

Testimony of the New York State Association of Health Care Providers, Inc.

Presented Before the New York State Department of Labor

Proposed Regulation on Sleep and Meal Time Regulations

July 11, 2018

INTRODUCTION

On behalf of the New York State Association of Health Care Providers, Inc. (HCP) Board of Directors and its members, thank you for the opportunity to provide testimony on the New York State Department of Labor's (DOL/the Department) proposed regulation that clarifies and specifies that hours worked may exclude meal periods and sleep times for home care workers who work shifts of 24 hours or more.

HCP is a trade association representing approximately 350 offices of licensed home care services agencies, certified home health agencies and health related organizations throughout New York State.

HCP's POSITION

Home care agencies are currently reeling from a perfect storm of challenges due to inadequate levels of reimbursement, spiraling labor costs and burdensome regulatory requirements, while simultaneously working to navigate the complex and rapidly changing health care transitions underway in New York.

In addition to mounting reimbursement issues, a large number of home care providers remain in legal limbo and financially exposed due to recent New York State Supreme Court rulings on 24-hour live-in care. There is a retroactive component of the 24-hour ruling that could cost the industry upwards of \$6 billion – forcing providers to shut their doors and leaving patients without access to essential home care services.

HCP supports the Department's longstanding guidance that allows sleep and meal time to be excluded under certain circumstances where employees work, sleep, and eat at the same location. The Association also maintains that providers that have adhered to DOL's longstanding guidance on payment for 24-hour live-in cases where providers have compensated aides for 13 hours of work during a 24-hour shift provided that three hours are spent on meal periods and eight hours are devoted to sleep time, should not be legally held liable for six years of retroactive payments to workers.

The Department's proposed regulation codifies the State's longstanding guidance, as well as Federal regulations related to sleep and meal periods for home health care workers working 24-hour shifts. HCP is supportive of the Department's Emergency Rule and the proposed regulation, and urges the State to continue to support the home care industry throughout this unresolved process.

24-HOUR IMPACT

Home care is the patient-preferred option that allows individuals to receive essential health care and personal care services so that they can continue to live independently in their communities. Aging baby boomers are reaching age 65 in record numbers and the numbers are expected to double in the next eight to ten years, so the demand for home care services in New York State is expected to grow rapidly.

Home care workers are often the first to identify changes in a patient's condition that can be quickly addressed to keep the patient stabilized at home. Home care has already played a major role in achieving cost savings in the State's Medicaid program and has the potential to provide even greater value with the proper investment in health care information technology and workforce development.

However, due to the uncertainty surrounding 24-hour live-in cases, the State's home care agencies are choosing not to provide such services, and managed care plans are having a difficult time placing these cases. Given the State's reimbursement structure, the current Medicaid and managed care system cannot satisfy a fraction of the costly obligations imposed by the recent wage-and-hour decisions – prospectively or retroactively – leaving New York home care agencies; home care workers; and frailest citizens at risk.

In late 2017, HCP estimated that the recent Court rulings would cost approximately \$4 billion retrospectively, and approximately \$1.4 billion prospectively based upon current wage mandates and the approximate number of 24-hour live-in cases that most agencies served at that time.

There are two fundamental issues related to payment for 24-hour shifts for home care workers:

- 1. Paying aides for the hours they work in accordance with DOL's longstanding guidance.**

Home care agencies that provide 24-hour care can provide that care in different ways. For example, some agencies have two aides that work two 12-hour shifts; some have three aides that work three 8-hour shifts; and some provide a live-in aide that is assigned to be in the patient's home for 24 hours or more, but the aide is only expected to work for 12 hours of that 24-hour shift.

During a live-in shift, and in accordance with DOL longstanding guidance, the aide is expected to receive eight hours of sleep and three hours for meal periods. If a patient calls the aide for assistance during the aide's sleep or meal periods, such interruption is considered working time and therefore must be paid by the home care agency. Home care agencies instruct aides to report those hours worked and pay them accordingly.

Home care agencies have been adhering to DOL's guidelines for decades. However recent decisions from the State Supreme Court in *Andryeyeva v. New York Health Care*, *Moreno v. Future Care Health Services* and *Tokhtaman v. Human Care* have ruled that aides must be paid for all 24 hours of a live-in shift. These decisions not only impact current 24-hour live-in cases, but if upheld by the New York State Court of Appeals, will bankrupt a significant number of home care providers due to the liability imposed on Medicaid providers by the Court resulting from the six year look back awarded to plaintiffs in these cases.

DOL issued their Emergency Rule on payments for 24-hour live-in shifts as a result of the implications of these Court rulings on the home care industry and consumers' access to home care services. The Department's proposed regulation will now clarify that hours worked may exclude meal periods and sleep times for employees who work shifts of 24 hours or more, which HCP supports.

2. The associated cost to the State of paying home care workers for all 24 hours of a live-in shift.

The State's reimbursement structure related to Medicaid and its managed care system is not adequate to meet current statutory wage obligations imposed by DOL or the New York State Department of Health (DOH). In its current capacity, the State reimbursement system would never be able to withstand doubling the amount of funds needed to pay workers for all 24 hours of a live-in shift. The cost would also be astronomical to non-Medicaid home care providers that would be unable to absorb a doubling of costs for these cases. The net result would be the end of 24-hour live-in cases, shifting the burden to nursing homes and other facilities that simply do not have the capacity to absorb all of these cases. The implications on the State's most vulnerable populations, including disabled populations, would be catastrophic.

While HCP appreciates that DOL has issued its Emergency Rule and is seeking to adopt its proposed regulation that home care workers should be paid for 13 hours of a 24-hour live-in shift, the State must continue to ensure New York's frailest populations have the option to remain in their homes and communities.

In the event that the Department of Labor's proposed regulation is not adopted, HCP recommends that the following measures be taken:

- The State must immediately allocate emergency funding to managed care plans with guidance stating that plans must provide full funding to home care agencies providing 24-hour live-in care so that they can pay their workers for all 24 hours of a live-in shift and ensure care for this vulnerable population.
- The State must assume the financial obligation for Medicaid providers that have followed the State's 2010 13-hour guidance in good faith and are now being held liable for billions of dollars simply because they followed the State's guidance.

CONCLUSION

In conclusion, HCP supports the Department's proposed regulation and longstanding sleep and meal time guidance and strongly urges the State to adopt the regulation. Without it, many home care agencies in New York State will go out of business – leaving home care workers without jobs and New York's most vulnerable citizens without the care they deserve.