



July 3, 2018

Michael Paglialonga  
NYS Department of Labor  
State Office Campus  
Building 12, room 509  
Albany, NY 12240

RE: I.D. No. LAB-17-18-00005-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 Medicaid and Medicare 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 “Hours Worked, 24-Hour Shifts” rule (I.D. No. LAB-17-18-00005-P).

### **About HCA**

HCA is the primary association representing home care and hospice providers and managed long term care plans in New York State. HCA serves as a central educational and technical resource to its members and as an advocate and public voice for the industry to the New York State Legislature, state and federal regulatory agencies, and New Yorkers whom its members serve. HCA’s mission is to promote and enhance the quality and accessibility of health care and support at home.

HCA’s members provide in-home services, including: nursing; physical, occupational and speech therapies; home health aide supports; and personal care aide supports to people throughout New York State. They also provide care coordination, care transitions, medical management, medication reconciliation and other services that are critical to keeping tens of thousands of New York State residents out of long term care facilities and hospitals and in their own homes.

HCA providers and programs are sponsored by health systems, hospitals, nursing homes, free-standing agencies and health plans employing thousands of home care aides.

### **HCA Strongly Supports the Necessary Codification of DOL Labor Policy for 24-Hour Home Care Cases**

We recognize that the purpose of the July 11 hearing and the proposed “Hours Worked, 24-Hour Shifts” rule (I.D. No. LAB-17-18-00005-P) is to obtain comments on the issue of excluding sleep time and meal periods from compensable hours for “an employee” – not limited to a home care aide – who works a shift of 24 hours or more. HCA’s comments, however, will focus on a

subset of individuals employed by home care and hospice providers, specifically home care aides who work shifts of 24 hours or more.

Home care is a unique occupational and health care delivery area for which longstanding state and federal regulations have been customized to this field and its patient care purposes. These regulations have already long recognized exemptions of meal and sleep times from compensable hours (as DOL is proposing more generally for all employees), given the unique infrastructure design and economics of home-based services, outlined in greater detail later in these comments.

These DOL regulations have become the target of litigation that will upend the state, the service providers, managed care plans, workers and, most importantly, the patients and families dependent upon home care services. The litigation contests long-standing policies, leaving no ability for the state or the delivery system to adapt to the sought-after change, or to absorb the consequences.

In advocating on behalf of home care and hospice services, it is urgent, in the face of this litigation, that the DOL labor policy for live-in cases be codified to avoid system collapse and the ensuing severe consequences to all.

Home care aides are the backbone of the home and community-based care system. HCA continuously advocates at the state, federal and third-party payor levels for support for wage and benefit levels that reflect the actual significance and value of these services for medically needy individuals. As long term patient care is almost exclusively dependent on Medicaid, both the funding and rules for home care service delivery are subordinate to state and federal dictates and payment levels. Therefore, the practice of paying aides for 13 hours on live-in cases (also known as the “13-hour standard,” as defined further later in my comments) is dictated by longstanding DOL and state Department of Health (DOH) rules and methodologies authorizing and paying for these services.

What follows is background on the delivery system for home care services in New York State, directly relevant to the issue of 24-hour compensation, followed by HCA’s main arguments supporting the necessity of DOL’s proposed “Hours Worked, 24-Hour Shifts” rule (I.D. No. LAB-17-18-00005-P).

### **Background on Home Care Services**

Patients who receive care at home are insured by Medicare, Medicaid, commercial insurance and other payors, including private pay, but Medicaid represents the major funding source for services provided by home health and personal care aides. Medicaid pays for home care services, when, among other things, such services are prescribed by a physician, in accordance with the patient’s plan of treatment, and provided by individuals who are qualified to provide such services, and who furnish the services in the recipient’s home or other location.<sup>1</sup>

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<sup>1</sup> N.Y. Social Services Law, section 365-a(2)(e)(i)

New York State Medicaid has adopted regulatory standards for determining when a patient requires “live-in 24-hour personal care services” by one aide or “continuous personal care services” provided by more than one aide.

- Live-in 24-hour personal care services are comprised of care delivered by one personal care aide for a patient who, because of the patient’s medical condition, needs assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding and whose need for assistance is sufficiently infrequent that a live-in 24-hour personal care aide would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide’s eight-hour period of sleep.<sup>2</sup>
- Continuous personal care services are comprised of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patient’s medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour personal care aide would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide’s eight-hour period of sleep.<sup>3</sup>

### **HCA’s Position in Detail**

The following are some more specific reasons, details and assertions for why we support DOL’s action exempting certain sleep and meal times from compensable hours in the delivery of 24-hour/live-in home care aide services.

**The practice of delivering home care has been subordinated and conformed to state and federal policies, including state DOL<sup>4</sup> and DOH<sup>5</sup> guidance and the Fair Labor Standards Act (FLSA).<sup>6</sup> This includes authorization and payment of aides for 13 hours on 24-hour/live-in cases. Changing this policy – especially without a commensurate shift in reimbursement policy, levels and workforce supply – will adversely affect home care providers and patients. Without such changes in reimbursement and workforce supply, this policy must be maintained and codified.**

This policy, known as the “13-hour standard,” has been the state’s methodology for compensating actual and likely work task times while also recognizing non-work periods to be exempt from pay through safeguards requiring 8 hours of total sleep time, 5 being uninterrupted, as well as 3 hours off for meals in order to meet the threshold in which the 13-hour standard may apply.

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<sup>2</sup> 18 NYCRR, section 505.14 (a)(4)

<sup>3</sup> 18 NYCRR, section 505.14 (a)(2)

<sup>4</sup> March 11, 2010 Opinion Letter (<https://labor.ny.gov/legal/counsel/pdf/Other/RO-09-0169%20-%20Live-In%20Companions.pdf>)

<sup>5</sup> MLTC Policy 14.08: Paying for Live-In Care Through Personal Care Services and Consumer Directed Personal Assistance Services ([https://www.health.ny.gov/health\\_care/medicaid/redesign/docs/mltc\\_policy\\_14-08\\_paying\\_for\\_live\\_in\\_cases.pdf](https://www.health.ny.gov/health_care/medicaid/redesign/docs/mltc_policy_14-08_paying_for_live_in_cases.pdf))

<sup>6</sup> Sections 785.19 (Meal Periods) and 785.22 (Duty of 24 hours or more) of 29 C.F.R.

HCA emphasizes that under this standard, aides are not precluded from being paid for more than 13 hours if attending to their patients' needs results in them not getting 8 hours of sleep (of which 5 are uninterrupted) and 3 hours for meals.

For many years, these intensive hour home care services have been structured upon this 13-hour standard, devised by the state to maintain the state's affordability of services and to allow service access necessary to successfully keep people out of hospitals and nursing homes. To meet these state standards and patient need, home care agencies have had to structure a whole set of policies and procedures relating to hiring, wages and benefits, scheduling, supervision and monitoring, to ensure recruitment and retention of a quality, accessible workforce to provide the necessary care.

Deviation from this longstanding and controlling policy on how many hours to compensate aides on 24-hour/live-in cases will trigger major and costly changes to the state and to the operations of home care agencies, and would have to be fully adjusted for in order to avoid collapsing both the overall state Medicaid budget and the delivery of services by home care agencies. Ironically, such a move would also cost many workers their income and/or their jobs.

The continuation of this policy is also necessary to protect patients at home and employers against unfair liability for having adhered to the state's mandated method of live-in aide compensation if the 13-hour standard is retroactively altered.

The existence alone of the litigation contesting the state's live-in payment methodology has already resulted in an adverse impact. HCA's 2018 survey of members<sup>7</sup> found that 10 to 20 percent of agencies said they are unable to serve all or some "24-hour/live-in" services cases due to the legal challenges against the state's policy on compensable hours for live-ins.

Should such litigation prevail, home care providers and New York State will face the consequences of up to six years of retroactive wages, plus associated fees. This means billions of dollars, the collapse of the system, and the collapse of major state policies and federal funds (including \$8 billion plus in Delivery System Reform Incentive Payment/DSRIP program monies) dependent on the viability of home care. Furthermore, aide employment will suffer from the loss of assignments and work opportunities that are enabled from the current flexibility of the state's and agencies' live-in arrangements.

**State Medicaid fee-for-service rates and managed care rates compensate only up to the state mandated methodology, and there is no policy provision or capacity under the statutory state Medicaid Global Cap to pay live-in aides on any other basis than the state's 13-hour method.**

By state mandate, payments that home care providers receive under Medicaid fee-for-service and managed care only cover up to 13 hours of care. There is no state reimbursement provision to pay providers and workers beyond this defined threshold for additional hours on 24-hour/live-in cases.

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<sup>7</sup> "2018 Home Care, Hospice and Managed Long Term Care Financial and Program Trends" (<https://hca-nys.org/wp-content/uploads/2018/02/Financial-Condition-Report-Updated-2-13-18.pdf>)

The Medicaid cap limits total Medicaid spending growth to no greater than the ten-year average rate for the long-term medical component of the Consumer Price Index. The current and future Medicaid spending projections, or the statute or future fiscal year budget obligations, offer no capacity for the state to expand Medicaid spending sufficient to cover the increase associated with any major change to the live-in care policy.

If spending is added, without such commensurate statutory and funding change for the cap, then any costs projected to exceed the cap are required to be removed. Counting on a state Medicaid adjustment to address the costs of changes in the live-in methodology is unrealistic and would leave the industry and the patients imperiled.

As a result, services to such cases would end up substantially curtailed, individuals would face institutionalization in the absence of home care, and other state costs would burgeon as a consequence. In addition, those in hospitals and nursing homes would face difficulties in returning to the community, backlogging the system, compromising care and quality, and further increasing state costs.

The financial and system crisis that portends any potential unfunded, unaccommodated change in the state's live-in policy overshadows what is already a severely unstable health care financing structure for in-home services in the state.

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 HCA,<sup>8</sup> nearly 80% of Certified Home Health Agencies (CHHAs) are expected to report negative operating margins in their 2016 cost reports, with an average CHHA operating margin of minus-13.46%. Also, 40% of all home health agencies in 2016-2017 had to use a line of credit or borrow money to pay for operating expenses.

The major source of Medicaid funding for home care agencies – managed long term care (MLTC) plans – is also struggling financially. Approximately 62% of all MLTC plans had negative premium incomes in 2016. There are no resources in the system to finance a change in the state's live-in policy, and any such change would indeed require massive funding revision.

**Even if the state agreed to reimburse agencies for 24 hours on live-in cases, agencies' practices would have to change and patient care could suffer.**

Even if an agency has a reimbursement level that is sufficient to support payment for 24 hours of care, there would be a significant disruption to patient care.

First, a departure from the 13-hour state standard to a 24-hour payment standard would also trigger new "overtime" obligations, and agencies would have to utilize multiple aides to manage overtime and expenses (which are not calculated into their rates). Moving from a live-in to a 24-hour multiple-shift model would impact the quality of care and continuity for both patients and families.

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<sup>8</sup> "2018 Home Care, Hospice and Managed Long Term Care Financial and Program Trends" (<https://hca-nys.org/wp-content/uploads/2018/02/Financial-Condition-Report-Updated-2-13-18.pdf>)

Moreover, this change would be particularly unsettling for those consumers with dementia or chronic diseases that have a significant need for consistency, familiarity and predictability of vital consequence to their health outcomes. The assignment of multiple staff will also lead to new and unfunded administrative costs for agency supervision of staff, paperwork, scheduling, task oversight and other activities at a time when agencies currently face tremendous financial challenges, as previously outlined.

In addition, agencies would face difficulties in finding enough aides to staff such cases as there is a significant shortage of aides in New York and the entire country. Coupled with high turnover rates of 40 percent or more, the pool of workers is inadequate to meet the need.

Significantly, private-pay patients, most of whom operate without the help of coverage and shoulder long term care expenses out-of-pocket, would also be priced out of affordability if their payment obligations would have to follow the same 24-hour trend. These patients would either be forced onto the Medicaid rolls, or forced into institutions.

HCA appreciates the opportunity to provide comments on this proposed rule and to share some of the factors specific to home care. I am available if you have any questions or need more information and can be reached at (518) 810-0662.

Sincerely,

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