

## Home Care Professionals Series, Part 2

### What Are Creditable Benefits under the WPA?

**Executive Summary.** Under the New York Wage Parity Act (“Act” or “WPA”), the term “supplemental wages” covers a wide range of benefits. Generally speaking, any non-wage remuneration that *primarily benefits the employee* rather than the home care agency may be considered. However, this standard is less than clear and in any event, deciding which benefits to provide workers depends on several factors. For example, some benefits are tax-advantaged both to the agency and the worker; other benefits are not. Some benefits require formal plans under the Internal Revenue Code; other benefits do not. They can be set up as payroll practices without a formal plan. And, some benefits will provide dollar-for-dollar credit against the Act’s \$4.09(NYC)/\$3.22(LI, Westchester) additional and supplemental wage package (the “WPA Package”); other benefits will not. These other benefits must be calculated using an “annualization method” from prevailing wage law, which reduces the creditable amount for WPA purposes.

#### **What Defines a Creditable Benefit?**

Under the Act, a home care worker’s “total compensation” is defined as “direct compensation paid to or on behalf of the employee *including but not limited to* wages, health, education or pension benefits, supplements in lieu of benefits and compensated time off.” (*emphasis added*).

The N.Y. Department of Health, (“DOH”) in its February, 2012 FAQ #18 said that “Qualifying benefits (under the WPA) are *those which primarily benefit the employee.*” Left unexplained is what that means. In its January 2014 FAQ #10, the DOH added that the definition of total compensation *does not exclude* either benefits that employers might choose to provide through “employee benefit plans regulated under the Employee Retirement Income Security Act (“ERISA”),” or “other benefits that employees may choose to obtain through wage deductions permitted under New York State Labor Law §193.” From a literal reading of “included but not limited to” in the definition of “total compensation”, as well as the FAQ’s use of the phrase “does not exclude,” it is arguable that eligible benefits are not limited to the enumerated benefits, but may include other benefits, so long as they “*primarily benefit the employee.*”

#### **What Are ERISA Benefits?**

Employee benefit plans regulated under ERISA include “employee pension plans”, and “employee welfare plans.” Without going into too much detail, “employee pension plans” are those that, “by their express terms or as a result of surrounding circumstances, (i) provide retirement income to employees, or (ii) result in a deferral of income by employees for periods extending to the termination of their covered employment or beyond.” These plans include typical pension plans, 401(k) plans, other profit sharing plans, and most (though not all) deferred compensation arrangements. For employers that are tax-exempt organizations, it also includes 403(b) plans (*a/k/a* tax-sheltered annuities) to which the employer contributes. “Employee welfare plans” include

plans that provide “medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services”, holiday benefits, and severance benefits (whether characterized as “severance” or not). So, all of those categories of benefits qualify as eligible benefits, as “employee benefit plans regulated under ERISA.”

### **What Are NYLL Section 193 Benefits?**

Although a number of the benefits “employees may choose to obtain through wage deductions permitted under New York State Labor Law §193” overlap with ERISA benefits, several do not and those may be valuable to agencies who want to offer them to help in recruiting and retaining home care workers. Since November, 2012,<sup>1</sup> those categories are: (i) insurance premiums; (ii) prepaid legal plans; (iii) discounted parking or transit fare media; (iv) gym/health club membership; (v) day care expenses; (vi) tuition, room, board and fees for pre-school, nursery, primary, secondary, or post-secondary education, and (vii) similar benefits for the benefit of the employee. Although the last category is vague, a benefit that fulfills a similar, even if not identical, objective for employees would appear to qualify. Moreover, the employees need not actually have elected a Section 193 benefit for its cost to the employer be creditable to the WPA Package.

What remains unclear is whether the “*primarily for the benefit of the employee*” standard must be interpreted within the context of Section 193. The Regulation to Section 193 circumscribes allowable deductions by stating:

Deductions shall be for the benefit of the employee when the deduction is for one of the items expressly listed in section 193(1)(b) of Labor Law. More generally, deductions are for the benefit of the employee when they provide financial or other support for the employee, the employee's family, or a charitable organization. Such support shall be limited to the following categories: health and welfare benefits; pensions and retirement benefits; child care and educational benefits; charitable benefits; dues and assessments; transportation; and food and lodging.<sup>2</sup>

If that limitation were to apply to determine whether a benefit is creditable under the WPA, it would render superfluous the DOH’s intentions that benefits other than those under Section 193 or ERISA, such as working condition fringe benefits, are creditable under the WPA.

### **What Are Working Condition Fringe Benefits?**

Items that qualify as nontaxable “working condition fringe benefits” under the Internal Revenue Code may also be creditable under the Wage Parity Act. A working condition fringe

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<sup>1</sup> At that time, Section 193 was amended to broaden the categories of benefits for which deductions might be taken from employees’ paychecks. The change enacted was temporary, and was scheduled to expire on November 6, 2015, but on November 2, Governor Cuomo signed a bill extending the increased list for another three years.

<sup>2</sup> 12 NYCRR §195-4.3(a).

benefit is a product or service, such as a cellphone that is provided by the employer that would, if it were paid for by the employee, be tax-deductible by the employee as an employee business expense. This will usually require that the expense be one that is helpful or necessary in order for the employee to do the job. There can be tension between this standard and the requirement that a WPA benefit *primarily benefit the employee*. Nevertheless, some benefits that can be provided tax-free as working condition fringe benefits may also be permissible under the Act.

### **Does It Make a Difference How a Benefit is Provided?**

The manner in which a benefit is provided can make a big difference in how much risk an agency is taking on and in the cost of the benefit. For example, providing health benefit coverage by simply paying insurance premiums on a group policy will cost the amount of the premiums themselves. On the other hand, providing the same benefit on a self-insured basis, while it could save the employer money, also exposes the employer to a much greater risk of loss if many claims for costly medical conditions are made. Though re-insurance with a stop-loss feature can mitigate this risk, a few large claims can make the cost skyrocket in a self-insured situation.

The income tax consequences to the employer and the worker can also make a big difference to whether it makes sense to provide the benefit at all. For example, if an employer chooses to pay for, or reimburse a home care worker's membership at a local gym, those reimbursements would not be tax free, but would be taxable "wages" to the worker. Of course, a heavily discounted gym membership could still be a worthwhile benefit to a worker. (A gym membership could qualify as a medical expense in some circumstances, and if so, it could be provided tax-free as part of a medical plan, but that is not the usual situation.)

### **How Do You Decide Which Benefits to Provide?**

Meeting other legal obligations, like those under the Affordable Care Act, and avoiding its penalties with an acceptable health benefit plan should be the first consideration determining which creditable benefits to use for the WPA Package. Beyond that, the NYS Domestic Worker Bill of Rights and for workers assigned to cases in New York City, the NYC Earned Sick Time Act, require that the WPA Package contain a minimum of five rest and sick days annually for workers employed more than 30 hours per week. That still leaves an employer with substantial discretion to determine which benefits its home care workers will most value and be easiest for the employer to administer.

### **What Are the Questions Your Legal Counsel Should Answer For You?**

1. Can a benefit be provided on a pre-tax basis to the worker? Is the total cost of the benefit fully tax-deductible by the employer as a business expense?
2. Must the benefit be provided through a formal "plan" established under ERISA or the Internal Revenue Code?
3. May (or must) the benefit be provided under a "cafeteria plan"?

4. Can benefit(s) be mandated or must the workers be given a choice to receive the benefit(s) or cash wages?
5. Is there a need for a separate trust to hold funds that are set aside to pay for the benefits under a cafeteria plan or otherwise?
6. Is there any advantage to using such a trust to fund benefits when an employer is charged administrative fees to maintain the trust and the trust itself may be liable for taxes?
7. How much of a benefit's cost is creditable against the WPA Package?
8. If the benefit's cost must be calculated using the "annualization method" of prevailing wage law, how is this done?
9. What kinds of "administrative" or "operational" expenses will be incurred in providing the benefit?
10. Can an allocable share of management costs be taken into account in determining the cost of a benefit?
11. What kind of documentation, e.g. invoices, payment receipts, etc., and how much detail is required in order to substantiate a benefit cost that is incurred by a worker, where expenses are being reimbursed (or paid) by the employer?

### **Bottom Line**

Employers must make sure that the \$4.09/\$3.22 WPA Package they provide employees includes only benefits that are creditable under the Act and that the credit per hour taken is calculated correctly using the right formula or method prescribed by the Act and the interpretive guidance issued by the NYS DOH.

If you have any questions regarding this article or would like our advice about how to lessen your home care agency's risks based on your particular facts and circumstances, please contact the authors, Jeffrey Ashendorf or Stephen Zweig, members of the firm's Homecare Industry Group in its New York City office, at [jashendorf@fordharrison.com](mailto:jashendorf@fordharrison.com) and [szweig@fordharrison.com](mailto:szweig@fordharrison.com), or at (212) 453-5900, or the FordHarrison attorney with whom you usually work. Please also visit our website at [homecareemploymentlaw.com](http://homecareemploymentlaw.com).