



Investing in New York's Home Care Workforce: Fair Labor, Health, and Dignity for Women, Immigrants, Communities of Color, Seniors, and New Yorkers Living with Disabilities

A Policy Brief by the Chinese-American Planning Council - April 2019

Summary

New York State faces a ballooning health budget -- over \$300 billion by 2020. As it rises, home health care and long term care continue to be a growing crisis. Recent court decision upholding the 13 hour rule (paying live-in home care workers for 13 of 24 shift hours), do not address the growing home care workforce shortage and rising need for community based home care. We recommend advancing a legislative solution to ensure that home care workers are adequately compensated, and provide comprehensive reform of regulations and rates to ensure stability of the home care sector to meet the needs of aging New Yorkers and New Yorkers with disabilities.

Demand in the Home Care Sector is Growing - But So Is the Workforce Shortage

New York State has the fourth oldest population in the nation, with 3.7 million people age 60 and over. By 2030, [5.2 million people](#) in the state will be 60 and older, with 1.81 million New Yorkers will be 75 or older. An estimated [seven out of 10](#) people over the age of 65 will need some kind of long term care. In addition, there are over a million New Yorkers with disabilities, chronic illnesses, or other functional complications that require direct care, creating an significant population in New York State that requires direct care support to live and age in dignity. Direct care in homes and communities is either provided by unpaid family caregivers, paid family caregivers, or home health workers through an agency. Care that takes place in homes and in communities is often higher quality, preferred by seniors and people with disabilities, and less costly overall than institutionalized care. In addition, many immigrant seniors and families prefer home health care because they can receive language accessible and culturally competent care that they would not find in institutionalized settings.

Because of the growing needs of people with disabilities and an increasingly aging population, the home care sector is the largest employer in the nation, yet continues to face shortages. In NYC alone, [there are 187,000 home health](#) workers, and in New York State, there are over 330,600 home health workers. Yet because of growing need, by 2025, New York State will see a 33 percent growth in need for home health aides and face a shortage of [23,000 workers](#). While automation and investments in technology serve to improve the function and efficacy of hospitalization and institutionalized care, this portion of the healthcare industry is highly reliant on human work, adding urgency to investments in this workforce.

Wage and Labor Issues Drive Shortages in the Home Care Sector

A primary driver of this workforce shortage is chronic low wages and poor working conditions pervasive throughout the sector. More than [one in seven](#) low-wage workers in New York City is a home care worker. According to the New York Department of Labor, the median annual salary for home care aides is [\\$24,810](#). One in four workers lives below the federal poverty line and more than half rely on some form of public assistance to make ends meet. The workforce is primarily comprised of women (90%), people of color (60%), and approximately one in three workers are Limited English Proficient (LEP). We know much of this thanks to the work of the [Caring Majority](#),

a coalition of seniors, people with disabilities, family caregivers, domestic workers, and home care providers from all across the state that seeks to improve the future of long term care.

Medicaid, the largest payer of home care and long term care in New York State, has exacerbated the workforce shortage through depressing wages in their reimbursement rates. Particularly for non-profit providers, home care agencies are beholden to the rates and requirements laid out by Medicaid and the State, and cannot compensate their workers adequately or competitively when caught between unfunded regulatory mandates and labor agreements. This complexity has ramifications across non-profit providers operations, from higher fiscal and stability levels to daily operations and home care worker scheduling as cases move in and out of eligibility. As the minimum wage rises in New York, these gaps widen for providers and home care workers alike. Increasingly, the emotionally and physically demanding labor of home care, in addition to inconsistent scheduling as providers balance underfunded plans and agreements, has become less attractive than other minimum wage jobs.

In addition to low wages, home care workers face high levels of uninsurance (twice that of the overall population), and inconsistent schedules. While the Fair Labor Standards Act was extended to home care workers in 2013, it has not been fully implemented in New York State, making scheduling and labor issues like overtime and spread of hours difficult for workers and providers to manage. However, home care workers were covered under home care labor law.

One of the most stark examples is that home care workers who work 24 hour shifts for round-the-clock care are being paid for 13 hours of work, with 8 hours allocated for sleep and 3 hours allocated for meals. However, many home care workers report that realities of caring for someone that is homebound often mean that they [must attend to their clients during break hours](#). And regardless of interruption, these shifts still require the workers to be away from their homes and families for 24 hours.

Consequences of Recent Court Decisions

Over the past several years, individual home care workers have brought lawsuits against their companies surrounding this issue. Last year, the New York Supreme Court, Appellate Division decided through [three key cases](#) (*Moreno v. Future Care Health Servs, Inc.*, *Tokhtaman v. Human Care, LLC.*, and *Andryeyeva v. New York Health Care, Inc*) that home care workers must be paid minimum wage for all hours spent at a client's home.

The current industry standard was built on a [March 2010 opinion letter](#) from the New York Department of Labor, which interpreted minimum wage and overtime provisions of the New York Labor Law. In response to the Supreme Court Ruling, the Department of Labor issued an [Emergency Regulation](#) in October 2017, which allowed them to uphold the 13 hour rule temporarily while they examine a permanent solution. The DOL concurrently initiated a proposed rulemaking in July to codify and clarify that existing 13-hour rule. That final clarification has yet to be released. In October 2018, the NYS Supreme Court rejected the renewal of subsequent emergency regulations, claiming that they did not abide by the State Administrative Procedures Act's standards for "emergency."

Because of their contracts, nonprofit home care organizations are being caught in the middle of the disagreement between the DOL and the Supreme Court. Home care agencies must comply with the DOL regulations. However, nonprofit home care providers' rates are set by MCO and MLTC plans, which are funded through Medicaid rates set by the Department of Health, which

uses a formula based on a 13-hour work day (originally set by DOL). Requiring nonprofit providers to abide by regulations without a budget solution that coordinates reformulation of DOH rates, the State leaves providers unable to make up the gap between the required wages (DOL) and the reimbursement from the contracts (DOH). This would cause many nonprofit home care agencies to go bankrupt and close, which would lead to the loss of jobs and the forced institutionalization of many patients who could have otherwise remained at home with adequate care (creating an even greater long-term cost for the State).

While 24 hour care is a critical issue, there are other regulations in addition to 24 hour care, including spread of hours, seven day overtime, and wage parity that have not been funded by the DOH and that workers have active claims on. Thus far, providers have had to make difficult choices to pay for these regulatory changes. Against better guidance, some providers have only managed to stave off closure by limiting the amount and types of cases they take on, thus reducing options for seniors and people with disabilities and limiting hours available for home care workers.

The New York State Court of Appeals, in a 5-2 decision, overturned lower court rulings on March 29th, 2019, upholding that home care workers who work 24 hours get paid for 13 hours of work, provided that attendants receive at least eight hours of sleep time (of which at least five consecutive hours are uninterrupted) and three hours of meal time (one hour for the three meals) during which they do not have to work with their patients. More specifically, the Court of Appeals upheld the DOL's interpretation of its own previously promulgated regulation to allow for the 13 hours pay for 24 hour live in home care workers, and to implement that interpretation by issuing a "wage order" without any additional process. At the core of these cases is the application of administrative law to both administrative agencies and the processes which home care agencies must comply. The Court of Appeals also accepted the State's argument that the DOL was in compliance with the Federal interpretation and practice, which allows for the 13 hour payments, in formulating its interpretation of the regulations.

The majority opinion, written by Judge Jenny Rivera stated, "Upon our review of the Wage Order and DOL's policy statements, we conclude that the DOL's interpretation is not inconsistent with plain language... nor is it irrational or unreasonable." The Court of Appeals emphasized in its ruling that if a home care worker receives one minute less than five hours of uninterrupted sleep, than the home care agency must compensate the attendant for the full 24 hours. The Court also emphasizes that the three meal hours must be totally work-free. Additionally, the majority opinion held open the possibility that home care workers claims that they were not paid for their work during these break hours have merit, calling the allegations "disturbing and paint a picture of rampant and unchecked years-long exploitation." The majority opinion also indicated that it was for the DOL and the State Legislature to assess whether sleep and meal time exemption is a viable methodology to ensure employer compliance with the law and proper wage payment.

This decision leaves New York with a sector in crisis, that will shortly be unable to meet the growing demand of the home care sector, for patients, employers, and workers alike.

Moving Forward by Addressing Historic Underfunding and Underpayment

While this represents a final decision on this case, the stability of the home care industry is still in jeopardy, as this case did not deal with other retroactive issues around hours and scheduling, nor does it create a permanent solution moving forward. We recommend that the State compensate home care workers to address all retroactive issues in the home care sector created by the

Department of Health (DOH) and the DOL, and establish a permanent solution to stabilize the sector, the agencies, the workers, and the consumers moving forward. This solution must prioritize both worker

Investing in the Home Care Industry's Future

The upholding of the 13-hour rule fails to address the growing crisis in the home care sector. The home care industry needs labor reform and investment to sustain its workforce and meet growing demand. Investing in adequate wages, fringe benefits, career ladders, and innovative practices will allow us to attract the skilled workers needed to reduce the staffing shortage and build a robust and thriving home care sector.

Nonprofit community-based home care providers work hard to ensure that the home care workers we employ are responsive and reflective of the communities we serve. We believe the best care comes from home health aides who understand and represent the same values and cultural understandings of our communities. We also believe that those home health aides are best able to deliver quality care when their work is recognized and fairly compensated.

Federal, state, and local labor regulations are ever-evolving to meet the needs of home care workers, providers, and those that receive care. However, nonprofit community-based home care providers are often underrepresented in much of the decision-making. Further, because the home care industry is largely employed by women, immigrants, and people of color, the interests of workers and community-based employers often takes back seat to the influence of private providers and insurance companies.

Immediately end the 24-hour rule and fully fund 12-hour split shifts

We recommend that New York State advance a legislative solution to create a robust home care sector that meets the needs of an aging population and creates a thriving workforce. Simply banning 24-hour cases will be insufficient, leaving open to harmful labor practices and putting the consumers who need to most care at risk of being unable to access it. We must advance a legislative solution that fully funds 24-hour care through Medicaid reimbursement rates to cover the full and actual cost of providing home care services, providing a living wage, and incentivizing innovation. This could be accomplished through breaking up round the clock care into 12- or 8-hour split shifts that would create better conditions for the worker, and by extension the consumer as well. This would also be consistent with best practices in the medical and healthcare field. However, the existing labor shortage means that there may not be enough home care workers to cover all shifts, as the amount of cases would multiply by effectively splitting a single case day into two or three shifts. Competitive wages are crucial to attract and retain a qualified workforce and meet demand.

The State should state to set minimum requirements for payments from Medicaid managed care plans to home care providers, and to create incentives for investing in the workforce through improved compensation, training, advancement opportunities, and other innovations.

Similarly, it is also important to make sure that consumers' plan hours are not reduced as a result of fully funding 24-hour coverage through 12-hour split shifts. Expanding coverage through Medicaid and increasing funding for Expanded In-home Services for the Elderly (EISIP) would also help meet this need and ensure that seniors who need home care are able to access it.

A Note on Fair Labor Standards Act

Current Fair Labor Standards Act (FLSA) provides that an employee who resides on their employer's premises on a permanent basis or for extended periods of time is not considered as working all the time they are on the premises. This may include scenarios like workers in group homes, boarding schools, on cruise ships, resorts, or in other facilities where employees are provided separate living or rest quarters. However, home care workers face unique challenges because they are often the sole employee on the premises in which they rest and work. Group homes, cruise ships, and the worksites described above often have rotationally staff scheduled to cover those who are onsite but on rest periods. This staggered scheduling prevents excessive interruption during sleep and meal periods. Such fallbacks are not available for home care workers. As the sole employee in the employer's home, home care workers must respond to tasks regardless of their personal sleep and meal schedule. Additional split shift scheduling is only possible after a home care worker reports interruption of rest periods and the home care provider is able to successfully negotiate additional hours with the patient's plan.

Because 24-hour home care workers as designated as residing onsite for "extended periods" they are also exempt from "on call" hours, which, for occupations like hospital nursing, airline workers, and emergency workers, normally would cover sleep and meal periods while waiting to be called for active duty. Home care workers are caught in a regulatory gap: they are exempted from pay because of the amount of time spent on employer premises, but they are not afforded the same scheduling security or stability as other occupations that require significant time on employer's premises. This should be remedied by including home care workers under Fair Labor Standards Act protections.

Create legislation and regulations to implement home care sector reforms to ensure sustainability of the sector and consider establishing a permanent office for oversight

In order to determine best practices for the industry moving forward, the State should establish a 6 month to 1 year taskforce to create and implement a comprehensive set of recommendations to stabilize the home care sector, create high quality jobs for its workers, and ensure that consumers receive high quality, dignified care in their homes. The taskforce should be comprised of home care providers (both for and non-profit), home care workers and advocates, patient advocates, legal and labor experts, union representatives, other health care industry representatives, umbrella organizations, and directly impacted individuals. They should examine the above options, as well as others. They should also address issues of compensation, benefits, scheduling, unpaid and family caregivers, Consumer Directed Personal Assistance Program, career ladders, and other critical issues. This could also be accomplished through a working group that advances a package of legislation, as long as the above perspectives are a part of decision making.

To ensure the ongoing sustainability of the sector, the State could also establish an office to focus exclusively on the evolving home care sector. For example, a Public Home Care Advocate could coordinate assessment and oversight of the industry, focusing on statewide data analysis, regulatory impact, workforce challenges, the future of the industry, as well as serving as a central resource for home care recipients, providers, and workers.

Conclusion

This issue must be resolved with an eye towards equitable compensation practices that fairly value the labor of the home care workforce, and prioritize the needs of an aging New York State.

At the same time, any solution must also account for the fiscal realities of home care providers that rely on State regulations and State-set Medicaid dollars to meet labor costs. Creating comprehensive home care reform will help build a thriving workforce and simultaneously meet the needs of a growing aging population in New York, allowing them to age in place, in their communities and homes, with dignity.