PHI Quality Care THROUGH Quality Jobs

FIVE STEPS

TO IMPLEMENTING THE NEW FEDERAL HOME CARE RULE

In October 2013, the U.S. Department of Labor published a revised rule extending the Fair Labor Standard Act's federal wage and hour protections to home care aides nationwide. Following extensive litigation that ultimately reaffirmed the validity of the rule, these protections go into effect in October 2015. The rule will impact nearly 300,000 home health and personal care aides across New York—and as many as 2 million nationwide—providing them with guaranteed federal labor protections such as the right to the federal minimum wage, time-and-a-half for overtime, and payment for time spent traveling between clients (see sidebar on page 4, Changes to the "Companionship Exemption").

In this policy brief, PHI lays out the key considerations for New York state policymakers to implement the new rule effectively, with an emphasis on the importance of stronger workforce data. Home care workers should be paid full and fair wages in a timely manner, and individuals who obtain support from home care programs should continue to receive high-quality services and supports without disruption. In the long term, effective implementation will result in greater workforce stability and improved services for elders and people living with disabilities. Here are five steps to begin making this a reality.

PHI | Paraprofessional Healthcare Institute | 400 East Fordham Road, 11th Floor | Bronx, NY 10458 | 718-402-7766 | phinational.org

1. COLLECT CURRENT WORKFORCE DATA IN ORDER TO ACCURATELY BUDGET FOR NEW COSTS

Across the country, states have asserted they do not have the workforce data necessary to assess the costs associated with the new home care rule. New York is no exception. To accurately pay for additional costs—which will include costs associated with overtime hours, as well as travel time—the state must implement new data reporting requirements for managed-care plans,[1] Licensed Home Care Services Agencies (referred to as "licensed agencies"), and the fiscal intermediaries that manage payroll for participants in New York's Consumer Directed Personal Assistance Services program (referred to as the "consumer-directed" program).

Data that should be reported to the state includes: number of aides employed in each agency, disaggregated by part-time and full-time employees; the total number of hours worked; the number of overtime hours worked; the number of clients served and the approved number of hours in their care plans; and time spent traveling between clients (see sidebar, Assessing Workforce Capacity and Controlling Overtime Costs). Once this data is collected and analyzed to determine if there is sufficient workforce capacity to reduce overtime hours, the state should implement a transition payment plan (see Step 2) that ensures service continuity while managed-care plans and their contractors adjust to the new rule.

The cost implications of the home care rule for licensed agencies and the consumer-directed program are detailed below.[2]

LICENSED HOME CARE SERVICES AGENCIES

For New York's licensed agencies, new costs will be associated with additional compensation for overtime as well as compensation for the travel time between clients.

Under state law, New York's licensed agencies have paid time-and-a-half on the state minimum wage ($8.75 per hour) for overtime hours. The new federal rule will increase overtime costs by approximately $2 per hour, since overtime must now be paid on the employee's base wage (about $10 per hour).

Agencies already manage the complex scheduling of home care aides to minimize overtime hours; nonetheless, some degree of overtime is inevitable in the delivery of home care services. An aide might need to accompany a client to the hospital and wait for a family member to arrive; or an aide might accumulate overtime while waiting for her replacement. In some cases, particularly for adults living with disabilities, a consumer's quality of life requires one aide to work more than 40 hours.

New overtime costs might also be associated with live-in aides, or those who sleep in on 24-hour shifts. The new FLSA rule no longer allows third-party employers of live-in aides to take the overtime exemption (see sidebar on page 4, Changes to the "Companionship Exemption"). However, under the federal rule, licensed agencies employing live-in aides, or assigning aides to 24-hour shifts, may exclude time set aside for eating (3 hours) and sleeping (8 hours) from compensable hours—common practice in New York (for more information on rules related to live-in care, refer to the U.S. Department of Labor Fact Sheet #79D).[3]

In some situations, this rule might eventually be superseded by recent New York court rulings[4] that, if upheld on appeal, would require licensed agencies to pay for the entirety of a 24-hour shift in instances where the worker maintains a separate residence for nights she is not with her client. This interpretation of the law could substantially increase overtime costs, despite efforts to spread work over more workers.

In response to pressure from managed-care plans, licensed agencies are already changing their scheduling practices, but the struggle to recruit workers to take additional shifts, particularly on nights and weekends, makes it virtually impossible to eliminate all 24-hour shifts. Moreover, any

WHAT TO DO

ASSESSING WORKFORCE CAPACITY AND CONTROLLING OVERTIME COSTS

- Require managed-care plans and their contractors, local departments of social services, and the Conflict Free Enrollment and Evaluation Center to identify all cases requiring more than 40 hours a week. Additionally, they should record the number of aides for each case and the total number of hours worked per aide.
- Establish a reporting mechanism for consumer-directed cases that exceed 40 hours per week yet have not successfully recruited additional personal assistance. It should not be assumed that family members can take on these roles.
- Create incentives for managed-care plans to work with their contractors to identify aides who can take on more hours, so as to spread hours more evenly across the workforce.
- Work with managed-care plans to report travel time for aides in both rural and urban areas.
- Evaluate the home care supply throughout upstate New York, including the number of potential aides and the compensation offered in competitive sectors. For the consumer-directed program, determine the impact of wages on the length of time it takes consumers to recruit additional assistants.
- Review the availability of training programs for home care aides and modify any requirements that impede workforce growth.[6] To fill worker shortages, the state needs additional training capacity and a mechanism for covering the associated costs.
- By region, identify and address other challenges to home care employment such as transportation, day care, and access to public benefits.

change in how 24-hour assistance is handled needs to be done carefully so as not to disrupt long-time relationships between consumers and their aides.

In addition to added overtime costs, licensed agencies are required under the new rule to pay for the time aides spend traveling between clients, a common occurrence given that most home care clients receive only a few hours of assistance per day.[5] Managing travel time adds another layer to the complexities of scheduling. Finding an available worker in certain geographic areas might not be possible when a scheduled aide calls out at the last minute, or when a licensed agency has multiple managed-care contracts and must fill cases as they are received. In upstate New York, long distances between clients combine with staff shortages to increase travel time, which could spill over into overtime hours.

Agencies will need accurate reporting systems to ensure aides receive full compensation for all work hours, including required in-service trainings and competency testing, which along with travel time, could result in overtime hours.

CONSUMER-DIRECTED PERSONAL ASSISTANCE SERVICES (CDPAS) PROGRAM

Approximately 16,000 New York residents receiving Medicaid-funded home and community-based services are enrolled in the consumer-directed program, which allows participants to hire their own aides, known as “personal assistants.” While home health aides and personal care aides hired by agencies must complete a training program and pass a criminal background check, personal assistants

CHANGES TO THE "COMPANIONSHIP EXEMPTION"

The new home care rule significantly narrows the "companionship exemption," which excluded nearly all home care aides from the basic protections of the Fair Labor Standards Act (FLSA) for more than 40 years. The new rule made several important changes to this federal labor law:

- Third-party employers, such as home care agencies or state programs, can no longer claim the exemption from FLSA, regardless of the type of assistance their employees provide. Only individual consumers or their surrogates can claim the exemption.
- "Companionship services" have been narrowly defined to include only "fellowship and protection" for people who due to age, illness, or disability require assistance in caring for themselves. Under the revised rule, a qualified employer may claim the exemption only if "care" (such as dressing, bathing, and preparing meals) is provided in conjunction with "fellowship and protection" and the care does not exceed 20 percent of the total hours worked in a week. In practice, this definition excludes almost all professional home care aides.
- "Live-in" workers employed by third-party employers are no longer exempt from overtime rules, though individuals or families who hire these workers directly may claim the overtime exemption. In New York, however, the state Domestic Workers Bill of Rights requires individuals and families who hire live-in "companion" workers to pay time-and-a-half compensation for all hours worked above 44 in a single week.[10]

For more detail on the specific requirements of home care rule, visit the U.S. Department of Labor at **www.dol.gov/whd/homecare.**

have no such requirements.[7] Consumers may hire whomever they choose, including family members (other than a spouse or parent) to provide services. As a result, across the state, the program is growing more rapidly than agency-provided services.

Notably, the new home care rule could have a significant impact on this growing program. Previously, a personal assistant accumulated overtime only if she or he worked for an individual consumer more than 40 hours per week. Under the new FLSA rule, the state Medicaid program and the fiscal intermediaries are "joint employers."[8] This means that personal assistants who provide support to multiple self-directing consumers must be paid for time spent traveling between clients, and for overtime, if their cumulative weekly hours exceed 40 hours per week. These are new costs to the Medicaid program, and while the state surveyed fiscal intermediaries to determine new costs related to the FLSA change—and provided "bridge" funding—more current data is needed.[9]

The state is encouraging fiscal intermediaries to collaborate with consumers on efficiently managing workers to control instances of overtime. However, a new layer complicates this goal: a personal assistant could support two or more clients using different fiscal intermediaries. To manage hours at this level, the state Medicaid program will need to devise a system that tracks each personal assistant's work hours across the entire consumer-directed program. There will also need to be a payment method when no single fiscal intermediary has responsibility for the worker's total hours.

2. Budget for Costs Associated with the New Home Care Rule and Ensure Timely Payment

With accurate data, the state's Medicaid program should be able to project the fiscal impact of the new home care rule. However, the payment process in a managed-care system is cumbersome and often results in payment delays that can compromise service. Currently, the state pays its managed-care plans on a per-member, per-month basis, and the plan negotiates a rate with subcontracted providers. Each plan, agency, and fiscal intermediary will need to undertake an internal review of their specific costs and current rates in order to determine the impact of the new rule. Those with sufficient workforce capacity will likely be able to spread work among more workers to avoid instances of overtime, but in many areas of the state, this might not be possible.

Making a rate adjustment is a lengthy process that requires the involvement of CMS and the state's actuary; a better alternative would be to immediately designate a pool of money for agency-employed and consumer-directed workers to be readily available during a transitional period. During this period the plans and providers could jointly address case assignment and scheduling changes that would limit cost increases. They could also partner to estimate the ongoing costs associated with new payment requirements and limited workforce capacity (see Step 5). The state should immediately begin analyzing all relevant data to determine the rate adjustment necessary to attract sufficient numbers of workers and cover continually rising labor costs.

For the consumer-directed program, rising costs in Worker's Compensation and the unemployment tax have already strained the budgets of fiscal intermediaries, requiring the state to assess the adequacy of their rates. The additional costs associated with the home care rule creates new urgency. A new payment mechanism is needed to cover travel and overtime costs resulting from personal assistants supporting multiple clients. The Centers for Medicare and Medicaid Services (CMS) has issued guidance for state Medicaid programs on how to cover these costs without compromising approved hours or tapping into individual consumer budgets.[11]

Regardless of the funding mechanism the state ultimately employs, timely payment to licensed agencies and fiscal intermediaries is essential. Licensed agencies already face tight budgets, and those in New York City have yet to receive full reimbursement to cover the costs of wage parity. Since agencies are required through their contracts to comply with wage and hour laws, failure to issue timely payments for overtime and travel costs could lead to agency closures, loss of employment, and disruptions in services and supports.

3. Protect Elders and People Living with Disabilities by Ensuring Flexibility in Meeting High-Hour Needs

To meet the support needs of all individuals who qualify for services, without compromising quality, the state needs to ensure sufficient flexibility in making determinations regarding overtime hours. In addition to situations when aides must remain with their clients longer than anticipated, it is often difficult to fill night and weekend shifts. Furthermore, a care plan might call for more than 40 hours, and one aide may be the preferred option—for example, when a person is living with dementia or has a complex condition that requires aides to have specialized knowledge and skills.

In the consumer-directed program, a participant needing a few overtime hours might struggle to recruit another personal assistant. A policy allowing for flexibility will ensure that New York remains in compliance with the Americans with Disabilities Act and the Supreme Court's decision in the case *Olmstead v. L.C.*, which requires appropriate accommodations for people with disabilities to live full and meaningful lives in their communities of choice.

public education approaches to spread the word. Here, the proposed office might implement a public campaign ensuring home care aides and personal assistants understand the changes to wage and hour laws. This campaign could also help recruit new home care workers who might not have considered a home care career.

4. Create a Home Care Worker Ombudsman Position to Inform Workers of Their New Rights and Ensure Appropriate Compliance

The U.S. Department of Labor has indicated they will begin fully enforcing the new home care rule in January 2016. We believe that effective implementation requires active collaboration between the state Department of Health, which oversees Medicaid-funded home care services, and the state Department of Labor, which is responsible for enforcing wage and hour rules.

Notably, neither the New York State Department of Health nor the Department of Labor has sufficient surveillance staff to enforce individual violations of labor law. Therefore, we propose that these state agencies—and others (e.g., Office for People with Developmental Disabilities, Office of Mental Health, Office of Alcoholism and Substance Abuse Services) as more populations are enrolled in managed-care plans—work together to create a Home Care Worker ombudsman position, an oversight role that mirrors the consumer ombudsman program[12] but focuses on protecting workers. New York's exceedingly complex home care system could benefit from an official entity responsible for monitoring the system, reviewing complaints, and answering questions regarding the rights of home care workers, or in nonunion cases, mediating disputes.

For starters, this proposed Home Care Worker Ombudsman's office could inform workers of their rights under the new rule, relying on an array of

5. Commission a Labor Market Analysis to Examine the Interplay of Workforce Policies Across Low-Wage Sectors

While extending FLSA's wage and hour protections to home care aides represents a significant change for the labor market, this shift is not happening in isolation. The impact must be understood in the context of a changing labor market where the minimum wage continually rises and labor competition from other industries might severely diminish the available pool of home health aides and personal assistants. The new rule shines a light on the need for in-depth analysis of various workforce policies impacting low-wage sectors, as well as the workforce available to meet the state's home care needs, both upstate and in the metropolitan New York City area.

The need for a broader labor market analysis, and greater collaboration between the state labor and health departments, is highlighted by the recent Wage Board decision to increase the minimum wage for fast food workers. Fast food workers are on track to earn $15 per hour by January 2019 in New York City, and statewide by 2021, while home care aides, charged with supporting the complex health and living needs of elders and people living with disabilities, have yet to receive the same consideration. As fast-food wages steadily rise, home care agencies and consumers will increasingly struggle to attract sufficient numbers of home care aides to meet the state's growing demand for services.

Closer collaboration between the state's health and labor departments in understanding labor market dynamics could also help mitigate regional workforce capacity issues. For example, to contain the cost of overtime, high-hour cases must be spread across several workers, a serious challenge in upstate New York, which deals with significant workforce shortages. Understanding how the region's demographic changes impact the availability of labor as well as the ability of the state Medicaid program to ensure adequate services under its cap is crucial to formulating appropriate state policies for the region's aging population.

SOURCES

1. New York has completed the transition to managed care for Medicaid-funded long-term services and supports.

2. Despite our effort to simplify by analyzing separately the impact of the home care rule on agency-delivered services and consumer-directed services, the reality is that these programs have a dynamic relationship that is affected by the labor market. For example, individuals who need home care in the upstate region often must use the consumer-directed program because it allows them to hire a family member when no other workers are available.

3. U.S. Department of Labor (September 2013). Fact Sheet # 79D: Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act (FLSA). Available at: http://www.dol.gov/whd/regs/compliance/whdfs79d.htm.

4. Andryeyeva v. New York Health Care d.b.a New York Home Attendant Agency, Decision and Order February 19, 2013 and Opinion September 16, 2014, 2014 WL 4650233 (N.Y. Sup. Ct. 9/16/2014); Moreno v. Future Care, 2015 WL 1969753*4, 43 Misc. 3d. 1202 (N.Y. Sup. Ct. Kings Cnty. May 4, 2015)

5. According to the U.S. Department of Labor, travel time from home to the first client of the day, as well as returning home from the last client of the day, is not considered compensable. See http://www.dol.gov/whd/homecare/travel_time.htm.

6. For example, potential workers upstate prefer to take the home health aide training course at night and on weekends, while continuing to work part-time. But the Department of Health requires the program to be completed in 60 days. Trainees often do not complete the program and receive their certification. See Preparing New York's Home Care Aides for the 21st Century (PHI, 2010). Available at http://phinational.org/sites/phinational.org/files/clearinghouse/PHI-483%20NY%20Training.pdf.

7. For more information on training requirements, visit http://phinational.org/sites/phinational.org/files/clearinghouse/PHI-483%20NY%20Training.pdf.

8. U.S. Department of Labor (June 2014). Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA). Available at http://www.dol.gov/whd/regs/compliance/whdfs79e.htm.

9. The state has created a pool to temporarily assist fiscal intermediaries. Fiscal intermediaries apply for the money and must report the number of workers who worked more than 40 hours per week over a 2-month period, as well as the weighted hourly rate using rates paid by plans. Available at https://www.health.ny.gov/health_care/medicaid/redesign/cdpas_flsa_qa.htm.

10. The New York Domestic Bill of Rights was passed in 2010. To learn more about the protections it provides, visit http://www.labor.ny.gov/legal/laws/pdf/domestic-workers/facts-for-domestic-workers.pdf.

11. U.S. Department of Health and Human Services (July 3, 2014). CMCS Informational Bulletin, "Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes." Available at http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf.

12. The Independent Consumer Advocacy Network (ICAN) is a state ombudsman program for people with Medicaid who need long-term care services. At: http://www.cssny.org/programs/entry/independent-consumer-advocacy-network-ican.

PHI works to transform eldercare and disability services. We foster dignity, respect, and independence for – all who receive care, and all who provide it. The nation's leading authority on the direct-care workforce, PHI promotes quality direct-care jobs as the foundation for quality care. For more information on the New York direct-care workforce and implementation of the home care rule, contact PHI Director of New York Policy Carol Rodat at crodat@phinational.org.

PHI Quality Care THROUGH Quality Jobs

400 East Fordham Road, 11th Floor
Bronx, NY 10458

P: 718.402.7766
F: 718.585.6852
E: info@PHInational.org

www.PHInational.org