

Upgrading Home Attendants to Home Health Aides: Is Training Time Compensable?

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New York's Medicaid Redesign

is intended to reshape the state's entire health delivery system, including home- and community-based services for elders and people with disabilities. The state's new model will move dramatically away from fee-for-service reimbursement toward a more efficient and effective "capitated" payment system—one in which a managed-care insurance plan receives a monthly pre-payment to pay for all of an individual's covered health and social services.

PHI Medicaid Redesign WATCH is a three-year project to record, analyze, report—and intervene to mitigate dislocation of consumers and workers—as New York fundamentally transforms its Medicaid-funded long-term services and supports.

The Employer Advisory series is intended to assist employers in understanding their obligations in the new environment, and to ensure the least disruption for workers and consumers.

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Additional partners in this project include Wider Opportunities for Women (WOW) and the National Employment Law Project (NELP). The brief was prepared by NELP attorney Sarah Leberstein.



New York's redesign of its Medicaid programs requires that tens of thousands of beneficiaries in need of long-term services and supports join managed-care and managed long-term care plans. These managed-care plans will receive capitated payments¹ from the state to coordinate services for their members, with the ultimate goal to improve care and reduce costs. The first group of beneficiaries required to make this transition were those who previously received services through the New York City Personal Care Services Program.

In the downstate area, the Personal Care Services Program is the oldest and largest long-term services and supports program.² It has long been recognized for low turnover rates among the program's 75,000 home attendants (also known as "personal care aides"), who were among the first public home care workers to be unionized. The program's workforce has long enjoyed steady hours as well as wages

at least \$2 higher than those of home health aides who deliver similar services through other programs.³ Critical to the wage differentiation is not only that the workforce is unionized, but that the home attendants are covered by New York City's living wage law.

In anticipation of thousands of Personal Care Services Program participants transitioning to managed-care plans, the New York State budget for fiscal year 2011–2012 included a “continuity of care” provision. The intention of this provision was to give participants the opportunity to continue their relationship with their aide, even as another entity took over managing their services. The provision was also intended to limit disruption for the home attendants, who were at risk of losing their jobs.

Greater Demand for Home Health Aides

For many program participants, this transition has been relatively smooth, and they have been able to continue to rely on the same home attendants for personal care services. But other changes in health care policy are pushing managed-care plans toward relying more heavily on home health aides. Without a concerted effort to ensure that home attendants are trained up to become home health aides, this trend could result in two unintended outcomes: home attendants without sufficient work hours to earn a living and a shortage of home health aides.

The reason that managed-care plans are relying more heavily on home health aides to deliver personal care services is that the plans are responsible for coordinating both *health care* and *personal care services*. Many of their members are “dually eligible,” meaning some health care services are paid for by Medicare and others by Medicaid. The Medicare home health benefit requires that home health aides be used when aide service is included in the plan of care.⁴ If personal care services are also required, it is easiest for the managed-care plans to have the home health aides provide those services as well.

This trend accelerated when New York State received approval from the federal government to run a demonstration program downstate to enroll “duals” in one single plan to cover all needed health and personal care services—acute, primary, post-acute health care, and long-term services and supports. In

anticipation of the start of the demonstration, most of the managed-care plans began assigning home health aides rather than home attendants to dually eligible clients.⁵ This practice is simply more efficient, since the home health aides can provide both medically related support services (such as checking blood pressure) essential to care management and personal care services.⁶

Recognizing the trend toward replacing home attendants with home health aides, in 2013, 1199SEIU used funds from its Training and Education Fund (TEF) to assist home attendants in acquiring the additional training needed to become home health aides. As of 2014, approximately 8,500 downstate home attendants (13 percent of the workers) have received their home health aide certificates, not only helping the workers but also alleviating a potential shortage of home health aides.⁷

In addition to the union's efforts, some employers who operate licensed home health aide training programs have provided home attendants with the 35 additional hours of training needed for a home health aide certificate. Nonetheless, to meet the growing demand for home health aides under managed care, these efforts are insufficient. Additional training is needed for tens of thousands of home attendants who provide personal care services but who are in danger of being pushed out of the field because they do not have certification as home health aides.

Is Upgrade Training Compensable Time?

With so many home attendants in need of additional training, questions arise as to how to pay for it. For example, are home attendants responsible for upgrading their own credentials on their own time? Or is it the responsibility of the employer to upgrade employees? This advisory does not take on all of these questions⁸ but focuses on one that is often difficult for employers to assess: does time spent in such training count as compensable work hours?

The answer to this question depends on the circumstances of the training. It is the responsibility of the employer to assess whether a particular training falls within the scope of compensable work time as defined by New York Labor Law.⁹

Factors for Determining Compensable Time

Both the U.S. Department of Labor (U.S. DOL) and the New York State Department of Labor (NY DOL) have set forth factors they deem relevant to this determination. Generally speaking, if the training primarily benefits the employer, it is compensable as work time, whereas training that primarily benefits the employee is not compensable by the employer.

State Test: For example, NY DOL has issued two opinion letters concluding that a state-mandated training that allows a worker to obtain or maintain a state certification that could be used for any job with any employer is primarily for the benefit of the worker and, therefore, not compensable.¹⁰ In these same letters, NY DOL has explained that if agencies require their home attendants to attend upgrade training for another purpose—for example, to satisfy state licensure requirements—the training time would more likely be treated as compensable by the employer. The courts, however, might rule more broadly on this issue in favor of requiring employers to pay, because the NY DOL opinion letters do not have a full analysis of the specific factors in the NY delineated test.

According to NY DOL's 2010 opinion letter, a training course or class attended by an employee will most likely *not* be considered for the benefit of the employer if the following four factors are present:

1. The training or class is outside of the employee's working hours;
2. Attendance is voluntary;
3. The training or class is not directly related to the employee's job duties; and,
4. The employee does not perform any productive work for the employer during the training or class.

In its opinion letter, NY DOL goes on to explain that the factors listed above are not the only factors to consider in deciding whether an employer is obligated to pay workers for time spent in training, but they offer insight into what types of circumstances would require an employer to compensate employees for training hours.¹¹

The NY test is derived from federal wage and hour regulations, which refer to almost identical factors in

assessing employer responsibility for paying for time spent in training.¹²

Federal Test: In elaborating the meaning of "voluntary," the federal regulations instruct that training attendance is not voluntary if the "employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance."¹³ A U.S. DOL fact sheet concerning workers in the health care industry further explains that, even if training is considered voluntary in name, if supervisors expect employees to attend such training, it is not truly voluntary and should be time compensated by the employer.¹⁴

The determination as to whether a training upgrade is compensable time will therefore depend on the circumstances of the particular training, using the four factors listed above and any other relevant considerations that could help determine whether the training primarily benefits the employer or employee.

Legal Opinions Relevant to Home Health Aide Upgrade Training

Federal and state rules and guidance related to training for child care workers and aides for developmentally delayed adults similarly address whether a state-mandated training fulfills the New York and federal tests. These opinions are especially relevant to our analysis of home health aide upgrading trainings.

Child Care Workers. Opinion letters by the U.S. DOL and NY DOL evaluate whether an employer must compensate child care employees for time spent in training required by state regulation, focusing on the distinction between training required for the individual worker as opposed to training required for the employer. The U.S. DOL letter explains:

[W]here a State *requires individuals* to take training as a condition of employment with any employer in the child care field—e.g., continuing education required of an individual to be licensed to practice the profession—attendance at such training would be voluntary and this criterion met, provided the employer does not impose additional requirements on the employee, such as taking a particular course(s).

[H]owever, where a State *requires employers* to provide training as a condition of the employer's license to remain open for business—e.g., a day care center operator's license is conditional on all employees receiving a fixed number of hours of child care training each year, that would be compensable. As the operator would typically require employees to attend such training, it would not be voluntary, and the employer would have to pay.¹⁵

The training referred to in the second paragraph is similar to in-service training required for New York's home care aides, time for which aides must be compensated even if the training is attended after work hours.

The opinion letter continues, however, stating that even if a training is directly related to an employee's job (factor 3 in the 4-part test above), it need not be counted as hours worked where:

- It is secured at an independent school, college or independent trade school that employees attend on their own initiative; or,
- It is established by the employer for the benefit of employees and corresponds to courses offered by independent bona fide institutions of learning.

The letter goes on to explain that “[a]s a practical matter in the child care industry, we would regard child care training to be for the benefit of the employees when it provides instruction of general applicability which enables an individual to gain or continue employment with any employer which provides child care services.” Seemingly, even where a training does not satisfy the four-part test (for example, it is directly related to the employee's job), the employer may not be responsible for compensating the employee for the time spent in training, if the worker could use the training to get a job with any employer in the field.

Similarly, the NY DOL's letter states that if an employee attends a state-mandated training in order to maintain a state certification as a child care worker, the training is for the benefit of the employee and not compensable because the employee could use the training and certification to obtain employment with another employer in the field.¹⁶ According to these letters, the “transferability” of the training seems to be an important consideration.

Caregivers in Residential Program for Developmentally Disabled Adults. Federal case law offers some insight into how a court might assess state-mandated trainings outside the child care field, and in a context closer to home care. A 2009 case, *Fowler v. Incor*, is particularly helpful because it evaluated a training requirement for the staff of a residential program for developmentally disabled adults, which the program imposed on its employees in order to meet a state-training mandate.¹⁷

The court in *Fowler* looked at several factors, noting that training was sometimes scheduled during an employee's regular working hours, but explaining that even if some of the training was during employees' regular working hours this would not mean that the entire training time was compensable. More importantly, it found that the training was not voluntary under the federal law¹⁸ because the employer instructed employees that they would be taken off the work schedule or fired for missing the training.

The court, however, also considered the employer's argument that the training was voluntary because it was the state of Oklahoma that required the training, not the employer. The evidence showed that the state required training for the agency's employees; that the employer required no training beyond that required by the state; and, under its contract with the state, if the employer did not use properly trained people, it was subject to loss of its state contract. In this particular situation, the court found that the training attendance was not voluntary because, although “strictly speaking ... the State did not require [the employer] to *provide* training ... [the employer] was effectively forced to do so and thus the training attendance was not voluntary.”¹⁹

Application to Home Health Aide Upgrade Training

The overriding question, then, regarding whether an upgrade training is compensable time, concerns whether the training is attended “voluntarily” to benefit the worker in his or her career, or an “involuntary” requirement that primarily benefits the employer. Since, in many instances, a case can be made that training will benefit both the worker and employer, other factors (the four-part test) may also need to be considered in making a determination.

A New York City home care agency that compels its home attendants to attend an upgrade training would most likely be responsible for compensating the employee for the training hours. This would likely be true regardless of whether the agency made this decision voluntarily for business reasons or the state required home care agencies to upgrade all home attendants to home health aides in order to upgrade the profession. For the worker, both of these situations require “involuntary” training as a condition of employment.

Training might be considered “voluntary” and not compensable by the employer under slightly different scenarios (for example, if the employer did not require the training but explained to its home attendants that the increased demand for home health aides could provide more opportunities for them and informed the workers of training opportunities held by an outside institution²⁰ during non-work hours).

An Employer Checklist

As the above analysis makes clear, many factors bear on the final determination concerning whether an employer is responsible for compensating employees for upgrade training hours. To make an initial determination, review the following checklist. If the following facts are true, then the employer is likely responsible for compensating home attendants for the time spent in training.

- The home health aide training is tailored specifically for the goals of the employer’s agency, including its need for more trained home health aides;
- The home health aide training is held during the home attendant’s regularly scheduled shift(s);
- The home health aide training is explicitly or implicitly required by the employer for the home attendant to remain employed with her agency;
- The home attendant’s standing with the agency or opportunities for work with the agency will be adversely affected if she does not attend the home health aide training;
- The employer has directed the home attendant to attend a certain home health aide training without choice of other program options; or,
- The training is not a state-mandated requirement for the home attendant.

To conclude, the less choice that a home attendant has regarding the decision to attend a home health aide upgrade training and the more employer-specific the training is, the more likely it is that the employer should compensate the aide for time spent in training. However, if the upgrade training is required by the government rather than the employer, and is part of a regular licensing or upgrading system that employees choose to attend, then the employer will most likely not be required to compensate the aide for the upgrading.

Endnotes

- 1 Under a capitated system, managed-care plans receive a set monthly payment for each beneficiary rather than payment for each service provided.
- 2 As of 2011, almost 25% of Medicaid spending in NYS, or \$10.9 billion, was for long-term care. Of this, 21% was for personal care, which accounted for \$3.572 billion in expenditures statewide.
- 3 Michael S. Sparer, *Medicaid and the Limits of State Health Reform* (Philadelphia, Temple University Press, 1996).
- 4 The Medicare home health benefit does not pay for personal care. Medicare home care is short term and intermittent.
- 5 New York’s demonstration for the “dually eligible” will create Fully Integrated Duals Advantage (FIDA) plans. CMS limited New York to no more than 25 plans.
- 6 Health-related tasks include taking a client’s temperature, pulse, and blood pressure as well as dry dressing changes and range of motion exercises when part of the care plan. On January 24, 2014, the NYS Department of Health issued a new policy requiring plans to use agencies that meet the Medicare Conditions of Participation (e.g., Certified Home Health Care Agencies, Long Term Home Health Care Programs) when serving a client needing skilled care in the home. This change will also lead to greater use of home health aides.
- 7 TEF referred their workers to selected proprietary schools in the City and covered most of the costs.
- 8 For a broader discussion of training costs and reimbursement issues, see “Wage Parity for Home Care Aides,” PHI Medicaid Redesign Watch Brief #1. PHI February 2014.

- 9 New York Labor Law § 652.
- 10 Counsel Opinion Letter, N.Y. Dep't of Labor, RO-09-0184 "Training Pay" [April 29, 2010]; and Counsel Opinion Letter, N.Y. Dep't of Labor, RO-08-0020 "Employee Training" [August 27, 2008], available at <http://labor.ny.gov/legal/counsel/pdf/Training%20Pay/RO-08-0020.pdf>
- 11 Counsel Opinion Letter, NY Department of Labor, RO-09-0184 "Training Pay" [April 29, 2010].
- 12 The federal regulations state: "Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met: (a) The employee's attendance was outside of their normal working hours; (b) the attendance is in fact voluntary; (c) the training is not directly related to the employee's job; and (d) the employee does not perform any productive work during the time spent in training." 29 C.F.R. § 785.27 [2012] [Electronic Code of Federal Regulations].
- 13 29 C.F.R. § 785.28. See also U.S. Department of Labor, Wage and Hour Division, Field Operations Handbook 31(b)(17)[2000], available at http://www.dol.gov/whd/FOH/FOH_Ch31.pdf.
- 14 U.S. Department of Labor, Wage and Hour Division, Fact Sheet No. 53, "The Health Care Industry and Hours Worked Under the Fair Labor Standards Act" [2012].
- 15 Wage & Hour Division, U.S. DOL, Opinion Letter Fair Labor Standards Act, September 9, 1996, 1996 WL 1031798.
- 16 Counsel Opinion Letter, NY Department of Labor, RO-08-0020 "Employee Training" [August 27, 2008], available at: <http://labor.ny.gov/legal/counsel/pdf/Training%20Pay/RO-08-0020.pdf>
- 17 2009 WL 366342 (E.D. Okla. 2009)
- 18 "Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance." 29 C.F.R. § 785.28.
- 19 Fowler, note 16 above, at *7.
- 20 There are three programs within the CUNY system approved for upgrading: LaGuardia Community College, and two campuses of Lehman College, Bronx and Brooklyn. However, all are taught in English, and approval does not guarantee that the course is being offered at a given time. There are 24 proprietary schools approved to offer upgrading of a personal care aide to home health aide, and 3 that transition certified nursing assistants to home health aides.

For questions related to employer responsibility, please contact PHI at 718.402.7226.

For questions related to worker's rights, contact NELP at 212.285.3025 ext. 313.

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