



December 2, 2016

Michael Paglialonga
NYS Department of Labor
Building 12, Room 509
State Campus
Albany, NY 12240

RE: I.D. No. LAB-42-16-00015-P: Minimum Wage – Increase the Salary Basis for Overtime Exemption for Executive, Administrative, and Professional Employees

Dear Mr. Paglialonga:

On behalf of LeadingAge New York, I am pleased to provide comments on proposed amendments to Parts 142-3 and 143 of Title 12 NYCRR which would increase the salary basis threshold for executive, administrative, or professional (EAP) employees under the state's wage and hour laws. LeadingAge NY recommends suspension of this portion of the rulemaking, pending resolution of this issue at the federal level and identification of Medicaid and other funding sources to reimburse providers for the associated compliance costs.

LeadingAge NY represents approximately 500 not-for-profit and public providers of long-term care services and supports throughout the State including home care agencies, nursing homes, assisted living and adult care facilities, senior housing, retirement communities, adult day health care programs and managed long term care plans, many of which are likely to be directly or indirectly affected by the proposed rule.

LeadingAge NY strongly recommends delaying promulgation of this aspect of the proposed regulations, particularly in light of recent developments surrounding the final rule promulgated by the US Department of Labor similarly amending the Fair Labor Standards Act (FLSA) overtime exemption regulations [29 CFR Part 541] as they apply to EAP employees. On Nov. 22, 2016, the US District Court for the Eastern District of Texas granted a preliminary injunction and stayed implementation of the federal rule nationwide. The Court held that the Department of Labor exceeded its delegated authority and ignored the Congressional intent of the FLSA.

The subject regulations proposed by the NYS Department of Labor would annually increase the overtime exemption income thresholds for EAP employees from \$675 per week to amounts that would soon exceed the thresholds required by the US Department of Labor's final rule, which has been enjoined. The NYS Department of Labor should not move forward with this portion of the proposed regulation until there is final resolution of the federal rule, and the resulting impact of any state rule can be fully understood and addressed.

LeadingAge NY and its members support fair and reasonable wages for workers. However, it is vitally important to analyze the impact of this element of the regulation in light of corresponding developments at the federal level, and to plan for the compliance costs and other impacts on regulated entities before it would become effective.

In this regard, not-for-profit providers that care for elderly and disabled individuals currently face numerous financial and administrative challenges, without having received concomitant increases in Medicaid reimbursement or Supplemental Security Income (SSI) payments to fully address compliance costs:

- The minimum wage initiative for food services workers has hurt senior care providers, which as a result of these increases and their timing now have less ability to compete with fast food establishments for paraprofessional workers.
- The minimum wage increases that are also reflected in the proposed regulation will put further pressure on wages for many hourly workers employed by our member organizations, and create a “compression effect” requiring employers to also grant increases to more experienced paraprofessional workers as well as those in more skilled occupations who are paid slightly above the new minimum wage levels. The Department of Health has worked diligently with the provider community to determine how the limited funding appropriated in the state budget should be allocated. Unfortunately, the funding will not support all senior care providers, and the amounts available do not even fully address the associated costs for minimum wage workers for those providers that stand to receive funding, much less the non-Medicaid costs of the mandate and any costs associated with the compression effect.
- Home care agencies have had to make costly adjustments in their service delivery as a result of the FLSA Companionship Exemption revisions, while questions remain on the distribution of FLSA Companionship Exemption reimbursements from Medicaid managed care plans to providers.
- The mass enrollment of Medicaid beneficiaries requiring long term care services into managed care and managed long term care plans has required providers to invest scarce funding in additional administrative and billing resources, while the level of payment to managed care and managed long term care plans has been insufficient to pay their downstream providers for these added costs.
- The federal home and community based settings rule requires enhanced care planning and, for some providers, potential environmental changes, with no enhanced Medicaid reimbursement identified.
- Nursing homes, home care agencies and other providers must come into compliance with new federal requirements regarding emergency preparedness, without any enhanced Medicaid rates or reimbursement to do so.

In summary, providers of long term care services and supports have recently been confronted with multiple costly federal and state mandates, without adequate assurances of Federal and state reimbursement for the associated costs. In fact, while the State has made an effort to provide some Medicaid increases to support minimum wage increases, the proposed increases to the overtime exemption income threshold included in this proposed regulation do not come with any assurance of increased reimbursement for the associated overtime and other costs.

The provider community is struggling to adjust to the many changes and challenges in the field. While we appreciate that the EAP income thresholds may be out-of-date, *state and federal payments to providers are also out-of-date*. There have been no cost-of-living increases to Medicaid and the state share of SSI payments since 2008. Those providers that rely largely on public funds to serve New York's low-income seniors are struggling to implement existing mandates and stay financially viable.

For these reasons, we respectfully urge the Department of Labor to suspend further consideration of the proposed overtime exemption income threshold increases, pending resolution of the associated federal rule and completion of a more comprehensive analysis of the administrative and financial impact of this change and identification of Medicaid, SSI and other funding sources to assist providers with compliance costs.

Thank you for the opportunity to provide comments. If you have any questions on our input, please do not hesitate to contact us at (518) 867-8383.

Sincerely,

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

Daniel J. Heim
Executive Vice President