

The Honorable Kathy Hochul  
Governor  
New York State Capitol  
Albany, NY 12224

**Re: Mandatory Nurse Overtime -Legislation Awaiting Action;** A.181-A/S.4885-A (Gunther/Savino), A.286-A/S.1997-A (Gunther/Jackson) and A.8874-B/S.8063-A (Joyner/Ramos)

Dear Governor Hochul,

On behalf of the over 400 not-for-profit, mission-driven aging services members of LeadingAge New York, I write to you today to urge you to veto three pieces of legislation that would have negative effects on individuals living in nursing homes or in need of home health services. The above-referenced bills impose additional penalties on providers that mandate nurse overtime and expand the scope of the mandatory overtime prohibition to include home care agencies. While we agree that overtime should be a last resort for our hard-working nurses, the enactment of this legislation in the context of statewide nursing shortages will only reduce access to long-term care and other health care services and jeopardize the well-being of patients and residents.

The three bills, which are awaiting delivery to your desk for action, amend existing section 167 of the Labor Law, which currently prohibits health care facilities from requiring nurses to work beyond their regularly scheduled hours, except under limited circumstances, such as a natural disaster, a federal or state health care emergency, a provider-determined emergency, or an ongoing medical or surgical procedure. The bills amend section 167 in different and inconsistent ways as follows:

- **A.181-A/S.4885-A (Gunther/Savino)** adds home care agencies and visits to the current law, thereby prohibiting home care agencies from requiring a registered professional nurse (RN) or a licensed practical nurse (LPN) to work more than that nurse's regularly scheduled work hours and home care visits. Unlike the other bills, it does not specify enhanced penalties for home care agencies, require a 15 percent reward for overtime hours, nor narrow existing exemptions from the prohibition on overtime.
- **A.286-A/S.1997-A (Gunther/Jackson)** specifies penalties for violations of section 167, beginning at \$1,000 and increasing to \$3,000 for repeat violations. The bill also mandates, for each violation, an additional 15 percent of the overtime payment to nurses who work mandatory overtime. Unlike A.181-A/S.4885-A, it does not include home care nursing services.
- **A.8874-B/S.8063-A (Joyner/Ramos)** also specifies penalties for violations of section 167, beginning at \$1,000 and increasing to \$5,000 for repeat violations occurring within 3 years, and for each violation mandates an additional 15 percent of the overtime payment to nurses who work mandatory overtime. Unlike the other two bills, it narrows the existing exceptions to the mandatory overtime ban, by reinstating the ban within 3 days after a health care disaster and at the end of a declaration of emergency or within 30 days, whichever is shorter. Unlike A.181-A/S.4885-A, it does not include home care nursing services.

LeadingAge New York strongly urges a veto of all three pieces of legislation. Mandating overtime is always a last resort for health care providers, but is at times necessary to ensure the delivery of high-quality care to patients and residents. Unfortunately, these bills ignore the State's nurse shortage and ask providers to sacrifice the well-being of patients and residents who have complex medical conditions and immediate nursing needs. Conscientious providers will not make that sacrifice, and in the context of our health care workforce emergency, will inevitably face heavy fines. Moreover, two of the bills will discourage nurses from volunteering to work overtime (and lead to an increase in mandatory overtime) by providing a 15 percent increase in pay when overtime is mandated. This will only lead to more violations and additional fines.

The three bills assume that harsh penalties will deter mandatory overtime for nurses. However, that assumption is not valid in the context of widespread staffing shortages and is especially flawed with respect to long-term/post-acute care. Nursing home residents and many home health patients require access to nurses to address both urgent and ongoing essential clinical needs. If a nurse calls in sick or a provider cannot fill a shift, mandating overtime may be the only way a nursing home or home care agency can meet these essential and life-sustaining needs. When people are in your care on a daily basis, you cannot simply cancel procedures or delay services to reduce their need for nurses like other settings may be able to do. In the absence of a nurse, a nursing home resident cannot get their medications, and a prospective home care patient cannot get assessed for home health services in order to be discharged from the hospital. Moreover, while the current law provides an exemption for nurses who are engaged in an ongoing "medical or surgical procedure," that exemption may not be broad enough to cover the types of services provided by nurses in nursing homes and home care.

Nursing homes in particular will find themselves in a Catch-22 as a result of A.286-A/S.1997-A (Gunther/Jackson) and A.8874-B/S.8063-A (Joyner/Ramos). Unlike any other category of health care facility, nursing homes will be forced to choose between penalties for mandating nurse overtime or penalties for violating extraordinarily challenging minimum nurse hours requirements per resident day. Approximately 80 percent of nursing homes statewide were unable to comply with the minimum hours requirements in the first quarter of 2022. They will face \$2,000 per day penalties for violations of these staffing requirements. If these overtime bills are signed into law, and nursing homes attempt to meet minimum nurse hours requirements going forward by mandating overtime, they will incur penalties of \$1,000 to \$5,000 (or \$1,000 to \$3,000) per violation, plus an additional 15 percent payment to the nurse(s) who are asked to work overtime. Moreover, these bills will make it even harder for nursing homes to meet the minimum hours requirements without mandatory overtime because they offer a 15 percent reward to nurses who work mandatory overtime. The additional 15 percent provides an incentive for nurses to refuse voluntary overtime and may force the homes to mandate it.

The expansion of the overtime prohibition to include home care agencies under A.181-A/S.4885-A (Gunther/Savino) bill disregards the chronic workforce shortages and the rising needs of older adults and individuals with disabilities who are seeking home care services. As the State aims to promote community-based care and meet the growing demands for these services, we cannot at the same time penalize providers for doing their best to meet the needs of the people they serve in the community. Home health, by its nature, demands more nimble response times which shape nurse visit scheduling. Unlike hospitals, home care has no on-site staff to share in coverage of a patient if someone is left without a nurse. While the bill provides that refusal to work will not constitute patient abandonment for purposes of professional discipline, from the patient's perspective, this bill may result in delays and denials of care and contribute to poor patient health outcomes.

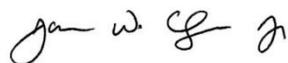
Although the bills and existing law provide exemptions from the mandatory overtime ban during declared emergencies, the current workforce emergency Executive Order does not offer much relief from the longer term impacts of these bills. Providers will not be able to suddenly hire additional nurses and avoid overtime once the emergency is terminated. Moreover, once it is terminated, various waivers that expanded the personnel authorized to practice nursing in New York will expire, placing additional pressure on providers to find nurses to fill nursing positions. The limits imposed by A.8874-B/S.8063-A (Joyner/Ramos) will make the situation even more untenable. It is impractical to expect that providers will be able recruit more nurses or will need fewer nurses merely three days after a disaster is declared or 30 days after a declaration of emergency, as suggested by A.8874-B/S.8063-A (Joyner/Ramos). Moreover, the bill would exclude from employer-determined emergencies situations in staffing needs arose in response to sick leave, personal leave, etc. However, these are real world challenges that are creating pressing staffing needs and that cannot be eliminated without an influx of nurses or a severe constriction of health care capacity.

Setting aside the challenges associated with implementing these bills in the context of widespread nurse shortages and the threat they pose to patient care, the bills appear to have been passed hastily in the final days of session, without careful consideration of their overlapping and inconsistent provisions. As a result, it is difficult to discern the Legislature's intent. For example, did they intend to impose the increased penalties and 15 percent compensation incentive on home care providers, and narrow the emergency exemptions for them? A.181-A/S.4885-A (Gunther/Savino) does not include these provisions. Would the State's health care workforce emergency provide the basis for an exemption from the penalties in the A.8874-B/S.8063-A (Joyner/Ramos) even though the emergency has already exceeded the 30-day limit set forth in that bill? If that bill were signed into law, would providers be subject to these additional penalties immediately? Which of the the conflicting penalties in A.286-A/S.1997-A (Gunther/Jackson) and A.8874-B/S.8063-A (Joyner/Ramos) would apply? And, what effective date would apply if these bills were enacted? All three bills have different effective dates. Clearly, the implications of passing these three bills were not considered holistically.

LeadingAge New York members are doing everything in their power to recruit and retain staff, while meeting the requirements of all laws and providing the highest quality care for their residents and patients. This includes paying shift differentials, raising wages, creating career ladders with tuition reimbursement, and spending exorbitant and unsustainable sums for staffing agencies, as well as suspending admissions and closing units. Despite these efforts, they are at times forced to mandate overtime in order to provide care to the vulnerable individuals they serve. It will take time to train and license new nurses to meet the growing demand for aging services. Simultaneously increasing penalties for providers and rewarding staff who refuse to volunteer for extra shifts will only drain providers of needed resources. The state must seek new ways to incentivize nurses to work in this field. These bills will not improve care and access. In fact, they will have the opposite effect.

We urge you to veto all three bills.

Sincerely,



James W. Clyne, Jr.  
President and CEO  
LeadingAge New York