



December 13, 2017

Ms. Megan Baldwin
Assistant Secretary for Health
Executive Chamber
NYS Capitol
Albany, NY 12224

RE: Proposed Regulations on Employee Scheduling (Call-In Pay)

Dear Ms. Baldwin:

We are writing on behalf of LeadingAge New York, the Adult Day Health Care Council (ADHCC), and the Hospice and Palliative Care Association of New York State (HPCANYS) to respectfully urge that long term care (LTC) providers licensed under Articles 28, 36, 40 and 46 of the Public Health Law, Article 7 of the Social Services Law and Consumer Directed Personal Assistance Services fiscal intermediaries authorized under Section 365-f of the Social Services Law be exempted from 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 call-in pay requirements relative to employee scheduling, which are impractical in LTC settings.

LeadingAge NY represents nearly 500 not-for-profit and public providers of LTC and post-acute care services throughout New York State, including nursing homes, home care agencies, adult care facilities (ACFs) and assisted living facilities. The ADHCC is a statewide membership association representing over 90 percent of the medical model adult day health care (ADHC) programs operating in New York State. HPCANYS represents 36 of the 45 hospice programs in New York State and a wide range of palliative care providers throughout the State.

The Employee Scheduling regulations would apply to most employees subject to the Minimum Wage Order for Miscellaneous Industries and Occupations, including, but not limited to, those in LTC and the health care industry. 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.

The NYSDOL's proposed rulemaking, which was 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. However, it fails to address the day-to-day employee scheduling realities that LTC providers face on a daily basis:

- A home care agency receives a referral from a hospital that is discharging a patient who needs services very quickly 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 home care agency schedules an employee to serve a patient with 14 days' advance 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' advance notice of the cancelled shift.
- A nursing home in a rural area that is experiencing worker shortages utilizes part-time and on-call aides to ensure it has sufficient staff. A few workers unexpectedly call in sick, leaving the facility short-handed.
- An ACF employs aides that 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 imperative 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 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 the replacement to ensure the highest level of patient care.

While other types of businesses certainly have to contend with unexpected periodic events like severe weather and cyclical events such as seasonal changes in demand, health care and LTC providers are unique in that:

1. they are serving frail elderly and disabled people whose health and safety are dependent on that assistance;
2. the care provided to these individuals can change on a daily basis, due to unexpected health care needs, changes in family or other caregiver circumstances and/or end-of-life situations;
3. new patients/residents are routinely referred to these providers with little or no advance notice;
4. their ability to address these staffing exigencies in real-time can have a direct impact on quality of care and access to services; and
5. LTC clinicians and paraprofessionals are among the worker occupations with the most severe shortages, necessitating the use of part-time, per diem and agency staff.

The ability of LTC providers to respond rapidly to unexpected events is tantamount to proper patient care.

Furthermore, the Cost section of the 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.

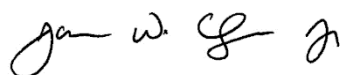
In the event these regulations are adopted and apply to LTC providers, there will be a significant cost implication and we will urge that Medicaid as a major payer recognize and reimburse these costs. In the case of hospice and home health providers, Medicare and private insurance companies are major payers. These at-home service providers will be unable to recover the additional costs of these requirements from Medicare and private insurance providers, creating an unfunded mandate which will jeopardize hospice and home care services. Other LTC providers such as ACFs will be particularly adversely affected since they have 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.

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

- The regulations include five different requirements for covered employees, and apply to more employment practices than simply calling-in an employee for work, making time and record keeping much more difficult.
- 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 very challenging and time consuming.
- Paraprofessional aides often work for multiple employers. The proposed regulations include weekly wage thresholds that would exempt certain workers from receiving additional compensation for call-in services. It is unclear how these thresholds would be tracked across employers.
- 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 tracing and recordkeeping.

For the above-noted reasons, we respectfully urge that LTC providers be expressly exempted from these regulations.

Sincerely,



James W. Clyne, Jr.
President/CEO
LeadingAge New York



Anne Hill
Executive Director
Adult Day Health Care Council



Carla Braveman, RN, M.Ed, CHCE
President & CEO
Hospice and Palliative Care Association of NY State

cc: Paul Francis
Jason Helgerson
John Ulberg
Frank Walsh