New York Supreme Court

Appellate Division—Second Department

**Docket No.:
2014-09087**

LILYA ANDRYEYEVA and MARINA ODRUS, individually
and on behalf of all others similarly situated,

Plaintiffs-Respondents,

– against –

NEW YORK HEALTH CARE, INC. d/b/a NEW YORK HOME
ATTENDANT AGENCY and MURRAY ENGLARD,

Defendants-Appellants.

BRIEF FOR *AMICI CURIAE* HOME CARE ASSOCIATION OF NEW YORK STATE, LEADINGAGE NEW YORK AND HOME CARE ASSOCIATION OF AMERICA

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INTRODUCTION

The Home Care Association of New York State ("HCA-NYS"), LeadingAge New York ("LeadingAge NY"), and the Home Care Association of America ("HCAOA") (collectively referred to as the "*amici*"), respectfully submit this joint amicus brief, pursuant to 22 N.Y.C.R.R. § 670.11, in support of Defendants'-Appellants' appeal to this Court from the Decision and Order of the Honorable Carolyn E. Demarest of the Supreme Court of the State of New York, Kings County, dated September 16, 2014 and entered in the Office of the Clerk of the Supreme Court of the State of New York, Kings County, on September 18, 2014 (the "lower court decision"), which held that Section 142-2.1 of the Minimum Wage Order for Miscellaneous Industries (the "Wage Order") requires home care workers to be paid for each hour of a 24-hour sleep-in shift, and each hour of a 24-hour shift is counted toward overtime, regardless of how many hours the individual home care worker was afforded for sleep and meals. For the reasons set forth herein and in Defendants'-Appellants' briefs, the lower court decision must be reversed.

PRELIMINARY STATEMENT

The lower court erred by failing to defer to the New York State Department of Labor's ("NYSDOL") interpretation of the Wage Order. In a March 10, 2011 Opinion Letter, the NYSDOL explained that the Wage Order requires all "live-in

aides" (*i.e.*, home care workers who work 24-hour shifts) – regardless of whether or not they reside in the home of their patient – to be paid for 13 hours of a 24-hour shift, provided that they are afforded eight hours of sleep, five of which are uninterrupted, and receive three work-free hours for meals. This long-standing interpretation of the Wage Order was also set forth by the NYSDOL in an October 20, 1992 Opinion Letter, *see* NYSDOL Opinion Letter, *Request for Opinion-Home Care Workers Overtime Compensation*, October 20, 1992, and again by the Commissioner of the Department of Labor himself in a letter dated October 27, 1998, *see* NYSDOL Opinion Letter, October 27, 1998, attached hereto as Exhibit A. This interpretation was again reiterated by the Department of Labor in two decisions of the New York State Department of Labor's Industrial Board of Appeals, *In the Matter of the Petition of Settlement Home Care Inc., et al. v. Commissioner of Labor, et al.*, Docket Nos. PR-32-83, *et al.*, and *Personalized Home Care, Ltd. v. Commissioner of Labor*, Docket No. PR-80-87. The Department of Labor's interpretation of the Wage Order is reasonable because the home care worker is not actually performing any work during the hours he/she is sleeping or taking uninterrupted meal breaks, and that fact does not change whether or not the home care worker resides in the home of his/her patient or works 24-hour shifts. The lower court, however, inexplicably failed to adhere to basic principles of administrative law and defer to the DOL's interpretation of a

regulation that it promulgated. *See infra* Section I.

In addition, if the lower court decision stands, home care workers will need to be paid for every hour of a 24-hour shift, without excluding the time the individual spent sleeping, eating, or otherwise not engaged in any work activity. As a result, they will be entitled to overtime during their second shift of work in a week (after 40 hours), rather than during their fourth shift in a week. The lower court's holding will, thus, exorbitantly increase wage costs for this already struggling industry, causing many of the home care agencies to close and/or reduce the availability of live-in services and/or decrease the hours of home care workers.

It is important to note that Certified Home Health Agencies ("CHHAs") are not reimbursed by Medicare or Medicaid for providing 24-hours of service for live-in cases whose patients are not in managed care plans. Rather, they are reimbursed a flat rate for a 24-hour shift, which assumes the live-in aides are paid for a 13-hour shift. The additional wage costs would have to be borne by the agencies alone, many of which are already operating on negative, or with very small, margins. In addition, many patients who require 24-hour live-in services are in managed care plans and those plans are paid monthly premiums by the state to care for their patients' needs. They in turn contract with Licensed Home Care Services Agencies ("LHCSAs") and CHHAs to provide such services. The current premium structure does not take into account the increased costs that would result

if home care attendants had to be paid for every hour of a live-in case. *See infra* Section II (A)-(B).

As a result of these increased wage costs, providers that continue to offer live-in services will be forced to use multiple home care workers to provide such services in a single week. This is because live-in aides will be eligible for overtime after only one-and-a-half shifts if they have to be paid for every hour of a 24-hour shift. In order to avoid or reduce the cost of overtime, agencies will no longer schedule two live-ins to cover one patient's care on the typical 4 day/3 day shifts. Rather, agencies will be forced to reduce the schedules of the aides to perhaps 1 or 2 shifts per week. In order to avoid the escalated cost of overtime, agencies may rotate home care workers every other day. Thus, consumers will face a revolving door of aides, potentially causing inconsistent care and instability in the lives of individuals with disabilities and frail seniors at a time when their health care expectations must be met. This is particularly confusing and difficult for those consumers diagnosed with dementia or chronic diseases who have a significant need for consistency. This degree of change will also be difficult for patients regardless of their diagnosis and have a negative impact on their health outcomes. *See infra* Section II (A)-(B).

Further, due to the increased need for 24-hour caregivers to work less desirable shifts, agencies may not be able to employ enough home care workers to

care for their patients, thereby leaving patients without the care they need. Patients may be forced to employ unqualified private caretakers via the "grey market" who have not been screened and vetted through the agencies, presenting serious safety and health risks to one of the most vulnerable sectors of the population. *See infra* Section II (A).

The lower-court's holding will also impact the patients (*i.e.,* consumers) and the home care workers themselves. If this decision stands, it is highly likely that many providers will no longer offer live-in services and, therefore, home care workers that benefit from live-in assignments will no longer receive such assignments. In addition, providers will be forced to reduce training and supervision costs, thereby impacting job satisfaction, retention, and quality patient care. In addition, if the lower court's holding is affirmed, thousands of home care workers will seek unpaid minimum wage and overtime, which will have a devastating financial impact on the home care industry. *See infra* Section II (B)-(E).

Moreover, agencies that are able to continue to provide these services to the community are likely to pass some of the significantly increased labor costs on to the consumer who is not on Medicaid, making these valued services cost prohibitive to the vast majority of families who are paying privately for these services. These consumers will be forced to seek care from an institution despite

home care being their best option, which violates the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which held that undue institutionalization qualifies as discrimination "by reason of . . . disability," and would be contrary to federal and state policies and guidance. This would have a devastating impact on individuals with disabilities and seniors who desire to, and should, remain in their homes while being provided with medical care and assistance rather than being institutionalized. *See infra* Section III.

For these reasons, discussed more fully below, the Court must reverse the lower court's decision.

STATEMENT OF ISSUE

This brief addresses the issue of whether Section 142-2.1 of the Wage Order requires home care agencies, such as the Defendants-Appellants, to pay home care workers for each hour of a 24-hour sleep-in shift (also referred to as a "live-in case"), and count all 24 hours toward overtime, regardless of how many hours the individual home attendant was afforded for sleep and meals. The lower court answered this question in the affirmative.

STATEMENT OF FACTS

Background

The New York Labor Law ("NYLL") provides a statutory minimum wage

for employees. N.Y. Labor Law § 652. The minimum wage is thereafter broken down by industry, and Section 652 of the Labor Law provides that the "minimum wage orders shall be modified by the commissioner" and "the modified orders shall be promulgated by the commissioner without a public hearing." *Id.* Pursuant to this authority, the Department of Labor promulgated various wage orders, including the "Minimum Wage Order for Miscellaneous Industries and Occupations", (hereinafter referred to as the "Wage Order") which is at issue herein. *See* 12 N.Y.C.R.R. § 142-1.1. The Wage Order expands on the minimum wage requirements from Section 652 of the NYLL, and provides that employees must be paid the minimum wage for the time that they are either "permitted to work, or are required to be available for work" by their employer. 12 N.Y.C.R.R. § 142-2.1(b).

The Wage Order supports the concept that home care workers are not entitled to compensation for every hour of a 24-hour shift. Specifically, the NYSDOL, in the Wage Order, mandates that "residential" home care workers are not deemed to be permitted to work or required to be available for work during "normal sleeping hours solely because he [or she] is required to be on call during such hours," or "at any time he or she is free to leave the place of employment." *Id.* The NYSDOL has interpreted this to mean that all home care workers, whether residential or non-residential, must only be paid for 13 hours of a 24-hour shift,

provided that they are afforded eight hours of sleep, five of which are uninterrupted, and receive three hours for meals. *See* NYSDOL Opinion Letters, dated October 20, 1992 and October 27, 1998, attached hereto as Exhibit A. Though the language of Section 142-2.1 of the Wage Order refers to "residential" employees, the NYSDOL has clarified that this regulation applies to all live-in home care workers, "including those workers employed on-site for 24-hour shifts," regardless of whether they are residential or non-residential workers. *Id*. This is because while they are sleeping or taking uninterrupted breaks for meals, they are not required to be available for work. It has always been the case that if the home care worker is interrupted during meals or if he/she does not receive 5 uninterrupted hours of sleep, the entire meal break and/or sleep time must be paid and counted towards overtime.

On March 10, 2011, the NYSDOL issued an Opinion Letter, endorsing and further clarifying this long-standing rule. *See* NYSDOL Opinion Letter No. 09-0169, *Request for Opinion-Live-in Companions*, March 11, 2010. The NYSDOL explained that although the distinction between "residential" and "non-residential" employees is relevant for purposes of determining when the overtime rate must be paid (after 44 hours per week for "residential" employees versus after 40 hours per week for "non-residential" employees), it "applies the same test for determining the number of hours worked by live-in employees." *Id*. at 4. In addition, the New

York State Office of Health Insurance Programs, Division of Long Term Care, endorsed this rule, advising the industry to pay home care workers in accordance with the NYSDOL's guidance. *See* New York State Office of Health Insurance Programs, Division of Long Term Care, *MLTC Policy 14.08: Paying for Live-In 24 Hour Care for Personal Care Services and Consumer Directed Personal Assistance Services* (Nov. 24, 2014).

Thus, in reliance on the NYSDOL's multiple opinion letters interpreting Section 142-2.1 of the Wage Order, and industry practice, home care agencies pay live-in home care workers for 13 hours of their 24-hour shifts provided that they are afforded eight hours of sleep, five of which are uninterrupted, and three hours per shift for meals.

Case Background

In this action, brought by home attendants who provide services to homebound elderly and disabled patients covered by Medicaid, Plaintiffs-Appellees sought class certification on behalf of 1,063 home attendants who worked 24-hour shifts during their employment with Defendants-Appellants. Plaintiffs-Appellees allege that Defendants-Appellants violated the NYLL and Section 142-2.1 of the Wage Order by failing to pay minimum wage and overtime when they worked 24-hour shifts. Despite the fact that Plaintiffs-Appellees were paid in accordance with industry standards and the NYSDOL's interpretation of

Section 142-2.1 of the Wage Order, Plaintiffs-Appellees claim that they were entitled to be paid at least the minimum wage for each hour of a 24-hour shift, and overtime premiums for all hours worked in excess of 40 hours per week.

The lower court granted Plaintiffs'-Appellees' motion for class certification. In doing so, it rejected the NYSDOL's long-standing interpretation of Section 142-2.1 of the Wage Order, and refused to find binding a New York federal court decision, *Severin v. Project OHR, Inc.*, Case No. 10-cv-9696, 2012 U.S. Dist. LEXIS 85705 (S.D.N.Y. June 20, 2012), that deferred to the NYSDOL's interpretation of same. Defendants-Appellants have appealed the lower court's decision, which is before this Court.

The *Amici Curiae*

HCA-NYS is the primary industry association representing home health care providers in New York State and advocates for cost-effective quality, home and community-based care. It serves as a central educational and technical resource to its members, as an advocate and spokesperson for the industry to the New York State Legislature, state and federal regulatory agencies, and New Yorkers whom its members serve. HCA-NYS was formed to further the development of home care services, act as an advocate for home care, and provide information to help improve the development, availability, accessibility, and quality of home care services.

HCA-NYS members include CHHAs, LHCSAs, long term home health care programs ("LTHHCPs"), managed long term care plans, and hospices. Its members provide to people throughout New York State non-residential health care services, including nursing, physical, occupational and speech therapies, home health aides and personal care aides. The care HCA members provide is critical to keeping tens of thousands of New York State residents out of long term care facilities and in their own homes.[1]

HCAOA is the nation's first association for providers of private duty home care. HCAOA represents more than 2,500 member organizations and over 300,000 employees throughout the United States providing private pay in home care services for the elderly and disabled. HCAOA's guiding principles include its belief that people should be able to age safely in place at home to the extent possible according to their desires and permitted by their resources. HCAOA champions measures at both the federal and state levels that promote home care quality and affordability.[2]

Founded in 1961, LeadingAge NY is the only statewide organization representing the entire continuum of not-for-profit, mission-driven, and public continuing care, including home care agencies, adult day services providers, other

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[1] *See* Home Health Care Association of New York, *About*, http://hca-nys.org/about (last visited Sept. 22, 2015).

[2] *See* Home Care Association of America, *Mission, Vision, Purpose & Guiding Principles*, http://www.hcaoa.org/?page=Our_Mission (last visited Sept. 22, 2015).

community services agencies, managed long term care plans, senior housing facilities, adult care and assisted living facilities, nursing homes, and continuing care retirement communities. Leading Age NY's over nearly 500 members employ 150,000 professionals serving more than 500,000 New Yorkers annually.[3]

The HCA-NYS, HCAOA and LeadingAge NY submit this brief in support of Defendant-Appellants, and advocate for the reversal of the lower court's decision.

ARGUMENT

I. THE LOWER COURT ERRED BY FAILING TO DEFER TO THE NYSDOL'S INTERPRETATION OF THE WAGE ORDER.

The Commissioner of Labor has the authority to issue regulations interpreting the NYLL as he or she finds "necessary and proper," and the NYSDOL is tasked with interpreting these regulations. *See* N.Y. Labor L. §§ 21(11); 652(2) (acknowledging the wage orders issued by the Commissioner and authorizing the Commissioner to modify said orders). The NYSDOL's interpretation of these regulations should be afforded deference by the courts, provided that its interpretation is not unreasonable, irrational, and/or in direct conflict with the plain meaning of the promulgated language. *See Seenaraine v. Securitas Security Servs. USA, Inc.*, 830 N.Y.S.2d 728 (2d Dep't 2007) (granting deference to the NYSDOL's interpretation of the spread-of-hour regulation, and

[3] *See* Leading Age, *About*, http://www.leadingageny.org/header/about/ (last visited Sept. 22, 2015).

finding that defendant's reliance on same was proper).

Because the NYSDOL promulgated Section 142-2.1 of the Wage Order and has the statutory authority to interpret it, for the reasons set forth below, the lower court erred in failing to defer to the NYSDOL's clear interpretation of the Wage Order as it applies to home care workers working on live-in cases.

A. The NYSDOL's Interpretation of the Wage Order Was Not Unreasonable, Irrational, or in Direct Conflict with the Plain Language of the Wage Order.

The lower court inexplicably declined to follow the NYSDOL's long-standing rule that home care workers who work 24-hour shifts must only be paid for 13 hours of their shift, provided that they are afforded at least eight hours for sleep, five of which are uninterrupted, and three hours for meals. *Andryeyeva v. New York Health Care, Inc.* 994 N.Y.S.2d 278 (Sup. Ct. Kings Co. 2014). In contravention to the NYSDOL's guidance, the lower court stated that this rule does not apply to Plaintiffs-Appellees, because they did not actually reside with their clients (*i.e.*, the patient or consumer). *Id.* at 285–86. Notably, however, in failing to defer to the NYSDOL's interpretation of Section 142-2.1 of the Wage Order, the lower court did not even explain why the NYSDOL's interpretation was unreasonable, irrational, or in conflict with the plain language of the Wage Order.

Contrary to the lower court, in deciding the very same issue, the Honorable Denise Cote, District Judge of the Southern District of New York, analyzed

whether to give deference to the NYSDOL's interpretation, and specifically gave deference to the NYSDOL's opinion in a well-reasoned decision. In *Severin v. Project OHR, Inc.*, Case No. 10-cv-9696, 2012 U.S. Dist. LEXIS 85705 (S.D.N.Y. June 20, 2012), home attendants, who worked 24-hour shifts, claimed that they were owed minimum wage for each hour worked.

The court found as follows:

> The DOL's interpretation of the NYLL's minimum wage regulation is entitled to deference and will be upheld and applied. The regulation obligates employers to pay non-exempt employees the minimum wage 'for the time [employees are] permitted to work, or [are] required to be available for work at a place prescribed by the employer[.]' 12 N.Y.C.R.R. § 142-3.1 (emphasis added). The DOL Opinion Letter, in turn, interprets what it means to be 'available for work at a place prescribed by the employer' in the context of home health aides working 24-hour shifts in the home of a client. According to the DOL, a 'live-in' home health aide is only 'available for work at a place prescribed by the employer' for thirteen hours of the day, provided the aide is afforded at least eight hours for sleep and actually receives five hours of continuous sleep.
>
> The DOL's interpretation does not conflict with the plain meaning of the regulatory language. The phrase 'available for work at a place prescribed by the employer' fairly means more than merely being physically present at the place prescribed by the employer. Otherwise, the words 'available for work' would be surplusage. The phrase as a whole goes beyond simple physical location to imply as well a present ability to work, should the employee be called upon to do so. The DOL's construction of the regulation, finding that a live-in employee who is afforded at least eight hours of

> sleep time and actually attains five hours of continuous sleep lacks any such present ability to perform work during those hours, does not conflict with the regulatory language.
>
> The DOL's interpretation is likewise not unreasonable or irrational. 'Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices . . . courts regularly defer to the governmental agency charged with the responsibility for administration of the statute.' *Kurcsics v. Merchants Mutual Insur. Co*., 49 N.Y.2d 451, 459, 403 N.E.2d 159, 426 N.Y.S.2d 454 (N.Y. 1980). Applying a general minimum wage regulation to the specific and unusual employment context of home health aides working 24-hour live-in shifts is precisely such an interpretive task.

Id. at *24–25.

Furthermore, as noted by the *Severin* court, the DOL opinion letter specifically states that it interprets the NYLL's minimum wage regulation in the context of home care workers working 24-hour shifts, and that its interpretation applies regardless of whether the home care worker is a "residential employee" as defined in the regulation. *Id.* at *27. Furthermore, although the term "live-in" is not defined in the Opinion Letter, the term "live-in 24 hour personal care services" is defined by the New York State Department of Health as "the provision of care by one person for a patient who, because of the patient's medical condition and disabilities, requires some or total assistance with one or more personal care functions during the day and night and whose need for assistance during the night

is infrequent or can be predicted." *Id.* at *27–28, n.8 (citing 18 N.Y.C.R.R. § 505.14(a)(5)). This definition is consistent with the type of work the 24-hour home care workers in the instant case provide. Indeed, if a patient were to require assistance frequently throughout a 24-hour day, the patient plan would not allow for a 24-hour live-in aide. Rather, the patient plan would provide the patient with two 12-hour shift aides. This not only ensures the patient receives adequate services but also ensures the aide has sufficient time for sleep and meals so that the aide can safely provide services to the patient.

Moreover, after finding, without any supporting authority, that the Opinion Letter simply did not apply, the lower court reinterpreted Section 142-2.1 of the Wage Order. *See Andryeyeva*, 994 N.Y.S.2d at 287. In doing so, it stated that the NYSDOL's opinion letters "do not clearly differentiate between home attendants that truly reside, or 'live' in the client's home and those that spend twenty-four hours in a client's home but maintain their own residences." *Id*. However, this is false. The NYSDOL's March 10, 2011 Opinion Letter clearly states that the aforesaid rule applies to home care workers who work 24-hour shifts, regardless of whether they reside in the homes of their clients, or not. *See supra*, NYSDOL Opinion Letter No. 09-0169. Thus, the lower court inexplicably reinterpreted the Wage Order (which it did not have the authority to do), applying a different test for home care workers who do not reside or live in the home of the individuals that

they are caring for. The authority to interpret the Wage Order, however, must be left to the NYSDOL.

Accordingly, because the NYSDOL's interpretation of the Wage Order is reasonable, the lower court was obligated, under basic principles of administrative law, to defer to its interpretation of same as courts have done in the past.

II. AFFIRMING THE LOWER COURT'S DECISION WOULD HAVE A DEVASTATING IMPACT ON THE FINANCIAL STABILITY OF THE 24-HOUR HOME HEALTH CARE INDUSTRY.

Over the past several years, many changes, such as decreased financial funding and growing labor costs, have negatively impacted the home health care services industry. According to a recent survey conducted by the HCA-NYS, in 2012, approximately 70% of CHHAs and LTHHCPs had negative operating margins. *See* Home Care Association of New York, *Home Care Financial and Program Support Vital for Success of New Care-Delivery Models* (January 29, 2015), http://hca-nys.org/policy-positions/hcas-financial-condition-report-home-care-financial-and-program-support-vital-for-success-of-new-care-delivery-models (last visited Sept. 22, 2015), at 2. As a result, the HCA-NYS reports that in 2014, 20% of home care agencies stated that they planned to close due to financial challenges. *Id*. at 3.

For the reasons set forth below, requiring agencies to pay home care workers for every hour of a 24-hour shift would have a devastating impact on an already

struggling industry, as agencies would be saddled with the significant expense of increased wages and an influx of unpaid wage litigation that would lead to enormous and unaffordable new costs.

A. Home Care Agencies Cannot Afford the Increased Wage Cost of Employment Live-in Home Care Workers.

Wages and benefit costs are the "biggest factor in rising costs for home care providers." *Id*. at 5. According to the HCA-NY's survey, 42% of home care providers indicated that wage costs had had the biggest impact on their rising costs. *Id.* If wage costs were to further increase, this would have a devastating impact on home health care providers, such as the members of the *amici* associations, Defendants-Appellants, and even private-pay patients.

For example, agencies will have to pay home care workers for each hour of their 24-hour shifts – which is nearly double than what they currently pay to employ home care workers. Notably, however, Medicaid, in reliance on the Department of Labor's enforcement of the wage and hour laws for home care workers as well as industry practice, currently reimburses CHHAs with a flat fee for each day of a live-in service, *see supra,* Section II (d), and an hourly rate of up to 13 hours for patients enrolled in managed care plans who require 24-hour live-in serves, and there is no known plan for there to be a corresponding increase in the reimbursement rate to CHHAs or to managed care plans for such Medicaid recipients. *See* Paraprofessional Healthcare Institute Medicaid Redesign Watch #2,

The Impending Threat to the NYC Home Care System (Apr. 2013) http://phinational.org/fact-sheets/medicaid-redesign-watch-2-impending-threat-nyc-home-care-system (last visited Sept. 22, 2015), at 1 (explaining that New York State will "no longer reimburse the home care system directly, based on the number of hours of service delivered").[4] As a result, the agencies and/or private pay patients will be forced to absorb these costs.

If agencies are unable to afford these increased costs (which is likely, given that many of them already have negative operating margins), *see supra*, *Home Care Financial and Program Support Vital for Success of New Care-Delivery Models*, at 2, agencies may reduce the hours of home care workers, or eliminate these services completely. In fact, after the passage of the New York Wage Parity Law – establishing a higher minimum rate of pay for home care workers – 35% of home health care providers reduced the hours of direct care staff, and approximately half of providers reduced staff overtime. *Id*. at 5. Thus, it is likely that this trend will continue if wage costs essentially double. As a result, elderly and disabled individuals may not be able to receive around-the-clock care, which

[4] Notably, if a patient frequently needs assistance 24-hours a day, the practice is to institute a patient care plan which provides for two aides working 12-hour split shifts to care for the patient. It is not acceptable for such patients to be provided a plan which calls for live-in 24-hour aides on a four day/three day rotation because the patient would not receive adequate care when the aide was sleeping, and if the aide was not afforded sleep time, such would not be a safe working environment for the aide or the patient. *See* 18 N.Y.C.R.R. § 505.14 (stating that a patient is entitled to continuous care when the "patient requires total assistance with toileting, walking, transferring or feeding").

may present severe health and safety risks for them. Agencies may assign multiple home care workers to care for one individual to avoid having to pay the exorbitant overtime costs. This would result in a new aide coming into the private home of a patient every day and a half. This may cause extreme difficulties for elderly and disabled patients, who may not be comfortable with multiple caregivers, who are essentially strangers to the patients, in their private homes, providing them with very intimate services, such as toileting and bathing. This is particularly confusing and difficult for those consumers diagnosed with dementia or chronic illnesses who have a significant need for consistency. In addition, the multiple caregivers will not be very familiar with their patients' individual and personalized care plans, resulting in a loss of continuity of care for the patient.

For example, at the end of a shift, the home care worker can update the next home care worker on duty, but the information passed along is going to be limited to the patient's most recent activity, and not necessarily information from a few days before. In contrast, under the current model, agencies strive to staff 24-hour live-in cases with two aides, one who works four days a week and the other who works three days a week. This allows the patient to become familiar and comfortable with the aide, and vice-versa. In addition, the two aides communicate with each other about all important care related information regarding the patient and can keep each other up-to-date, thereby providing a significant continuation of

care for the patient. *See* 18 N.Y.C.R.R. § 505.14(a)(3) (defining a split shift as the "provision of uninterrupted care, by more than one person, for more than 16 hours per day for a patient who, because of the patient's medical condition and disabilities, requires total assistance with toileting, walking, transferring or feeding at times that cannot be predicted").

Moreover, if agencies were to eliminate 24-hour home care services altogether, individuals would be forced to hire private caregivers and/or be institutionalized. *See supra,* Section III. Because these private caregivers are not overseen by an agency, they likely will have not received appropriate healthcare and emergency training, and may not have appropriate insurance. In addition, they may not be properly licensed and/or subject to oversight by healthcare professionals such as nurses and therapists, thus increasing the risk for medical errors, patient abuse, and neglect. *See* 10 N.Y.C.R.R. § 700.2 (b)(9) (requiring individuals to successfully complete a training program or pass an exam to become home health care workers, and for them to work under the supervision of a registered nurse or licensed therapist); *see also* New York State Department of Health, *Home Health Aide Training Program Frequently Asked Questions and Answers*, https://www.health.ny.gov/professionals/home_care/hhtap_training_program_faq.htm (last visited Sept. 22, 2015) (stating that licensed home health aides must complete 75 hours of training).

B. If Wage Costs Increase, There Would Be a Significant Decline in Jobs for Home Care Workers.

According to the United States Department of Labor, Bureau of Labor Statistics (the "Bureau"), the highest concentration of home health aides/attendants is in New York State. *See* United States Department of Labor, Bureau of Labor Statistics, *Occupational Employment and Wages* (May 2014), http://www.bls.gov/oes/current/oes311011.htm#st (lasted visited Sept. 22, 2015). The Bureau estimates that as of May 2014, there were approximately 146,550 home health aides in New York State. *See id*.

As previously discussed, after the passage of the New York Wage Parity Law and living wage laws, agencies decreased the hours of their direct care staff. Thus, if agencies are ultimately required to pay home care workers for each hour of a 24-hour shift, they will likely continue to decrease the working hours of home care workers and/or cease employing them altogether, thus negatively and financially impacting the livelihood of approximately 146,550 individuals employed in this state.

C. Increased Labor Costs Will Force Home Care Agencies to Reduce Training and Supervision Costs, Thereby Negatively Impacting the Care of Patients.

Over the last several years, there has been a significant increase in the cost of employing home care workers, causing agencies to struggle to afford these increased labor costs. For example, there has been a rise in the rate of pay for

home care workers due to increases in the minimum wage and the passage of the Wage Parity Law. In addition, Workers' Compensation costs – which have risen approximately fifty percent over the last several years – continue to rise. *See supra*, *The Impending Threat to the NYC Home Care System*, at 2. Moreover, agencies must incur the significant cost of providing health insurance coverage to full-time employees (or paying a penalty for failing to offer coverage) pursuant to the Affordable Care Act. *Id*. It is estimated that these aforementioned costs alone are predicted to increase the labor cost of home health care services by approximately 15%. *Id*.

Many agencies also have to supplement the state-required training for home care workers to keep them updated on changes in patient symptoms and treatment and to meet certain quality standards required by state and federal governments and their managed care contractors, and changes in the health delivery system under Medicaid reforms.

Due to these increased labor costs, it is predicted that well-established and reputable home care agencies – that employ a full-time, well-trained, and low-turnover workforce – will be forced to reduce costs related to this additional training and high-quality supervision of aides. *Id*. at 3–4. Currently, many larger agencies, at their own cost, sponsor training and certification programs for their home care workers, and offer high-quality frontline supervision and management

practices. *Id*. at 3. This training and supervision has been proven to assist with retention, increase job satisfaction, and ensure quality care of patients. *Id*. However, increased labor costs will force agencies to cut training and management practices, resulting in a workforce that may not receive supplemental training, has high turnover, and will have a difficult time in meeting certain quality standards. It is likely that these cost-cutting measures will only continue to increase if the lower court's decision is affirmed, and agencies are required to pay home care workers for each hour of a 24-hour shift.

D. Certified Home Health Care Agencies and Other Home Care Providers Will Be Forced to Cut 24-Hour Home Health Care for Patients.

Effective April 1, 2011, the New York State Public Health Law was amended to change the way in which CHHAs are reimbursed for the care of Medicaid recipients. Prior to the amendment, CHHAs were reimbursed based on the number of hours of service delivered. *See supra*, *The Impending Threat to the NYC Home Care System*, at 1. However, now, they are reimbursed based on an episodic fixed rate. Thus, home care agencies are not reimbursed for all hours of a 24-hour shift, thus making it difficult to provide such services.

Managed care plans also contract directly with LHCSAs to provide aides for 24-hour live-in cases. These LHCSAs are paid directly by the plan who receive premiums from the state to care for all of their enrolled patients' needs.

A significant increase in labor costs of home care workers will likely cause CHHAs and LHCSAs to cease offering these services to patients, or drastically reduce these services. As a result, elderly and disabled individuals will be left without home care and/or with reduced home care, even though they have a need for these services and their conditions/medical issues have not changed. However, prior to eliminating these services for Medicaid recipients, home care agencies must provide them with timely and adequate notice, notifying them of the opportunity for a Fair Hearing and continuing benefits while their hearings are pending, which places a considerable burden on them. *See* 42 C.F.R. §§ 435.919; 431.206 *et seq*. Further, there is no known plan for Medicaid to increase its reimbursement rates if the lower court's decision stands.

E. If the Lower Court's Decision is Affirmed, This Will Cause an Influx of Litigation for Unpaid Wages, Which Would Have a Devastating Financial Impact on the Industry.

The NYLL has a six-year statute of limitations, thus, permitting a plaintiff to recover the wages accrued six years prior to commencing an action. *See* N.Y. Labor L. § 198. In addition, a prevailing plaintiff may recover prejudgment interest at a rate of 9%, attorneys' fees and liquidated damages. *See* N.Y. CPLR § 5004.

Here, if the lower court decision is affirmed, this will have widespread financial implications for all home care agencies throughout New York State. In

this matter alone, over 1,000 home care workers would be able to recover unpaid minimum wage for 11 hours per day for each 24-hour shift that they worked for a period of six years, as well as overtime pay. In addition, they will be entitled to liquidated damages, prejudgment interest in the amount of 9%, and their reasonable attorneys' fees. The agencies would also be forced to bear the cost of their own legal fees, which will likely be in the six-figure range.

It is likely that if this court affirms the lower court's decision, this type of litigation will increase, in which thousands of home care workers will seek unpaid minimum wage for 11 hours of a 24-hour shift for a six-year period, interest, penalties, and attorneys' fees. Agencies will be forced to expend significant amounts of money to defend against this litigation. This will likely cause an already stressed industry to deteriorate even more. In addition, defending against these lawsuits will take away from the time that agencies can dedicate to patient care and service.

In sum, the increased expense of wages and inevitable litigation will have a devastating impact on the home health care industry, which may force it to cease offering in-home health care services and cause agencies to close.

III. THE INCREASE IN UNDUE INSTITUTIONAL CARE IS NOT THE PREFERRED SETTING FOR THE ELDERLY AND DISABLED POPULATION AND WOULD NOT BE IN COMPLIANCE WITH THE SUPREME COURT'S DECISION IN *OLMSTEAD V. L.C.*

According to a survey conducted by AARP Public Policy Institute and the National Conference of State Legislatures, the overwhelming majority of adults over 65 years old (approximately 90%) plan to remain in their homes for as long as possible. *See* AARP Public Policy Institute, *Aging in Place: A State Survey of Livability Policies and Practices* (December 2011), https://assets.aarp.org/rgcenter/ppi/liv-com/aging-in-place-2011-full.pdf (last visited Sept. 22, 2014). Thus, these individuals, at some point, will be reliant on home health care. However, because the increased cost of employing home health care workers will likely cause agencies to eliminate and/or reduce the number of home care workers, this will force individuals, who wish to receive care in their homes, to resort to institutional care.

Increased institutionalization is not in compliance with the United States Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581, which held that undue institutionalization qualifies as discrimination "by reason of … disability," and would be contrary to federal and state policies and guidance. The Supreme Court further explained that services for individuals with disabilities must be provided in the less restrictive setting to promote the independence of individuals with disabilities. *Id*.

In addition, the federal government and the State of New York have both instituted health care reform efforts in alliance with the *Olmstead* decision. In fact, on June 22, 2011, the 12th anniversary of the *Olmstead* decision, President Obama stated "The landmark *Olmstead* case affirmed the rights of Americans with disabilities to live independently . . . On this anniversary, let's recommit ourselves to building on the promise of *Olmstead* by working to end all forms of discrimination, and uphold the rights of Americans with disabilities and all Americans." *See* White House, *On Anniversary of Olmstead, Obama Administration Recommits to Assist Americans with Disabilities* (Jun. 22, 2011), https://www.whitehouse.gov/the-press-office/2011/06/22/anniversary-olmstead-obama-administration-recommits-assist-americans-dis (last visited Sept. 22, 2015). Similarly, New York State has vowed to reform the care given to disabled and elderly patients by making it a priority that they are able to stay out of institutions for as long as possible. *See* New York State Justice Center for the Protection of People with Special Needs, *Report and Recommendations of the Olmstead Cabinet* (October 2013), http://www.justicecenter.ny.gov/media/news/olmstead-cabinet-recommendations (last visited Sept. 22, 2015).

In addition, elderly and disabled patients will be forced to resort to institutional care, even though they will likely receive better and more personalized care one-on-one care in the home setting. According to a survey conducted by the

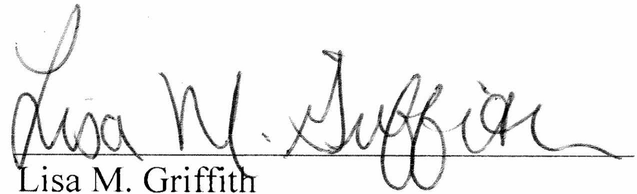
Joint Commission, an agency that accredits health care organizations and programs in the United States, of the sentinel events (unexpected occurrences involving death or serious physical and/or psychological injuries) that occurred from 2004 to 2015, only 1.6% of them occurred among patients who received home care. Rather, the majority of sentinel events occurred among those receiving care in hospitals, health care facilities, or other settings. *See* The Joint Commission, *Summary Data on Sentinel Events Reviewed by the Joint Commission* (August 26, 2015), http://www.jointcommission.org/sentinel_event_statistics_quarterly/ (last viewed Sept. 22, 2015). Thus, the home setting is preferable for patients, where they can comfortably and safely receive the care they need.

Accordingly, the lower court's decision, if allowed to stand, would have a serious impact on the missions of the federal and state governments.

IV. CONCLUSION

Based on the foregoing, the *amici* respectfully request that the lower court's decision be reversed.

Date: September 24, 2015
Melville, New York



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APPELLATE DIVISION – SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word 2010.

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Name of typeface: Times New Roman
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Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 6,848 words.

Dated: September 24, 2015

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STATE OF NEW YORK
DEPARTMENT OF LABOR
Governor W. Averell Harriman
State Office Building Campus
Albany, New York 12240

JAMES J. McGOWAN
Commissioner of Labor

October 27, 1998

Ms. Marian J. Massie

Dear Ms. Massie:

This is in response to your letter of August 24, 1998, forwarded to me by State Senator John A. DeFrancisco concerning your employment by Options for Independent Living.

The Minimum Wage Order for Miscellaneous Industries and Occupations, a set of regulations governing the field in which you are employed, states that

> "a residential employee – one who lives on the premises of the employer – shall not be deemed to be permitted to work or required to be available for work . . . during his normal sleeping hours solely because he is required to be on call during such hours . . ."

This means that, generally, for residential employees, sleep time is not considered working time. "Normal sleeping hours" is presumed to be eight hours a day.

With regard to "live-in" home health aides; (including those workers employed on-site for 24-hour shifts), it is the policy of the Department of Labor that such persons must be paid for no less than 13 hours of each 24-hour day they are required to remain "on call" in the home of the person receiving their services – provided that they are afforded eight hours for sleep and actually receive five hours of uninterrupted sleep and that they are afforded three hours for meals. If a "live-in" home health aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable, and the home health aide must be paid for all eight hours in question. Similarly, if a "live-in" home health aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable.

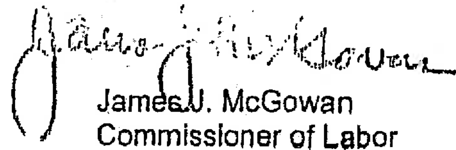
Telephone (518) 457-2741

Fax (518) 457-6908

In order for us to investigate the specific circumstances of your employment and make a determination as to whether the amount of compensation you receive represents a violation of law, I have requested Supervising Labor Standards Investigator Joseph V. Jakubowski, New York State Department of Labor, Division of Labor Standards, 333 East Washington Street, Syracuse, New York 13202, telephone (315) 428-4642, to contact you for the purpose of obtaining additional information.

I trust this course of action will address your concerns.

Sincerely,



James J. McGowan
Commissioner of Labor

cc: Senator John A. DeFrancisco
Joseph Jakubowski

STATE OF NEW YORK
DEPARTMENT OF LABOR
ONE MAIN STREET
BROOKLYN, NY 11201
(718) 797-7310

COUNSEL'S OFFICE

October 20, 1992

Paul J. Siegel, Esq.
Jackson, Lewis, Schnitzler & Krupman
100 Jericho Quadrangle, Suite 309
Jericho, New York 11753

Re: Request for Opinion
Home Care Workers
Overtime Compensation

Dear Mr. Siegel:

I am writing in response to your August 28, 1992 request for an opinion regarding certain issues relating to the above area.

You first ask whether the State of New York recognizes an overtime pay exemption for nurses' aides, home health care aides and other personnel who provide care to the elderly, infirm or ill in their own homes, comparable to that set forth in the Fair Labor Standards Act at 29 USC §213(b)(21) and interpreted at 29 CFR Part 552. The Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR §142-2.2, provides that: "An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of Section 7 and Section 13 of 29 U.S.C. 201 et seq., the Fair Labor Standards Act of 1938, as Amended[...]." Therefore, the overtime exemption to which you refer is incorporated by reference in New York law. However, the same Wage Order goes on to provide that: "In addition, an employer shall pay employees subject to the exemptions of Section 13 of the Fair Labor Standards Act, as Amended, [...], overtime at a wage rate of one and one-half times the basic minimum hourly rate," i.e., $6.375. Therefore, all employees exempted from the overtime requirements of the Fair Labor Standards Act, but still covered by the New York Minimum Wage Act and Orders, must be compensated for overtime at one and one-half times the minimum wage. For the purposes of your inquiry, the only domestic service workers not covered by any overtime provision would be those exempted from coverage pursuant to Section 651(5)(a) of the Labor Law, i.e., individuals employed in service as a part time baby sitter in the home of the employer, or who live in the home of an employer for the purpose of serving as a companion to a sick,

convalescing or elderly person, and whose principal duties do not include housekeeping.

You ask, next, whether a health care worker who sleeps and resides at the home of the client on a regular basis would be entitled to overtime compensation after forty hours of work. Pursuant to 12 NYCRR §142-2.2, such a worker would be considered a "residential employee" entitled to overtime compensation after 44, not 40, hours of work in a workweek.

You ask, next, whether certain periods in a worker's day would be considered working time, and whether this would depend on whether the worker was required to remain on the client's premises. Time actually spent sleeping, and time actually spent eating (provided the worker was entirely free of responsibility for the client while eating) would not be considered working time. If the client is away from home and the worker is not required to accompany the client, such time would not be considered working time. If the client is asleep and there are "no duties" to perform, such time would be considered working time if the worker is required to remain in the client's home for any reason.

You ask, next, whether travel time would be considered working time under four different hypothetical situations. In situation (a), where the health care worker travels directly from home to the home of the client, the time spent traveling would not be considered working time. In situation (b), where the health care worker is required to travel from one assignment to the next, the time spent traveling would be considered working time. In situation (c), where the health care worker has a four-hour hiatus between assignments, and goes home for this period, such time would not be considered working time. In situation (d), where the health care worker is required to come to the employer's office to pick up documents prior to traveling to the client's home, the worker must be paid for all time commencing with his or her reporting to the employer's office, which includes the time spent traveling from the employer's office to the client's home.

You ask, finally, whether registered nurses and therapists, who have college degrees that are essential to perform the basic functions of their jobs, would be considered professional employees exempted from overtime pay requirements. This office will not offer an opinion as to whether such employees would be exempted from the overtime pay requirements of the Fair Labor Standards Act as incorporated in 12 NYCRR §142-2.2; such an opinion should be requested from the United States Department of Labor. However, it would appear that such employees would be considered to be working in a "bona fide professional capacity," as defined in 12 NYCRR §142-2.16(c)(4)(iii), and therefore exempted from New York Minimum Wage Act and Order coverage regardless of their compensation.

The publications you requested have been sent to you under separate cover by the Division of Labor Standards. I trust that

the foregoing is responsive to your inquiry. If you have any further questions, please contact me at (718) 797-7310.

Very truly yours,

Robert Ambaras
Senior Attorney

RA:ee