



September 9, 2022

The Honorable Ron DeSantis
Governor
State of Florida
The Capitol
400 S. Monroe St.
Tallahassee, FL 32399-0001

Dear Governor DeSantis:

Thank you for your service to the State of Florida and to the long-term care community. As you know, our members have been on the front lines of the COVID-19 pandemic. **Therefore, we are asking for your help to intervene on a critical issue and deadline facing our members who participate in the Medicaid program by accepting Medicaid residents.**

The Florida Assisted Living Association (FALA) is the longest-established and largest assisted living association in the state. We have been providing advocacy, education, and regulatory support for our members for the past 30 years. In 2004, FALA's membership voted to amend our bylaws to allow membership for Adult Family Care Homes (AFCHs); and in 2006, FALA made history again by seeking passage of landmark legislation that moved ALF regulations from Florida Statute Chapter 400 to a new Florida Statute in Chapter 429.

The following information and questions were provided (via email letter) to the current Senate and House Appropriations Chairs, incoming Senate President and House Speaker as well as your Secretary of the Agency for Health Care Administration (AHCA). On behalf of the nearly 500 assisted living facility (ALF) members and nearly 300 associate members of FALA, I am writing in hopes that you will be able to help us get some clarification on a funding issue in the FY 2022-23 budget. Our concerns surround the proviso language in line #217 in the General Appropriations Act relating to Medicaid Long Term Care that states:

*“From the funds in Specific Appropriation 217, \$136,616 from the General Revenue Fund and \$207,505 from the Medical Care Trust Fund are provided to the Agency for Health Care Administration to adjust fee for service rates at the annual rate setting date for the sole purpose of raising wages of **direct care employees** of Medicaid providers including 1099 employees who provide services under the Florida Medicaid Program to at least \$15.00 per hour. The agency shall enter into a supplemental wage agreement with each provider to include this minimum wage requirement to ensure compliance. The agreement must require the provider to agree to pay **each of its employees at least \$15.00 per hour**. The agreement shall include an attestation under penalty of perjury under section 837.012, Florida Statutes, stating that **every employee of the provider**, as of October 1, 2022, will be paid at least \$15.00 per hour.”*

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While we have had several discussions with AHCA's staff and Secretary Marsteller, the FALA members who accept Medicaid residents are still very concerned about conflicting guidance both within the budget proviso language and the agency website. **To that end, we are hoping that as the Governor of this great state, you will be able to help us get the needed clarification before the October 1, 2022 deadline.** This will ensure FALA members are in compliance and our members fully understand how the calculation was performed for this minimum wage increase.

Below are our list of specific questions and concerns:

- 1) **WHAT IS THE DEFINITION OF DIRECT CARE EMPLOYEE?** The budget proviso language states "direct care employees" in the first sentence but goes on to reference "each of its employees" and "every employee of the provider..." Does the minimum wage increase affect ALL employees and contract employees of an ALF and AFCH or just those employees and contract employees who are direct care employees? Is there a definition of direct care employee? Does this include contracted staff such as dining staff, activities staff and drivers? For example, the AHCA web site outlines Medicaid reimbursable service which for non fee-for-service programs could be very broad depending on the ALF model. This needs to be clarified.
- 2) **ARE ALL EMPLOYEES AFFECTED?** The percentage of FALA members who accept Medicaid residents versus private pay residents varies. For example, some ALFs may have a Medicaid number but currently have either no Medicaid residents, a few Medicaid residents or in the case of six-bed ALFs and Limited Mental Health (LMH) ALF providers, all residents may be Medicaid recipients on the OSS, LTC or ACS programs. Does the definition of direct care employee include employees that provide direct care to non-Medicaid residents? In other words, if a licensed facility has both Medicaid and private pay residents, which employees are subject to the minimum wage increase? Please realize with the current workforce shortage in the industry, ALFs with both Medicaid and non-Medicaid residents would likely not be able to only increase the minimum wage for those employees who take care of participating members because those direct care employees may be providing assistance to Medicaid and non-Medicaid residents.
- 3) **WHEN IS THE \$15 MINIMUM WAGE EFFECTIVE?** Based on the passage of a Constitutional Amendment, we understand that Florida's minimum wage for all employees - regardless of industry - will be \$15 per hour starting in 2026. However, we understand it was the Legislature's desire to implement the \$15 per hour minimum wage requirement for direct care employees in the FY 2022-23 Medicaid Long Term Care budget versus waiting until the 2026 implementation deadline. Our members are experiencing conflicting guidance as to the effective date of this increase. Is it October 1, 2022, regardless if the facility has received the increased funding? How can a facility sign

an attestation form now if they don't know if the increased funds will in fact be passed on to them or if they must try to use their current operating funds to try to come up with funds for the wage increase? Some guidance has also suggested that the agency can begin penalizing non-compliance facilities as of January 2, 2023, but other guidance has suggested the effective date is October 1, 2022. Clarification on this is imperative.

- 4) **HOW WILL FACILITIES ENSURE THE INCREASED MEDICAID FUNDING FOR THIS WAGE INCREASE WILL BE PASSED ON TO THEM IN THE FORM OF REIMBURSEMENTS?** We understand that the Legislature was attempting to calculate the amount of funding needed to cover this wage increase and to increase the Medicaid Long Term Care budget to cover those costs. Based on the confusion about the definition of direct care employee and AHCA documents required to be signed by those providing Medicaid Long Term Care services to residents, it appears to be pre-mature if the contracts currently in place have not been amended to specify that the increased minimum wage cost is being passed on to the facility. Otherwise, these facilities will be taking unanticipated funds from their operating budgets during a time at which operating funds and staffing is tight and limited. In the waiver program for ALFs, it is not fee-for-service but rather a lump sum amount. Absent any directive to the plans from the Legislature on how the additional funding was calculated and the formula used to determine how much each facility should receive per Medicaid member to fulfill the cost of increasing the minimum wage to \$15 an hour for direct care employees, plans will be allowed to determine what the increase will be - which in some cases, might not be enough to cover the cost of the wage increase. The result will be an unfunded mandate and unanticipated cost for some ALF facilities.
- 5) **WAS THE COST OF ACS SERVICES TAKEN INTO CONSIDERATION?** Since 2015, Assistive Care Services (ACS) has been paid at \$12.25 per day per resident. According to the following link on the AHCA website, ACS will be raised to \$13.26 per day. Was this increase intended to cover the cost of increasing to the \$15 an hour minimum wage for those direct care employees who provide services to ACS residents?
https://ahca.myflorida.com/medicaid/review/Reimbursement/2022-01-01_Fee_Sched_Billing_Codes/Assistive_Care_Services_Fee_Schedule_2022_JULY.pdf

CAN FAQs OR AGENCY GUIDANCE BE CLARIFIED? Given the fact that all FALA members who provide Medicaid Long Term Care services are licensed at AHCA, we take agency guidance and direction seriously and are seeking very clear guidance on this issue. While the agency has attempted to answer some questions and provide updates to the FAQs, there are still many unanswered questions. Attached are some examples for your review and following is a link to the full page:
https://ahca.myflorida.com/Medicaid/Finance/finance/enh_wage/index.shtml

FALA's mission is to ensure Floridians have the best choices and quality services in assisted care communities where one can live and age with dignity. We want to be there to help assist Florida

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lawmakers to develop a policy framework promoting excellence in assisted care communities by providing education, standards, advocacy and consumer awareness. FALA is more than willing to be “at the table” if we can assist in discussions on this topic. Our members strive to provide the best care for their residents and will always place the health, safety and welfare of residents above all else. We would appreciate the opportunity to be involved in future conversations regarding this important topic so that we can help provide insight directly from the front lines of ALFs. We hope to continue to be an effective partner with both the Legislature and AHCA as well as your office. **Governor, we desperately need your help on this matter.**

Should you need any additional information on this issue, please contact me directly or Jennifer Green jennifer@libertypartnersfl.com, Adam Potts adam@libertypartnersfl.com or Tim Parson tim@libertypartnersfl.com on our advocacy team. For any other information about FALA’s membership, please see www.FALA.org.

Sincerely,



Veronica J. Catoe, LPN, QAS
Chief Executive Officer

cc: The Honorable Kathleen Passidomo, Senate President-Designate
The Honorable Paul Renner, House Speaker-Designate
The Honorable Kelli Stargel, Senate Appropriations Chairman
The Honorable Jay Trumbull, House Appropriations Chairman
FALA Board of Directors
Simone Marstiller, Secretary, Agency for Health Care Administration

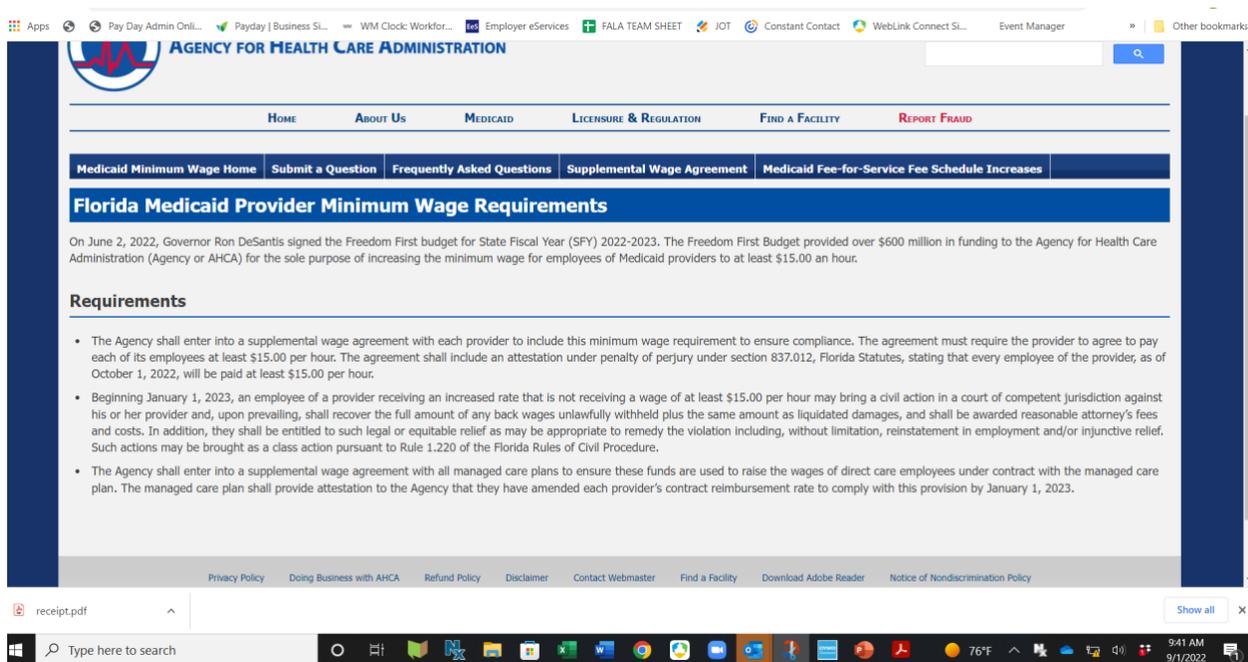
Excerpt from the FY 2022-23 General Appropriations Act (HB 5001):

MEDICAID LONG TERM CARE
217 SPECIAL CATEGORIES
ASSISTIVE CARE SERVICES
FROM GENERAL REVENUE FUND 1,279,935
FROM MEDICAL CARE TRUST FUND 1,944,082

From the funds in Specific Appropriation 217, \$136,616 from the General Revenue Fund and \$207,505 from the Medical Care Trust Fund are provided to the Agency for Health Care Administration to adjust fee for service rates at the annual rate setting date for the sole purpose of raising wages of direct care employees of Medicaid providers including 1099 employees who provide services under the Florida Medicaid Program to at least \$15.00 per hour. The agency shall enter into a supplemental wage agreement with each provider to include this minimum wage requirement to ensure compliance. The agreement must require the provider to agree to pay each of its employees at least \$15.00 per hour. The agreement shall include an attestation under penalty of perjury under section 837.012, Florida Statutes, stating that every employee of the provider, as of October 1, 2022, will be paid at least \$15.00 per hour. Beginning January 1, 2023, an employee of a provider receiving an increased rate that is not receiving a wage of at least \$15.00 per hour may bring a civil action in a court of competent jurisdiction against his or her provider and, upon prevailing, shall recover the full amount of any back wages unlawfully withheld plus the same amount as liquidated damages, and shall be awarded reasonable attorney's fees and costs. In addition, they shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, reinstatement in employment and/or injunctive relief. Such actions may be brought as a class action pursuant to Rule 1.220 of the Florida Rules of Civil Procedure.

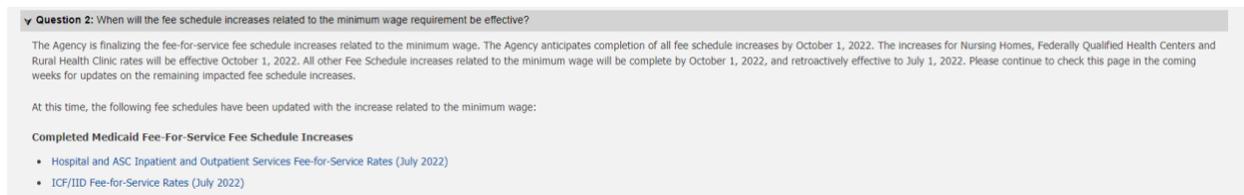
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Example 1: The front page of the web site states in bullet one “all of its employees”, “every employee” but the term “direct care employee” is used in different places.



Example 2: The proviso language includes ALFs but ALFs are not specifically referenced on the AHCA website or in the FAQs.

Example 3: If retroactive to July 1, 2022, are providers required to start paying the \$15 an hour minimum wage now or as of October 1, 2022? How will the retroactivity work? How will ALFs come up with the funding? The answer to the FAQ below is confusing.



Example 4: If this will be retroactive to July 1, 2022, why does the website direct reimbursement to begin October 1, 2022?

▼ Health Plan Related Questions **NEW**

▼ Question 1: When must health plans begin paying the enhanced rate to providers in their network. **NEW**

Capitation rates that become effective on October 1, 2022, will include the necessary funding for plans to begin reimbursement their network providers beginning on October 1, 2022.

Example 5: The answer to the FAQ below does not define food delivery as a direct care employee.

▼ Question 17: Is there a distinction between all employees and direct care employees? **NEW**

For all providers other than nursing home providers, the requirement applies only to direct care workers employed by the enrolled Medicaid Provider.

A Direct Care Worker is defined as an individual that has direct contact with a Medicaid recipient for purposes of providing a Medicaid reimbursable service. Direct care workers do not include individuals who do not provide a Medicaid reimbursable service, whose primary duty is maintaining the physical environment of the workplace, or whose duties are primarily administrative.

Example 6: In the Medicaid portal, ALFs are required to sign this attestation form under penalty of perjury indicating they will be paying “all employees” a minimum of \$15 an hour and not just “direct care employees”. Many of our members are hesitant to sign this attestation form without clarification on who they actually have to pay the \$15 minimum wage - “all employees” or “direct care employees”.

Certification and Attestation

Attest Type/Attest Type

The Agency for Health Care Administration ("Agency") and the provider ("Provider") associated with the unique identifier used to access this form on the Florida Medicaid Provider Portal enter into this Supplemental Medicaid Provider Wage Agreement ("Agreement"), with an effective date of October 1, 2022.

WHEREFORE, the Agency and the Provider entered into the Medicaid Provider Agreement (the "MPA"), effective upon the date of the Provider's enrollment in the Florida Medicaid Program, and in force as of the effective date of this Agreement; and

WHEREFORE, the Agency and the Provider (the "Parties") are required to enter into this Agreement to ensure that, as of October 1, 2022, all employees, including 1099 employees of the Provider, are paid at least \$15.00 per hour pursuant to the State of Florida General Appropriations Act ("GAA") for State Fiscal Year 2022-2023; and

WHEREFORE, the Parties intend that all provisions of the underlying MPA, incorporated herein by reference, and not specifically superseded by this Agreement, shall remain in force.

NOW THEREFORE, in consideration of the covenants and obligations contained herein, the Parties agree to the following terms and conditions:

(1) As of October 1, 2022, the Provider shall pay each of its employees, including 1099 employees, at least \$15.00 per hour for the 2022-2023 fiscal year.

(2) The Provider agrees to permit persons duly authorized by the Agency to inspect any records, papers, documents, facilities, goods, and services which are relevant to this Agreement.

(3) The Agency shall adjust Medicaid Provider Fee Schedules and Rates as directed in the GAA for State Fiscal Year 2022-2023, and the Provider agrees to accept the increased rate from the Agency for the provision of services or goods to Medicaid recipients.

(4) Term and signatures - The provider understands and agrees that no agency signature is required to make this agreement valid and enforceable. This Agreement shall remain in effect from the Effective Date until June 30, 2023.

A Chief Executive Officer, President, or Administrator of the Provider may sign this Agreement. Failure to sign the Agreement will make the Agreement voidable by the Agency.

The signatory hereto represents and warrants that they have read the Agreement, understand it, and are authorized to execute it on behalf of the Provider.

Select all items

* I certify that as the signatory to this Agreement, acting in a representative capacity, I am duly authorized to enter into this Agreement on behalf of the Provider to which the unique identifier used to access this form on the Medicaid Provider Portal is assigned.

* On behalf of the Provider, I attest under the penalty of perjury pursuant to section 837.012, Florida Statutes, that as of October 1, 2022, every employee of the Provider, including 1099 employees, will be paid at least \$15.00 per hour.

* I understand that if I am a provider with multiple locations, I will be required to complete this form separately for each location.

IN WITNESS WHEREOF, the undersigned representative has caused this agreement to be duly executed as October 1, 2022.

Effective Date/Effective Date
End Date/End Date
Date Signed/Date Signed
Signed By/Signed By