



NEW YORK STATE DEPARTMENT OF LABOR

***Public Hearing on Proposed Rulemaking –
Hours Worked, 24-Hour Shifts
[I.D. No. LAB-17-18-00005-P]***

Testimony of LeadingAge New York

July 11, 2018

Introduction

LeadingAge New York (LeadingAge NY) appreciates the opportunity to submit testimony to the New York State Department of Labor (NYSDOL) on the proposed rulemaking, *Hours Worked, 24-Hours Shifts* - [I.D. No. LAB-17-18-00005-P]. The proposed regulation clarifies that hours worked may exclude meal periods and sleep times for employees who work shifts of 24 hours or more, resulting in thirteen hours of pay for a live-in aide. LeadingAge NY supports this rulemaking, and seeks to address herein the potential implications for the provision of home care to New Yorkers in the absence of such a regulation.

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 Licensed Home Care Services Agencies (LHCSAs), Certified Home Health Agencies (CHHAs), other home and community-based services, nursing homes, adult care facilities, assisted living programs, continuing care retirement communities, adult day health care, senior housing, and managed long term care (MLTC) plans (hereinafter “LTC services”). LeadingAge NY’s approximately 400 provider and plan members serve an estimated 500,000 New Yorkers of all ages annually. Our LHCSA, CHHA and MLTC members are particularly affected by the issue this proposed regulation seeks to address.

LTC services are “hands-on”, and simply cannot be provided without professional and paraprofessional workers who are dedicated to meeting the needs of frail elderly and disabled New Yorkers. Indeed, LeadingAge NY’s member organizations collectively employ tens of thousands of workers throughout New York State to provide home and resident patient care and essential supportive services. Our member organizations and the people who work for them share a paramount goal – to ensure broad access to high quality care that allows people to age in place for as long as possible. It is LeadingAge NY’s mission to enable New York’s growing elderly population to access services in the most integrated settings appropriate to their needs, thereby providing them with better care at a lower cost and improving their overall health.

Proposed Regulation and Its History

LeadingAge New York supports the subject proposed rulemaking, which amends Sections 142-2.1(b), 142-3.1(b) and 142-3.7 of Title 12 NYCRR as follows to codify the Commissioner’s longstanding and consistent interpretations that hours worked may exclude meal periods and sleep time for employees who work shifts of 24 hours or more:

“The minimum wage shall be paid for the time an employee is permitted to work or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee—one who lives on the premises of the employer – shall not be deemed to

be permitted to work or require to be available for work: (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or, (2) at any other time when he or she is free to leave the place of employment. ***Notwithstanding the above, this subdivision shall not be construed to require the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards act of 1938, as amended, in accordance sessions 785.19 and 785.22 of 29 C.F.R for an employee who works a shift of 24 hours or more.***

The NYS Commissioner of Labor has long held and reiterated this position in regulation, opinions and determinations, and has ensured its consistency with the federal Fair Labor Standards Act of 1938. The exclusion from the minimum wage of hours of sleep solely because a person “lives” at the residence during those hours has been explicit for many years, on the basis that the worker is not available for work during meals and sleep time. It continues to be industry practice and is consistent with the NY Department of Labor Wage Order to pay 24-hour live-in aides for 13 hours of a 24-hour shift (the “13-hour Rule”), provided that person is afforded at least eight hours of sleep (five of which are uninterrupted) and three hours per shift for meals.

Adverse Consequences if the Regulation is Not Adopted

All facilities and providers along the LTC services continuum have a strong interest in the preservation of the 13-hour Rule, as articulated in the proposed regulation. In its absence, the home care industry will be upended and the delivery of LTC in home, community and facility settings will be disrupted, adversely affecting consumers’ access to needed services and supports.

A majority of the home care provided by LHCSAs is paid for by the state and/or federal governments under the Medicare and Medicaid programs, either directly or indirectly through managed care plans and CHHAs. Many, if not most, home care agencies and MLTC plans have negative or negligible operating margins. They are not reimbursed by the federal or state governments, nor by insurers or other third party payors, for every hour of a 24-hour shift for live-in cases and there is no known plan by the state or federal governments to pay agencies and plans for every hour of a 24 hour shift if the agencies were required to pay their aides in this way.

Given these realities, a deviation from the NYSDOL regulation and 13-hour Rule would be catastrophic to the financial operations of many home care agencies and possibly MLTC plans, without commensurate increases in Medicaid reimbursement. Such a deviation is possible due to the court challenge to the NYSDOL’s use of the 13-hour Rule. As a result, the NYSDOL proposed the clarification to the existing regulation to clarify what was the already existing policy decision of the State. A contrary interpretation would lead those agencies that currently offer 24-hour live-in aide services and/or have offered such services within the last 6 years (the

statute of limitations for wage and hourly legal claims) to be forced to close due to insolvency or bankruptcy. Medicaid beneficiaries will not be able to obtain 24-hour live-in aide services and will either go without needed services or have to seek institutional care.

When played out, many agencies will simply not offer 24-hour live-in care, and those that do will have to utilize multiple aides to reduce overtime expenses. If a live-in aide must be paid for every hour of a 24-hour shift, that person would need to be paid overtime during his or her second shift. Retaining the same aide throughout the week would be financially impossible for agencies. In this scenario, it would be necessary to staff 4-5 aides to provide a week's worth of care to one client without incurring overtime. What would then likely evolve is a revolving door of multiple aides throughout the week serving patients. Not only will this be practically and financially infeasible, it will likely result in a significant decrease in the continuity and quality of care for the elderly and disabled, and more gaps in care that must be covered by informal caregivers. Considering the many obstacles, many live-in patients will likely be placed in nursing homes.

Without the regulation, there would be ramifications for the private pay home care market as well. Having to pay each hour for 24-hour care would substantially increase the cost of private pay live-in services in New York. The cost of private pay clients would be financially prohibitive and many clients would have to go without the care they need, spend-down to qualify for Medicaid, or prematurely enter an institutional setting. The private pay agencies would have to charge their clients more to cover costs, including the increased aide's wages which would not only result in impoverishment and premature institutionalization, but would likely lead to private pay individuals finding less than qualified paid caregivers on their own, putting this vulnerable population at risk of inadequate care, harm or abuse.

The need for home care grows at a rapid pace and the preservation of this regulation is necessary to keep care available and affordable to those who need it. New York and the rest of the country will see an exponential growth in the next decade in the number of individuals who will need long term care. New York is currently home to approximately 3 million residents age 65 and older, representing 15 percent of the population. By 2025, that number will increase to 18 percent. Both the number and percentage of older New Yorkers is expected to continue to rise over the next 20 years. This growth will drive a corresponding increase in the number of New Yorkers with cognitive and functional limitations who will need home care and other LTC services and supports.

Further, the pool of informal and formal caregivers will decline as this older population grows. Availability of younger New Yorkers to care for seniors will be at its lowest point in a decade and further decline. According to the NYS Office for the Aging, the Aged Dependency Ratio (the ratio of the population aged 18 to 64 to the population aged 65 and over) is expected to decline from 4.31 in 2015 to 3.05 in 2030, and continue declining through 2040. This ratio is a proxy for

the availability of both informal care provided by family members and friends, and caregivers working in the formal care delivery system.

These reductions in the availability of informal caregivers will lead to increased reliance on the formal care delivery system. Moreover, a disproportionate number of this growing cohort of aged New Yorkers is likely to rely on public programs to pay for their care. Today, one-third of New Yorkers over age 65 have incomes at or below 200 percent of the federal poverty level. This economic reality has major implications for the Medicaid program, the predominant payer for home care and other LTC services. Couple this demographic problem with the potential to require 24-hour pay for live-in home care, and New York will exacerbate what is already considered a crisis situation.

The Olmstead decision and corresponding federal and state regulations and policies seek to promote the delivery of integrated care in the least restrictive setting appropriate to the needs of disabled individuals. New York has made significant strides transitioning and supporting many New Yorkers out of institutional settings. It will suffer a significant blow should this regulation not be adopted and upheld, and individuals with significant home care needs will personally experience the repercussions.

As aptly noted in the Impact Statement, this regulation is merely a clarification of the status quo, prevent the collapse of the home care industry, and avoid the institutionalization of patients who should be cared for at home. As an association of not-for-profit and publicly-sponsored providers of LTC services and supports committed to ensuring access to high quality care in the community, LeadingAge NY strongly supports adoption of the NYSDOL regulation to preserve the 13-hour Rule as it applies to 24-hour live-in aide services.

Conclusion

Thank you for the opportunity to provide this testimony. For questions or concerns, please feel free to contact the LeadingAge New York Advocacy and Public Policy staff at 518-867-8383.