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New York Introduces Health Care and Mental Hygiene Worker Bonus (HWB) Program

Background

This past April, as part of this year's [New York state budget](#), Governor Kathy Hochul and the New York State legislature allocated \$1.2 billion in funding to introducing a "New York State Health Care and Mental Hygiene Worker Bonus (HWB) Program." The [HWB Program](#) provides for the payment of bonuses of up to \$3,000 to certain frontline health care and mental hygiene workers in order to retain existing health care workers who were on the frontlines during the COVID-19 pandemic and to attract new frontline workers to the health care field.¹

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While the HWB Program offers critical funding to the health care workforce during a time of severe workforce strain, it requires certain health care providers to undertake a somewhat complicated analysis to determine whether their employees (and, in some cases, contractors) qualify for payments under the HWB Program and then submit claims to the State in order to fund these bonuses. Additionally, based on this determination, these providers face certain legal considerations and audit risks when participating in this program.

To help guide health care providers with this determination, the following Alert provides an overview of key aspects of the HWB Program, identifies ambiguities and risks providers must navigate, and offers some best practices for providers who are qualified employers to consider when seeking payments under this important but time-limited program.

Program Overview

The HWB Program requires health care providers who are "qualified employers" to pay bonuses to their "qualified employees" based on a vesting schedule issued by the State. Depending on the average number of hours that a qualifying employee worked during a "vesting period," the employer is required to claim a different bonus amount, up to a maximum of \$3,000 per employee, across five different vesting periods. Given these requirements, health care providers should undertake the following analysis:

1. Determine whether they are a qualified employer under the program;
2. Determine whether they employed any qualified employees during the vesting period; and
3. Based on the list of qualified employees and the number of average weekly hours worked by those employees during the vesting period, submit claims to the State for payment of bonuses and attest that any payments will be remitted to the employee within 30 days of receipt.

Determination Process

Am I a qualified employer?

Under the terms of the statute, "qualified employers" are providers enrolled in Medicaid that employ at least one (1) employee and that either bill for services under Medicaid or a home and community-based services ("HCBS") waiver, or have a provider agreement with a Medicaid managed care organization or Managed Long Term Care ("MLTC") plan.² This definition expressly includes certain providers, facilities, pharmacies and school-based health centers licensed under the state Public Health Law, Mental Hygiene Law, and Education Law, as well as certain programs funded by the Office of Mental Health ("OMH"), Office for the Aging, Office of Addiction Services and Supports ("OASAS"), and the Office for People with Developmental Disabilities ("OPWDD").³

Importantly, for any health care providers that are qualified employers—including private physician or dental practices, or other clinical practices, among many others—that are not subject to a Certificate of Need process as a condition of state

licensure or approval, at least 20% of the provider's patients or persons served must be eligible for Medicaid.⁴ The statute does not offer guidance as to how best to determine whether that threshold has been exceeded, including the time period over which the threshold should be measured nor whether the determination should look at patient counts or reimbursement. Additionally, there is a separate process for claiming bonus payments for educational institutions and certain other qualified employers.⁵ To the extent that an organization operates multiple Medicaid- and non-Medicaid-funded programs, they will have to ascribe to different determination and claiming processes.

Which of my employees qualify?

If the organization is a qualified employer, then they must determine which of their employees are entitled to payment of the bonus. This process is somewhat more straightforward, as the statute defines "qualified employees" as being someone under an "eligible worker title" for the duration of at least one "vesting period" (as defined below).

Broad in scope, eligible worker titles include certain workers that provide clinical or non-clinical services and there is a helpful list on the HWB Program's website.⁶ In addition, qualified employees must (a) not exceed an annualized base salary (excluding any bonuses or overtime pay) of \$125,000, (b) be full-time, part-time or temporary employees, or independent contractors, and (c) not be suspended or excluded from the Medicaid program during the vesting period.⁷

Despite the enumerated list of qualifying job titles, qualified employers must confront certain critical ambiguities as they navigate which of their "employees" are entitled to a bonus.

- First, as noted above, the statute includes "independent contractors" in the definition of employees, such that 1099-contracted staff members should be part of any determination process, which would likely include any individuals contracted or leased by a qualifying employer from a management services organization ("MSO") or similar services provider. However, a frequently asked question ("FAQ") issued by the Department of Health ("DOH"), in connection with the roll-out of the HWB Program, indicated that "contracted and temporary staff" who work for a qualifying employer under a staffing agency arrangement are not eligible for the HWB Program.⁸ Accordingly, employers will need to determine whether contracted or leased staff are part of a permitted independent contractor arrangement that qualifies such staff for a bonus, or part of a temporary staffing agency arrangement that would disqualify such individuals from payment.
- Second, nuances arise when an employee's work for a qualifying employer is not stable. The process, and the associated FAQs, work to address certain hypothetical situations, such as when an employee is promoted or terminated during or following a vesting period. While the FAQs are helpful in addressing certain common situations, significant employee mobility or churn, especially after the close of a vesting period, will require an employer to undertake an employee-specific determination process to ensure that the bonuses are appropriately claimed and paid.

What bonus amount should I claim?

Once a qualified employer completes the prior two steps, they are required to submit claims for bonus payments for their qualified employees that meet the eligibility criteria for participation in the HWB Program.⁹ Bonus amounts are based on the number of hours worked during the vesting period up to a maximum of \$3,000 per employee across *all* employers.¹⁰ A qualified employee "vests" if they have worked for the employer for the entire duration of a vesting period.

Any accruals or other leave, including sick, vacation and any leave under the Family Medical Leave Act are credited towards the number of hours worked over the course of the vesting period.¹¹ Claims for the first vesting period must be submitted within 30 days of August 3, 2022, the date DOH published the vesting schedule, and thereafter, within 30 days after the end of each additional vesting period through May 1, 2024.¹² A qualified employee is eligible for up to two vesting periods per employer.¹³

Discussion and Best Practices

As noted above, there are certain ambiguities with respect to how qualified employers should implement the HWB Program’s requirements. Accompanying these ambiguities, employers face a significant risk of penalties and potential audit by the Office of Medicaid Inspector General (“OMIG”) to the extent that they submit a false attestation of compliance and claim a bonus payment inappropriately for a non-qualifying employee. Compounding this risk, OMIG has not established a process to date for self-disclosure, corrections or subsequent amendments to the bonus payment determinations. With the closing date fast approaching for the first vesting period, employers will have to make certain judgment calls, likely in the absence of confirmatory DOH guidance, in determining eligibility and submitting claims for payment.

To mitigate risk, employers should consider the following best practices, among others:

- Ensure that any determinations of eligibility or ineligibility—either on the employer or employee-level—is carefully considered by the organization. To the extent an organization must grapple with any of the statutory ambiguities either noted here or new ones, the organization should consult with legal, compliance, and human resources to reach a consensus viewpoint.
- According to the statute, the bonus payments are not subject to New York State income tax, which will have implications for how such bonuses are paid and taxed by employers. Organizations should undertake efforts up front to ensure that their payroll systems are appropriately programmed, given this unique tax status, and accounted for as part of an employee’s payroll process.
- Communication between employers and employees will be critical, as certain employees may incorrectly believe that they are entitled to a bonus when they are not, or entitled to an amount that differs from expectations. Given the publicity and prominence of the program, managing employee expectations, or offering a careful explanation of how bonus payments were determined, will be important to reducing workforce abrasion.
- Given the prospect of audits and penalties by OMIG, qualified employers must consider how to incorporate the program under their compliance program’s oversight and retain sufficient documentation to support bonus payment determinations, especially given the judgment calls that will be required at least for the first submission window.

Please reach out to your contact at Ropes & Gray with any questions on the HWB Program.

1. Part ZZ of Chapter 56 of the Laws of 2022.
2. SSL § 367-w(2)(b).
3. SSL § 367-w(2)(b)(i)-(ii).
4. SSL § 367-w(2)(b)(iv).
5. SSL § 367-w(2)(c).
6. SSL § 367-w(2)(a). For a full list of eligible worker titles, see New York State Department of Health, “New York State Health Care and Mental Hygiene Worker Bonus (HWB) Program,” https://www.health.ny.gov/health_care/medicaid/providers/hwb_program/, (last accessed August 14, 2022).
7. SSL § 367-w(2)(a), (4)(h).
8. DOH, NYS Health Care Worker Bonus (HWB) Program FAQs (last updated Aug. 12, 2022), available at https://health.ny.gov/health_care/medicaid/providers/hwb_program/hwb_program_faq.htm.
9. SSL § 367-w(4)(a).
10. *Id.*
11. SSL § 367-w(4)(i).
12. SSL § 367-w(4)(f). For the vesting period schedule published by the Department of Health, see NYS Healthcare Worker Bonus (HWB) program, Vesting Schedule, https://health.ny.gov/health_care/medicaid/providers/hwb_program/docs/vesting_schedule.pdf (last accessed August 15, 2022).
13. SSL § 367-w(4)(c).