



The CLASS Act: What Post-Acute Care Providers Need to Know

CLIENT ADVISORY

It's no secret that the national population is aging, and yet a large percentage of Americans are unprepared for and unaware of the expenses associated with financing long-term care. It does not help that the applicability of existing government programs remains a mystery to the average American; for example, many people operate under the erroneous belief that Medicare will completely cover the costs of long-term care. As a result, family members of disabled or aging Americans often assume non-paid caregiver roles and shoulder the associated financial burdens. Additionally some Americans "spend down" their savings in order to qualify for Medicaid, further burdening a federal system already stretched thin. Section 8002 of the recently enacted Health Reform Act is the Community Living Assistance Services and Supports Act, "the CLASS Act," a voluntary, federal insurance program designed to provide its beneficiaries with cash stipends to cover costs associated with long term care. The purpose of the CLASS Act is to help solve this developing crisis by enabling disabled and aging workers to remain in the workforce and maintain independent lifestyles.

I. Summary of Enacted Legislation

A. Enrollment in Program:

Actively-employed Americans over the age of 18, who are not incarcerated or living in a nursing home, may participate by paying a monthly premium into the program. Employers may elect to automatically enroll employees in the CLASS program—much like a 401(k)—and

employees may then voluntarily opt out of the program and not pay the monthly premiums. For qualified individuals who are self-employed, employed by more than one employer, or employed by an employer who chooses not to participate in the CLASS program, the HHS Secretary will develop alternative enrollment procedures.

B. Cost:

The cost of monthly premiums is yet to be determined. The Secretary of HHS must develop a benefit plan and establish the price of monthly premiums such that the program will remain actuarially stable for a 75 year time period. So long as an individual remains actively enrolled in CLASS, their premiums will not increase. However, the Secretary has the authority to increase premiums if it is necessary to retain the 20 year solvency of the program, though not every participant in the program will be subject to the premium increase. The Secretary can also adjust the premium rate based on age so that younger people pay a lower premium. The Congressional Budget Office estimated that premiums could cost—on average—anywhere from \$123-\$146 per month; CMS estimated premiums could be as high as \$240 per month because of the program's risk of adverse selection. Individuals with incomes below the poverty line and full time students under the age of 22 may participate at a nominal premium price of \$5.00 per month.

C. Eligibility for Benefits:

Individuals participating in the CLASS program do not become eligible for



Hancock, Daniel, Johnson & Nagle, PC (HDJN) provides assistance and guidance to health care providers in virtually all legal matters affecting healthcare. Generally, these include corporate, employment, administrative, and transactional matters; litigation; and governmental affairs.

CLASS benefits unless they: (1) participate in the program for at least five years; (2) were actively working for at least three of those five years; and (3) are diagnosed by a certified licensed health care practitioner as having a “functional limitation” expected to last for at least 90 days. An individual has a functional limitation if she is unable to perform two or three¹ “activities of daily living” without substantial assistance. Eating, toileting, transferring, bathing, dressing, and continence, or any similar limitations are all considered activities of daily living under the statute. An individual who requires substantial supervision to protect him from threats to health and safety due to a substantial cognitive impairment also has a qualifying functional limitation under the CLASS program.

D. Benefits:

Eligible enrolled members in the CLASS program will receive a daily cash benefit scaled to the level of their functional impairment; thus, the more impaired an individual is, the more money they will receive from the program, with \$50.00 set as the minimum daily amount. There is no aggregate amount or lifetime limit placed on the daily cash benefits. The precise operation of the benefit plan is yet to be determined; the HHS Secretary is required to develop three different benefit plans, submit them to an advisory council, and ultimately adopt one plan by October 1, 2012, which will be followed by a period of public comment. The cash benefit may be used to purchase medical and non-medical services and supports that enable the beneficiary to maintain an independent lifestyle, such as: home modifications, assistive technology, accessible transportation, homemaker services, respite care, personal assistance services, home care aides, and nursing support. Beneficiaries may use the cash

benefit to compensate a family member acting as a caregiver or the benefits could be used to offset the costs of nursing home care. These payments will roll over from month to month but not from year to year.

Enrollment in the CLASS program does not supplant health care benefits an individual receives under Medicaid or other federal programs. When an individual in a hospital, nursing home, or other institutional facility is simultaneously enrolled in the CLASS program and Medicaid, they will receive only 5% of the cash benefit under CLASS, and remainder of the daily payments will go toward the cost of care at the facility. Medicaid will supplement the additional costs of care at the facility, and the individual will continue to receive a Medicaid personal needs allowance. When an individual enrolled in the CLASS Program also receives Medicaid for home and community based services or a PACE program, they will only receive 50% of the cash benefit, and the remainder of the daily payment will go toward the cost of the provided care, which will be supplemented by Medicaid.

Other benefits in the CLASS program include: advice and assistance counseling, and advocacy services.

II. Legislative History

The adopted version of the CLASS Act is markedly similar to the original version proposed in 2005 by Senator Ted Kennedy. Thus, the gist of Kennedy’s dream to create a voluntary, federal insurance program offering cash assistance to those in need of long-term care remained intact.

But a significant addition to the CLASS Act occurred in December of 2009, when the Senate unanimously approved the Whitehouse amendment.

¹ The PPACA gives the HHS Secretary the authority to precisely define functional limitation by deciding how restricted an individual must be in activities of daily living.



HDJN is one of the largest Virginia law firms primarily focusing its practice on the needs of the healthcare industry.

Senator Whitehouse proposed a number of additions with the overarching goal of increasing the financial soundness of the program. The amendment ensured that taxpayer dollars will not be used to pay for the benefits of the program; instead, the money paid out by the program generates only from the premiums paid into the program. The HHS Secretary is charged with reviewing the projected costs of the program and adjusting the premium rates if necessary to retain the solvency of the program based on a 20 year projection. The Secretary must set initial premiums such that the program will be financially stable for a period of 75 years. Importantly, the PPACA ensures that savings initially generated through the CLASS program will be reserved for the CLASS program, and not used to fund other portions of health care reform. The PPACA established a trust fund called the “CLASS Independence Fund,” in which all the money derived from CLASS premium payments will be kept and managed by a board of trustees.

As initially proposed by Senator Kennedy in 2005, the CLASS Act extended benefit coverage to non-working spouses who enrolled in the program and paid the monthly premiums. When the House of Representatives considered health care reform, they maintained this provision to include non-working spouses as eligible beneficiaries of the program. However, the Senate version of the CLASS Act—and the one that was ultimately adopted—did not include non-working spouses as eligible participants in the program. Only people who meet the three year active working requirement are eligible to participate under the enacted version.

The estimated cost of participation in the program has risen significantly since 2005. When he first presented the CLASS Act to the Senate floor, Senator Kennedy estimated that “for

only \$30 a month,” individuals could actively enroll in the program. Current estimates about the cost of monthly premiums are drastically higher. Also, the Whitehouse amendment—charging the HHS Secretary with evaluating anticipated costs and adjusting premiums accordingly—could lead to a significant increase in premiums if the program does not have high levels of participation in order to diversify the risk. These higher costs present a higher risk of the adverse selection problem.

III. Impact On Long-Term Care Service Providers

The CLASS Act will not eliminate the need for nursing homes, assisted living facilities, or other institutional facilities to care for the elderly and the disabled. First of all, not every American can or will participate in the plan. Second of all, the Act was designed for people who do not require around-the-clock care; indeed, Congressmen envisioned CLASS Act beneficiaries retaining employment by using their daily cash benefits to facilitate independent living. For the many elderly or profoundly disabled Americans who need constant care, independent living and employment are not possible. In fact, if these individuals are CLASS Act beneficiaries, they may use their cash benefits to supplement the costs of institutional care. Although this was not the Congressional intent, the CLASS Act could lead to increased numbers in nursing homes and facilities if more families choose to use their benefits for that purpose.

If the CLASS Act is a success, there will be an increased demand for post-acute care services approximately five years after the program begins. This means more opportunities for service providers who provide creative and valuable long-term care services. If the Act goes according to plan, one of the largest increases will occur for businesses that provide



The information contained in this advisory is for general educational purposes only. It is presented with the understanding that neither the author nor Hancock, Daniel, Johnson & Nagle, PC, is offering any legal or other professional services. Since the law in many areas is complex and can change rapidly, this information may not apply to a given factual situation and can become outdated. Individuals desiring legal advice should consult legal counsel for up-to-date and fact-specific advice. Under no circumstances will the author or Hancock, Daniel, Johnson & Nagle, PC be liable for any direct, indirect, or consequential damages resulting from the use of this material.

part-time adult day care services and homecare. Additionally, the Act requires the HHS Secretary to enter into agreements with public and private entities to provide advice and assistance counseling by January 1, 2012. Thus, businesses that develop counseling and assisting services have the potential to benefit under the Act.

IV. Conclusion

The CLASS Act is actually much more limited in scope than the legislative intent suggests. It covers neither elderly people who are retired, nor people who are so disabled that they are unable to work, nor the children or non-working spouses of people who pay the monthly premiums, nor people who are unable to afford the monthly premiums. Only those who are competent enough to work for three years and wealthy enough to pay

premiums for five years are eligible for benefits. Thus, the program will not cure all of the societal ills associated with long-term care for the elderly and the disabled. Indeed, many believe it will never be operational or pay a claim, and even if it does, it will likely not occur until 2017. At the end of the day, it is simply an aspirational, voluntary insurance program to be managed by the federal government.

If you have any questions, or for more information about the Act or for assistance in planning programs to meet these new challenges, please contact Jeannie A. Adams at (866) 967-9604 or by email at: jadams@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at: www.hdjn.com.

Richmond 4701 Cox Road Suite 400 Glen Allen, VA 23060 PO Box 72050 Richmond, VA 23255-2050 ☎ (804) 967-9604	Fairfax 3975 Fair Ridge Road Suite 475 South Fairfax, VA 22033 ☎ (703) 591-3440
Harrisonburg 3210 Peoples Drive Harrisonburg, VA 22801 ☎ (866) 967-9604	Virginia Beach One Columbus Center 283 Constitution Drive Suite 301 Virginia Beach, VA 23462 ☎ (757) 321-6555
Lewisburg, WV 111 North Jefferson Street Lewisburg, WV 24901 ☎ (866) 967-9604	Franklin, TN 725 Cool Springs Blvd. Suite 600 Franklin, TN 37067 ☎ (866) 967-9604