



## Department of Health

**ANDREW M. CUOMO**  
Governor

**HOWARD A. ZUCKER, M.D., J.D.**  
Commissioner

**SALLY DRESLIN, M.S., R.N.**  
Executive Deputy Commissioner

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Dear Colleague:

The purpose of this message is to inform providers and plans in regard to a recent Federal court decision impacting overtime, travel time and live-in rules and the steps the NYS Department of Health (DOH) will take to modify Medicaid reimbursement rates to ensure compliance.

### **Recent Federal Court Decision: Fair Labor Standards Act (FLSA)**

The US Department of Labor's (DOL) Final Rule concerning companionship exemption under the Federal FLSA brings important minimum wage and overtime protection to the many workers who serve the disabled and elderly individuals in NYS communities. The Final Rule is based on the US Court of Appeals August 21, 2015 unanimous decision, effective October 13, 2015, which affirms the validity of the Final Rule.

This Final Rule contains several changes with the most significant being:

Overtime – More NYS home care service workers will be protected by the FLSA's minimum wage, overtime, and recordkeeping provisions. Specifically for NYS, the rule requires payment of overtime at time and one half of wage versus the former requirement of overtime paid at time and one half of minimum wage.

In addition, the following related regulatory provisions were clarified and remain in effect:

- 1) Travel Time – The Final Rule states that travel within a day's work for an employee between clients or on behalf of a client such as to the grocery store or post office are compensable hours.
- 2) Live-in Rules – For live-in workers who previously were only allowed to bill up to 13 hours of care per day, the Final Rule allows for additional billable hours in the event that the worker's meal periods, sleep time, or other periods of free time are interrupted by a clients' needs.

### **Steps DOH Will Take to Implement FLSA**

The Department of Health's Office of Health Insurance Programs (OHIP) has begun efforts to expeditiously assess the extent of additional Medicaid funding that may be necessary to provide to both fee-for-service providers and managed care plans to assist them in ensuring that the new FLSA requirements for overtime are properly implemented for home care workers.

OHIP has begun outreach to seek input from the NYS home care associations and managed care plans on this important issue to more accurately determine the adjustment for 2016 rates.

In this effort, DOH is conducting a survey to gather necessary information to more effectively evaluate the potential fiscal impact.

- ✓ The survey is intended to be distributed by plans to their contracted agencies to more accurately evaluate the scope of hours impacted by FLSA.
- ✓ Results from the survey will be reviewed by OHIP in the coming months as a component in more accurately determining necessary adjustments to managed care plan premium rates and Medicaid fee-for-service rates.

In addition, OHIP has issued a separate survey to more accurately assess the fiscal impact of MLTC Policy 14-08 on November 24, 2014. This policy, based on guidance issued by both the Federal and NYS DOL's, stated that managed long term care plans and their network providers are required to provide a rate of payment that is based on at least 13 hours of care for live-in 24 hour Personal Care Services and live-in 24 hour Consumer Directed Personal Assistance; rather than the previously determined payment based on 12 hours of care. Information on MLTC policy 14-08 is available on the DOH public website at:

[http://www.health.ny.gov/health\\_care/medicaid/redesign/docs/mltc\\_policy\\_14-08\\_paying\\_for\\_live\\_in\\_cases.pdf](http://www.health.ny.gov/health_care/medicaid/redesign/docs/mltc_policy_14-08_paying_for_live_in_cases.pdf)

It is expected that the survey process and subsequent analysis could require up to two to three months to complete. As such, the Department has decided to expedite rate relief to fee-for-service home care programs and managed care plans retroactive to October 13, 2015 based on the latest available utilization information. Based on consultation with Mercer (the Department's actuary), the Department has decided to apply the home care industry standard that 10% of total hours worked are associated with overtime. It will also include additional funding for new FLSA employee travel and live-in requirement noted above. The total per hour adjustment is estimated to be an increase of \$0.34/hour<sup>1</sup> across all aide hours. The Department will monitor the effect of this additional funding and expects the increase to be passed on to the worker and/or agency as appropriate. The Department may be issuing additional guidelines if necessary as well.

The Department will be submitting managed care rate adjustments to the Centers for Medicare and Medicaid Services (CMS) for approval retroactive to October 13, 2015. However, in order to expedite funding into the rates, DOH intends to advance State share only payments to managed care plans which will be distributed as lump sum amounts by December 2015. For fee-for-service rates, the per hour amount will be factored into rate adjustments, retroactive to October 13, 2015, to be developed under the existing rate setting methodologies; with payments anticipated in January 2016. Both the managed care and fee for service payments are designed to provide funding for home care providers to meet their initial obligations under the Federal Final Rule.

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<sup>1</sup> There will also be an additional component to reflect payment for 13 hours for live-in personal care cases in accordance with the requirements of MLTC Policy 14-08. This funding will be factored into a rate adjustment to be developed under the existing fee-for-service and managed care rate setting methodologies.