



January 10, 2019

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-RP: Employee Scheduling (Call-In Pay)

Dear Mr. Paglialonga:

I am writing on behalf of LeadingAge New York relative to the revised 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. While the revised proposed rulemaking includes helpful modifications, we remain concerned that the new requirements could adversely affect access to high quality long term care (LTC) and senior services, create new administrative burdens and add to employer costs.

LeadingAge NY represents approximately 400 not-for-profit and public providers of LTC, post-acute care and senior services throughout New York State, including nursing homes, home and community-based services, adult care facilities, assisted living programs, retirement communities, senior housing and managed long term care 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 and senior services settings. The proposal requires employers that are covered by the 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.

We appreciate that the NYSDOL revised the proposed regulations in response to comments from LeadingAge NY and other stakeholders. While exceptions to the requirements were expanded and a new safe harbor was added in an attempt to lessen the added burdens on employers, multiple questions and concerns remain. Our specific comments appear below.

“Health and Safety” Exception [Paragraph (c)(3) of the Regulations]

The revised proposal adds a significant exception that excludes certain categories of employees from receiving call-in pay for unscheduled shifts, cancelled shifts, on-call and call for schedule practices. The exception would apply to “...employees whose duties are directly dependent on weather conditions, or to employees whose duties are necessary to protect the health or safety of the public or any person, or to employees whose assignments are subject to work orders, or cancellations thereof...” This exception is also conditioned on such employees receiving “...weekly compensation that exceeds the number of compensable hours worked times the applicable basic minimum wage rate, with no allowances.”

The proposed rulemaking does not further define “employees whose duties are necessary to protect the health or safety of the public or any person.” LeadingAge NY members provide a wide range of services to protect the health and safety of individuals in their own homes, in community-based settings such as adult day programs and senior centers, and in congregate care and senior living facilities. These services are provided by employees in various occupations including nurses, care aides and dietary, housekeeping, laundry and maintenance staff. ***We strongly recommend that the Department clarify and apply this exception at the employer level to all non-administrative employees of LTC, senior services and senior housing providers.***

Our member providers also utilize the services of third party staffing agencies to complement their employee staffing. We are concerned about whether this exception will similarly apply to employees of staffing agencies whose duties are necessary to protect the health or safety of the public or any person. If not, our members could experience significant increases in their agency staffing costs even though they do not have direct control over those workers’ schedules.

We are also concerned about the condition that weekly compensation ***exceed*** the number of compensable hours worked times the applicable basic minimum wage rate less any allowances. Most of our members receive funding for the services they provide from state and federal governmental sources, and most often these funding sources do not fully cover the actual costs of operation including payment of wages for paraprofessional employees over and above the minimum wage. ***Accordingly, we recommend that this standard be revised to weekly compensation of at least the number of compensable hours worked times the applicable basic minimum wage rate.***

Furthermore, the term “compensable hours” is not defined in the proposed rulemaking. The New York State Court of Appeals is currently considering two cases, *Andryeyeva v. New York Health Care, Inc.* and *Moreno v. Future Care Health Services, Inc.*, which concern whether non-residential 24-hour employees must be paid the minimum wage for all 24 hours of their shifts, regardless of whether they have opportunities for sleep and meals. If the Court of Appeals holds that every hour of a 24-hour shift may be compensable, then a home health agency that pays a home health aide for only 13 hours of a 24-hour shift under current NYSDOL rules may fall below the minimum wage threshold needed to qualify for this exception.

Full-Time Exception [Paragraph (c)(2) of the Regulations]

The proposed rulemaking provides an exception from all proposed forms of call-in pay except for reporting to work pay for employees during workweeks when their weekly wages exceed 40 times the applicable hourly minimum wage rate. In the LTC and senior services field, the standard full-time workweek is often less than 40 hours (i.e., 35 or 37.5 hours per week). In addition, as previously noted, governmental payments for services most often do not support payment of wages exceeding the applicable minimum wage. ***For these reasons, we recommend that this exception be revised to apply to employees who are paid weekly wages of at least the applicable basic minimum wage rate times the number of hours in the employer’s standard full-time workweek.***

In addition, while this exception could apply to many employees who work full-time for a LTC or senior services 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 whether this test would be applied to each employer separately, or in the aggregate across employers. Obviously, if the “health and safety” exception is broadly applied as we recommend above, this question may not be particularly relevant to LTC and senior services employers.

Cancelled Shift Exception [Paragraph (c)(6) of the Regulations]

The proposed rulemaking includes an exception to providing call-in pay for cancelled shifts when an employer cancels a shift due to the employee requesting time off, or when workplace operations cannot begin or continue due to a cause not within the employer’s control. The Dec. 12, 2018 *New York State Register* notice (page 11) further elaborates on this exception by indicating that employers should have more flexibility under the regulations if they operate at the will of customers and customer needs, and not have to pay additional money to employees due to customer cancellations.

We and our home care agency members are seeking assurance that this exception and/or the “health and safety” exception discussed above will apply when services cannot be delivered and are cancelled on short notice because the patient has been hospitalized or is otherwise unavailable and/or unwilling to receive home care services.

“Unscheduled Shift” Definition [Paragraph (a)(2) of the Regulations]

The regulations state that an employee who by request or permission of the employer reports to work for any shift for hours that have not been scheduled at least 14 days in advance of the shift shall be paid an additional two hours of call-in pay. We note that some LTC and senior services providers permit employees to schedule themselves, or to work as a team to schedule needed work hours. In this scenario, it is possible that some changes will occur within the 14-day time frame. Given that the employees are empowered to schedule themselves under such circumstances, such low-notice changes should not be considered “an unscheduled shift” for which the employer is responsible to pay additional hours. This policy should be expressly clarified under the exception identified in paragraph (c)(4) and/or the safe harbor provision in paragraph (d) of the regulations.

Cost of Proposed Regulations

The “Costs” section of the Regulatory Impact Statement in the *State Register* notice states that, “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 “health and safety” and other proposed exceptions to these regulations are not broadly applied to LTC and senior services providers, there could 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. Additional administrative costs are also possible, given that

employers may need to institute additions and changes to their scheduling, time tracking, record keeping and payroll reporting systems to ensure compliance.

Conclusion

LeadingAge NY appreciates the amendments that have been made to the previous version of the call-in pay regulations. Depending on how the various exceptions are defined and applied, the revised proposed regulations 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/client referrals. An inherent inability to predict staffing needs well in advance could lead to increased direct and administrative costs to LTC and senior services providers, which in turn would adversely affect provider finances.

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

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel J. Heim', with a long horizontal line extending to the right.

Daniel J. Heim
Executive Vice President
LeadingAge New York