

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-2413-P  
P.O. Box 8016  
Baltimore, MD 21244-8016

Re: File code #CMS-2413-P

Comments submitted electronically at [www.regulations.gov](http://www.regulations.gov)

Dear Secretary Azar and Administrator Verma:

Thank you for the opportunity to submit comments on the Department of Health and Human Services (HHS) and Centers for Medicare & Medicaid Services (CMS) proposed rule on the “Medicaid Program: Reassignment of Medicaid Provider Claims.” Pioneer Institute is an independent, non-partisan, privately-funded research organization that seeks to improve the quality of life in Massachusetts through civic discourse and intellectually rigorous, data-driven public policy solutions based on free market principles, individual liberty and responsibility, and the ideal of effective, limited and accountable government.

Pioneer Institute strongly supports your proposal to rescind 42 C.F.R. § 447.10(g)(4) **Prohibition against reassignment of [provider claims](#)**, which was most recently amended in 2014 and allows Medicaid payments owed to individual practitioners for whom Medicaid is the “primary source of service revenue” to be paid to third parties. Section 1902(a)(32) of the Social Security Act, codified as 42 U.S.C. § 1396a(a)(32), requires that state Medicaid plans “provide that no payment under the plan for any care or service provided to an individual shall be made 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 ...” Although the Medicaid statute includes several narrow exceptions to this “direct payment rule,” it does not delegate authority to

the HHS Secretary to create exceptions that contradict policies specifically enumerated in the Statute.

Because there was no statutory basis on which the Secretary could rely when she added 42 C.F.R. § 447.10(g)(4), we believe this additional exception is invalid and its addition was contrary to law. In our view, allowing Medicaid funds to be paid to parties outside the statutory exceptions presents a substantial risk of abuse, and may lead to diversion of Medicaid dollars for purposes not sanctioned by the Social Security Act. We are especially concerned that unions and allies in state governments may be using this exception to support the transfer of Medicaid dollars away from health care providers to elderly and disabled Medicaid beneficiaries to labor unions.

Many independent Personal Care Attendants (PCAs) in Massachusetts are family members or friends of Medicaid beneficiaries, and assist them with activities of daily living such as taking medications, bathing and grooming, dressing and undressing, and eating. PCAs may also help beneficiaries with shopping, laundry, meal preparation and clean up, light housekeeping, and traveling to medical appointments ([https://www.massgeneral.org/als/patienteducation/ALS\\_PCAs.aspx](https://www.massgeneral.org/als/patienteducation/ALS_PCAs.aspx)).

In 2006, the Massachusetts legislature unanimously overrode a gubernatorial veto to establish the Personal Care Attendant Quality Home Care Workforce Council (PCA Council) to serve as employer of record solely for collective bargaining purposes for PCAs who serve elderly and disabled Medicaid beneficiaries within the State. Under the law, beneficiaries remained the PCAs' employers for all other purposes, and PCAs were denied access to some benefits given to state employees performing similar functions. Shortly thereafter, 1199SEIU United Healthcare Workers East was certified as the exclusive bargaining representatives for PCAs. The SEIU was

aided in its unionization efforts by a legislative reduction in the required minimum showing of interest for unrepresented workers of 30% to 10%. (An Act Establishing A Personal Care Attendant Quality Home Care Workforce, 2006 Mass. Acts. ch. 268; Maxford Nelsen, Freedom Foundation, Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity, May 18, 2016, <https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf> (last visited August 8, 2018); Showing of Interest, Commonwealth of Massachusetts 2018, <https://www.mass.gov/service-details/showing-of-interest> (last accessed August 11, 2018))

The initial collective bargaining agreement (CBA) required signed authorization by PCAs to authorize withholding of union dues or “agency service fees by the Commonwealth from PCA’s paychecks. In the following years, the collective bargaining agreement was amended to require payment of dues or agency fees as a condition of employment for all PCAs employed by Medicaid beneficiaries. State contributions of \$2 million to the 1199SEIU Training and Upgrading Fund followed, as did the development of a mandatory joint Union-Council orientation program including Union presentations, that was “fully implemented in the month after the U.S. Supreme Court’s decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), which held that independent in-home caregivers in Illinois could not be forced to pay union fees. In addition, the PCA Council received complaints from Medicaid beneficiaries about persistent and aggressive efforts by SEIU organizers to reach their caregivers, who as family members often resided at the same address. (Nelsen, *supra*; Collective Bargaining Agreement, 2008 – 2011, <https://www.mass.gov/files/documents/2016/08/mv/pca-contract.pdf> (last accessed, August 11, 2018))

Despite the *Harris* decision, it is unclear from the existing CBA whether the State continues to deduct service fees from PCAs who do not actively join the Union. However, Massachusetts General Law Chapter 180 Section 17G provides that “state, county and municipal employers shall deduct from employees’ paychecks agency service fees specified by a collective bargaining agreement with the PCA Quality Home Care Workforce Council...”

<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXII/Chapter180/Section17G>). The current CBA states that agency service fees deductions must be explicitly authorized by PCAs, however the statute holds that paying such fees or union dues, and thus PCA authorization, are a requirement of employment. In addition, SEIU has access to all PCAs’ home, mailing, and e-mail addresses, home and cell phone numbers, and even PCAs’ Social Security numbers. Although SEIU has the right to send material in PCAs’ payroll envelopes, access to PCAs’ contact information is unavailable to other entities, including those who would inform PCAs of their legal right not to pay union fees. (Nelsen, *supra*)

In Massachusetts, PCAs are routinely paid via electronic funds transfers, and SEIU has the right to access the offices of the fiscal intermediary responsible for paying PCAs. As of 2018, PCAs are being pressed to authorize SEIU access to more financial information, as well as the right to charge their credit cards. Since 2009 SEIU has received over \$39 million in dues and fees from PCA’s Medicaid pay. (Nelsen, *supra*)

It is unclear what, if any, benefits PCAs or Medicaid beneficiaries receive from the dollars that are transferred to the Union on the PCAs’ behalf. Importantly, however, removal of 42 C.F.R. § 447.10(g)(4) will in no way impede the ability of workers to voluntarily join unions. Nor will it prevent them from obtaining potential benefits accruing to union membership if in their opinion joining a union offers such benefits to them.

Conversely, our experience in Massachusetts and reports from other states suggest that despite *Harris*, unions are willing to utilize aggressive tactics and collude with friendly state governments to gain the ability to coerce unwilling or unaware caregivers into paying union fees. Rescinding 42 C.F.R. § 447.10(g)(4) will preclude the automatic fee collection that is an essential component of efforts to divert funds from Medicaid beneficiaries, their caregivers, and the Medicaid Program to unions. Thus, it will close a significant loophole, and send a strong message that states must adhere to the Supreme Court's ruling in *Harris* and *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, No. 16-1466 (2018), decided in June, which held that state-employed workers cannot be required to pay agency service fees to unions as a condition of employment.

Respectfully yours,

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