive Order.¹⁰ However, the

² Executive Order 2015-05 (Feb. 27, 2015), *available at* https://www.oa.pa.gov/Policies/eo/Documents/2015_05.pdf

³ See Cal. Gov. Code §§ 110000–110036; Conn. Gen. Stat. §§ 17b-705–17b-706d; 5 Ill. Comp. Stat. 315/3; Md. Code, Health—General, §§ 15-901–15-907; Mass. Gen. Laws ch. 118E, § 73; Mo. Rev. Stat. §§ 208.850–208.895; Minn. Stat. § 179A.54; Or. Rev. Stat. §§ 410.612–410.625; Vt. Stat. Ann., tit. 21, §§ 1631–1644; Wash. Rev. Code § 74.39A.270.

⁴ EO § 4.c.

⁵ *Id.* at § 3.a(1); *cf.* 29 C.F.R. § 101.18; 43 P.S. §§ 211.7(c), 1101.603(a).

⁶ EO § 3.a(2).

⁷ See *Markham v. Wolf*, 147 A.3d 1259, 1268 (Pa. Cmwlth. 2016).

⁸ EO § 3.b.

⁹ *Id.* at § 3.b(2)(h).

¹⁰ See *Smith v. Wolf*, No. 177 MD 2015, 2016 WL 6069483 (Pa. Cmwlth. Oct. 14, 2016); *Markham*, 147 A.3d 1259.

Governor has appealed to the Pennsylvania Supreme Court, which is expected to issue a decision in the coming months.¹¹

HEMOCARE WORKER “ORIENTATION” IN PENNSYLVANIA

As our clients’ case was pending before the Pennsylvania Supreme Court, it became clear that neither UHCWP nor Pennsylvania’s Governor were fully observing the injunctions in place.¹² Instead, the Governor’s administration arranged to impose a mandatory “orientation” program on Direct Care Workers similar to that envisioned by the Executive Order.¹³

The Governor’s administration also ensured that the orientation program would be conducted by an SEIU-created organization and that, during the program, Direct Care Workers would receive an “[i]ntroduction to a Direct Care Worker representative.”¹⁴ Public-sector union officials in other states treat such programs as opportunities to recruit new members.¹⁵

The SEIU-created organization would receive \$1.25 million for providing the orientation program.¹⁶ Unfortunately, payment for such programs may come at the expense of our clients and other homecare workers and those for whom they care; in the past, CMS has encouraged this practice.¹⁷

¹¹ See *Smith v. Wolf*, No. 110 MAP 2016 (filed Oct. 24, 2016); *Markham v. Wolf*, No. 109 MAP 2016 (filed Oct. 24, 2016).

¹² See generally Pet’rs’ Appl. for Enforcement of Permanent Inj., *Smith*, No. 177 MD 2015 (Pa. Cmwlth. July 14, 2017).

¹³ See *id.* at ¶¶ 2–3.

¹⁴ *Id.* at ¶ 3 (quoting amended state contract).

¹⁵ See, e.g., Jane McAlevey, *Labor’s Only Real Choice: Beating Harris v. Quinn and Right-to-Work Attacks from the Inside Out*, THE NATION (July 2, 2014), <https://www.thenation.com/article/after-harris-v-quinn-state-our-unions/> (“We understood that clauses in a union contract dealing with such mundane issues as new employee orientation could be written in language that forced management to allow no less than one hour for *unsupervised* unionized employees to engage in worker-to-worker education . . .”).

¹⁶ *Id.* at ¶ 17.

¹⁷ See, e.g., DEP’T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., CTR. FOR MEDICAID & CHIP SERVS., CMCS INFORMATIONAL BULL., SUGGESTED APPROACHES FOR STRENGTHENING AND STABILIZING THE MEDICAID HOME CARE WORKFORCE 2–3 (2016) (“Professional associations or unions can also help support home care worker training and development. For example, they can offer orientation programs for new home care workers State Medicaid Agencies may, with the consent of the individual practitioner, make a payment on behalf of the practitioner to a third party that provides benefits to the workforce such as health insurance, skills training, and other benefits customary for employees (42 CFR 447.10(g)(4)). . . . Similarly, a state may build into its payment rates the provider’s cost of maintaining status as a qualified Medicaid provider, attending Medicaid-specific pre-service orientations or trainings, and post-enrollment training.”).

Following renewed litigation brought by the Fairness Center on behalf of Messrs. Lambrecht and Smith, the Governor agreed to suspend the orientation program until after the Pennsylvania Supreme Court addresses the validity of the Executive Order.¹⁸

CONCLUSION

Certainly, there may be additional attempts to unionize Direct Care Workers in Pennsylvania, legally or illegally. But section 447.10(g)(4) incentivizes union officials to take such risks; for them, it represents an opportunity to take money from Medicaid before homecare workers can see it.

Accordingly, the Fairness Center, on behalf of Messrs. Lambrecht and Smith, support the proposed removal of section 447.10(g)(4) and further request the adoption of language affirmatively prohibiting union officials from reassigning funds away from homecare services to labor unions or to union-related third parties for “orientation” programs.

Thank you in advance for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Osborne', with a stylized flourish extending to the right.

David R. Osborne
President & General Counsel

¹⁸ See Stips., *Smith*, No. 177 MD 2015 (Pa. Cmwlth. Oct. 5, 2017).