

**Testimony of the New York State Association of Health Care Providers, Inc.
Presented Before the Joint – Senate Standing Committee on Commerce, Economic
Development, and Small Business
NYS Department of Labor Proposed Rule Making-Employee Scheduling (Call-In Pay)**

January 4, 2018

On behalf of the members of the New York State Association of Health Care Providers, Inc. (HCP), thank you for the opportunity to provide comments on the employee scheduling regulations that were included in the New York State Register on November 22, 2017.

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

New York has followed through on its commitment by developing a comprehensive regulatory and oversight system for home care agencies. Home and community-based care has been recognized as a central component for new models of health care delivery aimed at achieving the State's triple aims of improving care, improving health, and reducing costs within the Medicaid system. Home care is the patient-preferred option, enabling disabled, chronically ill and elderly New Yorkers to remain with their families and be cared for with dignity in the comfort of their own homes.

New York State is home to the fourth-largest elderly population in nation. Currently there are approximately 3.7 million New Yorkers over the age of 60, and that number is only expected to grow; by 2030, 5.2 million people in New York will be over 60. As a growing percentage of New Yorkers "age in place" in their homes and communities, long term home care will become increasingly important to support those with chronic conditions and functional limitations.

Home care agencies are already reeling under 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. Earlier this week, the State's minimum wage increased for the second time, absent adequate reimbursement from managed care organizations. Home care providers continue face challenges set forth by a recent New York State Supreme Court ruling on 24-hour live-in care, will also facing an uphill battle throughout this year's budget process due to a

tremendous State budget deficit, bloated Global Medicaid Cap, and lacking action by the Federal government, in addition to regulations set forth by the New York State Department of Labor (DOL) that would place an additional unfunded mandate on the backs of home care providers. Absent any funding to reimburse Medicaid providers for the increased costs to comply with the new DOL regulations poses a very serious threat to the viability of an already laden industry.

Though faced with many financial burdens, the home care industry provides a great level of flexibility to its employees. Employees are able to create their own schedules, and employers work to specifically meet the needs of its employees. The employee scheduling regulations, if implemented, could in fact deter workers from joining the home care industry, which already struggles to recruit and retain staff.

After careful review of the proposed employee scheduling regulations and receiving valuable input from a large number of home care providers, HCP believes that these regulations would create additional and significant financial and administrative burdens on New York State's home care's industry. As previously mentioned, home care providers across the State are struggling due to inadequate reimbursement for State-imposed minimum wage increases and numerous other unfunded mandates, in addition to complying with stringent State and Federal health and labor regulations. Furthermore, home care providers already have best practices in place to address employee scheduling, including paying employees when there is a cancellation or other unforeseen occasion. It is our firm belief that the home care industry should not be included in these new employee scheduling regulations.

Recommendations

HCP is aware of recommendations made during hearings held regarding employee scheduling to exclude the health care industry, including home care, from potential regulations. It was specified that health care and home care employers must react quickly to unscheduled employee absences to protect the health of clients and employer's licensure. Furthermore, it was noted that such regulations could have a disproportionate effect on small employers.

HCP has solicited input from the home care provider community on the proposed regulations and how they would impact home care agencies, staff and clients. Home care providers strongly believe that the proposed regulations would have a dramatic and unintended effect on the cost of care and safety of the vulnerable populations that require home care to remain in the community.

HCP and HCP home care provider members urge the State to take the following information and circumstances into consideration when reviewing the employee scheduling regulations:

- ***The home care workforce remains critical.*** The home care industry provides flexibility and is employee-focused. This mandate would discourage workers from working in the industry if the flexibility of choosing a shift(s) or work

location is taken away. Home care providers arrange workers' schedules to meet the specific needs of the workers, who then provide care to the patients.

- ***It is unrealistic to mandate that an employee's schedule be arranged within 14 days when there are unplanned occurrences in the home that may lead to an immediate need for services.*** The home care industry often works on short turnaround times with respect to scheduling and cancelling shifts for those in need. A scenario that home care and companionship companies routinely address is the need to quickly adjust care schedules due to admittance or discharge from a hospital or other facility. For instance, home care services evolve due to a client's change in health condition, unforeseeable hospitalizations, or in some instances, death.

The additional two to four hours of call-in pay in these circumstances do not coincide with current State and managed care organization reimbursement rates; therefore, the home care provider would solely be held liable for paying the additional wages, threatening the financial viability of the home care agency.

- ***Home care agencies cannot mandate an aide to take a new or existing assignment.*** In many instances, home care aides often create their own schedules. If a social worker from a local hospital calls a home care agency on Friday afternoon looking for services that night, it may be untenable for a home care agency to schedule a home care aide in advance. Initial requests for services are often within one to two days; therefore, to place a scheduling burden on behalf of the home care provider is often unworkable.
- ***On-call professional staff that are employed and "available to report to work" are already compensated for their time.*** The on-call professional employees that are employed by home care agencies are already being compensated for their services, and they often have set schedules. In many instances, the home care provider will compensate the on-call employee additionally when the employee receives or makes a phone call, or conducts a visit. The proposed regulations, as written, do not take into effect current on-call practices set forth by home care providers.
- ***Home care agencies across the State struggle with recruitment and retention of staff.*** To mandate that a home care agency staff two weeks in advance, when home care providers are facing staffing shortages Statewide is impractical in the home care provider community.
- ***Home care providers would be mandated to pay additional wages in client-safety matters.*** Currently, home care providers cannot bill for payment when an employee must stay with a client when relief is unavailable due to weather or other staffing-related circumstances because the scenario becomes a client safety matter. The regulations would impose an additional financial burden on the home care provider.
- ***The Consumer Directed Personal Assistance Program (CDPAS) should not be included in this proposed regulation.*** Under CDPAS regulations, the consumer is in

charge of the hiring and scheduling of the individual provider in-home care. This program should most certainly be exempt from the scheduling regulations.

Conclusion

Home care agencies are in crisis. Mandatory wage and benefit costs for home care agencies in New York have dramatically increased over the past four years, while reimbursement for these services is woefully inadequate. Funding allocated by the State to help partially offset these additional costs continue to struggle to flow to home care providers. This has had serious negative impacts on the home care industry, home care workers, and the tens of thousands of New Yorkers who rely on these essential services. The employee scheduling regulations set forth by DOL will further constrain home care providers, their workforce, and ultimately, the clients will suffer. For these reasons, HCP urges the State to reconsider including home care providers within the employee scheduling regulations.