



January 4, 2018

Michael Paglialonga
Deputy Counsel
New York State Department of Labor
Harriman State Office Campus
Building 12, Room 509
Albany, NY 12240

RE: I.D. No. LAB-47-17-00011-P

Dear Mr. Paglialonga:

The Home Care Association of New York State (HCA), Inc. – on behalf of its nearly 300 member agencies, organizations and individuals statewide who serve approximately 420,000 beneficiaries annually throughout the entire continuum of home care, hospice and managed long term care – appreciates the opportunity to provide comments on the state Department of Labor’s (DOL’s) proposed employee scheduling (Call-In Pay) rule (I.D. No. LAB-47-17-00011-P).

We strongly urge DOL’s **withdrawal** of the proposed rule **or, in the least, a carve-out and exemption of home care and hospice** services from this rule, whose provisions are in complete contradiction to the operation of these services. These community health services would be uniquely and severely adversely impacted by the rule and could not simultaneously abide the state, federal and professional health standards that govern patient care and the standards established in this proposal.

The rule’s provisions, perhaps formulated envisioning more static work settings and scheduling, would virtually shut down home care and hospice services in New York State. To provide patient care, home care and hospice services must be dynamic and able to immediately and constantly adapt to patients’ changing needs and schedules. The rule is predicated on the exact opposite, and the rigidity and dysfunction it would impose on home care will reverberate through the entire health system, including the nearly half million home care cases throughout the state.

Our comments below identify specific scenarios and characteristics of home care and hospice service delivery and scheduling to which the provisions of the proposed rule are in direct contradiction, and as a result, the rule would confound these agencies’ ability to fulfill their fundamental role in the health care system and their daily responsibilities to patients.

The following outlines how the proposed rule would devastate the delivery of home care and hospice services at a time when the state and its citizens depend more and more on the home and community-based care system.

Incompatibility with Care Provided at Home

Foremost, this proposed rule places significant impediments to the manner in which home care and hospice services are structured and delivered, including the variable employer scheduling practices that are fundamental to meeting unpredictable and dynamic needs of patients and families.

While it may be the exception in other industries, the need for a high degree of variability is critical, and indeed a prerequisite, for the delivery of quality services provided at home. DOL's proposal would penalize home care and hospice for the very nature in which the worker's services to patients must – and only can – function. Indeed, the criteria and penalties envisioned by this proposed rule assume a norm of predictability that does not fundamentally exist in home care practice. Specifically:

- The rule's "unscheduled shift" and "cancelled shift" provisions are incompatible with how care at home is delivered, where hours are started, increased, decreased, eliminated or otherwise adapted due to reasons unique to home care and hospice agencies and their patients, and typically beyond the control of the employer. This includes the following circumstances:
 - A patient's condition deteriorates, improves or otherwise changes and the patient needs more, less or different services immediately or timely (incompatible with an advance notice requirement of 14 days);
 - The patient becomes ill and is admitted to a hospital or nursing home, or otherwise needs or requests an alternate care plan;
 - A patient or family cancels the aide visit with little advance notice;
 - Family members, who provide back-up care, have a sudden change in their own availability, altering the patient's need and/or timing for home care or hospice services;
 - A patient or the doctor schedules a medical appointment without possibility of the 14 day advance notice to the home care/hospice agency;
 - A patient is unpredictably discharged, without advance notice, from a hospital/nursing home and will need immediate/timely care at home, impossible and improper to delay in order to meet a 14 day advance scheduling requirement; and/or

- An aide has to take time off due to sickness, child and other responsibilities and replacement aides have to be scheduled for immediate/time service, precluding 14 day advance notice.

All of these (and countless more, daily) circumstances require the flexible assignment of aide services to meet the quickly emerging needs of patients and staffing exigencies. Such flexibility is necessary to meet these needs and to ensure home care's and hospice's functions as cost-effective mechanisms for delivering only the precise level of care necessary in response to a patient's changing health status or the availability of family caregivers. Restricting the flexibility inherent in the system as proposed by this rule is neither in the best interest of the patient or an efficient and effective delivery system. Moreover, this regulation is in direct contradiction with state and federal Medicaid and Medicare standards which prescribe that covered services shall be those which are medically necessary. This latter requirement does not permit the legal provision and payment of services that, while comporting with the DOL rule for continuity of an employee's schedule, are (as a result of adherence to the rule) inconsistent with or beyond a patient's true medical needs.

- Patient referrals are offered daily to home care agencies and the agencies have only little time – often, mere minutes – to accept or decline the referral. Certified Home Health Agency (CHHA) referrals are for services to begin the same day of the referral or the day after, making it impossible to schedule a shift 14 days in advance. This is the norm for these referrals, and the proposed 2 hours of additional call-in pay will place enormous financial burdens in the form of new wage obligations on all agencies that must routinely make case and personnel scheduling decisions in a far shorter time period than 14 days, and would have catastrophic fiscal consequences to the State Medicaid budget. This enormous cost burden comes at a time when agencies are shouldering an ever-decreasing average operating margin, and when the state is under ever increasing Medicaid fiscal pressure. Indeed, HCA's most recent financial analysis of home care found that 71% of CHHAs are operating in the red.
- Many patients are enrolled in managed care plans and those plans pre-authorize the delivery of services by home care providers. Plans may reduce, increase or otherwise change services without any possibility of meeting the proposed rule's advance notice standard, and resulting in a timely change to the worker's originally assigned schedule. Under the DOL rule proposal, these normal and necessary actions in the home care/hospice/managed care field will trigger a two hour call-in pay penalty.
- The complex task of scheduling hospice care in advance is not practical, as the needs of dying patients and their family supports change constantly, leading to unplanned and

unexpected visits to manage symptoms, decrease anxiety and provide care in what often are the last days of life.

- Providers who participate in the Traumatic Brain Injury program must include a stipulation written on the service plan that the provider is obligated to remain flexible and responsive to the needs of participants as well as ensuring the health and safety of each participant. The DOL proposal is contrary to this flexibility under the waiver program, as providers would be “penalized” under the unscheduled shift provision for simply following this mandatory public health standard.
- Home Health Aides are per-diem shift workers by design. This ruling is not conducive to the way that aides schedule their own time, given that the flux in home care scheduling not only matches the prerogative of patients and their families, but also the expectations of aides. While DOL’s proposal intends to support employees and compensate them for what in other (i.e., non-home care/hospice) settings may be perceived a disruption in shift, many individuals choose to work in home care because the scheduling of their cases is not so rigidly fixed. The rule would make recruitment and retention of home care workers (already an urgent need throughout the state) that much more challenging. NY cannot afford this.
- Aides who work at home are technically available to work for any shift but may accept or reject the case. These circumstances, where an aide is permitted to decline or accept new workloads, are not at all contemplated in the design or intent of DOL’s rule. Such circumstances provide flexibility, options and autonomy for the aide to elect or decline work and, therefore, do not warrant a penalty imposed on the employer. Such penalties would be imposed under the proposed “on-call pay” requirements, whereby employees must receive at least four hours of “call-in pay” if they are required to be “available to report to work for any shift.” Again, this design is contrary to the practice of care at home and the needs of patients, adding new costs and unjustly penalizing providers.
- The proposed rule should also not apply to the Consumer Directed Personal Assistance Program (CDPAP). In CDPAP, the consumer is responsible for the hiring and scheduling of home care workers (personal assistants) and the agency is precluded from handling these tasks.

The Rule’s “Limited Exceptions” Don’t Help Home Care/Hospice

At the same time that this rule and its assumptions are fundamentally at odds with the way home care and hospice must function, many of the exceptions that DOL has proposed to accommodate employers would not apply to home care and hospice; therefore, such exceptions do not provide the kind of relief otherwise extended to other types of employers.

- The “unscheduled shift” exception, in response to an “open request from the employer that is extended to all eligible employees,” would not be applicable to home care or hospice providers, as aides are selected for each case based on the unique needs of each patient and the skills of the individual aide, including language requirements, cultural competence, physical requirements, expertise for particular conditions, etc.
- The “unscheduled shift” exception, where an employee finds another employee to cover his or her shift, would not be applicable to home care or hospice providers as it is contrary to how aides are assigned to patients based on the needs of each patient and the skills of the aide, and how the agency, not the aides, handles all communication and scheduling for patients, given the sensitivity of a patient’s care needs and the role of the provider to manage those unique needs. Also, aides do not have the same type of routine contact with their peers as workers in other “fixed settings” because home care personnel largely work independently and rarely in the same space as their coworkers, thus making it impractical for an employee to arrange coverage and, therefore, exempt the employer from liability.
- The proposal that four hours of call-in pay for reporting to work and for cancelled shifts can be reduced to a lesser number of hours is too restrictive and again does not consider the practice of care delivered at home. It would allow a reduction to the lesser number of hours that the employee “normally works for that shift,” as long “as the employee’s total hours worked, or scheduled to work, for that shift do not change from week to week.” Home care hours, like patients’ needs, are very fluid and constantly changing based on individual patient changes, new patient admissions and patient discharges. In this situation, hours change from week to week. Thus, home care and hospice providers would not fall under this “exception.”
- The exception for employees whose weekly wages exceed 40 times the hourly minimum wage will apply to a small amount of the home care and hospice aide workforce as most of the workforce either works under 40 hours per week by choice, or works more than 40 hours but splits these hours across more than one agency, so no individual agency would ever solely meet the 40-hour threshold for the worker.
- These wage thresholds would apply on a week-to-week basis and could change every week, necessitating additional time on monitoring and recordkeeping.

Contrary to Existing State Policy

The proposed rule would be contrary to and undermine the state's recent reform efforts, including the Delivery System Reform Incentive Payment (DSRIP) program and Value Based Payments, which rely on a flexible, seamless and expeditious direction of resources and case assignment.

These models of care are designed on a risk or prospective basis of payment that rewards the careful and continuous alignment of services to the specific needs of the patient and to the evidenced-based clinical interventions that best meet those needs. The services and care plan must be allowed to be managed and adjusted over an episode of care, as opposed to traditional reimbursement and outcomes.

Cost Implications

Contrary to the state DOL's claim that the rule does not impose any mandatory costs, the rule would impose enormous costs on home care, hospice and managed care plans from the imposed rigidities on services and from the payment "penalties" that would be constantly and unfairly triggered from the natural patterns that require home care and hospice to revolve around the patient and the patient's variable and changing needs.

- Home care and hospice, even more than any other area of health care, do not (and cannot) function on a rigid schedule, like in retail or food service, etc. Home care's scheduling and assignment of staff must match the dynamic needs and circumstances of the patient — for the quality, health and safety of the patient. This leads to new costs that would result from the proposed rule.
- This rule would create an extreme and unreimbursed burden on an agency's scheduling and coordinating staff that would have to institute and monitor new practices to comply with the new rule, but be beset with rigidity that will drive massive inefficiency throughout home care and hospice, and throughout the health system as a whole, especially hospitals.
- The impact on the managed care plans and agencies from this proposed mandate would further extend to the state Medicaid budget and fiscal plan, as the large costs triggered would have to be factored into managed care premiums and home care and hospice rates in order to fund the costs. This is because the state is obligated to provide actuarially sound rates that are adequate to cover costs.

Thank you for the opportunity to provide comments on this proposed rule and for taking into consideration the unique scenarios in home care and hospice service delivery that, we believe,

compel an exemption of home care and hospice services from this rule or the wholesale withdrawal of the rule.

If you have any questions or need more information, please contact me at (518) 810-0662.

A handwritten signature in black ink that reads "Andrew Koski". The signature is written in a cursive style with a large initial 'A'.

Andrew Koski
Vice President
Program Policy and Services