COMMONWEALTH of VIRGINIA

Department of Medical Assistance Services

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September 14, 2020

MEMORANDUM

TO: The Honorable Janet D. Howell
Chair, Senate Finance Committee

The Honorable Luke E. Torian
Chair, House Appropriations Committee

The Honorable Mark D. Sickles
Vice Chair, House Appropriations Committee

FROM: Karen Kimsey
Director, Virginia Department of Medical Assistance Services

SUBJECT: Report on the Feasibility of Sick Leave for Personal Care Attendants

This report is submitted in compliance with the Virginia Acts of the Assembly – Item 313.JJJJJ of the 2020 Appropriation Act, which states:

> *"The Department of Medical Assistance Services shall conduct a review of other state methods and strategies for providing sick leave to personal care attendants and evaluate feasible options for the Commonwealth to consider. The department shall report its findings and recommendations to the Chairs of the House Appropriations and Senate Finance and Appropriations Committees by November 1, 2020."*

Should you have any questions or need additional information, please feel free to contact me at (804) 786-8099.

KK/awg

Enclosure

Pc: The Honorable Daniel Carey, M.D., Secretary of Health and Human Resources

Feasibility of Sick Leave for Personal Care Attendants Report

A Report to the Virginia General Assembly

November 1, 2020

Report Mandate:

Item 313.JJJJJ states "The Department of Medical Assistance Services shall conduct a review of other state methods and strategies for providing sick leave to personal care attendants and evaluate feasible options for the Commonwealth to consider. The department shall report its findings and recommendations to the Chairs of the House Appropriations and Senate Finance and Appropriations Committees by November 1, 2020."

Background

Personal care services are federally defined as services furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for individuals with intellectual disabilities, or institution for mental disease. These services are authorized for an individual in accordance with a plan of treatment, or otherwise authorized for the individual in accordance with a service plan approved by the State. The personal care services provided to the Medicaid member are offered by an individual who is qualified to provide such services and is not a member of the individual's family (where family member means legally responsible relative); and is furnished in a home, and at the State's option, in another location.

The Commonwealth of Virginia provides three services that are considered personal care services: personal care/assistance, respite, and companion services. In these services, assistance with Activities of Daily Living (ADLs), such as bathing, dressing, eating/feeding, toileting, and transferring, and/or Instrumental Activities of Daily Living (IADLs), such as housekeeping, laundry, meal preparation, and shopping is provided. These services are provided through three of Virginia's four 1915(c) Home and Community-Based Services waivers (Commonwealth Coordinated Care Plus, Community Living, Family and Individual Supports), as well as the Early and Periodic Screening Diagnostic Treatment (EPSDT) program, and the Medicaid Works program.

Personal care services are provided using the agency-directed model, in which an individual receives services from an aide employed by a personal care agency, the consumer-directed model, in which the individual or other designated person becomes the Employer of Record (EOR) and hires an attendant, or through a combination of the two models. In the consumer-directed model, Virginia uses the Employer Authority model where the EOR has the authority and responsibility to hire, to train, to supervise, and to terminate services from the attendant.

DMAS's mission is to improve the health and well-being of Virginians through access to high-quality health care coverage.

DMAS administers Virginia's Medicaid and CHIP programs for more than 1.6 million Virginians. Members have access to primary and specialty health services, inpatient care, behavioral health as well as addiction and recovery treatment services. In addition, Medicaid long-term services and supports enable thousands of Virginians to remain in their homes or to access residential and nursing home care.

Medicaid members historically have included children, pregnant women, parents and caretakers, older adults, and individuals with disabilities. In 2019, Virginia expanded the Medicaid eligibility rules to make health care coverage available to more than 400,000 newly eligible, low-income adults.

Medicaid and CHIP (known in Virginia as Family Access to Medical Insurance Security, or FAMIS) are jointly funded by Virginia and the federal government under Title XIX and Title XXI of the Social Security Act. Virginia generally receives a dollar-for-dollar federal spending match in the Medicaid program. Medicaid expansion qualifies the Commonwealth for a federal funding match of no less than 90 percent for newly eligible adults, generating cost savings that benefit the overall state budget.

Personal care attendants are compensated by the Medicaid program through a Fiscal-Employer Agent (F/EA). This funding comes from a dollar-for-dollar match between the Commonwealth and the federal government. The Federal Medical Assistance Percentage (FMAP) for personal care services is 50%.

The mandate from the General Assembly requires the DMAS to review other states' methods and to evaluate feasible options for the Commonwealth to consider implementing a sick leave benefit for consumer-directed attendants. Attendants currently receive no form of paid leave in Virginia.

Data and Analysis

DMAS contacted the Centers for Medicare and Medicaid Services (CMS) and Applied Self-Direction, a national organization that provides practical expertise to create and operate self-directed programs, to identify states that provide sick leave in their consumer-directed models. Five states were identified: Massachusetts, Minnesota, New Jersey, Vermont, and Washington.

DMAS gathered information from these five states' Medicaid agency websites on the provision of sick leave under their consumer-directed program. DMAS reached out to each state to discuss their leave models as well. Conversations were held with Washington State, Vermont, and Minnesota on the topic. Responses were not received from Massachusetts and New Jersey.

Models in Other States

The mandate for sick leave in consumer direction in these five states can be traced from one of two sources. In Minnesota and Washington, the state legislature mandated the state negotiate a collective bargaining agreement for personal care staff with a union. Over the years, a leave benefit was included in the agreement. In Massachusetts, New Jersey, and Vermont, the state legislature passed a law requiring all employers to provide sick leave benefits to employees, which included personal care attendants paid by Medicaid.

Virginia's consumer-directed model is just one model across the country. Many states provide their individuals with an annual budget where the individual and his/her supports must determine the best method to provide care for their needs during the year while adhering to the budget. In this model, the EOR can set the pay rate for the attendant. In other states, there is "agency with choice", in which the individual works with a personal care agency. In this model, the agency provides payroll and other supports while the individual possesses the responsibilities to hire, supervise, and fire the attendant. Some states have multiple models too, such as New Jersey in the table below.

The differences in consumer direction also extends to the leave benefit. Some states provide Paid Time Off, which enables the attendant use the leave for sick leave, vacations, family purposes, or other reasons. The table below shows a breakdown of each state's model:

State	CD Model	Type of Leave	Accrual Rate
Massachusetts	Agency with Choice	Sick	1 hour per 30 hours worked
Minnesota	Individual Budget	PTO (can opt out of benefit)	1 hour per 40 hours worked
New Jersey	Agency with Choice	PTO	Varies
New Jersey	Employer Authority	Sick	1 hour per 30 hours worked
Vermont	Individual Budget	Sick	1 hour per 52 hours worked
Washington	Employer Authority	PTO	1 hour per 25 hours worked

There are certain aspects of the benefit that are similar amongst all states:

- Leave can be used in 15 minute increments;
- Attendant can "roll over" unused leave to next year (with a maximum number of hours set);
- Leave is paid out upon termination/resignation;
- Advance notice should be given to the employer if possible;
- The attendant is not responsible for finding a replacement; and
- Leave does not count as part of the individual's hours in the Plan of Care.

Funding Leave

The question of funding the state's leave benefit was discussed during conversations with the three states who responded. In all states, the cost of sick leave is factored into the hourly rate. In Vermont, the state monitors the usage and expenses of sick leave and adjusts the service rate accordingly. For Minnesota and Washington, there is a set amount determined during the collective bargaining negotiations to be factored into the hourly rate. In all states, the amount designated for sick leave or paid time off (PTO) is set aside as an administrative cost for each hour worked, similar to unemployment compensation taxes. The money is then set aside in separate accounts and deducted when the attendant utilizes the leave benefit.

Sick leave or PTO in the states researched is funded through a combination of state funds and the FMAP. Each state specifically provided feedback on whether they sought approval from CMS to utilize sick leave or PTO. In each response, the states indicated that the payment rate includes the amount to be set aside for sick leave or PTO with the personal care, respite, or companion care service. In three of the five states, a mention of leave is included in the waiver application. Massachusetts references the ability "to make sick time payments" as part of their Fiscal Management Service's responsibilities. Minnesota included an overview of self-direction that a budget may include paid time off. Washington is the only state that mentions that the personal care rate methodology, based on the negotiated rate as part of the collective bargaining agreement, includes "vacation pay".

Next Steps for Virginia

Based on the information gathered, sick leave is an option that can be available as a benefit to provide to consumer-directed attendants. Washington could be used as model in developing a sick leave benefit for attendants of personal care services given the similarity in consumer-directed models, though as mentioned, their state is required to conduct periodic collective bargaining negotiations. However, each state provides insights and best practices that may be of use should Virginia implement this benefit. Should the General Assembly consider sick leave as a feasible option for this workforce, several items will need consideration:

Items to Consider

- Accrual: The Commonwealth would likely need to consider a rate of accrual similar to the other states as opposed to a set number of days per year based on an average of hours worked. The Commonwealth would also need to determine if there should be a maximum limit to the amount of sick leave an attendant can accrue; if and how much sick leave can be rolled over from year to year; whether an attendant accrues leave based on hours worked for each employer separately or in aggregate; and if and when leave is paid out to attendants who leave employment.
- Tenure: States like Massachusetts, Minnesota, and Vermont require the attendant to work for a set number of hours or be an active attendant for a set period before the leave can be taken.
- Limits on use: Other states provide PTO as opposed to sick leave. Washington State is in negotiations for separate PTO and sick leave benefits. In Vermont, the attendant can only use leave for the employer in which it was earned and cannot transfer leave to use towards another employer.
- Rates: The Commonwealth would need to revise the rate methodology to account for an increase in the rate for personal care, respite care, and companion services based on the anticipated cost and utilization of sick leave. This would require additional general fund appropriation from the General Assembly.
- Contract modifications: The Commonwealth and the Managed Care Organizations would need to update contracts with its F/EAs to institute system changes, administrative costs, and monitoring of utilization of each attendant's sick leave balance.
- Amendments to CMS: The Commonwealth would need to submit State Plan Amendments and 1915(c) waiver amendments to CMS to get approval for the new rate methodology.