

Congress of the United States
Washington, DC 20515

August 13, 2018

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

Re: Proposed Rule: Medicaid Program; Reassignment of Medicaid Provider Claims (RIN 0938-AT61)

Dear Administrator Verma:

We write in opposition to the Centers for Medicare & Medicaid Services' (CMS) proposal to rescind a provision of a 2014 rule affirming that states may make payments to third parties on behalf of an individual provider "for benefits such as health insurance, skills training, and other benefits customary for employees."¹ The Administration's proposal to rescind this rule appears intended to limit the ability of home care workers and other independent providers to contribute their own wages to support their union to bargain for better working conditions, including safety protections and training. Any restrictions that prohibit workers from contributing their own wages and benefits that support their health and wellbeing would both harm the workers and jeopardize the quality of care they provide for seniors and people with disabilities.

Home care workers assist clients with activities of daily living, providing vital services in every community across the country. These tasks include administering medications, preparing meals, transporting the consumer, and providing personal services such as bathing, dressing, and grooming. They provide these services to clients, such as low-income seniors and people with disabilities, who may have multiple chronic conditions and need high-quality care to ensure good outcomes and a good quality of life. These services, which are primarily funded by state Medicaid programs, ensure that clients may continue to live in their homes and communities, rather than costlier care settings. Similarly, medical language interpreters in Washington, who are independent Medicaid providers like home care workers, help patients with limited English proficiency communicate with their providers, improving language accessibility for Medicaid beneficiaries and saving the state and federal budget money.

However, low pay and poor working conditions for home care workers can present unique challenges for these workers and undermine their clients' quality of care. Average hourly wages for home care workers have declined since 2004, adjusting for inflation, despite growing

¹ Medicaid Program; Reassignment of Medicaid Provider Claims, 83 Fed. Reg. 32252 (proposed July 12, 2018) (to rescind 42 C.F.R. § 447.10(g)(4)).

revenues in the home care industry.² Home care workers also have few opportunities for training or professional development, and the nature of the work can be stressful and isolating. As a result of such poor conditions, annual turnover is as high as 50 to 60 percent.³ In the meantime, over 10,000 baby boomers turn 65 every day, and this rapidly growing population of older adults requires qualified home care workers to provide quality care.⁴ Unfortunately, recent Republican proposals in Congress would impose draconian cuts on Medicaid, further threatening the funding that states need to be able to offer home care workers a living wage.

Improving the wages and working conditions of home care workers is crucial for guaranteeing a stable workforce and ensuring the quality care they provide to seniors and people with disabilities. A growing number of states have improved the working conditions of home care workers by recognizing their right to join a union and participate in negotiations affecting their profession. Although the National Labor Relations Act excludes individual provider home care workers (who are not employed by private agencies) from the protections of federal labor law, states have stepped in and empowered these home care workers by designating them as public employees for purposes of union representation and collective bargaining.⁵

By exercising their right to join unions, home care workers have improved both the quality of home health care in the states where they work and their own working conditions. For instance, after Illinois home care workers organized a union in 2004, they negotiated for orientation and ongoing training programs. In Washington, home care workers benefit from a training partnership jointly operated by their union, the state government, and private industry; this program trains 45,000 workers each year and operates an apprenticeship program.⁶ Through this program, home care workers are able to adapt their skills to their clients' changing needs, and better able to coordinate with the patient's multi-provider care team.⁷ In addition to training programs, unions have bargained for higher wages, paid sick leave, and health care benefits.⁸ These improvements play a crucial role in reducing turnover.⁹ The Agency's proposed rule would risk undermining worker organizations and threaten to reverse progress made to improve working conditions for home care workers and the quality of care they can provide.

The proposed rule lacks any statutory basis for targeting the process by which individual providers voluntarily contribute to their union or other benefits, such as health insurance, with their own wages. Individual provider home care workers are not required to pay anything to a

² Anastasia Christman and Caitlin Connolly, *Surveying the Home Care Workforce: Their Challenges & The Positive Impact of Unionization*, National Employment Law Project (Sept. 22, 2017) available at https://www.nelp.org/publication/surveying-the-home-care-workforce/#_ednrefl.

³ *Id.*

⁴ PHI, *Paying the Price: How Poverty Wages Undermine Home Care in America*, Feb. 2015 <https://phinational.org/wp-content/uploads/legacy/research-report/paying-the-price.pdf>.

⁵ 29 U.S.C. § 152(3).

⁶ PHI, *Improving Jobs to Improve Care: The SEIU Healthcare NW Training Partnership*, Mar. 6, 2015 <http://www.aspenwsi.org/wordpress/wp-content/uploads/SEIU-CaseStudy.pdf>.

⁷ David Rolf, "Life on the Home Front" *Generations: Journal of the American Society on Aging* vol. 40 no. 1 (Spring 2016).

⁸ Christman and Connolly, at 8.

⁹ *Id.*

union unless they choose to do so.¹⁰ When home care workers agree to pay dues, they authorize the state, county, or fiscal intermediary to deduct those dues from the workers' paychecks. This deduction is identical to the way that most union members—whether they are police officers, nurses, or teachers—pay membership dues to a union. Although the proposed rescission cites Section 1902(a)(32) of the Social Security Act to justify its attempt to prohibit dues deduction, Section 1902(a)(32) merely limits “a state plan” from providing payment “to anyone other than such individual or the person or institution providing such care or service under an assignment or power of attorney or otherwise.”¹¹ This statute was enacted to prevent the practice of factoring, where providers sell accounts receivable to a collection agency or other third party for a portion of their face value, which Congress found to lead to incorrect or inflated claims.¹² The proposed rule inaccurately relies on a statute prohibiting factoring in order to ban the wholly unrelated practice of dues deductions for workers who wish to contribute a portion of their wages to their union. Multiple states, including California and Illinois, permitted the deduction of home care workers' dues to their unions for years prior to the 2014 CMS rule authorizing certain payments to third parties.¹³ The proposed rule cites no legal precedent for arguing that dues payments in these states are reassignments under Section 1902(a)(32).

Moreover, because Section 1902(a)(32) provides that a “state plan...must provide that no payment...be made to anyone other than” the home care worker, it does not cover dues deductions, because such dues are paid by the employees and not the state employer. When dues are deducted and paid to the union, the state has already made the payment to the home care worker, and the deduction process is one of the worker paying their union. The Supreme Court has ruled that dues payments, even when “deducted by the employer from the earnings of the ...employee[] and paid to the employee organization,” are payments from the employee to the union rather than from the employer to the union.¹⁴ CMS would therefore be mistaken if it assumed that the unions representing individual provider home care workers are being paid by a state's Medicaid fund. Moreover, because home care workers would still be able to deduct union dues from their paychecks if they are employed by agencies financed by Medicaid, the rule would arbitrarily treat individual providers differently. Section 1902(a)(32) provides no limitations on how employees voluntarily arrange for the payment of dues, and, as a result, CMS would run afoul of the statute if it implemented the proposed rescission as intended.

¹⁰ *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

¹¹ 42 U.S.C. § 1396a(a)(32).

¹² S. Rep. No. 92-1230, 92nd Congress, 2nd Sess. 204-05 (1972) (“Experience...shows that some physicians and other persons providing services reassign their rights to other organizations or groups under conditions whereby the organization or group submits claims and receives payment in its own name. Such reassignments have been a source of incorrect and inflated claims for services and have created administrative problems with respect to determinations of reasonable charges and recovery of overpayments. Fraudulent operations of collection agencies have been identified in Medicaid...This provision would not preclude a physician or other person who provided the services and accepted an assignment from having the payment mailed to anyone or any organization he wishes, but the payment would be to him in his name.”); H.R. Rep. No. 95-393, 95th Cong., 1st Sess. 48-49 (1977).

¹³ See, e.g., 2002 Cal. Stats. Ch. 1135 (enacting 2002 Cal. A.B. 2235) (enacted Sept. 30, 2002); Collective Bargaining Agreement between State of Illinois and SEIU as Representative of Personal Assistants (effective Jul. 1, 2012) available at https://www2.illinois.gov/cms/personnel/employeeresources/Documents/emp_seiupast.pdf.

¹⁴ *Harris*, 134 S. Ct. at 2625; see also *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2486 (Jun. 27, 2018) (analyzing when an “amount is automatically deducted from” an employee's wages as a payment by the employee to the union).

It is difficult to avoid the conclusion that the proposed rule is motivated by animus toward unions, and not by any rational interest in administering the law. Just months ago, the Solicitor General took the position in *Janus v. AFSCME* that dues deducted from workers' paychecks and remitted to their union representatives are payments by workers with their own money.¹⁵ Here, the proposed rule now takes the opposite position: that dues voluntarily deducted from workers' paychecks are payments by Medicaid, not by the workers. The Administration appears willing to whipsaw between conflicting legal theories so long as the result weakens workers' ability to join together and bargain collectively.

Further, the ability of workers to contribute to a health insurance benefit with their own wages is a widespread practice—one that both Members of Congress and federal employees enjoy. The intent of the rule seems to be the elimination of this option for certain home care workers, despite the fact that there is no rationale for making it harder for the workers who are providing home care services to access their own needed care.

We oppose any actions that would undermine the ability of home care workers to improve their own terms and conditions of employment, and urge you to withdraw the proposed rule.

Sincerely,



PATTY MURRAY
Ranking Member
Committee on Health, Education, Labor
and Pensions
U.S. Senate



ROBERT C. "BOBBY" SCOTT
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives

¹⁵ Brief for the United States as Amicus Curiae Supporting Petitioner at 26, *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466) (“[M]andatory agency fees compel public *employees* to subsidize speech on matters of public concern...”) (emphasis added).