



March 9, 2012

Mary Ziegler
Director
Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 201210

RE: RIN 1235-AA05

Dear Ms. Ziegler:

I write on behalf of the Home Care Association of New York State (HCA) to provide comments on the Department of Labor's (DOL) proposed rule (RIN 1235-AA05) regarding the companionship exemption and the Fair Labor Standards Act.

HCA is deeply concerned about the serious effects of the proposed rule on our agencies' patients, workers, fiscal stability and operations, as will be explained in the ensuing comments. Given the far-reaching problems and adverse implications of this rule, including the absence of corresponding funding adjustments in Medicare and Medicaid payments necessary to achieve the goal of the rule, HCA respectfully requests that the rule be withdrawn.

HCA is a statewide association comprised of nearly 400 health care providers, organizations and individuals involved in the provision of home care services to several hundred thousand individuals annually in New York State. HCA's membership includes Certified Home Health Agencies, Long Term Home Health Care Programs, Licensed Home Care Services Agencies, Managed Long Term Care Plans, and Hospices, which form the core of New York's cost-effective home and community based care system.

Our members provide a comprehensive range of services, including post-hospital skilled care, therapies, nursing care, home infusion, medication management, comprehensive medical and care management and personal care. Some of that care has been considered companionship services, which, in New York State, already must be paid at time-and-a-half of minimum wage for overtime hours.

For New York providers, just as for providers in other states, under the proposed (unfunded) rule change, these services would nevertheless be subject to unaffordable new payment thresholds (as New York providers would have to pay an overtime rate on the basis of the employee's regular wage, not minimum wage). In addition, providers would face onerous new documentation requirements

affecting provider and caregiver alike, and added administrative costs under DOL's proposed change to the companionship exemption.

We preface our comments by noting that HCA has long supported compensation for home care wages at levels that are appropriately funded by payor sources. We also certainly understand the collective effect of wage policy in its entirety on caregivers, patients, service stability, and continuity of care – an understanding that we bring to our comments on DOL's proposed rule, as provided on the following pages.

Justification for the Rule is Based on Inaccuracies and Inconsistencies

DOL's proposed justification for the rule is based on many inaccuracies and inconsistencies which undermine the validity and foundation for the purported change.

First, under the "Need for Rulemaking" section (page 81191), one of DOL's more technical justifications for changing the current companionship exemption is the growing demand for home care and the accompanying increase in the number of certified home health agencies (CHHAs). However, in order to meet the Medicare rules, most of the services provided by CHHAs are skilled in nature and their home health aides generally do not provide companion services. Thus, the trends in CHHA capacity are not a valid indicator of a need for eliminating the companionship exemption.

Next, the rule cites the large growth in the number of home health aides and personal care aides between 1998 and 2008 and suggests that this is a reason why the exemption should be limited. However, there is no data presented on how many of these aides are providing companionship services for which the change in rule would apply, nor evidence of any relationship between the number of aides and the purported need to eliminate the exemption.

Later in the rule, DOL states that increased costs due to new minimum wage and overtime requirements may eventually be reimbursed to agencies (and thus won't be an expense for agencies). This contention does not reflect past practice nor the direction of future changes in the reimbursement system, as state Medicaid programs have been reducing and are eliminating "cost" of care delivery (including wage costs) as a basis for provider reimbursement, and Medicare has frozen or reduced updates to its home health prospective payment system. Also, as pointed out earlier, Medicare does not usually pay for companionship services and thus will not reimburse agencies for such care. This fact needs to be considered in DOL's projections of the average first-year costs of the rule (page 81236).

In New York, Medicaid reimbursement is currently administered on a fee-for-service basis using historic cost-based reporting. The fiscal practicality of this system for providers is predicated on a trend factor adjustment – applied to two-year-old reported cost data – that, in theory, aligns payment to providers with the present-day costs of providing care. However, providers in New York State have not received a trend factor increase since 2009 and are actually experiencing a 2 percent reduction in their rates from 2011 to 2013 as part of across-the-board budget cuts being instituted by the state to erase its budget deficits. In addition, most home care services are being transitioned from fee-for-service to managed care and managed long term care organizations in New York, in which case

providers won't be paid a state-designated rate that incorporates statistically reported costs. In such a setting, where these managed care plans are paid a capitated rate, there is no provision to reimburse home care providers for the increased costs accompanying any change in the companionship exemption.

While well-intended, one of DOL's arguments for requiring that overtime be paid – to ensure that aides receive higher wages for such services – is contradicted in other areas of the written justification. DOL's rule states very clearly (page 81229) that one of the purposes of the Federal Labor Standard Act's overtime pay requirement is to induce employers to hire more people to work *fewer* hours. This contradicts the earlier contention that a change in the rule would result in higher pay, since the unfunded cost of this change will induce a reduction in hours per worker.

Overtime Requirement

Costs

As stated earlier in these comments, for New York State, the impact of this rule change primarily concerns the calculation of overtime payment. Thus, our comments focus on this aspect of DOL's proposal, specifically its cost impact for New York providers which we find is severely underestimated by DOL.

DOL's estimate of the cost of requiring companions to be paid overtime – about \$69.7 million (page 81202) in additional wages – is unrealistically low especially in New York, as these estimates do not include the costs incurred by New York City (NYC). In an amicus brief submitted for the *Coke* case [551 U.S. 158 (2007)], NYC estimated that changing the overtime requirements would cost an additional \$279 million a year for the City alone in providing personal care to 50,000 patients, which represents just a portion of the state's total home care cases.

New York State already mandates that aides be paid minimum wage and overtime, but overtime is required to be paid at time-and-a-half of the minimum wage – not time-and-a-half of the aide's regular wage. While it is difficult to estimate the statewide cost to New York agencies of requiring that overtime be paid on the basis of the aide's regular wage, we have received estimates of the annual cost for individual providers ranging from \$1.5 million to \$9.5 million.

DOL's estimated cost impact on small businesses also does not account for increased costs due to local living wage laws, which require payment to personal care aides at a much higher rate than minimum wage, as well as recently enacted New York state Wage Parity legislation that establishes a higher wage level for all aides in New York City, Long Island and Westchester. This higher wage level would be the basis for calculation of time-and-a-half under DOL's proposed changes to the companionship exemption and, therefore, must be factored into any analysis of cost impact on a state like New York.

A national survey of mostly small businesses, conducted by the National Association for Home Care and Hospice (NAHC) and the National Private Duty Association, further supports our claim that DOL has underestimated the costs of its proposed rule on small (and other size) businesses. This survey found that over 75 percent of all agencies who don't pay overtime reported that paying overtime

wages would result in significant increased costs: a result which surely applies in New York State for employers who would be required to pay overtime based on wages that, in many cases, are already enhanced by local living wage and state Wage Parity laws for thousands of employees.

Work Restrictions

Contrary to the intent of DOL's proposed rule change, more expensive overtime requirements for aides will lead to a **decrease** – not an increase – in aide wages. If agencies have to pay higher overtime rates, particularly with no increase in reimbursement, they will be forced to restrict overtime to affordable levels. Thus, instead of sending one or two workers to a patient's home for live-in cases, providers will have to send multiple workers. Those aides who are now receiving time-and-a-half of minimum wage in New York will face a lost opportunity to receive overtime (and the resultant time-and-a-half rate of payment), with consequences for employees, the scheduling and administrative activity of their employers, and patient access to services. (See the next section on continuity of care.)

This conclusion is supported by many of HCA's members who report that they will have no choice but to institute major restrictions on overtime if they have an unfunded requirement to pay overtime at time-and-a-half of the aide's actual wage. This finding was also reported by 86 percent of the agencies in the NAHC survey who do not currently pay overtime.

Continuity of Care

DOL provides no data or evidence for its contention that continuity of care in home care cases currently is minimal due to high turnover rates and that a change in the companionship exemption will address the issue of staff turnover. Continuity of care is a critical priority in home care service planning and delivery, and is a goal which the proposed rule would in fact work against. HCA and our members assert that the fiscal and scheduling patterns triggered by this new mandate will actually lead to another form of staff turnover that will itself disrupt continuity of care, as patients lose their long-established aides (for live-in and overnight cases) and/or have to adjust to new aides and multiple persons coming into their homes. This will cause confusion and anxiety for patients and will be especially disorienting and stressful for those patients with dementia and other patients who are difficult to serve due to mental and physical impairments.

Agencies that cannot fill such positions with existing staff will have to hire additional staff and will face increased administrative costs, including recruitment, training and orientation, health screenings, criminal history checks, scheduling and increased supervisory hours. The NAHC survey found that about 70 percent of the agencies expect to face increases in human resources and staff training costs due to the overtime pay requirement.

New Record Keeping

The proposed rule would impose new excessive, onerous, confusing and costly reporting requirements, which will compound an already burdensome paperwork mandate in home care, and which further argue against proceeding with this rule.

The proposed rule will require that employers maintain an accurate record of the actual hours worked by live-in workers, instead of allowing the employer to maintain a copy of the agreement of the hours to be worked and to indicate that the employee's work time generally coincides with that agreement. This inflexible new requirement will be very difficult to implement, as some patients wake up frequently overnight and need assistance with different tasks. Under this change, aides will have to keep records that include what time(s) their patients woke up, what they needed help with, what assistance was provided, and how long their assistance was provided – documentation that is both difficult to maintain and altogether burdensome.

In addition, for purposes of this reporting requirement, it is sometimes difficult to distinguish the time an aide spends helping a patient from the time that same aide spends on meeting his or her own needs, especially in cases where these activities may overlap. For instance, an aide may have a meal at the same time that he or she is feeding a patient. Under this new reporting requirement, should the aide claim all of his time as assisting the patient, some of the time or none, and is it reasonable to expect that the reporting requirement guidelines can anticipate all of these circumstances in a manner that permits staff and provider compliance?

This new record keeping requirement is simply one more unfunded mandate that will necessitate additional staff time and resources on top of numerous such mandates that have besieged providers and personnel alike, including the Consumer Assessment of Health Providers and Systems (CAHPS) survey of patients; new paper-chasing activity surrounding the physician face-to-face requirement which, providers report, has required some agencies to hire full-time staff simply to follow-up on documentation requests; provider enrollment in the Provider Enrollment, Chain and Ownership System (PECOS); advance beneficiary notices; monthly checking of multiple provider exclusion lists; Third Party Liability; and others.

In summary, DOL's rationale for changing the exemption rule is based on misconceptions about the home care industry – especially inaccurate assumptions about the effects of the rule on workers and on patient care – as well as inconsistent and unsubstantiated arguments, and unreliable cost implications data. The proposed change will result in unsustainable costs to home care agencies for cases where overtime cannot be avoided, decreased pay for aides with reduced overtime assignments, and diminished continuity of care for patients who need live-in workers.

We appreciate your consideration of our concerns and respectfully urge DOL to withdraw this misguided and very harmful rule change.

Sincerely,



Andrew Koski
Vice President for Program Policy and Services