LeadingAge New York

January 5, 2018

Michael Paglialonga
Deputy Counsel
New York State Department of Labor
Harriman State Office Campus
Building 12, Room 509
Albany, NY 12240

RE: I.D. No. LAB-47-17-00011-P Employee Scheduling (Call-In Pay)

Dear Mr. Paglialonga:

I am writing on behalf of LeadingAge New York in opposition to the proposed amendment of sections 142-2.3 and 142-3.3 of Title 12 NYCRR. These regulatory amendments proposed by the NYS Department of Labor (NYSDOL) would impose new employee call-in pay requirements, which are not only patently impractical in long term care (LTC) settings but could adversely affect access to high quality services, administrative costs and provider finances.

LeadingAge NY represents approximately 400 not-for-profit and public providers of LTC and post-acute care services throughout New York State, including nursing homes, home and community-based services, adult care facilities (ACFs), assisted living programs, retirement communities, senior housing and managed long term care (MLTC) plans.

The employee scheduling regulations would apply to most employees subject to the Minimum Wage Order for Miscellaneous Industries and Occupations, including those working in LTC settings. The proposal requires employers that are covered by the Miscellaneous Minimum Wage Order to either give significant advance notice of changes in employee schedules or pay additional amounts to employees who are asked to work without fourteen (14) days' notice.

LTC services are "hands-on", and cannot be provided without professional and paraprofessional workers who are dedicated to meeting the needs of frail elderly and disabled New Yorkers. Indeed, LeadingAge NY member organizations collectively employ tens of thousands of workers throughout New York State to provide direct resident/patient care and essential supportive services. Our member organizations and the people who work for them share a paramount goal – to ensure broad access to high quality care in safe and secure environments. Resident/patient needs are inherently unpredictable and can change on a daily, even hourly basis. In this light, the proposed regulations are simply unworkable in LTC settings and would threaten quality of care and access to services, while increasing costs and damaging provider finances.

Unpredictable Schedules

The NYSDOL's proposed rulemaking, as published in the November 22, 2017 issue of the *State Register*, acknowledges that employers need to be able to contend with unforeseen issues including severe weather, fluctuations due to seasonal demand and other market conditions like material supply and emergency situations. These are examples of circumstances that are

outside of the normal operating environment for most employers and time-limited in nature. Contrast those types of unforeseen issues with the employee scheduling realities that LTC providers face on a **daily basis**. Here are some real-world examples:

- A home care agency receives a referral from a hospital that is discharging a patient who needs services within 24 hours to ensure his/her health and safety. The home care agency had no way of knowing 14 days in advance it would receive this referral.
- A hospice has multiple patients and families in crisis at the same time, requiring multiple unplanned and unexpected visits on a weekend to manage symptoms, decrease anxiety and provide for care in the last few hours of life. The hospice could not have anticipated this occurring well in advance of the issues.
- A nursing home located in a rural area that is experiencing worker shortages utilizes part-time and on-call aides to ensure it has sufficient staff at all times, as required by state and federal regulations. A few workers unexpectedly call in sick, leaving the facility short-handed.
- A home care agency schedules an employee to serve a patient with 14 days' notice but, due to his/her clinical condition, the patient is admitted to the hospital and the home care agency is unable to provide 72 hours' notice of the cancelled shift.
- An ACF employs aides who are largely single mothers. An aide who works the overnight shift calls in because her child is sick. Given the lighter staffing of overnight shifts, it is necessary to call in another worker at the last minute to ensure the well-being and safety of the residents.
- A home care agency needs to use the services of an on-call employee, and the needs of the patient require specific training. Given this need, the home care agency cannot rely on the employee to "shift-switch" and must review and approve a replacement worker to ensure the highest level of patient care.

While retailers, fast food establishments and other types of businesses certainly contend with unexpected time-limited events like severe weather and cyclical events such as seasonal changes in demand, LTC providers are unique in that:

- they serve frail elderly and disabled people whose health and safety are dependent on that assistance;
- their services are provided both intermittently and around-the-clock, in congregate settings as well as in individuals' homes;
- the care provided to these individuals can change daily, due to unexpected health care needs, changes in family or other caregiver circumstances and/or end-of-life situations;
- new patients/residents are routinely referred to these providers with little or no advance notice;
- they are subject to federal and state regulations governing staffing, quality of care, how and when services are provided, and the level of payment for such services;
- their ability to address these staffing exigencies in real-time can have a direct impact on quality of care and access to services; and
- LTC clinicians and paraprofessionals are among the worker occupations with the most severe shortages, necessitating widespread use of part-time, per diem and agency staff.

LTC providers' ability to respond rapidly to unexpected events is tantamount to ensuring proper resident/patient care.

Applicability of Regulatory Exceptions

The proposed regulation contains four exceptions to the requirements placed on employers to pay additional amounts to employees for reporting to work, unscheduled shifts, cancelled shifts, on-call, and/or call-for-schedule practices when sufficient advance notice is not provided. However, the available evidence suggests that these exceptions will not apply to large numbers of LTC workers and associated work shifts.

1. *These additional payments do not apply to employees who are covered by a valid collective bargaining agreement that expressly provides for "call-in pay."* Nursing homes may be the most highly unionized LTC provider type. Based on 2015 data, 30 percent of nursing homes are not at all unionized and 37 percent of workers in homes with unions are not in collective bargaining units. Furthermore, it is not even clear that existing collective bargaining agreements in LTC expressly provide for call-in pay.
2. *Most of these payments do not apply to employees whose weekly wages exceed 40 times the hourly minimum wage rate.* While this could exclude many employees who work full time for a LTC employer, its applicability to part-time and casual employees is much less clear. For individuals who work for multiple employers – commonplace in LTC – we do not know for certain whether this test would be applied to each employer separately, or in the aggregate across employers. Assuming the former, this exception may not apply to the nearly 40 percent of all nursing home workers who are either part-time or casual employees (and possibly higher percentages in other LTC settings).
3. *Payments for unscheduled shifts do not apply to new employees during their first two weeks of work, or to employees who volunteer to cover a new and additional shift during the first two weeks the shift is worked or a shift that was scheduled at least 14 days in advance for another employee.* This appears to be a narrow, time-limited exception that applies only to payments for unscheduled shifts in limited circumstances.
4. *Payment for cancelled shifts does not apply when the employer cancels the shift at the employee's request for time off, or where the operations of the workplace cannot continue because of an act of God or other cause not within the employer's control.* This also appears to be a narrow exception that applies only to payments for cancelled shifts in limited circumstances.

In summary, we do not believe that these limited exceptions will meaningfully address the plethora of daily employee scheduling challenges faced by LTC employers.

Cost of Proposed Regulations

The Cost section of the NYSDOL's Regulatory Impact Statement in the *State Register* notice states as follows:

> "This proposed regulation does not impose any mandatory costs on the regulated community, as employers may avoid call-in pay by providing sufficient notice to employees of work schedules."

If the regulation is predicated on employers having the ability to avoid call-in pay by providing sufficient notice to employees of work schedules, then clearly it should not apply to LTC providers for the reasons already cited.

If these regulations are adopted and apply to LTC providers, there will be a significant direct cost implication to these employers given the need for staffing flexibility and the significant reliance on part-time, per diem and agency staff. Due to the inherent unpredictability of LTC staffing needs, providers will invariably be required to provide additional pay to employees for reporting to work, unscheduled shifts, cancelled shifts, on-call and call-for-schedule status.

Most Medicaid beneficiaries receiving home and community-based services and nursing home care on a continuing basis are enrolled in MLTC plans, which are paid a pre-determined monthly premium by the State and are responsible to contact with LTC providers to pay for and oversee the provision of covered services. MLTC plans will be faced with similar challenges to providers due to the unpredictability of enrollees' care needs, and the State's inability to predict the amount that each plan should receive in its premiums to reimburse each contracted provider for the added payments made to employees under the regulation.

There are added concerns over how the regulations will apply to Consumer Directed Personal Assistance Services (CDPAS), an MLTC-covered service in which the Medicaid beneficiary is the employer and would be responsible for providing the CDPAS aide with a predictable schedule. Given that many beneficiaries suffer from severe illness and cognitive deficiencies, it would be particularly difficult to ensure that all measures were taken to provide the aide with sufficient advance notice of his or her schedule to minimize the cost to MLTC plans.

Contrary to the assertion in the NYSDOL's Regulatory Flexibility analysis, there will also be significant additional administrative costs associated with this proposal:

- The regulations include five different payment requirements for covered employees, and apply to more employment practices than simply calling-in an employee for work, making time tracking and record keeping much more difficult.
- Payroll reporting systems will need to be revised. For example, nursing homes are required by the federal government to report hours paid for direct care staff, and this information is used to calculate and publicly post staffing ratings for every facility. Additional hours paid under the proposed regulation may need to be separately tracked depending on whether they are reportable to the federal government.
- Given that employee shifts in home care and hospice are often scheduled telephonically when changes need to be made, the ability to track and monitor the changes of a dispersed work force and their travel time would be challenging and time consuming.
- Paraprofessional aides and other types of direct care staff often work for multiple employers. As previously noted, the proposed regulations include weekly wage thresholds that would exempt certain workers from receiving additional compensation for call-in services. If these thresholds are to be tracked for each employee across multiple employers, this would impose a time-consuming burden on LTC providers.
- The wage thresholds would apply on a week-to-week basis, meaning that eligibility for call-in pay can change every week. LTC providers that have multiple part-time employees will expend considerable additional time on tracking and recordkeeping.

- MLTC plans would be responsible for tracking the additional paid hours for every LTC provider in their network, potentially modifying their provider contracts to reflect the new requirements, and providing reimbursement to the provider in each case.

As with the increases in minimum wage, we will urge that Medicaid as a major payer recognize and reimburse these potentially significant added direct and administrative costs.

However, even if Medicaid agrees to cover its share of the added direct costs as was the case for minimum wage increases, other payers such as Medicare and private insurance companies are under no obligation to do so. This would leave many LTC providers – most notably hospices and home health agencies which derive much of their revenues from Medicare and private insurance – unable to recover the additional costs of this mandate. Other LTC providers such as ACFs will be even more adversely affected since they have had had to absorb the cost of other recent employee mandates with no state financial support, and no mechanism to increase revenue by increasing the cost to the consumer.

Conclusion

As we have demonstrated, the proposed regulations would uniquely impact the delivery of LTC services. They could adversely affect quality of care and access to services by further restricting the flexibility needed to respond in real time to changing care needs and new resident/patient referrals. The inherent inability to predict staffing needs well in advance will lead to increased direct and administrative costs to LTC providers, which in turn will adversely affect provider finances and increase Medicaid expenditures by an unknown amount, assuming the state plans to reimburse these costs across all affected LTC, health and human services providers.

Accordingly, LeadingAge NY strongly recommends that if this regulation is to be adopted, LTC providers licensed under Articles 28, 36, 40 and 46 of the Public Health Law, Article 7 of the Social Services Law and CDPAS fiscal intermediaries authorized under Section 365-f of the Social Services Law be expressly exempted from its requirements. Other health and human services providers are likely to face similar challenges from the regulations, and should be considered for exemption as well.

Please contact me at dheim@leadingageny.org or (518) 867-8383 if you have any questions on our comments or require further information.

Sincerely,

Daniel J. Heim
Executive Vice President
LeadingAge New York