Assessment of Public Comment

The New York State Department of Financial Services ("Department") received 18 comments on the proposed 23 NYCRR 600 ("Part 600") from providers, entities and persons representing them, and advocates for the small business community. These comments, and the Department's responses, are summarized below. A full Assessment of Public Comments will be posted on the Department's website at: https://www.dfs.ny.gov/industry_guidance/regulations/proposed_fsl, with the Department's revised proposal.

In response to commenters requesting time to implement the new aspects of the rule, the Department decided to provide providers with six months from the date of final adoption to implement the proposed regulation.

Many commenters want Part 600 to be identical to a similar regulation under consideration in California. The Department has consulted California regulators and wishes to harmonize our respective regulations. Nonetheless, the two regulations cannot be identical, in part because the relevant New York statute differs from California's statute on commercial financing disclosures.

The Department incorporated many comments into its revised proposal. These are the most notable changes:

(1) The Department clarified when an Annual Percentage Rate ("APR") must be disclosed. APRs must be disclosed when a specific commercial financing offer is made, but not any time a broker, salesperson, or covered individual mentions an interest rate or financing amount during the application process.

(2) Some commenters observed that default fees and other avoidable fees and charges should not be used when making APR calculations. Further, the provider should not be required to make new disclosures when the recipient incurs such charges or penalties. The Department agrees.

(3) In response to commenters' concerns that Part 600 had required the disclosure of broker fees paid by the recipient but not those paid by the provider, the Department added a requirement that providers inform recipients whether the broker is being compensated by the provider (and if so, that the broker's compensation may be based upon the transaction size and profitability to the provider) or the recipient (and if so, the amount of the compensation paid by the recipient), or if the broker is not being compensated.

(4) The Department added a requirement that, when providing a specific offer of commercial financing to a recipient, the broker must inform the recipient, in writing, of how, and by whom, the broker will be compensated for the broker's role in the transaction.

(5) The Department has included the new Section 600.24 in its revised proposal to define when Part 600 is applicable to particular parties. The regulation only applies when one of the parties, either provider or recipient, is managed and directed in New York. Section 600.24 also provides a conflicts rule for transactions when another state's disclosure statute may apply.

The Department considered and rejected numerous comments:

(1) The Department did not accept requests for blanket exemptions for sales-based financings, open-ended financings, factoring or agricultural lending, as these requests were inconsistent with the underlying statute;

(2) The Department did not create exemptions for subsidiaries of federally chartered banks and foreign banks. Such exemptions are not authorized by the underlying statute; and

(3) The Department did not state that open-end financing APR calculations are to be made in accordance with 12 C.F.R. § 1026.6(b)(2)(i), because the statute specifically provides that such calculations are to be made in accordance with 12 C.F.R. § 1026.22.

Department of Health

NOTICE OF ADOPTION

Telehealth Services

I.D. No. HLT-12-22-00003-A

Filing No. 677

Filing Date: 2022-08-29

Effective Date: 2022-09-14

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of sections 505.17, 533.6; addition of Part 538 to Title 18 NYCRR.

Statutory authority: Public Health Law, sections 2999-cc(2)(y), (4), 2999-ee, 201(1)(v); Social Services Law, section 365-a

Subject: Telehealth Services.

Purpose: To ensure continuity of care of telehealth services provided to Medicaid enrollees.

Text or summary was published in the March 23, 2022 issue of the Register, I.D. No. HLT-12-22-00003-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of Program Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.ny.gov

Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2027, which is no later than the 5th year after the year in which this rule is being adopted.

Assessment of Public Comment

The Department of Health (the "Department") received comments from several parties regarding proposed amendments to sections 505.17 and 533.6 of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York and the addition of Part 538, governing radiology and telehealth services. The comments and responses are summarized below:

COMMENT:

Sixteen letters from federally qualified health centers (FQHCs) and affiliates and associations representing FQHCs provided nearly identical comments supporting the Department's expansion of telehealth coverage in the proposed regulations and suggested the following reimbursement policies be added:

Provide Full Reimbursement Parity, Regardless of Patient or Provider Location, for In Person, Audio-Only and Audio-Visual Telehealth

The commenters ask for payment parity, regardless of whether the provider and/or patient are located on-site. They state Medicaid reimbursement for Article 28 and Article16 clinics are based on the Ambulatory Patient Groups (APGs) which include a capital add-on. Most FQHCs are reimbursed via their Prospective Payment System (PPS) through three fee-for-service rate codes: a threshold rate, a lower offsite rate, and a group psychotherapy rate. They outline these bundled payment rates, and as dictated by Federal statute, are cost-based in nature. The FQHC offsite rate is not equivalent to the threshold rate minus a traditional facility fee. The offsite rate was created for FQHCs to provide care outside of the walls of the clinic. For Article 28 and Article 16 clinics, there is no offsite rate, and the APG rate minus the capital add-on is not equivalent to removing a "facility fee."

Furthermore, they explain all three clinic types continue to incur fixed personnel costs along with operation and maintenance of their physical sites and telehealth infrastructure regardless of provider and patient locations. As such, the offsite rate/removal of "facility fee" should not be deemed an appropriate reimbursement for any clinic service delivered via telehealth, even when both a patient and provider are offsite. Commenters ask for their APG or threshold rate for telehealth visits and express without it, clinics will experience workforce shortages and on-site constraints. With the increased need for behavioral health providers, remote options have been utilized to fill these gaps in staff and the space remote services creates has been used to meet medical demands.

Ensure Consistency in Payment Across Licensure Types & Payment Models

The commenters state there should be no disparity between payment policy among Article 16, 28, or 31, licensed providers. Providers should receive their full APG or full threshold rate for all audiovisual and audio only telehealth visits just as they would for in person services, regardless of patient or provider location.

Enable FQHCs to Bill for a Full Range of Telehealth Services

The commenters encourage the Department to add FQHC providers to the list of those who can bill for Remote Patient Monitoring (RPM) and the services under the expanded definition of telehealth included in the regulation (e.g., eConsults). The Department should accomplish this by allowing FQHCs to bill separately for the new modes of telehealth or by recalculating the costs in the bundled PPS rates to account for costs not currently captured under PPS.

RESPONSE:

The commenters' concerns regarding payment parity appear related to the 2023 NYS Enacted Budget amending Public Health Law (PHL) § 2999-dd(1) and not the proposed regulatory amendments. This regulatory amendment is intended to provide authority for expansion of telehealth services. Once the regulations are finalized, the Department will provide additional telehealth policy and billing guidance. Furthermore, Interagency workgroups are coordinating to align post-pandemic agency

policies, to the extent possible, while supporting care for diverse populations with very different needs. Consistent with CMS rules, FQHCs that have not opted into APGs are currently not authorized to bill for Remote Patient Monitoring outside of the PPS rate. The increased demand for behavioral health services, workforce shortages, and clinic constraints, including billing rules for RPM, will be included in further internal policy discussions.

COMMENT:

ATA Action (the American Telemedicine Association's affiliated trade association) and Philips commented they support enactment of the proposed regulations and feel they have the potential to impact healthcare delivery. Both groups stress the need for coverage of remote fetal non-stress tests to support maternal health.

RESPONSE:

This regulatory amendment is intended to provide authority for expansion of telehealth services. Once the regulations are finalized, the Department will provide additional telehealth policy and billing guidance. The Department's Internal Review Benefit Committee (IBRC) will be charged with reviewing coverage of remote fetal non-stress tests.

COMMENT:

The New York State Association of County Health Officials (NYSACHO) and the 58 local health departments in New York State represented by NYSACHO, wrote in support of the proposed regulatory amendments by stating they allow for the continuity of care for Medicaid recipients receiving telehealth services after the current public health emergency ends. While recognizing certain barriers still exist, such as broadband access, these amendments ensure virtual service reimbursement and serve as a step forward in improving access to health care for those enrolled in Medicaid.

RESPONSE:

The Department appreciates the support of the NYSACHO and the 58 local health departments in New York State. Additionally, Department staff look forward to opportunities to coordinate with local health departments to identify any remaining barriers to telehealth services.

COMMENT:

A letter from Neurocrine Biosciences outlines concerns about audio-only telehealth replacing in-person care for behavioral health services. They strongly recommend that the Department (1) extend additional guidelines to Medicaid providers to ensure determinations of telehealth appropriateness align with existing standards of care for people living with serious mental illnesses, which recognize the most appropriate clinical approach will differ based on disease state; (2) consider including language that clearly recognizes that for some conditions, periodic, in-person encounters are necessary; and (3) support additional administrative action to evaluate the impact of audio-only reimbursement on patient-focused measures, especially underserved populations living with serious mental illnesses and drug-induced movement disorders.

RESPONSE:

New York State Medicaid providers are advised "audio-only" visits should only be used when in-person and audio-visual are not available or when audio-only is the patient's request. Furthermore, providers are advised they need to use the most appropriate mode of care for their patient. The Department plans to monitor audio-only services post-PHE for appropriateness. Both providers and members have expressed coverage for audio-only visits supports gaps in care and technological deficiencies.

COMMENT:

NYC Department of Health and Mental Hygiene (DOHMH) wrote stating they strongly support the Department's actions to permanently expand the modalities eligible for reimbursement, particularly the addition of audio-only visits. Telehealth is a critical tool for care delivery, supplementing in-person care by providing high-quality, convenient services without visiting a provider's office. They urge the Department to continue to prioritize equity in its approach to telehealth through robust data collection and dissemination, and sustained investments to close the digital divide. The commenter states the inclusion of audio-only telehealth services on a permanent basis will allow more New Yorkers to effectively communicate with their health care providers and reduce inequities. However, they also state audio-only telehealth services have serious limitations and are not appropriate for all patients or visit types. A visit that involves both an audio and visual connection facilitates more meaningful interactions, for which an audio-only connection is no substitute. Therefore, they recommend the Department collect and publicly release data on the use of various telehealth modalities to ensure providers are using audio-only modalities only as a last resort when audio-visual visits are not possible and when clinically appropriate, and not as a direct substitute for other virtual or in-person care. To ensure quality and accountability, they urge the Department to also develop a set of process or outcomes measures related to health equity in telehealth. They also ask the Department to work with other state agencies to increase access to, and affordability of, high-quality broadband and expand the scope of telehealth providers able to offer eConsults.

RESPONSE:

The Department appreciates the support of the NYC DOHMH and recognizes the need to prioritize equity through data collection. The Department is using surveys to measure provider and consumer engagement and experience with telehealth modalities. Regarding NYS DOHMH's concerns about audio-only telehealth, the Department agrees audio-only is not a direct substitute for audio-visual and in-person visits. Guidance to Medicaid providers conveys visits with a visual component are the preferred method and audio-only should be reserved for when an audio-visual visit is not an option. Additionally, interagency workgroups convene to discuss barriers and post-public health emergency (PHE) policies.

COMMENT:

The Adult Day Health Care Council (ADHCC) sent a letter with the following statements and recommendations:

- We support the inclusion of the catch-all provision allowing any Medicaid provider to provide telehealth as long as services are appropriate;
- Make the authority to offer telehealth services permanent;
- Include audio-only telehealth to enable all individuals to utilize this care;
- Modify the reimbursement of telehealth to ensure parity with in-person services and require MLTCs to reimburse at adequate levels; and,
- Work with providers to develop billing codes that make sense for providers.

They state their programs provide an interdisciplinary approach to care and are ideal telehealth providers. They know their registrants and can discern changes in their behavior and condition that result in immediate care and case management preventing more serious deleterious conditions. Many of their registrants suffer from chronic conditions such as diabetes, COPD, dementia, congestive heart failure, and asthma. Telehealth gives them the ability to provide necessary support and services to ADHCC's highly vulnerable registrants.

RESPONSE:

The Department is glad to hear this telehealth expansion will support the work ADHCC provides to their most vulnerable registrants. The regulatory amendments are intended to provide authority for permanent adoption of audio-only telehealth services and other modalities outlined in the proposal. Once the regulations are finalized, the Department will provide additional telehealth policy and billing guidance. While not the subject of this regulation, the 2023 NYS Enacted Budget amending PHL § 2999-dd(1) includes a provision for payment parity that applies to all health plans, including MLTC plans.

COMMENT:

The Health Plan Association wrote to express where they see value in telehealth and where they have concerns. They state health plans are well-positioned to recognize the vital role telehealth plays in ensuring members are able to access the care they need and as an important tool to making health care more efficient. They agree telehealth reduces barriers to care and can expand access to services, but they have concerns telehealth will become a revenue maximizing opportunity with the potential to incentivize unnecessary services. They express the focus should be on increasing access to broadband, technology/telehealth education, and what services they feel may not be appropriate for remote delivery (i.e., surgery, rheumatology, and ophthalmology). In particular, the Health Plan Association has concerns about the applicability of audio-only telehealth for Applied Behavioral Analysis (ABA) therapy. They express because ABA services have a focus on how behaviors change, or are affected by the environment, as well as how learning takes place, it is vital that there be a visual assessment – at the very least – of the skills and actions that are needed to talk, play, and live. They also believe it's important to include telehealth in value-based payment (VBP) arrangements.

RESPONSE:

The Department agrees with the Health Plan Association's comments about the benefits of telehealth and the potential for abuse. Policies will reiterate that any service delivered via telehealth needs to be appropriately and effectively delivered remotely. As with all Medicaid services, claims are subject to monitoring and audit to identify fraud or misuse. Additionally, there is continued focus on training and educating medical staff and students on telehealth policies and best practices; DOH has partnered with the Northeast Telehealth Resource Center on a training portal for ongoing provider education on telehealth (www.nytelehealth.netrc.org).

The Department agrees that Medicaid managed care plans and providers should work on ways to bundle telehealth services into VBP contracts to incentivize flexible use of telehealth as part of total cost of care, integrated primary care, and other population-or episode-based arrangements.

Department of Labor

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Prevailing Wage for Aggregate Hauling

I.D. No. LAB-37-22-00004-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Addition of Part 222 to Title 12 NYCRR.

Statutory authority: Labor Law, section 21(11)

Subject: Prevailing Wage for Aggregate Hauling.

Purpose: To clarify the application Labor Law section 220(3-a)(f).

Text of proposed rule: A new Part 222 is added to Chapter III of title 12 NYCRR to read as follows:

Part 222 - Hauling of Aggregate Supply Construction Materials

§ 222.1 Definitions

For the purposes of Section 220 of the Labor Law:

(a) "Worksite" means the area in which the improvements associated with a specific project, as defined in the construction contract, and any surrounding areas supporting that specific project.

(b) "Central stockpile" means a location of centrally stockpiled materials solely dedicated for use on a public work project that is not part of a worksite but intended to support the worksite.

(c) "Aggregate supply construction materials" means sand, gravel, stone, crushed stone, dirt, soil, millings, and fill.

§ 222.2 Application

For the purposes of Section 220 of the Labor Law:

(a) Prevailing wage shall be paid for work performed at a worksite involving the delivery of aggregate supply construction materials to such worksite.

(b) Prevailing wage shall be paid for work performed involving the hauling of aggregate supply construction materials from a worksite to a central stockpile, as well as any return hauls, empty or loaded, time spent loading or unloading at a worksite, and time spent loading or unloading at a central stockpile related to hauls from or to a worksite.

(c) Prevailing wage shall be paid for work performed within a 50-mile radius of a worksite involving the delivery of aggregate supply construction materials from a vendor of aggregate supply construction materials, such as a plant or quarry, to a worksite, except prevailing wage shall not be paid to direct employees of a supplier of aggregate supply construction materials, when making a single delivery in a given day.

Text of proposed rule and any required statements and analyses may be obtained from: Jill Archambault, Department of Labor, Building 12, State Office Campus, Room 509, Albany, NY, (518) 485-2191, email: regulations@labor.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 60 days after publication of this notice.

This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.

Regulatory Impact Statement

1. Statutory Authority: The statutory authority for the promulgation of this rule is the Commissioner's rulemaking authority under Labor Law § 21(11).

2. Legislative Objectives: To administratively promulgate regulations governing any provision in the Labor Law that she deems necessary and proper under Labor Law § 21(11).

Section 220(3-a)(f) of the Labor Law ("Section 220(3-a)(f)") requires prevailing wage be paid for work performed on a public works worksite for any work involving the delivery to and hauling from such worksites of aggregate supply construction materials, as well as any return hauls, whether empty or loaded, and any time spent loading/unloading. Neither the Labor Law, nor amendments to Section 220(3-a)(f) clearly define terms necessary to implement this new law.

When Section 220(3-a)(f) was initially enacted on December 31, 2021, the Governor's Approval Memorandum to Senate Bill 255-B stated: "I have reached an agreement with the Legislature to clarify that prevailing wage will be paid only at the worksite itself and for travel between the worksite and a designated central stockpile where aggregate supply construction materials are delivered. Prevailing wage will not apply to out of jurisdiction deliveries of aggregate supply materials to the designated central stockpile." Subsequently, Section 220(3-a)(f) was amended to reflect the agreement described in the Governor's Approval Memorandum; however, the amendment introduced new terms, such as "worksite," that were not defined. These undefined terms leave open questions about the application of the law.

3. Needs and Benefits: The purpose of this rule is to clarify the application of Section 220(3-a)(f). This rule defines when prevailing wage is required by this law by defining key terms applicable to conditions within the scope of the statue.

The rule defines the terms "worksite," "central stockpile," and "aggregate supply construction materials." The rule further clarifies that prevailing wage is required to be paid for delivering and hauling aggregate supply construction materials within a worksite, including the specific project site defined by the contract, surrounding areas, and central stockpiles, as well as delivering such materials within a 50-mile radius of a worksite.

The proposed rule provides clarity to the regulated community as to the requirements of the Labor Law. The rule will be beneficial to employers as it will reduce uncertainty and potential violations by providing clear definitions for compliance.

4. Costs:

(a) Costs to Regulated Parties: The proposed rule is not expected to impose any new costs on the regulated community since, as described above, the rule provides definitions and clarity as to the existing requirements of Section 220(3-a)(f). The proposed rule implements the statute while avoiding any costs above what the law already requires.

(b) Costs to Agency, the State and Local Governments: None.

(c) The Information, Including the Sources of Such Information: The proposed rule does not impose any new mandates or costs; rather, it provides clarity to Section 220(3-a)(f).

5. Local Government Mandates: The proposed rule does not impose any new mandates.

6. Paperwork: There are no changes in the reporting or record-keeping requirements proposed by this rule; existing requirements for public work covered by Article 8 of the Labor Law remain unchanged.

7. Duplication: No relevant rules or other legal requirements of the State and/or federal government exist that duplicate, overlap, or conflict with this rule.

8. Alternatives: The Department considered a similar regulation that only provided definitions without any clarity as to the application of Section 220(3-a)(f); however, this would be insufficient to provide necessary clarity to the regulatory community.

9. Federal Standards: There are no minimum standards of the federal government for this or a similar subject area.

10. Compliance Schedule: The regulated community will be required to comply with this regulation upon its effective date.

Regulatory Flexibility Analysis

1. Effect of rule:

This rule clarifies the application of Section 220(3-a)(f) of the Labor Law ("Section 220(3-a)(f)"). This rule defines when prevailing wage is required by this law by defining key terms applicable to conditions within the scope of the statue.

2. Compliance requirements:

There are no changes in the reporting or record-keeping requirements proposed by this rule; existing requirements for public work covered by Article 8 of the Labor Law remain unchanged.

3. Professional services:

No professional services would be required to comply with this rule.

4. Compliance costs:

This proposed rule is not expected to impose any additional compliance costs separate and apart from the costs already associated with Section 220(3-a)(f). The proposed rule implements the statute while avoiding any costs above what the law requires, and provides clarity to the regulated community as to the requirements of Section 220(3-a)(f). In so doing, the proposed rule will be beneficial to employers as it will reduce uncertainty and potential violations by providing a clear framework for compliance.

5. Economic and technological feasibility:

Compliance with this proposed rule will be economically and technologically feasible because this proposed rule simply provides clarity to the regulated community as to the requirements of Section 220(3-a)(f).

6. Minimizing adverse impact:

The proposed rule was written to provide clarity to implement Section 220(3-a)(f), as well as to avoid adverse impact on employers (including small businesses) and employees.

7. Small business and local government participation:

Small businesses and local governments may submit public comments during the public comment period. The Department, as part of its implementation of 220(3-a)(f), will publish public awareness information on its website.

8. For rules that either establish or modify a violation or penalties associated with a violation: