STATE OF NEW YORK
COURT OF APPEALS

LILYA ANDRYEYEVA and MARINA ODRUS, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-against-

NEW YORK HEALTH CARE, INC. d/b/a NEW YORK HOME ATTENDANT AGENCY, and MURRAY ENGLARD,

Defendants-Appellants.

BRIEF OF HOME CARE ASSOCIATION OF NEW YORK STATE, INC. AND LEADINGAGE NEW YORK, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

No. APL-2018-00038
App. Div. Docket No. 2014-09087
Kings County Index No. 14309/11

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DISCLOSURE STATEMENT

The Home Care Association of New York State, Inc. ("HCA-NYS") is a New York not-for-profit corporation. It has an affiliate not-for-profit 501(c)3 corporation, "HCA Education and Research," of which HCA is the sole member. It is a member of the National Association for Home Care and Hospice.

LeadingAge New York, Inc. ("LeadingAge") is a New York not-for-profit corporation formerly known as New York Association of Homes and Services for the Aging. It has no subsidiaries. It is affiliated with LeadingAge New York Services, Inc., a New York business corporation; LeadingAge New York ProCare LLC, a New York limited liability company; LeadingAge New York Technology Solutions, LLC, a New York limited liability company; the Foundation for Long Term Care, Inc., a New York not-for-profit corporation; and Adult Day Health Care Council, Inc., a New York not-for-profit corporation. LeadingAge is the New York affiliate of LeadingAge, Inc.

PRELIMINARY STATEMENT

For many years, Medicaid beneficiaries have been entitled to "home attendant" or "personal care/home health aide" services, which include, but are not limited to, bathing, cooking, feeding, assistance using the toilet, assistance with transferring, turning and positioning, and routine skin care. These services, which must be prescribed by a medical professional, enable Medicaid beneficiaries to stay in their own homes, rather than having to reside in more institutional settings, such as a nursing home. Throughout the State, and especially in New York City, these services are commonly provided by state licensed home care services agencies employing aides, who when necessary work 24-hour shifts. These shifts are sanctioned by and subject to New York State Department of Health ("NYSDOH") regulations governing these services and Medicaid reimbursement thereof.

"Live-in" or 24-hour shifts are specifically approved for and designed into care plans to meet the needs of patients who require some assistance throughout the day, but not constant, continuous 24-hour medical care or services. Medicaid – which is administered by NYSDOH – has adopted 24-hour shifts as a common staffing model for home care, and sanctions payment to the provider only for staffing that is deemed appropriate based upon the patient's medical needs.

The New York State Department of Labor ("NYSDOL") promulgates regulations governing minimum wages required by New York State law. NYSDOL has long taken the position that home attendants need to be compensated only for 13 hours of the 24-hour shift, provided that they receive sufficient time for sleep and meals (see e.g. NY Reg, Oct. 25, 2017, at 6).

NYSDOH promulgates regulations and guidance that cover Medicaid-funded home and long term care services. NYSDOH's guidance for payment of 24 hour live-in cases aligns with NYSDOL's regulation (see NYSDOH, MLTC Policy 14.08 [Nov. 2014], available at https://www.health.ny.gov/health_care/medicaid/redesign/mltc_policy_14-08.htm [last accessed Sept. 15, 2018]).

Granting class certification in this case punishes health care providers for following the government's rules. Moreover, requiring home care providers to pay for sleep and meal time during a 24-hour shift will be virtually impossible to implement, from both a financial and staffing perspective. Inasmuch as home attendants are providing a Medicaid service paid for by the government, providers are bound by the government's rules, which align the reimbursement and payment standards to the services. If the alignment is broken, the services cannot survive. This would be an absurd result, which is contrary to sound public policy, and that federal courts addressing the issue have rightly rejected. This Court now has the

opportunity to correct the errors of the courts below, and realign state court jurisprudence with the relevant agency and federal court interpretations.

STATEMENT OF INTEREST OF *AMICI CURIAE*

HCA-NYS is the primary association representing home care, comprised of home care and hospice providers, and managed long term care plans in New York State. HCA-NYS has approximately 300 member agencies, organizations, and individuals statewide who serve over a half million Medicaid and Medicare beneficiaries annually through the entire continuum of home care, hospice, and managed long term care. It is the mission of HCA-NYS to promote and enhance the quality and accessibility of health care and support at home.

LeadingAge is an association representing approximately 400 not-for-profit, mission driven, and public continuing long term care providers, including home care providers, hospices, and managed long term care plans across New York. LeadingAge's provider and plan members serve approximately 500,000 New Yorkers annually. The members of LeadingAge and their employees share a paramount goal: to ensure broad access to high quality care and housing that allow people to age in place for as long as possible.

HCA-NYS and LeadingAge have a clear, relevant interest in this action. The entity defendant-appellant in this case, New York Health Care, Inc., was a Licensed Home Care Services Agency ("LHCSA") that contracted with the City of New York, acting through the Department of Social Services of the Human Resources Administration ("HRA") to provide "home attendants" to Medicaid

beneficiaries within the City (see R. 166-168; 388-390). The named plaintiffs worked as "home attendants" for the LHCSA (see R. 189, 340).

The membership of HCA-NYS and LeadingAge includes a significant number of LHCSAs and Certified Home Health Agencies ("CHHAs"), which provide these same "home attendant," i.e., home health and/or personal care aide, services to thousands of Medicaid beneficiaries across New York. HCA-NYS and LeadingAge have a substantial interest in ensuring that state court interpretation of the applicable NYSDOL regulations aligns with that of federal courts and the agency itself.

Home care agency services span the continuum of care –from maternal and child health, to primary and preventive care, to post-acute recovery and rehabilitation, to complex chronic care and disease management, to long term care and support, to palliative and end-of-life care. Home care encompasses the direct care provided in a person's home; care and service in community settings; the transition of persons from setting-to-setting, especially from hospital-to-home or nursing home-to-home; and managing the navigation of complex service planning and delivery, including medications, appointments, personal and environmental supports, and transport to and from physicians and outpatient services. Home care aides play an integral role in all of these services and any disruption in aide services would affect the whole continuum of services.

HCA-NYS and LeadingAge respectfully submit that the Appellate Division order interprets the NYSDOL regulations in a manner that threatens the ability of home health and personal care service providers to furnish Medicaid beneficiaries with aides using the medically appropriate staffing model contemplated in the applicable NYSDOH regulations. It is the government, not a private party, that regulates and ultimately pays the providers for these services. If providers cannot comply with and pay for the staffing model that Medicaid requires, these beneficiaries will be left without services they need to stay in their homes and be forced into hospitals and long term care institutions.

STATEMENT OF RELEVANT FACTS

HCA-NYS and LeadingAge adopt Appellants' Statement of Relevant Facts as relevant to their arguments.

ARGUMENT

POINT I

THE APPLICABLE STATE LAW AND REGULATIONS HAVE LONG BEEN INTERPRETED TO BE COEXTENSIVE WITH FEDERAL LAW

This Court has long held that "[t]he construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (Matter of Entergy Nuclear Operations, Inc. v New York State Dept. of State, 28 NY3d 279, 289 [2016] [internal quotation marks and citation omitted]). Generally, there is nothing "unreasonable" about interpreting a state regulation in a manner that is "consiten[t] with Federal law" (Lovelace v Gross, 80 NY2d 419, 425 [1992]).

The Appellate Division's conclusion that NYSDOL's interpretation of its own regulation was "neither rational nor reasonable" is fatally flawed on a number of grounds (Andryeyeva v New York Health Care, Inc., 153 AD3d 1216, 1218 [2d Dept 2017]). For one, that Court disregarded Federal standards that apply to construing this particular regulation.

Wage-and-hour disputes, due to the number of federal statutes involved, are largely creatures of federal litigation. Federal courts have consistently held that

NYSDOL's "interpretation" of the regulation at issue "is entitled to deference and will be upheld and applied" (Severin v Project OHR, Inc., No. 10 Civ. 9696[DLC], 2012 WL 2357410, *8 [SD NY Jun. 20, 2012]; see Shillingford v Astra Home Care, Inc., 293 F Supp 3d 401, 416-417 [SD NY 2018]; Bonn-Wittingham v Project O.H.R. (Office for Homecare Referral), Inc., No. 16-CV-541[ARR][JO], 2016 WL 7243541, *6-7 [ED NY Dec. 14, 2016]). As the Southern District explained in Severin:

> "The phrase 'available for work at a place prescribed by the employer' fairly means more than merely being physically present at the place prescribed by the employer. Otherwise, the words 'available for work' would be surplusage. The phrase as a whole goes beyond simple physical location to imply as well a present ability to do work, should the employee be called upon to do so. [NYS]DOL's construction of the regulation, finding that a live-in employee who is afforded at least eight hours of sleep time and actually attains five hours of continuous sleep lacks any such present ability to perform work during those hours, does not conflict with the regulatory language"

(2012 WL 2357410, *8). The Court further explained that NYSDOL's interpretation was "not unreasonable or irrational" in light of "the specific and unusual employment context of home health aides working 24-hour live-in shifts" (id. at *9).

A. The Federal Backdrop to the State Labor Law

New York's wage-and-hour regulatory scheme does not exist in a vacuum. Rather, the state Minimum Wage Act "is the state analogue to the federal" Fair

Labor Standards Act ("FLSA") (Ethelberth v Choice Sec. Co., 91 F Supp 3d 339, 359 [ED NY 2015] [internal quotation marks and citation omitted]). "New York has adopted the manner, methods, and exemptions of the FLSA regarding overtime pay" and "New York Law also follows the FLSA's minimum wage requirements" (Gold v New York Life Ins. Co., 153 AD3d 216, 227 [1st Dept 2017]; see also Ballard v Community Home Care Referral Serv., 264 AD2d 747, 748 [2d Dept 1999] ["Because the plaintiff was engaged as a home health care aide, her right to overtime compensation is strictly and solely defined by the Miscellaneous Minimum Wage Order, which is based upon the FLSA"]).

The FLSA and its attendant regulations establish "a floor as to when an employer must compensate employees for their time" (Singh v City of New York, 524 F3d 361, 372 n 10 [2d Cir 2008]).[1] As relevant here, the FLSA provides:

> "Every employer shall pay to each of his [or her] employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:
> (1) except as otherwise provided in this section, not less than—
> (A) $5.85 an hour beginning on the 60th day after May 25, 2007;

[1] New York exceeds this federal floor with a higher statutory minimum wage (compare Labor Law § 652 with 29 USC § 206 [a]). However, when defining hours worked, NYSDOL has long "look[ed] to, and rel[ied] upon, federal FLSA regulations interpreting hours worked to address sleep and meal periods and sleeping time so that hours worked were calculated consistently at the state and federal level for overtime (and other) purposes" (NY Reg, Oct. 25, 2017 at 6 [citations omitted]).

(B) $6.55 an hour, beginning 12 months after that 60th day; and

(C) $7.25 an hour, beginning 24 months after that 60th day"

(29 USC § 206 [a]). Notably, the statute "contains no definition of 'work'" and only "a partial definition of 'hours worked' in the form of a limited exception for clothes-changing and wash-up time" (29 CFR 785.6; see 29 USC § 203 [g]; [o]).

In order to clarify the statute's scope, the United States Department of Labor promulgated regulations that "discuss[] the principles involved in determining what constitutes working time" under the FLSA (29 CFR 785.1). The rules define hours worked consistent with a series of U.S. Supreme Court decisions:

> "the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his [or her] employer, that 'an employer, if [it] chooses, may hire a [person] to do nothing, or to do nothing but wait for something to happen. Refraining from other activity is often a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer.' The workweek ordinarily includes 'all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place'"

(29 CFR 785.7 [emphasis added; citations omitted]).

The FLSA regulations provide that, notwithstanding the foregoing general rule:

"Duty of 24 hours or more.

(a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.

(b) Interruptions of Sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time"

(29 CFR 785.22 [citations omitted]). The FLSA regulations further state:

"Employees residing on employer's premises or working at home.

An employee who resides on his [or her] employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he [or she] is on the premises. Ordinarily, he [or she] may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he [or she] may leave the premises for purposes of his [or her] own"

(29 CFR 785.23).

The FLSA regulations are not new. Rather, they were adopted in 1961 (see 26 Fed Reg 190 [1961]) to replace guidance issued shortly after the FLSA was enacted (see e.g. Muldowney v Seaburg Elevator Co., 39 F Supp 275, 282 [ED NY 1941] [discussing two 1940 interpretive bulletins]).

New York state courts facing the issue in the context of other 24-hour staffing arrangements have followed the federal regulations regarding the compensability of sleep and meal time (see Hofler v Spearin, Preston & Burrows, 51 Misc 2d 758, 762 [Civ Ct, NY County 1966], affd 54 Misc 2d 686 [App Term, 1st Dept 1967], affd 30 AD2d 639 [1st Dept 1968], cert denied 393 US 1038 [1969]).

Accordingly, under the long-standing federal regulatory scheme, "absent an express or implied agreement to the contrary, sleep time and meal periods constitute hours worked [by a non-residential employee]. However, an employer and its employees may agree to exempt sleep time . . . from paid working time" (Braziel v Tobosa Developmental Servs., 166 F3d 1061, 1063 [10th Cir 1999]).[2]

B. The Labor Law, Like the FLSA, Leaves "Hours Worked" Undefined

The relevant portion of the State Labor Law – article 19 – was enacted around the same time as the Federal regulations were adopted (see L 1960, ch 619, § 2). Labor Law § 652 currently requires "[e]very employer" to pay a minimum wage to "each of its employees for each hour worked." Like the FLSA, the Labor Law leaves the phrase "hour worked" undefined. It is clear from the legislative

[2] The record in this case, which includes excerpts of deposition transcripts and the employee handbook, indicates that the named plaintiffs understood that sleep time was exempted from paid working time (see R. 203; 249).

history, however, that the Legislature has always meant for the statute to be interpreted and enforced consistent with the FLSA.

For example, when approving 1974 amendments to Section 652 to increase the minimum hourly wage to match the FLSA, the Governor stated:

> "a substantial number of working families in our State look to State law and not the new Federal minimum wage to help them meet the ever-increasing cost of living. . . . These increases in the State minimum wage will enable the State to continue to meet its acknowledged responsibility to provide a meaningful minimum wage for all workers. It will also assure that the workers in the State who are not covered by the Federal law will receive the same important wage protection afforded those covered by the Federal law, without imposing an unreasonable burden on the employers of the State"

(Governor's Mem approving L 1974, ch 280, 1974 McKinney's Session Laws of NY at 2093 [emphasis added]; see L 1974, ch 280, § 1).

In 1978, the Legislature amended the introductory language of Section 1 of Labor Law § 652 to its current form quoted above (see L 1978, ch 747). The purpose of repealing the prior version of Section 1 and replacing it with the current language was to "follow the federal approach in various stages" (Senate Mem in Supp, Bill Jacket, L 1978, ch 747).

In 1990, the Legislature again amended Labor Law § 652, as it had in the 1970s, to increase the hourly wage to match that required by the FLSA (see L 1990, ch 38). The Executive Department's Statement in Support of the legislation explained:

"This past summer, President Bush signed into law P.L. 101-157, raising the federal minimum wage rate above the New York State minimum wage rate. While the coverage and exemptions (in the non-agricultural sector) of both federal and New York minimum wage laws overlap in most areas, the coverage of both laws is not completely identical.

Generally, the coverage of the federal law applies to employees of large businesses and those businesses involved in interstate/international commerce while the New York statute generally provides protection to employees of the smallest businesses. If the federal rate were to rise but not the New York rate, employees of these businesses could still be paid at the lower rate. . . .

Moreover, when state and federal laws are not equal, arbitrary and unfair distinctions which are difficult to administer result"

(Mem of State Exec Dept, 1990 McKinney's Session Laws of NY at 2333 [emphasis added]).

In 1999, when Labor Law § 652 was amended to reflect increased hourly wage requirements in the FLSA, NYSDOL voiced "no objection" inasmuch as:

"This bill will make the State minimum wage law consistent with federal law, which will enable the Department of Labor to enforce the $5.15 per hour rate instead of the $4.25 per hour rate in areas such as sweatshop investigations. The bill will also reduce employer confusion regarding the proper wage to pay workers.

The bill will also provide those workers who fall outside the scope of the federal minimum wage law an increase in the hourly rate. The Department of Labor estimates that approximately 10,000 workers currently earn the State minimum wage"

(Mem of Dept of Labor, Bill Jacket, L 1999, ch 3, at 9-10 [emphasis added]). Notably, NYSDOL's first reason for supporting the change was ensuring that state and federal law on hourly compensation remained consistent.

C. The Minimum Wage Order Must Be Read in Context of the Statute

As noted above, the State statute leaves the concept of hours worked to be defined by NYSDOL. Consistent with NYSDOL's position that State and Federal law should be similar regarding compensation for hours worked, the applicable Minimum Wage Orders, i.e., the agency's regulations, explain hours worked as follows:

> "The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee—one who lives on the premises of the employer—shall not be deemed to be permitted to work or required to be available for work:
>
> (1) During his or her normal sleeping hours solely because he [or she] is required to be on call during such hours; or
> (2) At any other time when he or she is free to leave the place of employment"

(12 NYCRR 142-2.1 [b]; see 12 NYCRR 142-3.1 [b] [applicable to not-for-profit entities]).

Subsequent proceedings involving NYSDOL demonstrate its reasonable and unvarying interpretation of the statute and its regulations consistent with the FLSA. In Matter of Settlement Home Care v Industrial Bd. of Appeals of Dept. of Labor

of State of N.Y., the Appellate Division addressed NYSDOL's authority under the Labor Law to regulate the minimum wages of "sleep-in home attendants," i.e., individuals similarly situated to the plaintiffs in this case (151 AD2d 580, 581 [2d Dept 1989]). The Court confirmed the determination of the Industrial Board of Appeals that these individuals "were covered by the Minimum Wage Act" (id. at 581).[3] Notably, Settlement Home Care was a "bifurcated" proceeding, where the only issue before the Court was "the jurisdictional aspects of the notices of labor violations issued against the [employers]," while the determinations in the violations were left for another day (id. at 580).

In the Industrial Board's subsequent proceeding on the merits, NYSDOL took the position that the employers had violated the Labor Law by compensating the home attendants "for twelve-hours of work," when the employees should have been paid "on the basis of a thirteen or in some cases a fourteen and one-half hour work day" (Matter of Settlement Home Care, Inc. v Commissioner of Labor, Industrial Board of Appeals Dkt. No. PR-32-83, *3 [May 28, 1997], available at http://industrialappeals.ny.gov/decisions/pdf/3741-001.pdf [accessed Aug. 6, 2018]). Notably, NYSDOL allowed the employer "credit for eight-hours sleep time and three or three and one-half hours meal time per duty shift," (id.). In other words, the agency interpreted its rule consistent with the FLSA. Notably,

[3] The Industrial Board is an independent agency empowered to administratively review NYSDOL determinations (see Labor Law § 101).

NYSDOL's position contrasted with that of an intervening labor union, which had urged the Industrial Board to decide that "the subject sleep-in home attendants were required to work and should be compensated on a twenty-four hour per shift basis" (id. at *5).

The relevant passage of NYSDOL's 2010 opinion letter expresses the agency's continued, reasonable decision to interpret its minimum wage regulations consistent with the FLSA. After citing the relevant regulation (12 NYCRR 142-2.1), NYSDOL explained:

> "In interpreting these provisions, it is the opinion and policy of this Department that live-in employees must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable"

(NYSDOL Opn RO-09-0169, R. 413).

In sum, although NYSDOL did not expressly incorporate provisions of the FLSA into the applicable portion of the Wage Order in the same manner as with respect to overtime (compare 12 NYCRR 142-2.1 with 12 NYCRR 142-2.2), it was rational for the agency to interpret its regulation consistent with the FLSA. To do otherwise would potentially have deleterious effects not only in the highly

regulated home health care space (see Point II, infra), but in any industry using a 24-hour shift model.

D. NYSDOL Has Engaged in Rulemaking Confirming Its Consistent Interpretation that the Wage Order Conforms with the FLSA

HCA-NYS and LeadingAge understand that, in its amicus brief in support of Defendant's motion before the Appellate Division for leave to appeal to this Court, the State of New York discussed rulemaking by NYSDOL to amend the Wage Orders at issue. This rulemaking may provide the Court additional perspective.

After the Appellate Division decision in this action, NYSDOL promulgated an emergency regulation which amended the Wage Orders to add:

> "Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more"

(NY Reg, Oct. 25, 2017, at 6; see also NY Reg, Jan. 24, 2018, at 7-9; NY Reg, Apr. 25, 2018, at 41-43; NY Reg, Jun. 20, 2018, at 10-12; NY Reg, Aug. 15, 2018, at 13-16).[4] The validity of the emergency regulation has been challenged (see Matter of Chinese Staff & Workers Assn. v Reardon, Sup Ct, NY County, Sept. 26, 2018, Rakower, J., index No. 450789/2018).

[4] The phrase "home care aide" is statutorily defined to include, among others, "personal care aide" and "home attendant" workers such as Plaintiffs (Public Health Law § 3614-c [1] [d]).

NYSDOL has also proposed a permanent rule with similar language (see NY Reg, Apr. 25, 2018, at 43-45). NYSDOL stated:

> "Needs and Benefits: This regulation is necessary to preserve the status quo in the face of recent decisions by the State Appellate Divisions for the First and Second Departments that treat meal periods and sleep time by employees as hours worked for purposes of state (but not federal) minimum wage. The purpose and intent of this rulemaking is to narrowly codify the Commissioner's longstanding and consistent interpretation that compensable hours worked under the State Minimum Wage Law do not include meal periods and sleep time of employees who work shifts of 24 hours or more"

(NY Reg, Apr. 25, 2018, at 45).

As relevant to this litigation, the effect of this rulemaking is simple: the Court should hold that "the same statutory regime applies for [an employee's] term of employment *before* the amendment to the law" (Rodriguez v Avondale Care Group, LLC, No. 16-CV-03084[SN], 2018 WL 1582433, *5 [SD NY Mar. 27, 2018]). In sum, the rulemaking merely confirms that NYSDOL had been correctly interpreting the minimum wage regulations and that such interpretation should be continued, both prospectively and retrospectively.

POINT II

THE ELIMINATION OF THE 13-HOUR RULE WOULD COLLAPSE THE HOME HEALTH CARE SYSTEM DUE TO LACK OF MEDICAID FUNDING

Home health care is vital to New York's health care system because it allows individuals to receive necessary personal care and skilled professional health and support services in their own home as opposed to an institutional setting such as a nursing home. The home health care industry is growing to meet the increasing and complex demand for patient care, especially in New York City, and is heavily dependent on Medicaid reimbursement for services provided. The freedom and independence associated with home health care makes these services desirable to Medicaid participants, generally the neediest of the State's population. Affirming the Appellate Division's order in this case places the future of these services in jeopardy.

A. The Medicaid Program in New York State

NYSDOH administers Medicaid pursuant to federal guidelines and "implement[s] plans for medical assistance which include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan, [and] which . . . are consistent with the objectives of [the Social Security Act]" (Kuppersmith v Dowling, 93 NY2d 90, 94 [1999] [internal quotations omitted]; see Social Services Law § 363-a). Prior to 2012, the local social services district

(HRA in New York City) contracted with agencies like Defendant to reimburse for Medicaid services on a fee-for-service model.[5] Since then, the provision of home care has transitioned from fee-for-service to managed care, with Managed Long Term Care (MLTC) and Mainstream Medicaid Managed Care (MMMC) plans, not the social services district, determining rates for services and reimbursing providers. The services must be provided consistent with NYSDOH's rules and regulations (see e.g. NYSDOH, MLTC Policy 14.08 [Nov. 2014]).

An important and significant aspect of the State's annual Medicaid budget is accounting for the incremental rise in the minimum wage required by the State Minimum Wage Act. It is estimated that "DOH Medicaid spending on minimum wage . . . for health care workers providing services reimbursed by Medicaid, is projected to grow by 176 percent to $703 million in . . . [the] 2018-19 [fiscal year], due to the impact of the increases, as well as higher Medicaid enrollment and an increased utilization of home care and personal care services," i.e., without accounting for the impact of the Appellate Division order in this case (Report on the State Fiscal Year 2018-19 Executive Budget, State Comptroller, available at https://www.osc.state.ny.us/reports/budget/2018/executive-budget-report-2-13-18.pdf [accessed Aug. 21, 2018]).

[5] The HRA contract is in the record (see R. 94-95; 388-390).

B. The Home Health Care Industry under New York's Medicaid Program

As noted above, New Yorkers requiring long term care, and the home health care system which provides that care, are heavily reliant on Medicaid reimbursement (see NY Reg, Sept. 10, 2014 at 27 [noting that "(m)ost split-shift cases and live-in 24-hour services cases reside in New York City"]). During the relevant timeframe of this case, HRA was the local social services district tasked with administering the City's Medicaid program, including determining eligibility and the appropriate level of services. Presently, the eligibility determination and reimbursement for Medicaid services is made by the MLTC or MMMC plan, consistent with NYSDOH's Medicaid rules and regulations.

NYSDOH only permits reimbursement of home care services "prescribed by a physician, in accordance with the recipient's plan of treatment and provided by individuals who are qualified to provide such services, . . . and [the services are] furnished in the recipient's home or other location" (Social Services Law § 365-a [2] [e] [i]). NYSDOH contemplates that the patient will generally receive either live-in 24-hour personal care from one attendant or continuous personal care by more than one attendant (see 18 NYCRR 505.14 [a] [3] [iii]).

Live-in 24-hour personal care means:

> "the provision of care 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 [one] 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"

(18 NYCRR 505.14 [a] [4]; NYSDOH, MLTC Policy 15.09 [3] [b] and [d] [Dec. 2015]).

Continuous personal care, which permits services by multiple aides, is:

> "[U]ninterrupted 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"

(18 NYCRR § 505.14[a][2]; NYSDOH, MLTC Policy 15.09 [3] [c] [Dec. 2015]).

The managed care plan or the local service district determines the staffing level for the patient's care plan (see Schlossberg v Wing, 277 AD2d 41, 41 [1st Dept 2000] [government "determination to continue 24-hour sleep-in care, but to deny petitioner's request for 24-hour continuous split-shift care (was) based on substantial evidence and (was) not arbitrary and capricious"]). The provider does not set the staffing level in the care plan.

NYSDOH's policies align with NYSDOL's interpretation of the Labor Law and regulations, i.e., that home attendants assigned a live-in shift are to be paid for 13 hours worked, provided they are "afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three

hours for meals" (NYSDOH, MLTC Policy 14.08 [Nov. 2014]). As discussed in Point I, infra, this assumption accords with the standards set forth in the federal FLSA regarding shifts involving "duty of 24 hours or more" and "bona fide meal periods" (29 CFR 785.22; 29 CFR 785.19). Moreover, the Medicaid payment standards contemplate, but for the aforementioned sleep and meal exceptions, a 13-hour *limit* to the allowed reimbursement for these services (see NYSDOH, MLTC Policy 14.08 [Nov. 2014]).

C. Impact of Affirmance

Affirming the Appellate Division would effectively abolish the 13-hour Rule for the period before the emergency regulations, and would cause a catastrophe within the home care system and the Medicaid program. Even if providers could unilaterally change the staffing model – which they cannot for reasons discussed below – they would face major staffing challenges that are adverse to patient care and access.

Significant exposure to back wage lawsuits for alleged failure to pay for sleep and meal time threatens the ability of many home care providers to keep their doors open. NYSDOL forecasts this could disrupt care for Medicaid beneficiaries, and even lead to "institutionalizing patients who could be cared for in the home" (NY Reg, Oct. 25, 2017, at 6).

i. It is Unlikely that Home Care Providers Will Receive Additional Source of Funding to Compensate Aides for Sleep and Meal Time

After the Appellate Division's decision in this case, NYSDOH released Informal Guidance declaring, in pertinent part:

> "[NYS]DOH and [NYSDOL] expect providers to continue staffing and covering live-in cases in accordance with current Managed Care contracts, Medicaid agreements, MLTC Policy 14.08, and all applicable labor requirements. Live-in cases should not be converted to 24-hour continuous split-shift care unless the individual meets the criteria for this higher level of care"

(NYSDOH, Services for Live-In Home Care [Jul. 2017], available at http://hca-nys.org/wp-content/uploads/2017/07/Live-In-Home-Care-Guidance-7-14-17.pdf [accessed Aug. 21, 2018] [emphasis added]). NYSDOH has generally taken the position that split-shift care should be authorized only in certain circumstances, and its regulations are intended "to allow the identification of situations in which a person's needs can be met by a live-in aide and still allow the aide to have an uninterrupted five hours for sleeping" (NYSDOH, GIS 12 MA/026: Availability of 24-Hour Split-Shift Personal Care Services [Oct. 2012]).

It is also unlikely that the state's Medicaid budget could handle the financial strain of paying live-in staff for sleep and meal time, without first considering a commensurate statutory and funding change.

If the Appellate Division order is affirmed, home care agencies will be placed in the impossible position of employing workers on state-approved shifts,

for reimbursement from a state-regulated system at a rate that accounts for only half of the hours for which compensation may be required by state courts.

ii. Home Care Providers Will Face Crippling Claims for Unpaid Wages & Be Forced to Close

With the destruction of the 13-hour Rule, the home care system will be exposed to hundreds of millions of dollars in claims for unpaid wages for sleep and meal time.[6] Many home care providers have employed hundreds or even thousands of individuals during that period. If one employee worked four (4) live-in shifts a week, the agency may be liable for at least 44 hours per week of unpaid wages. Assuming the employee works year round, a provider could be responsible for paying a single employee for 2,288 hours of sleep and meal time in a single year. Utilizing the hourly minimum wage of $11.00 for 2017 in New York City, this would amount to approximately $25,168 annually in unpaid "wages" (and more for overtime) for a single employee only working four (4) shifts a week. If the agency employed 200 aides, it could face additional annual costs of $5 million (and more for overtime).

Agencies may also face millions of dollars in unpaid overtime claims and claims for attorneys' fees from successful litigants. NYSDOL recognized the potential for this previously unknown liability to threaten "the stability of jobs of

[6] The statute of limitations to commence an action for unpaid wages in New York is six years (Labor Law § 198 [3]).

employees who work shifts of 24 hours or more in New York State" (NY Reg, Apr. 25, 2018 at 45).

The recent challenge to the 13-hour Rule that is the subject of this litigation has already resulted in an adverse impact to the home care system. HCA-NYS's 2018 survey of its home care provider members found that 20.45% of agencies said they are unable to serve all or some 24-hour live-in services cases due to the legal challenges to the 13-hour Rule (see Home Care Association of New York State, 2018 Home Care, Hospice and Managed Long Term Care Financial and Program Trends, available at https://hcanys.org/wp-content/uploads/2018/02/Financial-Condition-Report-Updated-2-13-18.pdf [accessed Aug. 21, 2018]). Ultimately, the negative effects on the home care industry will adversely affect consumers' access to medically necessary services and make live-in home health care more difficult to obtain, contrary to State and Federal policy.[7]

iii. Home Care Providers Already Face a Shortage of Live-In Aides Coupled with a Rising Demand for Care

Even if home care agencies could afford to utilize a different aide each day, or multiple aides, to minimize overtime costs without compromising patient care,

[7] There is a clear, strong State and Federal policy favoring care in the most integrated setting, i.e., home or community based care, when it is proper for the individual Medicaid beneficiary (see 28 CFR 41.51 [d]; Olmstead v L.C., 527 US 581, 605-606 [1999]; Report and Recommendations of the Olmstead Cabinet at 14-15 [Oct. 2013], available at https://www.ny.gov/sites/ny.gov/files/atoms/files/Olmstead_Final_Report_2013.pdf [accessed Sept. 10, 2018]).

agencies would face difficulties locating, training, and employing enough aides to staff their live-in cases. A recent survey of HCA's members revealed a significant shortage of aides in New York, with approximately 14% of positions unfilled (see HCA-NYS, NYS Home Care Program and Financial Trends 2017 [Feb. 2017], available at http://hca-nys.org/wp-content/uploads/2017/01/NYSHomeCareProgramandFinancialTrends2017.pdf [last accessed Sept. 17, 2018]). Further, home care providers experience a high rate of turnover, approximately 24%, for their aides (see id.). A shortage of available workers combined with a high turnover rate has left the average agency unable to accept approximately 37 cases each year (see id.). This problem would only be exacerbated by the elimination of the 13-hour Rule and the subsequent need to locate, train, employ and utilize more aides per patient. Utilizing multiple aides per patient will also affect the continuity and quality of service to the patient, and is more disruptive to the patient, and his or her family.

The shortage of available aides will only become more serious as New York's population ages and the need for home care grows at a rapid pace. New York has seen substantial growth in the number of individuals providing home health care (see Center for Health Workforce Studies, School of Public Health, University at Albany, The Health Care Workforce in New York: Trends in the

Supply of and Demand For Health Workers at 31 [Mar. 2018]), but the need is expected to exceed the workforce.

New York is currently home to approximately 3 million residents age 65 and older, representing slightly over 15 percent of the population. (United States Census Bureau Population Estimates, New York, 2017, available at https://www.census.gov/quickfacts/fact/table/ny/PST045217 [accessed August 17, 2018]). By 2025, that number will increase to almost 18 percent. (New York Office for the Aging County Data Book, 2015, available at https://www.aging.ny.gov/ReportsAndData/2015CountyDataBooks/01NYS.pdf [accessed Aug. 17, 2018]). These numbers are expected to rise over the next few decades. (id.). This trend will drive a corresponding increase in the number of New Yorkers with cognitive and functional limitations who will need live-in home care (see U.S. Bureau of Labor Statistics, Employment Projections, Employment by detailed occupation [Jan. 30, 2018], available at https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm [last accessed Sept. 17, 2018] [projecting a 47.3 percent increase nationwide in home health aides from 2016-2026, and a 38.6 percent increase in personal care aides, which are among the greatest projected increases across all occupations]). Forcing home care providers to pay aides for sleep and meal time for each live-in shift will only accelerate the problems of this financially challenged system.

CONCLUSION

In sum, this Court should reverse the Appellate Division because there is no "question[] of law . . . common to the class" inasmuch as the state has long followed the FLSA and its attendant regulations regarding hours worked (CPLR 901 [1]). Both the FLSA regulations and the Minimum Wage Orders define the concept of an hour worked by reference to whether the employee is required to be available for work at a premises prescribed by his or her employer. Under both regulatory schemes, the employer and 24-hour employee can agree that sleep and meal times, while at a premises prescribed by the employer, are not hours during which the employee is required to be available for work. If an individual employee alleges that she has to work during her sleep time because, for example, her patient required frequency assistance, the remedy is to permit her individual claim to proceed, not to certify a class (see Heredia v Americare, Inc., No. 17cv6219, 2018 WL 2372681, *4 [SD NY May 23, 2018]). The Court should not do what the Appellate Division did, which is declare a broad rule that all hours of all 24-hour shifts are per se compensable under state law.

The financial impact of an affirmance would be catastrophic. Providers would be forced to shoulder the financial burden of paying home health care attendants for sleep and meal time in a 24-hour shift and related overtime costs, with no assistance from the State, unless increased staffing was medically justified.

Accordingly, an affirmance would put the home health care system in jeopardy of collapsing, and limit the ability of Medicaid patients to receive services that they need to remain in their homes.

Dated: Albany, New York
September 28, 2018

Respectfully submitted,

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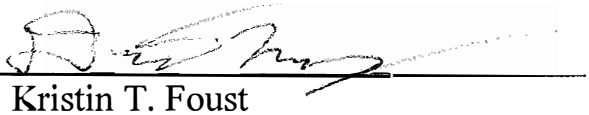
By: 

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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR 500.13 (C)

This document complies with the word limit of Rules of Court of Appeals (22 NYCRR) § 500.13 (c) (1) because, excluding parts of the document exempted by Rule 500.13 (c) (3), the document contains 6,914 words.

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