



Task Force to Combat Worker Exploitation and Abuse

Statement of PHI

PHI would like to thank Governor Cuomo and the members of the Task Force for their efforts to identify and address industries that are prone to worker exploitation. Specifically, the attention your work has brought to workers' rights – along with outreach and education – are important steps to combating exploitation. We applaud the interest in the home care workforce because these workers are not only essential to helping older adults and people with disabilities to safely remain in their homes and communities, but they also represent a large portion of the workforce in our state. For example, in New York City, when personal care aides and home health aides are totaled, they form the largest single occupation at 173,110, outnumbering retail salespeople who number 125,270.¹

As the nation's leading authority on the direct-care workforce, PHI (Paraprofessional Healthcare Institute) focuses on improving the quality of care through quality jobs for home care aides and other direct care workers, by improving wages, training, career paths, and health coverage. Unfortunately, given the demographics of this workforce, and the general lack of standard protections, these workers are at significant risk of exploitation. We discuss a number of the ways home care aides – both personal care aides² and home health aides – are exploited in New York as well as how to address these practices. While some of these issues and solutions are specific to home care, others may be broadly applicable to all of the industries the workgroup is focusing upon.

Contributing Factors

Home care aides are an incredibly important part of our long term care system. This workforce has historically been largely female, of color, with limited education, and low

¹ Source: NYS Department of Labor, Occupational Employment for New York State at: <http://labor.ny.gov/stats/lswage2.asp>

² Personal Care aides in New York City are referred to as Home Attendants.

income.³ These factors combine to make home care aides vulnerable to worker exploitation. Unfortunately, the levels of education means they have limited job options and often put up with exploitation because they are unsure they would be able to find another job. Below are a number of factors that put these workers at risk for exploitation.

- **Wage Exploitation:** New York City has several important requirements that relate to aide compensation and together create a complex set of expectations for employers and workers. Wage Parity, the Fair Labor Standards Act (FLSA), and recent court decisions regarding cases in which an aide “sleeps-in” for a 12-24 hour shift , complicate the computation of wages, creating opportunities for worker exploitation whether accidental or intentional. The changes discussed below are designed to protect workers, but have little oversight and enforcement. Moreover, the state has not been able to increase payments to managed care plans for timely payment of these new costs. These payment lags encourage managed care plans to contract with non-unionized employers who are more likely to skirt the requirements.
 - **Wage parity:** The Wage Parity Law gradually increased home health aide wages in NYC and the surrounding counties. It requires the same base wage of \$10 an hour for home health aides and home attendants as well as an additional amount in benefits for each hour an aide provides care, with an option for this amount to be provided in benefits or paid out as a supplemental wage.⁴
 - **Fair Labor Standards Act (FLSA):** The US DOL modified its regulations to extend the protections of the Fair Labor Standards Act to home care workers. After multiple legal challenges, the requirement was implemented on October 13, 2015. Previously, this workforce had been under an exemption which meant that, in New York, they were paid time and a half of the NY minimum wage for overtime rather than time and a half of their base rate, and did not receive compensation for travel

³ PHI. “About New York Direct-Care Workers, 2008-2010.” Accessed at: <http://phinational.org/policy/state-activities/phi-new-york/workforce-facts>

⁴ PHI (February 2014). “Medicaid Redesign Watch #1: Wage Parity for Home Care Aides.” Accessed at: <http://phinational.org/research-reports/medicaid-redesign-watch-1-wage-parity-home-care-aides>

between cases or pay for non-care hours.⁵ Further complicating matters, the higher wage under Wage Parity does not have to be paid on these newly compensated “non-care hours.” Instead, aides can be paid the New York State minimum wage. In short, while these laws and regulations have provided wage floors and protections for home care aides, they have also created a system in which it is extremely difficult to estimate proper wages. When combined with an inadequate enforcement system, worker exploitation is much more likely.

- ***Sleep-in cases:*** Historically, home care aides have not been paid for every hour of a 24-hour shift with a single client, which is known as a “sleep-in” or “live-in” case. FLSA requires an aide to be paid for at least 13 hours in these cases (with 8 hours for sleeping and 3 hours for meals) – with pay for every hour if the aide does not receive at least 5 hours of uninterrupted sleep.⁶ However, recent New York court rulings in two separate cases could require aides to be paid for the entirety of a 24-hour shift when the worker maintains a separate residence for nights she is not with her client.⁷ We believe this is one other change that could lead to less pay than the aide is entitled to. And, it is one other area which requires greater attention to rates and processes of payment which we address later in these comments.
- ***Travel:*** FLSA provides a step forward for home care aides, requiring them to be compensated for travel time between clients. However, without more sophisticated systems of tracking, aides may once more be denied compensation due. Despite the benefits of this new policy, aides do not have to be compensated for their travel costs. This is an especially important issue outside of New York City as aides typically have to travel much greater distances in order to reach their clients. Without an adequate public transportation system, aides are forced to use their own cars for transportation. Since they are typically not compensated for

⁵ PHI (October 2015). “FLSA facts: Understanding the revised companionship exemption.” Accessed at: <http://phinational.org/fact-sheets/flsa-facts-understanding-revised-companionship-exemption>

⁶ U.S. Department of Labor (September 2013). Fact Sheet # 79D: Hours Worked Applicable to Domestic Service Employment, available at: <http://www.dol.gov/whd/regs/compliance/whdfs79d.htm>.

⁷ *Andryeyeva v. New York Health Care d.b.a New York Home Attendant Agency*, Decision and Order February 19, 2013 and Opinion September 16, 2014, 2014 WL 4650233 (N.Y. Sup. Ct. 9/16/2014); *Moreno v. Future Care*, 2015 WL 1969753*4, 43 Misc. 3d. 1202 (N.Y. Sup. Ct. Kings County. May 4, 2015)

mileage or other travel costs, this puts an additional burden on the aide and can also lead to safety concerns, especially in extreme weather conditions.

- **Benefits:** Paid time off, health insurance, pension and access to additional training comprise the package of benefits for home care workers. When employers do offer health insurance, home care aides usually only qualify after a probationary period and then, only if they work a certain number of hours each month.⁸ Due to the nature of this work and other complications, aides' hours often fluctuate greatly from one month to the next, making it difficult for the aide to track all of her benefits. With respect to health insurance, the fluctuation in hours leave a worker uncertain as to whether she will maintain health care insurance coverage. Further, some employers purposely keep aides' hours below the benefit threshold, or offer benefits that are too expensive. Further, it has been our experience that many aides believe that they are or can be covered under Medicaid despite the fact that they have been offered affordable coverage that meets the requirements of the Affordable Care Act.

Further, aides often work for more than one employer which can compromise their access to benefits. If both employers have a collective bargaining agreement with 1199 SEIU, the home care worker gets credit for all hours worked regardless of employer. Paid time off, however, can be difficult to track.

Finally, as described previously, the Wage Parity requirements include supplemental wages or benefits that are not regularly tracked or audited.

- **Training:** There are three types of home health aide training programs. The first is a program operated by an employer who is a provider of health services (i.e., a licensed home care services agency), which is approved by the New York State Department of Health, and cannot charge the student more than \$100 in fees. The second type of training program is offered by public entities (e.g., community colleges), which are require tuition payments or vouchers for payment which may come through a workforce development program. The final type of training program is offered through proprietary schools. Students of

⁸ Eligibility for health insurance from 1199 SEIU's Home Care Benefit Fund require that the aide work 100 hours for two consecutive months and agree to contribute to the costs of the coverage (\$5 a week as of January 1, 2016).

proprietary school training programs must often pay for these schools out-of-pocket and are much more likely to be victims of predatory lending practices. Unfortunately, students are often unaware of the differences between these training options and the costs, making them susceptible to exploitation through predatory lending. Further, not all training programs ensure employment, leaving the aide without expected income after the time put in to be trained.

- **Safety:** The fact that a home care aide works in their client's home has the potential to put their safety at risk in a variety of ways:
 - *Physical environment:* Often, agencies and other entities do not properly assess the physical environment of the client to ensure it is safe for the aide and the client. Aides often have to deal with environmental safety issues ranging from dangerously poorly maintained homes to bug and other animal infestations.
 - *Non-physical environment:* There are inadequate protections for aides when dealing with non-physical environment safety issues. For example, if drugs are present in the client's home or apartment building, aides are often subjected to additional safety concerns.
 - *Injury:* Home care aides have one of the highest rates of injury out of any occupation.⁹ Often, these injuries can be prevented if the aide is provided with the proper assistive equipment, such as a Hoyer lift, or if the agency or payer dedicates more staff, such as two home care aides to transfer an obese client. These injuries often cause the aide to miss significant amounts of work, as well as having the potential to leave them with a life-long disability.

Recommendations

Based on the issues discussed above, PHI recommends a number of actions which can help protect home care aides from exploitation.

- **Home Care Worker Ombudsperson:** The current system is too complicated for home care aides and other workers to navigate on their own. A worker

⁹ U.S. Department of Labor, Bureau of Labor Statistics, Injuries, Illnesses, and Fatalities Program (2014, December 16). Nonfatal occupational injuries and illnesses requiring days away from work, 2013. Retrieved from: <http://www.bls.gov/iif/>

ombudsman would help home care aides sort through any issues that may arise around wages, benefits, and safety. An ombudsman would be an unbiased source of information and support. Further, through an education campaign on worker rights, resources, and supports, the ombudsman could help empower workers to be their own advocates and make use of the Anti-Retaliation or Mediation Unit if appropriate. Additionally, workers could file complaints with the ombudsman, which would be forwarded to the proper agency for investigation. Complaint reports will also help identify employers or situations that deserve greater scrutiny.

- **Clarify where enforcement will occur:** The state agency responsible for paying for wage and hour requirements – DOH – is different from the agency that is in charge of labor law, interpretation and violations – DOL. Additional payments to cover Wage Parity and FLSA go through managed care plans that must attest to the compliance of the employers. While the Office of the Medicaid Inspector General could review for compliance, the staff would need to be well versed in labor and employment law. At a minimum, a system of review and communication is needed between DOH and DOL. Further, the State needs to clearly delineate responsibility for monitoring and enforcing home care compensation requirements to ensure that home care aides are afforded the protections they deserve. A “system” based on attestations is not a system and will allow for abuses without some form of compliance review and enforcement.
- **Develop a strong system of workforce data collection, monitoring, and reporting:** Despite the fact that the state collects regular data on other health care professions (e.g., physicians, RNs), it does not regularly track the home care aide workforce. In addition, given the changes that will be soon implemented for fast food workers, New York needs to plan for the new wage pressures that will result from the “Fight for \$15,” so it can budget for and quickly adjust to new labor costs, such as an increase in minimum wage. Labor market analyses will allow the state to identify and address shortage areas and the compensation needed to attract and retain these valuable workers.

- **Funding for increased labor costs:** Medicaid – the dominant payer of home care aide services – does not have the ability to immediately adjust managed care rates to recognize newly mandated labor costs. Without a system of rate determination and payment that adjusts the funding when new rules go into effect, a disincentive is created for employers to properly compensate home care aides. Changes in labor costs, such as an increase in the minimum wage, need to be immediately recognized in rates to home care agencies or, if a separate funding pool is used, the state’s share of the funds must be immediately available. The state is working on this problem, much of which is attributable to the federal government. However, over time, we believe the managed care rates need to be rebased in order to reflect the labor costs required to maintain a well-trained and compensated, stable home care workforce that is treated with respect.

Home care aides work in an environment that leaves them susceptible to exploitation. PHI is encouraged that the Governor is addressing this issue and hope that our information will assist the advisory group in forming its recommendations. If you have any questions or would like further information, please do not hesitate to contact Carol Rodat, New York Policy Director, at crodat@PHInational.org or (518)461-9563.