

Home Care Worker Wage Parity Frequently Asked Questions (FAQs) February 2012

This document responds to questions that are not addressed, and clarifies questions that are addressed, in other Home Care Worker Wage Parity materials posted on the HCS and the MRT web site, such as Dear Administrator Letters (DALs). The previous FAQs referenced throughout this document are from the January 2012 FAQs. Please consult these materials in conjunction with the following FAQs.

General Questions

Q1. In regards to the January 2012 Wage Parity FAQ1 and 23, the answers seem to contradict each other. Please clarify.

A1. FAQ1 asked when the terms of a CBA supersede the Wage Parity Law. The answer to this question is if the CBA was in effect on January 1, 2011 and/or is a successor to an agreement that was in effect on that date, it must provide for the provision of health benefits through payments to a jointly administered labor management fund.

FAQ23 asked whether a CBA supersedes the wage and health insurance/ health supplement requirements of the Wage Parity Law. The answer to this question is no. A CBA which meets the requirements described in the answer to FAQ1 supersedes only the health insurance/ health supplement requirements of the wage parity law; it does not supersede the wage requirements of the Wage Parity Law.

Q2. If an agency was collectively bargained by January 1, 2011 are they exempt from the living wage act?

A2. The existence of a CBA does not exempt a provider from having to comply with the Wage Parity Law.

Q3. Is it true that the requirement to pay the supplemental benefit rate of \$1.35 per hour in NYC for the period March 1, 2012 through February 28, 2013 only applies when the employer does not provide health benefits? If an employee declines the health insurance program offered to them, is the employer required to pay that employee \$1.35 in addition to the minimum wage of \$9?

A3. The \$1.35 supplement is required when the employer does not provide health benefits. It would similarly be required when the employer does not provide health benefits to those who decline such benefits. Note, however, the employer could choose to provide health benefits without allowing individual employees to decline such benefits, and the supplement would not be required as long as the employer actually provided the benefit. In this context, providing the benefit refers to the employer's policy associated with providing benefit coverage for the employee and the resulting incurred costs, not the employee's decision to accept the available benefits and make claims. Employers are not required to report to the department whether or not workers have chosen to accept/decline health coverage.

Q4. Under what circumstances can an employer discount the \$9.00 per hour wage if health coverage is offered?

A4. There are no circumstances under which an employer can pay less than the \$9.00 per hour wage to employees impacted by the Wage Parity Law.

Q5. Are there any requirements or guidelines regarding the type of health insurance which employers may offer in lieu of the \$1.35?

A5. No. The Wage Parity Law does not address or identify the types of health insurance that an employer could offer. This is a business decision and is at the discretion of the provider.

Q6. If the employer's policy is that all new employees do not receive benefits during a probationary period, does the agency have to pay the \$1.35 to those individuals as of their date of hire or after they have completed their probationary period?

A6. The worker is entitled to the \$1.35 health supplement until they are in receipt of health benefits by their employer.

Q7. Many contracting entities have not yet provided increases to LHCSAs sufficient to cover the wage requirements, nor have they committed to providing such increases. How can we determine if we should send termination letters if we do not know the rate the contracting entity will provide?

A7. Since August 2011, the Department of Health has issued numerous documents, including DALs and Qs and As, to facilitate providers' implementation of the requirements of the Wage Parity Law. A decision to terminate a contract is a business decision and should be left to the discretion of the LHCSA.

Q8. What mechanism should be used in separating out Medicare and Medicaid hours when giving out cases? Are we required to pay the Wage Parity on hospice cases?

A8. It is the provider's responsibility to determine what mechanism will be used to identify cases that are subject to the Wage Parity Law. Medicaid hospice services provided through a CHHA, LTHHCP, or MCO are subject to the Wage Parity Law.

Q9. If a home health aide is working on a Medicare case, is that case exempt from the Wage Parity Law?

A9. If a case is Medicare only, the Wage Parity Law does not apply.

Q10. On "split-bill" cases where the agency bills both Medicaid and Medicare, does the Worker Parity Law apply?

A10. The Wage Parity Law applies to cases that are Medicaid reimbursed either in whole or in part. Accordingly, the Home Care Worker Parity rate must be paid for all hours associated with split-bill cases.

Q11. FAQ 8 indicates that certified home health agencies, long term home health care programs and managed care organizations must submit certifications of compliance beginning on March 1, 2012. We request DOH to change the due date to February 28, 2013.

A11. Providers are to *certify* prospectively to the Department, on an annual basis, compliance with the Wage Parity Law. Therefore, certification forms from the New York City providers are due to the Department on March 1, 2012 for the March 1, 2012 to February 28, 2013 period. The second set of certifications for NYC, and the first set for the remaining counties, is due on March 1, 2013 for the March 1, 2013 to February 28, 2014 period.

Entities, such as LHCSAs, providing services via contracts with CHHAs, LTHHCPs, or MCOs, must certify, on a quarterly basis, to the entity they are subcontracting with. Therefore, such entities in New York City must certify to their subcontracted entities beginning on March 1, 2012.

Q12. Regarding coordination of benefits, if an aide continues to use her Medicaid card, can NYS seek restitution from the self-insured LHCSA?

A12. The Wage Parity Law does not address coordination of benefits or the Medicaid eligibility of the worker.

Q13. FAQ15 and 16 recognize that a covered home care agency may offset the cost of certain benefits against the agency's obligations under the Wage Parity Law. Without citing the Wage Parity Law, however, FAQ16 states that the offset may not be applied to any portion of the cash mandate of \$9.00 per hour. The distinction drawn in FAQ16 is not supported by the terms of the Wage Parity Law.

A13. The distinction between wage requirements that must be satisfied in cash, and wage supplement requirements that may be satisfied by either cash or benefits, is one that is recognized under state and federal minimum wage laws, local living wage laws, and the state prevailing wage law. The Wage Parity Law has been interpreted consistent with those well-established distinctions. The fact that the Wage Parity Law sets wage rates by reference to NYC's local living wage law, which expressly establishes separate wage and supplement rates, provides a reasonable basis for distinguishing those two rates. This interpretation is consistent with the legislative intent to increase wage rates. If this distinction was disregarded, benefits could be used to reduce or eliminate wages in ways that would be inconsistent with existing state and federal minimum wage and local living wage laws.

Q14. The concept of credit is introduced in the previous FAQ document but there is confusion as to what is meant by 'credits' and how and to whom they are to be applied? Do the 'credits' apply to agencies with a CBA? If so, would paid time off be part of the credit?

A14. Employers who provide benefits can credit their costs to reduce the amounts that they would otherwise have to pay in wages. For example, if the employer contributes \$1 towards qualifying benefits for every hour that employees work, then the employer may credit that \$1 against the \$1.35 wage supplement amount required under the Wage Parity Law and, as a result, the employer could pay wages in an amount totaling \$9.35, instead of the full \$10.35 otherwise required under the wage parity law. The employer's ability to credit its benefit costs to reduce its wage obligations does not depend on whether the employer is signatory to a Collective Bargaining Agreement.

Q15. Many employers have pointed out that the cost of a benefit which can be "credited" toward total compensation may, in some circumstances, vary over time. Does the employer have to calculate its anticipated average hourly cost, subject to a periodic "true-up" to assure that the predicted cost of those benefits was in fact met, or if not, to provide the necessary cumulative wage supplement.

A15. Yes, employers may compute their hourly cost of providing benefits by using an average that divides total costs by total hours. Note, however, that the total hours worked should not be limited to simply those hours that are subject to the Wage Parity Law, but should include all hours worked during the relevant period.

Any adjustments made due to varying costs of benefit supplements that are predictable should not result in a requirement to "true-up" the credit taken since such costs should have been anticipated by employers. Any unanticipated changes in costs should be taken into account as soon as practicable without the reduction in the benefits or wages provided to employees.

Q16. Please clarify how overtime for workers who work at multiple hourly rates during the week will be computed.

A16. The Wage Parity Law does not change the overtime requirements under applicable State and Federal minimum wage laws.

Employees who are exempt from overtime under the Fair Labor Standards Act must be paid at least \$10.88 per hour for all hours worked in excess of forty per week.

Employees who are not exempt from overtime under the Fair Labor Standards Act must be paid at one and one-half of their regular (cash) rate of pay for all hours worked in excess of forty per week. For employees who earn multiple rates of pay, the regular rate is the weighted average of that employee's multiple rates of pay, which can be computed by dividing the total wages, before overtime, by the total number of hours worked by that employee during the workweek.

Q17. Is overtime pay required for holiday and weekend hours worked?

A17. No. The State and Federal minimum wage laws do not require overtime pay for work performed on holidays and weekends and the Wage Parity Law does not impose such a requirement. Note, however, that voluntary payments may impact an employer's overtime obligations under the State and Federal minimum wage laws. (See, [NYS DOL Overtime Frequently Asked Questions](#); See also [USDOL Overtime Webpage](#).) The Wage Parity Law does not impact these requirements.

Q18. What types of worker benefits qualify under the definition of the home care worker parity law? For example, is in service training a qualifying benefit?

A18. Qualifying benefits are those which primarily benefit the employee. While benefits relating to education are permissible, in-service training primarily benefits the employer since it is specific to the operations of the employer, cannot be counted as an education benefit. In addition to the requirement that the education primarily benefit the employee, the following requirements, which are derived from Federal Regulation 29 CFR §778.27, apply to qualify educational benefits:

- a) Attendance is outside of the employee's regular working hours;
- b) Attendance is in fact voluntary;
- c) The course, lecture, or meeting is not directly related to the employee's job; and
- d) The employee does not perform any productive work during such attendance.

Q19. Are employers who contribute \$1.35 per hour per employee to a plan (or a third-party administrator), whether insured or self-insured, to cover the cost of premiums, still in compliance with Section 3614-c if the arrangement subsequently distributes a "refund" or "dividend" to the employer after the end of a plan year, which results in a contribution of less than \$1.35 per hour per employee?

A19. No. Any arrangement where the employer may qualify for a refund or dividend must include a guarantee that the contribution will not be less than the amount of the credit taken.

Q20. How is the hourly rate calculated for employees that are paid a daily rate for live in cases?

A20. The rate for services provided on a daily basis must not be less than that paid to employees on an hourly basis as discussed above, based on the total number of hours worked.